

No. _____

IN THE
Supreme Court of the United States

ABEL REVILLA OCHOA,

Petitioner,

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE; LORIE DAVIS, DIRECTOR, CORRECTIONAL
INSTITUTIONS DIVISION, TEXAS DEPARTMENT OF CRIMINAL JUSTICE;
MICHAEL BUTCHER, WARDEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE QUESTIONS PRESENTED

Over two months before his scheduled execution date, Abel Ochoa contacted Texas prison officials to request permission to film an interview to submit as part of his request for clemency. Although they routinely permit members of the media to film Texas death row inmates, the prison officials refused to allow Mr. Ochoa to film a clemency interview unless he first secured a court order. Mr. Ochoa sued under 42 U.S.C. § 1983, alleging that the prison's policies and practices interfered with his clemency process in violation of his constitutional and statutory rights. To remedy these violations, Mr. Ochoa requested declaratory and injunctive relief, and a court order to permit the filming. Both courts below declined to stay the execution despite Mr. Ochoa not yet receiving complete relief.

The questions presented are:

1. Whether a state actor can insulate unconstitutional policies and practices from judicial review by asserting that the upcoming execution of the plaintiff serves as an irrefutable endpoint to any harm, rendering the state actor's policies and practices non-justiciable.
2. Whether a state actor violates a death row inmate's due process rights when it interferes in the clemency process by preventing the condemned individual from submitting evidence to support his request for clemency.

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the case caption.

LIST OF RELATED CASES

State Court proceedings:

- Trial: *State v. Ochoa*, No. F-0253582-JM, 194th Judicial District Court of Dallas County, Texas (judgment entered on April 23, 2003).
- Direct appeal: *Ochoa v. State*, AP-74,663, 2015 WL 8153976 (Tex. Crim. App. Jan. 26, 2005).
- State habeas: *Ex parte Abel Ochoa*, Nos. WR-67,495-01, WR-67495-02, 2009 WL 2525740 (Tex. Crim. App. Aug. 19, 2009).
- Petition for writ of mandamus: *In re Abel Ochoa*, No. WR-67-495-03, (Tex. Crim. App. Feb. 3, 2020) (denied without written order).

United States District Courts:

- Federal habeas: *Ochoa v. Davis*, 3:09-CV-2277-K, 2016 WL 5122107 (N.D. Tex. Sept. 21, 2016), *motion to amend denied by Ochoa v. Davis*, 2017 WL 2666150 (N.D. Tex. June 20, 2017).
- Complaint pursuant to 42 U.S.C. § 1983: *Ochoa v. Collier, et al.*, 4:19-CV-04976 (S.D. Tex. Jan. 27, 2020) (Order denying stay of execution).

United States Court of Appeals for the Fifth Circuit:

- Federal habeas: *Ochoa v. Davis*, 17-70016, 750 F. App'x 365 (5th Cir. Oct. 18, 2018).
- Complaint pursuant to 42 U.S.C. § 1983: *Ochoa v. Collier*, 20-70001, ___. F. App'x ___ (5th Cir. Feb. 4, 2020).

Supreme Court of the United States:

- Petition for writ of certiorari: *Ochoa v. Davis*, 140 S. Ct. 161 (Oct. 7, 2019).

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- APPENDIX B Order denying stay of execution, *Ochoa v. Collier, et al.*, 4:19-CV-04976 (S.D. Tex. Jan. 27, 2020) (Doc. 15).
- APPENDIX C Complaint pursuant to 42 U.S.C. § 1983, *Ochoa v. Collier, et al.*, 4:19-CV-04976 (S.D. Tex. Dec. 23, 2019) (Doc. 1).

Each Appendix is cited below as “App.A,” “App.B,” and “App.C.”

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PETITION FOR A WRIT OF CERTIORARI

Abel Revilla Ochoa petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The February 4, 2020, opinion of the United States Court of Appeals for the Fifth Circuit denying Mr. Ochoa’s appeal of the district court’s order denying a stay of execution is attached as Appendix A. The January 27, 2020, order of the United States District Court for the Southern District of Texas denying Mr. Ochoa’s motion for a stay of execution is attached as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on February 4, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Unites States Constitution, Amendment XIV, provides in relevant part: “[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”

42 U.S.C. § 1983 provides in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .”

STATEMENT OF THE CASE

A. Mr. Ochoa's attempt to secure a filmed interview for purposes of clemency.

Mr. Ochoa was sentenced to death on April 23, 2003, following his conviction for capital murder in the 194th District Court of Dallas County, Texas. On September 24, 2019, his execution date was scheduled for February 6, 2020. (R.9)¹ With his appeals exhausted, Mr. Ochoa immediately began to prepare his clemency petition, which was due to be filed with the Texas Board of Pardons and Paroles (“Clemency Board”) on January 16, 2020. Mr. Ochoa presented a compelling case for commutation to a life sentence given his deep and sincere remorse for his crime, the positive impact he has had on guards and other inmates, his personal story of redemption, and his remarkable faith and relationship with God. (App.C 18). Given his unique story, Mr. Ochoa retained a professional videographer to conduct a filmed interview with Mr. Ochoa to present to the Clemency Board along with his written petition.² (App.C 18).

There are two ways for a civilian to bring camera equipment into a Texas Department of Criminal Justice (“TDCJ”) facility under its policies and practices: (1) as a member of the media; or (2) as a member of the legal team for the inmate with the approval of the Warden’s office. The process for members of the media to conduct a filmed interview with a death row inmate is simple. TDCJ’s Media Policies and Guidelines presume that a media representative, once approved to enter the prison,

¹ “R.” refers to the electronic record on appeal in the Fifth Circuit.

² On February 4, 2020, the Clemency Board denied Mr. Ochoa’s request for clemency.

may bring in “camera equipment.” The only requirement listed is that members of the camera crew must have valid photo identification. (App.C 21–24).

Given this streamlined approach for media representatives, they routinely film interviews with Texas death row inmates. There are numerous examples of such footage in the media, ranging from single interviews to full-blown television series such as BBC’s *Life and Death Row* and Netflix’s *I am a Killer*. In a recent example, TDCJ allowed Dr. Phil McGraw, host of the daytime television show *Dr. Phil*, to enter the Polunsky Unit, where Texas death row inmates are incarcerated, with camera equipment and conduct a filmed interview with a death row inmate with a pending execution date. The two-part episode, which aired on October 10-11, 2019, showed footage of Dr. Phil going through security at the front entrance of the unit, getting a pat-down as part of the security check, and interviewing the death row inmate inside the prison. (App.C 21–24).

TDCJ policy also ostensibly allows an inmate’s legal team to bring in camera equipment for legal visits, though there are more requirements. Counsel and any other representative of the legal team must (1) go through a background check before entering the prison, (2) provide the “warden or designee” with a justifiable reason for bringing in the camera equipment, and (3) attest that the equipment is “absolutely essential” to facilitate the attorney-client relationship. (App.C 24). Once counsel has completed these steps, the “warden or designee” decides whether to approve or deny the request. (App.C 24).

On November 20, 2019, approximately two and a half months before his scheduled execution date, Mr. Ochoa contacted TDCJ and requested that his retained videographer be allowed to bring camera equipment into the prison under either the media or legal team policy to film an interview of Mr. Ochoa for his clemency petition. (App.C 24–25). TDCJ took three weeks to inform Mr. Ochoa that, as a practice, the Warden does not allow legal team members to bring camera equipment into the prison without a court order.³ (App.C 25–28). Consistent with that practice, the Warden denied Mr. Ochoa’s request absent a court order. (App.C 27–28). TDCJ refused to provide Mr. Ochoa written confirmation of its denial, and, on December 17, informed Mr. Ochoa there was no mechanism to appeal the Warden’s decision. (App.C 28).

B. District court proceedings.

Within seven working days of the prison’s denial and still six weeks before the scheduled execution, Mr. Ochoa sued Respondents under 42 U.S.C. § 1983, alleging that their policies and practices regarding camera equipment interfered with his clemency process in violation of Mr. Ochoa’s First and Fourteenth Amendment rights to access to the courts and petition the government for redress of grievances, federal statutory right to representation services at clemency under 18 U.S.C. § 3599, and Fourteenth Amendment right to due process of law. (App.C 29–30). As evidence that Respondents’ policies and practices are unreasonable and not tied to legitimate

³ Throughout the process, TDCJ gave conflicting information on how to request a filmed interview. The Director of Communications, Jeremy Desel, stated that the request should go through the Warden’s Office. (R.16). The Warden informed Mr. Ochoa in writing that the request should go through Mr. Desel’s office. (R.215). Ultimately, the request was processed and denied by the Warden’s Office.

security interests, Mr. Ochoa noted that the prison allows members of the media to enter the prison with camera equipment and conduct filmed interviews every Wednesday afternoon without a court order or even a background check. (App.C 15). In his prayer for relief, Mr. Ochoa requested not only that the court order Respondents to allow the filmed interview, but also that it grant declaratory relief that TDCJ's policies and practices requiring judicial intervention before legal team members are allowed to film their own clients are unlawful and enjoin TDCJ from enforcing them. (App.C 30–31).

Before Respondents answered the complaint, the district court held a telephonic hearing at which it pressed Respondents to justify their policies and practices restricting Mr. Ochoa's ability to film without a court order. (R.245). When Respondents could not articulate a response, the district court suggested the parties reach an agreed resolution on allowing the videographer to bring camera equipment into the prison. (R.251). Respondents were so unwilling to address their unconstitutional policies and practices that they literally laughed at the court's suggestion:

THE COURT: I'm trying to talk, and you're talking at the same time as me. It sounds like you said something facetious like "Agreed?" Like that was something weird. So that's not a possibility? . . . [Y]'all are over there laughing like that's some impossibility to come up with an agreed order.

(R.252). The court then indicated it would issue an order allowing the videographer to film the interview if Respondents did not enter into an agreed resolution with Mr. Ochoa. (R.252–53).

On January 9, 2020, the parties informed the district court through a Joint Advisory they had reached a one-time agreement to allow the videographer to bring camera equipment into the prison at a certain date and time, but continued to negotiate complete relief in the case. (R.63–64). On January 13, Mr. Ochoa’s videographer entered the prison and conducted a filmed interview with Mr. Ochoa. That same day, Mr. Ochoa sent Respondents a proposed settlement agreement, requesting that Respondents amend their policies and practices, or issue a directive clarifying such, to avoid this issue in the future. (R.134–35). Respondents rejected the proposal in its entirety and refused to provide any counterproposals. (R.135). On January 17, Respondents filed a Motion to Dismiss the lawsuit. (R.76–108).

On January 21, Mr. Ochoa filed an Opposed Motion for Stay of Execution to allow the district court time to resolve his requests for relief regarding Respondents’ policies and practices. (R.127–53). In the Motion, Mr. Ochoa explained the legal basis for his claims as follows. First, Respondents violated Mr. Ochoa’s right to access the courts and petition the government for redress of grievances. Specifically, Respondents’ policies and practices “unjustifiably obstruct[ed] the availability of professional representation or other aspects of the right to access the courts.” *See Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Second, Respondents’ policies and practices violated Mr. Ochoa’s statutory right to representation services at clemency under 18 U.S.C. § 3599. Third, Respondents’ policies and practices interfered with Mr. Ochoa’s ability to develop evidence in support of clemency in violation of his due

process rights. *See Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000). Mr. Ochoa further explained that Respondents’ unlawful policies and practices do not bear a reasonable relationship to legitimate penological interests under *Turner v. Safley*, 482 U.S. 78 (1987), because Respondents did not place similar restrictions on members of the media who requested to conduct filmed interviews with death row inmates. The arbitrariness of the distinction between the restrictions placed on members of the media and members of the legal team “reveal[ed] the absence of any real justification” for the policies and practices. *See Martinez*, 416 U.S. at 420.

On January 24, Respondents filed a Response to the Opposed Motion for a Stay of Execution. (R.156–81). Later that afternoon, Mr. Ochoa filed a Response to the Motion to Dismiss. (R.183–212).

On January 27, the district court issued an order denying Mr. Ochoa’s Motion for a Stay of Execution. (App.B). The district court incorrectly asserted that Mr. Ochoa had not filed a response the Motion to Dismiss. (App.B 10, 12). The court found that “much,” but not all, of Mr. Ochoa’s suit was mooted by the Joint Advisory allowing the videographer to film the interview. (App.B 11). Regarding the remaining non-mooted claims—namely Mr. Ochoa’s attack on Respondents’ unlawful policies and practices—the court found that Mr. Ochoa was unlikely to suffer additional harm because he was scheduled to be executed in just ten days. (App.B 12). The court declined to rule on Respondents’ Motion to Dismiss and the § 1983 suit remains pending. (App.B 12).

C. Circuit court proceedings.

On January 29, Mr. Ochoa filed his opening brief in the United States Court of Appeals for the Fifth Circuit, appealing the district court's denial of the stay motion as an abuse of discretion, which the court had jurisdiction over pursuant to 28 U.S.C. § 1292. In their brief in response, Respondents openly admitted that they had changed none of their policies or practices in creating the one-time exception for Mr. Ochoa's videographer. (Appellees' Brief at 43). Nevertheless, they argued that their wrongful behavior "could not reasonably be expected to recur"—not because they changed their unlawful policies and practices, but because they will execute Mr. Ochoa before he can be harmed by them again.

Ochoa has already had his videotaped clemency interview. His clemency application has been submitted. His execution date is now days away. Ochoa's February 6th execution date provides an irrefutable endpoint for the possibility of allegedly wrongful behavior from recurring.

(Appellees' Brief at 28).

On February 4, 2020, the Fifth Circuit affirmed the district court's denial of the Motion for Stay of Execution. (App.A). The court agreed that portions of the suit were not mooted by the Joint Advisory but nevertheless found that Mr. Ochoa failed to make a substantial showing of likelihood of success on the merits for three reasons. (App.A 4). First, the court held that the district court lacked jurisdiction to rule on the remaining issues because Mr. Ochoa filed his § 1983 lawsuit before the filing of his clemency petition, so he "cannot present an injury in fact." (App.A 5) (citing *Sepulvado v. La. Bd. of Pardons & Parole*, 114 F. App'x 620, 621 (5th Cir. 2004)). Second, it held that Mr. Ochoa's request for the district court to order the prison to

create new policies and practices that did not violate the constitution was an improper request for mandamus relief. (App.A 5). Third, it held that Mr. Ochoa failed to state a claim for a violation of a constitutional right. (App.A 6).

The court further found that Mr. Ochoa failed to meet the three other requirements for a stay of execution under *Nken v. Holder*, 556 U.S. 418 (2009). Regarding the second factor—irreparable harm to the plaintiff—the court stated that Mr. Ochoa “cannot argue he would be irreparably harmed by this court failing to stay his execution pending the outcome of his § 1983 lawsuit, as the outcome of that case has no bearing on whether he would be executed.” (App.A 7). It likewise found that the final two factors weighed against a stay of execution. (App.A 7).

Mr. Ochoa seeks a petition for writ of certiorari from this decision.

REASONS FOR GRANTING THE WRIT

Mr. Ochoa presents two reasons for granting his petition for a writ of certiorari, both of which demonstrate that the United States Court of Appeals for the Fifth Circuit has decided an important federal question in a way that conflicts with the constitution and laws of the United States. The lower court’s erroneous interpretation of the relevant federal law underpinned their decisions to deny Mr. Ochoa a stay of execution and warrant review from this Court. And, the emerging circuit split on whether a state actor’s interference with submitting evidence supporting a clemency petition violates due process warrants this Court’s review—particularly when one side of this split leaves death-sentenced inmates with no opportunity for judicial review of such claims.

I. This Court should grant certiorari to address an important national question regarding the justiciability of constitutional violations perpetrated by prisons against death row inmates in their final months of life.

A state actor cannot evade review of its unconstitutional policies or practices by executing the plaintiff. Over two centuries ago, this Court stated that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The importance of the constitution’s protections and the ability to seek remedies for violations is an integral part of the constitutional fabric of this country. *See id.* (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES 23 (1783) (“[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.”). Yet here, the lower courts adopted a rationale that would allow death row inmates to be subjected to any form of unconstitutional actions in the months leading up to their executions on a theory that any harm will cease with their execution. Judicial review of unconstitutional practices cannot be thwarted by killing the plaintiff.

The Respondents argued below that Mr. Ochoa’s motion for stay of execution should be denied because Mr. Ochoa cannot show he will be harmed by their unlawful policies and practices again before he is executed. (R.88–91, 167–72). This is not because Respondents will cease the injurious practice—they have unequivocally

stated that they have changed none of their policies and practices, (R.101), and they do not appear likely to do so. Rather, they argue that the harm will cease because they will simply execute the injured party before he is affected by the policy again. Thus, the argument goes, Mr. Ochoa cannot show an ongoing harm.⁴ As Respondents stated in their brief in response before the Fifth Circuit, “Ochoa’s February 6th execution date provides an irrefutable endpoint for the possibility of allegedly wrongful behavior from recurring.” (Appellees’ Brief at 28; *see also* R.168 (same)). The Fifth Circuit gave a full-throated endorsement of this reasoning in its opinion affirming the denial of the Motion for Stay of Execution:

[Ochoa] cannot argue he would be irreparably harmed by this court failing to stay his execution pending the outcome of his § 1983 lawsuit, as the outcome of that case has no bearing on whether he would be executed.

(App.A 7).

The premise of this argument is outrageous. If this reasoning were accepted, then the prison would be free to violate any and all constitutional rights of a death row inmate with impunity in the final months before his execution and the inmate would have no recourse because the execution of the plaintiff “provides an irrefutable endpoint” for the condemned individual to suffer harm from the unlawful practices. Contrary to this proposition, an individual’s pending execution does not provide the

⁴ While Respondents consistently employ this general argument below, they do not consistently tie it to any legal theory. At times they argue it renders Mr. Ochoa’s case moot. At other points they argue it undermines Mr. Ochoa’s standing. The Fifth Circuit likewise used this argument for a different purpose: as an argument that Mr. Ochoa has failed to show irreparable injury if the stay is denied. Whatever the legal purpose of the argument, it is clear that it is critical to the reasoning in the lower court opinions.

prison carte blanche to trample the Constitution and other federal law. If, for example, a prison began torturing an inmate two months before their execution, that would undoubtedly violate the Constitution but would be non-justiciable in the view of the Fifth Circuit. That a plaintiff in a § 1983 action is set for execution does not allow a defendant to avoid judicial review of unconstitutional policies or practices.

The Fifth Circuit's opinion that this is a non-justiciable issue presents similar concerns to those underlying the "capable of repetition yet evading review" exception to the mootness doctrine. This Court most famously addressed this in *Roe v. Wade*, 410 U.S. 113 (1973). There, the State of Texas argued that the case was moot because the petitioner was no longer pregnant by the time the case reached the Supreme Court. Justice Blackmun, writing for the majority, recognized that accepting such an argument would effectively foreclose the possibility of fully litigating issues related to abortion:

The normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.

Id. at 125.

Here, Mr. Ochoa does not need to rely on this doctrine because his case is not moot, as both courts below recognized. But the concerns about the ability of a defendant to avoid judicial review of its actions that underpin *Roe* apply with equal force here. This suit did not become ripe until the Warden's Office denied Mr. Ochoa's request to bring camera equipment into the prison on December 11, 2019. (R.18).

Respondents and the lower courts now assert that the case becomes non-justiciable just 57 days later on February 6, 2020, when Respondents plan to execute the plaintiff to the lawsuit. The time period between when an execution date is set and when an inmate is executed in Texas is routinely less than six months. If Respondents continue their unlawful policies and practices—which they appear poised to do—the harm will be repeated and each time the plaintiff cannot achieve a remedy before they are executed by Respondents. This presents a truly exceptional situation that warrants intervention by this Court to ensure that this issue does not permanently evade review.

The record below shows that Respondents will not change their ways absent judicial intervention. Two weeks after the initiation of the suit, Respondents literally laughed at the district court’s suggestion that they agree to allow the requested filming. (R.252). While they relented and allowed a one-off waiver after the district court made clear it would enter an order to allow the filming, they emphasize that in granting the one-off waiver, they changed none of the policies or practices Mr. Ochoa challenged. (R.101). Indeed, they rejected Mr. Ochoa’s attempt to resolve the policy and practice issues via settlement without offering a single counterproposal. (R.135). And now, they rely on the impending execution to evade review. This Court must intervene.

II. This Court should grant certiorari to resolve the circuit split over whether a state actor’s interference in the clemency process violates due process.

There is no requirement that states have a clemency process. But, if they do, “some minimal procedural safeguards apply to clemency proceedings.” *Ohio Adult*

Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring). In *Woodard*, this Court could not agree on what constituted due process in the clemency setting, concluding only that Ohio's process was constitutional. *See generally id.* at 275–88. Circuit courts have split on their interpretation of the *Woodard* rule. Here, Mr. Ochoa does not challenge the procedures used by the Clemency Board, but instead he alleges that the Respondents' interference with his ability to submit evidence supporting his clemency petition violates due process. (R.148–49). The Eighth Circuit has held that a state actor's interference in the clemency process constitutes a due process violation, while the Eleventh Circuit has rejected that reasoning. With the decision below, the Fifth Circuit now joins the Eleventh, solidifying a circuit split on an important issue that warrants this Court's attention.

A. As the Eighth Circuit has recognized, a state actor's intentional interference with submitting evidence supporting clemency violates due process.

In his complaint, Mr. Ochoa asserts that Respondents' policies and practices unlawfully interfere in his ability to prepare his clemency petition in violation of his Fourteenth Amendment right to due process of law. The Eighth Circuit has taken up the issue in a posture similar to Mr. Ochoa's. In *Young v. Hayes*, the district attorney threatened to fire a line prosecutor if she provided information to the clemency board on behalf of the inmate. 218 F.3d 850 (8th Cir. 2000). Mr. Young argued that the DA's interference with his development of clemency evidence constituted a due process violation. The Eighth Circuit agreed. In doing so, it noted that Mr. Young did not claim to have a liberty interest in an affirmative grant of clemency. Instead, he argued that the government's intentional interference with preparing clemency—

whether or not the Governor ultimately granted clemency—violated due process. Thus, the court held that, “[t]he Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state’s own officials refrain from frustrating it” *Id.* at 853; *see also Noel v. Norris*, 336 F.3d 648 (8th Cir. 2003) (confirming its adoption of *Young*).⁵

The *Young* court also addressed the complication of “voluntary cessation.” After the § 1983 lawsuit was filed on behalf of Mr. Young, the district attorney withdrew her threat and the line prosecutor submitted an affidavit supporting the inmate’s clemency petition. *Id.* at 852. Nevertheless, the court found that the case was not moot, as the prison’s actions showed “nothing more than the voluntary cessation of allegedly illegal activity,” and the court stayed the inmate’s execution. *Id.* at 852–53.

Like *Young*, Mr. Ochoa does not argue that he has a liberty interest in an affirmative grant of clemency. Nor does he argue that the Clemency Board has violated his due process rights. Rather, he claims that if Texas is to have a clemency process, then state actors have an obligation not to interfere with that process. Also like *Young*, Mr. Ochoa argues that Respondents’ temporary voluntary cessation of their unlawful activity does not render the suit non-justiciable.

⁵ In 2014, the Eighth Circuit distinguished *Young* based on its facts, but provided no explanation for the distinction and explicitly declined to comment on the merits of the *Young* opinion. *Winfield v. Steele*, 755 F.3d 629, 631 (8th Cir. 2014) (en banc).

The government seeks to deprive Mr. Ochoa of his life without providing him with due process of law. *See* U.S. CONST. amend. XIV (“[N]or shall any state deprive any person of life . . . without due process of law.”). Interference by state actors with a death-sentenced inmate submitting evidence supporting his clemency petition violates due process. Here, Respondents knew Mr. Ochoa sought to submit a filmed interview with his clemency petition and prohibited him from doing so absent a court order, despite the routine permission they grant media representatives to film.

B. The Eleventh and Fifth Circuits do not recognize interference in the clemency process as a due process violation.

Below, in addressing Mr. Ochoa’s likelihood of success on the merits, the Fifth Circuit held that Mr. Ochoa’s argument that Respondents violated his due process rights by interfering in the clemency process failed to state a claim for relief. (App.A 6) (“[Ochoa] fails to tie his right to videotape an interview to submit to the Clemency Board to any constitutional right. Establishing this constitutional right is crucial to Ochoa’s success.”). Mr. Ochoa has never alleged that he has a freestanding constitutional right to submit a clemency video, but instead that Respondents’ intentional interference with the clemency process violates due process. (R.148–49). With this decision, the Fifth Circuit now joins the Eleventh Circuit in its refusal to recognize such a claim. In *Gissendaner v. Comm’r*, the Eleventh Circuit explicitly rejected the reasoning in *Young*—albeit in dicta—and denied the plaintiff’s due process claim based on the prison’s intimidation of a potential clemency witness. 794 F.3d 1327, 1333 (11th Cir. 2015).

As further evidence of the Fifth Circuit’s exceedingly narrow construction of due process claims at clemency, the court below found that Mr. Ochoa lacked standing to bring his § 1983 suit because he sued before filing his clemency petition and therefore any claim of injury was “speculative.”⁶ (App.A 5) (quoting *Sepulvado v. La. Bd. of Pardons & Parole*, 114 F. App’x 620, 621 (5th Cir. 2004)). This reasoning only makes sense if one assumes that the only actionable injury one can suffer at clemency is from the Clemency Board itself. While that may be the only due process claim at clemency the Fifth Circuit recognizes, it is not the claim Mr. Ochoa raises. Rather, Mr. Ochoa argues that the injury occurred when Respondents interfered with his ability to film the interview. Under the claim raised, there is no speculation about the injury—as it already occurred—and there would be no reason to wait until after the clemency petition deadline to sue.

The holding of the Eighth Circuit cannot be reconciled with the holdings of the Fifth and Eleventh Circuits. This will be a recurring dispute this Court should resolve now. Thus, Mr. Ochoa requests this Court step in to address the split.

⁶ The Fifth Circuit also held that Mr. Ochoa improperly sought “mandamus relief” in his complaint. (App.A 5). Mr. Ochoa sought declaratory and injunctive relief pursuant to an ongoing constitutional violation, which §1983 lawsuits are specifically designed to provide. Section 1983 “was intended to provide private parties a cause of action for abuses of official authority which resulted in the deprivation of constitutional rights, privileges, and immunities.” *Moor v. Cty. Of Alameda*, 411 U.S. 693, 699 (1973). It is well within the purview of federal courts to fashion remedies to address constitutional violations so long as they “directly address and relate to the constitutional violation itself.” *M.D. v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018) (quoting *Miliken v. Bradley*, 433 U.S. 267, 282 (1977)); see also *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (upholding district court’s order for prison officials to “devise and implement a plan desegregating the housing facilities” at a prison to end the prison’s unconstitutional policy of housing prisoners by race); *Alberti v. Klevenhagen*, 790 F.2d 1220, 1228 (5th Cir. 1986) (upholding a district court remedy which included requiring hourly visits to prisoners’ cells in order to curtail rampant sexual abuse occurring in violation of prisoner’s Eighth Amendment rights). Mr. Ochoa’s § 1983 case is rooted in TDCJ’s unconstitutional policies and practices that interfere with the ability to prepare for clemency. Thus, it is not a request for mandamus relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 5th day of February, 2020,

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