

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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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.*

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

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**PETITIONER'S APPENDIX**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

\_\_\_\_\_  
No. 20-70001  
\_\_\_\_\_

United States Court of Appeals  
Fifth Circuit

**FILED**

February 4, 2020

Lyle W. Cayce  
Clerk

ABEL REVILLA OCHOA,

Plaintiff - Appellant

v.

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

Defendants - Appellees

\_\_\_\_\_  
Appeal from the United States District Court  
for the Southern District of Texas  
No. 4:19-CV-04976  
\_\_\_\_\_

Before ELROD, GRAVES, and WILLETT, Circuit Judges.

PER CURIAM:\*

Abel Ochoa is scheduled to be executed on February 6, 2020. On January 21, 2020 he filed a motion in federal district court to stay his execution pending the resolution of claims he raised in a 42 U.S.C. § 1983 complaint filed in December 2019. The district court denied the motion to stay and determined

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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that Ochoa could not satisfy even one of the four *Nken* factors. *Nken v. Holder*, 556 U.S. 418 (2009). Ochoa now appeals this denial and also seeks a stay in this court. We conclude that the district court did not abuse its discretion in denying Ochoa's motion to stay; for the same reasons, we will not grant his request for a stay. We AFFIRM the district court's denial and DENY Ochoa's motion to stay his execution.

## I.

In August 2002, Abel Ochoa shot his wife, his nine-month-old daughter, his seven-year-old daughter, his father-in-law, and two of his sisters-in-law. All but one of the victims, one of his sisters-in-law, died. Ochoa was convicted of capital murder in Texas state court in 2003. On direct appeal, the Texas Court of Criminal Appeals (CCA) affirmed his conviction and sentence. *Ochoa v. State*, No. AP-79, 2005 WL 8153976, at \*1 (Tex. Crim. App. Jan. 26, 2005). Ochoa then filed an application for habeas corpus in the state court in February 2005. The CCA denied state habeas relief. The CCA also denied Ochoa's subsequent *pro se* habeas application as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. *Ex parte Ochoa*, No. WR-67,495-01, 2009 WL 2525740 (Tex. Crim. App. Aug. 19, 2009).

After his state applications failed, Ochoa filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254. That application presented twenty-one claims, including violations of the Confrontation Clause, ineffective assistance of counsel, and jury selection and cross section claims. *Ochoa v. Davis*, No. 3:09-CV-2277-K, 2016 WL 5122107, at \*2 (N.D. Tex. Sept. 21, 2016). The district court determined that each of Ochoa's claims were unexhausted, procedurally defaulted, or meritless and denied his application. *Id.* at \*2–3. Ochoa then sought a certificate of appealability (COA) from this court. Of the twenty-one claims presented to the district court, Ochoa sought a COA on only three issues: the alleged shackling, unconstitutional *voir dire*, and the denial

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of funding under 18 U.S.C. § 3599. This court denied Ochoa's application for a COA and affirmed the denial of funds under § 3599(f). *Ochoa v. Davis*, 750 F. App'x 365 (5th Cir. 2018).

On December 23, 2019, Ochoa filed a civil-rights action under § 1983 against Texas prison officials regarding a request to bring a videographer into prison to film an interview to use in the state clemency process. He asserts that "the denial of a filmed interview interferes with [his] access to courts and access to counsel, violated his rights under 18 U.S.C. § 3599, and denies him due process of law." Ochoa's civil complaint asks the district court to "(1) order the Defendants to allow the filmed interview; (2) enjoin the Defendants from executing [Ochoa] during the pendency of this lawsuit; (3) declare unconstitutional prison policies that allegedly favor access to media over that of an inmate's attorneys; (4) enjoin the Defendants from creating or enforcing policies that favor media; and (5) create new accommodations for the videotaping of inmates." On January 9, 2020, the parties submitted that they had reached a reasonably agreeable solution that would permit Ochoa's videotaped interview to occur on January 13, 2020. That interview occurred.

Ochoa is scheduled for execution on February 6, 2020. On January 21, 2020, Ochoa filed an opposed motion in the district court to stay his execution pending the resolution of the remainder of his § 1983 lawsuit. The district court denied Ochoa's motion for a stay of execution because it determined "that Ochoa had not met any of the factors required for staying an execution."

## II.

There are two matters now before this court. Ochoa's appeal of the district court's denial of his motion to stay and Ochoa's motion for this court to stay his execution. We AFFIRM the district court's denial and DENY Ochoa's request to stay his execution.

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This court reviews a district court’s decision to deny a stay of execution for an abuse of discretion. *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion.” *Id.* (alternation in original) (quoting *Green v. Thaler*, 699 F.3d 404, 411 (5th Cir. 2012)).

A court considers four factors when deciding whether to stay an execution: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken*, 556 U.S. at 433–34. Federal courts “can and should’ protect settled state judgments from ‘undue interference’ by invoking their ‘equitable powers’ to dismiss or curtail suits that are pursued in a ‘dilatory’ fashion or based on ‘speculative’ theories.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006)).

The district court concluded that each factor weighed heavily in the State’s favor. Ochoa challenges this conclusion on appeal. While he discusses each of the four factors, he focuses on the district court’s conclusion that his claims were unlikely to succeed on the merits.

## A.

The district court concluded that Ochoa’s claims were unlikely to succeed on the merits because “[t]he January 13, 2020, videotaped interview mooted much of Ochoa’s lawsuit,” and there are “serious procedural defects” and “substantive weaknesses” in Ochoa’s non-mooted claims. Ochoa disputes the conclusion that his non-mooted claims suffer from procedural defects or are substantively weak.

The district court held that Ochoa’s case was unlikely to succeed on the merits because it suffered from procedural defects as argued by the State. The

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State maintains that Ochoa's entire case is moot. But even if it is not moot, the State argues that Ochoa lacks standing to challenge the prison procedures and improperly seeks mandamus relief. We agree with the State and district court that Ochoa's claims suffer from procedural defects.

The district court likely lacks jurisdiction because Ochoa cannot present an injury in fact. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Ochoa filed his § 1983 lawsuit prior to the filing of his application for clemency. In *Sepulvado v. La. Bd. of Pardons & Parole*, this court held that a plaintiff lacked standing to bring suit “[b]ecause, prior to filing this action, [the petitioner] had not filed an application for clemency, his claims of injury based on any alleged constitutional defects in the clemency process were speculative.” 114 F. App'x 620, 621 (5th Cir. 2004) (unpublished). Ochoa attempts to get around any jurisdictional defects by arguing that this case is “capable of repetition yet evading review” but he has not made the requisite showing that “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.” *Turner v. Rodgers*, 564 U.S. 431, 439–40 (2011) (alterations in original) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

Further, Ochoa improperly seeks mandamus relief. He asks the district court to order the prison to create new policies or accommodations that grant counsel as much access to inmates as media. But, federal courts do not have jurisdiction to issue the writ against a state actor or state agencies. *Moye v. Clerk, Dekalb Cty. Superior Court*, 474 F.2d 1275, 1276 (5th Cir. 1973).

The district court also discussed various substantive weakness in Ochoa's claims: (1) no authority incorporates a constitutional right to present videotaped evidence into a State's clemency process; (2) counsel's representation in this instance is not constitutionally guaranteed but afforded

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by statutory law, therefore the limitations on videotaping do not offend Ochoa's right to counsel; (3) Ochoa has experienced no deprivation of access to the courts; (4) only limited and narrow due process guarantees govern a State's clemency proceedings; and (5) differences between access of the media and attorneys to prison inmates are not a matter of constitutional dimension. Ochoa contests these conclusions on appeal, but still 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.

We agree with the district court that Ochoa's claims are unlikely to succeed on the merits because they are procedurally defaulted and substantively weak. We hold the district court did not abuse its discretion by finding Ochoa has not satisfied the first *Nken* factor.

## B.

While the "inability to establish a likelihood of success on the merits is, effectively, dispositive of the motion to stay," the district court also concluded that the remaining factors weighed heavily against Ochoa. *Crutsinger v. Davis*, 930 F.3d 705, 707 (5th Cir. 2019) (citing *Adams v. Thaler*, 679 F.3d 312, 350 (5th Cir 2012)). Ochoa challenges the district court's conclusions on each remaining factor.

The second factor is "whether the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 433–34. The district court concluded that even if Ochoa's civil claims had merit, the "policies no longer pose any concern for him individually" because the State "already accommodated his request for a videotaped interview." Therefore, it concluded that Ochoa could not establish an irreparable injury.

Ochoa argues that his execution is an irreparable injury regardless of the merits and its relativity to the § 1983 lawsuit. He cites this court's precedent, which says that "in a capital case, the possibility of irreparable



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injury weighs heavily in a movant's favor." *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) (quoting *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982)). However, the cited case qualifies that statement with "especially when his claim has some merit." *Id.* We have established that Ochoa's case is unlikely to succeed on the merits. But even more importantly, Ochoa admits that his § 1983 claim is not challenging his conviction or sentence. Ochoa also admits that he already received the substantive relief sought by the lawsuit—a filmed interview to be used in his clemency application. His pending § 1983 claim is now not just unlikely to succeed on the merits, but unrelated to his impending execution. He 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. The district court did not abuse its discretion in finding that he was unable to establish irreparable harm.

The two remaining *Nken* factors, whether a stay would injure the other parties in the proceeding and where the public interest lies, also cut in the State's favor. The district court found that a stay would prejudice Texas because it has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (citations and internal quotations omitted). Ochoa asserts that Texas is not harmed because "Ochoa's suit does not attack the constitutionality of his conviction or sentence, so he does not argue that he is ineligible for the death penalty." While Ochoa argues that Texas will not be harmed by a delay because when the lawsuit is over they could proceed with the execution, he overlooks the fact that states have a strong interest in enforcing their valid judgments without delay or undue interference from our court.

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As to the public interest, the district court concluded that Ochoa's § 1983 case was a delay tactic to prevent the state from carrying out its valid judgment. And the Supreme Court has explained that "[p]rotecting against abusive delay is an interest of justice." *Martel v. Clair*, 565 U.S. 648, 662 (2012) (emphasis omitted). While Ochoa argues that he has not brought his § 1983 claim simply to delay his execution, he admits that he does not challenge the validity of the State's judgment.

### III.

Ochoa has not carried his burden to demonstrate that any of the *Nken* factors weigh in favor of granting the stay. Therefore, the district court did not abuse its discretion in denying Ochoa's motion for stay of his execution. Likewise, because we conduct the same analysis for stays requested in our court, he is not entitled to a stay in this court. We AFFIRM the district court's denial of a stay of execution and DENY his motion to stay.

**ENTERED**

January 27, 2020

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ABEL REVILLA OCHOA,

Plaintiff,

v.

BRYAN COLLIER, et al.,

Defendants.

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CIVIL ACTION NO. H-19-4976

**ORDER**

Death-row inmate Abel Revilla Ochoa is scheduled for execution on February 6, 2020. On December 23, 2019, Ochoa filed a civil-rights action relating to his request to bring a videographer into prison to film an interview for use in the clemency process. Ochoa claims that prison policy provides greater access to death row inmates for media than for attorneys. Ochoa argues that “the denial of a filmed interview interferes with [his] access to courts and access to counsel, violates his rights under 18 U.S.C. § 3599, and denies him due process of law.” (Docket Entry No. 1 at 1). Ochoa’s complaint asks for the Court to: (1) order the Defendants to allow the filmed interview; (2) enjoin the Defendants from executing him during the pendency of this lawsuit; (3) declare unconstitutional prison policies that allegedly favor access to media over that of an inmate’s attorneys; (4) enjoin the Defendants from creating or enforcing policies that favor media; and (5) create new accommodations for the videotaping of inmates. (Docket Entry No. 1 at 16).

This Court held a telephone hearing on January 7, 2020, after which the parties

reached an agreement permitting Ochoa's video interview. Ochoa's interview occurred on January 13, 2020. Ochoa has not raised any concern about the access provided for the videotaped interview.

Two motions are pending. On January 17, 2020, the Defendants filed a Motion to Dismiss Plaintiff's Complaint and Response in Opposition to Plaintiff's Request for Stay of Execution. (Docket Entry No. 10). The Defendants primarily argue that Ochoa has already received the substantive relief that he requested. With the substance of Ochoa's arguments now moot, the Defendants ask this Court to dismiss the lawsuit. Alternatively, the Defendants argue that any remaining claims concerning prison policy suffer from various procedural defects. The Defendants argue that Ochoa lacks standing to challenge the prison procedures, has not exhausted administrative remedies, improperly seeks mandamus relief, and has not complied with the applicable limitations period. The Defendants also contend that Ochoa's claims lack constitutional footing and are without merit.

Ochoa has not yet filed a response to the Motion to Dismiss. On January 21, 2020, Ochoa filed an Opposed Motion for a Stay of Execution. (Docket Entry No. 11). Ochoa argues that the January 13, 2020, interview did not moot his lawsuit because the objectionable prison policies still remain in place. Ochoa reiterates the constitutional arguments from his complaint and contends that he has met the showing necessary to stay an execution.

A federal court has inherent discretion when deciding whether to stay an execution.

*See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). Under well-established law, a court considers four factors in deciding whether to stay an execution: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434. When considering these factors, however, federal courts “can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories.” *Bucklew v. Precythe*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1112, 1134 (2019).

The *Nken* factors weigh heavily in the Defendants’ favor. The January 13, 2020, videotaped interview mooted much of Ochoa’s lawsuit. To the extent Ochoa argues that his constitutional attack on prison policy remains viable, the Defendants have identified serious procedural defects in Ochoa’s claims. The Defendants have also pointed out serious substantive weaknesses in Ochoa’s constitutional challenges to prison policy, such as (1) no authority incorporates a constitutional right to present videotaped evidence into a State’s clemency process; (2) counsel’s representation in this instance is not constitutionally guaranteed but afforded by statutory law and thus limitations on videotaping do not offend a constitutional right to counsel; (3) Ochoa has experienced no deprivation of access to the courts; (4) only limited and narrow due process guarantees govern a State’s clemency proceedings; and (5) differences between the access of media and attorneys to prison inmates

are not a matter of constitutional dimension. While Ochoa has not yet responded to all these arguments, this Court's review of the pleadings and the law suggests that Ochoa has not shown a likelihood of success on the merits.

Ochoa's "inability to establish a likelihood of success on the merits is, effectively, dispositive of the motion for stay." *Crutsinger v. Davis*, 930 F.3d 705, 707 (5th Cir. 2019). The Court, however, notes that the other factors weigh heavily against Ochoa. Here, the possibility of irreparable injury does not weigh in Ochoa's favor. Even if merit exists to Ochoa's argument that prison policies violate the Constitution, those policies no longer pose any concern for him individually. The Defendants have already accommodated his request for a videotaped interview. Any continuing constitutional problem with the prison videotaping policy will not injure Ochoa personally.

The remaining two *Nken* factors weigh strongly in the Defendants' favor. A stay would prejudice the Defendants because Texas has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Crutsinger v. Davis*, 936 F.3d 265, 272-73 (5th Cir. 2019). The public interest more greatly lies in allowing the State to carry out its otherwise-valid judgment because "protecting against abusive delay is an interest of justice." *Martel v. Clair*, 565 U.S. 648, 662 (2012).

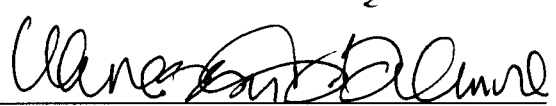
The Court, therefore, finds that Ochoa has not met any of the factors required for staying an execution. The Court **DENIES** Ochoa's motion for a stay.

The Court will take the Defendants' Motion to Dismiss under advisement. All

briefing is currently suspended. The parties will inform the Court within twenty-four (24) hours of either (1) a stay granted by any other court or (2) the execution of Ochoa's death sentence.

The Clerk is directed to provide copies of this order to the parties.

SIGNED at Houston, Texas on January 27, 2020.

  
\_\_\_\_\_  
VANESSA D. GILMORE  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

ABEL REVILLA OCHOA  
Plaintiff,

v.

BRYAN COLLIER,  
Executive Director,  
Texas Department of Criminal  
Justice,

LORIE DAVIS,  
Director, Correctional Institutions  
Division,  
Texas Department of Criminal  
Justice,

MICHAEL BUTCHER,  
Senior Warden, Polunsky Unit  
Livingston, Texas,  
Defendants.

Civil Case No.

**DEATH PENALTY CASE**

**EXECUTION SCHEDULED FOR  
FEBRUARY 6, 2020**

**COMPLAINT PURSUANT TO 42 U.S.C. § 1983**

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**I.  
NATURE OF ACTION**

1. Plaintiff faces imminent execution. He seeks to tell his story of remorse and redemption to the Texas Board of Pardons and Paroles and the Governor in the form of a filmed interview submitted with his clemency petition. This will allow him to speak to the clemency board directly and make a plea in his own voice to be spared the ultimate punishment.
2. Contrary to their own policy, Defendants refuse to allow Plaintiff's counsel to bring a videographer into the prison to film the interview without a court order—despite the fact that the videographer has passed TDCJ's own security background investigation.
3. Defendants' denial and interference with Plaintiff's development of his clemency petition stands in stark contrast to Defendants' lenient treatment of members of the media. The operative policy on media visits does not require a background check (much less a court order), and Defendants routinely allow media representatives, such as Dr. Phil and Netflix production teams, into the prison to film inmate interviews if they secure the consent of the inmate.
4. Defendants' denial of a filmed interview interferes with Plaintiff's access to courts and access to counsel, violates his rights under 18 U.S.C. § 3599, and denies him due process of law. Accordingly, Plaintiff brings this action pursuant to 42 U.S.C. § 1983 to remedy these violations. Ultimately, Plaintiff requests this Court ensure that, on the eve of execution, a death row inmate's

counsel has at least as much access to the inmate as Dr. Phil, or any other media representative, would.

## **II. JURISDICTION AND VENUE**

5. This action is brought pursuant to 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.
6. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) because all Defendants reside or have business offices in the State of Texas and at least one Defendant resides or has business offices in this District.

## **III. PARTIES**

7. Abel Ochoa (999450) is a death-sentenced inmate under the supervision of the Texas Department of Criminal Justice (“TDCJ”). He is confined at the Polunsky Unit, located at 3872 FM 350 South, Livingston, Texas 77351.
8. Defendant Bryan Collier is the Executive Director of TDCJ. Collier is the commanding officer of all TDCJ employees and contractors and is responsible for their conduct. By law, he is responsible for protecting the constitutional rights of all persons and entities under TDCJ’s supervision. He also has the authority to change TDCJ policy. Collier has business offices located at 861 B IH 45 North, Huntsville, Texas 77320.
9. Defendant Lorie Davis is the Director of TDCJ, Correctional Institutions Division. Davis is responsible for the supervision and administration of the state prison system and the execution of death warrants and has the authority

to change TDCJ policy. TDCJ lists Davis' address as P.O. Box 99, Huntsville, Texas 77342.

10. Defendant Michael Butcher is the senior warden of the Polunsky Unit of the TDCJ. Butcher oversees the Polunsky Unit and has decisionmaking power on certain issues under TDCJ's policies. Butcher has offices located at 3872 FM 350 South, Livingston, Texas 77351.
11. In all respects relevant to this action, Defendants are all state officials acting under color of state law. They are all sued in their individual and official capacities.

#### **IV. FACTS**

##### **Background**

12. Plaintiff Abel Ochoa was sentenced to death on April 23, 2003, following his conviction for capital murder in the 194th District Court of Dallas County, Texas. Mr. Ochoa challenged his conviction and sentence on direct appeal and in state and federal post-conviction proceedings.
13. On January 25, 2010, the United States District Court for the Northern District of Texas appointed Paul Mansur to serve as Mr. Ochoa's counsel throughout federal habeas proceedings and clemency, pursuant to 18 U.S.C. § 3599.
14. On February 28, 2018, the United States Court of Appeals for the Fifth Circuit appointed the Federal Public Defender's Office for the Northern District of Texas ("FPD") as co-counsel to represent Mr. Ochoa under 18 U.S.C. § 3599.

15. On October 7, 2019, Mr. Ochoa's initial federal habeas proceedings concluded when the United States Supreme Court denied his petition for writ of certiorari.
16. On September 24, 2019, the 194th District Court of Dallas County, Texas, set an execution date of February 6, 2020, for Mr. Ochoa. That execution date remains in place.

### **Preparation for Clemency**

17. With his appeals exhausted, Mr. Ochoa will seek a commutation of his death sentence from the Texas Board of Pardons and Paroles ("BPP") and the Governor of the State of Texas via the clemency process. Under the BPP's rules, Mr. Ochoa's clemency petition is due by January 16, 2020.
18. In support of Mr. Ochoa's clemency petition, the FPD retained a professional videographer, Doug Passon, and sought to conduct a video interview with Mr. Ochoa to present to the BPP with his petition for clemency.
19. Mr. Ochoa presents a particularly compelling case for commutation to a life sentence given his deep and sincere remorse for the crime for which he is convicted, his personal story of redemption, and his remarkable faith and relationship with God. A paper record is wholly inadequate to convey Mr. Ochoa's story of remorse and redemption.
20. TDCJ has policies permitting such videos to be filmed either by media or by an attorney or their designated representative. Appointed counsel began preparation for filming a video of Mr. Ochoa approximately two months before

his clemency petition was due, which would provide ample time to present such evidence as part of his clemency petition.

**TDCJ Visitation Policies for Legal Visits**

21. Legal visits with TDCJ inmates are governed by Board Policy BP-03.81, Rules Governing Offender Access to the Courts, Counsel, and Public Officials. Ex. 1. To meet with a Texas death row inmate, counsel must submit a signed copy of form I-163, "Attorney Application to Visit TDCJ Offender," to the Inmate Records department of the Polunsky Unit in Livingston, Texas.
22. Counsel may also sponsor an approved representative to meet with an inmate. To do so, counsel must submit a form I-166, "Attorney Authorization for Approved Representative to Visit TDCJ Offender," to the Inmate Records department of the Polunsky Unit on behalf of the approved representative. The approved representative must also submit a form I-164, "Application to Visit TDCJ Offender as Attorney's Representative," to the Access to Courts department of TDCJ at least one week before the visit. The I-164 form requires the representative to disclose his date of birth, social security number, state driver license number, home address, place of employment, criminal history, citizenship, and relationship to any inmates currently incarcerated in any TDCJ unit, among other things. Access to Courts uses the information to conduct an "investigation" into the representative before approving his visit to a TDCJ unit as an approved representative of counsel. Once the representative's I-164 form has been approved by the Access to Courts

department and his I-166 form has been approved by the Inmate Records department, the representative may enter the prison to meet with the inmate.

23. Visits between inmates and counsel, or an approved representative, must take place on business days during business hours.

#### **TDCJ Policies for Media Visits**

24. Visits between TDCJ inmates and media representatives are governed by the Executive Directive on News Media Relations (“Executive Directive”), effective March 27, 2017, Ex. 2, and TDCJ’s Media Policies and Guidelines for Offender Interviews (“Media Policies and Guidelines”), Ex. 3.
25. Media visits are coordinated through the TDCJ Public Information Office. Neither the Executive Directive nor the Media Policies and Guidelines require media representatives to submit any specific forms or undergo a background check before entering the prison to meet with an inmate. Media representatives need only obtain written consent from the inmate and submit a written request to visit, on the media organization’s letterhead, to the Public Information Office approximately 24-48 hours before the visit. Visits between death row inmates and media representatives must take place between 1:00 p.m. and 3:00 p.m. on a Wednesday, and the visits are limited to one hour in length. Legal and family visits are not allowed with death row inmates during this time.
26. Under the Executive Directive, “[m]edia access is considered distinct from other forms of access to offenders . . . .” Therefore, a media representative may not be

on an inmate's visitation list, and the inmate's attorneys and family members may not be present during the media interview.

**TDCJ Policies for Camera Equipment: Media**

27. There are two ways to bring camera equipment into a TDCJ facility under its policies: (1) as a member of the media; or (2) as a member of the legal team for the inmate with approval of the Warden's office.
28. The process for media to conduct a filmed interview with death row inmates is simple. The Executive Directive creates no additional requirements for media to bring in camera equipment beyond the requirements for entering the prison. TDCJ's Media Policies and Guidelines presume that a media representative may bring in "camera equipment," listing no additional requirements, other than to require members of the camera crew to have valid photo identification.
29. The result is that TDCJ routinely allows members of the media to bring camera equipment into the Polunsky Unit to conduct filmed interviews with death row inmates. There are numerous examples of such footage in the media, including interviews by Chris Hayes (*All in with Chris Hayes*) and Warner Herzog (*Into the Abyss*). The BBC filmed multiple episodes of its *Life and Death Row* series at the Polunsky Unit, as did Netflix for its *I Am a Killer* series.
30. In a recent example, TDCJ allowed Dr. Phil McGraw, host of the television show *Dr. Phil*, to enter the Polunsky Unit 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 Polunsky Unit, getting a pat-down as part of the security check, and interviewing the death row inmate inside the prison.<sup>1</sup>



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<sup>1</sup> The photographs provided in this section are screenshots taken from online videos that can be found at:

[https://www.youtube.com/watch?v=EP96WgwTOwM&feature=emb\\_title](https://www.youtube.com/watch?v=EP96WgwTOwM&feature=emb_title) and [https://www.youtube.com/watch?v=yuL5vKWPJc&feature=emb\\_title](https://www.youtube.com/watch?v=yuL5vKWPJc&feature=emb_title)







31. For each example, TDCJ's current policies would require only that the media representative obtain written consent from the inmate and submit a visit request 24-48 hours before the visit.

**TDCJ Policies for Camera Equipment: Legal Team**

32. TDCJ policy also ostensibly allows the legal team to bring in camera equipment for legal visits under Board Policy BP-03.81, Rules Governing Offender Access to the Courts, Counsel, and Public Officials. To do so, counsel must provide the "warden or designee" with a justifiable reason for bringing in the equipment and attest that the use of the equipment is absolutely essential to facilitate the attorney-client relationship. The policy does not specify that a court order is required.

**Plaintiff's Attempt to Secure Filmed Interview**

33. In pursuit of Mr. Ochoa's effort to produce a clemency video to submit to the BPP, on or about November 20, 2019, the FPD contacted TDCJ's Public

Information Office to inquire about getting the videographer approved to video Mr. Ochoa under TDCJ's media policies. A secretary at the Public Information Office transferred the call to Jeremy Desel, the Director of Communications for TDCJ. The FPD explained the videographer's role in producing the clemency video to Mr. Desel, and Mr. Desel indicated that he was unsure of the best way to proceed under the circumstances. Mr. Desel indicated that he would speak with his colleagues to see if they had suggestions about the best way to handle the issue and would call the FPD back shortly.

34. Mr. Desel did not immediately return the FPD's call. On November 25, 2019, the FPD left a message for Mr. Desel requesting an update on his consultation with colleagues regarding the videographer.
35. Mr. Desel again did not return the FPD's call. On December 4, 2019, the FPD again called Mr. Desel. At this time, Mr. Desel informed the FPD he could not coordinate the videographer's visit with Mr. Ochoa through TDCJ's Public Information Office because the videographer would be considered a member of the legal team, and suggested the FPD contact the Warden's office at the Polunsky Unit to make the request.
36. Under the operative policies, had the Public Information Office recognized Mr. Ochoa's videographer as a media representative, the videographer would have needed only to secure written consent from Mr. Ochoa and submit a request to the Public Information Office 24-48 hours before the interview. Moreover, through that process, it would have been presumed that the videographer could

bring camera equipment into the prison to interview Mr. Ochoa. But that was not allowed.

37. Later, on December 4, 2019, the FPD contacted the office of Warden Michael Butcher (“Warden’s office”) at the Polunsky Unit to inquire about the videographer filming an interview with Mr. Ochoa. The Warden’s office informed the FPD that the request should be submitted through Inmate Records, and transferred the call to that department. An Inmate Records employee named “Ms. Daniel” informed the FPD that the FPD should contact the Access to Courts department and submit a formal request to have the videographer approved as a representative of the legal team, using TDCJ form I-164. Ms. Daniel stated that once the videographer was approved by Access to Courts, the FPD should submit a separate visit request to Inmate Records, via form I-166, enumerating the items that the videographer needed to bring into the prison for his visit with Mr. Ochoa.
38. Later that same day, December 4, 2019, the FPD submitted the formal request to Access to Courts, using form I-164. Additionally, the FPD called Access to Courts and spoke with Jennifer Farrow-Chavez, Library Assistant III. The FPD explained the purpose of the videographer’s requested visit. At that time, Ms. Farrow-Chavez informed the FPD that her interpretation of TDCJ policies was that members of the legal team would not be allowed to bring video equipment into the prison without a court order.

39. On December 6, 2019, the FPD called Access to Courts to request an update on TDCJ's background investigation into the videographer under his I-164 formal request for approval to visit the prison. Ms. Farrow-Chavez was out of the office that day, and her colleagues could not provide an update on the application.
40. On December 9, 2019, still without word on whether the videographer had passed the background investigation, the FPD submitted an I-166 visit request to Inmate Records, pending the outcome of Access to Courts' investigation. The FPD attached to the visit request a letter, on office letterhead, requesting that the Warden or his designee allow the videographer to bring camera equipment into the prison for his December 12, 2019, visit to film an interview for Mr. Ochoa's clemency petition. Ex. 4. Consistent with the requirements of TDCJ Board Policy BP-03.81, the FPD attested that the use of the camera equipment was absolutely essential to facilitate the attorney-client relationship. *Id.*
41. On December 11, 2019, Ms. Chavez-Farrow of the Access to Courts department contacted the FPD to advise that the videographer had passed the background check and was approved to enter the prison the following day, but that he would not be allowed to bring in camera equipment, as that is "only allowed for a deposition." Ms. Chavez-Farrow did not claim to be acting as the Warden's designee with regard to the decision to deny the camera equipment.
42. Later that same day, Ms. Daniel of the Inmate Records department informed the FPD that the Warden's office approved the videographer's I-166 request to enter the prison, but denied the request to bring camera equipment into the

prison absent a court order. Ms. Daniel refused to provide written confirmation of the denial of the camera equipment.

43. On December 17, 2019, the FPD contacted Ms. Daniel of the Inmate Records department to inquire about appealing the Warden's decision to deny the camera equipment. Ms. Daniel informed the FPD there is no process to appeal the Warden's decision and reiterated that no camera equipment would be allowed into the prison without a court order.
44. The Defendants' actions in refusing to allow members of the legal team to bring in camera equipment without the intervention of a court order is contrary to their official policy, which permits the Warden to authorize such equipment during a legal visit.

**Defendants Frustrated and Impeded Mr. Ochoa's Plea for Clemency**

45. The clemency process is a critical part of the justice system. The United States Supreme Court has recognized clemency as an essential failsafe in death penalty cases. Clemency is the appropriate—and sometimes *only*—method for remedying injustices that may persist after a case has made its way through the appellate process.
46. Mr. Ochoa presents a particularly compelling case for commutation to a life sentence given his deep and sincere remorse for the crime for which he is convicted, his personal story of redemption, and his remarkable faith and relationship with God. Mr. Ochoa has made great efforts to make a positive influence on other inmates, correctional officers, and others he has

encountered during his 16 years on death row. He speaks in an eloquent and vulnerable manner about the greatest mistake of his life and his daily struggle for redemption—which he recognizes would not be possible without his sincere faith in God.

47. With his execution date fast approaching, Mr. Ochoa sought to personally present this information to the BPP and the Governor in the form of a filmed interview but the Defendants have interfered with his ability to do so. The Defendants' denial of Mr. Ochoa's request to conduct a filmed interview has frustrated and impeded his plea for clemency, and as a result Mr. Ochoa suffered an actual injury in not being able to present this video as part of his clemency petition.
48. The Defendant's actions described above were intentional.

## V. CLAIMS

### **Count I: Access to Courts**

49. Mr. Ochoa incorporates by reference each and every statement and allegation set forth throughout this Complaint as if fully set forth herein.
50. By virtue of the above stated facts, the Defendants have deprived Mr. Ochoa of his First and Fourteenth Amendment rights to access the courts, in violation of 42 U.S.C. § 1983.

### **Count II: Access to Counsel**

51. Mr. Ochoa incorporates by reference each and every statement and allegation set forth throughout this Complaint as if fully set forth herein.

52. By virtue of the above stated facts, the Defendants have obstructed the availability of professional representation guaranteed by 18 U.S.C. § 3599, in violation of 42 U.S.C. § 1983.

**Count III: Due Process**

53. Mr. Ochoa incorporates by reference each and every statement allegation set forth throughout this Complaint as if fully set forth herein.
54. By virtue of the above stated facts, the Defendants have deprived Mr. Ochoa of his constitutional right to due process of law by interfering with the clemency process.

**VI.  
PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests this Court grant him the following relief:

1. Order the Defendants to allow Mr. Ochoa's retained videographer to enter the Polunsky Unit with a video camera and conduct a filmed interview with Mr. Ochoa to submit as part of his clemency petition;
2. Enjoin the Defendants from executing Mr. Ochoa during the pendency of this lawsuit;
3. Declare any TDCJ's video camera policies that favor media representatives over legal counsel, whether *de facto* or *de jure*, unconstitutional or in violation of federal law;
4. Enjoin Defendants from creating or enforcing policies that provide media representatives greater access to inmates than the inmates' own counsel;
5. Order Defendants to create accommodations and policies for legal counsel to film inmates that provide at least as much access to inmates as the accommodations applied to members of the media;
6. Order other preliminary and permanent injunctive and declaratory relief as necessary to enforce Mr. Ochoa's constitutional rights; and



7. Grant any other such relief as this Court deems just and proper.

Respectfully submitted,

DATE: December 23, 2019

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### **CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court for the Southern District of Texas using the electronic case-filing (ECF) system of the Court. I have also provided a copy of this document to counsel for the Defendants, the Office of the Attorney General.

/s/ Jeremy Schepers  
Jeremy Schepers