No. 20A-128

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFERSON DUNN, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS,

APPLICANT,

V.

WILLIE B. SMITH III,

RESPONDENT.

EXECUTION SCHEDULED FOR FEBRUARY 11, 2021 AT 6 P.M. CST

OPPOSITION TO EMERGENCY APPLICATION TO VACATE INJUNCTION OF EXECUTION

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The Court of Appeals for the Eleventh Circuit overruled the district court and granted a preliminary injunction to Willie B. Smith III that required the Alabama Department of Corrections (the "ADOC") to permit Mr. Smith's religious advisor to be present in the execution chamber at the time of execution. Rather than accommodate Mr. Smith's request and move forward with the execution under that condition, the ADOC has moved to vacate the preliminary injunction. This Court should deny the motion.

No one disputed the evidence presented below that Mr. Smith is a practicing Christian. No one disputed that "Mr. Smith's faith teaches him that the point of transition between life and death is important and that Pastor Wiley can provide spiritual guidance during this difficult time." Dkt. 4-1, Decl. of Spencer Hahn ¶ 14. No one disputed that "Pastor Wiley's physical presence in the execution chamber is ***essential*** to Mr. Smith's spiritual search for redemption." *Id.* (emphasis added). And no one disputed Mr. Smith's belief that Pastor Wiley's presence in the execution chamber, praying with him and holding his hand, would "eas[e] the transition between the worlds of the living and the dead." *Id.*

As for the ADOC's burden, no one disputed that the ADOC considered ***no*** less restrictive alternatives to the blanket prohibition on religious advisors in the execution chamber. *See* Dkt. 26-15 (Dep. of Cheryl Price (Aug. 20, 2020) 159:21–160:3). It did not consider background checks, it did not consider training. *Id.* at 158:18–22; 159:9–20. It bizarrely suggested that granting Mr. Smith's request would somehow ***limit*** inmates' choices of spiritual advisors but presented no evidence on how this is so. *See, e.g.*, Emergency Appl. to Vacate Inj. of Execution ("Appl. To Vacate") at 26. Instead, it posited a speculative parade of possibilities, none supported by concrete evidence and none consistent with the stringent standard this Court has imposed.

In seeking to reverse the Eleventh Circuit, the ADOC rests largely on the abuse of discretion standard but it does not properly explain what that means in the preliminary injunction context. Questions of law are reviewed *de novo*. *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005). No deference should be given to the district court's application of the law to the facts, which were largely undisputed. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007) (finding that the district court had abused its discretion by misapplying Michigan law to the facts of the case). Nor does the abuse of discretion standard of review give the district court ***unfettered*** discretion. *See Gall v. United States*, 552 U.S. 38, 68, (2007) (Alito, J., dissenting) ("A decision calling for the exercise of judicial discretion 'hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.'" (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, (1975) (emphasis added)). When a district court ignores one side's evidence and credits speculation over fact, it has abused its discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

Ultimately, contrary to the suggestion of the dissent below, this is not a hard case requiring nuanced judgment. This Court has opined on the breadth of Religious Land Use and Institutionalized Persons Act ("RLUIPA") protections and the stringency of the government's burden in two recent landmark cases that went largely ignored in the district court's 57-page decision. *See Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). To boot, this is the fourth time in two years that this Court has been asked to rule on a religious advisor request similar to what is at issue here, each time signaling merit to the petitioner's claims. The Court vacated a stay in the first of those cases on timeliness

grounds, but a four-Justice dissent would have granted relief, finding that the petitioner was likely to succeed on the merits. *See Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.). In two subsequent cases, the Court found no timing issue and granted stays, each time determining that each prisoner was substantially likely to succeed on the merits of his claims. *See Murphy v. Collier*, 139 S. Ct. 1475 (2019) (mem.); *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020) (mem.).

The Eleventh Circuit rightly determined that the same result should ensue here. The district court, while crediting the sincerity of Mr. Smith's beliefs, found that the ADOC's policy was not a substantial burden because Mr. Smith did not rely on authoritative scriptural sources, did not opine that he would be deprived of salvation in the absence of the accommodation, and was being allowed to practice his religion in other ways. Order at 18–23. The Eleventh Circuit properly rejected this analysis as directly contrary to this Court's directives in *Holt* and *Hobby Lobby*. Indeed for 55 years, this Court consistently has held that religious belief is inherently subjective and in the eye of the beholder; it is not only orthodoxy that is protected. *United States v. Seeger*, 380 U.S. 163, 184 (1965).

The ADOC does not take issue with the Eleventh Circuit's reversal of the district court's substantial burden analysis. It instead argues that the Eleventh Circuit should not have disturbed the district court's finding that the ADOC policy was the least restrictive means to accommodate a compelling interest. But in reaching this finding, the district court ignored the stringency of the least restrictive means test. It did not heed this Court's holding in *Hobby Lobby* that the test is "exceptionally demanding." 573 U.S. at 728. The undisputed evidence in fact showed that the ADOC had failed to consider ***any*** less restrictive alternatives to its blanket policy. It suggested some speculative concerns but presented no evidence to support them.

This Court should deny the motion.

BACKGROUND AND PROCEDURAL HISTORY

The ADOC has long recognized the importance of having a religious advisor to minister to a condemned prisoner in the execution chamber at the time of death. For more than twenty years, the ADOC required its state-employed chaplain—a Protestant Christian—to attend every execution. *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 692 (11th Cir. 2019). The chaplain would stand by the prisoner's side, hold his hand, and pray and comfort him until he died. *Id.* at 692–93.

In January 2019, Domineque Ray—a devout Muslim—requested that that same spiritual comfort be afforded to him. *Id.* But because the ADOC did not employ any Muslim chaplains, it denied Mr. Ray's request for an imam to stand by his side during the execution. *Id.* Mr. Ray challenged the ADOC's decision as violative of the Establishment Clause and RLUIPA. *See id.* at 693. Although the Eleventh Circuit granted Mr. Ray's request for a stay of execution, *id.* at 703, this Court concluded in February 2019 that his challenge was untimely and vacated the stay without addressing the merits of the case. *See Dunn v. Ray*, 139 S. Ct. 661 (2019) (mem.). Writing for four members of the Court, Justice Kagan dissented: "Given the gravity of the issue presented here, I think that the decision [vacating the stay is] profoundly wrong. . . . Ray has put forward a powerful claim that his religious rights will be violated at the moment the State puts him to death." *Id.* at 661–62 (Kagan, J., dissenting).

The following month, a Buddhist prisoner in Texas sought similar relief from this Court. *See Murphy v. Collier*, 139 S. Ct. 1475 (2019) (mem.). Texas—like Alabama—had for years permitted its state-employed chaplains to minister to inmates at the time of death. *Id.* (Kavanaugh, J., concurring). But when Patrick Murphy asked to have a Buddhist priest attend his execution, Texas denied the request. *Id.* This Court granted injunctive relief to Mr. Murphy,

prohibiting Texas from "carry[ing] out Murphy's execution pending the timely filing and disposition of the petition for writ of certiorari unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution." *Id.* (mem.). In a concurring opinion, Justice Kavanaugh suggested two possible "equal-treatment remedies": "(1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room." *Id.* at 1475 (Kavanaugh, J., concurring).

Although Justice Kavanaugh was writing as to the Establishment Clause's equal-treatment mandate, Texas revised its execution protocol to prohibit all religious advisors—including its state-employed chaplains—from the execution chamber. *See* Order, *Gutierrez v. Saenz*, Civil No. 1:19-CV-00185, at 7 (S.D. Tex. Nov. 24, 2020) [ECF No. 124]. This, too, was challenged. In *Gutierrez*, another death row prisoner requested the presence of a Catholic priest in the execution chamber. *Id.* at 9. The Fifth Circuit denied the request for a stay of execution, 818 F. App'x 309, 314 (5th Cir. 2020), but this Court summarily reversed, *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020) (mem.).

This Court then directed the district court to "promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution." *Id.* Following that directive, the district court concluded that Texas had not demonstrated "that serious security concerns would result from allowing inmates the assistance of a chosen spiritual advisor in their final moments." Order, *Gutierrez v. Saenz*, Civil No. 1:19-CV-00185, at 29 (S.D. Tex. Nov. 24, 2020) [ECF No. 124].

This Court then granted certiorari and remanded to the district court for adjudication on the merits. *Gutierrez v. Saenz*, No. 19-8695, 2021 WL 231538 (Jan. 25, 2021) (mem.).

While the Court has not definitively ruled on this issue, the direction of the Court's orders have been clear, especially when read with *Hobby Lobby* and *Holt*. A state is not to inquire into the orthodoxy or reasonableness of a prisoner's request, and must provide accommodations for sincerely held religious beliefs unless it can demonstrate that its policy is the least restrictive means of furthering a compelling interest.

Yet the ADOC has ignored these directions. Following *Murphy*, the ADOC revised its execution protocol to exclude all religious advisors from the execution chamber. *See* Appl. to Vacate at 3. The ADOC's policy change was not the result of a careful consideration of prisoners' religious freedoms, but in response to Justice Kavanaugh's concurrence in *Murphy*. Panel Op. at 2. The ADOC, in fact, conceded that it did not consider any alternatives other than an outright ban on religious advisors in the execution chamber. *Smith*, No. 2:20-CV-1026-RAH, Dkt. 26-15 (Dep. of Cheryl Price 159:21–160:3 (Aug. 20, 2020)). It did not survey the practices of other states or the federal BOP. *Id.* at 158:7–12. It did not hire an expert to consider the feasibility of lesser restrictive alternatives. *Id.* at 158:18–22. Although the ADOC's state-employed chaplain testified that minimal time (e.g., three or four hours) was required to train a religious advisor to attend an execution, the ADOC never considered training a non-employee religious advisor. *Id.* at 159:9–20.

On December 1, 2020, Mr. Smith received an execution date of February 11, 2021. Panel Op. at 2. Mr. Smith was raised in the Christian faith and, during his incarceration, he became a born-again Christian and developed a close spiritual relationship with his pastor, Robert Paul Wiley, Jr. *See Smith*, No. 2:20-CV-1026-RAH, Dkt. 4-1 (Decl. of Spencer J. Hahn) ("Hahn

Decl.”). But the ADOC’s execution protocol barred him from having Pastor Wiley by its side in the execution chamber. Panel Op. at 2.

The ADOC scheduled Mr. Smith’s execution in the midst of the ongoing pandemic, when it had not set an execution date for any prisoner since early 2020, before pandemic restrictions began. *See* Equal Justice Initiative, Alabama Executions, https://eji.org/alabama-executions/ (most recent ADOC execution was March 5, 2020). Despite the ADOC’s pandemic response preventing Mr. Smith from meeting with his attorneys in person to discuss his case since March 2020, on December 14, 2020, Mr. Smith filed a Complaint and Emergency Motion for Preliminary Injunction, challenging the ADOC’s policy as violative of RLUIPA. *See* Dtk. 4-1, Hahn Decl. ¶ 4; Panel Op. at 2. During a hearing on the motion, the district court expressed concern that the ADOC had presented ***no evidence*** to satisfy its burden. Tr. of Hr’g at 49, *Smith v. Dunn*, No. 2:20-CV-1026-RAH (M.D. Ala. Jan. 20, 2021). None. It nevertheless permitted the parties to submit additional evidence. *See* Order, *Smith v. Dunn*, No. 2:20-CV-1026-RAH (M.D. Ala. Jan. 25, 2021).

On February 2, 2021, the district court denied the motion. *See generally* Mem. Opinion & Order, *Smith v. Dunn*, No. 2:20-CV-1026-RAH (M.D. Ala. Feb. 2, 2021) (“Order”). The court acknowledged that Mr. Smith had a sincere belief in the need for his pastor to attend his execution, *id.* at 15–16, but concluded that he had failed to show that the ADOC’s decision “substantially burdened” that religious belief, *id.* at 22–23. Specifically, the district court found that Mr. Smith had cited no authoritative religious source showing that he would be deprived of salvation if his pastor was not present at the moment of death. *Id.* at 18, 23. The court also concluded that—notwithstanding the ADOC’s practice of allowing non-employee medical

personnel into the execution chamber[1]—the ADOC had a compelling security interest in prohibiting non-employee religious advisors from the execution chamber. The court blindly accepted the ADOC's statement there was no "guarantee" that a heightened background investigation on a religious advisor could be completed before the execution,[2] even though there was no evidence that the ADOC even requested a background check for Pastor Wiley. *See Smith*, No. 2:20-CV-1026-RAH, Dkt. 12 (ADOC Resp.) (Dec. 22, 2020); Dkt. 27 (ADOC Evidentiary Submission) (Jan. 22, 2021). And the court ignored the ADOC's prior admission that it had not considered alternatives other than an outright ban on religious advisors in the execution chamber. *Smith*, No. 2:20-CV-1026-RAH, Dkt. 26-15 (Dep. of Cheryl Price 159:21–160:3 (Aug. 20, 2020)).

The Eleventh Circuit reversed. *See generally* Panel Op., *Smith v. Dunn*, No. 21-10348 (11th Cir. Feb. 10, 2021). It reviewed the district court's decision on an abuse of discretion standard, and found two violations of RLUIPA principles on substantial burden that this Court articulated in *Holt*. *Id.* at 9–10. First, a court "should not inquire into whether a prisoner prefers one sort of religious exercise over another." *Id.* at 9. Second, "availability of alternative means of practicing religion is not a relevant consideration under RLUIPA." *Id.* at 10. Because the sincerity of Mr. Smith's beliefs was not in question, *see id.* at 7, 10, and because the ADOC's

[1] Several members of the execution team—the IV team, the person responsible for inserting a central line if needed, and the person declaring the prisoner dead—are all non-employees. Order at 26 n.17; *Smith*, No. 2:20-CV-1026-RAH, Dkt. 27-9 (Dep. of Cheryl Price 110:4–15, 112:02–18 (Aug. 20, 2020)).

[2] In support for its argument that a heightened background investigation may not be completed in time, the ADOC cited testimony from its institutional chaplain that a background check could take weeks or months. But the chaplain repeatedly admitted that he was unfamiliar with background checks and that he really did not know about the timing of such a request. *Smith*, No. 2:20-CV-1026-RAH, Dkt. 27-10 (Dep. of Chris Summers 49:15–51:9 (Aug. 13, 2020)).

policy would prevent him from exercising those beliefs, Mr. Smith demonstrated a substantial burden, *see id.* at 11.

The Eleventh Circuit then turned to the burden the ADOC was required to shoulder under RLUIPA—that its decision denying Mr. Smith's request for his pastor in the execution chamber was the least restrictive means of furthering a compelling governmental interest. The Eleventh Circuit found, "the ADOC has a compelling interest in maintaining safety, security, and solemnity" during an execution. *Id.* at 12. But, describing the least restrictive means standard to be "exceptionally demanding," the Eleventh Circuit found the district court had abused its discretion. *Id.* at 13 (quoting *Davila v. Gladden*, 777 F.3d 1198, 1207 (11th Cir. 2015) (quoting *Hobby Lobby*, 573 U.S. at 728)). In particular, the federal BOP's allowance of prisoners' religious advisors in the execution chamber showed there was an alternative available, but the district court "ignored this highly probative evidence." Panel Op. at 14. The ADOC even conceded that it could undertake the same measures as the BOP. *Id*. at 13-14. Because the district court did not hold the ADOC to its burden, the Eleventh Circuit found that reversal was required. *Id.* at 14.[3]

ARGUMENT

I. The Eleventh Circuit Applied the Correct Standard of Review

The ADOC argues that on appeal from a grant or denial of a preliminary injunction, the Eleventh Circuit should have reviewed for abuse of discretion. Appl. to Vacate at 17–18. This articulation of the standard of review, however, ignores that conclusions of law are still reviewed *de novo*. As this Court has explained, "on appeal from a preliminary injunction . . . [we] review

[3] After finding that Mr. Smith had shown substantial likelihood of success on the merits, the Eleventh Circuit briefly addressed the remaining preliminary injunction factors—irreparable injury, balance of harms, and the public interest—and found they had been satisfied. Panel Op. at 16-19.

the District Court's legal rulings *de novo*, and its ultimate conclusion for abuse of discretion." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 867 (2005) (citation omitted); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) ("We review the District Court's legal rules *de novo* and its ultimate decision to issue the preliminary injunction for abuse of discretion.") (citation omitted); *see also LSSI Data Corp. v. Comcast Phone, LLC*, 696 F.3d 1114, 1119 (11th Cir. 2012) (on appeal, "review[ing] the ultimate decision of whether to grant a preliminary injunction for abuse of discretion, but [ ] review[ing] *de novo* determinations of law made by the district court en route").

The Eleventh Circuit, accordingly, correctly reviewed the district court's application of the "substantial burden" and "least restrictive means" standards *de novo* in reaching its ultimate conclusion that the district court abused its discretion. *See LSSI Data Corp.*, 696 F.3d at 1119. With respect to the "substantial burden" test, the Eleventh Circuit concluded that the district court had misapplied the law. It had ignored "two key [legal] principles underlying the substantial burden analysis." Panel Op. at 9.

With respect to the "least restrictive means" test, the Eleventh Circuit found that the district court misapplied the standard by engaging in an overly-deferential analysis to the point of ignoring evidence altogether. Panel Op. at 9. The district court, for example, ignored: (1) that the federal BOP (which, over the last year, has conducted far more executions than any other prison system) permits spiritual advisors in the execution chamber, *id.* at 13; (2) that the BOP conducts background checks for spiritual advisors in two weeks or less and imposes no training requirements on the advisors, *id.*; (3) that there were no disruptions or disturbances by the spiritual advisors permitted by the BOP, *id.* at 14; (4) that the ADOC conceded it could comply with the same BOP policy, *id.* at 14-15; and (5) that the ADOC did not provide any evidence that

adopting the BOP policy would undermine any compelling interest in security, *id.* at 15-16. This failure, the Eleventh Circuit found, was "troubling" and "especially concerning." *Id.* at 16.

But in any event, it is perplexing that the ADOC is arguing that the Eleventh Circuit did not apply the abuse of discretion standard when the panel described the district court's findings as "an abuse" at least six times. *See, e.g.*, Panel Op. at 6 ("[T]he District Court abused its discretion by finding Smith failed to demonstrate his religious exercise was substantially burdened . . . [and] abused its discretion in finding the ADOC's policy is the least restrictive means to further that compelling interest.").[4] When the district court failed to properly apply the "substantial burden" and "least restrictive means" tests, upon a *de novo* review of those conclusions, the Eleventh Circuit found a jarring abuse of discretion.[5] *See, e.g., Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007) (finding abuse of discretion where district court misapplied Michigan law to the facts of the case). The decision below should stand.

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[4] *See also* Panel Op. at 9 ("The District Court abused its discretion by questioning whether Smith's belief that Pastor Wiley should be present in the execution chamber was only a 'preference,' rather than a tenet or practice of his religion, and by relying on alternative ways Smith could practice his religion."); *id.* at 12–13 ("Our review of the record leads us to the conclusion that this [finding on least restrictive means] was an abuse of discretion."); *id.* at 16 ("[T]he District Court credited the ADOC's concession that it could comply with a policy similar to that followed by the BOP, but did not hold the ADOC to its burden to show its compelling interests were undermined by the less restrictive policy. This was an abuse of discretion."); *id.* at 19 ("The District Court abused its discretion by improperly inquiring into Smith's religious beliefs and practices and finding the ADOC policy does not substantially burden Smith's religious exercise. The District Court also incorrectly applied the least restrictive means inquiry.").

[5] The ADOC implies that the Eleventh Circuit improperly reached the merits. Not so. It simply reviewed the lower court's conclusions regarding the substantial likelihood of the merits—a necessary step in the review of a denial of a preliminary injunction. *See Gonzalez*, 546 U.S. at 428.

II. The Eleventh Circuit Correctly Enjoined the ADOC

Congress enacted RLUIPA with the intent of "provid[ing] very broad protection for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)); see also *Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010) (RLUIPA provides greater protection of religious liberties than the First Amendment) (citing *Lovelace v. Lee*, 472 F.3d 174, 199–200 (4th Cir. 2006)). Under RLUIPA, a government cannot impose "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. § 2000cc–1(a).

A. The Eleventh Circuit Correctly Interpreted the "Least Restrictive Means" Test

Under RLUIPA, once a prisoner shows that his sincerely held belief has been substantially burdened, the government must show that its decision satisfies a compelling interest and that it is the least restrictive means for addressing that interest. *Holt*, 574 U.S. at 362; 42 U.S.C. § 2000cc–1(a). Although the Eleventh Circuit erred in finding that the ADOC demonstrated a compelling governmental interest, it nevertheless correctly concluded that the ADOC failed to show that it had considered lesser restrictive means than an outright ban on all religious advisors in the execution chamber.

This Court has described the "least restrictive means" standard as "exceptionally demanding." *Hobby Lobby*, 573 U.S. at 728. It requires the government to "show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Id.* Based on the evidentiary record—and the district court's failure to follow this Court's teachings that "[i]f a less restrictive means is available for the Government to achieve its

goals, the Government must use it"—the Eleventh Circuit correctly concluded that the ADOC failed to meet its burden. *See* Panel Op. at 13, 15–16 (quoting *Holt*, 573 U.S. at 728).

Critical to the Eleventh Circuit's analysis was the fact that the district court "ignored [] highly probative evidence" of the practices in the federal BOP. *Id.* at 14.[6] In at least five recent executions, the BOP has allowed a religious advisor of the inmate's choosing in the execution chamber. In at least two of those executions, background checks were completed in less than two weeks, *see id.* at 13, and the religious advisors received no training whatsoever, *see, e.g.*, *see* Dkt. 26-2, Decl. of Shawn Nolan ¶ 5. No security breaches resulted from their presence in the execution chamber. Panel Op. at 14. The BOP practice is significant because most recent executions have been conducted in the federal system.[7] "While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need

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[6] The ADOC complains that "the district court ***did*** consider the BOP," and cites to a footnote in which the court stated that neither party had presented "detailed information" regarding the BOP's practice or policy. Appl. to Vacate at 28 (emphasis in original). But that is patently not the case. Mr. Smith submitted the sworn declaration of the Chief of the Capital Habeas Unit for the Federal Community Defender Office for the Eastern District of Pennsylvania, who averred that the BOP granted prisoner requests for their religious advisors' presence in the execution chamber shortly before the schedule execution, that the spiritual advisors received little or no training, and that no sort of disruption or disturbance ensued. Dkt. 26-2, Decl. of Shawn Nolan ¶¶ 3, 5-6. The district court did not acknowledge this evidence at all.

[7] In 2020, the BOP carried out 10 of the 17 executions in the United States. *See* https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2020. The Court may take judicial notice of the statistical information on the Death Penalty Information Center, which are not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *Chhetry v. U.S. Dep't of Justice*, 490 F.3d 196, 199–200 (2d Cir. 2007) (the Board of Immigration Appeals could take judicial notice of "changed country conditions based on news articles found on yahoo.com, or the websites of CNN and BBC News"); *Wilson v. Dunn*, 2:16-CV-364-WKW, 2017 WL 5619427, at *6 (M.D. Ala. Nov. 21, 2017) (taking judicial notice of information on www.deathpenaltyinfo.org); *McGehee v. Hutchinson*, 4:17-CV-00179 KGB, 2017 WL 1399554, at *11 (E.D. Ark. Apr. 15, 2017), *vacated on other grounds*, 854 F.3d 488 (8th Cir. 2017), and *judgment entered*, 17-1805, 2017 WL 1423782 (8th Cir. Apr. 17, 2017) ("[T]he Court takes judicial notice of the publicly-available searchable execution database on the website for the Death Penalty Information Center ('DPIC'). See https://deathpenaltyinfo.org/views-executions.").

for a particular type of restriction." *Holt*, 574 U.S. at 368 (quoting *Procunier v. Martinez*, 416 U.S. 396 (1974)).[8]

As the Eleventh Circuit noted, the ADOC offered no explanation why the federal executions could proceed with an outside religious advisor in the execution chamber, but executions in Alabama could not. *See* Panel Op. at 14-15; *see also Spratt*, 482 F.3d at 42 ("in the absence of any explanation by [the state] of significant differences between the [state prison] and a federal prison that would render the federal policy unworkable,'" the state is unlikely to satisfy strict scrutiny).[9] This was "especially concerning," the Eleventh Circuit found, "because the ADOC conceded that it could undertake those very same measures" as the BOP. Panel Op. at 14. The ADOC "provided no evidence that adopting this alternative—requiring spiritual advisors to undergo a background investigation—would undermine its compelling interest in security." *Id.* at 15.

The ADOC complains instead that other states that conduct execution by lethal injection do not permit outside religious advisors in the execution chamber. Appl. to Vacate. at 28-29. This argument is both misplaced and irrelevant. Most of those protocols do not say one way or

[8] *See also Rich v. Sec'y, Florida Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013) ("While the practices at other institutions are not controlling, they are relevant to an inquiry about whether a particular restriction is the least restrictive means by which to further a shared interest."); *Warsoldier*, 418 F.3d at 1000 ("[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

[9] *See also Warsoldier*, 418 F.3d at 999 (enjoining prison's hair-length policy where "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy"); Order at 26, *Gutierrez v. Saenz*, Civil No. 1;19-CV-00184 (S.D. Tex. Nov. 24, 2020) (in light of "the experience of BOP requiring minimal training for spiritual advisors in the execution chamber," concluding that Texas "could implement some means of training and vetting of an outside spiritual advisor that would effectively minimize security concerns").

the other whether religious advisors are permitted in the execution chamber.[10] They do not describe how these states would address a request by a condemned inmate for pastoral care in the execution chamber. The ADOC does not suggest that any inmates in these states actually requested and were denied a religious advisor. What is more, many of these states have not executed anyone in years, so it is unclear whether the protocols are even in force.[11]

The ADOC also contends that it was not required to "refute every conceivable option to satisfy the least restrictive means requirement." Appl. to Vacate. at 26 (quoting Order at 26 (quoting *Holt*, 574 U.S. at 371 (Sotomayor, J., concurring))). But the ADOC's Rule 30(b)(6) representative unequivocally testified that, when revising the execution protocol to ban all religious advisors from executions, the ADOC did not consider ***any*** alternatives. Dkt. 26-15 (Dep. of Cheryl Price (Aug. 20, 2020) 159:21–160:3). There was, moreover, zero evidence the ADOC considered Mr. Smith's proffered alternative: that the ADOC screen and conduct a background check on Pastor Wiley before allowing him entry into the execution chamber. *See Smith*, No. 2:20-CV-1026-RAH, Dkt. 12 (ADOC Resp.) (Dec. 22, 2020); Dkt. 27 (ADOC Evidentiary Submission) (Jan. 22, 2021).

In light of the evidentiary record—including the ADOC's inability to distinguish practices of the BOP and its concessions that it did not consider lesser restrictive alternatives,

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[10] *See* https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols. The ADOC implies that certain states, including Idaho, Nevada, and North Carolina, have explicit bans on spiritual advisors in the execution chamber, which is inaccurate. Appellee's Br. at 43. These protocols simply do not list "spiritual advisor" on their list of authorized individuals in the chamber; there is a difference. The ADOC then lists Georgia, Indiana, Kentucky, Louisiana, Mississippi, Ohio, Oklahoma, and South Dakota, for which the same is true. *Id.* Review of the publicly available protocols reveals that only Alabama, Texas, and Tennessee have explicit bans.

[11] For example, in 2020, only the BOP and five states—Alabama, Georgia, Missouri, Tennessee, and Texas—conducted executions. *See* https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2020.

including that put forward by Mr. Smith—the Eleventh Circuit correctly found that the ADOC failed the "exceptionally demanding" least restrictive means test.

B. The Eleventh Circuit Erred in Deferring to the State's Generalized Security Concerns

This Court can also affirm the Eleventh Circuit's grant of the injunction based on the ADOC's failure to demonstrate a compelling interest. Petitioner submits that the Eleventh Circuit was wrong in that analysis. This Court has explained that the government must show a compelling interest "through application of the challenged law to the person—the *particular claimant* whose sincere exercise of religion is being substantially burdened." *Holt*, 574 U.S. at 363 (internal quotation marks and citations omitted; emphasis added). For example, in *Holt*, while the prison had a "compelling interest in staunching the flow of contraband into and within its facilities," it did not have a compelling government interest under the more focused inquiry into the particular policy at issue: prohibiting a prisoner from growing a half-inch beard. *Id.*[12]

What this means is that generalized concerns—even about prison safety and security—do not satisfy that test. Although courts may defer to prison officials' expertise on security, this Court has warned that that deference should not be "unquestioning." *Holt*, 135 S. Ct. at 864; *id.* (respect for prison officials' expertise "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard"); *Hobby Lobby*, 573 U.S. at 726–27 (courts must "scrutinize the asserted harm of granting specific exemptions to particular religious claimants") (internal quotation marks omitted). As Justice Sotomayor has explained, "prison policies grounded in mere speculation are exactly the ones that motivated Congress to

[12] *See also, e.g.*, *Williams*, 895 F.3d at 190 ("[T]he government must justify its conduct by demonstrating not just its general interest, but its particularized interest in burdening the individual plaintiff in the precise way it has chosen.").

enact RLUIPA." *Holt*, 135 S. Ct. at 867 (Sotomayor, J., concurring) (quoting 106 Cong. Rec. 16699 (2000)) (internal quotation marks omitted). In a case about a prison, the ADOC cannot satisfy its burden by saying this is a case about a prison.

But that is exactly the type of deference the Eleventh Circuit gave the ADOC. Correctly applied, the ADOC should have been required to show a compelling governmental interest in barring non-ADOC religious advisors like Pastor Wiley from the execution chamber. The Eleventh Circuit, however, held that the ADOC need only show a "compelling interest [ ] in maintaining safety, security, and solemnity during an execution. The prohibition on Pastor Wiley's presence, specifically, inside the execution chamber might promote the ADOC's compelling interest—but it is not the interest itself." Panel Op. at 11. Under this analysis, the government will always be able to show a compelling interest. For example, here, the ADOC presented evidence of "disciplinary problems with ADOC-employed chaplains and religious volunteers," *see* Panel Op. at 12, but these handful of examples involved incidents of smuggling contraband in the general prison setting, *see* Appl. to Vacate at 23. None of them involved security breaches by clergy (whether in Alabama or elsewhere) in the execution chamber.[13] The ADOC's invocation of these intrusions in the general prison setting is disingenuous at best, as it is *permitting* Pastor Wiley to accompany Mr. Smith in the general prison setting right up to the execution chamber.

Similarly, the ADOC presented evidence of its "extensive" vetting process and training for execution team members, *see* Appl. to Vacate. at 16, but that selection and training process

[13] *See* Order, *Gutierrez v. Saenz*, Civil No. 1:19-CV-00185, at 20 & n.14 (S.D. Tex. Nov. 24, 2020) [ECF No. 124] (although Texas identified one disturbance inside the execution chamber caused by the condemned inmate, "[t]here was no evidence in the record of security problems in the execution chamber ***caused by clergy***" (emphasis added)).

related to the security team and medical personnel. The ADOC chaplain explained that he received minimal training to participate in executions and does not participate in full "rehearsal" executions. *See* Dkt. 26, Ex. J (Summers Dep. at 124:16–125:8) (Chaplain Summers attended 30 minutes of the two or three hour rehearsal before his first lethal injection execution); *see also* Dkt. 26-14 (the ADOC previously allowed another chaplain in the execution room after a couple hours of informal training).

Finally, the ADOC presented evidence of disturbances caused by family members of the condemned and by the condemned inmate himself. Panel Op. at 22. None of the examples involved the chaplain and none occurred inside the execution chamber. Although the ADOC's proffered evidence may have been relevant to support placing restrictions on family members in the viewing room or searching visitors for contraband, it is not relevant to Mr. Smith, "the particular claimant whose sincere exercise of religion is being burdened," or to the "particular context" at issue, the prohibition on Pastor Wiley's presence in the execution chamber. *Holt*, 574 U.S. at 363.

Nor did the court acknowledge the contrary evidence, which suggested that the ADOC's security concern about an outside religious advisor in the execution room was, to put it candidly, made up:

- For more than 20 years, the ADOC had not just permitted but required the prison chaplain to be with the inmate in the execution chamber without incident. Panel Op. at 3; Order at 4–5.
- The ADOC previously allowed another prison chaplain to be present in the execution chamber with just three or four hours of informal training and without incident. Dkt. 26-14.
- The execution team includes several non-ADOC employees (*e.g.*, the IV team) who access the execution chamber immediately before and after executions.

> There have been no incidents involving these team members. Panel Op. at 3; Order at 36 n.17; Dkt. 27-9.[14]

Without any evidence to support concerns specific to a religious advisor's presence in the execution chamber, the ADOC has not carried its burden, and the Eleventh Circuit erred in finding a compelling governmental interest.

C. The Eleventh Circuit Correctly Found that the ADOC's Decision "Substantially Burdened" Mr. Smith's Religious Beliefs

The ADOC does not challenge the Eleventh Circuit's substantial burden analysis, presumably because the district court's analysis was clearly legally erroneous and an abuse of discretion.

Explaining this analysis helps put this case into its proper context. RLUIPA applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Congress instructed that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc-3(g).

Applying these mandates, this Court has made clear that the protections of RLUIPA apply to the subjective religious beliefs of individuals. *Holt*, 574 U.S. at 362. After all, "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real to life to some may be incomprehensible to others." *See Seeger*, 380 U.S. at 184 (internal quotation marks and citations omitted). Courts

[14] In *Gutierrez*, based on "extensive evidence" and briefing, the district court determined that "no serious security problems would result" from having an outside religious advisor attend the execution. *See* Order, *Gutierrez v. Saenz*, Civil No. 1;19-CV-00184 (S.D. Tex. Nov. 24, 2020). The prison's position, the court concluded, boiled down to "speculat[ion] about the hypothetical malfeasance a spiritual advisor could inflict." *Id.* at 24

therefore "have no business" wading into questions of orthodoxy or whether a particular religious belief is reasonable. *Hobby Lobby*, 573 U.S. at 724.

For example, in *Holt*, this Court unanimously found that a state prison policy prohibiting prisoners from growing beards imposed a substantial burden on a Muslim prisoner, who wished to grow a 1/2-inch beard in accordance with his religious beliefs. 574 U.S. at 355–56. Because the prisoner believed the growing of a beard was a dictate of his faith, but the prison would impose serious disciplinary action if he did so, the policy was a substantial burden. *Id.* at 361. It mattered not whether the burden was "slight," or the prisoner's beliefs were idiosyncratic. *Id.* at 361–62. RLUIPA "applies to an exercise of religion regardless of whether it is 'compelled.'" *Id.* at 362 (quoting 42 U.S.C. § 2000cc-5(7)(A)).

Similarly, in *Hobby Lobby*, the Court rejected the government's invitation to address whether a particular religious belief was "reasonable." 573 U.S. at 724. "For good reason," the Court noted, "we have repeatedly refused to take such a step." *Id.* "[I]t is not for [the Court] to say that [] religious beliefs are mistaken or insubstantial. Instead [the Court's] 'narrow function . . . in this context is to determine' whether the line drawn reflects an 'honest conviction.'" *Id.* at 725 (quoting *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981)).

The Eleventh Circuit correctly concluded that the ADOC's decision to deny pastoral care in the execution chamber "substantially burdened" Mr. Smith's sincerely held religious belief. No one questioned that Mr. Smith genuinely believed he needed his pastor to attend his execution. *See* Panel Op. at 7, 10, 11. He explained that Pastor Wiley's presence in the execution chamber was "important" and "essential" to his "spiritual search for redemption." *Id.* at 10–11 (internal quotation marks omitted). And because the ADOC's decision prevented Pastor Wiley from being physically present in the execution chamber, Mr. Smith could not carry out his

religious practice. *Id.* at 11. That is all that is required to establish a substantial burden on religious exercise. *Id.*[15]

III. The Eleventh Circuit Correctly Found that the Other Preliminary Injunction Factors Weigh in Favor of a Preliminary Injunction

As the Eleventh Circuit found, each of the other factors—irreparable injury, the balance of the harms, and the public interest—all favored granting Mr. Smith's motion for preliminary injunction. *See* Panel Op. at 16-19.

First, Mr. Smith faces irreparable injury. RLUIPA was designed to enforce religious freedom rights, *see* 42 U.S.C. § 2000cc–3(g), which is why "the infringement of one's rights under RLUIPA constitute[s] irreparable injury." *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 795 (D. Md. 2008); *see also Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (finding irreparable harm when RLUIPA is violated); *see also Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (observing that a prisoner's "colorable" RLUIPA claim "sufficiently established that he will suffer an irreparable injury absent an injunction"). Without injunctive relief, it is likely that the ADOC will execute Mr. Smith "without Pastor Wiley in the room with him as he passes. There is no do-over in this scenario." Panel Op. at 18; *id.* at 16-17). The potential harm is unquestionably irreparable.

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[15] *See also, e.g.*, *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) (religious exercise is substantially burdened if a prison "prevents the plaintiff from participating in an activity motivated by his sincerely held religious belief"); *Fox* v. *Washington*, 949 F.3d 270, 281–82 (6th Cir. 2020) (prison's refusal to allow a group of white separatists to pray together on the Sabbath and holidays rather than as part of other religious services was a substantial burden on their professed Christian Identity religious beliefs); *Jones* v. *Carter*, 915 F.3d 1147, 1151–52 (7th Cir. 2019) (providing a Jewish inmate with only vegetarian meals that did not include meat substantially burdened his religious beliefs even though the prisoner had other options to obtain appropriate meat); *Ware* v. *La. Dep't of Corr.*, 866 F.3d 263, 269 (5th Cir. 2017) (policy banning dreadlocks was found to be a substantial burden).

The ADOC instead complains that Mr. Smith's lawsuit is untimely. This argument is belied by the record and is unavailing in any event under Supreme Court precedent. In *Murphy*, the death row prisoner "knew or had reason to know everything necessary to assert" his RLUIPA claim as early as 2013, but he did not file his state court action until 2019, just one month before his scheduled execution date. *Murphy*, 139 S. Ct. at 1479 (Alito, J., dissenting). When his state action case was dismissed, Murphy sued in federal court just two days before the scheduled execution date. *Id.* The Supreme Court granted a stay of execution, finding Murphy's complaint timely because "Murphy made his request to the State of Texas a full month before his scheduled execution." *Id.* at 1477 (Kavanaugh, J., concurring); *see also* Pet. for Writ of Certiorari, *Gutierrez v. Saenz*, No. 20-70009, at 8–9 (June 15, 2020); *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020) (mem.) (staying execution without questioning the timeliness of the complaint). Here, Mr. Smith made his request nearly 60 days before his scheduled execution. The ADOC thus had "plenty of time" to respond to the Mr. Smith's concerns. *Murphy*, 139 S. Ct. at 1477 (Kavanaugh, J., concurring).

Nor was the ADOC prejudiced with respect to the timing of Mr. Smith's motion for relief. In response to that motion, the ADOC presented ***no evidence***. During oral argument, the district court gave the ADOC another chance to submit evidence. This should not have been difficult for the ADOC to do. For the past two years, the ADOC has been litigating a case brought by a Muslim prisoner challenging the ADOC's denial of his imam in the execution chamber and the district court expressly permitted the ADOC to present evidence adduced in that case. *See Burton v. Dunn*, No. 2:19-CV-242 (M.D. Ala.) Discovery in that case had closed a month earlier, so the ADOC was able to use the full panoply of documents produced and testimony elicited in that case. Accordingly, even if Mr. Smith had delayed in bringing this suit

(and he did not), the ADOC was not prejudiced and the district court was able to rule with a complete evidentiary record. As the Eleventh Circuit found, given Mr. Smith's showing that he is likely to prevail on his claims, "any delay is not so weighty." Panel Op. at 17-18.

Second, the harm suffered by Mr. Smith in the absence of an injunction would far exceed the harm suffered by the ADOC if the injunction is issued. Any harm posed to the ADOC amounts to the minor inconvenience of the delayed execution of a prisoner who has been on death row for more than two decades. In actions alleging violations of First Amendment rights, where a plaintiff has shown likelihood of success on the merits, the "balance of harms normally favors granting preliminary injunctive relief[.]" *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589–90 (7th Cir. 2012). Further, where a plaintiff shows a likelihood of success on a RLUIPA claim—as is the case here—courts routinely conclude that the balance of hardships favors the plaintiff. *See, e.g.*, *Guatay Christian Fellowship v. County of San Diego*, 2008 WL 4949895, at *4 (S.D. Cal. Nov. 18, 2008) ("Congress has determined that the balance of equities and public interest should weigh in favor of free exercise of religion and that this balance should only be disrupted when the government is able to prove, by specific evidence, that its interests are compelling and its burdening of religious freedom is as limited as possible.").

Third, the public "has a serious interest in the proper application and enforcement of . . . RLUIPA." *Ray*, 915 F.3d at 701. *Cf. Brooklyn*, 141 S. Ct. at 68 ("The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure."). As the Eleventh Circuit explained, because RLUIPA "must be construed broadly to protect religious exercise," the

avoidance of a RLUIPA violation is in the public interest. Panel Op. at 18. Mr. Smith has thus met this final consideration.

CONCLUSION

For all of the reasons set forth above, the Court should affirm the Eleventh Circuit and grant the injunction requiring the ADOC to permit Mr. Smith to have Pastor Wiley in the execution chamber at the time of execution.

Respectfully submitted.

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