No. 20A128

In the Supreme Court of the United States

JEFFERSON DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
APPLICANT,
v.
WILLIE B. SMITH III,
RESPONDENT.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE INJUNCTION OF EXECUTION

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General

A. Barrett Bowdre
Deputy Solicitor General

Lauren A. Simpson*
Beth Jackson Hughes
Richard Anderson
Assistant Attorneys General
* *Counsel of Record*

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Lauren.Simpson@AlabamaAG.gov

February 11, 2021

EXECUTION SCHEDULED THURSDAY, FEBRUARY 11, 6:00 P.M. CST.

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Smith's response confirms that this Court should vacate the injunction. Doubling down on a "fool me once" standard, Smith contends that the court of appeals erred by stating the obvious: that the ADOC has a "compelling interest . . . in maintaining safety, security, and solemnity during an execution."[1] That was error, Smith claims, because the ADOC must show a compelling interest in excluding Pastor Wiley *specifically* from the execution chamber. And to that, Smith says, the ADOC would have to, at minimum, present evidence of "security breaches by clergy (whether in Alabama or elsewhere) in the execution chamber."[2] But RLUIPA does not require prison officials to implement every requested accommodation just to have a compelling interest to reject those that didn't turn out okay. Not only would that merge the interest analysis with the least-restrictive means query, but it would also mean that prison officials could never rely on their experience and seasoned judgment to reject an idea—no matter how outlandish—they hadn't tried before. That flies in the face of this Court's recognition that RLUIPA's standard is to be applied "with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and

1. Smith's Br. 17 (quoting *Smith v. Comm'r, Ala. Dep't of Corrs.*, 21-10348 (11th Cir. Feb. 10, 2021), slip op. at 11.

2. *Id.* Smith does not explain why the inquiry should be broadened to "security breached by clergy." If one spiritual advisor disrupts an execution, under Smith's logic, how can the State be sure that another spiritual advisor—the one the condemned inmate asks for—would do so? Or, for that matter, that the same spiritual advisor would do so again?

discipline."[3] It also goes against common sense. *Of course* "States have a compelling interest in controlling access to the execution room."[4]

The court of appeals recognized this and rightly rejected Smith's interpretation.[5] But the error is important because it infects Smith's analysis of the least-restrictive means standard, and it explains why he thinks the district court abused its discretion by (for instance) not requiring the ADOC to follow the lead of the federal Bureau of Prisons.[6] On that point, though, not only was there precious little in the record regarding how the BOP carried out its method and what factors it considered in making its recent change (the only evidence before the district court was an affidavit from a federal defender in Pennsylvania[7]), but even if there were, RLUIPA is not a one-size-fits-all approach. And the ADOC's officials did give reasons for their opinion that allowing outside advisors into the chamber—even after background checks and training—would not adequately promote the State's interest in solemnity and security in the chamber.[8] That the federal BOP may have reached a different judgment does not mean that the ADOC officials are no longer "experts in running prisons and at evaluating the likely effects of altering prison rules" at their prisons.[9]

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3. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (citation omitted).
4. *Murphy v. Collier*, 139 S. Ct. 1475, 1475–76 (2019) (Kavanaugh, J., concurring in grant of application for stay).
5. *Smith*, 21-10348, slip op. at 11.
6. *See* Smith's Br. 13; *see also* Becket Fund Amicus Br. 6–7; Rutherford Institute Amicus Br. 4–5.
7. *See* Smith's Br. 13 n.6.
8. *See* Doc. 32 at 27.
9. *See Holt v. Hobbs*, 574 U.S. 352, 364 (2015).

As for the emphasis that Smith and the amicus place on the ADOC's prior practice of having an institutional chaplain on the execution team, there are at least two problems with their reasoning.[10] First, it ignores the critical distinction between a trained and experienced ADOC employee and a relative stranger to the ADOC. As prison officials explained, because of the tense and unpredictable nature of an execution, only those ADOC employees who have both passed extensive background checks *and* have proven themselves trustworthy during employment with the prison are then selected for the weighty task of serving on the execution team.[11] While this may not be a perfect means for securing safety and solemnity in the chamber, experience has taught that it works well, and that the proposed alternatives carry risks that unacceptably threaten the State's compelling interests.[12] Second, amicus decries the ADOC's decision to remedy a potential Establishment Clause problem by removing the institutional chaplain from the execution team as "draconian" "[l]eveling down."[13] Of course, that solution was suggested—and then lauded—by a member of this

10. *See, e.g.*, Becket Fund Amicus Br. 3.

11. Doc. 32 at 29–30.

12. The Rutherford Institute argues that the evidence of disruptions outside the execution chamber does not constitute proof that Pastor Wiley would be similarly disruptive. Rutherford Institute Amicus Br. 5–6. Amicus overlooks the fact that these disruptions occurred leading up to executions and around the execution chamber, even with heightened security measures in place. ADOC should not be compelled to introduce ***additional*** risk into executions by admitting untrained, untested, free-world volunteers into the execution chamber itself.

13. Becket Fund Amicus Br. 4.

Court.[14] And in any event, the criticism mixes apples and oranges, treating seasoned ADOC employees and members of the public just the same.

Finally, there's the issue of timing. Even amicus supporting Smith notes the "time-compressed nature of this appeal" and recognizes that there are other cases pending in Alabama presenting similar issues brought by inmates who did not delay in bringing their claims.[15] But this case *was* delayed—and now, it is unduly rushed as a result. Yet as the district court found, Smith bears the blame for bringing the claim when he did, because he "could have requested relief much earlier than weeks prior to his execution."[16] "He could have brought this action in April 2019 immediately after the change in protocol. Or contemporaneously with the claims in his initial § 1983 suit filed [in November 2019]."[17] He didn't.

CONCLUSION

The Court should vacate the decision below.

Dated: February 11, 2021

Respectfully submitted,

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General

A. Barrett Bowdre
Deputy Solicitor General

14. *Murphy*, 139 S. Ct. at 1476.
15. *See* Becket Fund Amicus Br. 1, 4.
16. Doc 32 at 56.
17. *Id.*

/s/ Lauren A. Simpson
Lauren. A. Simpson
Beth Jackson Hughes
Richard Anderson
Assistant Attorneys General
Counsel of Record

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152
Tel: (334) 242-7300
Lauren.Simpson@AlabamaAG.gov