Nos. 21-5592 & 21A33

IN THE SUPREME COURT OF THE UNITED STATES

JOHN RAMIREZ,

Petitioner,

v.

BRYAN COLLIER, Executive Director, Texas Department of Criminal Justice; BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division; DENNIS CROWLEY, Warden, TDCJ, Huntsville, TX,

Respondents,

This is a capital case. Mr. Ramirez is set for execution September 8, 2021, 6 p.m. CT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY TO RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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APPOINTED ATTORNEY FOR JOHN RAMIREZ

Comes now, John Ramirez, and files this Reply to the Response in opposition to his application to stay execution.

INTRODUCTION

Ramirez has no idea what this sentence on page 21 of the Response brief means: "If passing without another's benediction and spiritual hands upon him violates his religion, one would have expected Ramirez to say so." The sentence is gainsaid by the fact that a Section 1983 'spiritual advisor' case was filed on August 10, 2021, that the General Counsel of TDCJ sent a letter to Counsel on her agency's stationary clarifying that no pastor would be allowed to touch Ramirez's body as it dies- **or speak any words of prayer**, and that a lengthy dissent issued in the Fifth Circuit concluding that Ramirez enjoys a substantial likelihood of success.

Most alarming to this Court should be the Respondents' embrace of Ramirez's prediction that they intend to exclude Pastor Moore ***entirely***. Please see pages 36-37 of the Response brief. The implications of irreparable injury are great, obvious, and, indeed, embraced by the Respondents just hours before this execution begins.

THE 'SECOND QUESTION' IS PREMISED ON A COUNTER-FACTUAL; RAMIREZ NEVER "SHIFTED" HIS POSITION, STRATEGICALLY OR OTHERWISE

On page I, the Respondents frame their second question as follows:

> Should this Court grant a stay of execution where a plaintiff ***strategically shifted his litigation posture*** when TDCJ accommodated his initial religious request, even though he fails to demonstrate a substantial likelihood of success on the merits of his claims?

(emphasis added).

This is simply untrue. Ramirez asks this Court to observe that the State agreed to withdraw the death warrant in 2020 right after the section 1983 suit was filed. The issue was simply not developed factually.

In other words, the State agreed to withdraw the 2020 death warrant ***before*** Pastor Moore was asked to give a supporting affidavit. Had the State not agreed to withdraw the death warrant so quickly, Ramirez would have ascertained an affidavit from Pastor Moore (who has ministered to him since the year 2016); once the laying-on-of-hands religious practice was explained, Ramirez would have amended his petition. Please note that the State never filed an answer to that suit.

Further, one may recall that the COVID-19 pandemic was at its highest last summer when the execution was originally set. Pastor Moore and the guards would have had to violate social distancing rules then in affect to enter the execution chamber.

More specifically, Pastor Moore was not asked to give an affidavit before the first 1983 suit was filed because it was not yet clear if the execution could proceed under a passel of state and local laws promulgated to mitigate the effects of COVID-19. All of this is no surprise to the Respondents; at the 'Zoom' hearing held by Judge Gavan of the Nueces County District Court before ruling on the joint motion to withdraw death warrant, two lawyers with the Texas Attorney General's Office specifically cited COVID concerns as a reason to stop the execution they had previously requested.

One must wonder why the Respondents wish to make the "sincerity of Ramirez's religious beliefs" an issue when all of the reviewing federal courts have concluded that Ramirez's sincerity is not an issue. This is unsteady ground for the State to tread.

This Court has refused to question a penitent's interpretation of religious precepts. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (declining to question whether sincerely held beliefs "are mistaken or insubstantial").

Applying the Respondents' reasoning, this Court should evaluate Ramirez's contentions under a different legal standard if his religious beliefs change, or are described differently. In other words, according to the Respondents, federal courts should compare Ramirez's expression of religious beliefs explained in his August *2020* section 1983 suit, to his expressions of belief in his August *2021* section 1983 suit, and infer that his religious beliefs are insincere or manufactured. Asking federal judges to evaluate the sincerity of any litigant's religious beliefs, finding recent ones to be less persuasive than older ones, is perilous territory.

In other words, assume that Ramirez had not filed a 1983 suit in the year 2020- and that the State ultimately moved to withdraw its death warrant due to the COVID-19 concerns that became known as spring turned to summer of last year. Or, assume that Ramirez had converted to Judaism in the past year and was now asking for a rabbi to minister to him at tonight's execution. In either alternative scenario, the entire predicate of the Respondents' second question would be extirpated.

RAMIREZ AMENDED HIS PETITION; HE NEVER ADDED ANY "NEW CLAIMS"

Page 7 of the Response brief contains a factual inaccuracy. Respondents write, "Ramirez filed a reply, adding his new, unexhausted challenges to TDCJ's verbal restrictions as support for his motion." Untrue. At all times since suit was filed on August 10, 2021, the claims brought arose under the First Amendment's Free Exercise Clause and the RLUIPA.

As best as Ramirez understands the point the Respondents are trying to make through their contention that Ramirez tried to sandbag them with a "new claim," is that they dislike that their General Counsel's letter makes clear the absolute prohibition on vocalized prayer

that was opaque until so clarified by Ms. Worman. While it is understandable why the Respondents would want to put distance between themselves and this missive on the official agency letterhead, this was obviously an admission by party opponent. At the time her letter was written, sent, and received by Counsel, General Counsel Worman was acting as agent for Respondents in the scope of her agency and the civil rights litigation had already begun in federal court.

Respondents' problems regarding their claim of sandbagging go deeper. First, the district court judge never delineated what evidence was to be considered in his ruling on the motion to stay. Moreover, a plaintiff bears the burden at the injunction stage to produce evidence in the form of affidavits or declarations. *Sierra Club, Lone Star Chapter v. FDIC,* 992 F.2d 545, 551 (5th Cir. 1993).

Ramirez started out with the notarized affidavit of Pastor Moore; Ramirez supplemented with the statement from General Counsel on TDCJ's official letterhead as soon as the letter arrived. If Respondents wanted to strike the statement from their own General Counsel as competent evidence, they had many days to do so before the trial court ruled. They did not.

ABUSE OF DISCRETION

On page 10, Respondents complain that Ramirez only mentioned "abuse of discretion" one time:

> Aside from the single mention included in the opinion Ramirez copies and pastes into his brief, he does not argue that the lower courts abused their discretion in denying a stay.

With all due respect, Ramirez does not know how many times he is supposed to write the words "abuse of discretion" in his application to meet their satisfaction.

To be clear, Ramirez's position is that both the federal district court, as well as two judges in the Fifth Circuit who ruled against him, abused their discretion in their ultimate conclusion (as to both RLUIPA and the First Amendment) because Supreme Court doctrine compels a different conclusion.

> [T]he Eleventh Circuit was right to bar Alabama from executing Smith without his pastor ***by his side.*** The law guarantees Smith the right to practice his faith free from unnecessary interference, including at the moment the State puts him to death.

Dunn v. Smith, 141 S. Ct. 725, 726 (2021) (emphasis added).

In the Respondents' conception, these three rather straightforward words reflect the authoring Justice's maladroit use of vernacular, slang, or some other uninformed "figure of speech." More specifically, on page 27, the Response brief calls this term "figurative language." By contrast, Ramirez contends that these words mean what they say; for a minister to be "by [Ramirez's] side]" *ipso facto* such minister cannot be standing supine on the other side of the room with his tongue tied.

NO PROCEDURAL DEFAULT CONCERING THE VOCALIZATION OF PRAYER ISSUE

Presumably because they cannot defend its rationale, the Respondents dedicate pages 12-13 and 23-24 arguing that the vocalization of prayer issue was somehow defaulted in this litigation.

The most glaring problem is that both the district court order and the appellate opinion that they are asking this Court to affirm specifically cognized the vocalization of prayer issue. The District Court was clear:

> The instant case is one of first impression as to the specific question of whether a person set to be executed has the right, under RLUIPA and the Free Exercise Clause of the First Amendment, to have an approved spiritual advisor lay hands upon the person's body ***and vocalize prayers*** during the execution.

A.18 (emphasis added).

Judge Owens wrote "vocalize" at A4.

And Judge Dennis' dissent characterized Ramirez's argument as follows:

> Ramirez contends that ***audible prayer*** and physical touch are components of his religious faith and that the policy prohibiting him from exercising these practices violates his rights.

A7 (emphasis added).

In other words, it is a little hard to see how Ramirez defaulted this issue when every court to consider the issue [both the opinion/order that they like - and the one they do not like] has considered vocalized prayers to be an essential part of the respective holdings.

"PAST MONTH" MEANS THE FILING DATE OF THE 1983 SUIT

On page 23, Respondents take great umbrage at the term "the last month" in Ramirez's cert petition:

> He asserts that 'over the past month' no one from TDCJ has explained how Dr. Moore's audible speaking might interfere with the execution.

Perhaps Ramirez's opening brief was not clear; the 1983 suit was filed on August 10, 2021. This was 28 days ago; "the last month" refers to the filing date of the 1983 suit.

Respondents go on to protest, "To be clear, one month ago, Ramirez had not even asked TDCJ if his pastor could pray aloud during his execution." One is left to wonder, if General Counsel's letter could so unambiguously declare the TDCJ policy of no vocalized prayer- and if the mootness policy is impacted with as little constitutional problem as Respondents so adamantly maintain- why the repeated contentions of waiver that neither of the reviewing lower courts perceived?

RESPONDENTS VERY MUCH DO NOT LIKE RAMIREZ'S PROPOSED LESS RESTRICTIVE ALTERNATIVES

The Response brief is not exactly consistent when it comes to the proffered less restrictive alternatives. On page 27, Respondents explain that "To show that the BOP's and TDCJ's policies are not the least restrictive means to further their security interests, Ramirez needs to identify, at the very least, a policy less restrictive."

Agreed, and Ramirez offered six less restrictive alternatives; in descending order, this is limned as Pastor Moore singing prayers, or saying prayers, or whispering prayers.

But the Respondents very much do not like these alternatives. "Ramirez's list of six violations to TDCJ's verbal restriction does not help him establish the likely success of his claim, as required for the stay he seeks." [Response Brief, at 24].

RESPONDENTS' BASE SOPHISTRY IS FOUND ON PAGE 24

The most honest statement in the Response brief is found on page 24:

> [H]e asks this Court to intervene based on a list, in which he proposes six different ways to ***verbally disrupt*** the execution process.

(Emphasis added).

As the highlighted language makes clear, Respondents truly believe that any vocalized prayer is inherently disruptive to the execution process. The problem is that RLUIPA does not allow the State to leap to this conclusion absent some showing [there is simply none in this record] that vocalizations would author any sort of risk to the execution team or the execution process.

CONCLUSION

The Respondents are honest in saying that they want the execution chamber to be a godless vacuum. That was their most recent policy amongst the four they have promulgated in the last two years.

But the First Amendment and RLUIPA do not allow the prohibition on religious exercise *vel non*. Under the Respondents' conception, Pastor Moore is to be no different from a potted plant; they could place a potted plant in the corner of the room with a sign taped on the pot entitled "Pastor Moore."

If this execution is not stayed, Ramirez will be deprived of his religious liberty during the execution, even if the Respondents do not make good on their repeated threat to carry Dr. Moore out sometime before the execution concludes.

DATED this 8th day of September, 2021.

Respectfully submitted,

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