No. 21-5592

IN THE

Supreme Court of the United States

JOHN H. RAMIREZ,

Petitioner,

v.

BRYAN COLLIER, ET AL.,

Respondents.

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

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect religious civil liberties and family values. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in dozens of cases before this Court, numerous cases before federal courts of appeal, and hundreds of cases before federal and state courts across the country, as well as tribunals throughout the world.

Alliance Defending Freedom regularly litigates to protect the religious freedoms of individuals and churches whose religious exercise is burdened by laws, regulations, and governmental practices. Alliance Defending Freedom litigates issues arising under the federal and state constitutions, as well as statutes such as the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 ("RLUIPA") and the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 ("RFRA"). Alliance Defending Freedom has strong interests in ensuring that these laws, which are designed to alleviate government-imposed burdens on religion, are fully and robustly applied.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel for all parties have filed letters granting blanket consent to the filing of *amicus* briefs.

INTRODUCTION AND ARGUMENT SUMMARY

The potential for conflict between prison administration and the accommodation of religious exercise reaches its zenith in capital cases. But RLUIPA calls for strict scrutiny of governmental policies that substantially burden religious exercise, and even the execution chamber is not exempt from that demanding level of review.

The Texas Department of Criminal Justice ("TDCJ") seeks to do here what RLUIPA proscribes. Petitioner John Henry Ramirez is a Christian who says that his faith demands that his pastor pray by his side when the State of Texas executes him. Assuming he is sincere, TDCJ must accommodate that practice under RLUIPA. But the courts below sanctioned a misapplication of RLUIPA that guts its protections. Because Mr. Ramirez's appeal to God in his final moments demands respect, this Court should reverse the Fifth Circuit and provide guidance to lower courts on the application of RLUIPA in this sensitive area.

Congress enacted RLUIPA "to provide 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)). The law includes robust protections in the land-use and prison contexts. The concerns animating the bill's passage included evidence presented to Congress over three years' worth of hearings, which showed "that 'frivolous or arbitrary' barriers" often "impede[] institutionalized persons' religious exercise." *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005). Accordingly, Congress enacted RLUIPA to "protect[] institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and

accommodation for exercise of their religion." *Id.* at 721.

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless "the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). In other words, Congress enacted a regime calling for strict scrutiny of governmental policies and practices that burden religious exercise. To ensure the statute's goals are met, Congress instructed courts to analyze petitioners' claims using the stringent least-restrictive-means standard.

As this Court has explained, RLUIPA offers "expansive protection for religious liberty." *Holt*, 574 U.S. at 358. The statute defines "'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Id.* (quoting § 2000cc-5(7)(A)). The statue also instructs courts to construe its provisions broadly to protect religious exercise, and it provides that successful application of its terms "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." *Id.* (quoting § 2000cc-3(c)).

These expansive terms protect Mr. Ramirez. Assuming the sincerity of his beliefs, the courts below ignored the foundational principal animating RLUIPA—to provide "expansive protection for religious liberty." *Id.* As a result, the courts below gave short shrift to the burden that TDCJ's policy imposes on Mr. Ramirez's beliefs.

Compounding that error, the courts below failed to hold TDCJ to its statutory burden of proof of demonstrating that its broad ban on ministerial activity in the execution chamber was the least restrictive means of advancing its interest in prison security. Among other things, the lower courts failed to demand that TDCJ demonstrate that it had considered or attempted alternative methods that would advance its interest. Although Congress was "mindful of the urgency of discipline, order, safety, and security in penal institutions" when it passed RLUIPA, *Cutter*, 544 U.S. at 723, it did not condone the sort of blind deference the courts below gave to TDCJ here. See *Holt*, 574 U.S. at 364.

Amicus respectfully submits this brief to highlight several aspects of the RLUIPA analysis relevant to Mr. Ramirez's claim specifically and religious liberty cases more generally. While the Court's analysis of Mr. Ramirez's claims may be "context specific," this appeal implicates RLUIPA's mode of application more broadly. Requiring governments—whether state, local, or federal—to satisfy RLUIPA's strict standard wherever it applies serves as an important bulwark against encroachment on religious exercise for persons of all faiths.

ARGUMENT

I. THE COURTS BELOW ERRED BY SECOND-GUESSING WHETHER TDCJ'S POLICY SUBSTANTIALLY BURDENS MR. RAMIREZ'S SINCERELY HELD RELIGIOUS BELIEFS.

A. There appears to be no dispute that Mr. Ramirez's religious beliefs are sincerely held.

The sincerity of Mr. Ramirez's religious beliefs as to the ministry he wishes to receive from his pastor as he departs from this life does not appear to be in dispute. See Pet. App. 4 (Owens, C.J., concurring) ("I do not doubt the sincerity of Ramirez's religious beliefs . . . ."). The practices he raises thus come within RLUIPA's "expansive protection for religious liberty." *Holt*, 574 U.S. at 358.

Spoken prayer from a pastor to his people is fundamental to Scripture and Christian practice. See, *e.g.*, 2 *Timothy* 4:2 ("Preach the word . . . .").

Such a practice does not lose its religious significance in the context of end-of-life pastoral care. To the contrary, it is ubiquitous in end-of-life rituals practiced for centuries across various Christian denominations, ranging from the Catholic spoken liturgy of the Viaticum, to Protestant traditions deeply rooted in this nation's history. See generally Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Petitioner, *Ramirez* v. *Collier*, No. 21A33 (U.S. Sept. 7, 2021).

B. The substantial burden analysis does not change when religious exercise occurs in an execution chamber.

Prohibiting Mr. Ramirez's exercise of these sincerely held religious beliefs constitutes a substantial burden under RLUIPA because it forbids the very religious practice he seeks. As this Court has made clear, policies substantially burden an inmate's religious exercise when they require him "to 'engage in conduct that seriously violates [his] religious beliefs.'" *Holt*, 574 U.S. at 361 (alteration in original) (quoting *Hobby Lobby*, 573 U.S. at 720).

Whether a policy forbids religious exercise outright or requires conduct that violates a religious belief is a distinction without a difference. "[T]he 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . ." *Cutter*, 544 U.S. at 720 (alterations and omissions in original) (quoting *Emp't Div., Dep't of Hum. Res.* v. *Smith*, 494 U.S. 872, 877 (1990)). As a result, "[w]hen prison officials . . . effectively bar [an adherent's] sincere faith-based conduct,"—*i.e.*, the practice of receiving end-of-life ministry—"they necessarily place a substantial burden on it." *Haight* v. *Thompson*, 763 F.3d 554, 565 (6th Cir. 2014). And because prisoners are necessarily "dependent on the government's permission and accommodation for exercise of their religion," RLUIPA's capacious terms apply here. *Cutter*, 544 U.S. at 721.

Moreover, this Court's recent actions recognize that RLUIPA should extend to inmates who desire support from their spiritual advisors in the execution chamber. See *Murphy* v. *Collier*, 139 S. Ct. 1475

(2019) (mem.) (granting application for stay of execution).

Similarly, in *Gutierrez* v. *Saenz*, the Court granted a stay of execution and ultimately vacated the denial of a stay in a different case arising out of the Fifth Circuit. See 141 S. Ct. 127 (2020) (mem.); 141 S. Ct. 1260 (2021) (mem.). There, the Fifth Circuit had held that Texas's then-operative policy of prohibiting a spiritual advisor in the execution chamber entirely did not rise to the level of a substantial burden. *Gutierrez* v. *Saenz*, 818 F. App'x 309, 314–15 (5th Cir. 2020) (per curiam), *vacated*, 141 S. Ct. 1260 (2021) (mem.). This Court vacated the judgment and remanded to 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." *Gutierrez*, 141 S. Ct. at 128.

By directing the district court to evaluate whether the policy was the least restrictive alternative to accomplish the state's legitimate security interest, the Court necessarily presumed that the policy at issue imposed a substantial burden on Gutierrez's religious liberty. Cf. Pet. App. 11 (Dennis, J., dissenting) (reasoning that "the grant of a stay and the scope of the Court's directive to the district court strongly suggests that the Court determined that Gutierrez had satisfied his initial burden of showing a substantial burden on his religious exercise").

In *Dunn* v. *Smith*, this Court again considered whether a state could exclude clergy members from the execution chamber and denied a motion to vacate an injunction prohibiting an inmate from being executed without having his minister present in the

execution chamber. Justice Kagan's concurring statement emphasized that the inmate understood that having his minister in the execution chamber was "integral to [his] faith" and "essential to [his] spiritual search for redemption." 141 S. Ct. 725, 725 (2021) (mem.) (Kagan, J., concurring in denial of application to vacate injunction) (alterations in original). The concurrence concluded that an inmate has a right to have a pastor "by his side" during an execution if he so chooses. *Id.* at 726.

Taken together, *Murphy*, *Gutierrez*, and *Smith* recognize that governmental policies do not somehow cease creating substantial burdens on religious exercise simply because the policy takes effect within the execution chamber. Moreover, at no point did the Court second-guess whether these policies are burdens on religious exercise at all. The RLUIPA analysis animating *Murphy* and other recent cases applies here too.

C. TDCJ's policy imposes a substantial burden on Mr. Ramirez's exercise of his religious liberty.

To avoid the conclusion that TDCJ's policy substantially burdens Mr. Ramirez, the lower courts speculate that TDCJ can offer accommodations that will adequately allow Mr. Ramirez to seek his pastor's support before his execution. But their reasoning impermissibly questions the basis of Mr. Ramirez's beliefs and attempts to rewrite those beliefs for him.

This Court has made clear that courts should avoid second-guessing a belief's centrality or essentiality to the claimant. See *Hobby Lobby*, 573 U.S. at 725 (holding that "it is not for us to say [whether] religious beliefs are mistaken *or insubstantial*")

(emphasis added). In other words, it is not for courts to "tell [religious adherents] that their beliefs are flawed." *Id.* at 724; see also *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."). As then-Judge Gorsuch explained, the RLUIPA inquiry "isn't into the merit of the plaintiff's religious beliefs or the relative importance of the religious exercise: [the Court] can't interpret his religion for him." *Yellowbear* v. *Lampert*, 741 F.3d 48, 55 (10th Cir. 2014). "Instead," he explained, "the inquiry focuses *only on the coercive impact of the government's actions*." *Id.* (emphasis added).

Here, however, the courts below would upend these principles. First, in the decision affirmed by the Fifth Circuit in a per curiam opinion, the district court charted a new—but flawed—course to conclude that TDCJ had offered satisfactory alternatives to Mr. Ramirez. See Pet. App. 21–22. As an initial matter, it is improper for a district court to question whether the activities that *are* permissible under TDCJ's policy "accommodate Ramirez's religious needs." *Id.* at 22. But even if it were permissible, the district court committed the fallacy of composition by reasoning that the whole of Mr. Ramirez's religious belief is not substantially burdened by TDCJ's policy because both parts of his beliefs can be accommodated *separately*—that is, because Mr. Ramirez may both (1) pray aloud with his pastor before he enters the execution chamber, and (2) have his pastor stand in his presence in the execution chamber.

But that reasoning is no more valid than saying that a person may (1) pray while he is at home, and (2) go to church but not pray while there. The district

court's deconstruction and misconstruing of Mr. Ramirez's sincerely held religious belief thus fatally undermines its finding that TDCJ's policy does not substantially burden that right, and the Fifth Circuit erred in affirming that decision.

Second, in opposing certiorari in this Court, TDCJ characterized Mr. Ramirez's beliefs as mere "accommodations believed to enhance [his] blessing." BIO at 20. But RLUIPA protects "*any* exercise of religion, whether or not compelled by, *or central to*, a system of religious belief." *Hobby Lobby*, 573 U.S. at 695–96 (emphases added) (quoting 42 U.S.C. § 2000cc-5(7)(A)). Any distinction between incidental and non-incidental infringements of religious liberty is thus without any legal difference in this context.

Third, TDCJ says that its policy neither "forces [Ramirez] to do what his religious [tenets] forbid, nor pressures him to modify his religious behavior." BIO at 20. But religious belief is no less worthy of protection based on the mere accident that Mr. Ramirez is merely forbearing from, rather than engaging in, conduct that implicates his religious beliefs. Cf. *Haight*, 763 F.3d at 565. And here again, the distinction is without any difference: the state is asking Mr. Ramirez to enter the execution chamber knowing that his pastor will not be praying by his side as the state puts him to death. At bottom, the lower courts' rewriting of Mr. Ramirez's beliefs distorts the substantial-burden analysis by ignoring that TDCJ's policy will in fact require him to "engage in conduct that seriously violates [his] religious beliefs," *Holt*, 574 U.S. at 361, simply because he is "dependent on the government's permission and accommodation for [the] exercise of [his] religion," *Cutter*, 544 U.S. at 721.

II. TEXAS HAS NOT SATISFIED ITS BURDEN TO DEMONSTRATE THAT ITS BAN ON MINISTERIAL ACTIVITY IN THE EXECUTION CHAMBER IS THE LEAST RESTRICTIVE MEANS FOR FULFILLING ITS INTEREST IN PRISON SECURITY.

A. Texas failed to offer sufficient proof to meet its burden under RLUIPA's "exceptionally demanding" standard.

1. Although Texas's execution protocol allows a spiritual advisor in the execution chamber, nothing in that protocol speaks to whether the spiritual advisor may or may not speak prayers, sing hymns, or provide any other form of end-of-life ministry or comfort. The protocol is simply silent on this point. Instead, correspondence from TDCJ's general counsel bars the religious comfort Mr. Ramirez seeks. Responding to an inquiry whether Mr. Ramirez's pastor must remain silent during the execution, the general counsel stated that "[a]t this time, the TDCJ does not allow the spiritual advisor to pray out loud with the inmate once inside the execution chamber." Letter from Kristen Worman, Gen. Counsel, TDCJ, to Eric Allen (Aug. 21, 2021) (Dkt. 12, Ex. 7, at 66 (PDF page)).

After Mr. Ramirez challenged that policy under RLUIPA and established the substantial burden it placed on his religious exercise, Texas bore the burden to establish that (1) it had a compelling interest in that restrictive policy and (2) the restriction was the least restrictive means of advancing that policy. See 42 U.S.C. § 2000cc-1(a); *Holt*, 574 U.S. at 362. This is an "exceptionally demanding" standard, *Holt*, 574 U.S. at 364–65, and "sets a high bar for [TDCJ] to clear," *Dunn*, 141 S. Ct. at 725 (Kagan, J., concurring in denial of application

to vacate injunction). Under RLUIPA's strict-scrutiny analysis, TDCJ must "demonstrate that the compelling interest test is satisfied 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 362–63 (quoting *Hobby Lobby*, 573 U.S. at 726).

TDCJ falls short of RLUIPA's high bar because it cannot justify its policy as the least restrictive means for advancing prison safety in the context of Mr. Ramirez's execution. In the proceedings below, TDCJ did not argue that it has tried less restrictive measures and found them inadequate to advance TDCJ's purposes. *E.g.*, Pet. App. 22. (TDCJ merely asserted a compelling interest in "minimizing risk and maintaining order during the execution procedure."). While there is little dispute that "TDCJ has a compelling interest in maintaining an orderly, safe, and effective process when carrying out an irrevocable, and emotionally charged, procedure," *id.* at 6; cf. *Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring in grant of application for stay), TDCJ has not *proved* that it has tried and discarded less restrictive means in advancing that interest. See *Holt*, 574 U.S. at 362–63. It has not.

As Judge Dennis pointed out in dissent below, TDCJ "has not met [the] demanding and specific burden" required by RLUIPA. Pet. App. 14 (Dennis, J., dissenting). Aside from the general counsel's email categorically denying Mr. Ramirez's request for pastoral care as his sentence is carried out, there is no record evidence supporting the state's policy vis-à-vis less restrictive policies.

Without such proof, courts cannot "scrutinize the asserted harm of granting specific exemptions to particular religious claimants and . . . look to the

marginal interest in enforcing the challenged government action in that particular context.'" *Holt*, 574 U.S. at 363 (cleaned up) (quoting *Hobby Lobby*, 573 U.S. at 726–27). In *Holt*, for example, a Muslim prisoner challenged a prison's grooming policy, which proscribed his growing a beard according to his religious practice. See *id.* at 355–56, 359. The prison asserted a security interest in limiting contraband in prisons but could not identify any instances where a prisoner had actually hidden contraband in his beard. See *id.* at 359. As a result, this Court found the state's argument "hard to take seriously." *Id.* at 363.

Here, TDCJ has not explained or even attempted to explain how audible prayers or Bible reading would disrupt an execution, much less that such actions have *ever* disrupted an execution. As noted in the *Dunn* concurrence, there is no evidence to suggest that "the presence of a clergy member (whether state-appointed or independent) [has] disturbed an execution." 141 S. Ct. at 726 (Kagan, J., concurring in denial of application to vacate injunction). TDCJ's arguments to the contrary "simply presume that every clergy member will be untrustworthy." *Id.* That falls short of RLUIPA's demand that the government establish how *this* inmate's religious practices might burden *this* particular proceeding if no accommodation is offered.

Indeed, the Fifth Circuit has previously recognized that "speculative" arguments "without record support" do not pass RLUIPA muster. *Chance* v. *Tex. Dep't of Crim. Just.*, 730 F.3d 404, 418 (5th Cir. 2013) ("[W]e have consistently tested the prison's asserted interests with regard to the risks and costs of the specific accommodation being sought."). That is, RLUIPA requires a fact-intensive, case-by-case analysis to ensure that the government meets its

narrow-tailoring requirement. See *id.* at 418 & n.15 (collecting cases). The failure of the courts below to hold TDCJ to the same standard here requires reversal.

TDCJ's references to the district court's order on remand from this Court in *Gutierrez* do not change the analysis. E.g., BIO at 25–26. In *Gutierrez*, the district court concluded "that the extensive evidence submitted by the Parties does not demonstrate that serious security concerns would result from allowing inmates the assistance of a chosen spiritual advisor in their final moments." Order at 29, *Gutierrez v. Saenz*, No. 1:19-cv-00185 (S.D. Tex. Nov. 24, 2020), ECF No. 124 ("*Gutierrez* Order"). Any analysis beyond that TDCJ cites in its favor runs into the problem that the court there was analyzing Mr. Gutierrez's claims, not Mr. Ramirez's, and RLUIPA demands a to-the-person analysis. *Holt*, 574 U.S. at 362.

Referencing that order does not pass muster for another reason. The district court examined a Federal Bureau of Prisons ("BOP") memorandum concerning an outside spiritual advisor who would be present for an execution. The memo provided that "[a]ny disruptive physical or verbal behavior will result in her immediate removal from the room for the remainder of the procedure." *Gutierrez* Order at 13. TDCJ characterizes this memo as explaining "no-contact and verbal restrictions placed on [a] spiritual advisor during execution" by BOP. BIO at 25–26. But such a restriction does not follow from the language quoted in the *Gutierrez* order. TDCJ suggests that BOP in fact bars verbal prayers, rather than only *disruptive* verbal prayers. Such a factual distinction is one that should be raised and resolved

by a fact-finder and further counsels in favor of vacating and remanding to the lower courts.

2. The courts below overlooked this problem by according excessive deference to TDCJ's asserted interests. As this Court explained in *Holt*, "RLUIPA . . . does not permit such unquestioning deference." 574 U.S. at 364. There, the lower courts had concluded "that they were bound to defer to the Department's assertion" of its interest. *Id.* Not so, this Court explained—the lower courts could *respect* the prison officials' "expertise," but "that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Id.*

To be sure, RLUIPA "affords prison officials ample ability to maintain security," and a court need not "blind" itself "to the fact that the analysis is conducted in the prison setting." *Id.* at 369; see also *Dunn*, 141 S. Ct. at 725 (Kagan, J., concurring in denial of application to vacate injunction) ("Prison security is . . . a compelling state interest."). But, as then-Judge Gorsuch has explained, the deference that should be "extend[ed to] the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat." *Yellowbear*, 741 F.3d at 59; see also *Cutter*, 544 U.S. at 716–17.

Opposing certiorari, TDCJ suggested that "RLUIPA defers to the expertise of prison officials who create intricate and exacting execution protocols to reduce risks, not to petitioners who disregard the risks they do not bear." BIO at 25 (citation omitted). Courts may rightly take prison officials' expertise into account, but they may not simply give blind deference, as this Court has previously held. TDCJ's security interest alone cannot satisfy its burden.

Instead, the state must offer sufficient evidence to show that its policy furthers that compelling interest in preventing Mr. Ramirez's pastor from offering verbal prayer in the execution chamber, and is the least restrictive way of doing so.

The lower courts' reasoning departs from the plain meaning of RLUIPA and the strict scrutiny standard it demands. Cf. *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 490 (2020) (applying the "plain meaning" of RFRA). Taken to its logical conclusion, their reasoning would allow a state to simply assert an important—albeit generalized—interest to prevail. Thus, in *Holt*, the prison officials would have prevailed simply by showing that contraband can be a problem in the prison context, without the need to show that the particular grooming accommodation would exacerbate that problem in any meaningful way. Such a result would water down the strict-scrutiny analysis Congress imposed through RLUIPA and create opportunities for government officials to mask bias—even unconscious bias—against religious adherents.

3. This case illustrates the importance of putting the government to its proofs in the RLUIPA context. Doing so can help minimize the unconscious bias that can creep into governmental decision making. Indeed, this was one of the motivating purposes of RLUIPA. See 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (RLUIPA's "hearing record compiled massive evidence that [the First Amendment] right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation."); see

also *id.* at S7775 ("[T]he hearing record reveals a widespread pattern of . . . discrimination against small and unfamiliar denominations as compared to larger and more familiar ones.").

The Court's decision and its guidance here should reiterate RLUIPA's "exceptionally demanding" standards and remind lower courts that the government must be put to its proofs under the narrow-tailoring test. At a minimum, the Court should vacate the decision below and remand to the lower courts for additional fact-finding.

B. It appears that TDCJ failed to seriously consider or attempt alternative policies.

The lack of record evidence justifying TDCJ's apparent ban on execution-chamber ministrations highlights another reason why its policy would fail to clear RLUIPA's high bar.

As part of the least-restrictive-means analysis, courts require governmental entities to consider whether other policy options would be less burdensome on individuals' religious exercise. That is, governments seeking to impose restrictions on the religious practices of individuals cannot satisfy RLUIPA by merely enacting a policy and subsequently defending that policy as the least restrictive possible option. The government must actually have analyzed—perhaps even attempted—alternative options. See *Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007) ("A prison 'cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." (quoting *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005))); *Washington* v. *Klem*, 497 F.3d 272, 284 (3d

Cir. 2007) ("[T]he phrase 'least restrictive means' is, by definition, a relative term. It necessarily implies a comparison with other means."); *Couch* v. *Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (explaining that the government must "acknowledge and give some consideration to less restrictive alternatives").

One way the government can satisfy its burden is by "prov[ing] that each of the inmate's proffered alternatives is too burdensome." *Williams* v. *Annucci*, 895 F.3d 180, 193 (2d Cir. 2018). When the government does "not show[] that [a petitioner's] proposed alternatives are not viable," the government has necessarily failed to establish its high burden. *Id.* at 193–94; see also *Yellowbear*, 741 F.3d at 62–63 ("As part of its burden to show that its policy represents the least restrictive means available to further its putatively compelling interest, the government must *of course* 'refute . . . alternative schemes' suggested by the plaintiff to achieve that same interest and show why they are inadequate." (omission in original) (emphasis added) (quoting *United States* v. *Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011))).

Of course, RLUIPA does not require a government to consider *every* possible policy option. See *Holt*, 574 U.S. at 371–72 (Sotomayor, J. concurring). But at a minimum, a government should consider any less-restrictive options that are proposed by a religious claimant. See *id.*

Here, the general counsel's email announcing TDCJ's policy for Mr. Ramirez's pastor offers no significant reasoning, as noted above. And TDCJ does not appear to have considered alternatives

beyond the complete ban.[2] For example, as the Eleventh Circuit has observed, Alabama's historical practice was for the state chaplain to pray for an inmate *during* an execution and, if desired, hold the inmate's hand as he died. See *Ray* v. *Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 696–97 (11th Cir. 2019), *vacated sub nom. Dunn* v. *Ray*, 139 S. Ct. 661 (2019) (mem.). If chaplains in Alabama could safely offer verbal prayers, TDCJ should at a minimum show why ministers in Texas cannot do the same in order to establish that its policy is the least restrictive means of advancing its interests. Because it did not do so here, the policy cannot survive RLUIPA's strict scrutiny.

TDCJ's claim that verbal prayer risks disturbance and cannot be safely allowed does not satisfy RLUIPA's proof burden. This Court has parsed the distinction between "forms of protest" and "quiet conversations" in the First Amendment context, *McCullen* v. *Coakley*, 573 U.S. 464, 489, 496 (2014), and there is no reason to think these same distinctions do not also obtain in the capital context. Texas must attempt to distinguish auditory prayer from disruptive speech within the execution chamber, and its failure to do so does not satisfy RLUIPA's exceedingly high bar.

In his Petition, Mr. Ramirez offered several proposals that would allow him to satisfy the needs of his faith as his sentence is carried out. These proposals include allowing his pastor to speak, sing,

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[2] As discussed above, TDCJ's citation to a federal BOP policy by way of a federal court order does not provide the evidence it needs to carry its burden on showing alternatives either. *Supra* 14–15. Even if BOP applies the policy TDCJ claims it does, TDCJ should offer that evidence here, for Mr. Ramirez should be able to cross-examine it in his own proceeding.

or even whisper scriptures or prayers, either standing by Mr. Ramirez's side or farther away. Pet. 14–15. TDCJ describes these practices as "six different ways to verbally disrupt the execution process." BIO at 24. But the record established neither that a spoken prayer *would* verbally disrupt an execution nor *how* such a disruption could not be mitigated in other ways. And there is no record evidence that TDCJ considered whether these or any other alternative accommodations are feasible or would somehow disrupt the execution chamber.

A lack of record evidence means "mere speculation" about a supposed harm that a government policy is meant to prevent—the very type of reasoning RLUIPA was designed to prevent. *Holt*, 547 U.S. at 371 (Sotomayor, J., concurring) (citing 106 Cong. Rec. 16699 (2000)).

In sum, the lower courts did not treat Mr. Ramirez's religious claims with the deference and flexibility that RLUIPA requires. Through RLUIPA, Congress struck a delicate balance that protects the interests of both the state and the individual. RLUIPA places the burden of demonstrating the unsuitability of a petitioner's less-restrictive options on the government. The lower courts' willingness to suspend that burden does not accord with the statue's respect for inmates' religious practices.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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