No. 21-5592

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN HENRY RAMIREZ,
Petitioner,
v.
BRYAN COLLIER, Executive Director, Texas Department of Criminal Justice, *et al.*,
Respondents.

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

BRIEF OF CHRISTIAN LEGAL SOCIETY, THE ANGLICAN CHURCH IN NORTH AMERICA, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, NATIONAL ASSOCIATION OF EVANGELICALS, QUEENS FEDERATION OF CHURCHES, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the government has satisfied its burden under RLUIPA to demonstrate that its blanket prohibition on clergy in the execution chamber engaging in audible prayer or laying on hands is the least restrictive means of furthering a compelling government interest.

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INTEREST OF *AMICI CURIAE*[1]

In carrying out the execution of John Henry Ramirez, the State of Texas ("the State") will substantially burden his right of religious exercise if it imposes a blanket ban on his pastor engaging in audible prayer or touching him to give spiritual comfort at his moment of death. Previous cases in this Court have already indicated the importance of the right to such meaningful spiritual comfort in the execution chamber for a condemned prisoner of any faith. The *amici* joining this brief, who include Christian religious bodies of varying theological views, affirm the importance of that right.

Christian Legal Society ("CLS") is a nondenominational association of Christian attorneys, law students, and law professors. CLS's legal advocacy division, the Center for Law & Religious Freedom, works to protect all Americans' right to be free to exercise their religious beliefs. CLS was instrumental in passage of both the Religious Land Use and Institutionalized Persons Act (RLUIPA) and its sister statute, the Religious Freedom Restoration Act (RFRA). CLS has a longstanding interest in defending RLUIPA's constitutionality and proper application in the courts. In passing RFRA and RLUIPA, Congress honored our nation's historic, bipartisan tradition of respecting religious conscience. Ensuring prisoners' religious

[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise. Both parties have filed blanket consents.

exercise, especially at the time of execution, accords with that tradition of respecting religious conscience.

The Anglican Church in North America ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates - leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

The Baptist Joint Committee for Religious Liberty ("BJC") is an 85-year-old education and advocacy organization that serves 16 supporting organizations, including state and national Baptist conventions and conferences, as well as congregations throughout the United States. BJC deals exclusively with religious liberty issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to protecting religious liberty for all Americans. As chair of the Coalition for the Free Exercise of Religion, BJC worked with dozens of religious and civil liberties organizations toward the passage of RLUIPA and has defended its constitutionality and applicability in numerous cases in the courts.

The Ethics & Religious Liberty Commission of the Southern Baptist Convention ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 22 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. The General Conference of Seventh-day Adventists has a long history of working to protect religious liberty and ensuring that the Free Exercise Clause of the First Amendment fully protects all Americans. It was a founding member of the coalition that advocated for the passage of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) and has a strong interest in seeing their protections upheld.

National Association of Evangelicals is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 74 different denominations and serves a constituency of over 20 million people.

Queens Federation of Churches was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

SUMMARY OF ARGUMENT

Amici agree that if the State imposes a blanket ban on his pastor engaging in audible prayer and physical touching, it will impose a substantial burden on John Henry Ramirez's religious exercise. We file this brief to detail how the State has failed to justify imposing this substantial burden under the demanding standard of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 *et seq*. The State has failed to "demonstrate[]," as RLUIPA requires, that its blanket prohibition on spiritual advisors engaging in audible prayer or physical touching of the prisoner furthers "a compelling governmental interest" and is the "least restrictive means of furthering that" compelling interest. 42 U.S.C. § 2000cc-1. We make four specific points.

A. The State has failed its obligation under RLUIPA to present specific evidence—not merely generalized assertions or speculation—as to why banning these practices is necessary to serve order and security. RLUIPA's text and underlying purposes demand that government present such specific evidence concerning its interests; the State here has presented only generalized assertions. The respect that courts give to prison officials' expertise does not justify "unquestioning acceptance" of such assertions. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). Moreover, the State's assertion that order and security require bans on these practices is inherently speculative and questionable.

B. In its Brief in Opposition to the certiorari petition and stay application, the State attempted to excuse its failure to present specific evidence by attempting to shift the burden of proof back to Ramirez concerning less restrictive means and compelling interests. But under RLUIPA, both the burden of production and the burden of persuasion remain on the State, not the person whose religious exercise is substantially burdened. And to the extent that this case involves interim relief and not just ordinary consideration on the merits, this Court has made clear that the allocation of burdens of proof still tracks the allocation of burdens at trial.

C. Even if the State demonstrates that denials of audible prayer and physical touching further a compelling interest, it must also prove that the denials are the least restrictive means of furthering that interest. The State has multiple less restrictive means of maintaining order and security, and it has not demonstrated that these are inadequate. It can (and does) vet and train outside spiritual advisors, and if their actions cause disruption, it can remove them from the chamber and impose penalties. And as Ramirez has suggested, the State can require that audible prayers be soft and nondisruptive.

D. Finally, the State's assertion that blanket prohibitions on audible prayer and physical touching are necessary to serve compelling interests is undercut because the State has already permitted essentially these practices. It has already permitted audible prayer by spiritual advisors in the execution

chamber. And it has already permitted spiritual advisors to place their hands on inmates during the execution procedure.

Accordingly, Ramirez is entitled to a continued injunction to prevent him from being executed in a manner inconsistent with his right to exercise his religion in the last minutes of his life. And this Court should order that if the State continues to ban these religious practices, the case should be remanded to litigate Ramirez's demand for a permanent injunction against the State's ban.

ARGUMENT

The State Has Failed to Meet Its Burden, Under RLUIPA, of Demonstrating That Refusing an Inmate Audible Prayers and Laying on Hands During His Execution Serves a Compelling Interest and Does So By the Least Restrictive Means.

The State has failed to meet the requirements of RLUIPA. The statutory text forbids the government to "impose a substantial burden on [an inmate's] religious exercise," even through "a rule of general applicability," unless the government meets the demanding standard the statute sets forth. 42 U.S.C. § 2000cc-1(a). The government must "demonstrate[ ] that the imposition of the burden on that person" (1) furthers "a compelling governmental interest" and "(2) is the least restrictive means of furthering that compelling governmental interest." *Ibid.* This

standard is demanding; by RLUIPA's explicit terms, it "must be construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g). That and other provisions of RLUIPA "underscore its expansive protection for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 358 (2015).

The State will substantially burden John Henry Ramirez's religious exercise if it refuses to allow him to hear prayers and receive spiritual comfort from his pastor "at the moment the State puts him to death." *Dunn v. Smith*, 141 S. Ct. 725, 726 (2021) (Kagan, J., for four justices, concurring in denial of application to vacate injunction). The arguments of Ramirez and other *amici* establish that burden. See Petitioner's Br. Argument Section I; Brief of Religious-Liberty Scholars as *Amici Curiae*.

The State must, therefore, "demonstrate" that its refusal to allow audible prayers and laying on hands at Ramirez's execution furthers a compelling interest in security and is the least restrictive means of doing so. The State has failed to meet that burden on this record. Ramirez is, therefore, entitled to relief under RLUIPA.

A. The State Has Failed to Meet Its Burden of Presenting Specific Evidence, Not Merely Generalized Assertions or Speculation.

Most fundamentally, on this record, the State has not provided specific evidence of how audible prayers

or touching the condemned prisoner would necessarily create security problems implicating compelling governmental interests. Throughout its filings, the State has asserted concerns about order and security in an array of generalized terms rather than identifying specific problems. It has said that "when they [prisoner and clergyperson] both enter the chamber, security concerns require restrictions." Defendants' Opposition to Plaintiff's Motion for a Stay of Execution at 12, *Ramirez v. Collier et al.*, 4:21-cv-02609 (S.D. Tex. Aug. 23, 2021); *id.* at 14 (adding that "RLUIPA is especially sensitive to security concerns"). It has said that "prisons have a strong interest in 'controlling access to' the execution chambers." Brief of Defendant-Appellees at 23, *Ramirez v. Collier et al.*, 10 F.4th 561 (5th Cir. Sept. 6, 2021) (No. 21-70004) (citation omitted) (hereinafter "Respondents' 5th Cir. Br."). It has said that "prisons have a compelling interest 'in maintaining an orderly, safe, and effective process.'" Br. in Opp. 26 (citation omitted).

But the State does not say precisely what the security or safety concerns are or how audible prayers or touching would necessarily undermine its interests. Whose safety is in jeopardy? The inmate? The physician administering the injection? What are the potential security breaches the State is attempting to mitigate? Smuggling contraband? Interference with the injection? Throughout its filings in this Court and the courts below, the State has failed RLUIPA's requirement that it specify how its ban furthers its asserted compelling interests.

1. RLUIPA's text and purposes demand that government present specific evidence concerning its interests, not generalized assertions.

The State's generalized assertions do not meet RLUIPA's demanding standard. The text requires the government to "demonstrate[ ] that imposition of the burden … further[s]" its compelling interest and does so by the least restrictive means. 42 U.S.C. § 2000cc-1(a). To assert that the restriction furthers an interest does not "demonstrate" that it does so. And the text explicitly defines "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion." *Id.* § 2000cc-5(2). The government must go forward with evidence, not mere generalized assertions.

RLUIPA's underlying purpose, as reflected in the text, also requires the government to set forth specific problems and not generalities, mere assertions, or speculation. The text says that RLUIPA's terms "shall be construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g); see *Holt*, 574 U.S. at 358 (RLUIPA's text underscores its "expansive protection for religious liberty"). The statute protects religious liberty by making it "'the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'" *Holt*, 574 U.S. at 364 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 434 (2006)). "That test requires the Department not merely to explain why it denied the exemption but to

prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Ibid.* If the State provides no specific evidence—or at the very least, specific likely scenarios—to support its assertion of a compelling governmental interest, the Court simply cannot conclude that the substantial burden on religious exercise is justified under RLUIPA's standard.

This Court's precedents confirm that the compelling-interest test requires the state to provide particularized, specific evidence and does not accept general interests stated in the abstract. In *O Centro*, for example, the federal government asserted that the mere listing of a drug as a controlled substance established a compelling interest and "preclude[d] any consideration of individualized exceptions" under the Religious Freedom Restoration Act (RFRA). 546 U.S. at 430 (ruling under RFRA, 42 U.S.C. § 2000bb *et seq.*). This Court unanimously rejected that argument, holding that RFRA required analysis "beyond broadly formulated interests justifying the general applicability of government mandates" and required government "'to show with more particularity how its admittedly strong interest … would be adversely affected by granting an exemption'" in the particular case. *Id.* at 431 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972)). RLUIPA, which adopts the same standard as RFRA, likewise requires a showing with "particularity" rather than "broadly formulated interests."

The government in *O Centro* also asserted that it had a compelling interest in upholding a congressional drug regulation scheme in "compliance with the 1971 United Nations Convention." 546 U.S. at 437. This Court held that assertion insufficient because "the [g]overnment did not even submit any evidence addressing the international consequences of granting an exception." *Ibid.* (stating that the asserted interest did "not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA").

The Court also rejected generalized and speculative assertions of state interests in *Sherbert v. Verner*, 374 U.S. 398 (1963), the leading decision from which both RLUIPA and RFRA drew the compelling-interest test. *Sherbert* exempted a Saturday worshiper from the requirement to take "suitable work" (*id.* at 401)—in that case, a job requiring her to work on her sabbath—in order to receive unemployment benefits. The state asserted an interest in preventing the "possibility … of fraudulent [benefits] claims," but the Court rejected the assertion because there was no "proof whatever to warrant such fears." *Sherbert*, 374 U.S. at 407.

Sherbert also helps explain why the compelling-interest test logically demands specificity in the government's assertion and proof of its interests. As the Court said, in the "highly sensitive constitutional area" of religious liberty, the rights of the claimant should only be limited upon "the gravest abuses" that "endanger a paramount interest."

Sherbert, 374 U.S. at 406 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). The State cannot demonstrate such a "grave abuse" merely by asserting generally that executions require order and security.

2. The respect given to prison officials' expertise does not justify "unquestioning acceptance" of generalized assertions.

The State tries to evade its duty to present specific evidence by asserting that "RLUIPA defers to the expertise of prison officials" in their creation of "execution protocols to reduce risks." Br. in Opp. 25. But in *Holt*, this Court unanimously said that while "courts should respect th[e] expertise" of prison officials, "that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." 574 U.S. at 364. Courts cannot give "a degree of deference that is tantamount to unquestioning acceptance." *Ibid.* (adding that RLUIPA "does not permit such unquestioning deference"). Thus, *Holt* refused "to swallow the [state's] argument that denying petitioner a ½–inch beard actually furthers the Department's interest in rooting out contraband." *Ibid.* The Joint Statement of the Senate managers of RLUIPA confirms that courts should give prison officials "due deference," but that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." Joint Statement of

Senators Hatch and Kennedy, 146 Cong. Rec. 16698, 16699 (2000) (quoting S. Rep. 103-111 at 10).[2]

3. The State's asserted security concerns are inherently speculative and questionable.

Finally, the State's assertion that physical touch and audible prayer would necessarily create increased security risks is inherently speculative and questionable. This is so for several reasons.

First, the State asserts that having outside spiritual advisors in the execution chamber creates risks that are only manageable because it has placed restrictions on physical touch and audible prayer. But there is little evidence that outside spiritual advisors create serious risks—as four Justices of this Court have recognized. *Dunn v. Smith*, 141 S. Ct. 725, 725–26 (2021) (Kagan, J., for four Justices, concurring in denial of application to vacate injunction) (noting that states and the federal government have conducted a number of executions with clergy present and "[n]owhere, as far as I can tell, has the presence of a clergy member (whether state-appointed or independent) disturbed an execution"). See also Petitioner's Br. Section II-C (setting forth evidence undercutting the State's alleged interests). Likewise, after this Court remanded an earlier case for a

[2] The report being quoted was the Senate Judiciary Committee's report on RFRA. It is reprinted in 1993 U.S. Code Cong. & Admin. News 1892.

specific determination on security concerns, *Gutierrez v. Saenz*, 141 S. Ct. 127, 128 (2020), the district court held that the "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 re Security Concerns, *Gutierrez v. Saenz et al.,* No. 1:19-cv-00185 at 29, DE 124 (S.D. Tex. Nov. 24, 2020) (hereinafter "*Gutierrez* Order re Security Concerns"). The district court further concluded that "[s]peculative hypotheticals without evidentiary support do not create an unmanageable security risk." *Ibid.* There is little evidence that spiritual advisors present underlying security risks that would necessitate banning them from engaging in audible prayer or touching the prisoner.

Indeed, there is reason to think that far from undermining an "'orderly, safe and effective process'" (Br. in Opp. 26), the presence of a spiritual advisor may help maintain it. As the State itself notes, under its policies a spiritual advisor chosen by an inmate must "have previously established an ongoing spiritual relationship with the inmate demonstrated by regular communications or in-person visits with the inmate before the inmate's scheduled execution date." Br. in Opp. 4. Inmates look to their spiritual advisor to answer their questions and provide comfort before and during execution proceedings. 6/24/19 Moss Tr. at 18:2-19, *Murphy v. Collier*, No. 4:19-cv-1106 (S.D. Tex. June 24, 2019) (hereinafter "Moss Dep. in *Murphy*"). Spiritual comfort in the moment of death provides inmates with peace and may decrease

instances of inmate agitation or resistance. *Gutierrez* Order re Security Concerns, *supra*, at 12 (quoting Lopez Tr., *Gutierrez v. Saenz et al.*, No. 1:19-cv-00185, 185 DE 109 at A826) ("'In my experience, the Chaplain's presence helped the process go more smoothly because the Chaplain is there as a calming and comforting presence for the condemned.'") Spiritual advisors may help maintain the very order that the State here claims they disrupt.

Finally, physical contact in a confined space does not necessarily create a security risk. The prison has changed its procedure to allow for clergy in the room. In doing so, the State "mitigate[d] associated risks" and deemed that policy safe. Br. in Opp. 25. Execution rooms are small. Respondents' 5th Cir. Br., *supra*, at 25 ("[T]he chamber leaves no room for substantial physical distance between any of its occupants."). Under the State's practices, spiritual advisors have previously stood "within inches" of the inmate. 6/24/19 Brouwer Tr. at 36-37, *Murphy v. Collier*, No. 4:19-cv-1106 (S.D. Tex. June 24, 2019). As the State itself said in this Court, during Ramirez's execution "his "pastor [will] stand[ ] in his 'immediate physical presence,' less than half the gurney's length away from him." Br. in Opp. 27 (citation omitted). Since the spiritual advisor already stands inches away, it is inherently speculative to say that a mere extension of the advisor's arm to create physical contact significantly increases the risk of disorder.

B. The Burdens of Production and Persuasion Concerning Less Restrictive Means (and Compelling Interests) Remain on the State and Do Not Shift Back to the Person Whose Religious Exercise is Substantially Burdened.

Under the second prong of RLUIPA's strict scrutiny test—that the burden must be the "least restrictive means" of furthering the government's compelling interest—Ramirez has set forth several means of maintaining security during the execution that are less restrictive than banning all audible prayers and all touching of the condemned prisoner. We discuss those, and the State's failure to demonstrate their inadequacy, in the next section, *infra* part C.

First, however, we note that the burdens of production and persuasion concerning whether less restrictive means exist rest on the State, not on Ramirez. The State asserted, in its Brief in Opposition, that "Ramirez must make a strong showing that the State will not meet its burden of establishing that the policy is the 'least restrictive means'" of furthering the compelling interest. Br. in Opp. 22; see *id.* at 25 ("Ramirez must show a strong likelihood that Respondents will not meet their burden"). By attempting to shift the burdens back to Ramirez, the State sought to excuse its failure to present specific evidence showing that entirely excluding audible prayer or touching is necessary.

The State cannot evade its burden by this device. As this Court's Sept. 10, 2021 briefing order states, the question remains "whether the government has satisfied *its burden under RLUIPA to demonstrate* its policy is the least restrictive means of advancing a compelling government interest" (emphasis added). The posture of the case, and the equitable relief sought, does not change that allocation of burdens. The rule is clear that "the burdens at the preliminary injunction stage track the burdens at trial." *O Centro*, 546 U.S. at 429 (following *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004)). In *O Centro*, the Court unanimously rejected the federal government's assertion that under RFRA, "although it would bear the burden of demonstrating a compelling interest as part of its affirmative defense at trial on the merits, the [RFRA claimant] should have borne the burden of disproving the asserted compelling interests at the hearing on the preliminary injunction." *Ibid.*

The same rule—that burdens on the merits concerning interim relief track those at trial—surely applies under RLUIPA's identical substantive legal standard. The State cannot evade its burden of demonstrating, with specific evidence, that it has a compelling interest and is pursuing the least restrictive means of furthering that interest. As already noted, RLUIPA's text states that "the government shall bear the burden of persuasion on any element of the claim" (except that the claimant must show the law "substantially burdens" religious exercise, which Ramirez has done). 42 U.S.C § 2000cc-2(b). And "the term 'demonstrates'"—the onus that

the text places on the government—"means meets the burdens of going forward with the evidence and of persuasion." *Id.* § 2000cc-5(2).

The State's arguments for shifting the onus of proof to Ramirez all invoke the context of an emergency stay of execution. See, e.g., Br. in Opp. 24 (referring to requirements on Ramirez "for the stay he seeks"). But the particular interim relief sought does not change the fundamental rule of *O Centro*/*Ashcroft*: the burdens at the interim-relief stage "track the burdens at trial." 546 U.S. at 429. To the extent this case still involves a stay of execution—as opposed to simply consideration of the merits on writ of certiorari—Ramirez must show "a significant possibility of success on the merits." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). If the state fails to meet its burdens of production and persuasion with specific evidence, 42 U.S.C. § 2000cc-5(2), Ramirez should succeed on the merits.

Thus, as this Court has confirmed, RLUIPA requires the state "not merely to explain why it denied the exception" but to "prove" that the denial furthers a compelling interest by the least restrictive means. *Holt*, 574 U.S. at 364. Once a substantial burden on the claimant's religious exercise is found, "the statute requires the Government to satisfy the compelling interest test." *O Centro*, 546 U.S. at 424. It is not Ramirez's burden to show that the State has failed the test. This Court should hold the State to its obligation, in accord with RLUIPA's plain text, rationale, and case law.

C. There Are Less Restrictive Means of Maintaining Order and Security, and the State Has Not Met Its Burden of Demonstrating that They Are Inadequate.

Even if the State proves that denying audible prayer and physical touching furthers a compelling interest, it must also prove that the denial is the least restrictive means of furthering that interest. With respect to this prong of the test, the government again must do more than just "explain why it denied" the claimant's requested exemption; it must "prove that denying the exemption is the least restrictive means of furthering [its] interest." *Holt*, 574 U.S. at 364. "'The least-restrictive-means standard is exceptionally demanding.'" *Ibid*. (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt*, 574 U.S. at 365 (brackets in original; quotation omitted).

There are numerous means to further order and security that are less restrictive than total bans on audible prayer or on physical touching of the prisoner. As four Justices have recognized, the State can vet and train spiritual advisors. *Smith*, 141 S. Ct. at 726 (Kagan, J., concurring in denial of application to vacate injunction) ("The State can do a background check on the minister; it can interview him and his associates; it can seek a penalty-backed pledge that he will obey all rules."). The State already requires outside spiritual advisors to undergo a two-hour

orientation with prison staff members. Br. in Opp. 4 (citing Texas Department of Criminal Justice, Execution Procedure (April 2021), Defs.' Ex. 1, *Ramirez v. Collier*, No. 4:21-cv-2609 (hereinafter "Execution Procedure")).

Moreover, the State's current policy already gives prison officials discretion to refuse a spiritual advisor's presence if the advisor is deemed a security risk and to remove a spiritual advisor if officials deem the advisor is disruptive. Execution Procedure, *supra*, at 10. The State has not demonstrated why these less restrictive means are inadequate to mitigate any security concerns associated with physical touch and audible prayer. As another means short of a ban on those religious practices, the State can require a security guard to stand next to the spiritual advisor. This would prevent physical interference in the execution proceedings and subsequent procedures.

Regarding audible prayers specifically, the State has failed to show that its goals cannot be achieved by the less restrictive means that Ramirez suggests: "If Pastor Moore cannot stand next to the body, he could sing prayers and read scripture standing away…. If he cannot speak too loudly, he can whisper the prayers and scripture in Ramirez's ear as he loses consciousness." Pet. Cert. 14-15. The State can require that spiritual advisors speak in a whisper. It can enforce that requirement through an oath or signed statement; if a spiritual advisor violates the rule, the State can remove the advisor from the room and administer penalties. In short, the State has not

demonstrated that its current means of maintaining a secure process are inadequate; and it has additional less restrictive means it can implement to achieve such a process.

D. The State's Assertions Are Undercut Because It Has Already Permitted Essentially These Practices.

The government's showing of a compelling interest and the least restrictive means is further undermined when it has permitted conduct similar to the religious exercise it now forbids. In *Holt*, *supra*, the Court held that the prison system's prohibition on a prisoner's ½–inch beard was undermined because the system permitted ¼–inch beards; the state "offered no sound reason why hair, clothing, and ¼–inch beards can be searched but ½–inch beards cannot." 574 U.S. at 365. Likewise, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020), the Court held that the state could achieve its public-health goals by means less restrictive than onerous limits on religious worship services; the Court said, "It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows." See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

Here, the State's ban on audible prayer by spiritual advisors is undercut by the fact that it has already permitted audible prayer by spiritual

advisors in the execution chamber. See Petitioner's Br. Section II-C-1 (setting forth evidence). Chaplains have had dialogue with prisoners in the execution chamber. *Ibid.*; see also Moss Dep. in *Murphy*, *supra*, at 18:2-19. In addition to all that, the State affirms that "[w]hen it is time for his sentence to be carried out, Ramirez himself may pray aloud." Br. in Opp. 19. If there were really a serious risk of disturbances to safety and order, such disturbances could be caused by anyone speaking or praying: Ramirez, or a spiritual advisor on his request. Speaking is speaking. Neither has been proven to cause material disruption.

Likewise, the State previously permitted spiritual advisors to place their hands on the inmates. See Petitioners' Br. Section II-C-1 (setting forth evidence); see also Moss Dep. in *Murphy*, *supra*, at 19:4-8. If physical touching truly compromised order and security, the State presumably would not have allowed it in previous executions. Physical touching has previously occurred, and the State has not presented evidence that it created a security breach.[3]

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[3] The State may attempt to distinguish this behavior because the chaplains were State chaplains. However, as already noted, the State has shown no distinction in security risks between outside spiritual advisors and State chaplains that could justify blanket restrictions on outside advisors. See *supra* p. 14. The distinctions between the two categories are very limited. State chaplains have testified that they received only "minimal preparation for [their] part in an execution." *Gutierrez* Order re Security Concerns, *supra*, at 12 (citations omitted). Some State chaplains are not full-time employees but rather contract workers or part-time volunteers. See Moss. Dep. in *Murphy* at 28-29. And on the

These two points undercut the State's compelling interest; they also show that the State has a less restrictive means of ensuring security and order. The State has maintained an orderly process and achieved security all while permitting physical contact and speaking in the execution chamber.

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other hand, outside spiritual advisors must establish a previous relationship with the inmate, which requires regular communication or in-person visits. See *supra* p. 15 (quoting Br. in Opp. 4 and Execution Procedure, *supra*, quoted therein). Outside spiritual advisors are required to undergo a two-hour orientation with prison staff members. *Ibid.*

CONCLUSION

For all the reasons above, the State has failed to justify its ban on spiritual advisors delivering audible prayers or physically touching the condemned prisoner in the execution chamber. Ramirez is entitled to a continued injunction to prevent him from being executed in a manner inconsistent with his right to exercise his religion in the last minutes of his life.

This Court should order that if the State continues to ban these religious practices, the case should be remanded to litigate Ramirez's demand for a permanent injunction against the State's ban.

Respectfully submitted.

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