No. 21-5592

In the Supreme Court of the United States

JOHN H. RAMIREZ, PETITIONER

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner is a state capital inmate. This Court stayed his execution pending consideration of his challenges to the State's policies restricting his spiritual adviser's ability to pray audibly or physically touch him in the execution chamber. The Court directed the parties to brief the following questions:

1. Whether petitioner adequately exhausted his audible-prayer claim under the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a).

2. Whether petitioner has satisfied his burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc, *et seq.*, to demonstrate that a sincerely held religious belief has been substantially burdened by the State's restrictions on either audible prayer or physical contact.

3. Whether respondents have satisfied their burden under RLUIPA to demonstrate that the State's policies are the least restrictive means of advancing a compelling government interest.

4. Whether petitioner has satisfied the appropriate standard for the type of equitable relief that he seeks.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the questions on which this Court has requested briefing. The exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a), applies to claims by federal prisoners. The Attorney General may bring actions to enforce the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* See 42 U.S.C. 2000cc-2(f). In addition, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, imposes the same substantive standard on federal prisons that RLUIPA imposes on their state counterparts. Finally, respondents

and the court of appeals have relied on their understanding of the relevant recent practices of the Federal Bureau of Prisons (BOP), and the United States has a substantial interest in clarifying those practices.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

Following a jury trial in Texas state court, petitioner was convicted of capital murder and robbery. 641 Fed. Appx. 312, 314-315 (5th Cir.), cert. denied, 137 S. Ct. 279 (2016). Based on the jury's penalty verdict, the court imposed a capital sentence. *Id.* at 315. Petitioner exhausted his state-court appeals and state and federal collateral-review rights. Pet. App. A1. After his execution was scheduled for September 8, 2021, petitioner filed this suit challenging state policies prohibiting his spiritual adviser from praying audibly or laying hands on petitioner in the execution chamber. *Id.* at A1-A2. The lower courts denied emergency equitable relief. *Id.* at A2, B9. This Court granted certiorari and stayed petitioner's execution.

A. Background

1. The State of Texas, which has carried out more than 500 executions by lethal injection since 1982, has traditionally allowed a religious figure inside the execution chamber to help the condemned inmate through his final moments. See Op. at 2-3, *Gutierrez* v. *Saenz*, No. 19-cv-185 (S.D. Tex. Nov. 24, 2020) (*Gutierrez* Remand Op.). A news report of Texas's (and the Nation's) first lethal injection recounted that the inmate "went through a Muslim ritual" with two spiritual advisers while strapped to the gurney in the execution chamber.

United Press Int'l, *1st Execution by Injection Carried Out* (Dec. 7, 1982). And until 2019, a state-employed chaplain was generally required, or at least allowed at the inmate's request, to attend Texas executions. *Gutierrez* Remand Op. 3; see *Murphy* v. *Collier*, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring in grant of application for stay); *id.* at 1478-1479 (Alito, J., dissenting from grant of application for stay).

Public sources suggest that state-employed chaplains engaged in both audible prayer and physical contact with inmates during some Texas executions. For example, a Texas chaplain explained in an interview that, "[a]fter the[inmate is] strapped down and the needles are flowing * * * you've got probably forty-five seconds where you and he are together for the last time, and * * * the conversations that took place in there were, well, basically indescribable." StoryCorps, *Witness to an Execution* (Oct. 20, 2000). Among other topics, inmates would ask the chaplain "to pray [a] prayer" or discuss the inmate's religious experiences. *Ibid.*; see Associated Press, *Maryland Weighs Allowing Inmates' Own Clergy at Death* (July 20, 2010) (stating that Texas chaplains "pray[ed] while the lethal injection [was] taking place").

Another Texas chaplain testified in a recent deposition that he and his colleagues "would always" offer to "put [a] hand" on the inmate "to indicate a presence." 19-cv-185 D. Ct. Doc. 110-14, at 7 (S.D. Tex. Sept. 22, 2020). A published account has accordingly described a Texas state chaplain who "stood in the death chamber with the warden, one hand resting on the condemned's leg, and * * * closed prisoners' eyes once they lost all sign of life." Pamela Collof, *The Witness*, Texas Monthly (Sept. 2014) (*The Witness*).

2. In March 2019, this Court stayed the execution of a Texas inmate whose request to have a Buddhist spiritual adviser in the execution chamber had been denied because Texas had no Buddhist state chaplains. See *Murphy*, 139 S. Ct. at 1475; *id.* at 1478 (Alito, J., dissenting). The next month, Texas revised its execution procedures to exclude all spiritual advisers, including state chaplains, from the execution chamber. See Second Am. Compl., Ex. 1, at 8.

In June 2020, this Court stayed the execution of a Texas inmate who had challenged the no-advisers policy and instructed the district court to consider "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* v. *Saenz*, 141 S. Ct. 127, 128 (2020). On remand, the district court found that "the extensive evidence submitted by the [p]arties does not demonstrate that serious security concerns would result from allowing inmates the assistance of a chosen spiritual advisor in their final moments." *Gutierrez* Remand Op. 29. This Court then granted the prisoner's petition for a writ of certiorari, vacated the court of appeals' decision, and remanded for further consideration in light of the district court's findings. *Gutierrez* v. *Saenz*, 141 S. Ct. 1260, 1261 (2021).

3. In April 2021, Texas revised its policy again. The current policy allows either state-employed chaplains or outside spiritual advisers who satisfy certain screening requirements into the execution chamber. See D. Ct. Doc. 13-1 (Aug. 23, 2021) (2021 Execution Procedure). The policy states that "[a]ny behavior by the spiritual advisor" that prison officials determine "to be disruptive to the execution procedure shall be cause for

immediate removal." *Id.* at 10. The policy does not expressly address whether spiritual advisers present in the execution chamber may pray audibly or touch inmates during executions.

B. Procedural History

1. On the night of July 19, 2004, petitioner and two associates "drove around Corpus Christi looking for someone to rob" so that they could buy drugs. 641 Fed. Appx. at 314. They pulled into a convenience-store parking lot where the night attendant, Pablo Castro, was taking out the trash. *Ibid.* Petitioner stabbed Castro 29 times, searched his body for money, and made off with $1.25. *Ibid.*

A state jury found petitioner guilty of capital murder and robbery and determined that he should receive a capital sentence, which the trial court imposed. 641 Fed. Appx. at 314-315. Petitioner unsuccessfully sought relief on direct appeal, state collateral review, and federal collateral review. See Pet. App. A1; 641 Fed. Appx. at 314. The State scheduled petitioner's execution for September 2020. Second Am. Compl. ¶ 37.

In August 2020, petitioner filed suit in federal district court asserting that the then-extant version of Texas's execution protocol—which barred all spiritual advisers from the execution chamber—violated the First Amendment's Free Exercise Clause and RLUIPA. See 20-cv-205 D. Ct. Doc. 1 (S.D. Tex. Aug. 7, 2020). Petitioner sought relief allowing his religious adviser, Pastor Dana Moore, "to be present at the time of his execution to pray with him and provide spiritual comfort and guidance in his final moments." *Id.* ¶ 23. He stated that "Pastor Moore w[ould] pray with him," but "need not touch [him] at any time in the execution chamber." *Id.* ¶ 24. A week later, the State withdrew petitioner's

death warrant, and petitioner voluntarily dismissed his suit without prejudice. See 20-cv-205 D. Ct. Doc. 2, at 2 (Aug. 14, 2020).

2. In February 2021, Texas rescheduled petitioner's execution for September 8. See Resps. C.A. Br. 6. On April 12, petitioner filed an administrative grievance seeking to have Pastor Moore in the execution chamber. See Second Am. Compl., Ex. 4, at 1. During the pendency of the grievance process, the State adopted its current policy permitting execution-chamber access by vetted spiritual advisers, see 2021 Execution Procedure 3-4, and petitioner received administrative relief, see Second Am. Compl., Ex. 4, at 5-6.

In early June 2021, petitioner e-mailed prison officials to request that Pastor Moore be allowed to touch him during the execution. See D. Ct. Doc. 13-2, at 1 (Aug. 23, 2021). The State responded that "[a]t this time," it "does not allow the spiritual advisor to touch the inmate once inside the execution chamber." *Ibid.* On June 14, petitioner filed an administrative grievance requesting to "be allowed to have [his] Spiritual Advisor 'lay hands on [him]' & pray over [him] while [he is] being executed." Second Am. Compl., Ex. 4, at 3-4 (capitalization omitted). On July 2, the State denied relief on the ground that "a Spiritual Advisor is not allowed to touch an inmate while inside the execution chamber." *Id.* at 4 (emphasis omitted). Petitioner administratively appealed that decision, D. Ct. Doc. 13-3 (Aug. 23, 2021), and alleges that the State has not acted on that appeal, Second Am. Compl. ¶ 32.

3. On August 10, 2021, petitioner filed suit in federal district court, claiming that the State's policy prohibiting Pastor Moore from touching him during the execution violated the First Amendment and RLUIPA.

D. Ct. Doc. 1; see 42 U.S.C. 1983. Petitioner sought declaratory and preliminary and permanent injunctive relief barring state officials from carrying out his execution unless they allowed Pastor Moore to lay hands on him during the execution. See D. Ct. Doc. 1, at 15.

The record indicates that, on August 16, 2021, petitioner's counsel sent prison officials an inquiry about Pastor Moore's ability to pray audibly during the execution. See Second Am. Compl., Ex. 7. On August 18, petitioner filed a motion for a stay of execution in the district court. See D. Ct. Doc. 11. On August 19, Texas officials informed petitioner's counsel that they would not permit Pastor Moore to pray audibly during the execution. See Second Am. Compl., Ex. 7.

On August 22, 2021, petitioner filed an amended complaint, which sought injunctive relief permitting Pastor Moore both to lay hands on him and to audibly pray with him during the execution. See Second Am. Compl. 18-19. On August 23, the State filed an opposition to petitioner's pending motion to stay his execution. D. Ct. Doc. 13. The State contended that its policies did not violate the First Amendment or RLUIPA; that the equities weighed against relief; and (in a follow-up filing) that petitioner had not exhausted available administrative remedies regarding audible prayer as required by the PLRA. See *ibid.*; D. Ct. Doc. 18 (Aug. 31, 2021).

On September 2, 2021, the district court denied petitioner's motion. Pet. App. B1-B9. The court concluded that petitioner had not established a likelihood of success on his RLUIPA or First Amendment claims. *Id.* at B5-B8. Focusing principally on RLUIPA's more stringent requirements, the court took the view that even if petitioner could show that Texas's current policy "imposes a substantial burden on his religious exercise, he

ha[d] not made a strong showing" to rebut the State's submission that the policy was "the 'least restrictive means' of furthering [a] compelling interest[]" in prison security. *Id.* at B8 (citation omitted); see *id.* at B5-B8; see also 42 U.S.C. 2000cc-1(a). The court added that the other equitable factors relevant to a request for a stay of execution "do not tip the scales in [petitioner's] favor." Pet. App. B9.

4. Petitioner appealed the district court's denial of relief, D. Ct. Doc. 24 (Sept. 2, 2021), and additionally requested that the court of appeals itself stay his execution, Pet. C.A. Br. 29. The court of appeals denied relief in a summary per curiam opinion that it issued as its mandate in the appeal. Pet. App. A1-A2.

Chief Judge Owen and Judge Higginbotham wrote concurring opinions agreeing with the district court's conclusion that petitioner was unlikely to succeed on his RLUIPA or First Amendment claims. Pet. App. A3-A6. In discussing the merits of those claims, both judges reiterated respondents' statements that the federal BOP had not permitted religious advisers to pray audibly or touch inmates in the execution chamber during recent executions. See *id.* at A3 (Owen, C.J., concurring); *id.* at A5 (Higginbotham, J., concurring in the denial of the motion for a stay of execution). Judge Dennis dissented on the ground that petitioner had demonstrated a likelihood of success on the merits of his RLUIPA claim (but not his First Amendment claim) and that a stay of execution was warranted. *Id.* at A7-A16.

5. Acting on petitioner's emergency request, this Court granted certiorari and a stay of execution. The Court then directed the parties to address petitioner's exhaustion of his audible-prayer claim under the PLRA,

two issues related to the merits of his RLUIPA claim, and his entitlement to equitable relief.

SUMMARY OF ARGUMENT

Although the record below was limited, it suggests that petitioner is likely to succeed (at least in part) on his RLUIPA challenge to Texas's categorical ban on audible prayer and laying of hands by a spiritual adviser in the execution chamber. Because the lower courts' denial of equitable relief appears to have rested on a contrary view, this Court should vacate and remand for further proceedings. And because no execution date is imminent, a remand would allow the lower courts time to reconsider petitioner's claim based on a more developed record. The State might, for example, be able to offer more compelling evidence to support a categorical ban on audible prayer and touching. At minimum, the State could likely justify significant limitations on those activities. A remand would also allow the lower courts to consider in the first instance other fact-intensive issues that would benefit from a supplemented record.

One of those issues is the State's exhaustion defense to petitioner's audible-prayer claim, which neither lower court expressly considered. The record below suggests that the same grievance process through which petitioner undisputedly exhausted his laying-of-hands claim may have also exhausted the "administrative remedies" that were "available," 42 U.S.C. 1997e(a), for his audible-prayer claim. Petitioner's grievance proceedings appear to reflect a natural understanding that Pastor Moore's presence would necessarily include at least some audible prayer. And it is not apparent that any further administrative remedy was "available" to petitioner if he learned otherwise only shortly before the execution, as a result of his counsel's queries.

On the merits, petitioner has satisfied RLUIPA's threshold requirement to show that Texas's prohibitions impose a substantial burden on his religious exercise. 42 U.S.C. 2000cc-1(a). The lower courts credited the sincerity of his representations that his faith calls for both audible prayer and the laying of hands by his pastor in the execution chamber. And under the text of the statute, this Court's decisions, and straightforward logic, Texas's prohibition on those practices constitutes a substantial burden even if it does not compel petitioner himself to violate religious tenets.

The substantial burden would be permissible under RLUIPA if the State could "demonstrate[]" that its policy "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a)(2). Texas's execution-chamber restrictions plainly further compelling interests in the security of the prison and the sensitive lethal-injection procedure, the solemnity of the execution, and the privacy of those conducting it. Courts should afford considerable deference to the expert judgments of Texas prison officials about the policies necessary to further those interests. Nonetheless, the somewhat more accommodating practices of other jurisdictions—including the federal government—suggest that similarly effective, but less restrictive, alternatives to unqualified bans on audible prayer and touching may exist, particularly with respect to audible prayer.

The preliminary equitable relief that petitioner has sought, although commonly labeled a "stay" of execution, is in substance a form of preliminary injunctive relief because it is directed at the state officials implementing his criminal judgment rather than at the judgment itself. Petitioner sought tailored relief that would

prohibit his execution only if prison officials failed to accommodate his religious beliefs. The denial of that relief should be vacated because it was premised on a flawed analysis of his RLUIPA claim on the then-existing record. A remand would allow for a reevaluation of the traditional equitable factors—informed by further record development on issues such as delay, exhaustion, and the State's justifications for its restrictions—and the entry of any appropriate relief.

ARGUMENT

The lower courts should reexamine petitioner's RLUIPA challenge to a categorical ban on audible prayer and laying of hands by a spiritual adviser during an execution. Particularly because petitioner could reasonably have assumed that Pastor Moore's presence would necessarily entail at least some speech, petitioner may well have exhausted, or else been unable to exhaust, his audible-prayer claim as well as his laying-of-hands claim. The allegations in his complaint, which the lower courts credited, satisfy RLUIPA's threshold requirement to show that denial of the requested accommodations would substantially burden the exercise of his sincere religious beliefs. And while the State has compelling interests in the security and solemnity of the execution, and the privacy of the personnel involved, it has not yet shown that an unqualified ban—which is inconsistent with federal execution practices, particularly with respect to audible prayer—is the least restrictive means of advancing those interests. Whether or not the State's motion to lodge new evidence in this Court is granted, the most prudent course would likely be to remand for the lower courts to further explore petitioner's RLUIPA claim and other issues (such as delay and exhaustion) in the first instance and then reapply the

standards for equitable relief. That approach is particularly appropriate now that no execution date is imminent.

I. PETITIONER MAY WELL HAVE SATISFIED THE PLRA'S EXHAUSTION REQUIREMENT FOR HIS AUDIBLE-PRAYER CLAIM

Neither the district court nor the court of appeals addressed the State's contention that petitioner failed to exhaust his audible-prayer claim. In the absence of a fully developed lower-court record, the Court may ultimately elect to adhere to its usual practice of declining to consider such issues in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). But at least based on the record below, it appears that petitioner may well have exhausted his audible-prayer claim.

The parties do not dispute that the PLRA's exhaustion requirement, codified in 42 U.S.C. 1997e(a), applies to petitioner's claims. Section 1997e(a) forecloses a federal-law claim "with respect to prison conditions" unless the plaintiff exhausts "such administrative remedies as are available." The exhaustion requirement is "mandatory" and not subject to any atextual "'special circumstances'" exceptions. *Ross* v. *Blake*, 578 U.S. 632, 640 (2016). A failure to exhaust may instead be excused only if the administrative process is not "'available'"—*i.e.*, not "'capable of use' to obtain 'some relief for the action complained of.'" *Id.* at 642 (citation omitted).

Petitioner here undisputedly exhausted his laying-of-hands claim. See Second Am. Compl., Ex. 4; Br. in Opp. 12-13 (challenging exhaustion only as to the audible-prayer claim). And the currently available facts suggest that he may well have exhausted his audible-prayer claim in the same process. In petitioner's June 2021 grievance filing, he requested that Pastor Moore be

allowed to "'lay hands on me' & *pray over me* while I am being executed." Second Am. Compl., Ex. 4, at 4 (emphasis added). In denying the grievance, the State informed petitioner only that "a Spiritual Advisor is not allowed to *touch* an inmate while inside the execution chamber," *ibid.* (emphasis altered), without articulating any limits on praying. Petitioner's administrative appeal accordingly reiterated only a need for his pastor to "'lay hands on me' to pray," D. Ct. Doc. 13-3, at 1, suggesting a natural understanding that audible prayer was an inherent aspect of the pastor's presence.

That understanding is consistent with Texas's April 2021 policy permitting spiritual-adviser access to the execution chamber, which does not expressly bar audible prayer. Instead, the policy provides only that spiritual-adviser behavior that is "disruptive to the execution procedure shall be cause for immediate removal." 2021 Execution Procedure 10. Prior Texas practices, in which state chaplains would pray with inmates during executions, would have reinforced the impression that at least some audible prayer would be allowed. See pp. 2-3, *supra*. And in litigation regarding spiritual-adviser access to the execution chamber under the State's relatively brief no-advisers policy, plaintiffs —including petitioner—seemingly presumed that a spiritual adviser's presence would include at least some vocalized prayer. See, *e.g.*, 20-cv-205 D. Ct. Doc. 1 ¶¶ 23-24 (petitioner's 2020 complaint seeking access for "Pastor Moore to be present at the time of [petitioner's] execution to pray with him"); *Gutierrez* Remand Op. 11.

Petitioner's counsel apparently did send an inquiry (which does not seem to be in the public record) to prison officials about audible prayer on August 16, 2021. See Second Am. Compl., Ex. 7. But if petitioner first

learned of the State's complete prohibition on audible prayer only through prison officials' August 19 response, an administrative remedy might reasonably be considered "unavailable." *Ross*, 578 U.S. at 644. This Court has defined unavailability to include circumstances where a "misrepresentation" by "prison administrators" has "thwart[ed] [an] inmate[] from taking advantage of [the administrative] process." *Ibid.* Although the record below suggests that any misrepresentation was implicit and presumably unintentional, if the three weeks remaining before the execution date were insufficient for the processing of a new grievance and the timely initiation of any pre-execution litigation, any failure to exhaust may be statutorily excusable.

II. THE CHALLENGED POLICY IMPOSES A SUBSTANTIAL BURDEN ON PETITIONER'S RELIGIOUS EXERCISE

On the merits, the threshold question in a RLUIPA case is whether the challenged policy imposes a "substantial burden" on the plaintiff's "religious exercise," defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-1(a), 2000cc-5(7)(A). Although that definition is "capacious[]," *Holt* v. *Hobbs*, 574 U.S. 352, 358 (2015), it has limits. Petitioner, however, has made the required showing here.

A. The threshold substantial-burden inquiry has two components. First, a prisoner's accommodation request "must be sincerely based on a religious belief and not some other motivation." *Holt*, 574 U.S. at 360-361; see *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 n.28 (2014) (same under parallel RFRA provision). If, for example, "an institution suspects that an inmate is using religious activity to cloak illicit conduct, prison officials may appropriately question whether a prisoner's

religiosity, asserted as the basis for a requested accommodation, is authentic." *Holt*, 574 U.S. at 369 (citation and internal quotation marks omitted).

Second, as its text indicates, "RLUIPA proscribes only government actions that *substantially* burden religious exercise." *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1325 (10th Cir.) (Gorsuch, J., concurring), cert. denied, 562 U.S. 967 (2010). "An inconsequential or *de minimis* burden on religious practice does not rise to th[at] level." *Kaemmerling* v. *Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008). The "practice burdened need not be central to the adherent's belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion." *Sossamon* v. *Lone Star State of Texas*, 560 F.3d 316, 332 (5th Cir. 2009), aff'd on other grounds, 563 U.S. 277 (2011).

B. Here, petitioner has asserted that, "in accordance with his * * * faith tradition," his pastor "needs to lay his hands on" him and "vocalize[] * * * prayers" at the time of his death "to help guide him into the afterlife." Second Am. Compl. ¶¶ 22-23; see *id.* ¶¶ 3-4, 6-7, 24-25, 50, 64 (elaborating on petitioner's beliefs); *id.* Ex. 2 (pastor's affidavit). By any measure, those are important beliefs, implicating profound spiritual issues, whose observance fits within RLUIPA's definition of "religious exercise." 42 U.S.C. 2000cc-5(7)(A).

Respondents observe (Br. in Opp. 32-33) that petitioner disclaimed the need for physical contact with his pastor in his August 2020 suit. See p. 5, *supra*. Petitioner suggests (Reply Br. 2) that this apparent shift in position resulted from further pastoral discussion over the intervening months. Such shifts or contradictions may be probative of sincerity. Here, however, although Chief Judge Owen suggested that the timing of peti-

tioner's assertion of his beliefs about laying of hands may be relevant to the balance of the equities, Pet. App. A4 (concurring opinion), none of the judges below questioned the sincerity of petitioner's beliefs for purposes of the RLUIPA analysis, see *id.* at B5 ("[Petitioner's] pleadings do not give any reason to doubt his sincerely held religious beliefs."); see also *id.* at A4 (Owen, C.J., concurring) ("I do not doubt the sincerity of [petitioner's] religious beliefs."); *id.* at A9, A12 (Dennis, J., dissenting) (similar).

And the challenged policy substantially burdens petitioner's observance of those religious beliefs. It was apparently undisputed on the record below that Texas's policy categorically forbids the audible prayer and laying of hands that petitioner asserts are important parts of his religious practice. See Pet. App. B2. Contrary to respondents' assertions, neither the general applicability of that prohibition to all inmates facing execution (see Br. in Op. 15, 21-22), nor the greater burdens previously imposed on other prisoners under a policy that excluded spiritual advisers from the execution chamber entirely (*id.* at 21-22), mitigates the substantial burden that the current policy imposes on petitioner himself. "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise" of a particular person, "not whether the RLUIPA claimant is able to engage in other forms of religious exercise" or the State was previously even less accommodating of others. *Holt*, 574 U.S. at 361-362.

C. Respondents have contended (Br. in Opp. 18-22) that their policy does not impose a substantial burden because it denies petitioner a religious benefit, rather than forcing him to violate his beliefs. That proposed distinction lacks foundation in RLUIPA's text.

Forcing a person to violate a religious belief is one way to impose a "substantial burden" on religious exercise, 42 U.S.C. 2000cc-1(a), but it is not the only way. A government can also impose a substantial burden by, for example, prohibiting religious believers from possessing items used in religious rituals or wearing religious attire. See, *e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (applying parallel RFRA provision to religious request for access to controlled substance); *Cutter*, 544 U.S. at 721 n.9 (discussing prison restriction on wearing of yarmulkes). RLUIPA, moreover, was enacted against a backdrop of prison officials' denial of affirmative accommodations, such as halal meals, sacramental wine, or food that could be saved until an inmate was religiously allowed to eat. See *Cutter*, 544 U.S. at 716 n.5, 721 n.9.

Courts have accordingly widely recognized that RLUIPA applies not only to prison policies that "require[] the plaintiff to participate in an activity prohibited by a sincerely held religious belief," but also to those that "prevent[] the plaintiff from participating in an activity motivated by a sincerely held religious belief" and important to the plaintiff's religious exercise. *Yellowbear* v. *Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.); see, *e.g.*, *id.* at 56 (using a sweat lodge); *Cavin* v. *Michigan Dep't of Corr.*, 927 F.3d 455, 458-459 (6th Cir. 2019) (group worship); *Ware* v. *Louisiana Dep't of Corr.*, 866 F.3d 263, 267, 269 (5th Cir. 2017) (dreadlocks), cert. denied, 138 S. Ct. 1181 (2018). Indeed, this Court's own actions in recent cases involving RLUIPA claims by inmates seeking a spiritual adviser in the execution chamber are inconsistent with an interpretation of "substantial burden" that would include only forced violations. See *Gutierrez* v. *Saenz*, 141 S. Ct. 127

(2020) (staying execution based on a spiritual-adviser-presence claim); *Dunn* v. *Smith*, 141 S. Ct. 725 (2021) (declining to vacate injunction halting execution based on similar claim).

Nor would a distinction between forcing religious violations and denying religious accommodations be logically coherent or administrable. Many restrictions could easily be described as either. For example, respondents have relied (Br. in Opp. 14, 18, 20 & n.9) on this Court's description of the RLUIPA claim in *Holt* v. *Hobbs* as a challenge to a policy requiring the plaintiff "to shave his beard" and thus to "'engage in conduct that seriously violate[d] his religious beliefs.'" 574 U.S. at 361 (brackets and citation omitted). But the Court also described the same prison policy in terms of "the growing of a beard," which the inmate regarded as part of his "religious exercise." *Ibid.* The Court did not draw any sharp distinction between a compelled violation of a religious belief (shaving a beard) and denial of a benefit that enables religious exercise (growing a beard), and any such distinction would be untenable.

III. ON THE RECORD BELOW, TEXAS HAS NOT SHOWN THAT THE CHALLENGED POLICY IS THE LEAST RESTRICTIVE MEANS OF ADVANCING ITS COMPELLING INTERESTS

A substantial burden on petitioner's sincere religious beliefs would be permissible under RLUIPA if respondents could "demonstrate[] that imposition of the burden" is "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc-1(a). Respondents have satisfied the first of those requirements, because Texas's policy furthers compelling governmental interests in safeguarding the

security of the execution, the solemnity of the proceeding, and the privacy of those who carry it out. But on the record below, respondents have not shown that their apparently categorical ban is the least restrictive means of advancing those interests. The federal government and other States have been able to accommodate some audible prayer by spiritual advisers in the execution chamber. And while it might be possible to justify a ban on physical contact with an inmate receiving a lethal injection through intravenous (IV) lines, Texas has not yet made the necessary showing.

A. Texas's Restrictions On Spiritual Advisers' Conduct During Executions Advance Compelling Interests

Respondents' restrictions on the conduct of spiritual advisers in the execution chamber advance multiple compelling governmental interests. First and foremost is Texas's "compelling interest in prison safety and security." *Holt*, 574 U.S. at 362. Although this Court has cautioned against viewing that interest at an overly high level of generality, safety and security are compelling interests in the "particular context," *id.* at 363, of implementing a capital sentence.

As the district court correctly recognized, the State has a "compelling interest in maintaining an orderly, safe, and effective process when carrying out" an execution by lethal injection. Pet. App. B6. In particular, an effective lethal injection requires proper setting and maintenance of the IV lines through which fluids—including the lethal drug—flow into the inmate's body. An effective lethal injection likewise requires that prison officials closely monitor the inmate's condition throughout the procedure. See, *e.g.*, *Baze* v. *Rees*, 553 U.S. 35, 55-56 (2008) (plurality opinion).

States and the federal government have accordingly adopted intricate protocols "setting forth the precise details for carrying out" lethal injections. *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 109-110 (D.C. Cir.) (per curiam) (describing the current federal protocol, including an addendum adopted in 2019), cert. denied, 141 S. Ct. 180 (2020)*; see 2021 Execution Procedure. Any disruption to those carefully prescribed procedures—such as intentional or accidental interference with the IV lines, inmate restraints, or monitoring equipment—could cause serious problems, including ineffective lethal-drug delivery or pain for the inmate. Cf. *Glossip* v. *Gross*, 576 U.S. 863, 871-873 (2015) (explaining problems caused by ineffective insertion of IV lines during Oklahoma's 2014 execution of inmate Clayton Lockett).

As the district court further recognized, some restrictions on a spiritual adviser's vocalizations and physical conduct in the execution chamber may directly advance the objective of "ensuring 'that the execution occurs without any complications, distractions, or disruptions.'" Pet. App. B7 (quoting *Murphy* v. *Collier*, 139 S. Ct. 1475, 1476 (2019) (Kavanaugh, J., concurring)); accord *id.* at A3-A4 (Owen, C.J., concurring); *id.* at A5-A6 (Higginbotham, J., concurring); *id.* at A13 (Dennis, J., dissenting). Even if the spiritual adviser acts in complete good faith, the mere presence of an additional speaking person in the execution chamber—

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* The Attorney General has suspended use of the addendum to the federal execution protocol pending a review of the Department of Justice's policies and procedures governing capital sentences. See Memorandum from Merrick B. Garland, Attorney General, to the Deputy Attorney General et al., *Re: Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021).

particularly one who has not participated in an execution before—has the potential for either physical (*e.g.*, jostling an IV needle) or audible (*e.g.*, talking during audio monitoring) disruption. And even apart from such disruptions, the need for prison personnel to watch the spiritual adviser requires resources, introduces potential distraction, and complicates the proceedings.

Separately but relatedly, the State has a compelling interest in "preserving the dignity of the [execution] procedure." *Baze*, 553 U.S. at 57 (plurality opinion). An execution is an "emotionally charged" proceeding. Pet. App. B6. In Texas, the inmate's family members, as well as victims' family members, are typically invited to attend. *The Witness*, *supra*. The "tension and passion" of that environment "add a layer of unpredictability to events." *Gutierrez* Remand Op. 19. And the State has a powerful interest in ensuring that the execution occurs with appropriate "solemnity," recognizing both the humanity of the inmate and the interest in "closure for victims' families." *Dunn*, 141 S. Ct. at 726-727 (Kavanaugh, J., dissenting from denial of application to vacate injunction). Actions or words by a spiritual adviser that distract from the proceedings could interfere with those important goals.

Finally, the State has an interest in maintaining the privacy of personnel involved in the execution procedure. As courts and state legislatures have recognized, "any actions leading to the disclosure of members of the execution team" could cause those members to decline to participate in future executions. *Flynt* v. *Lombardi*, 885 F.3d 508, 513 (8th Cir. 2018); see, *e.g.*, Tex. Code Crim. Proc. Ann. art. 43.14(b) (West 2018). Partly for that reason, both Texas and the federal BOP have allowed religious advisers to enter the execution chamber

only after confidential personnel have set the IV lines and moved to a different room. See 2021 Execution Procedure 10; p. 24, *infra*. The federal BOP has also instructed spiritual advisers that they must leave the execution chamber if confidential personnel are required to reenter. See p. 24, *infra*. Such precautions directly advance the compelling interest in preventing intentional or inadvertent exposure.

B. The Record Below Suggests That Texas Can Advance Its Compelling Interests With Measures Less Restrictive Than A Complete Ban

For Texas's policy to be validly applied to petitioner under RLUIPA, respondents must additionally demonstrate that it "is the least restrictive means of furthering" the State's compelling interests. 42 U.S.C. 2000cc-1(a)(2). That standard "requires the government to 'show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.'" *Holt*, 574 U.S. at 364-365 (brackets and citation omitted). "If a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id.* at 365 (brackets and citation omitted). The Court has recognized prison officials' "expert[ise] in running prisons and evaluating the likely effects of altering prison rules" and cautioned courts to "respect that expertise" in assessing the existence of viable and effective alternatives to a challenged practice. *Id.* at 364. Here, however, the circumstances provide grounds to question a professed need for a blanket ban, as opposed to a more tailored restriction—particularly with respect to audible prayer by spiritual advisers.

1. A primary way for courts to appropriately assess prison officials' expert judgment is to compare a chal-

lenged prison practice to the practices of other similar institutions. See *Holt*, 574 U.S. at 364. Here, such comparisons—particularly with the federal BOP's practices during recent executions—indicate that categorical preclusion of all audible prayer and physical contact by spiritual advisers is likely not the least restrictive means of advancing the State's compelling interests.

The federal government has long sought to accommodate inmates' religious practices when carrying out capital sentences. A 1942 BOP manual provided, for example, that up to three "spiritual advisers * * * as may be requested by the prisoner" may attend a federal execution. Gov't Opp. to Stay Appl. App. at 4a, *Bourgeois* v. *Barr*, 141 S. Ct. 180 (2020) (No. 19A1050). And in at least some cases, spiritual advisers appear to have engaged in audible prayer or physical contact with inmates during executions.

At a 1936 execution, a federal inmate "[c]lasp[ed] the hand of the prison chaplain" in his final moments atop the gallows as the hangman adjusted the noose. Associated Press, *First Kidnapper Hanged Under Lindbergh Law* (June 20, 1936). At another federal execution that year, an inmate's spiritual adviser said a prayer beside him on the scaffold just before "[t]he trap was sprung." Associated Press, *Murderer of G-Man Is Hanged in Indiana* (Mar. 24, 1936). At the 1953 federal execution of Julius and Ethel Rosenberg, a rabbi standing near the electric chair read prayers as the executioner pulled the switch. Associated Press, *Atom Spies Walk Calmly to Death* (June 20, 1953). And at a 1956 federal execution, two "priests entered the death chamber and recited a prayer while [the inmate] was being strapped into the chair" before he was executed by

lethal gas. Associated Press, *Arthur Ross Brown Dies Quickly* (Feb. 24, 1956).

More recently, between July 2020 and January 2021, the federal BOP conducted 13 executions at the federal execution chamber in Terre Haute, Indiana. The BOP has informed this Office about the practices that it followed with respect to spiritual advisers during those executions. The BOP allowed one spiritual adviser of the inmate's choice in the execution chamber, and 11 of the 13 inmates elected to have a spiritual adviser present. In advance of those executions, the BOP vetted the advisers and reached out to them to discuss their activities in the execution chamber. The spiritual advisers each agreed that they would not cause a disruption during the execution; that any disruption would be cause for their immediate removal from the facility; and that they would be required to leave the execution chamber if confidential personnel were required to reenter.

The spiritual advisers also agreed generally to remain silent and not approach the inmate. In practice, however, the BOP allowed some flexibility with respect to those limitations, often based on pre-execution discussions with each adviser. Shortly before each execution was scheduled to begin, the inmate was moved into the execution chamber and restrained on a gurney. After confidential personnel inserted IV lines, the inmate's spiritual adviser was permitted to enter the chamber with a BOP security escort. According to BOP records, at least six religious advisers spoke or prayed audibly with inmates in the execution chamber during times when official personnel were not speaking. For example, at the first of the recent federal executions, inmate Daniel Lee and his spiritual adviser, an Asatru priestess, "were often joking and laughing with each other" in

the chamber during a litigation-related delay. 19-mc-145 D. Ct. Doc. 246-1, Ex. B, at 1 (D.D.C. Sept. 14, 2020) (BOP Mem.). When flow of the lethal drug began, Lee and the priestess "recit[ed] * * * religious chants, with the" priestess "chanting and inmate Lee repeating the chant." *Ibid.*

Although the BOP's practices across executions were not entirely uniform, inmates and their spiritual advisers likewise prayed and interacted audibly at other federal executions. For example, Wesley Purkey's spiritual adviser, a Buddhist priest, "was praying out loud" when administration of the lethal drug began. BOP Mem. 3. During the execution of Brandon Bernard, he and his spiritual adviser, a Seventh Day Adventist pastor, "spoke to each other and prayed together" in the execution chamber. 19-mc-145 D. Ct. Doc. 367-1, at 1 (D.D.C. Dec. 22, 2020). Similarly, Alfred Bourgeois and his spiritual adviser, a Methodist pastor, "prayed together" in the execution chamber shortly before administration of the lethal drug. 19-mc-145 D. Ct. Doc. 367-2, at 1 (D.D.C. Dec. 22, 2020). And Dustin Honken's spiritual adviser, a Catholic priest, "performed a religious ceremony" with him in the execution chamber that involved prayer and brief physical contact. BOP Mem. 4.

Those recent federal practices are consistent with the practices of a number of States. As previously discussed, Texas itself apparently long allowed state chaplains to pray with, and even sometimes touch, the inmate in the chamber during the execution. See pp. 2-3, *supra*. Similarly, state chaplains in Alabama would "pray with and touch the inmate's hand as a lethal cocktail of drugs is administered." *Ray* v. *Commissioner*, 915 F.3d 689, 697 (11th Cir.), stay vacated, 139 S. Ct.

661 (2019). And in response to recent litigation, Alabama agreed to permit the inmate's chosen spiritual adviser to anoint the inmate's head with oil in the execution chamber before the curtains to the witness room are opened, to talk with the inmate prior to the execution, and to "pray with [him] and hold his hand" after the execution begins. 20-cv-1026 D. Ct. Doc. 57, at 4 n.13 (M.D. Ala. June 16, 2021). Similarly, Georgia's lethal-injection protocol allows a spiritual adviser in the execution chamber "to administer to the spiritual needs of the condemned and to provide a prayer on the condemned's behalf upon request." Georgia Dep't of Corr., *Lethal Injection Procedures* 1 (July 17, 2012). And in Oklahoma, state chaplains have stood "at the head of [the inmate's] bed" with "an open Bible" and read aloud "as the execution starts." Bobby Ross, Jr., *Execution Day Starts Early, Lasts 18 Hours*, The Daily Oklahoman (June 24, 2000).

None of the spiritual advisers present in the execution chamber during the recent federal executions created any meaningful disruption. Nor is the government aware of any such disruptions in other States with similar practices. See *Dunn*, 141 S. Ct. at 726 (Kagan, J., concurring in denial of application to vacate injunction) ("Nowhere, as far as I can tell, has the presence of a clergy member (whether state-appointed or independent) disturbed an execution."). And in response to this Court's limited remand following the stay of an earlier execution, Texas submitted "no evidence of any disruption caused by the spiritual advisors" in the execution chamber during any of the State's executions over the past four decades. *Gutierrez* Remand Op. 9; see *id.* at 20 ("There is no evidence in the record of security problems * * * caused by clergy.").

2. The experiences of the federal government, Texas, and other States cast considerable doubt on whether a categorical ban on audible prayer and physical contact by religious advisers in the execution chamber is the least restrictive means of advancing the State's compelling interests. See *Holt*, 574 U.S. at 368-369 (contrasting a state prison policy with BOP's and other States' policies).

Texas's position is particularly questionable with respect to petitioner's audible-prayer claim, as spiritual-adviser prayers appear to have been not only unproblematic, but relatively common, in other executions. Their frequency, while not "controlling" for RLUIPA purposes, *Holt*, 574 U.S. at 368 (citation omitted), implies that at least some limited audible prayer would not present a meaningful risk of undermining the security or solemnity of the execution proceeding. Cf. *Gutierrez* Remand Op. 18-27 (concluding that allowing outside religious advisers into Texas execution chamber would not present meaningful security risks).

In permitting such an accommodation, Texas could take the same measures "to ensure that a clergy member will act responsibly during an execution" that it is entitled to take before allowing the spiritual adviser to enter the execution chamber in the first place. *Dunn*, 141 S. Ct. at 726 (Kagan, J., concurring). For example, as the federal BOP has done, Texas can vet outside spiritual advisers in advance, obtain their agreement not to disrupt the execution, require accompaniment and close monitoring by prison security, and make clear that any disruptive actions or failure to follow prison officials' directions will result in immediate removal and potentially other penalties. See *ibid.* Texas could also impose significant specific restrictions on the spiritual adviser's

conduct in the execution chamber, particularly with respect to physical contact.

3. Perhaps in part because of the emergency posture of the case in the days leading up to the previously scheduled execution date, the State did not present a specific justification for categorically barring Pastor Moore from audible prayer or physical contact with petitioner in the execution chamber. Texas has instead primarily relied (Br. in Opp. 23-26) on its understanding that the federal BOP imposes a categorical ban on audible prayer and physical contact. For reasons just discussed, that understanding of federal practice was incomplete (probably due to the limited public information available).

It remains conceivable that the State could justify the entirety of a categorical ban based on state-specific considerations. See *Holt*, 574 U.S. at 369 (declining to "suggest that RLUIPA requires a prison to grant a particular religious exemption as soon as a few other jurisdictions do so"). If Texas prison officials were to present a credible basis for concluding that security measures like those just discussed are insufficient to minimize the various dangers of spiritual-adviser activity in the specific context of a Texas execution, their judgment should be respected. See *id.* at 368-369. For example, the State might show that the configuration of its execution facilities, resource constraints, particular procedures for carrying out or monitoring an execution, or other valid considerations make it infeasible to follow an approach similar to the federal government's recent practice.

Alternatively, Texas could readily justify significant restrictions that are less absolute than its current blanket ban. See *Yellowbear*, 741 F.3d at 64 (explaining that

RLUIPA may produce a different result when the government is not contending "at the level of absolutes"). In particular, the State should be able to adopt audible-prayer limitations ensuring that prison officials in the execution chamber can communicate with each other and the outside; prison officials and the inmate can make statements that can be heard clearly in the witness rooms; prison officials and the medical team are able to monitor the inmate's condition; and the execution environment retains dignity and solemnity.

Because physical contact has greater disruptive potential than audible prayer, Texas could even more readily place restrictions—and perhaps even a categorical ban—on such activity. Even if Texas has previously allowed physical contact by state chaplains, see pp. 2-3, *supra*, physical contact by an outside spiritual adviser presents more acute concerns. Such concerns led the federal BOP to generally prohibit physical contact during the recent federal executions, and physical contact by outside spiritual advisers likewise appears to be infrequent in other jurisdictions. Accordingly, the State should be able at least to prohibit any contact near the IV lines, inmate restraints, or monitoring equipment; any conduct that would obstruct prison personnel from readily accessing the inmate; and any movement or contact that would expose the identity of confidential execution personnel.

4. As Texas correctly notes (Br. in Opp. 28-29), courts should not entangle themselves in the minutiae of execution logistics. Cf. *Baze*, 553 U.S. at 51 (plurality opinion) (cautioning that courts are not "boards of inquiry charged with determining 'best practices' for executions"). In considering the challenged policy here, however, a court would not need to prescribe any

particular execution arrangements, but instead simply assess whether respondents have shown that denial of *all* audible prayer and physical contact by religious advisers in the execution chamber is the least restrictive means of advancing the State's compelling interests. On the record below, respondents have not done so, particularly with respect to audible prayer.

IV. THE PRELIMINARY EQUITABLE RELIEF THAT PETITIONER SEEKS IS INJUNCTIVE IN NATURE AND SHOULD BE RECONSIDERED ON REMAND

Although commonly referred to as a "stay" of execution, the equitable relief that petitioner sought in the district court is in substance a preliminary injunction. As this Court has explained, a "stay" is judicial intervention that "temporarily suspend[s] the source of authority to act—the order or judgment in question." *Nken* v. *Holder*, 556 U.S. 418, 428-429 (2009). An inmate seeking a "stay of execution" based on a challenge to execution procedures, however, is not asking the courts to suspend the criminal judgment that authorizes the execution, which may instead be challenged through the procedures for criminal collateral review. See *Hill* v. *McDonough*, 547 U.S. 573, 579-580 (2006) (permitting challenge to execution method through suit under 42 U.S.C. 1983 rather than habeas petition because the claim did not "challenge the sentence itself").

Instead, a plaintiff raising claims like petitioner's seeks judicial intervention to prohibit prison officials from carrying out his capital sentence in a particular way—relief that, whether "preliminary or final," is injunctive in nature, because it "directs the conduct of a party" and "'operat[es] *in personam*.'" *Nken*, 556 U.S. at 428 (citation omitted). As petitioner's complaint recognized (Second Am. Compl. 18-19), the plaintiff in such

an action may obtain at most the limited relief of enjoining prison officials from employing unlawful execution procedures—not from carrying out his sentence altogether. See *Nelson* v. *Campbell*, 541 U.S. 637, 648 (2004) (discussing propriety of limiting equitable relief to "enjoin an allegedly unnecessary" execution procedure, rather than "enjoin[ing] the execution"); see also 18 U.S.C. 3626(a)(2) ("Preliminary injunctive relief [in prison-conditions cases] must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.").

The district court here denied such relief, and the court of appeals appears to have both affirmed that denial and declined to grant relief on its own. See Pet. App. A1-A2 (noting appellate posture, issuing order "as the mandate," and "deny[ing] the motion for a stay of execution") (capitalization omitted). The well-established standard applicable to petitioner's requests for relief in both the district court and the court of appeals required him to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); cf. *Nken*, 556 U.S. at 434 (describing similar and "substantial[ly] overlap[ping]" four-factor test for true "stay"). The courts below appear to have premised their denials principally on their view that petitioner was unlikely to succeed on the merits of his RLUIPA claim. See Pet. App. B9 (concluding after merits discussion that equitable factors "d[id] not tip the scales in [petitioner's] favor"); *id.* at A1-A2

(summary affirmance); *id.* at A3-A16 (all three separate opinions principally discussing merits).

Because Texas has not, on the record below, shown that a categorical ban is narrowly tailored to serve its compelling interests (particularly with respect to audible prayer), see pp. 22-30, *supra*, the lower courts' view of the merits was mistaken. It is possible, however, that denial of preliminary relief was nevertheless appropriate based on the remaining equitable factors. See, *e.g.*, *Winter*, 555 U.S. at 31-33 (holding that an injunction should be denied regardless of likelihood of success on the merits). In particular, this Court has instructed that, in a capital case, "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," and that courts should apply "'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650). But neither lower court has yet determined whether preliminary equitable relief should be denied based solely or primarily on delay or other non-merits considerations.

The appropriate course is accordingly to remand for further proceedings in the lower courts. See *Cutter*, 544 U.S. at 718 n.7 ("[This Court is] a court of review, not of first view."). That is particularly so because the circumstances of this case have changed since the lower courts considered it. As a result of the stay of execution entered by this Court, the previously scheduled execution date has now passed, and the State has not rescheduled the execution. Cf. Tex. Code Crim. Proc. Ann. art. 43.141(c) (West 2018) ("An execution date may not be

earlier than the 91st day after the date the convicting court enters the order setting the execution date."). This Court can accordingly allow its own stay of execution to expire and give the lower courts a new opportunity to evaluate the propriety of preliminary or permanent equitable relief in a less compressed timeframe. The additional time would not only affect imminence considerations informing the equitable factors, but also allow exploration of additional issues that were not addressed in the previous emergency proceedings.

Such issues could include the effect of petitioner's 2020 disclaimer of a religious need for pastoral touch in the execution chamber, and whether the change in petitioner's representations or any other features of this case support finding the sort of "dilatory" or "abusive litigation tactics" that warrant the denial of equitable relief. *Hill*, 547 U.S. at 582-585. Further proceedings would also presumably include additional factfinding on the merits. The lower courts have not yet expressly considered the State's contention that petitioner failed to exhaust his audible-prayer claim, which would provide the State with an affirmative merits defense to that aspect of the complaint. See *Jones* v. *Bock*, 549 U.S. 199, 211-217 (2007). The State may also submit additional evidence about the justification for a categorical ban on audible prayer and touching, or evidence justifying lesser restrictions on those activities. And further review, including potential review in this Court, would be available following any grant or denial of equitable relief on a more complete record.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision below and remand to the court of appeals for further proceedings.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 1997e provides:

Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the

underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988[1] of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988[1] of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.

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[1] See References in Text note below.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

2. 42 U.S.C. 2000cc-1 provides:

Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title,

even if the burden results from a rule of general applicability, 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.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

3. 42 U.S.C. 2000cc-2 provides:

Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause

or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden

by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

4. 42 U.S.C. 2000cc-3 provides:

Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

5. 42 U.S.C. 2000cc-5 provides:

Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.