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.

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

BRIEF FOR RESPONDENTS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

ARI CUENIN
NATALIE D. THOMPSON
ERIC J. HAMILTON
Assistant Solicitors General

QUESTIONS PRESENTED

John Henry Ramirez was sentenced to death for brutally murdering a father of nine for pocket change. Seventeen years after the murder, but seventeen days before his scheduled execution, Ramirez filed his operative complaint, seeking to enjoin his execution pending accommodation of his ostensible religious beliefs.

The questions presented are:

1. Whether Ramirez's inequitable conduct precludes him from receiving a preliminary injunction against his execution under *Hill v. McDonough*, 547 U.S. 573, 584 (2006).
2. Whether Ramirez properly exhausted his claims under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a).
3. Whether Ramirez has demonstrated a likelihood of success on the merits of his claims, including:
   a. Whether Ramirez 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 the Texas Department of Criminal Justice (TDCJ) has burdened his sincerely held religious beliefs by rejecting his requests for pastoral touch and vocalization while a lethal injection is being administered.
   b. Assuming Ramirez met that burden, whether TDCJ has demonstrated that its policies are the least-restrictive means of advancing a compelling governmental interest.
   c. Whether Ramirez has preserved a First Amendment claim that is likely to succeed on the merits.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Cases (continued):

Page(s)

Cases (continued):

Page(s)

Cases (continued):

Page(s)

Constitutional Provisions and Statutes:

Other Authorities:

Page(s)

Other Authorities (continued):

Page(s)

Other Authorities (continued):

Page(s)

Other Authorities (continued):

Page(s)

Other Authorities (continued):

STATEMENT

I. Ramirez's Capital Sentence for Stabbing Pablo Castro 29 Times for $1.25

In 2004, Pablo Castro, a father of nine, lived in Corpus Christi.[1] He worked hard to support his family. Lydia Salinas, his long-time manager, testified that they worked the night shift at the Times Market and took turns buying dinner. *Ramirez v. State*, No. AP-76100, 2011 WL 1196886, at *1 (Tex. Crim. App. Mar. 16, 2011) (*Ramirez I*). On July 19, 2004, Salinas bought dinner because Castro had only about $1.00 in his pocket. *Id.* Near close, Castro went to empty the garbage; when Salinas next saw him, Castro was dead—beaten, stabbed 29 times, and lying in a pool of his own blood. *See id.*; *Ramirez v. Stephens*, 641 F. App'x 312, 314 (5th Cir. 2016) (*Ramirez IV*).

The last people to see Castro alive testified that he was attacked by a man later identified as Ramirez. *Ramirez I*, 2011 WL 1196886, at *2. Ramirez had gone out that night to steal money for drugs and alcohol. *Ramirez v. Stephens*, No. 2:12-CV-410, 2015 WL 3629639, at *1 (S.D. Tex. June 10, 2015) (*Ramirez III*). Bystanders found Castro "conscious" but "gurgling and spitting out blood" with a "large bloody gash on his throat." *Id.* at *1. Castro died at the scene for the $1.25 in his pocket. *Id.*

After absconding to Mexico for over three years, Ramirez was tried for Castro's brutal murder in 2008. At trial, he admitted to killing Castro but denied the

[1] Sara Lee Fernandez, *Rosary Held for Slain 'Amigo': Family, Friends Gather to Grieve for Pablo Castro*, CORPUS CHRISTI CALLER-TIMES (July 23, 2004), 2004 WLNR 24784667.

robbery that made it a capital offense. *Ramirez I*, 2011 WL 1196886, at *6-8. A jury disagreed, and Ramirez was sentenced to death in December 2008. *Ramirez IV*, 641 F. App'x at 315.

Ramirez spent the next eight years attacking his conviction and sentence through appeals and post-conviction proceedings. Notably, Ramirez claimed his lawyer was constitutionally ineffective for complying with his instructions to stop offering mitigation evidence during the trial's penalty phase. *Id.* at 316-17; *cf. Ex parte Ramirez*, No. WR–72,735–03, 2012 WL 4834115, at *1 (Tex. Crim. App. Oct. 10, 2012) (*Ramirez II*). That litigation became final five years ago, *Ramirez v. Davis*, 137 S. Ct. 279 (2016) (*Ramirez V*), and Ramirez's execution was first set for February 2, 2017, JA.21.

II. Texas's Execution Protocols

Executions present complex and competing legal, ethical, and logistical considerations. *See, e.g.*, *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality op.). Texas has updated its procedures over the years: most recently to reflect this Court's guidance, *Dunn v. Smith*, 141 S. Ct. 725 (2021); *Murphy v. Collier*, 139 S. Ct. 1475 (2019), but also to mitigate security and suffering concerns, *infra* pp.37-38. TDCJ's execution protocols balance multiple interests, including the solemnity of the occasion, the State's interests in enforcing valid criminal judgments, maintaining uniformity in executions to reduce the opportunity for errors, the safety and privacy of execution personnel, the rights of the inmate, and closure for the victim's family and the community.

A. TDCJ's execution manual describes the process in detail. JA.32-46, 133-52. The 30-day process begins with a meeting between prison officials and the inmate to gather information such as whether the inmate wants a

spiritual advisor to minister to him on execution day and how to distribute the inmate's trust account. *Cf.* JA.134. On execution day, the inmate may see family, friends, his chosen spiritual advisor, and his lawyer. JA.142. Consistent with TDCJ policy, contact visits are prohibited on death row. TDCJ, OFFENDER ORIENTATION HANDBOOK 103 (Feb. 2017), https://tinyurl.com/4xja484j [hereinafter "*Handbook*"].

On the scheduled execution date, the inmate is transferred to Huntsville in the early afternoon, *see* JA.146-47, and escorted to the execution chamber at approximately 6 p.m., JA.148. A licensed medical professional on the drug team sets and verifies the function of intravenous lines. JA.148-49. The drug team then departs to an adjoining room where its members can observe any visible or audible signs of distress from the inmate throughout the procedure. *See* JA.172-74. This precaution allows the drug team to detect even subtle problems—and thereby prevent unnecessary inmate suffering—while preserving drug team anonymity. *See* U.S. Br. 21-22.

Once the drug team has departed, execution witnesses—including the media and the victim's family—enter viewing rooms adjoining the chamber. *See* JA.149. The inmate may then make a final statement or pray aloud, and the injection is administered. JA.150. As one observer noted, once an execution begins, the chamber is "eerily silent."[2]

Texas uses a single-drug protocol, which renders the inmate unconscious "within 20 to 30 seconds." *Bucklew v. Precythe*, 883 F.3d 1087, 1096 n.4 (8th Cir. 2018). Staff members remain silent so they can monitor the inmate

[2] Jimmy Jenkin, *Arizona Could Resume Executions With Single-Drug Protocol*, NPR (Sept. 30, 2019), https://tinyurl.com/42r284yx.

through a microphone above the inmate's head. JA.167-69. If something goes awry, the proximity to the inmate and the chamber's small size (approximately nine feet by twelve feet) enable the team to respond promptly—for example, by using a backup syringe of the lethal drug, pentobarbital. *See* JA.150, 167-69.

B. Under the pre-*Murphy* protocol, once the inmate was transferred to Huntsville on the day of his scheduled execution, he could visit only with his lawyer and designated and trained TDCJ staff. JA.40. If the inmate requested, that staff could include a TDCJ chaplain, though TDCJ employed only Christian and Muslim chaplains. *Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring). Spiritual advisors from other faiths were permitted to visit with condemned inmates on the date of execution, JA.38, but unlike prison chaplains, these volunteers were excluded from the chamber to avoid disrupting the procedure intentionally or inadvertently. *See Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring).[3]

This Court's 2019 order in *Murphy* suggested that TDCJ's then-current protocol impermissibly discriminated against inmates who were neither Christian nor Muslim. *Id.* at 1476. Consistent with this Court's anti-discrimination jurisprudence, Justice Kavanaugh suggested that TDCJ could resolve the inmate's denominational-discrimination claim by either allowing non-employee spiritual advisors into the chamber or forbidding all spiritual advisors from the chamber. *Compare id.*, *with Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S.

[3] For example, IV lines are easily displaced or pinched—particularly with an untrained individual in the tight space of the chamber. *Cf.* Greg Miller, *America's Long and Gruesome History of Botched Executions*, WIRED (May 12, 2014), https://tinyurl.com/299tea4x.

Ct. 2335, 2354 (2020) (plurality op.). TDCJ chose the latter. *Cf.* Lumpkin Decl. ¶¶ 6-7, 14 (lodged).

Claims against the State by condemned inmates under RLUIPA swiftly followed. Inmates argued—one of them successfully to this Court—that TDCJ was obligated to permit volunteer chaplains into the chamber. *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020). In 2021, Texas voluntarily amended its protocol to allow an inmate's chosen spiritual advisor to be inside the chamber. JA.149.

An inmate's spiritual advisor may now minister to, pray with, and counsel the inmate until the inmate is taken into the chamber and restrained on the gurney. Lumpkin Decl. ¶¶ 15-16. These volunteers may not speak to or touch the inmate once he is in the chamber to preserve the drug team's ability to observe signs of distress. *Id.* ¶¶ 8-13. The inmate's spiritual advisor nonetheless remains close to and visible by the inmate. *Id.* ¶¶ 4, 15.

III. Ramirez's Efforts to Avoid Execution

Ramirez has evaded execution on three separate occasions since exhausting challenges to his conviction and sentence. He has done so for three different last-minute reasons.

A. 2017 Stay Litigation

Days before his first execution date—set for February 2017—Ramirez insisted that his long-time lawyer provided ineffective assistance by, among other things, not seeking clemency. Order 4-5, *Ramirez v. Davis*, No. 2:12-cv-00410 (S.D. Tex. Jan. 31, 2017), ECF 48 (*Ramirez VI*). The district court expressed concern that Ramirez's claim was a sham, as Ramirez had instructed counsel not to seek clemency, and the same lawyer was involved in a similar incident the prior year. *Id.* at 5 n.4.

Nevertheless, the court concluded that it was improper for counsel *not* to file documents on Ramirez's behalf because the court had not allowed him to withdraw. *Id.* at 7. That petition was rejected as an improper second or successive habeas petition, but it prevented Ramirez's execution for years to come. *Ramirez v. Davis*, 780 F. App'x 110, 111 (5th Cir. 2019) (*Ramirez VII*), *rehearing on cert. denied*, 140 S. Ct. 2797 (2020) (*Ramirez VIII*). Ramirez's execution was set for a second date: September 9, 2020. JA.21.

B. 2020 RLUIPA Claim

Having no further complaints about his lawyers to press, in August 2020, Ramirez switched to claiming that RLUIPA entitled him to his spiritual advisor's presence inside the chamber. JA.21-22.

1. Statutory Framework

Under RLUIPA, the government may not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution," 42 U.S.C. § 2000cc-1(a), unless it can show that burden is the least-restrictive means of furthering "a compelling governmental interest." *Id.*; *see also id.* § 2000cc-2(b). Nevertheless, "a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation." *Holt v. Hobbs*, 574 U.S. 352, 360-61 (2015). And the government retains discretion in how to "eliminate[] the substantial burden." 42 U.S.C. § 2000cc-3(e).

Like all other federal-law prison-conditions litigation, however, a RLUIPA plaintiff must satisfy the PLRA's exhaustion requirements. *Id.* § 2000cc-2(e). Passed to stanch the "endless flow of frivolous litigation" that was "tying our courts in knots," 141 Cong. Rec. S14,626 (daily

ed. Sept. 29, 1995) (statement of Sen. Hatch), the PLRA provides that "[n]o action shall be brought with respect to prison conditions" by an inmate "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Unexhausted claims must be dismissed. *Jones v. Bock*, 549 U.S. 199, 211, 221 (2007).

Texas operates a two-step prison grievance system to provide administrative relief to inmates alleging violations of their rights. Tex. Gov't Code § 501.008; *Moussazadeh v. TDCJ*, 703 F.3d 781, 788 (5th Cir. 2012). Both steps are mandatory and apply to death-row inmates with pending execution dates. *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001); Riley Decl. ¶¶ 3, 10 (lodged). An inmate must try to resolve concerns regarding prison conditions informally. *Handbook*, *supra*, at 73. If unsuccessful, the inmate must complete a preprinted form within 15 days, "clearly stating" the nature of his complaint and the "specific action" requested in response. *Id.* at 74-75. Prison officials at the inmate's unit must respond in writing within 40 days. *Id.* at 74; *see also* Riley Decl. ¶¶ 5, 7. If the inmate is unsatisfied with that resolution, within 15 days he must file a step-two grievance, which is elevated to the Administrative Review and Risk Management Division within TDCJ and expedited as necessary. Riley Decl. ¶¶ 9-10. Absent expedition, prison officials must again respond within 40 days. *Handbook*, *supra*, at 75.

2. Procedural History

In July 2020, Ramirez submitted a grievance complaining: "They do NOT allow us to have spiritual advisor w/ us in the death chamber!" Grievance File 4 (lodged). Before receiving a response, he sued to insist that Dana Moore, a Baptist minister, be permitted to accompany him into the chamber. Pet. Br. 38 n.12, 41. The request

was denied because—consistent with *Murphy*—TDCJ did not permit spiritual advisors in the chamber. JA.44.

In 2020, Ramirez insisted that Pastor Moore's attendance presented no security risk because Moore "need not touch Mr. Ramirez at any time in the execution chamber." JA.61. TDCJ had no basis at the time to question that representation. The parties agreed to dismiss that litigation when the execution date was withdrawn. JA.22.

C. This Proceeding

On February 5, 2021, the State set Ramirez's third execution date: September 8.

Sixty-five days later, on April 11, Ramirez submitted a step-one grievance asking again that Pastor Moore be "present in the death chamber with me," referencing the then-current policy. JA.50-51. When that grievance was denied, he submitted a step-two grievance on April 18 regarding Pastor Moore's presence. JA.54-55. TDCJ responded by changing its policy to allow spiritual advisors to be present in the chamber. *See generally* JA.133-52. Ramirez did not file a grievance regarding touch—an accommodation he affirmatively disclaimed in his first RLUIPA case, JA.61—until June 11. JA.52-53. His grievance was denied on July 2, and he filed a step-two grievance on July 8, JA.53; Pet. Br. 39 n.13.

On August 10, before a response to Ramirez's step-two grievance was provided or due, Ramirez filed a complaint asserting that TDCJ's refusal to allow physical contact by his pastor violated the First Amendment and RLUIPA. JA.1.[4] Ramirez amended his complaint on August 16 and sought a stay of execution on August 18, and

[4] TDCJ denied the step-two grievance on August 16. Grievance File 13.

the district court ordered the State to respond to Ramirez's stay application by August 23. JA.1-2.

The day before the State's response was due, and 17 days before his scheduled execution, Ramirez amended his complaint again. In this operative complaint, Ramirez asserted for the first time a right to prayer vocalization in the chamber. JA.96. He filed no additional grievances in the meantime. *See generally* Grievance File (containing all grievance records filed by Ramirez since January 1, 2020).

On September 2, the district court denied the requested stay. JA.175-83. That court agreed that the State had compelling interests in "maintaining an orderly, safe, and effective process" during an execution as well as in "controlling access to" the chamber. JA.180-81. It likewise credited the State's security concerns in part because Pastor Moore had signed—and promptly violated—a penalty-backed pledge not to disclose TDCJ information. JA.181. The court further concluded no other stay factor favored Ramirez. JA.182-83.

The Fifth Circuit likewise denied Ramirez's stay application, though without a majority opinion. JA.184-85. Chief Judge Owen agreed that the State had met RLUIPA's compelling-interest and least-restrictive-means tests, but further found that "the shifting of Ramirez's litigation posture indicate[d] that [his] change in position is strategic and that delay is the goal." JA.187. She therefore concluded that because Ramirez raised his touch claim "after previously disavowing the need for touch during the execution process . . . the district court's exercise of discretion was not an abuse of that discretion." *Id.* Judge Higginbotham concurred, crediting the "nigh universal reluctance to allow individuals access to the execution chamber beyond the medical team," and

stating that "the complexities attending the administration of drugs in the execution procedure and its failures expose the risks of non-medical hands on the body of a person undergoing" execution. JA.189.

Less than a day before his scheduled execution, Ramirez filed the current petition and stay request, which this Court granted. JA.202.

On the morning Ramirez was scheduled to die, he visited with his family and friends before he was transported to Huntsville, where he had the opportunity to meet with his spiritual advisor for two hours. Redacted Decl. ¶ 7 (lodged). He initially told TDCJ staff he "did not want to waste his time meeting with Pastor Moore." *Id.* "[A]sked again," Ramirez "indicated that he did not want to but then stated, 'I guess I probably should meet with him because I've got this thing in the courts.'" *Id.* ¶ 8.

SUMMARY OF ARGUMENT

I. Ramirez correctly identifies that he seeks to enjoin his execution. This Court begins with "a strong equitable presumption against the grant of" such relief "where a claim could have been brought at such a time as to allow consideration of the merits without" delaying an execution. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Likewise, a capital litigant's "attempt at manipulation" of the judicial process justifies denying equitable relief. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

Ramirez alleges that he has sought substantially the same relief since 2020. Yet after he dismissed his 2020 lawsuit, he waited 240 days to file a new grievance asking to have a pastor accompany him into the chamber; indeed, this request came 51 days after his most recent execution date was set. After TDCJ granted the requested accomodation, Ramirez waited another 38 days to file his next grievance, and without completing

the grievance process, another 60 days to file his complaint. And although he wrought months of delay, Ramirez filed his operative complaint only 17 days before his scheduled execution date. This Court should deny Ramirez additional delay on equitable grounds.

II. Ramirez also failed to satisfy the PLRA's exhaustion requirements. *Porter v. Nussle*, 534 U.S. 516, 532 (2002). Ramirez cannot bring his claims without having first properly exhausted them, which required him to both comply with TDCJ's grievance rules and pursue both steps of the grievance process to their conclusions.

Ramirez did not properly exhaust either his pastoral-touch or vocalization claim. He failed to properly exhaust his pastoral-touch claim because he filed suit before allowing TDCJ to respond to a step-two grievance. He failed to even start the grievance process for his vocalization claim. Ramirez's ambiguous-at-best step-one grievance asking for his pastor to "pray over" him failed to clearly request vocalization. Having received TDCJ's response indicating it did not understand Ramirez's grievance to ask for vocalization, Ramirez was obligated to clarify the relief he sought in a step-two grievance. He did not.

Contrary to both Ramirez's and the United States's contentions, Ramirez's failure to exhaust is inexcusable. As Ramirez's success in obtaining his pastor's presence proves, TDCJ's grievance process works. Against this backdrop, Ramirez cannot meet his burden to show that exhaustion is excused because administrative remedies are unavailable. And in the light of Congress's clear exhaustion requirement, the Court should not judicially amend the PLRA to create a method-of-execution exception. Moreover, rewarding inmates for bringing last-

minute litigation to avoid an execution turns the PLRA's pre-suit exhaustion requirement on its head.

III. If the Court reaches the merits, it should hold that Ramirez's claims have no likelihood of success. Ramirez must show that he sincerely believes in the accomodation he requests *and* that his "request for an accommodation" is "sincerely based on a religious belief and not some other motivation." *Holt*, 574 U.S. at 360-61. Ramirez provides evidence of neither. He relies exclusively on an affidavit from Pastor Moore that speaks only to what *Moore*—not Ramirez—believes. As Chief Judge Owen recognized, JA.187, Ramirez's repeated delays and strategic shifts in litigation posture strongly imply that his accommodation requests are based on a desire to delay his execution, not the sincere religious belief required by RLUIPA.

Even if Ramirez had carried his burden, his RLUIPA claims fail because TDCJ's protocol is the least-restrictive means of achieving the State's compelling interests, which include ensuring security, preventing pain and suffering for Ramirez, and protecting his victim's family from further emotional trauma. An outsider touching the inmate during lethal injection poses an unacceptable risk to the security, integrity, and solemnity of the execution. Even inadvertent interference with the IV lines could cause pain to Ramirez and emotional distress to his victim's family. Vocalizing during the lethal injection would interfere with the drug team's ability to monitor and respond to unexpected occurrences. TDCJ's prohibitions on contact and vocalization further its compelling interests.

Ramirez suggests no less-restrictive means of furthering TDCJ's interests while allowing touch or vocalization. The confined space in the chamber limits where

the spiritual advisor and security escort can stand without blocking the view of either the drug team or witnesses. As to vocalization, Ramirez suggests Moore could whisper in his ear during the lethal injection—but even a whisper amplified by microphone would prevent the drug team from properly monitoring the execution. TDCJ has carried its burdens under RLUIPA.

ARGUMENT

I. Ramirez Is Not Entitled to an Injunction.

"[C]hallenges to lawfully issued [capital] sentences" must be resolved "fairly and expeditiously." *Bucklew*, 139 S. Ct. at 1134. To guard "against attempts to use such challenges as tools to interpose unjustified delay," courts apply a strong presumption against equitable relief for a capital litigant making last-ditch plea to avoid his sentence. *Id.*; *Hill*, 547 U.S. at 584. Ramirez cannot overcome that presumption in the light of his inequitable conduct and the other vital interests at stake, let alone make a clear showing that he satisfies the requirements for an injunction.

A. Ramirez seeks an injunction, not a stay.

TDCJ agrees with Ramirez (at 48) that he seeks relief that is best understood as a preliminary injunction. As the United States explains (at 30-31), a stay of execution suspends the State's authority to enforce Ramirez's sentence, while an injunction prevents specific officials from executing him in a particular way. A method-of-execution challenge may effectively function as a stay, but it seeks an injunction. *See Nelson v. Campbell*, 541 U.S. 637, 648 (2004).

A preliminary injunction "is never awarded as of right." *Munaf v. Green*, 553 U.S. 674, 690 (2008). Ramirez must make a "*clear showing*," *Mazurek v.*

Armstrong, 520 U.S. 968, 972 (1997) (per curiam), "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. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Ramirez cannot meet this demanding standard. Traditional equitable principles preclude him from equitable relief; even if they did not, the strong public interest in the execution of his sentence would prevent injunctive relief. And beyond that, Ramirez's claims are meritless.

B. Ramirez's inequitable conduct forecloses equitable relief.

A capital litigant's dilatory conduct or "attempt at manipulation" of the courts, *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam), can foreclose equitable relief, *Hill*, 547 U.S. at 585. Ramirez has ignored that warning, and his application exemplifies both faults: he has sought delay for delay's sake, relying on strategic reversal and ambiguity.

1. Ramirez has inequitably sought delay.

a. When a party seeking equitable relief "has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him," and "the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933). Applying this principle, the Court has recognized "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. This presumption reflects the traditional

rule that "courts of equity uniformly decline to assist a person who has slept upon his rights." *Gildersleeve v. N.M. Mining Co.*, 161 U.S. 573, 578 (1896).

This Court therefore routinely rejects last-minute requests for equitable relief from capital inmates. For example, in *Gomez*, the Court vacated a stay based on a claim that "lethal gas is cruel and unusual" punishment that could have been brought years earlier. 503 U.S. at 653. More recently, the Court vacated equitable relief in favor of capital defendants who sued two weeks, *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019), or even two months, *Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019), before their executions.

The history of this dispute is rife with delay. Ramirez brutally murdered Pablo Castro 17 years ago; he absconded to Mexico and stayed there for over three years; a jury condemned him 13 years ago; and Pastor Moore started ministering to him over four years ago. JA.47, 61, 191; *Ramirez IV*, 641 F. App'x at 314. Ramirez waited 240 days after dismissing his 2020 lawsuit to file a new grievance seeking his pastor's presence in the chamber. JA.51, 94. He then waited 61 additional days before filing his first grievance seeking touch. JA.51, 53. Ramirez then delayed until 29 days before his execution before initiating this action. JA.1, 14, 53. And Ramirez first raised his vocalization claim 17 days before his scheduled execution. JA.84-86.

Ramirez insists (*e.g.*, at 11) that his beliefs have remained consistent for at least 14 months. Yet he never exhausted his claims, *infra* Part II, and filed his complaint only weeks before his execution, JA.1. Ramirez "could have . . . brought [his claim] at such a time as to allow consideration of the merits without requiring entry

of a stay." *Hill*, 547 U.S. at 584. He chose not to. That alone suffices to deny him relief.

b. Ramirez argues (at 12, 38) his delay is justified because he has "consistently" believed he needed touch and vocalization; he just did not demand them sooner because he assumed both would follow from his pastor's admittance to the chamber. According to Ramirez (at 9-10), TDCJ disabused him of that assumption only in August 2021—thereby excusing his delay. But this Court has already held that an inmate cannot rest on assumptions: Ramirez's failure to seek clarification until shortly before his execution requires denial of his claim. *See Bucklew*, 139 S. Ct. at 1134 n.5.

Ramirez's explanation fails for both claims. He admitted he did not need touch in 2020. JA.61. Concession aside, Ramirez could not have reasonably assumed that TDCJ would allow Pastor Moore to touch him in the chamber. TDCJ *never* allows a non-TDCJ employee to touch a death-row inmate. *Handbook*, *supra*, at 103; *accord* Redacted Decl. ¶ 6. He could not have reasonably believed that TDCJ would allow a non-TDCJ employee to do so for the first time in 13 years at a moment fraught with security risks.[5]

Ramirez's assertion that he assumed his outside spiritual advisor could vocalize if permitted inside the chamber is also false. He claims he realized this limitation only on receipt of an August 19 letter from TDCJ's general counsel. Pet. Br. 42. But the email that precipitated this letter states: "it is [Ramirez's attorney's] understanding that the advisor will have to remain silent." Email from

[5] This conclusion is buttressed by the grievances and pleadings of another death-row inmate who understood the need to explicitly request pastoral touch. Exhibits at 15, *Gonzales v. Collier*, No. 4:21-cv-00828 (S.D. Tex. Mar. 12, 2021), ECF 1-1.

E. Allen to K. Worman (Aug. 16, 2021) (on file with counsel). Ramirez cannot credibly assert now that he believed in good faith that TDCJ allowed vocalization under the new spiritual-advisor policy when his attorney told TDCJ the opposite.

c. Ramirez's argument reveals his dilatory purpose. Ramirez admits that he did not request Pastor Moore's affidavit sooner because "it was not yet clear if the execution could proceed" during the pandemic. Cert. Pet. Reply 3. The pandemic may have complicated TDCJ's execution schedule, but there is no suggestion that it would impact Texas's method of execution—and thereby Ramirez's claim. Ramirez's explanation is therefore in the nature of a confession: he did not *want* to litigate the claim until he was sure when the execution would otherwise proceed.

2. Ramirez has inequitably manipulated the courts.

a. Ramirez continues a "pattern" recognized nearly forty years ago "in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent." *Woodard v. Hutchins*, 464 U.S. 377, 380 (1984) (Powell, J., concurring). This Court correctly "presum[ed]" in *Hill* that "[r]epetitive or piecemeal litigation . . . raise[s] similar concerns" as untimely litigation. 547 U.S. at 585. This sort of manipulation bars equitable relief. *Gomez*, 503 U.S. at 654; *see also Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam).

After Ramirez filed his first section 1983 complaint in August 2020 and submitted grievances in April 2021 repeating that request, TDCJ amended its policies that month to grant Ramirez the relief he sought. JA.149. But

when Texas later set a third execution date, Ramirez needed a basis for a new section 1983 suit, so he backtracked on his 2020 representation that his faith did not require Pastor Moore to touch him. *Supra* p. 8. He then filed a complaint to the same effect in August 2021.

Though he had already commenced litigation, Ramirez continued to assert brand-new religious needs. Six days after suing, and 23 days before Ramirez's execution date, Ramirez's attorney sought confirmation from TDCJ that its rules forbade vocalization without actually seeking an accommodation. *Supra* pp. 16-17. After receiving confirmation, Ramirez filed (without leave) a second amended complaint seeking vocalization for the first time. JA.96.

Ramirez's strategy of asserting three distinct religious demands in 12 months—the third on the day before the State had to oppose his stay motion—maximized his chances of postponing his execution rather obtaining the accommodations he insists his faith requires. Ramirez's true reason for delaying this action is obvious: "to manipulate the judicial process," and thereby thwart his execution. *Gomez*, 503 U.S. at 654. That abuse is enough to withhold equitable relief.

b. If anything, this case's broader context demonstrates how death-row inmates piggyback on one another's lawsuits to make ever-increasing demands on the State. For example, this Court granted Ruben Gutierrez a stay of execution in June 2020 based on his claim that his faith required his spiritual advisor's presence in the chamber. *Gutierrez*, 141 S. Ct. at 127. Only then did Ramirez's counsel email a similar demand to TDCJ. JA.61. Ramirez's 2020 section 1983 suit followed the next month—complete with his affirmative representation that his religious exercise did *not* require touch. JA.61,

70. Only *after* Texas amended its policies did Ramirez assert that his religion required touch and vocalization up until moment of death. JA.52.

Since the Court granted a stay in this case, similar claims have arisen across Texas.[6] For example, Stephen Barbee filed a section 1983 complaint 13 days after this Court granted Ramirez a stay.[7] Fabian Hernandez[8] and Kosoul Chanthakoummane[9] filed grievances seeking copycat accommodations. As of the time of filing, two of the executions have been stayed. Gutierrez has also sought to revive his claim that the district court had rejected based on "dilatory" and shifting religious needs.[10]

c. Ramirez has further manipulated the judicial process by seeking to retract his 2020 concession that Pastor Moore need not touch him. This Court should forbid him to do so.

Ramirez's about-face is opportunistic. TDCJ initially relied on Ramirez's assurances that "Pastor Moore need not touch Mr. Ramirez at any time in the execution chamber," JA.61, and that Ramirez "raise[d] the same challenge to the execution protocol that Mr. Gutierrez

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[6] Juan A. Lozano, *Texas executions face delays over religious rights claims*, ABC NEWS (Oct. 9, 2021), https://tinyurl.com/yk5tuda3.

[7] Order Staying Execution 1, *Barbee v. Collier*, No. 4:21-cv-03077 (S.D. Tex. Oct. 4, 2021), ECF 14.

[8] Joint Motion to Vacate Order ¶¶ 1.2, 3.1, *Texas v. Hernandez*, No. 20060D05825 (Tex., 346th Dist. Ct. Sept. 28, 2021).

[9] Agreed Motion to Modify Execution Date 2-3, *Texas v. Chanthakoummane*, No. 380-81972-07 (Tex., 380th Dist. Ct. Oct. 11, 2021).

[10] Plaintiff's Motion to Alter or Amend Judgment 3-5, *Gutierrez v. Saenz*, No. 1:19-cv-185 (S.D. Tex. Sept. 16, 2021), ECF 179.

did," JA.65. TDCJ agreed to withdraw Ramirez's execution warrant and to dismiss his 2020 lawsuit in reliance on these assurances. *See* JA.22. TDCJ continued to have security concerns, but it weighed those against its interest in carrying out sentences and providing closure to victims' families.

Ramirez insisted that he had the "same challenge" as Gutierrez, reiterating that nothing distinguished the two demands. JA.56-70. But the *only* indication that Ramirez's claim might not be fully resolved by *Gutierrez* was that Ramirez's nonsuit reserved the right to "re-calibrate any new 1983 petition he seeks to bring" given the uncertain resolution of that case. Notice of Non-Suit Without Prejudice 2, *Ramirez v. Collier*, No. 2:20-cv-00205 (S.D. Tex. Aug. 14, 2020). Ramirez's assertion that he would "re-calibrate" depending on how collateral litigation proceeded strongly suggested he not seeking to vindicate sincerely held religious beliefs. Nevertheless, to allow the execution to go forward, the State designed protocols around how to allow Ramirez's pastor in the chamber with the understanding that no further compromise of the "safety, security, and solemnity of the execution room" would be required. *Smith*, 141 S. Ct. at 726 (Kavanaugh, J., dissenting).

Ramirez's excuse for his last-moment litigation reversal only underscores the inequity of his conduct: he admits that "[h]ad the State not agreed to withdraw the death warrant so quickly, Ramirez would have ascertained [sic] an affidavit from Pastor Moore (who has ministered to him since the year 2016)." Cert. Pet. Reply 2. In other words, Ramirez's decision to sue TDCJ before first deciding what religious accommodations he would request implies that he was never seeking to vindicate sincere religious beliefs in the first place. *Cf. Burwell v.*

Hobby Lobby Stores, Inc., 573 U.S. 682, 717-18 & n.29 (2014). Ramirez's gamesmanship is precisely the sort of manipulation this Court has rejected.

C. The balance of equities and public interest favor finally enforcing Ramirez's sentence.

The balance of equities and public interest also weigh against a preliminary injunction. "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24. "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* In death-penalty cases, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584; *see also Gomez*, 503 U.S. at 654. For at least three reasons, Ramirez's evasion of three execution dates through eleventh-hour litigation harms these interests.

First, Ramirez's litigation conduct has unjustifiably delayed justice for Pablo Castro's family and friends, who must revisit his murder with each new death warrant. Each return to the courthouse compounds their suffering. Children Br. 14. An injunction would severely harm the interests that Castro's family and friends have in finality and closure.

Second, further "[d]elay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence." *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens, J., dissenting). Texas's penological interests are impeded every day Ramirez escapes his lawful sentence.

Third, additional delay would encourage Ramirez to continue his streak of last-minute, emergency-posture

motions for stays of execution. Indeed, as discussed above (at 19), numerous death-row inmates have already begun their journeys down this path, exponentially increasing the public harm from the requested relief. *Contra* Pet. Br. 46 (insisting that such a "pathway for abuse" would not open). Condemned murderers should not be rewarded for their dilatory tactics with yet more delay.

Ramirez counters (at 44) that these effects can be contained by instructing lower courts to act with "appropriate dispatch," as this Court did in *Barr v. Roane*, 140 S. Ct. 353, 353 (2019). But that case proves the State's point: though the statutory-interpretation issue was "straightforward" and "already . . . very ably briefed," *id.* (Alito, J., respecting denial of stay or vacatur), it took six months for the court of appeals to finally resolve the case. Mandate, *In re: Fed. Bur. of Prisons' Execution Protocol Cases* (D.C. Cir. 2020) (No. 19-5322). It took a year to execute the inmates. *See Capital Punishment Historical Information*, FED. BUREAU OF PRISONS (last accessed Oct. 14, 2021), https://www.bop.gov/about/history/federal_executions.jsp. Russell Bucklew's litigation took even longer: it stretched five years even though his suit "amount[ed] to little more than an attack on settled precedent" and failed "not just one but many essential legal elements." *Bucklew*, 139 S. Ct. at 1134. Even Ralph Baze remains on death row. *Offender Information: Baze, Ralph Stevens Jr.*, KOOL, https://tinyurl.com/epps4p2r (last visited Oct. 14, 2021). *Contra Baze*, 553 U.S. at 77 (Stevens, J., concurring) (suggesting a one-drug protocol to avoid further delay).

Ramirez's time has come. Seventeen years of delay is enough. Equity demands that the State's and the victims' interests finally be vindicated.

II. Ramirez Has Not Exhausted His Claims.

Even if Ramirez's inequitable conduct did not preclude relief, Ramirez has no likelihood of success on the merits because his claims are unexhausted. As an "inmate suit[] about prison life," this case is subject to the PLRA's strict exhaustion requirements. *Porter*, 534 U.S. at 532. Ramirez had to pursue all administrative relief to its conclusion and comply with all prison rules in doing so before filing suit, *Woodford v. Ngo*, 548 U.S. 81, 89-95 (2006)—"irrespective of the forms of relief sought and offered through administrative avenues," *Booth v. Churner*, 532 U.S. 731, 739, 741 n.6 (2001).

Nor can Ramirez's failure to exhaust be excused. As his own experience shows, TDCJ's grievance process is available for his complaints. Creating an atextual exception to the PLRA for death-row inmates who delay their litigation would upend Congress's design. Because exhaustion "is mandatory," Ramirez's "unexhausted claims cannot be brought." *Jones*, 549 U.S. at 211, 221.

A. Ramirez failed to follow mandatory grievance rules and thereby failed to exhaust his claims.

Ramirez contends (at 38) that he "generally exhausted" his present complaints "[t]hrough [g]rievances [a]nd [l]itigation." That is not how it works: as the United States explained elsewhere,[11] the PLRA requires "proper exhaustion," not "exhaustion *simpliciter*." *Woodford*, 548 U.S. at 88, 93. "[F]iling an untimely or otherwise procedurally defective administrative grievance or appeal" is insufficient, and failure to exhaust cannot be cured by litigation conduct that, by definition, cannot properly occur until *after* exhaustion. *Id.* at 83-84.

[11] Amicus Br. of U.S. 10, *Ross v. Blake*, 136 S. Ct. 1850 (2016) [hereinafter, "U.S. *Ross* Br."]. *Contra* U.S. Br. 12-13.

Because Ramirez's grievances were not completed before he filed suit, let alone in compliance with prison grievance rules, his claims are unexhausted.

1. Ramirez's premature resort to litigation violated the PLRA.

Litigation cannot satisfy a pre-litigation exhaustion requirement. *See Jones*, 549 U.S. at 211. Inmates cannot pick and choose which "grievance procedures" to "comply with" before suing. Pet. Br. 43. *See Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016); *Woodford*, 548 U.S. at 90. By invoking (at 38) *litigation conduct* to clarify what he sought to exhaust, Ramirez admits his failure to comply with Texas's two-step process. *Wright*, 260 F.3d at 358 (explaining that completion of both steps is required). Ramirez's efforts (at 42) to circumvent prison grievance procedures by appealing to other authorities likewise confirm his failure to exhaust. *See Jones*, 549 U.S. at 218; *Woodford*, 548 U.S. at 90.

Far from "unreasonable" or "hypertechnical," Pet. Br. 40, these rules protect courts and ultimately the public from an inmate filing a vague or incomplete grievance to set up a lawsuit about what his "request should be read as having sought," *id.* Ramirez knows this: when grieving an unrelated complaint, he explicitly stated he "need[ed] to file this grievance for the preservation of [his] legal issues." Grievance File 2. These rules give courts a clear picture of what TDCJ did and why. For example, Ramirez complains (at 38 n.12) that TDCJ's response to his 2020 grievance seeking Pastor Moore's presence in the chamber was "not part of" the record because the 2020 litigation never "fully developed." *Id.* at 41. That is because Ramirez violated the PLRA by suing *before* TDCJ had resolved the grievance. But his assertion is false in any event, as he had made a specific

request in his grievance: his lone 2020 step-one grievance asked only for Pastor Moore's presence in the chamber. Grievance File 4-5. It was silent as to touch and vocalization. *Cf. id.*

2. Ramirez's failure to comply with the procedures meant TDCJ lacked notice of or the ability to respond to his requests.

After successfully obtaining his first requested accommodation, Ramirez eschewed the same process to obtain further relief in favor of half-baked "grievances and litigation." Pet. Br. 40. Ramirez's grievances failed to satisfy his obligation to exhaust his claims because he did not comply with TDCJ's rules demanding fair notice of his complaints and an opportunity for TDCJ to address them.

a. *Clear Statement—Vocalization.* Ramirez gave insufficient notice of the relief he sought. Because inmate complaints are extremely varied—particularly when it comes to religion—TDCJ requires inmates to "clearly state[]" the "specific action required to resolve the complaint." *Handbook*, *supra*, at 75. Yet, in April 2021, after disclaiming a need for touch, JA.61, Ramirez asked only to "have [his] spiritual advisor present in the death chamber w/ [him]." JA.50; *see also* JA.54 (complaining about "NOT being allowed a spiritual advisor in the death chamber w/ [him] during execution"). Not until June 11 did Ramirez request that he be "ALLOWED to have [his] Spiritual Advisor 'lay hands on [him]' & pray over [him] while [he] [is] being executed." JA.53. Prayer takes many forms, *infra* pp. 29-30, and at no point did

Ramirez "clearly state[]" that any such prayer needed to be aloud. *Handbook*, *supra*, at 75.[12]

Similarly misplaced is Ramirez's suggestion (at 8) that he satisfied the PLRA by requesting the "ministration[]" of Pastor Moore. *See Woodford*, 548 U.S. at 90 (requiring Ramirez to comply with TDCJ's "critical procedural rules"). Seeking "ministration" does not state "[t]he specific action required" to address the grievance. *Handbook*, *supra*, at 75. Different faiths vary in their views of dying; a generalized request for "ministration" hardly tells TDCJ what accommodation Ramirez needs for his particular religious practice.[13]

b. *Timeliness—Touch and Vocalization.* Even if Ramirez's requests were sufficiently specific, they were untimely. Inmates must raise a grievance within "15 days from the date of the alleged incident." *Handbook*, *supra*, at 73-74. Ramirez impliedly concedes (at 11) that this 15-day period began in 2020 as part of litigation that he insists "has been brewing for some time." If so, his 15-day period ran months before his June 11 grievance. But at minimum, it began no later than May 4, 2021, when Ramirez admits (at 42) he learned that TDCJ would permit Pastor Moore's presence in the chamber. Ramirez further admits (at 43) that TDCJ's policies do not

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[12] Petitioner implies (at 40-42) that he assumed when TDCJ allowed all spiritual advisors into the chamber, it would extend "pre-*Murphy* TDCJ practices" without regard to whether a spiritual advisor had an employment relationship with TDCJ. For the reasons discussed above (at Part II.A), the PLRA's exhaustion requirement does not permit such a presumption.

[13] *See generally, e.g.*, Andrew Taylor & Margaret Box, *Multicultural Palliative Care Guidelines*, PALLIATIVE CARE AUSTRALIA (1999), https://tinyurl.com/4m3kb6tn (describing end-of-life traditions across religions).

expressly permit the practices he now demands in the name of religion. Nonetheless, rather than seek immediate clarification or accommodation, he waited until June to request touch and until August to seek "clarification" about vocalization. Far outside the 15-day window, this delay itself prevents Ramirez from properly exhausting his claims. *Woodford*, 548 U.S. at 95-96.

Ramirez cannot cure these defects, so this Court should reject his alternative requests (at 12, 44-48) to remand for further development regarding exhaustion. Ramirez's failure to exhaust is plain from the current record. Ramirez claims that he has desired both touch and vocalization since 2020 and has known he could have Pastor Moore with him since May 2021. He necessarily had several months before his September execution to pursue administrative relief. *Contra* Pet. Br. 42-43; U.S. Br. 14. If Ramirez did not learn TDCJ's position until 19 days before his execution, it is because he did not ask until 22 days before it. *Contra* Becket Br. 32; U.S. Br. 14. Ramirez cannot blame his delay on anyone else.

B. Ramirez failed to complete the grievance process for his touch claim or begin it for his vocalization claim.

Even if Ramirez could be excused for presenting vague grievances well after TDCJ's deadlines, his claims would still fail for lack of exhaustion. Although Ramirez started the process of exhausting his touch claim, he sued before completing it. He did even less for his vocalization claim.

1. Ramirez sued before completing the grievance process regarding his touch claim.

In addition to failing to follow TDCJ's grievance rules, Ramirez concedes (at 39 n.13) he filed this suit while his step-two grievance was still pending. JA.20. This alone is fatal to his claim. The fact that TDCJ issued a substantive response to his grievance after the suit was filed does not transmute untimely, incomplete exhaustion into proper exhaustion. *See Woodford*, 548 U.S. at 93-95.[14]

2. Ramirez did not grieve his vocalization claim at all.

Effectively admitting that he failed to clearly state a request for vocalization, Ramirez and his *amici* attempt to depict his vocalization claim as properly encompassed by one of his other grievances. These attempts fail for at least four reasons.

First, Ramirez (at 39, 42) and the United States (at 13) insist that Ramirez's June 2021 grievance implicitly included some form of vocalization. This response ignores that this process was incomplete when Ramirez sued and therefore could not have exhausted anything. *Supra* Part II.A.1.

Second, the response also ignores that TDCJ rules forbid grievance by implication, because inmates may

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[14] Contrary to Ramirez's assertion (at 39 n.13), TDCJ has not conceded this claim is exhausted. Exhaustion is an affirmative defense that will be raised in the answer—if this case ever gets there. *Jones*, 549 U.S. at 212. Moreover, TDCJ may "defend the judgment below on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982); *accord United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924).

"state only one issue per grievance." *Handbook*, *supra*, at 74. Ramirez's defense that he implicitly grieved his vocalization claim is a confession that he did not follow grievance rules. That procedural default precludes proper exhaustion. *Woodford*, 548 U.S. at 93-95.

Third, vocalization is not implicit in what Ramirez requested. A request to "pray over" an inmate does not specify vocalization, let alone clearly. JA.53. Subsequent interactions between the parties confirm that the June 11 grievance was not understood to include vocalization. For example, Ramirez's counsel sent an email in June describing a request for touch without connection to prayer. JA.154. TDCJ responded that it "will not honor [Ramirez's] request" because it "does not allow the spiritual advisor to touch the inmate once inside the execution chamber." JA.153. Similarly, Ramirez's step-two grievance asserted that his Christian faith required touch. JA.52-53. This was his opportunity to tell TDCJ what was wrong with its initial decision. Yet nothing in petitioner's step-two grievance indicated that TDCJ misunderstood the "ordinary meaning" of his grievance. Exhaustion Scholars Br. 15. Indeed, he did not mention vocalization at all. JA.155.

Ramirez did not mention vocalization until August. That alone is damning: there was no need for "clarification" (Pet. Br. 42) if Ramirez's "clearly stated" grievance included vocalization, *Handbook*, *supra*, at 75. Having already skirted the requirement of pre-suit exhaustion, Ramirez can hardly claim he relied on a "clarification" that he received *after* seeking a stay.

Fourth, and perhaps most troubling, accepting Ramirez's position that the State should have recognized that vocalization was implied in his other claims would force States to guess what is a "natural understanding"

of an inmate's religion. U.S. Br. 13. While Ramirez expects the State to assume the "standard practices" of his faith, Pet. Br. 23, "religious practices are rarely fungible," Religious Liberty Scholars Br. 23. And *Murphy* repudiated a reliance on "common religious practice" in the chamber. Pet. Br. 39; *see also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Instead, the State must be mindful that it "may [not] prescribe a religious orthodoxy" for any religion. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 581 (2012). Thus, TDCJ must rely on Ramirez to state the religious accommodations he seeks.

By its terms, Ramirez's statement indicates that silent prayer satisfied his religious needs. Prison staff cannot guess that some other practice was implicit in Ramirez's request: though not uncommon, audible prayer is far from the universal practice that his argument suggests, even in Christian faith traditions.[15] It cannot be the case that exhaustion turns on whether the State could interpolate what he meant to request based on "prevailing religious norms" or a "common understanding of Christian prayer." Pet. Br. 16-17, 40.

C. As TDCJ's grievance process was "available," Ramirez's failure to exhaust is inexcusable.

Ramirez establishes none of the three circumstances in which this Court excuses exhaustion as "unavailable." *See Ross*, 136 S. Ct. at 1859-62.

First, the grievance system is not "an effectively unavailable 'dead end.'" Pet. Br. 43. To meet this standard, Ramirez must show that TDCJ is "consistently unwilling to provide any relief" through the grievance system.

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[15] *See, e.g.*, Jurell Sison, *The Power of Silent Prayer*, IGNATION SPIRITUALITY, https://tinyurl.com/kzb32ba2 (last accessed Oct. 12, 2021).

Ross, 136 S. Ct. at 1859. Whether the relief Ramirez requested is available is immaterial. U.S. Br. 12. Ramirez cannot meet this standard because he successfully used TDCJ's process to obtain the accommodation he originally sought: Pastor Moore's presence in the chamber.

Second, that same success shows that the grievance process is not "so opaque" that "no ordinary prisoner can discern or navigate it." *Ross*, 136 S. Ct. at 1859. Indeed, TDCJ makes grievance investigators available to help with the process. *Handbook*, *supra*, at 74; Riley Decl. ¶ 8. *Contra* Exhaustion Scholars Br. 13-14.

Third, Ramirez has not even tried to show that TDCJ "thwart[s] inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross*, 136 S. Ct. at 1860. At most, the United States suggests (at 14) that Ramirez may have subjectively believed that exhaustion was unnecessary because "some" vocalization would be permitted. But this Court has rejected exceptions to exhaustion based on inmates' subjective beliefs. *See Ross*, 136 S. Ct. at 1856-58.[16]

D. The Court should not exempt Ramirez from the PLRA's exhaustion requirement because he delayed exhausting his grievances.

The Court should not tailor an exception for Ramirez. In an unexplained reversal from its prior position that "[t]he PLRA does not permit courts to create a new, unwritten exception to excuse a failure to exhaust," U.S. *Ross* Br. 7, the United States suggests (at 14) that

[16] Ramirez also intimates (at 40, 42) that TDCJ has made relief a "moving target" by "chang[ing] its policy yet again." TDCJ, however, changed its policy in response to this Court's suggestions of what the law may require. That hardly represents bad-faith conduct excusing exhaustion.

Ramirez's obligation to exhaust "may be" excusable if there was "insufficient" time for "processing of a new grievance and the timely initiation" of litigation. But the United States got it right last time: such a position would "effectively restore[]" the pre-PLRA regime under which exhaustion was largely discretionary—a regime that Congress repudiated. U.S. *Ross* Br. 8.

To excuse exhaustion because an inmate sues just days before his execution turns the PLRA on its head. Because exhaustion is neither a rubber stamp nor a "dead end," *Ross*, 136 U.S. at 1858, it necessarily takes time, *see, e.g.*, *Handbook*, *supra*, at 73-74. Nevertheless, the PLRA excuses exhaustion only when administrative remedies are unavailable, 42 U.S.C. § 1997e(a)—not when an inmate deliberately does not avail himself of those remedies in a timely fashion. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

Accepting the United States's argument would require the Court to overturn *Ross* (at least in part), which held that Congress's decision to create an exhaustion requirement "foreclos[ed] judicial discretion" to make exceptions to that requirement. 136 S. Ct. at 1857. The United States has made no attempt to reconcile such an outcome with statutory *stare decisis*. And to the extent *Ross* has been raised, this Court has consistently applied it.[17] Ramirez is no more entitled to relief based on delaying administrative procedures than judicial ones.

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[17] For example, the Court explicitly noted that Domineque Ray waited too long to raise his claim. *See Ray*, 139 S. Ct. at 661. In *Murphy* and *Gutierrez*, the parties disputed how exhaustion applied when TDCJ failed to respond to inmate requests—not whether *Ross* was good law. *See* Plaintiff's Response to Defendants' Motion to

III. Ramirez's Claims Fail on the Merits.

Ramirez's bid to enjoin his execution fails because he cannot show a likelihood of success on the merits. He has not carried his burden to show that he seeks an accommodation of his sincere religious beliefs.[18] By contrast, Texas's restrictions further compelling state interests, and Ramirez has not proposed less-restrictive means that sufficiently advance those compelling interests.

A. Ramirez is unlikely to succeed on his touch claim.

1. Ramirez has not shown that he seeks touch based on a sincere religious belief.

RLUIPA protects only accommodation requests "sincerely based on a religious belief and not some other motivation." *Holt*, 574 U.S. at 360-61. To obtain an injunction, Ramirez must show—and not merely allege—the elements of his claim. *Id.*; *Mazurek*, 520 U.S. at 972. Thus, Ramirez must present evidence that he sincerely believes that his spiritual advisor must touch him up until the moment of his death *and* that his belief was his motivation for seeking an accommodation. Ramirez shows neither.

a. Most fundamentally, Ramirez lacks evidence that *he* sincerely believes Pastor Moore needs to touch him while he dies. Instead, Ramirez relies exclusively on

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Dismiss 7-11, *Gutierrez v. Saenz*, No. 1:19-cv-00185 (S.D. Tex. Dec. 9, 2019), ECF 30; Complaint 5, *Murphy v. Collier*, No. 4:19-cv-01106, (S.D. Tex. Mar. 26, 2021), ECF 1. Alabama waived exhaustion in Willie Smith's case. Answer 4, *Smith v. Dunn*, No. 2:20-cv-1026 (M.D. Ala. Feb. 25, 2021), ECF 47.

[18] Contrary to Ramirez's assertions (at 12 n.3, 20), the lower courts did not conclude—and the State did not concede—that he demonstrated his beliefs were sincere. *See* JA.179, 185.

Pastor Moore's affidavit about what *Pastor Moore* believes. JA.47. To be sure, that affidavit gives Moore's opinion as to what many Christians believe and identifies Ramirez as a member of Moore's church. *See* JA.47. But as to Ramirez, the affidavit states that Moore "need[s] to be in physical contact" with Ramirez "during the most stressful and difficult time of his life in order to give him comfort." JA.47; *but see* JA.61. This affidavit fails to carry Ramirez's burden for three reasons.

First, the question before the Court is whether TDCJ's policy substantially burdens Ramirez's religious exercise—not Pastor Moore's. Evidence of Pastor Moore's beliefs is not evidence of Ramirez's beliefs.

Second, RLUIPA does not protect an inmate's desire for comfort. Because Pastor Moore's affidavit speaks in terms of Ramirez's comfort and not his religious belief, *see* JA.90, it cannot satisfy RLUIPA.

Third, Ramirez's own representation in 2020 that "Pastor Moore need not touch Mr. Ramirez at any time" fatally undermines Pastor Moore's affidavit. JA.61. At no point does either Pastor Moore or Ramirez credibly explain this strategically convenient shift in belief in the intervening 14 months.

b. Ramirez also has not shown that his request was "sincerely based on a religious belief and not some other motivation." *Holt*, 574 U.S. at 360-61 (citing *Hobby Lobby*, 573 U.S. at 717 & n.28). Instead, as Chief Judge Owen noted, "the shifting of Ramirez's litigation posture indicate[s] that [his] change in position is strategic and that delay is the goal." JA.187. Ramirez's conduct while awaiting execution proves it: he only agreed to see Pastor Moore—and then only for five minutes—because, in his own words, "I've got this thing in the courts." Redacted Decl. ¶ 8.

Ramirez says (at 6) he is a "devout Christian." But sincerity is not assessed at such a high level of generality. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). Instead, Ramirez must show sincerity as to the specific accommodations he seeks. *Holt*, 574 U.S. at 359.

Ramirez claims (at 16) he "has consistently requested that Pastor Moore . . . lay hands on" him during his execution. That is false. Ramirez affirmatively disclaimed it in 2020, saying that "Moore need not touch Mr. Ramirez at any time in the execution chamber." JA.61. TDCJ accommodated Ramirez in April 2021, allowing Pastor Moore into the chamber. JA.149. Only then did Ramirez decide that even with Moore present, the chamber would be "a godless vacuum" without additional accommodations. Pet. 15.

To be sure, an inmate may sincerely change his religious beliefs over time. For example, conversion to a new religion could explain a need for new religious accommodations. *See, e.g.*, *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987). But Ramirez's own words foreclose this possibility—indeed, they repeatedly affirm the opposite. After all, he states (*e.g.*, at 4) he has belonged to Pastor Moore's church for years, including the entire pendency of his RLUIPA litigation. And he identifies no change in his religious beliefs between August 2020 and today. *Compare* JA.90, *with Hanna v. Sec'y of the Army*, 513 F.3d 4, 7-8 (1st Cir. 2008).

Ramirez attempts to reconcile his inconsistency in a footnote (at 11 n.3), claiming "there was never an amendment to align the allegations in the complaint with [Ramirez's] sincere beliefs and his requests in his underlying grievances." This admission presents a dilemma for

Ramirez. Either he concedes that he filed a complaint that did not represent his sincere religious beliefs, or that he always planned to reformulate his religious beliefs at a later stage of litigation. Each possibility indicates insincerity. And the suggestion his underlying grievance asked for touch is inaccurate. Grievance File 4.

Ramirez's deliberate delay is even more apparent when compared to his broader claim (at 3) that touch "lies at the core of his sincere religious beliefs." Death-row inmates are prohibited from having physical contact with visitors. *Handbook*, *supra*, at 103. Pastor Moore confirmed that he has "never touched" Ramirez. Daniel Silliman, *Can This Texas Pastor Lay Hands on an Inmate During Execution?*, CHRISTIANITY TODAY (Aug. 23, 2021), https://tinyurl.com/dteuuuw. And Ramirez has never asked for Pastor Moore to do so. Such "nonobservance is relevant on the question of sincerity and is especially important in the prison setting." *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988); *e.g.*, *Gardner v. Riska*, 444 F. App'x 353, 355 (11th Cir. 2011) (per curiam). If Ramirez held a sincere religious belief that required touch, one would have expected some evidence of that before it became expedient for delaying his execution. *Witmer v. United States*, 348 U.S. 375, 382 (1955).

c. The Court should draw a strong inference of insincerity where, as here, a capital inmate's RLUIPA claim arises on the eve of his execution. Capital inmates "deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). Such a presumption comports with how courts treat other circumstances in which religion appears to be strategically invoked for secular purposes. *Compare United*

States v. Messinger, 413 F.2d 927, 929 (2d Cir. 1969), *with Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

Given Ramirez's ongoing game of ecclesiastical whack-a-mole, he would have trouble overcoming such a presumption even on a fulsome factual record. Here, he cannot do so because the best evidence of his beliefs—what he actually did when facing imminent execution—demonstrates that he is using this RLUIPA claim for delay. Redacted Decl. ¶¶ 7-8. Ramirez's claim fails at the outset.

2. Texas carried its burdens regarding Ramirez's touch claim.

Even if Ramirez could carry his initial burden, TDCJ's policy satisfies RLUIPA because it furthers Texas's compelling interests and is the least-restrictive means of doing so.

a. TDCJ's protocol furthers compelling interests.

As the United States agrees (at 18-19), TDCJ has numerous compelling interests implicated in its execution protocols, including "safeguarding the security of the execution, the solemnity of the proceeding, and the privacy of those who carry it out." Ramirez's request for touch implicates at least three of those interests: security, reducing preventable suffering, and avoiding re-traumatizing the victim's families observing the execution.

i. *Security*. As TDCJ's Director has explained, prohibiting non-TDCJ personnel from touching the condemned inmate preserves the State's vital safety interest: "in the event the inmate escaped his restraints, smuggled in a weapon, or otherwise became a threat in the chamber, a spiritual advisor standing close enough to touch the inmate would be in harm's way or in a position

to assist the inmate." Lumpkin Decl. ¶ 7; *cf.* Decl. of Eric Guerrero, *Barbee v. Collier*, No. 4:21-cv-03077 (S.D. Tex. Oct. 4, 2021), ECF 9-3 (discussing security incidents involving volunteers). For example, in 2000, TDCJ had to subdue a combative inmate with mace and restrain him—only to discover that, notwithstanding extensive security screenings, he had smuggled in a key for his restraints. *See* Michael Graczyk, *Texas Executes Ponchai Wilkerson*, AP NEWS (Mar. 14, 2000), https://tinyurl.com/4673m8nv. Inmates are now strip-searched before entering the chamber. JA.144.

Adding non-TDCJ personnel heightens these security concerns. Because volunteers who develop relationships with inmates have contributed to numerous security incidents, Guerrero Decl. ¶¶ 3-7, an inmate's outside spiritual advisor must be accompanied by an escort, JA.149. The advisor and escort stand approximately three feet from the gurney in the chamber. Lumpkin Decl. ¶¶ 4, 6. That distance, small enough to allow direct eye contact, nevertheless gives the escort a chance to react to potential disruption. By contrast, "[a] spiritual advisor touching the inmate would be within reach of the restraints securing at least one of the inmate's limbs and could attempt to release the inmate," endangering everyone in the room—as well as traumatizing the families of the victim, who must witness the incident. *Id.* ¶ 7.

ii. *Preventable Suffering.* TDCJ's no-touch policy also furthers the State's interest in avoiding preventable suffering and respecting the inmate's dignity. *See Bucklew,* 139 S. Ct. at 1125; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality op.). "It would be unacceptable for a condemned inmate to experience pain or otherwise suffer from the administration of the lethal drugs." Lumpkin Decl. ¶ 12. And TDCJ's policy is

designed to "ensur[e] the highest level of dignity that the process will allow for the inmate." *Id.* ¶ 3. Ramirez does not dispute that these interests are compelling.

Preventing an outside spiritual advisor from touching the inmate during the lethal injection furthers these compelling interests. The infamous Lockett execution apparently went awry because no one could see that the IV was leaking. *Estate of Lockett v. Fallin*, 841 F.3d 1098, 1105-06 (10th Cir. 2016). Bucklew argued that, because pentobarbital is caustic, leaks would destroy surrounding tissue and cause extreme pain. Pet. Br. 11, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Lines can also get clogged or pinched, Miller, *supra*, reducing the delivery of the drugs that should render the inmate "unconscious and incapable of experiencing pain," *Bucklew*, 139 S. Ct. at 1132. "A spiritual advisor touching the inmate . . . . could attempt to pull the IV lines as drugs are administered, which may inflict pain or suffering on the inmate." Lumpkin Decl. ¶ 7. Even if Pastor Moore did not intentionally interfere, his "placement immediately next to the gurney would complicate the response of TDCJ personnel and the drug team in the event of a problem with the IV lines or an unintended reaction to the lethal drugs." *Id.* ¶ 14.

iii. *Victim Trauma*. The State also has a compelling interest in facilitating closure by enforcing the judgment while preventing "further emotional trauma," *Murphy*, 139 S. Ct. at 1481 (Alito, J., dissenting), for the victim's family observing the execution, Lumpkin Decl. ¶¶ 7, 13.

For example, TDCJ recently received a request that an inmate's "spiritual advisor be allowed to hold [his] hand, place her free hand on [his] chest, the left side over [his] heart." Exhibits at 15, *Gonzales*, No. 4:21-cv-828, ECF 1-1. Such a display for a convicted murderer would

undermine the State's interests in implementing the death penalty and remind the victim's family that their loved one received no such solace for his transition to the afterlife.

Worse, a "spiritual advisor touching the inmate would be within reach of the restraints" and "could attempt to release the inmate." Lumpkin Decl. ¶ 7. Even unsuccessful attempts to prevent the execution would "cause emotional distress to the families of the victim and inmate." *Id.* ¶ 7. Regardless, a spiritual advisor standing close enough to touch the inmate would likely block witnesses' view of the inmate during the execution—while standing to the other side would obstruct the drug team's view. *Id.* ¶¶ 8-10, 13; JA.172.

Precisely because executions require prison officials to balance such disparate interests, this Court defers to prison officials' judgment concerning how to ensure the "safety, security, and solemnity of the execution room" during an execution. *Smith*, 141 S. Ct. at 726-27 (Kavanaugh, J., dissenting). Indeed, even in less emotionally charged circumstances, this Court has held that "[p]rison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise." *Holt*, 574 U.S. at 364. That deference is particularly necessary during an execution when there are no do-overs—either for the inmate or for the victim's family members, who are frequently forced to wait for years as a murderer extends his own life by manipulating both the courts and the court of public opinion.

b. TDCJ employs the least-restrictive means of furthering the State's compelling interests.

TDCJ's current protocols are the least-restrictive means of serving the State's compelling interests. This standard does not obligate TDCJ to "refute every conceivable option." *Holt*, 574 U.S. at 371-72 (Sotomayor, J., concurring); *see, e.g.*, *id.* at 363-66 (majority op.). Instead, there must be a plausible, effective alternative that TDCJ has improperly refused to adopt. *Id.* at 369; *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987). In other method-of-execution claims, this Court has stated that it is the prisoner's burden to show a "feasible and readily implemented alternative." *Bucklew*, 139 S. Ct. at 1125. The Court should apply the same standard here as only the RLUIPA claimant can know what would satisfy his religious needs. *Infra* p. 45.

Ramirez does not identify any less-restrictive means TDCJ could employ to further its compelling interests while allowing Pastor Moore's touch. That alone is fatal to his claim. *Holt*, 574 U.S. at 371-72 (Sotomayor, J., concurring). Instead of proposing a less-restrictive means of advancing Texas's compelling interests, Ramirez proposes two comparisons. Neither is sufficient.

i. Ramirez first notes that Texas previously allowed TDCJ-employed chaplains to touch inmates during executions and argues that his volunteer chaplain ought to be permitted to do the same. But this disregards the heightened risks that come with allowing an outsider into the chamber. *See Murphy*, 139 S. Ct. at 1475-76 (Kavanaugh, J., concurring); *Smith*, 141 S. Ct. at 725-26 (Kagan, J., concurring); *id.* at 726 (Kavanaugh, J., dissenting); *Ray*, 139 S. Ct. at 662 (Kagan, J., dissenting).

Ramirez insists (at 34) "[i]t makes no practical difference that Pastor Moore is not a TDCJ employee" because he has had a background check. But "every person involved in the [execution] process is hand-picked after many years of devoted service because it is extremely difficult to know how anyone will handle [the] uniquely high level of stress" that comes with an execution. Defendants' Response Exhibit O 2, *Gutierrez v. Saenz*, No. 1:19-cv-00185 (S.D. Tex. Sept. 22, 2020), ECF 110-16. No background check, orientation, or prescreening can replicate that training and experience—let alone eliminate the possibility that someone who "feel[s] a loyalty to the inmate" or is "intensely averse to the death penalty" may, without prior warning, "attempt to frustrate the execution." Lumpkin Decl. ¶ 6. Indeed, the ink was barely dry on Pastor Moore's signed confidentiality agreement before he violated it. JA.181; Redacted Decl. ¶¶ 4-5.

Nor is it any response that touch does not increase the risks associated with a spiritual advisor being in the room. As discussed above (at 38), the advisor is three feet away and has a security escort who can intervene in the event of something untoward. Lumpkin Decl. ¶¶ 4, 6-7.

Ramirez also declines to explain how a spiritual advisor and accompanying security escort could stand close enough to touch him from beside the gurney without obstructing the view of either the drug team (to the inmate's right) or the witnesses (to the inmate's left). TDCJ considered the chamber's layout and determined that would not be feasible. Ramirez disagrees (at 34). But mere disagreement does not satisfy his obligation to identify a less-restrictive means to minimizes these risks.

ii. Similarly unavailing is Ramirez's insistence (at 34-37) that Texas should follow the examples of the

federal government and Alabama, which he says allow chaplains to at some point touch a condemned inmate.[19] This fails for at least three reasons.

First, another jurisdiction's accommodations do not prove that Texas is not using the least-restrictive means available *to it.* A State must "persuasive[ly]" explain itself when it refuses an accommodation permitted by "the vast majority of States and the Federal Government." *Holt*, 574 U.S. at 368-69. But this Court has never required a State to justify its refusal to adopt an accommodation permitted by one or two other jurisdictions. Indeed, it has affirmatively rejected this sort of floor-setting exercise. *Id.*

Whatever happens at other facilities, "[t]he gurney . . . takes up almost the entire room" in Huntsville. *Witness to an Execution*, STORYCORPS (Mar. 8, 2017), https://tinyurl.com/6w9c9ak8/; Lumpkin Decl. ¶ 14; JA.172. Someone standing close enough to hold an inmate's hand would prevent either the drug team or the witnesses from seeing the inmate. *See id.* ¶¶ 9-10, 13. No authority requires the State to build new execution facilities to satisfy RLUIPA.

Second, assuming that Ramirez actually asks for the policies exercised by Alabama and the United States, those jurisdictions are in the minority—further confirming the infeasibility of Ramirez's accommodation in most States. Not all States have made their execution protocols publicly available, but as of the filing of this brief, at least fifteen States allow a spiritual advisor in the

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[19] The United States asserts (at 26) that Georgia follows a similar protocol. But the protocol says only that a chaplain can "provide a prayer on the condemned's behalf"—not when, where, or whether that chaplain must be a state employee. Georgia Dep't of Corr., Lethal Injection Procedures 1 (2012).

witness rooms but not in the chamber.[20] And South Carolina permits a spiritual advisor to read the inmate's final statement from its chamber before exiting during the lethal injection.[21]

Third, the record does not show that these two jurisdictions would allow what Ramirez demands. The federal government has allowed a spiritual advisor to touch the inmate *before* the execution to administer last rites, but that advisor "stepped back while the lethal drugs were administered." Spiritual Advisors Br. 15. That procedure would not satisfy Ramirez, who currently demands that Pastor Moore "lay his hands on Ramirez's body as he dies." Pet. 3 (citing JA.47). Alabama uses a three-drug protocol, and—in response to litigation—allowed a single inmate's spiritual advisor to "pray with [the inmate] and hold his hand," U.S. Br. 26, but only until the inmate lost consciousness, Joint Motion to Dismiss 4 n.13, *Smith v. Dunn*, No. 2:20-cv-1026 (M.D. Ala. June 16, 2021), ECF

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[20] *See* Ariz. Dep't of Corr. Rehabilitation and Reentry, Dep't Order: 710—Execution Procedures 16–17 (Mar. 10, 2020); Ark. Dep't of Correction, Religious Servs. Policy & Procedure Manual 56 (Nov. 7, 2018); Ga. Code § 17-10-41; Idaho Dep't of Corr., Execution Procedure 12-13 (Mar. 30, 2021); Ind. Code § 35-38-6-6; La. Stat. § 15:570; Mo. Stat. § 546.740; Miss. Code § 99-19-55(2); Tenn. Dep't of Correction, Witnesses to an Execution; N.C. Dep't. of Pub. Safety, Execution Procedure Manual 7, 16, (Oct. 24, 2013); Ohio Rev. Code § 2949.25; Okl. Dep't of Corr., Procedures of the Execution of Offenders Sentenced to Death 3-7; S.D. Dep't of Corr., 1.3.D.3 Execution of an Inmate 5-8; Ut. Code § 77-19-11(2)(d); Wyo. Stat. § 7-13-908. Based on a reasonable inquiry, Nebraska and Nevada follow similar protocols, and Florida allows an advisor in the chamber but does not allow vocalization or touch.

[21] S.C. Dep't of Corr., Death Row / Capital Punishment, https://tinyurl.com/59fhjddd.

57. The advisor was "instructed to step away" before the lethal drugs were administered. *Id.*

At bottom, Ramirez did not request the accommodations that have been used for federal executions and in Alabama. And only the RLUIPA claimant can know if a proposed alternative accommodation addresses his religious needs. Such a rule makes sense: religious beliefs vary and "are rarely fungible." Religious Liberty Scholars Br. 23. TDCJ cannot guess what will suffice for any particular inmate. For example, Ramirez says (at 7) that Christians "believe they will either ascend to heaven or descend to hell at the moment of death." But last rites are often performed in the days leading up to death—not at the literal moment a person expires. *E.g.*, Fr. Jason Signalness, *When Should We Call a Priest for the 'Last Rites?'*, DIOCESE OF BISMARCK (Oct. 2, 2015), https://tinyurl.com/emjwek7b.

B. Ramirez is unlikely to succeed on his vocalization claim.

1. Ramirez has not shown that he seeks vocalization based on a sincere religious belief.

a. For similar reasons, Ramirez is unlikely to succeed on his vocalization claim. To begin with, Ramirez has provided *no* evidence of his religious beliefs regarding vocalization. The sole evidence he submitted, Pastor Moore's affidavit, never mentions it, JA.46-47, and vocalization is not inherent in the concept of prayer, *supra* pp. 29-30. Ramirez is not entitled to injunctive relief absent evidence to support his alleged religious belief. *Supra* pp. 33-34.

b. Ramirez's conduct also shows his request for a religious accommodation is intended to delay his execution, not to satisfy a sincere religious belief. Neither his

grievances nor his first two complaints in this case sought vocalization. *Supra* Part II.B.1. And he agreed to meet with Pastor Moore only because of "this thing in the courts." Redacted Decl. ¶ 8.

2. Texas carried its burdens under RLUIPA regarding Ramirez's vocalization claim.

a. TDCJ's protocol furthers the State's compelling interests.

Even if Ramirez could satisfy his burden, TDCJ's protocol serves at least two compelling government interests.

First, the drug team monitors the inmate's status during the execution through a microphone suspended directly above the inmate's head. JA.172-74; Lumpkin Decl. ¶¶ 8-12. Extraneous speech could impair staff's ability to hear subtle signs of an unexpected event during the execution. *Id.* ¶¶ 8-12. Moreover, if something goes wrong, extraneous speech would be a distraction as "members of the drug team, the Warden, or the CID Director [must] attend to the inmate quickly" and be able "to speak to each other as they react." *Id.* ¶ 14. A spiritual advisor speaking during the lethal injection would inhibit the team's communication. *Id.*

Second, an opportunity to speak during the execution could be exploited to make a statement to the witnesses or officials, rather than the inmate. For example, a death penalty opponent could use the opportunity to disrupt or make a political statement. *See id.* ¶¶ 6-7. Or he could criticize the inmate's conviction or even the victim, causing further emotional trauma to the victim's family. *See id.*

b. TDCJ employs the least-restrictive means of furthering its compelling interests.

Although Ramirez proposes some potentially less-restrictive alternatives to Texas's policy regarding vocalization, none effectively furthers these compelling interests.

1. As with his touch claim, Ramirez's comparisons to the federal government's and Alabama's recent accommodations are inapt. The federal government and Alabama seemingly have identified means of permitting some speech in the chamber. But TDCJ has determined that, under the circumstances in Texas's chamber, allowing speech during the execution is not feasible. *See* Lumpkin Decl. ¶ 4. This determination is entitled to deference. *Baze*, 553 U.S. at 47.

2. Ramirez's comparison to instances in which a TDCJ chaplain spoke or prayed in the chamber misses the point. Ramirez does not offer a less-restrictive means of ensuring that an outside spiritual advisor does not use the opportunity to disrupt the execution. To be sure, TDCJ can and does require spiritual advisors, on pain of penalty, to agree not to disrupt the execution. *See Smith*, 141 S. Ct. at 726 (Kagan, J., concurring). TDCJ accordingly conducted a background check and required Pastor Moore to make "a penalty-backed pledge that he will obey all rules." *Id.* He immediately violated that pledge. JA.181. TDCJ is attempting to accommodate Ramirez by continuing to allow Moore's presence, but it cannot trust that Moore will act in good faith. It must act to protect the victim's family from the further trauma of disruptions or outbursts during the execution.

3. Ramirez does not propose a less-restrictive means of ensuring the drug team can closely monitor the

execution to prevent pain and suffering and to respect his dignity. One proposed alternative bears mention: he argues Pastor Moore could "whisper the prayers and scripture in Ramirez's ear." Pet. 15. Leaving aside that this option would seem to give up his touch claim, that alternative is not feasible because, if close enough to whisper, the spiritual advisor (and the security escort accompanying him) would obstruct the line of sight for either the drug team or the witnesses. And whispering may still be picked up by the microphone located above the inmate. *See* Lumpkin Decl. ¶ 8. His remaining less-restrictive means suffer similar failings as they all involve talking at different volumes, or mouthing a prayer, which TDCJ has never prohibited. *Cf.* Pet. 4.

C. Ramirez has not preserved his First Amendment claim.

Finally, Ramirez has not shown that he has a likelihood of success on the merits of any First Amendment claim. *See* JA.95-98; Pet. Br. 3-4, 10 & n.2. Indeed, he makes no independent argument supporting that claim. Pet. Br. 10 n.2. Ramirez's First Amendment claim is forfeited in this Court for inadequate briefing or fails for the same reasons as his RLUIPA claims.

CONCLUSION

The Court should affirm the Fifth Circuit.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

ARI CUENIN
NATALIE D. THOMPSON
ERIC J. HAMILTON
Assistant Solicitors General

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