No. 21-5592

IN THE

Supreme Court of the United States

JOHN HENRY RAMIREZ,

Petitioner,

vs.

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

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

KENT S. SCHEIDEGGER
Counsel of Record
KYMBERLEE C. STAPLETON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

QUESTIONS PRESENTED

Per the Court's order of September 10, 2021:

1. Did petitioner adequately exhaust his audible prayer claim under the Prison Litigation Reform Act, 42 U. S. C. § 1997e(a)?

2. Has petitioner satisfied his burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to demonstrate that a sincerely held religious belief has been substantially burdened by restrictions on either audible prayer or physical contact?

3. Has the government satisfied its burden under RLUIPA to demonstrate its policy is the least restrictive means of advancing a compelling government interest?

4. What is the appropriate standard for the type of relief the petitioner is seeking, and has that standard been met here?

This brief *amicus curiae* is addressed to Question 4.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves a stay of execution issued in civil litigation after habeas corpus review of a capital case

1. Both parties have filed blanket consents to *amicus* briefs. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

was concluded, further delaying justice in a case where it was already badly overdue. Such delay is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In July 2004, John Ramirez and two accomplices hatched a plot to commit a robbery in order to obtain money to buy drugs. On the night of July 19 at the Times Market convenience store in Corpus Christi, night clerk Pablo Castro was taking out the trash before closing when Ramirez and his companions drove into the parking lot. Ramirez confronted Castro, wrestled with him, and stabbed him 29 times. Then he and an accomplice went through Castro's pockets, stealing $1.25. They left him to die in the parking lot and went on to commit another robbery and attempt a third. The accomplices were soon caught, but Ramirez evaded capture for nearly four years. *Ramirez* v. *Stephens*, 641 Fed. Appx. 312, 314 (CA5 2016).

Ramirez was convicted and sentenced to death, and the judgment was affirmed on direct appeal. *Ramirez* v. *State*, No. AP-76100, 2011 WL 1196886, *19 (Tex. Crim. App., Mar. 16, 2011) (unpublished). The state trial court recommended denial of habeas corpus relief after a multi-day evidentiary hearing, and the Court of Criminal Appeals adopted the recommendation. See *Ramirez*, 641 Fed. Appx., at 316-317. The federal district court found that the state court decision was reasonable under 28 U. S. C. § 2254(d) and denied a certificate of appealability. *Id*., at 317. The Court of Appeals also denied a certificate. *Id*., at 327. This Court denied certiorari. *Ramirez* v. *Davis*, 580 U. S. __, 137 S. Ct. 279, 196 L. Ed. 2d 58 (2016).

Despite a final judgment litigated all the way to this Court denying federal habeas relief, Ramirez gained

another three years of delay by litigating a motion under Federal Rule of Civil Procedure 60(b), seeking to relitigate his previously rejected ineffective assistance claim. See *Ramirez* v. *Davis*, 780 Fed. Appx. 110 (CA5 2019), cert. denied 589 U. S. __, 140 S. Ct. 1273, 206 L. Ed. 2d 259 (Mar. 2, 2020); cf. 28 U. S. C. § 2244(b)(1) (mandatory dismissal of repeated claims in successive petitions, no exceptions).

On March 28, 2019, this Court granted a stay of execution to Texas inmate Patrick Murphy. See *Murphy* v. *Collier*, 587 U. S. __, 139 S. Ct. 1111, 204 L. Ed. 2d 252 (2019) (amended opinions of May 13). Murphy's theory was that the State's policy of allowing prison-employed chaplins in the execution chamber but not outside clergy discriminated against adherents of religions for which the State did not employ chaplins. Five days later, Texas changed its policy to "allow all religious ministers only in the viewing room and not in the execution room." *Id*., 139 S. Ct., at 1112, 204 L. Ed. 2d, at 252 (statement of Kavanaugh, J.). Justice Kavanaugh, joined by the Chief Justice, noted:

> "And because States have a compelling interest in controlling access to the execution room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. § 2000cc *et seq*., and the Free Exercise Clause.
>
> "Put simply, this Court's stay facilitated the prompt resolution of a significant religious equality problem with the State's execution protocol and should alleviate any future litigation delays or disruptions that otherwise might have occurred as

a result of the State's prior discriminatory policy." *Ibid*.

Given that three Justices dissented from the grant of the stay, see *id*., 139 S. Ct., at 1112, 204 L. Ed. 2d, at 253 (Alito, J., dissenting), Justice Kavanaugh's statement appeared to be the position of the Justices concurring on the narrowest grounds, see *Marks* v. *United States*, 430 U. S. 188, 193 (1977), and was the best indication available of the path that states should take.

Surprisingly, to put it mildly, early this year the Eleventh Circuit reversed a denial of a stay to an Alabama inmate even though the State had done exactly what the Justices concurring on the narrowest grounds had said in *Murphy* was a solution to the constitutional problem, see *Smith* v. *Commissioner, Ala. Dept. of Corrections*, 844 Fed. Appx. 286 (CA11 2021), and this Court declined to vacate the stay. See *Dunn* v. *Smith*, __ U. S. __, 141 S. Ct. 725, 209 L. Ed. 2d 30 (2021). As there is no majority opinion, we still do not know if the simple rule of keeping all ministers in the viewing room is legal.

So Texas needed to change its policy yet again due to conflicting signals from this Court.[2] To deal with the problem of nonemployees in the execution chamber, the Texas authorities denied Ramirez's requests to allow his minister to touch him and pray aloud during the execution. See Brief in Opposition 6-8.

Ramirez filed suit in Federal District Court, and that court denied a stay. The District Court held that

2. Petitioner huffs about "TDCJ's rapidly shifting execution policies," Brief for Petitioner 40, without the context of the mercurial legal environment that effectively requires rapid shifts.

the Texas Department of Criminal Justice[3] (TDCJ) had substantially accommodated Ramirez's religious needs, that it had a compelling interest in maintaining order during the execution procedure, including controlling access to the execution chamber, and that Pastor Moore's conduct to date has already raised concerns about his willingness to comply. See App. to Pet. for Cert. 22-24 (District Court opinion 6-8). A divided panel of the Court of Appeals affirmed. See App. to Pet. for Cert. 1-2.

SUMMARY OF ARGUMENT

This case is not merely about the discrete issue of accommodation of religion at the moment of execution. This case concerns the additional layer of litigation that has been added on to capital cases in recent years, further delaying justice beyond the already excessive delays in reaching the conclusion of direct and collateral review of the judgment that *should* mark the end of federal court involvement.

Execution of judgment in the worst murder cases is a compelling interest of society and of the surviving victims. This interest is recognized in the Antiterrorism and Effective Death Penalty Act and the Crime Victims' Rights Act. The interests protected in the Religious Land Use and Institutionalized Persons Act are important also, but courts should not focus on them to the exclusion of these other interests.

While the specific problem is relatively new, the general problem of federal civil suits interfering with state criminal cases was addressed half a century ago in the landmark case of *Younger* v. *Harris*. The same

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3. That is, Texas's prison department.

framework should be used in this case. *Younger* requires a greater showing of harm for interference with a state criminal case than is required for injunctive relief generally. *Younger* also requires exhaustion of state judicial remedies, even when the underlying statute does not generally require such exhaustion.

The District Court found that petitioner in this case had not even met the threshold showing of injury for the lower bar of the *Nken* v. *Holder* test. See App. to Pet. for Cert. 25 (D.C. opn. 9). He has certainly not cleared the higher bar of "great" injury for *Younger*.

ARGUMENT

I. The needs of society and of victims of crime weigh heavily against creating more opportunities for last-minute litigation delay.

"To no one will we sell, to no one deny or *delay* right or justice." Magna Carta, Cl. 40 (1215), online at https://www.law.gmu.edu/assets/files/academics/founders/MagnaCarta.pdf (emphasis added) (as visited October 7, 2021). From the earliest times in the long march of the Anglo-American tradition of law and liberty, delay of justice has been recognized in tandem with denial of justice as an abuse of the first magnitude. The present case is not about a single, simple, yes-or-no question of accommodation of a particular religious practice to be excised from the body, placed on a microscope slide, and examined in isolation. This case is about a pattern of legal maneuvers that in the aggregate delay justice for decades and in many cases deny it altogether.

The delay problem is exceptionally bad in capital cases, and both this Court and Congress have taken a number of steps to address it, yet delays far in excess of

those needed for fair adjudication persist. Part of the problem is judicial failure to properly implement the habeas corpus reforms enacted by Congress. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Shinn* v. *Ramirez*, No. 20-1009, pp. 7-8. A second problem is that a new layer of delay, civil litigation after the completion of appellate and habeas review, is now frequently added on top of the layers that already take too long. In *Bucklew* v. *Precythe*, 587 U. S. __, 139 S. Ct. 1112, 1133-1134, 203 L. Ed. 2d 521, 544 (2019), this Court confronted a particularly egregious case:

> "Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court.
>
> * * *
>
> "The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better."

Murder victims' families often spend decades following every twist and turn that the cases take, waiting for the day when they finally see justice and finality. CJLF has represented a number of such families in capital cases. The finality of knowing to a certainty that the perpetrator has been fully punished, will not escape his punishment, and will never hurt

anyone else is profoundly important to them.[4] The delays for litigation, particularly of matters that pale in comparison to the magnitude of the crime, are deeply painful.

Both this Court and Congress have recognized the importance of reducing delay, both for society and the victims. Shortly before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), this Court characterized a "2½-year stay of execution" as "severe prejudice." *In re Blodgett*, 502 U. S. 236, 239 (1992) (*per curiam*). In AEDPA itself, the primary purpose of Congress in enacting the habeas corpus provisions was "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases...." *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003).

In the Crime Victims' Rights Act (CVRA), Congress recognized that victims of crime have a right to "proceedings free from unreasonable delay." 18 U. S. C. § 3771(a)(7). The CVRA's protection extends to the families of deceased crime victims. See 18 U. S. C. § 3771(e)(2). The act initially applied only to federal criminal proceedings, but it was later amended to include habeas corpus proceedings, specifically including the "unreasonable delay" provision. See 18 U. S. C. § 3771(b)(2)(A).

The normal course of review of a capital case should be a direct appeal, one state collateral review, and one

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4. A nominal "life without parole" sentence provides no finality. Persons with such sentences can be released via executive clemency, retroactive legislation, see, e.g., Cal. Penal Code § 3051(b)(4), or retroactive invention of new constitutional rules with no basis in the original understanding. See *Miller* v. *Alabama*, 567 U. S. 460, 502 (2012) (Thomas, J., dissenting). Escape is also a possibility that cannot be completely eliminated.

federal habeas review, including appeal to the court of appeals and a petition for writ of certiorari to this Court. See Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal, Part III (Aug. 23, 1989), reprinted in 135 Cong. Rec. 24,695, col. 2 (1989). We can put to one side, for now, the extensive delays in the normal review and the reasons for them. When that review is completed, execution of the judgment should follow shortly in most cases, with additional proceedings reserved for extraordinary cases. That is what Congress intended when it severely restricted successive federal habeas corpus petitions in AEDPA. See *Calderon* v. *Thompson*, 523 U. S. 538, 558 (1998) ("central concern").

Initially, the successive petition reform was one of the most successful changes made by AEDPA, and there was a large increase in the number of judgments carried out. See U. S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 2005, Figure 4, p. 10 (2006). In the mid-2000s, though, not one but two new layers of litigation emerged. In *Gonzalez* v. *Crosby*, 545 U. S. 524, 531-532 (2005), this Court held that Rule 60(b) could be imported from the Rules of Civil Procedure into habeas corpus but not when doing so circumvented AEDPA's restrictions on raising new claims or relitigating rejected claims. Yet *Tharpe* v. *Sellers*, 583 U. S. __, 138 S. Ct. 545, 546, 199 L. Ed. 2d 424 (2018), invoked the vague and expansive phrase "extraordinary circumstances" to require further litigation on a 60(b) motion that sought to do exactly what AEDPA forbids: reopen a previously litigated claim, see *id*., 138 S. Ct., at 549-550, 199 L. Ed. 2d, at 428-429 (Thomas, J., dissenting), without meeting AEPDA's stringent requirements for reopening. Regardless of whether these 60(b) motions are often granted, they all have to be briefed and decided, forming a new layer of litigation in defi-

ance of the intent and purpose of the statute. In Ramirez's case, that layer took three years. See *supra*, at 2.

The other new layer is civil litigation, the subject of this case. *Nelson* v. *Campbell*, 541 U. S. 637 (2004), poked a seemingly small hole in the dyke by allowing civil litigation to enjoin one execution procedure while conceding the acceptability of another. But it is the natural course for such small holes to widen, and this one did. *Hill* v. *McDonough*, 547 U. S. 573, 583-584 (2006), held that a court may stay execution altogether, not just direct use of one method rather than another, with general language about respecting the state's interest in enforcing its judgments. Notwithstanding that language, widespread method-of-execution litigation took off, leading to the multi-year delays of justice noted and denounced in *Bucklew*, *supra*.

And now we have religious practice litigation. This case may be called narrow, like *Nelson*, but that does not mean that the new layer of post-habeas litigation opening up will be narrow or brief or rare. It is easy to scoff at "slippery slope arguments," but we know from long and bitter experience in capital cases that the slopes are indeed almost always slippery. *Nelson* is far from the only example. *Strickland* v. *Washington*, 466 U. S. 668, 690 (1984), nominally allows ineffective assistance claims only for gravely deficient representation "outside the wide range of professionally competent assistance," but it is a rare capital case today where the inmate does *not* claim ineffective assistance, no matter how skilled and dedicated his lawyer was. *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion), spread into a justice-choking oil slick vastly beyond the simple rule that its author thought he had written. See *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 267 (2007) (Roberts, C.J., dissenting) ("a dog's breakfast of divided,

conflicting, and ever-changing analyses"); see generally Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131, 155-158 (2019).

Those whose goal is to gum up the works of capital punishment are likely salivating at the opportunities this case may open. Inmate religious claims are unique in that plaintiffs can claim nearly any belief they like, and the defendants are nearly powerless to challenge it. Plaintiff says over and over in his brief that his belief is sincere.[5] The lack of evidence to the contrary does not mean it is true; it means there is no way to challenge it.

There are virtually no limits to asserted beliefs in RLUIPA litigation. A Wisconsin prisoner claimed that he and his group were Odinists (as in the Norse god Odin) and therefore were entitled to an annual pork feast. That was enough to go to trial. The Seventh Circuit reversed the district court's grant of summary judgment to the prison officials. See *Kramer* v. *Pollard*, 497 Fed. Appx. 639 (CA7 2012); see also Scheidegger, Odin in the Slammer, Crime and Consequences Blog Archive (Dec. 7, 2012), http://www.crimeand consequences.com/crimblog/2012/12/odin-in-the-slammer.html (as visited October 7, 2021).

In this case there is tangible reason to doubt the sincerity of Ramirez's purported belief that he *must* have his minister touching him and saying audible prayers. On the touch issue specifically, earlier papers filed by his lawyer, the same lawyer representing him in this Court, expressly disclaimed any such requirement at the point where presence of the minister in the chamber was at issue. See App. to Pet. for Cert. A4 (Owen, C.J., concurring). In this Court, petitioner's

5. Adobe Acrobat counts 20 occurrences of "sincere."

brief contains only an opaque footnote shedding no light on why that statement was in the earlier pleading. See Brief for Petitioner 11, n. 3. This certainly raises a reasonable suspicion that petitioner, his attorneys, or both are making it up as they go along, asserting whatever belief it takes to object to whatever procedure is going to be used. Even if they are not in this case, there is no reason to believe that the next capital inmate will not do so in the next case. Given the history of shameless obstructionism by the capital defense bar, see, e.g., *Commonwealth* v. *Spotz*, 610 Pa. 17, 170-171, 18 A. 3d 244, 336 (2011) (Castille, C.J., concurring); *In re Reno*, 55 Cal. 4th 428, 515, 283 P. 3d 1181, 1246-1247 (2012), there is every reason to believe they will.

Neither AEDPA nor CVRA specifically addresses the use of civil suits to block the enforcement of criminal justice, but that is because this additional layer of delay barely existed at the times of those enactments. It was not until after *Hill* v. *McDonough*, 547 U. S. 573 (2006), that the floodgates were opened to routine use of federal civil rights suits as a stratagem for delay. That does not mean that these statutes are not important in this case. As with the Anti-Injunction Act in *Younger* v. *Harris*, 401 U. S. 37 (1971), discussed in the next part, the policies expressed by Congress in enacting them deserve substantial weight as courts decide how to exercise equitable powers.

The policy behind the Religious Land Use and Institutionalized Persons Act (RLUIPA) also has weight, of course. But it does not deserve a tunnel-visioned focus oblivious to all other considerations and policies. Nowhere in the text of RLUIPA is there any indication that Congress contemplated its use to prevent the enforcement of criminal judgments. Normally, prisoner civil litigation deals only with the conditions of confinement, while the fact and duration

of confinement—the subject of the criminal judgment in noncapital prisoner cases—is reserved for habeas corpus. See *Heck* v. *Humphrey*, 512 U. S. 477, 481 (1994).[6] This case therefore deals with competing policies of statutes that Congress did not anticipate would compete.

In a broader sense, though, the competing considerations when civil rights litigation interferes with a state criminal case are not new. This Court addressed them a half a century ago. An examination of that landmark precedent for the light it may shed on the present problem is in order.

II. Enjoining the execution of a state court judgment raises concerns similar to *Younger* v. *Harris* and warrants a similar rule of restraint.

A. Application of Younger to Execution Cases.

In *Younger* v. *Harris*, 401 U. S. 37, 38-39 (1971), Harris was indicted for violation of the California Criminal Syndicalism Act and sued Los Angeles District Attorney Younger to enjoin him from prosecuting the case. The State of California objected that the suit was barred by the Anti-Injunction Act. See *id*., at 40; 28 U. S. C. § 2283.[7] Somewhat surprisingly, given the age of the statutes and their predecessors, it was still an

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6. A prominent exception to this general rule is prisoner release orders in overcrowding cases, where the relief granted does interfere with enforcement of the criminal judgment. Congress cracked down hard on such orders in the Prison Litigation Reform Act. See 18 U. S. C. § 3626(a)(3).

7. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

open question in 1971 whether the private action section of the Civil Rights Act of 1871, since codified at 42 U. S. C. § 1983, was an exception to the general rule of the Anti-Injunction Act's prohibition of federal injunctions against state court proceedings, first enacted in 1793. See *Younger*, 401 U. S., at 55 (Stewart, J., concurring).

The Court decided that it did not need to decide the Anti-Injunction Act issue because abstention was required on "equitable principles." See *id*., at 54. That did not make the Act irrelevant, though. It stood as a centuries-old declaration of "longstanding public policy against federal court interference with state court proceedings." *Id*., at 43. In observance of this policy, the norm in federal courts was to refuse such injunctions, with granting them being the exception. *Id*., at 45.

The Anti-Injunction Act, where it applies, is not limited to restraint of actions in the state court itself. It also prohibits injunctions against enforcement of the state judgment. See *Hill* v. *Martin*, 296 U. S. 393, 403 (1935); *Atlantic Coast Line R. Co*. v. *Locomotive Engineers*, 398 U. S. 281, 287 (1970) (citing *Hill*). Given that *Younger* is based on the same policy, it should also apply to executions as well as trials, and so it does. See *Pennzoil Co.* v. *Texaco, Inc.*, 481 U. S. 1, 13-14 (1987).

The *Younger* doctrine has been applied to a number of cases other than criminal prosecutions. It "serves to ensure that 'the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.' " *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 431 (2010) (quoting *Younger*, 401 U. S., at 44). *Levin* involved "allegedly discriminatory state taxation." *Id*., at 417. Other cases include civil nuisance proceedings instituted by government officials, see

Huffman v. *Pursue, Ltd.*, 420 U. S. 592 (1975), and contempt of court during civil litigation. See *Juidice* v. *Vail*, 430 U. S. 327 (1977). *Juidice* noted that while the State's interest was "[p]erhaps ... not quite as important as is the State's interest in the enforcement of its criminal laws," *id*., at 335, it was still important enough to invoke *Younger*. That is, interference was "undue," see *id*., at 335-336, even though the case was within the § 1983 jurisdiction of the federal court.

Huffman is also important to the present case because it was a § 1983 action, see 420 U. S., at 598, following a state action that was completed, and arguably no longer "pending" for the purpose of the *Younger* rule. See *id*., at 607. *Huffman* held that did not matter. "[W]e believe that a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger." Id*., at 608. Even though a plaintiff may be suing under a statute with no requirement to exhaust state judicial remedies, as neither § 1983, the Prison Litigation Reform Act, nor RLUIPA does, if *Younger* applies there is an exhaustion requirement to avoid abstention.

Finally, the fact that respondent has not raised *Younger* to date in this case does not preclude application of the doctrine. A State may waive *Younger* by "expressly urg[ing]" a federal court "to proceed to an adjudication of the ... merits," *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc*., 477 U. S. 619, 626 (1986), but in the absence of such an explicit waiver the doctrine still applies. See *O'Neill* v. *Coughlan*, 511 F. 3d 638, 641-643 (CA6 2008). This is consistent with a related important limitation in federal-state court relations, the exhaustion rule in habeas corpus. See 28 U. S. C. § 2254(b)(3).

B. The Younger Requirements as Applied to this Case.

The essence of the *Younger* rule is that when a federal court is asked to enjoin a state court proceeding, the "normal thing to do" is decline, see *Younger*, 401 U. S., at 45, and exceptions are reserved for "unusual circumstance[s]" such as "bad faith [and] harassment." *Id*., at 54. The Anti-Injunction Act is a rigid prohibition where it applies, while *Younger* is less rigid but still a prohibition. Where the Act says "never," *Younger* says "hardly ever."

Two aspects of the *Younger* doctrine are particularly applicable to litigation over the execution process. First is an elevated standard of harm that the plaintiff must show for relief. Second is a consideration of whether adequate state court remedies are available.

1. Great injury.

Hill v. *McDonough*, 547 U. S. 573, 583-585 (2006), briefly discussed the requirements for a stay of execution in a method-of-execution case. These include the usual requirements for a stay, but they also include consideration of "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*., at 584. *Nken* v. *Holder*, 556 U. S. 418, 434 (2009), distills the factors to be considered when a court is asked to stay the judgment of a lower court or administrative agency whose judgment it has appellate jurisdiction to review.

What the petitioner in this case is asking is quite different from *Nken*. He wants a federal court to stop the enforcement of the judgment of a coordinate court that it does *not* have appellate jurisdiction to review. For habeas corpus, there is a statute on point, see 28 U. S. C. § 2251, but in a civil 42 U. S. C. § 1983 action we are back to *Younger*. The *Nken* factors are necessary

but not sufficient for a federal court stay of a judgment of a coordinate state court.[8] The considerations of *Younger* and its progeny must also be accounted for.

The general law of stays requires a showing of irreparable injury, but *Younger* requires more. "[E]ven irreparable injury is insufficient unless it is 'both great and immediate.' " 401 U. S., at 46 (quoting *Fenner* v. *Boykin*, 271 U. S. 240, 243-244 (1926)). This heightened standard did not begin with *Younger*. It goes back to *Fenner*, a case followed multiple times in the interim. See *Younger*, 401 U. S., at 45-46.

If we assume purely for the sake of argument that Ramirez does have a sincere religious belief in the need for physical touch at the very moment of execution (rather than shortly before), does deprivation of that practice constitute a "great" injury within the meaning of *Younger*? It is difficult to see how that is possible, given that the methods of execution used for most of the twentieth century precluded it, and while the methods were challenged on other grounds, see, e.g., *In re Kemmler*, 136 U. S. 436 (1890); *Gomez* v. *United States District Court*, 503 U. S. 653 (1992), there were few and possibly zero challenges on free exercise grounds.[9]

Hanging was the standard method of execution in the United States until the late nineteenth to the early twentieth century, when electrocution and lethal gas

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8. Federal courts, that is, with the exception of this Court. This Court is unique in being the only federal court with appellate jurisdiction to directly review state court judgments, see 28 U. S. C. § 1251, and it has a corresponding statutory stay authority. See 28 U. S. C. § 2101.

9. The negative is difficult to prove, but *Amicus* CJLF is not aware of any such cases, has looked for them, and has not found any.

were introduced in the belief that they were more humane. See *Glossip* v. *Gross*, 576 U. S. 863, 867-868 (2015). We can be very sure that there were no clergy present in the gas chamber while cyanide gas was being released or laying hands on an inmate while high voltage was being applied.[10]

Whether the State's interest in security requires these restrictions—if it genuinely is required to allow nonemployee clergy inside the chamber—is a matter deserving of careful consideration in a future case where it can be decided without further delay of long-overdue justice. In the posture of the present case, however, this suit can be disposed of under *Younger* if immediate injury to the plaintiff is not "great." Surely it is not. Ramirez will be allowed a large measure of accommodation for his religious beliefs, see App. to Pet. for Cert. 22 (D.C. Opn. 6), and denied only a couple of aspects, one of which was regularly denied for most of a century without substantial religious objection. This is not "great" injury on a scale sufficient to warrant interference with the State's system of justice, especially in its punishment of the very worst crimes. Pablo Castro, we should not forget, was left to die in a parking lot with no comfort from anyone.

2. Existence of state remedies.

As noted *supra*, at 15, the *Younger* doctrine includes a requirement to exhaust state remedies or at least inquire into their adequacy. Prisoner litigation law generally requires exhaustion of administrative remedies, see 42 U. S. C. § 1997e(a), but the *Younger* line requires consideration of whether an adequate state

10. Notably, *Amicus* Becket Fund addresses its history-based argument solely to audible prayer, not touch. See Brief for Becket Fund for Religious Liberty as *Amicus Curiae* i.

court remedy is available. See *Younger*, 401 U. S., at 45; *Pennzoil*, 481 U. S., at 14-16. For example, *Kowalski* v. *Tesmer*, 543 U. S. 125, 133 (2004), noted "ample avenues to raise [the] constitutional challenge in [state criminal] proceedings" before applying *Younger*.

In recent years, execution method challenges have routinely landed in federal court with little or no inquiry as to the existence of adequate state remedies. Some states clearly do have them. For example, in California the original trial court is vested with exclusive jurisdiction to hear the challenge and empowered to order the use of a valid method if it finds the challenged method invalid. See Cal. Penal Code § 3604.1(c). This is superior to a federal court suit, where *Ex parte Young*, 209 U. S. 123 (1908), casts doubt on the authority of the court to order a state official to do anything other than refrain from an unconstitutional act. It would be error under *Younger* to sanction the bypass of such a remedy without an unusual and compelling justification.

The situation in Texas is less clear, may vary with the type of challenge, and is not suitable for adjudication in this Court in the first instance. The Court of Criminal Appeals held that the method of execution was not a cognizable claim in habeas corpus in *Ex parte Alba*, 256 S. W. 3d 682 (Tex. Crim. App. 2008), but it held that such a claim could be made via writ of prohibition and decided the case on the merits in *Ex parte Chi*, 256 S. W. 3d 702 (2008). In that case, "the underlying data that negates applicant's claim ... was supplied by applicant himself." *Id.*, at 705-706 (Cochran, J., concurring). In a case with disputed facts, the remedy might not be adequate.

Amicus CJLF expects that the Court of Appeals' decision in this case can be affirmed on the absence of a great injury or on the grounds briefed by the respon-

dent without resolving this question. If not, the state remedy question would be appropriate for decision on remand. Either way, a clear statement that the existence of state judicial remedies, as well as administrative ones, is an important factor would be helpful in putting these cases on the right track. It would send such challenges to state court in states that already have adequate remedies, and it would provide an incentive to create such remedies in states that do not.

C. The Posture of the Case.

Much of the briefing in this case seems to assume that the question before this Court is the same as if this were a final judgment in a routine RLUIPA case, fully tried on the merits, with no issues of federalism involved. It is not. This is a case where a federal court was asked to halt the execution of a state court's judgment at the last minute, long after all federal review of the judgment was completed. This is far different from the typical prisoner case under 42 U. S. C. § 2000cc-1. In the typical case, the prisoner will continue to serve his sentence as ordered by the state trial court in the criminal case regardless of the final outcome of the RLUIPA case and regardless of any interim orders in that case.

The Acts of Congress discussed in Part I, *supra*, are all based on important policies worthy of careful consideration. This case involves a claim of free exercise of religion, but it is not *solely* about free exercise. It also involves finality of criminal judgments, the strong interest of the public and the victims against excessive delay, the integrity of state courts and their ability to enforce their judgments, and the federal government's respect for the sovereign authority of the states.

The landmark case of *Younger* v. *Harris* provides a time-honored guide to straightening all this out. It should be employed in this case.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation