**Nos. 22–6054 & 22A424**

IN THE

# Supreme Court of the United States

STEPHEN DALE BARBEE,
Petitioner,

v.

BRYAN COLLIER; BOBBY LUMPKIN; DENNIS CROWLEY,
Respondents.

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

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND APPLICATION FOR STAY OF EXECUTION


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## CAPITAL CASE
## QUESTIONS PRESENTED

Petitioner Stephen Dale Barbee was convicted and sentenced to death for suffocating his pregnant ex-girlfriend, Lisa Underwood, and her seven-year-old son, Jayden. Barbee filed a federal civil rights lawsuit seeking certain religious accommodations in the execution chamber. Respondents have already agreed to honor *all* of Barbee's religious requests, but the district court entered a preliminary injunction further requiring the prison to draft a new protocol governing the behavior of spiritual advisors in the chamber before executing Barbee. The Fifth Circuit vacated the injunction as an abuse of discretion and remanded the case, holding that the district court's injunction was overbroad and that *Ramirez*[1] and the PLRA[2] limited relief to an injunction mandating Barbee's specific accommodations.

Barbee's petition for a writ of certiorari and application for a stay of execution now present the following questions:

1. Is a preliminary injunction under *Ramirez* and the PLRA limited to mandating that the prison accommodate a condemned inmate's requested religious practice?

2. Barbee must show a substantial burden on his religious exercise to prevail on a RLUIPA[3] claim. Can he make a strong showing on the merits when the prison agreed to accommodate all his religious requests?

3. Has Barbee shown irreparable injury when neither his conviction nor his sentence is contested and the prison has completely accommodated his religious requests?

4. Has Barbee shown that the public interest lies in favor of delaying his execution after seventeen years of litigation?

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1 *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

2 The Prison Litigation Reform Act of 1995.

3 The Religious Land Use and Institutionalized Persons Act of 2000.

## LIST OF ALL PROCEEDINGS[4]

*Barbee v. State*, No. AP–75359 (Tex. Crim. App. Dec. 10, 2008)

*Ex parte Barbee*, No. WR–71,070–01 (Tex. Crim. App. Jan. 14, 2009)

*Ex parte Barbee*, No. WR–71,070–02 (Tex. Crim. App. Sept. 14, 2011)

*Ex parte Barbee*, No. WR–71,070–02 (Tex. Crim. App. May 8, 2013)

*Ex parte Barbee*, No. WR–71,070–03 (Tex. Crim. App. Feb. 10, 2021)

*Ex parte Barbee*, No. WR–71,070–04 (Tex. Crim. App. Oct. 8, 2021)

*Ex parte Barbee*, No. WR–71,070–05 (Tex. Crim. App. Nov. 9, 2022)

*Barbee v. Stephens*, No. 4:09–CV–074–Y (N.D. Tex. July 7, 2015)

*Barbee v. Collier et al.*, No. 4:21–CV–03077 (S.D. Tex.)

*Barbee v. Collier et al.*, No. 4:22–CV–03684 (S.D. Tex.)

*Barbee v. Davis*, No. 15–70022 (5th Cir. Mar. 21, 2018)

*Barbee v. Collier et al.*, No. 22–70011 (5th Cir. Nov. 11, 2022)

*Barbee v. Texas*, No. 08–10834 (U.S. Oct. 5, 2009)

*Barbee v. Davis*, No. 18–5289 (U.S. Nov. 19, 2018)

[4] Barbee's petition has omitted the list of related cases required by Rule 14.1(b)(iii).

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## INTRODUCTION

Barbee murdered his pregnant ex-girlfriend and her seven-year-old son by suffocating them to death. In 2006 a Texas jury convicted him of capital murder and sentenced him to die. Barbee is now scheduled to be executed on November 16, 2022. This is his third execution date.

This dispute concerns certain religious accommodations that Barbee seeks in the execution chamber. Respondents have agreed to honor *all* of Barbee's requests, but the district court entered a preliminary injunction purporting to require the prison to draft a new protocol governing the behavior of spiritual advisors in the chamber before executing Barbee. It did so only days before his execution date, even though this case has been pending for over a year. Respondents moved the court of appeals to vacate the injunction as an abuse of discretion, which it did. The Fifth Circuit held that the injunction was not authorized by *Ramirez* or the PLRA. *Barbee v. Collier et al.*, No. 22–70011, slip op. (5th Cir. Nov. 11, 2022) (per curiam) (unpublished).

As background, during last-minute litigation prior to his last execution date, Barbee filed the instant civil rights lawsuit pursuant to 42 U.S.C. § 1983. ROA.7.[5] Concurrently, Barbee sought an injunction prohibiting TDCJ from executing him unless it allowed his spiritual advisor to touch him and audibly

[5] "ROA" refers to the record on appeal.

pray in the chamber. ROA.79. The district court granted a stay conditioned on Respondents accommodating Barbee's religious practices. ROA.314.

The Court then decided *Ramirez*. Following *Ramirez*'s guidance, Respondents assiduously seek to accommodate condemned inmates' religious requests, and the district court acknowledged that "[i]t appears that Defendants have agreed to accommodate all Barbee's religious requests." ROA.470. Notwithstanding Respondents' full accommodation of Barbee's religious requests, the district court entered a preliminary injunction requiring the prison to rewrite its policy governing religious practice in the execution chamber. ROA.571–87. The injunction did not even mention Barbee's requested accommodations. *Id*.

The district court's injunction was thus contrary to *Ramirez*. Under *Ramirez*, there is only one correct remedy for a condemned inmate's complaint about limitations on religious exercise in the execution chamber—an order mandating the inmate's religious accommodation. *Ramirez*, 142 S. Ct. at 1283 ("the proper remedy is an injunction ordering the accommodation"). The PLRA likewise requires relief to be narrowly tailored and limited to the claimant. *Id*. at 1277–78, 1282. In fact, the district court issued such a tailored order before the Court decided *Ramirez*. ROA.314. And, following *Ramirez*, the Respondents have promised compliance with the previous injunction. ROA.470 ("Defendants will comply with the stipulations contained in the order staying

the earlier execution"). Respondents have sworn in writing to provide all the religious accommodations Barbee requested to date. ROA.402–04, 449–50, 572. The district court's injunction thus went beyond what was necessary, was incompatible with *Ramirez* and the PLRA, and gave Barbee impermissible relief.

Moreover, even if the district court's injunction was permissible in its scope, the injunction standard calls for Barbee to make a strong showing on the merits. But Barbee's RLUIPA claim requires demonstrating that the government has placed a substantial burden on his religious exercise in the chamber. *Ramirez*, 142 S. Ct. at 1277. Given that the Respondents have agreed to accommodate each of his religious requests, there is no burden on Barbee's religious exercise, let alone a substantial one.

This vague injunction was also effectively a mandamus directed at Respondents—who were required draft a new policy to Barbee's satisfaction—or a de facto stay. Even if TDCJ could have feasibly enacted a new policy before the 16th, Barbee would have immediately challenged the new policy as not complying with the injunction, and the execution would not proceed.

To be sure, *Ramirez* recommended in dicta that prisons create new policies governing religious practice in the execution chamber. *Ramirez*, 142 S. Ct. at 1277. However, *Ramirez* did not mandate the creation of new policies and neither Barbee nor the district court have mustered any precedent that

says that it did. The Court just suggested that new policies might facilitate timely resolution and make litigation a rare occurrence. *Id.* at 1283. But once litigation occurs, the appropriate preliminary remedy is ordering the religious accommodation.

Furthermore, the equities weigh against Barbee. Barbee cannot show irreparable harm in the absence of a written protocol. This is a § 1983 action, so Barbee necessarily does not challenge his death sentence (if so, his suit would sound in habeas). And the prison has granted Barbee every religious accommodation that he has asked for, even when he changed his requests. Only delay, not "sincere religious belief," animates the policy rewrite. *Ramirez*, 142 S. Ct. at 1282.

The victims' suffering and their long wait for justice also demands no further delays. The district court did not even mention the victims in its discussion of the injunction's propriety. ROA.584–86. This egregious oversight gives short shrift to the human facet of the stay analysis. "Last-minute stays should be the extreme exception, not the norm[.]" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019); *see also Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). Seventeen years have passed since Barbee brutally murdered his victims. The ensuing delay in carrying out Barbee's sentence should weigh heavily against this injunction. "The people of [Texas], the surviving victims of Mr. [Barbee]'s crimes, and others like them deserve better." *Bucklew*, 139 S. Ct. at 1134.

Accordingly, the Fifth Circuit properly vacated the district court's injunction, and Barbee's request for a stay should be denied.

## STATEMENT OF THE CASE

### I. Facts of the Crime

Barbee suffocated his pregnant ex-girlfriend Lisa Underwood and her seven-year-old son Jayden. *Barbee v. State*, AP–75,359, 2008 WL 5160202, at *1–3 (Tex. Crim. App. Dec. 10, 2008), *cert. denied*, 558 U.S. 856 (2009). At punishment, the State showed that Barbee acted abusively to his ex-wife and a coworker who refused his advances. *Barbee v. Davis*, 660 F. App'x 293, 318–19 (5th Cir. 2016); *Barbee v. Davis*, 728 F. App'x 259, 260–62 (5th Cir. 2018). Barbee presented testimony attesting to his good deeds and character, and that he could behave in prison if he received a life sentence. *Id.*

### II. Conviction and Postconviction Proceedings

Barbee was convicted of capital murder and sentenced to death in 2006. *State v. Barbee*, No. 1004856R, 2006 WL 6916746 (213th Jud. Dist. Ct., Tarrant Co., Tex. Feb. 27, 2006). The CCA affirmed on direct appeal. *Barbee*, 2008 WL 5160202. Three state habeas applications have been dismissed or denied. *Ex parte Barbee*, No. WR–71,070–01, 2009 WL 82360 (Tex. Crim. App. Jan. 14, 2009) (per curiam); *Ex parte Barbee*, No. WR–71,070–02, 2013 WL 1920686 (Tex. Crim. App. May 8, 2013) (per curiam); *Ex parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App.), *cert. denied* 142 S. Ct. 258 (2021). Barbee's bid for federal

habeas relief was rejected. *Barbee v. Stephens*, No. 4:09–CV–074–Y, 2015 WL 4094055 (N.D. Tex. Jul. 7, 2015); *Barbee*, 728 F. App'x at 260–70; *Barbee v. Davis*, 139 S. Ct. 566 (2018).

Barbee already had two prior execution dates stayed, including one in this cause. *Ex parte Barbee*, 2019 WL 4621237, at *2; *Barbee v. Collier*, 566 F. Supp. 3d 726, 730 (S.D. Tex. 2021). On August 12, 2022, the trial court issued an order resetting Barbee's execution date for November 16, 2022. Since the execution date was set, the CCA has rejected Barbee's request for mandamus relief[6] and his suggestion for reconsideration of one of his subsequent state habeas applications. Barbee has also filed a second civil rights lawsuit challenging the lethal injection protocol. Compl., *Barbee v. Collier et al.*, No. 4:22–cv–03684 (S.D. Tex.), ECF No. 1. That case was denied with prejudice on November 15, 2022. *Id.*, ECF Nos. 12 & 13. The Board of Pardons and Paroles voted against recommending commutation or a reprieve.

## III. The RLUIPA Litigation

As noted, Barbee was previously scheduled to be executed on October 12, 2021. Just weeks before his execution date, Barbee filed the instant lawsuit under § 1983 and RLUIPA, based on TDCJ's denial of his request for his

[6] This rejected mandamus action was premised on the state trial court lacking authority to set the execution date in light of the pending federal spiritual advisor litigation. *See* Pet.9–10 ("That Motion was filed with the State's full knowledge of the ongoing district court proceedings.").

spiritual advisor to touch him and audibly pray during his execution. ROA.315. Barbee sought and received a stay of his October 12th execution. *Id*. The district court prohibited Barbee's execution unless "the State allows his chosen spiritual advisor in the execution chamber, authorizes contact between Barbee and his spiritual advisor, and allows his spiritual advisor to pray during the execution." ROA.332.

The Defendants moved to dismiss, but the district court stayed the proceedings pending the *Ramirez* decision. ROA.350, 361, 370. After *Ramirez*, the Defendants again moved to dismiss, arguing that Barbee's claims were largely moot given their agreement to provide him the requested religious accommodations. ROA.393. To support that argument, Defendant Lumpkin provided a sworn statement explaining that Barbee's requested accommodations had been approved and would be fulfilled during Barbee's execution. ROA.403–04.

In response to TDCJ's approval, Barbee raised an additional and unpled religious request to have his spiritual advisor hold his hand during his execution. ROA.412. Although Barbee had failed to initially request that accommodation, TDCJ nonetheless approved it. ROA.438–50. Through a sworn statement, Director Lumpkin explained the accommodations have been officially approved and will not be withdrawn. *Id*.; *see also* ROA.572.

The district court acknowledged that "[i]t appears that Defendants have agreed to accommodate all Barbee's religious requests." ROA.469–71. Nonetheless, the district court requested additional briefing concerning whether another injunction would be appropriate. *Id.* The district court then entered the preliminary injunction at issue here. ROA.571–87. Unlike its previous injunction, which only required accommodation of Barbee's stated religious demands, this injunction ignores that TDCJ officials have agreed to accommodate all of Barbee's requests and instead requires the prison to publish "a clear policy that has been approved by its governing policy body that (1) protects an inmate's religious rights in the execution chamber and (2) sets out any exceptions to that policy, further describing with precision what those exceptions are or may be." ROA.587. The Defendants appealed.

In a per curiam opinion, the Fifth Circuit vacated the injunction. *Barbee*, No. 22–70011, slip op. at 1–2. The Fifth Circuit explained: "There is no doubt that Barbee is entitled to have his spiritual advisor pray and touch him in the execution room under *Ramirez*, as the circumstances are nearly identical." *Id.* at 4 (citing 142 S. Ct. at 1275–82). But instead, the district court's injunction "went beyond the circumstances of Barbee's case and ordered the Defendants to enact a written policy on religious accommodation that would apply to all executions." *Id.* at 4. The Fifth Circuit observed that the relief in this case was constrained by the PLRA and Circuit precedent, which precluded forcing the

prison to rewrite its policy. *Id.* at 4–6. The Fifth Circuit acknowledged this Court's statement in *Ramirez* that prisons would do well to adopt clear rules governing spiritual advisors in advance of executions, but this statement was a recommendation and "was not a requirement on states." *Id.* at 6. The Fifth Circuit further noted that this was not a class action and the district court's injunction was overbroad. *Id.* at 6–7. The Fifth Circuit therefore remanded for the district court to consider "what relief specific to Barbee is consistent with *Ramirez* and is appropriate in this case." *Id.* at 7. Barbee filed the instant petition for certiorari review late in the evening on November 14, 2022. The district court entered an amended injunction on November 15, 2022, which is available on the district court's docket as ECF No. 47.

**REASONS FOR DENYING THE WRIT**

The questions that Barbee presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." As for Barbee's application for a stay of execution, "[f]iling an action that can proceed under § 1983 does not entitle the [plaintiff] to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.*

(citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). "It is well-established" that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2). In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id.* at 893. The State's "powerful and legitimate interest in punishing the guilty," as well as its interest in finality, must also be considered, especially in a case where the State and the victims have for years borne the "significant costs of federal habeas review." *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring); *see also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (both the State and victims have an important interest in a sentence's timely enforcement). Thus, in deciding whether to grant a stay, the Court must consider four factors: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Ramirez*, 142 S. Ct. at 1275.

Barbee's stay application asserts that this is an interlocutory appeal, and that consequently the Respondents must show irreparable harm from the district court's injunction. Appl.6. But Barbee's cited precedent, *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478 (1978), deals with the question of whether a class certification order implicated injunctive relief and was therefore appealable and reflects the hesitancy of the Court to expand the field of non-final orders subject to appeal. *Gardner*, 437 U.S. at 480–82. Similarly, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981), dealt with whether the district court's denial of a proposed consent decree was appealable. Here, the lower court's injunction was unquestionably appealable. 28 U.S.C. § 1292(a)(1). It is not a different type of order that the Respondents are trying to wedge into § 1292(a)(1). Barbee's case is not on point.

Here, Barbee's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction, and certiorari should be denied. Likewise, Barbee fails to make the requisite showing for a stay of execution, and his application should also be denied.

## I. Neither *Ramirez* nor the PLRA Allow an Injunction Ordering Respondents to Rewrite Their Execution Protocol.

"[A] preliminary injunction is 'an extraordinary remedy never awarded as of right.'" *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008) ). When the

relief sought is a preliminary injunction, "the party seeking relief 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Ramirez*, 142 S. Ct. at 1275 (quoting *Winter*, 555 U.S. at 20). A district court's grant of a preliminary injunction is reviewed for abuse of discretion. *Benisek*, 138 S. Ct. at 1943 (citing *Winter*, 555 U.S. at 32).

While Respondents believe their accommodations have rendered this case moot, to the extent the district court thought further action was necessary, it was limited to an injunction requiring Barbee's requested religious accommodations. *Ramirez*, 142 S. Ct. at 1283. When cases "arise and a court determines that relief is appropriate under RLUIPA, the proper remedy is an injunction ordering *the accommodation*." *Id.* (emphasis added). *Ramirez* does not authorize alternate forms of relief. Likewise, the PLRA states that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs"; that such relief must be "narrowly drawn, [and] exten[d] no further than necessary to correct the violation of the Federal right"; and that it must be "the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A); *see also Ramirez*, 142 S. Ct. at 1282 ("a tailored injunction [ ]—rather than a stay of execution—

will be the proper form of equitable relief when a prisoner raises a RLUIPA claim in the execution context"). The result is clear: if a condemned prisoner receives his accommodations, then the State may proceed with the execution. By mandating a policy rewrite, the district court upset the balance that both Congress and the Court struck.

Indeed, the lower court has previously held that a district court may not require what the district court did here. *See*, *e.g.*, *Gates v. Cook*, 376 F.3d 323, 338–39 (5th Cir. 2004) (vacating an injunction requiring a prison to reduce a practice to writing). In *Gates*, the Fifth Circuit concluded that while a written policy may be "desirable," the PLRA does not authorize an injunction to go so far as to require the measure to be in writing. Injunctive relief must be narrowly drawn and extend no further than necessary to correct the alleged violation. 18 U.S.C. § 3626(a)(1)(A); *Ball v. LeBlanc*, 792 F.3d 584, 598 (5th Cir. 2015). Thus, under *Ramirez* and the PLRA, the most the district court could have ordered is that the prison accommodate Barbee's religious practices. Other courts, including the Southern District, have entered such narrowly tailored orders. *See*, *e.g.*, *Gonzales v. Collier*, No. 4:21-CV-00828, 2022 WL 4100852, at *16 (S.D. Tex. Jul. 5, 2022) ("Gonzales seeks a narrowly tailored injunction—not a stay of his execution date. In that sense, he doesn't oppose his execution going forward. He only requests that it go forward with

observance of his requested religious accommodations.")[7]; *Atwood v. Shinn*, No. CV2200625PHXJATJZB, 2022 WL 2047759, at *8–9 (D. Ariz. Jun. 6, 2022); *Smith v. Li*, No. 3:22-CV-00270, 2022 WL 1179405, at *5 (M.D. Tenn. Apr. 20, 2022).

Here, the district court does not seem to mention the PLRA at all in its order and injunction, despite that statute governing the injunctive relief available in this case. *See generally* ROA.570–87. Refusing to acknowledge or engage with the governing statute is plainly an abuse of discretion. In fact, the lower court's injunction would have been subject to immediate termination if it had not been vacated. The PLRA provides that:

> In any civil action with respect to prison conditions[8], a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

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7 Barbee cites *Gonzales* as support for his argument that Respondents cannot be trusted. Pet.13. But *Gonzales* did not require a policy change as an enforcement mechanism to prevent Respondents from reneging on their commitments. Rather, it simply mandated the religious accommodations and *suggested* policy changes. *Gonzales*, 2022 WL 4100852, at *16; *see also id.* (ECF No. 92). The case was later mooted due to the Respondents' accommodation of Gonzales's religious requests. *Id.* (ECF No. 104).

8 This includes "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

18 U.S.C. § 3626(b)(2). Here, there is no indication that the district court made a finding in its order requiring a policy rewrite that its relief was narrowly drawn, extends no further than necessary to allow Barbee's religious practice, and is the least intrusive way to do so. *See*, *e.g.*, *Gonzales*, 2022 WL 4100852, at *16 ("This relief is narrowly drawn, extends no further than necessary to correct the harm, and is the least intrusive means necessary to correct the harm."); *Atwood*, 2022 WL 2047759, at *9 (same). These are not mere magic words—they reflect a respect for comity and acknowledgment of the burdens that federal court intervention places on the State. Barbee would have the Court simply infer that district court did this mandatory analysis. It did not. ROA.587.

Similarly, the statute states that a court "shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless . . . the relief is necessary to correct the violation of a Federal right [ ] and [ ] no other relief will correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(B)(ii)–(iii). Here, Respondents are responsible under Texas Code of Criminal Procedure Art. 43.15 and the order of the trial court to conduct Barbee's execution on November 16th. As reflected by the Respondents-Appellants' briefing and the lower court's previous injunction in this matter, there is other relief that will correct the potential violation of Barbee's religious

freedom. ROA.332. That is, simply, an order mandating his religious accommodations. "The PLRA greatly limits a court's ability to fashion injunctive relief." *Ball v. LeBlanc*, 792 F.3d 584, 598 (5th Cir. 2015). "Under the PLRA, plaintiffs are not entitled to the most effective available remedy; they are entitled to a remedy that eliminates the constitutional injury." *Id.* at 599. The district court was wrong to enter a more onerous order that may put the Respondents in violation of both a state court order and state statute if they do not accede to Barbee's demands.

Moreover, this Court has cautioned that:

> the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The [PLRA] imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1); *accord*, § 3626(a)(2).

*Nelson*, 541 U.S. at 650. Giving "substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief," this Court should refuse to allow the district court's order to interfere with TDCJ's lawful responsibility to carry out the trial court's execution order. As explained below, the district court has created a de facto class action and is allowing Barbee to set policy for all of Texas' death row. *Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020) ("that level of micromanagement, enforced upon threat of

contempt, does not reflect the principles of comity commanded by the PLRA"). Under the plain text of the PLRA, Barbee is only entitled to his own religious accommodations and nothing more. 18 U.S.C. § 3626(a)(1)(A) ("[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs").

The PLRA is not just a reminder for "judicial caution," *see* Pet.16—it is a collection of statutory commands that limit and curtail the injunctive relief available to federal courts. Barbee implausibly argues that the district court's injunction is permissible because a protocol rewrite is specific relief with mere collateral effects. Pet.16–18 (citing *Brown v. Plata*, 563 U.S. 493 (2011). But Barbee's cited precedent is inapposite—*Plata* relates to systemwide problems (including overcrowding) in the California penal system that were previously found and also stipulated to by the State. *Plata*, 563 U.S. at 530–34. Granting relief to some inmates would necessarily impact other inmates because the issues were systemic. Here, the portion of the execution protocol in question may or may not have relevance to remainder of Texas' death row inmates, who obviously have varied faith requirements or perhaps even none at all. And, as shown, more specific relief clearly exists—simply ordering the accommodation (much as this Court did in *Ramirez*). *Ramirez*, 142 S. Ct. at 1284.

In *Ramirez*, the Court did comment: "If States adopt clear rules in advance, it should be the rare case that requires last-minute resort to the federal courts." 142 S. Ct. at 1283. But this best-practices recommendation represents neither a rule of law nor controlling precedent. The Court was explicit about what happens when the prison does not change its policy and litigation results—the federal court can order the religious accommodation. In fact, the district court itself seemed to recognize this, acknowledging that *Ramirez* only "recommended" or "encouraged" the adoption of new policies. ROA.576–77, 579, 582. Barbee now unconvincingly argues that this remedy is only available if the prison has first adopted a new policy. Pet.14. But this argument makes little sense in light of the Court's order in *Ramirez* itself, which specified that "[i]f Texas reschedules Ramirez's execution and declines to permit audible prayer or religious touch, the District Court should therefore enter appropriate preliminary relief." *Ramirez*, 142 S. Ct. at 1284. The *Ramirez* Court's commandment to the district court did not tell it to grant preliminary relief if Texas did not do a policy rewrite. *Id*. Rather, this Court's relief was narrowly focused on the specific religious accommodations that Ramirez sought.

Here, the district court's main rationale for the injunction was "the urgency to restrain the power of the State in the face of a federal constitutional and statutory right already afforded Barbee that has not been formally

recognized by the State." ROA.585. This appears to refer to the prison operating "under an unwritten policy where prison officials may unilaterally decide whether to allow an inmate's requested accommodation." ROA.583, 586. The district court believed "this practice constitutes an arbitrary method for interpreting its own policy; hence, the accommodation may be withdrawn at the will or caprice of any prison official at the last moment thereby avoiding judicial review." *Id*. Accordingly, the district court's injunction was premised on the idea that TDCJ would break its word and withdraw the accommodations Barbee has been promised under oath.

This concern is baseless. State officials are generally entitled to a presumption of good faith, and Respondents have submitted sworn assurances that Barbee's accommodations will not be withdrawn.[9] *Cf*. *Sossamon v*. *Lone Star State of Tex*., 560 F.3d 316, 325 (5th Cir. 2009). Respondents, TDCJ staff, and their representatives are law-abiding civil servants who are not in the business of lying to federal courts.

The district court nevertheless observed that "an unwritten policy not only fails to guarantee protection of an inmate's rights—it fails to specify when discretion will be used to deny a religious accommodation." ROA.586. Further,

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[9] Director Lumpkin: "These approved accommodations will not be withdrawn . . . Even if unanticipated events occur . . . the accommodations will still be honored." ROA.450.

"neither the inmate nor the spiritual advisor has notice as to what behavior, speech, action, or circumstance may result in a denial or withdrawal of a promised accommodation." *Id*. To the extent that this oath-breaking or lack of notice is a real concern, the PLRA's narrowly tailored remedy is apparent—order the accommodations, make the injunction binding on all TDCJ staff and successors, and specify penalties. The district court could have also ordered Respondents to provide notice of any intent to rescind Barbee's accommodations. But, again, there is no evidence in the record that Respondents have rescinded any accommodation or plan to do so.

*Ramirez* found that the equities favored the plaintiff's injunction because it was "possible to accommodate Ramirez's sincere religious beliefs without delaying or impeding his execution." *Ramirez*, 142 S. Ct. at 1282. Here, the district court's overbroad injunction went beyond simply accommodating Barbee's beliefs. Rather, the injunction effectively allowed Barbee to litigate on behalf of future condemned inmates with similar claims. "RLUIPA, however, requires that courts take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Id*. at 1281 (citing *Holt v. Hobbs*, 574 U.S. 352, 363 (2015)). This is not a class action: the district court's authority extended only so far as necessary to redress Barbee's claims.

Barbee now adds that the district court was right to enter its injunction as a matter of docket management—i.e., to prevent this issue from reoccurring in future cases. But, as shown, the PLRA does not allow Barbee to litigate on behalf of his fellow capital murderers. Moreover, this argument is curious since allowing this injunction will have the exact opposite effect and cause a proliferation of similar claims. Any death-sentenced inmate who wants an injunction to stay an execution will simply argue that the policy needs to be changed—regardless of whether or not the TDCJ has accommodated his/her requests.

In truth, what will actually tamp down on litigation is what the Fifth Circuit did—vacating the injunction. Post-*Ramirez*, TDCJ assiduously seeks to accommodate inmates' religious exercise in the chamber—much like it has done in the instant case. There will generally be no basis for RLUIPA claims in light of such accommodations. Rather, if litigation is allowed to persist despite the Respondents' accommodations, that yields the real docket management problem.

Indeed, Respondents have a proven track record in this respect. Texas has executed four inmates this year—Carl Buntion[10], Kosoul

[10] Juan Lozano & Michael Graczyk, Oldest Texas death row inmate executed for officer's death, AP News (Apr. 21, 2022), https://apnews.com/article/crime-shootings-texas-executions-houston-74e25cf0325008b48a21619d257c69d0 ("Buntion, joined by

Chanthakoummane[11], John Ramirez[12], and Tracy Beatty[13]—and all have received their requested religious accommodations. This demonstrated history of honoring inmates' religious requests post-*Ramirez* flatly rebuts Barbee's claims that vacating the district court's injunction will perpetuate "chaos." Pet.11 Along the same lines, when Barbee says the prison's policy can be fairly read to "prohibit" audible prayer and touch, *see* Pet.12–13, that does not appear to reflect real world practice now that the prison has this Court's guidance in *Ramirez*. Finally, this track record of accommodation likewise belies any claim that TDCJ officials cannot be trusted when they say that they will honor

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his spiritual adviser, began praying Psalm 23, 'The Lord is my Shepherd. . .' as the lethal dose of the powerful sedative pentobarbital began.").

[11] Juan Lozano & Michael Graczyk, Texas executes man for slaying of Dallas real estate agent, AP News (Aug. 17, 2022), https://apnews.com/article/texas-dallas-executions-mckinney-ebf5963c3cee971c818b63fbb0d957e6 ("Just before the execution took place and at Chanthakoummane's request, a Buddhist monk placed his right hand on the inmate's chest and read a passage from the Book of Ecclesiastes that refers to 'a time for everything.' He responded: 'Amen.'").

[12] Juan Lozano & Michael Graczyk, Texas executes inmate who fought prayer, touch rules, AP News (Oct. 5, 2022), https://apnews.com/article/us-supreme-court-texas-prisons-religion-prayer-9d424be517314cbf2b59543a22d47fa4 ("In the execution chamber, his spiritual adviser, Dana Moore, placed his right hand on the inmate's chest, and held it there for the duration. With his back to witnesses, Moore offered a brief prayer. 'Look upon John with your grace,' he prayed. 'Grant him peace. Grant all of us peace.' As Moore's prayer ended, Ramirez responded: 'Amen.'").

[13] Juan Lozano & Michael Graczyk, Texas man executed for 2003 strangling death of his mother, AP News (Nov. 9, 2022), https://apnews.com/article/us-supreme-court-health-prisons-executions-texas-079923327d4348534bebf3c62aa67fe7 ("Immediately before the procedure started, a prison chaplain placed his right hand on Beatty's chest and said a brief prayer.").

Barbee's religious requests in the execution chamber. Indeed, inmate Buntion voluntarily dismissed his own § 1983 lawsuit under Fed. R. Civ. P. 41 based upon TDCJ's assurances, which turned out to be solid. Ord., *Buntion v. Collier et al.*, No. 4:22–CV–01168 (S.D. Tex. Apr. 15, 2022), ECF No. 4. It appears that Chanthakoummane and Beatty never filed one in the first place. And Ramirez himself moved jointly with TDCJ to dismiss without prejudice. Ord. on Dismissal, *Ramirez v. Collier et al.*, No. H–21–2609 (S.D. Tex. May 13, 2022), ECF No. 39. Barbee is an outlier in his belief that the prison will not follow through on their promises.

## II. The District Court's Injunction Was Procedurally Improper.

### A. The injunction violated Rule 65(d)(1).

The Fifth Circuit did not vacate the injunction on this basis, but the Respondents continue to urge that the district court's order was procedurally improper. An injunction must specify precisely that which it seeks to require or enjoin any party from doing. Fed. R. Civ. P. 65(d)(1). Parties must be able to interpret an injunction from the four corners of the order. *Seattle-First Nat. Bank v. Manges*, 900 F.2d 795, 800 (5th Cir. 1990). Here, it is impossible to tell from the face of the district court's injunction exactly what TDCJ must do. And since the injunction never mentions the religious accommodations that Barbee specifically wants, the enjoined conduct is not clearly articulated within the four corners of the injunction. *Seattle-First Nat. Bank*, 900 F.2d at 800; *Sheila's*

*Shine Products*, *Inc. v. Sheila Shine*, *Inc.*, 486 F.2d 114, 129 (5th Cir. 1973). While silent as to handholding and audible prayer in the execution chamber, the injunction instead orders TDCJ to enact a policy that "protects inmate's religious rights in the execution chamber." The injunction thus falls short of redressing Barbee's specific claims, while extending far beyond the district court's limited authority under the PLRA.

The district court's injunction was also impermissibly vague when it directed Respondents to obtain approval for a new protocol from a "governing policy body." ROA.587. The Texas Legislature has delegated authority for determining execution procedures to the TDCJ-CID Director alone. Tex. Code Crim. Proc. Art. 43.14(a). No governing policy body approval is required when the Director makes changes to those procedures. Tex. Gov't Code § 2001.226 (exempting TDCJ from Administrative Procedures Act (APA) for changes to any rule or internal procedure "that applies to an inmate . . . or to an action taken under that rule or procedure."); *Foster v. TDCJ*, 344 S.W.3d 543, 548–49 (Tex. App.—Austin 2011, pet. denied) (holding § 2001.226 exempts TDCJ from APA for changes to the execution protocol). Consequently, it is unclear if Respondents could have ever fully complied with the district court's injunction because there is no approval available for the changes. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (Rule 65(d) "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders"). Certainly, it could

not be confidently complied with without delaying the execution, contrary to *Ramirez*.

### B. The district court's injunction is an improper mandamus.

Forcing the prison to rewrite its policies is also relief not available to Barbee because it "is in the nature of mandamus." *Norton v. Enns*, 2:14-CV-0040, 2014 WL 3947158, at *3 (N.D. Tex. Aug. 12, 2014). Federal courts "do not have jurisdiction to issue the writ against a state actor or agency." *Id.* (citing *Moye v. Clerk, Dekalb Cnty. Superior Court*, 474 F.2d 1275–76 (5th Cir. 1973)). "Instead, if relief is available to [Plaintiff], he must obtain it through a mandamus action or other appropriate action in the state courts." *Id.* Here, Barbee is effectively seeking to compel the prison to draft and approve new policies—mandamus relief. However, the district court lacked jurisdiction to compel state officials by writ of mandamus. *See, e.g., Waters v. Texas*, 747 F. App'x 259, 260 (5th Cir. 2019).

## III. Barbee's Already-Granted Religious Accommodations Foreclose His RLUIPA Claim.

To receive an injunction, Barbee must make a strong showing on the merits. In turn, RLUIPA requires Barbee to demonstrate that the government has substantially burdened his sincere religious exercise. *Ramirez*, 142 S. Ct. at 1277. But the Respondents have presented uncontested evidence that TDCJ officials have approved Barbee's requested religious accommodations. No

*religious* relief sought in this case remains unresolved. Barbee filed suit seeking an injunction prohibiting TDCJ from carrying out his execution unless his spiritual advisor can touch him and audibly pray in the chamber. Director Lumpkin provided a sworn statement explaining that these accommodations have been approved and will be fulfilled during Barbee's execution. ROA.403–04. The uncontroverted evidence demonstrates Barbee's accommodations have been officially approved by the person with authority to do so, at least one other prisoner has been executed with similar religious accommodations without problems, and Barbee's chosen spiritual advisor has been previously vetted and approved. *Id*. TDCJ has also considered and approved an additional, unpled request for handholding. ROA.438–50. Through a sworn statement, Director Lumpkin explains the accommodations have been officially approved and will not be withdrawn. *Id*. Director Lumpkin is statutorily responsible for overseeing executions in Texas. Tex. Code Crim. Proc. Art. 43.15. There is no evidence suggesting these accommodations will not be provided during Barbee's November 16th execution.

The district court's prior injunction provided that: "The State may not carry out Barbee's execution until the State allows his chosen spiritual advisor in the execution chamber, authorizes contact between Barbee and his spiritual advisor, and allows his spiritual advisor to pray during the execution." ROA.332. The Respondents have sworn in writing they will fully comply with

this order. The district court has acknowledged that "Barbee has not identified any religious request that the Defendants have not agreed to accommodate." ROA.470. Nor does any "sincere religious belief" require a policy change. *Ramirez*, 142 S. Ct. at 1282. Barbee must show that he sincerely believes in the accommodation 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. Demanding that the prison rewrite its execution policy strongly suggests a desire to delay the execution, not the sincere religious belief required by RLUIPA. Barbee has received all the religious accommodations that he requested. Thus, he cannot show the substantial burden on his religious exercise required by RLUIPA. *Ramirez*, 142 S. Ct. at 1277.

Barbee does not seem to seriously contest that he secured all the religious accommodations that he sought. Rather, he parrots the district court and complains that TDCJ's shifting interpretations of its spiritual advisor protocol mean that the Respondents cannot be trusted to follow through on their promises. Pet.11, 14–17. The policy change is thus a necessary enforcement mechanism. But this argument collapses under its own weight. Barbee effectively complains that the prison's policy changes should be rectified with yet another policy change. Also, it is far-fetched to think that a federal court order—enforceable by sanctions and contempt—would have less coercive force than a policy rewrite. Pet.15 (asserting the vacatur of the

injunction leaves district courts "powerless" to preserve religious rights). Barbee asserts that the Respondents can change that very policy at a whim and on a dime.[14] Pet.14 (arguing that the injunction was necessary to "eliminat[e] the likelihood that a last-minute exercise of the CID Director's discretion would result in a deprivation of [Barbee's] religious rights"). On the other hand, Respondents cannot change a federal court order mandating the accommodations, at least not without permission from the lower court or risking contempt.

If Barbee were truly concerned about his religious exercise in the chamber, he should have accepted the Respondents' accommodations and dismissed his lawsuit. At very least, he should have asked for a court order mandating those accommodations. Instead—despite his action now being severed from its raison d'être—Barbee continues to litigate on. Barbee's extended litigation is thus merely a meritless attempt to delay imposition of his well-deserved sentence. *See Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) (it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of

[14] Barbee unconvincingly argued below that when the district court required a new protocol's approval by a "governing policy body" that the district court was referring to Director Lumpkin. Plaintiff-Appellee's Brief at 23. That is a stretch. The more obvious interpretation is that the district court did not understand the policy-creation mechanism that it and Barbee are now trying to dictate and control.

death."); *cf. Burwell v. 21 Hobby Lobby Stores, Inc.*, 573 U.S. 682, 718 (2014) ("by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented").

Additionally, since Barbee has received the religious accommodations that he sought, there is nothing left for Barbee to obtain for himself by this lawsuit. Instead, he is just impermissibly litigating on behalf of unascertained capital murderers who may or may not be harmed by application of these policies in the future. But those inmates have their own attorneys and can press their own individual cases. *See Kowalski v. Tesmer*, 543 U.S. 125, 129–32 (2004). The lower court should not have a converted a dispute over Barbee's personal religious accommodations into a class action over the prison's policies for all of death row.

Barbee cannot show any burden on his religious practice—let alone a substantial burden. Because Barbee cannot prevail under RLUIPA, he cannot make the strong showing required for an injunction.

## IV. The Remaining Equities Cut Against Barbee.

As explained above, Barbee has not made a strong showing that he will succeed on the merits. Barbee cannot credibly show harm from TDCJ's execution protocol when he has already gotten all the religious accommodations that he asked for and received a penalty-backed pledge to fulfill those accommodations. But the remaining equities do not favor Barbee

either. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Barefoot*, 463 U.S. at 893. The harm that Barbee himself has identified is the deprivation of his religious liberty, not that his execution is itself inappropriate. *Cf. Ochoa v. Collier*, 802 F. App'x 101, 106 (5th Cir.), *cert. denied*, 140 S. Ct. 990 (2020); *Skinner v. Switzer*, 562 U.S. 521, 533 (2011); *Nance v. Ward*, 142 S. Ct. 2214, 2224 (2022) ("the claim belongs in § 1983 because . . . it challenges not the validity of a death sentence, but only the State's mode of carrying it out"). Of course, Respondents have agreed to these accommodations, meaning that Barbee has already secured the substantive relief sought in this lawsuit. He will no longer suffer any injury under the prison's purportedly unconstitutional policies. Barbee himself accrues no tangible benefit from winning his lawsuit and suffers no personal harm from losing it. Only anonymous future inmates may potentially be harmed by any purported defect in prison policy or its application, not Barbee. Even if merit exists to Barbee's argument that prison policies violate the Constitution, those policies no longer pose any concern for him individually. Now that Barbee has secured his relief, further litigation serves no apparent purpose save to prevent the imposition of Barbee's lawful punishment.

Finally, the State, the victims, and the public have a strong interest in seeing Barbee's sentence carried out. The State and crime victims have a

"powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). And "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence." *Bucklew*, 139 S. Ct. at 1133 (quotation omitted); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) ("a State retains a significant interest in meting out a sentence of death in a timely fashion"); *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). Once post-conviction proceedings "have run their course . . . finality acquires an added moral dimension." *Calderon*, 523 U.S. at 556. "Only with an assurance of real finality can the State execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." *Id.* The State should be allowed to enforce its "criminal judgments without undue interference from the federal courts." *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (citations and internal quotations omitted).

Here, the public's interest lies in executing a sentence duly assessed, particularly where years of judicial review have found no reversible error. Barbee has already passed through state and federal collateral review. The public's interest[15] is not advanced by postponing Barbee's execution any

[15] Barbee asserts that the "death warrant that is void on its face because it is based on untruthful statements." Appl.7. This apparently refers to the allegations in

further, and the State opposes further delay. *Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.").

Barbee killed a pregnant woman and a child. Some of the victims in this case submitted letters to the district court before Barbee's last execution date, ROA.301–10[16], but their pain and suffering hardly factor in the district court's analysis, if at all. ROA.584–86. This was an abuse of the district court's discretion. Seventeen years after Barbee's crime, justice should no longer be denied for those that he has hurt.

## CONCLUSION

The Fifth Circuit correctly held that the district court abused its discretion by entering an injunction ordering the prison to rewrite its execution protocol before executing Barbee. The district court's injunction was rife with legal errors and vastly exceeded the limits of the district court's authority. A preliminary injunction under *Ramirez* or the PLRA is limited to mandating that the prison accommodate a condemned inmate's requested religious practice. Furthermore, Barbee must show a substantial burden on his religious

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his state-level mandamus action. The state court rejected that lawsuit without written order.

[16] Lisa Underwood's best friend explains: "Myself and Lisa's family respectfully request denying a Stay of Execution and it is not in the best interest of Lisa's and Jayden's family that a Stay be approved. It has been an excruciating time waiting 16 years for justice for Lisa and Jayden and her unborn baby girl that all died at the hands of the defendant. His bare hands killed all 3 of them. They died a horrible, violent death." ROA.308.

exercise to prevail on his RLUIPA claim. He cannot make a strong showing on the merits when the Respondents have agreed to accommodate all his religious requests. Congruently, Barbee cannot show irreparable injury when neither his conviction nor his sentence is contested and the TDCJ has completely accommodated his religious requests. And the public interest does not favor delaying Barbee's execution after seventeen years of litigation.

"[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 should apply a strong presumption against equitable relief for a capital litigant making a last-ditch plea to avoid his sentence. *Id.*; *Hill*, 547 U.S. at 584. Barbee has been granted all the religious accommodations that he has asked for, and this Court should therefore deny Barbee's petition for a writ of certiorari. Moreover, the State's strong interest in the timely enforcement of a sentence is not outweighed by the unlikely possibility that Barbee's petition for certiorari will be granted. Thus, his application for a stay of execution should be denied as well.

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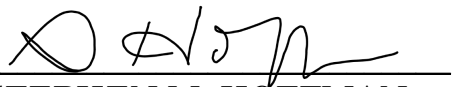

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