Nos. 18-8615, 18A982 & 18A985

IN THE

Supreme Court of the United States

PATRICK HENRY MURPHY,
Petitioner,

v.

BRYAN COLLIER; LORIE DAVIS; BILLY LEWIS,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit,
Original Petition for Writ of Prohibition,
and Motions for Stay of Execution

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

GWENDOLYN S. VINDELL
Assistant Attorney General

MATTHEW OTTOWAY
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
matthew.ottoway@oag.texas.gov

Counsel for Respondents

CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari in a case presenting an unexhausted and untimely challenge to Texas's execution protocol?

2. Should this Court grant a stay of execution where there is no substantial likelihood of success on the merits, where there is extreme dilatoriness, and where the equities favor the State?

3. Does this Court have jurisdiction to compel state officials to allow a non-employee into an execution chamber during the execution process?

4. If the Court does have writ-of-prohibition jurisdiction, should the Court exercise such authority where remedies have been made unavailable by dilatoriness, where there are disputed facts, and where there is no clear right to relief?

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BRIEF IN OPPOSITION

Bryan Collier, Executive Director, Lorie Davis, the Director of the Correctional Institutions Division, and Billy Lewis, Senior Warden, all of the Texas Department of Criminal Justice (TDCJ), respectfully submit this brief in opposition to the petition for a writ of certiorari, original petition for writ of prohibition, and motions for stay of execution filed by Patrick Henry Murphy.

STATEMENT OF THE CASE

I. Murphy's Offense and Postconviction Challenges

On December 13, 2000, Murphy and six other inmates escaped from a Texas prison. *Murphy v. Davis*, 737 F. App'x 693, 695 (5th Cir. 2018). On December 24, 2000, the group robbed a sporting-goods store in Irving, Texas, killing Officer Aubrey Hawkins as they fled. *Id.* at 696–07. The escapees made their way to Colorado where they were eventually captured, save one who committed suicide, in January 2001. *Id.* at 697.

Murphy was convicted of capital murder and sentenced to death in November 2003. *Murphy v. State*, No. AP-74,851, 2006 WL 1096924, at *1 (Tex. Crim. App. Apr. 26, 2006). His conviction was affirmed on direct appeal in April 2006. *Id.* His state habeas application was denied in July

2009. *Ex parte Murphy*, No. WR-63,549-01, 2009 WL 1900369, at *1 (Tex. Crim. App. Nov. 15, 2006).

Murphy then turned to the federal forum, but collateral relief was denied by the district court. *Murphy*, 737 F. App'x at 699. On appeal, Murphy was unable to obtain a certificate of appealability or otherwise demonstrate reversible error. *Id.* at 709. A petition for writ of certiorari was denied late last year. *Murphy v. Davis*, 139 S. Ct. 568 (2018).

II. Murphy's Recent Litigation

In late November of last year, the state district court set Murphy's execution for March 28, 2019. Order Setting Execution Date, *State v. Murphy*, No. F01-00328-T (283d Dist. Ct., Dallas County, Tex. Nov. 29, 2018). About two weeks before his execution date, Murphy moved the Court of Criminal Appeals (CCA) to reopen his direct appeal. Suggestion That the Court, On Its Own Motion, Reconsider Its April 26, 2006 Denial of Relief, *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. Mar. 12, 2019). The CCA declined Murphy's request. Order, at 1, *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. Mar. 20, 2019).

That same day, Murphy filed a petition for writ of prohibition, a motion for leave to file that petition, and a motion for stay of execution

with the CCA. Petition for Writ of Prohibition, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Motion for Leave to File Petition for Writ of Prohibition, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Motion for Stay of Execution, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019). Murphy also moved the CCA to reopen his habeas proceeding. Suggestion That the Court, On Its Own Motion, Reconsider Its July 1, 2009 Denial of Relief, *Ex parte Murphy*, No. WR-63,549-01 (Tex. Crim. App. Mar. 20, 2019). In a single order, the CCA declined to reopen Murphy's habeas proceeding and denied him leave to file his writ of prohibition. Order 1–3, *Murphy v. State*, Nos. WR-63,549-01; WR-63,549-02 (Tex. Crim. App. Mar. 25, 2019). To date, there has been no further review sought of these decisions.

III. The Course of Murphy's Present Lawsuit

Only two days before this execution setting, Murphy filed suit against TDCJ pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA). ROA.4–34.[1] Predicated on this suit, Murphy sought a stay of his execution. ROA.41–45. The district court, however, declined to stay Murphy's execution. ROA.244–55.

[1] "ROA" refers to the record on appeal filed in the court below.

Murphy appealed the district court's stay-of-execution denial and moved the United States Court of Appeals for such a stay. Pl.–Appellant's Br. 1–22. The Fifth Circuit, however, affirmed the district court's decision and thus denied Murphy a stay. *Murphy v. Collier*, No. 19-70007, 2019 WL 1375660, at *1–2 (5th Cir. Mar. 27, 2019).

REASONS FOR DENYING THE PETITIONS AND A STAY

As to the petition for writ of certiorari, the district court did not abuse its broad discretion in denying Murphy's stay-of-execution request and the Fifth Circuit did not err in affirming that decision. Most readily supporting these decisions is a recent decision of this Court *reversing* another circuit court's stay of execution predicated upon behavior *less* dilatory than Murphy's. But the decisions are also supported by Murphy's failure to show likely success on the merits of any of his claims, either because they were unexhausted, time-barred, called for improper relief, or because they fail as a matter of law (although the lower courts did not decide such issues). And, finally, the decisions are supported by the fact that Murphy failed to show irreparable harm or that the balance of equities favored him (although, again, no such issues were decided below).

As to the original petition for writ of prohibition, this Court is without jurisdiction to compel state actors as opposed to judicial actors. Assuming jurisdiction, however, the Court should not utilize such power when the available remedies have been rendered futile by Murphy's dilatoriness, there are disputed facts, and there is no clear and indisputable right to relief.

As to the motions for a stay of execution, Murphy's request should be denied for the same reasons no writ of certiorari or prohibition should issue—he is dilatory, he fails to show likely success on the merits for a variety of reasons, he fails to show irreparable harm, and he fails to show that the equities favor him.

ARGUMENT

PETITION FOR WRIT OF CERTIORARI RESPONSE

I. The Standard Governing Stay Requests.

"Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In utilizing that discretion, a court must consider:

> (1) whether the stay 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.

Id. at 434 (citations omitted) (internal quotation marks omitted). "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy *all* of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill*, 547 U.S. at 584 (emphasis added). "Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Id.* And courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585.

To the extent that declining to issue a stay is a compelling reason for certiorari review, *see* Sup. Ct. R. 10, review of such a decision is deferential and should only be overturned "when the lower courts have clearly abused their discretion." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., concurring).

II. Murphy's Dilatory Litigation Tactics Fully Support the Lower Court's Affirmance of a Stay Denial.

"A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584.

The legal, but not the factual, foundation for Murphy's claims mirrors those at issue in *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689 (11th Cir. 2019), and Murphy relied heavily on *Ray*'s reasoning in the lower courts. Pl.—Appellant's Br. 16–21; ROA.18–21. His reliance on *Ray* is important, not because it supports his case, but because it supports the reasonableness of the lower courts' decisions.

In *Ray*, the Eleventh Circuit granted a stay even though the inmate waited until shortly before his execution date to file suit. *See Ray*, 915 F.3d at 691 (February 7, 2019 execution date), 693 (January 28, 2019 filing). This Court promptly vacated the stay "[b]ecause Ray waited until [ten days before his execution] to seek relief[.]" *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019). If waiting until ten days before an execution does not prove diligence to this Court, then surely the two-day period here falls within the district court's broad discretion. Given that Murphy was even

more dilatory than the inmate in *Dunn*, there was no error in the denial of a stay.

Murphy resisted this straightforward application of *Dunn* in three ways. First, Murphy claimed that his conduct was not dilatory because he contacted TDCJ a twenty-eight days before his execution whereas the inmate in *Dunn* waited until only fifteen days before his execution. *See* Pl.–Appellant's Br. 14, 19. Second, he claimed that the record was silent on whether he had notice of TDCJ's chaplain execution protocol. *See* Pl.–Appellant's Br. 19. Third, he arguedA that he properly brought his claims to the attention of the CCA first "to give the courts of Texas an opportunity to address [his] claims." Pl.–Appellant's Br. 7–8. Murphy's attempt at distinguishing his case from *Dunn* is not persuasive.

As the lower court correctly held, the issue of diligence is not measured by when Murphy began to take informal actions, but when he knew or should have known of TDCJ's chaplain execution protocol, which permits only TDCJ chaplains to enter the execution chamber. *Murphy*, 2019 WL 1375660, at *2. As the district court correctly recognized, TDCJ's chaplain execution protocol is publicly available. *Id*. For example, in June 2008, TDCJ publicly filed the May 2008 execution protocol while

defending a challenge to the three-drug lethal injection protocol then in use. Defendants' Brief on the U.S. Supreme Court Decision in *Baze v. Rees* and in Support of Motion for Summary Judgment, Exhibit B, *Raby v. Livingston*, H-05-CV-765 (S.D. Tex. June 17, 2008), ECF No. 51-4. Then, in defense of another lawsuit in October 2013, TDCJ publicly filed the current single-drug execution protocol from July 2012. *See* Defendant's Advisory, Exhibit A, *Whitaker v. Livingston*, No. H-13-291 (S.D. Tex. Oct. 2, 2013), ECF 9-1. And in 2014, the Fifth Circuit compared the July 2012 and May 2008 protocols, noting only one change not relevant here. *See Trottie v. Livingston*, 766 F.3d 450, 452 n.1 (5th Cir. 2014) ("The *only* difference between the July 9, 2012 Execution Procedure and the [May 2008] procedure considered in *Raby v. Livingston*, 600 F.3d 552 (5th Cir. 2010), is a change from the use of three drugs to a single drug." (emphasis added)). This is unlike the execution protocol in *Dunn*, which is not publicly available. *See Ray*, 915 F.3d at 694 (noting that Alabama's correctional agency filed its "relevant written policies or procedures" under seal). Thus, Murphy's first attempt to distinguish himself from *Dunn* fails because TDCJ's chaplain execution protocol has been publicly available for more than a decade.

The second attempt at distinguishing *Dunn* fails too. While it is true that the record is silent as to whether Murphy himself knew about TDCJ's chaplain execution protocol, that is not the end of the matter. Rather, counsel, as his agents, have a duty to know or learn about TDCJ's execution protocol. *Cf.* 18 U.S.C. § 3599(e) (describing the scope of counsel's duties to a death-sentenced client). As the district court recognized, "[c]ounsel . . . [is] an experienced death penalty litigator [and] has represented Murphy for a decade[.]" ROA.252. Thus, Murphy cannot avoid the imputation of this knowledge, especially when the truncated record is caused by the fact that he waited until two days before his execution to file suit.

The third and final attempt to distinguish *Dunn* fails as well. In the context of what is fundamentally a civil suit, Murphy's "exhaustion" argument rings hollow because, had the CCA considered his constitutional claims, the *Rooker–Feldman* doctrine would bar federal-court review. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) ("The *Rooker–Feldman* doctrine . . . [prohibits] cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings

commenced and inviting district court review and rejections of those arguments."). But even if there was a state-federal judicial comity issue present, it certainly does not exist where the lawsuit at issue—a § 1983 suit—can be filed in *both* state and federal court. *See Haywood v. Drown*, 556 U.S. 729, 731 (2009) ("In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to . . . § 1983[.]"). And it especially does not exist when the vehicle used in state court is wholly inapt for bringing such claims. *See* Order 2, *In re Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 25, 2019) (Richardson, J., concurring) ("The petition for writ of prohibition is not the appropriate vehicle for seeking relief in this Court."). Murphy's attempt to justify his state court litigation, and use it as an excuse for a lack of diligence, does not withstand scrutiny. Ultimately, *Dunn* controls and fully supports the lower court's stay denial affirmance.

And, as discussed above, Murphy could have brought this suit long ago. TDCJ's chaplain execution protocol has been in place and publicly known since at least July 2012. ROA.236; *see Trottie*, 766 F.3d at 452 n.1. In other words, TDCJ's prohibition on non-TDCJ chaplains entering the execution chamber has been publicly available since at least July 2012.

ROA.236. Murphy has therefore been on notice for at least six years about this policy. But instead of bringing this suit in a timely manner, Murphy did "the very thing he is not entitled to do . . . namely, to wait until his execution is imminent before suing to enjoin the state's method of carrying it out." *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004). Specifically,

> [b]y waiting until the execution date was set, [Murphy] left the state with a Hobbesian choice: It could either accede to his demands and execute him in the manner he deems most acceptable, even if the state's methods are not violative of the Eighth Amendment; or it could defend the validity of its methods on the merits, requiring a stay of execution until the matter could be resolved at trial. Under [Murphy's] scheme, and whatever the state's choice would have been, it would have been the timing of [Murphy's] complaint, not its substantive merit, that would have driven the result.

Id. "By waiting as long as he did, [Murphy] leaves little doubt that the real purpose behind his claim[s] is to seek a delay of his execution, not merely to affect an alteration of the manner in which it is carried out." *Id*. Murphy's claims "could have been brought [long] ago [and t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Ct. N. Dist. Cal.*, 503 U.S. 653, 654 (1992). Given this law and these facts, the lower court clearly did not abuse err in affirming the denial of a stay of execution.

III. Murphy Failed to Show Any Likelihood of Success on the Merits, Let Alone the Required Substantial Showing.

Murphy, in district court, raised three claims challenging TDCJ's chaplain execution protocol: (1) that TDCJ violated the Establishment Clause by favoring certain religions over Murphy's; (2) that TDCJ violated the Free Exercise Clause by prohibiting his spiritual advisor from entering the execution chamber; and (3) that TDCJ violated RLUIPA by declining to allow Murphy's spiritual advisor from accompanying him into the execution chamber. ROA.15–25. Not only do these claims lack substantive merit, but they are untimely, unexhausted, and call for an improper remedy as well. Hence, Murphy failed to show likely success on any of them.

A. The Establishment Clause and Free Exercise Clause claims

1. The claims are unexhausted.

Murphy is a prisoner proceeding in forma pauperis. ROA.256–58. Thus, he is subject to the Prison Litigation Reform Act of 1995 (PLRA). *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). Per the PLRA, a prisoner "must now exhaust administrative remedies even where the relief sought . . . cannot be granted by the administrative process." *Id.* (citing *Booth v. Churner*, 532 U.S. 731, 734 (2001)). Moreover,

"exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983." *Id.* (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)). Indeed, "[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007).

"In Texas, prison grievances involve a two-step process." *Moussazadeh v. Tex. Dep't of Justice*, 703 F.3d 781, 788 (5th Cir. 2012); *see also* Defs.' Ex. B, at 73–75, ECF No 8-2 (setting out the grievance process). To properly exhaust, a prisoner must "pursue the grievance remedy to conclusion." *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). This requires completion of both steps of TDCJ's grievance process before a complaint may be filed. *Id.*

Here, Murphy did not engage TDCJ's grievance process concerning his desire that a non-TDCJ spiritual advisor accompany him into the execution chamber. *See* ROA.75–80. Rather, the latest—and only—grievance Murphy filed was in late 2011, and it did not concern the

execution process. ROA.77–80.[2] Hence, Murphy failed to exhaust his Establishment Clause and Free Exercise Clause claims and, as such, Murphy failed to show likely success on the merits.

2. The claims are untimely.

Claims challenging an execution protocol and raised in a civil rights action are subject to a state's personal-injury statute of limitations. *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008); *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (determining that a state's personal-injury statute of limitations applies to § 1983 actions). Texas's personal-injury-limitations period is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West 2017). A claim concerning execution protocol accrues on the later of two dates: when direct review is complete or when the challenged protocol was adopted. *Walker*, 550 F.3d at 414–15.

Murphy's constitutional claims are, at bottom, that TDCJ favors certain religions over his because its execution protocol permits only TDCJ chaplains in the execution chamber, and TDCJ does not employ a

[2] Notably, the one grievance Murphy did file concerned a request for a religious accommodation. ROA.77. Thus, he cannot possibly claim that TDCJ's grievance procedure is not an appropriate and required administrative process necessary to exhaust his present claims—also requesting religious accommodation—under the PLRA.

Buddhist chaplain, which also impedes his ability to practice his religion. *See* ROA.15–24. But publicly available TDCJ policy, since at least July 2012, has provided that only TDCJ chaplains may enter the execution chamber: "the Huntsville Unit Chaplain[,] or a designated approved TDCJ Chaplain[,] shall accompany the offender while in the Execution Chamber." ROA.236; *see also Trottie*, 766 F.3d at 452 n.1. In other words, TDCJ's execution protocol, which is available to the public, has clearly prohibited non-TDCJ chaplains from entering the execution chamber since at least July 2012. Thus, more than six years have passed since Murphy should have raised these claims.

The alternative accrual date does not save Murphy's Establishment Clause and Free Exercise Clause claims. Murphy's direct appeal was decided by the Court of Criminal Appeals (CCA) on April 26, 2006. *Murphy v. State*, No. AP-74,851, 2006 WL 1096924 (Tex. Crim. App. Apr. 26, 2006). Even assuming that the denial of a writ of certiorari marks the point of finality for limitations purposes, Murphy's direct appeal ended more than a decade ago. *Murphy v. Texas*, 549 U.S. 1119 (2007). As such, the direct review termination date does not render these claims timely. *See Walker*, 550 F.3d at 415 (holding a claim untimely based on the

conclusion of plaintiffs' direct appeals). Because Murphy filed outside of the two-year limitations period based on either accrual date, the claims are untimely, and Murphy failed to show a likelihood of success.

3. The district court lacked mandamus authority.

Murphy requested that TDCJ permit his spiritual advisor into the execution chamber during Murphy's execution. *See* ROA.10. Thus, Murphy was affirmatively seeking to compel a state actor to behave in a particular manner—mandamus relief. However, the district court lacked jurisdiction to compel TDCJ officials by writ of mandamus.[3] *See, e.g.*, *Waters v. Texas*, 747 F. App'x 259, 260 (5th Cir. 2019) (affirming a jurisdictional dismissal where the plaintiff sought mandamus relief against "Texas state officials to deregister her as a Tier I sex offender"). Accordingly, Murphy failed to show likely success because the lower court could not provide the relief requested.

[3] If there was any doubt that Murphy was seeking mandamus relief, Murphy's attempt at obtaining an extraordinary writ in state court should wipe away such doubt.

4. The claims fail as a matter of law.

i. The Establishment Clause claim

The Establishment Clause provides in relevant part that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This clause applies to the states through the Fourteenth Amendment. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). Governmental action under the Establishment Clause is typically analyzed under a three-prong test: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

Murphy alleged that TDCJ's execution policy prohibiting non-TDCJ chaplains from entering the execution chamber favors certain religions over others because TDCJ does not employ a Buddhist chaplain. *See* Pl.'s Compl. 15–23. This allegation implicates governmental viewpoint neutrality concerning religion. *See Larson v. Valente*, 456 U.S. 228, 244–46 (1982). Where a denominational preference is claimed to exist, "the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary

three-pronged Establishment Clause inquiry derived from *Lemon*[.]" *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989).

TDCJ's chaplain policy is facially neutral. It permits either the "Huntsville Unit Chaplain" or any other "approved TDCJ Chaplain" to accompany Murphy into the execution chamber.[4] ROA.236. It does not refer to a particular religion (and Murphy offered no evidence regarding TDCJ's chaplaincy makeup). And, as explained above, it does not compel an inmate to accept a TDCJ chaplain at all, either one who shares the inmate's religious viewpoint or otherwise. *See supra* Note 4. In sum, TDCJ's chaplain execution protocol "makes no 'explicit and deliberate distinctions between different religious organizations.'" *Hernandez*, 490 U.S. at 695 (quoting *Larson*, 456 U.S. at 246–47 n.23). Given the absence of religious viewpoint endorsement in TDCJ's execution protocol, the *Lemon* test applies, and Murphy failed to show an Establishment Clause violation under that analysis (though he made no such argument or acknowledgment of such test).

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[4] While the protocol reads mandatory, TDCJ permits an offender to forgo accompaniment by a chaplain should they choose. *See* ROA.30; *see also* Texas Department of Criminal Justice, *Rehabilitation Programs Division—Chaplaincy Program*, https://www.tdcj.texas.gov/divisions/rpd/chaplaincy.html (last visited Mar. 21, 2019) ("Participation in religious activities and attendance at religious services is voluntary.").

First, while chaplains are necessarily schooled in matters of religious faith, there is a secular purpose in the execution context—to provide emotional comfort to an inmate during his or her last living moments. Indeed, the inmate may request that the TDCJ chaplain pray with him or her, or may simply request accompaniment by the TDCJ chaplain. And, ultimately, if the inmate would prefer not to be accompanied by a TDCJ chaplain, that is also honored. Thus, there is a secular purpose to the TDCJ chaplain execution protocol. *See Comer v. Scott*, 610 F.3d 929, 936 (5th Cir. 2010) (holding that a "law labeled as 'neutral' or 'balanced' violates the Establishment Clause *if* it was 'enact[ed] . . . to serve a religious purpose" (alteration in original) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 585 (1978))).

Second, by treating the chaplain protocol as voluntary, TDCJ is not advancing nor inhibiting religion. A death sentenced inmate may either partake in having a TDCJ chaplain at his or her side during the moments leading to execution or not. That TDCJ permits an inmate such a choice is not tantamount to governmental endorsement of religion because it is not mandatory; neither a religious nor a non-religious person is compelled to accept a TDCJ chaplain in the execution chamber. Given

this, "'there [is] no realistic danger that the community would think that [TDCJ] was endorsing religion." *Freiler v. Tangipahoa Par. Bd. of Educ.*, 185 F.3d 337, 348 (5th Cir. 1999) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993)).

Third, TDCJ's chaplain execution protocol risks no excessive entanglement between church and state. Allowing a TDCJ chaplain into the execution chamber at the inmate's choice does not require TDCJ to "inquire[] into religious doctrine," it does not cede "power to a religious body," and it does not require "'detailed monitoring and close administrative contact' between secular and religious bodies." *Hernandez*, 490 U.S. at 696–97 (quoting *Aguilar v. Felton*, 473 U.S. 402, 414 (1985)). Accordingly, the TDCJ chaplain execution protocol does not run afoul of the Establishment Clause and, therefore, Murphy failed to show likely success on the merits.

Even if, however, strict scrutiny applied to Murphy's Establishment Clause claim, TDCJ's chaplain execution protocol survives such review. Lorie Davis, the Director of TDCJ's Correctional Institutions Division, explained why permitting non-TDCJ personnel into the death chamber is unacceptable. ROA.239–42.

Director Davis understatedly explained that, because an execution involves a "uniquely high level of stress," it is necessary to ensure that those who participate in the process are truly dedicated to TDCJ's interests, understand the process, and have the mental fortitude to endure the event. ROA.240–41. To determine whether these qualifications exist, it requires "years of devoted service," participation in practice runs prior to an execution, and close observation of the participant's behavior in prior executions. ROA.240–41.

Murphy contended that a background check would be sufficient to allay TDCJ of their security concerns. *See* ROA.17. But what background check can ensure dedication to TDCJ's interests like *years* of employment by TDCJ? Indeed, Director Davis revealed the security concerns for which no background check could account—pulling intravenous lines out of the inmate, taunting witnesses observing on behalf of the victim, causing disruption within the execution chamber, or attempting to gain access to the execution team. ROA.241. Director Davis explained that the motivation behind such behavior might not be malicious (though it could be), but rather the product of witnessing such an event, such as irrational and uncontrollable behavior or fainting. ROA.241–42; *see* The Associated

Press, *Two Men Arrested in Fight During Execution of Texas Inmate*, USA Today (Mar. 1, 2019, 6:47 AM ET), https://www.usatoday.com/story/news/nation/2019/03/01/texas-inmate-billy-wayne-coble-executed-murders/3025769002/ ("As Coble was finishing his statement, his son, a friend and a daughter-in-law became emotional and violent. They were yelling obscenities, throwing fists and kicking at others in the death chamber witness area."). The harms at play are many, including physical harm to Murphy and TDCJ personnel, emotional harm to the victim's friends and family, and exposure of the identities of the execution team, confidential by state law. ROA.241–42; *see* Tex. Code Crim. Proc. art. 43.14 (West 2017).

Given these harms, and given that these harms cannot be solved simply through a background check no matter how thorough, TDCJ's chaplain execution protocol serves a compelling interest that has been narrowly tailored to further that interest. Thus, Murphy's Establishment Clause claim fails on the merits even if subjected to the higher strict-scrutiny standard of review, and he thus failed to prove likely success on the merits.

ii. Free Exercise Clause claim

Murphy also asserted that TDCJ's chaplain execution protocol violates the Free Exercise Clause. ROA.23–24. Such claims are subject to the deferential standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). Under *Turner*, "a prison regulation that impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. To make such a determination, there is a four-part test:

> (1) whether there is a rational relationship between the regulation and the legitimate government interest advanced; (2) whether the inmates have available alternative means of exercising that right; (3) the impact of the accommodation on prison staff, other inmates, and the allocation of prison resources generally; and (4) whether there are 'ready alternatives' to the regulation.

Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 860 (5th Cir. 2004) (quoting and citing *Turner*, 482 U.S. at 89–91); *see also Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) ("We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel[,] . . . nor must a chaplain, priest or minister be provided without regard to the extent of demand."). Murphy undoubtedly failed this test (indeed, he failed to even

acknowledge that this test applies because he is confined within a penal institution).

First, there is clearly a rational relationship between permitting only TDCJ chaplains in the execution chamber—the safety and security of the execution process. Second, Murphy has an alternative means of exercising his right—his spiritual advisor may meet with Murphy for an hour prior to the execution and may witness the execution in a designated area. ROA.30. Third, the impact on TDCJ staff would be immense. As mentioned above, Murphy's request threatens to reveal the confidential identities of the execution team (thus possibly preventing TDCJ personnel from voluntarily assisting in the process) and threatens the careful administration of the execution protocol (including physical or emotional harm to TDCJ personnel, Murphy, and the witnesses). Fourth, Murphy did not point to a readily implementable alternative "that fully accommodates [his] rights at de minimis cost to valid penological interests[.]" *Turner*, 482 U.S. at 91. Thus, Murphy failed to prove a

violation of the Free Exercise Clause or likely success on the merits of such a claim.[5]

B. The RLUIPA claim

1. The claim is unexhausted.

As noted above, in forma pauperis prisoners must exhaust their claims by engaging available administrative remedies or face dismissal under the PLRA. *See supra* Argument III(A)(1). Like the prior claim, this one too has not been exhausted through TDCJ's grievance process. *See* ROA.75–80. Rather, Murphy's only grievance is seven years old and does not concern the execution process. *See* ROA.77–80. Hence, Murphy failed to exhaust his RLUIPA claim thus requiring mandatory dismissal by the district court. Consequently, he failed to demonstrate a likelihood of success on the merits.

2. The claim is untimely.

Civil actions arising from acts of Congress post-1990 are subject to the four-year, catch-all limitations period of 28 U.S.C. § 1658(a). *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). RLUIPA, enacted

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[5] If strict scrutiny applied, TDCJ's chaplain execution protocol survives for the same reasons it survives Murphy's Establishment Clause claim. *See supra* Argument III(A)(4)(i).

in 2000, thus qualifies, and claims pursuant thereto must be filed within four years of the claim's accrual date. *See Robinson v. Superintendent Houtzdale SCI*, 693 F. App'x 111, 116–17 (3d Cir. 2017); *Pfeil v. Lampert*, 603 F. App'x 665, 667 (10th Cir. 2015); *Pouncil v. Tilton*, 704 F.3d 568, 573 (9th Cir. 2012); *Al-Amin v. Shear*, 325 F. App'x 190, 193 (4th Cir. 2009).

The accrual date for Murphy's RLUIPA claim should match that of his Establishment Clause and Free Exercise Clause claims—the conclusion of his direct appeal or a change in TDCJ's public execution protocol. *See supra* Argument III(A)(2). Murphy has known since his direct appeal became final in January 2007 that he labors under a sentence of death, and he has known since at least July 2012 that TDCJ does not permit non-TDCJ chaplains into the execution chamber. ROA.236 In other words, because these claims rely on the same publicly available factual basis as his RLUIPA claim, there is no good reason to have different claim-accrual dates. And under those accrual dates, his RLUIPA claim is outside the limitations period. *See supra* Argument III(A)(2). Hence, Murphy failed to establish either the timeliness of this claim or its likely success on the merits.

3. The district court lacked mandamus authority.

Murphy's requested relief boils down to affirmatively requiring TDCJ to permit his spiritual advisor entry into the execution chamber contrary to TDCJ's execution protocol. *See* ROA.24. As mentioned above, however, the lower court did not possess jurisdiction to compel TDCJ officials by writ of mandamus. *See supra* Argument III(A)(3). Likely success is not established when the relief is unattainable.

4. The claim fails as a matter of law.

Under RLUIPA, a state cannot substantially burden an inmate's sincere religious exercise unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a). RLUIPA requires the inmate to initially prove that the state's policy imposes a substantial burden on his sincere religious exercise and, if proven, the state must establish its compelling governmental interest and that it is utilizing the least restrictive means to further that interest. *See Holt v. Hobbs*, 135 S. Ct. 853, 862–63 (2015). This Court has "emphasize[d] that although RLUIPA provides substantial protection for the religious exercise of institutionalized persons, it also affords prison officials ample ability to maintain security." *Id.* at 866. Indeed, RLUIPA does not "elevate accommodation

of religious observances over an institution's need to maintain order and safety." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

Assuming that Murphy has met his initial burden under RLUIPA, which is difficult to assume because he provided no evidence supporting his claims, TDCJ proved its compelling interest—the safety and security of the execution process—and that it is using the least restrictive means to further that interest. *See supra* Argument III(A)(4)(i). As such, Murphy failed to prove likely success on the merits of this claim.

IV. Murphy Did Not Prove That He Is Likely to Suffer Irreparable Harm.

Because TDCJ's chaplain execution protocol does not violate the Establishment Clause, Free Exercise Clause, or RLUIPA, Murphy failed to demonstrate irreparable injury without a stay. *See supra* Argument III(A)(4), III(B)(4). Moreover, TDCJ accommodated most, though not all, of Murphy's requests: that his body not be disturbed for seven minutes after his execution, that his spiritual advisor may meet with him shortly before his execution, and that such individual may observe Murphy's execution in the appropriate witness room. *See* ROA.30. If there is any harm, it has been mitigated and is not substantial enough to overcome

the State's and victims' interest "in the timely enforcement of a sentence." *Hill*, 547 U.S. at 548. There was no abuse of discretion.

V. The Balance of Equities Favored the State.

"Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 548. Murphy has challenged his conviction and death sentence for more than fifteen years. *See Murphy*, 2006 WL 1096924, at *1 (noting that Murphy was sentenced in November 2003). Murphy sought further unjustifiable delay through his present litigation, a request for religious accommodation that notably occurred only after the Eleventh Circuit issued its opinion in *Ray*. *Compare* ROA.29 (February 24, 2019), *with Ray*, 915 F.3d at 691 (February 6, 2019). And, as explained above, TDCJ's interest in the security and safety of the execution process is a compelling governmental interest that outweighed Murphy's interests. *See supra* Argument II(A)(4). Murphy therefore failed to prove that the equities were in his favor. There was no abuse of discretion.

PETITION FOR WRIT OF PROHIBITION RESPONSE

VI. The Court Does Not Possess Jurisdiction to Issue a Writ of Prohibition in this Case.

Outside of cases falling within the Court's original jurisdiction, an extraordinary writ cannot issue unless it is "shown to be an exercise of appellate jurisdiction, or to be necessary to enable [the Court] to exercise appellate jurisdiction." *Marbury v. Madison*, 5 U.S. 137, 175 (1803); *see Parr v. United States*, 351 U.S. 513, 520 (1956) ("Such writs may go only in aid of appellate jurisdiction."). That is not what Murphy seeks. Rather, he seeks to compel TDCJ to conduct his execution in a particular way, by forcing them to permit entry of his spiritual advisor into the execution chamber. Pet. Writ Prohibition 9. Murphy's requested relief, however, is not an exercise of appellate review or an attempt to protect appellate jurisdiction. Hence, the Court does not have jurisdiction, at least as the Constitution is concerned, to issue a writ of prohibition directed at TDCJ.

Murphy, however, contends that the Court has jurisdiction pursuant to 28 U.S.C. § 1651(a), the All Writs Act. But the All Writs act does not provide federal courts with an independent grant of jurisdiction. *See Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31 (2002) ("But the All Writs Act authorizes writs 'in aid of [the courts'] respective

jurisdictions' without providing any federal subject-matter jurisdiction in its own right." (alteration in original)). And Murphy has not pointed the Court to any statutory authority that authorizes this Court to issue a writ of prohibition to a state actor outside of its original jurisdiction or in aid of its appellate jurisdiction. *Cf.* Sup. Ct. R. 20.1 ("To justify the granting of any such writ, the petition must show that the *writ will be in aid of the Court's appellate jurisdiction*, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." (emphasis added)). As such, no writ of prohibition may issue against TDCJ as the Court does not possess the jurisdiction to do so.

VII. If The Court Possesses Jurisdiction to Issue a Writ of Prohibition, It Should Not Exercise Its Discretionary Authority.

Assuming that the Court possesses jurisdiction to issue a writ of prohibition directed to TDCJ, the Court should not do so. Extraordinary writs "are drastic and extraordinary remedies . . . reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947). The party seeking the writ must "have no other adequate means to attain the relief he desires [and] . . . he [must] satisfy 'the burden of showing that

(his) right to issuance of the writ is 'clear and indisputable.'" *Kerr v. U.S. Dist. Ct. N. Dist. Cal.*, 426 U.S. 394, 403 (1976) (quoting *Banker's Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

This is not an extraordinary case. Indeed, it is unfortunately rather ordinary—a last-minute challenge to TDCJ's execution protocol that could have been raised long ago. *See Murphy*, 2019 WL 1375660, at *2 ("In response to systemic abuses by prisoners bringing dilatory claims, the federal courts—and this circuit in particular—have been forced to develop extensive jurisprudence resisting those requests for long-available claims presented, for the first time, on the eve of execution." (quoting *Ruiz v. Davis*, 850 F.3d 225, 229 (5th Cir. 2017)). Thus, no writ of prohibition should issue.

It also should not issue because Murphy fails to show a "clear and indisputable" right to relief. There are both disputed facts and law. Indeed, there has been no real factual development in this case because Murphy first filed a petition for an extraordinary writ in state court, a wholly improper vehicle and venue for developing facts. *See* Order 2, *In re Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 25, 2019) (Richardson, J., concurring) ("The petition for writ of prohibition is not

the appropriate vehicle for seeking relief in this Court."). And that is true here, too, as this Court does not sit as a factfinder save in limited cases where the Court has original jurisdiction.

But even if the facts were clear, the parties dispute which law applies and how it applies. *See supra* Argument III(A)–(B). And the case that Murphy primarily relied upon, *Ray*, has been vacated by this Court, so it can hardly be settled law, to the extent that such would ever settle an issue before this Court. *See Dunn*, 139 S. Ct. at 661. Because there are disputed facts and law, there is no clear and indisputable right to relief, so a writ of prohibition is improper.

Finally, while Murphy claims that he no longer has adequate means to obtain the relief he desires, that is because he waited too long to bring his claims. The Court should not reward dilatory behavior by finding inadequate what were once proper avenues for seeking relief that are now closed off because of Murphy's last-minute litigation tactics. Accordingly, no writ of prohibition should issue against TDCJ even if the Court has jurisdiction to do so.

MOTIONS FOR STAY OF EXECUTION RESPONSE

VIII. The Court Should Deny Murphy a Stay of Execution.

All of the above arguments are relevant to whether this Court should exercise its discretion regarding a stay of execution. In brief, and as discussed more thoroughly above, Murphy has failed to prove a substantial likelihood of success on any of his claims; indeed, they would all be subject to dismissal on the pleadings had he raised them in a timely manner after exhausting administrative remedies. *See supra* Argument III(A)–(B). He also fails to prove irreparable harm, that the State's interest in executing a violent escapee and cop killer in a timely fashion outweighs Murphy's interests in meritless claims, and that his dilatory litigation behavior is somehow excused. *See supra* Argument II–V. And he fails to show that this Court possesses jurisdiction to issue a writ of prohibition or that one should issue even if it does. *See supra* Argument VI–VII. Like the district and circuit courts properly did, this Court too should refuse Murphy a stay of execution.

CONCLUSION

Murphy has shown no error in the lower court's affirmance of a denial of stay of execution, and he fails to show independent entitlement to such a stay in this Court. Neither a writ of certiorari nor prohibition should issue, and Murphy's stay requests should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

GWENDOLYN S. VINDELL
Assistant Attorney General

MATTHEW OTTOWAY
Assistant Attorney General
State Bar No. 24047707
Counsel of Record

Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
matthew.ottoway@oag.texas.gov

Attorneys for Respondents