

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

PATRICK HENRY MURPHY,

Petitioner

v.

BRYAN COLLIER, ET AL.,

Respondents

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

CERTIFICATE OF SERVICE

I certify that on the 28th day of March 2019, one copy of Mr. Murphy's Motion for Stay of Execution Pending Filing, Consideration, and Disposition of his Petition for Writ of Certiorari was emailed to Mr. Matthew Ottoway, Assistant Attorney General of Texas at matthew.ottoway@oag.texas.gov. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ David R. Dow

David R. Dow
Texas Bar No. 06064900
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
713-743-2171

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**MOTION FOR STAY OF EXECUTION PENDING
FILING, CONSIDERATION, AND DISPOSITION OF
PETITION FOR WRIT OF CERTIORARI**

This is a capital case. Mr. Murphy is scheduled to be executed after 6 o'clock p.m.
central time today, March 28, 2019.

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
713-743-2171
713-743-2131 (f)

* Member, Supreme Court Bar

QUESTION PRESENTED

Capital Case.

When a state allows a Christian chaplain to be present in the execution chamber for Christian (or other) inmates during their executions, does the Constitution or federal law also require that they allow inmates of other faiths, including Buddhist inmates, to be accompanied by ministers of their respective faiths when those inmates provide prison officials with notice at least a month in advance of their scheduled executions that they wish such pastoral accompaniment?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff in the district court and plaintiff-appellant in the court of appeals) is Patrick Henry Murphy. Murphy is currently incarcerated under a sentence of death at the Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas. He is scheduled to be executed today, March 28, 2019.

Respondents (defendants in the district court and defendants-appellees in the court of appeals) are Texas Department of Criminal Justice (TDCJ) employees Bryan Collier, Lorie Davis, and Billy Lewis. Bryan Collier is the executive director of the Texas Department of Criminal Justice. He is being sued in his official capacity.

Lorie Davis is the director of the Correctional Institutions Division of the Texas Department of Criminal Justice. She is being sued in her official capacity. Ms. Davis is the person charged by the trial court's order to execute the judgment of death against Murphy.

Billy Lewis is the senior warden of the Huntsville Unit, the unit at which TDCJ executes inmates. He is being sued in his official capacity. As the warden of the Huntsville Unit, Mr. Lewis is the TDCJ official that supervises Texas executions.

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INTRODUCTION

Petitioner Patrick Murphy is scheduled to be executed by the State of Texas after 6 o'clock p.m. today, Thursday, March 28, 2019. In a contemporaneously filed pleading invoking this Court's Rule 20.3, 23, and 28 U.S.C. § 1651(a), Murphy has requested that this Court prohibit the State from carrying out his execution unless it permits Murphy's Buddhist spiritual advisor, who has been ministering to Murphy on Texas' death row for six years, or another Buddhist reverend of the

State's choosing, to accompany Murphy into the execution chamber. If the State informs this Court it is unable to carry out Mr. Murphy's execution this evening if it is required to permit him to be accompanied by a Buddhist minister, Murphy has requested this Court issue a stay of execution until the State of Texas is able to carry out the execution without violating Murphy's right to religious freedom.

If this Court neither issues an order prohibiting the State of Texas from carrying out the execution in the absence of a Buddhist minister in the execution chamber, nor issues a stay of execution in connection with Murphy's request for a Writ of Prohibition, Murphy alternatively requests that this Court issue a stay of execution pending the filing and disposition of a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Mr. Murphy a stay of execution is published. A copy is attached as Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue the relief requested pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution states, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The relevant facts and procedural history are contained in Murphy's Original Petition for Writ of Prohibition.

REQUEST FOR RELIEF

Murphy requests that this Court issue an order staying his execution pending the filing and disposition of a Petition for Writ of Certiorari, which will raise the following question:

When a state allows a Christian chaplain to be present in the execution chamber for Christian (or other) inmates during their executions, does the Constitution or federal law also require that they allow inmates of other faiths, including Buddhist inmates, to be accompanied by ministers of their respective faiths when those inmates provide prison officials with notice at least a month in advance of their scheduled executions that they wish such pastoral accompaniment?

A stay of execution is warranted where there is: (1) a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

Mr. Murphy satisfies these criteria. First, a reasonable probability exists that four members of the Court would consider the underlying issues as presenting important questions that warrant guidance from this Court, as is evidenced by this Court's recent decision in *Dunn v. Ray*, 139 S.Ct. 661 (2019).

Specifically, the underlying issues involve: (1) whether, if a State permits a Christian death row inmate to be accompanied in the execution chamber during the execution by a Christian minister, must it also allow inmates of others faiths, who so request, to be accompanied by ministers of their faith during the execution; and (2) is a request for such accompaniment timely when made a month in advance of a scheduled execution?

Second, given the inattentiveness of the lower court's ruling to the fact that, to this very day, the State of Texas has not informed Murphy whether it intends to permit him to be accompanied by a minister of his faith, there is a significant possibility this Court will conclude that the court below erred in denying Murphy relief based entirely on its conclusion he waited too long to bring this action. Finally, Murphy will suffer irreparable injury if a stay is not granted because he will be executed.

CONCLUSION

Mr. Murphy respectfully requests that the Court stay his execution currently set for March 28, 2019, pending the filing and disposition of his Petition for Writ of Certiorari.

Respectfully submitted,

s/ David R. Dow

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
713-743-2171
713-743-2131 (f)

* Member, Supreme Court Bar

Appendix A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-70007

United States Court of Appeals
Fifth Circuit

FILED
March 27, 2019

Lyle W. Cayce
Clerk

PATRICK HENRY MURPHY,

Plaintiff-Appellant,

v.

BRYAN COLLIER, Executive Director, Texas Department of Criminal Justice;
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional
Institutions Division; BILLY LEWIS, Warden,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:

Patrick Murphy is scheduled for execution on March 28, 2019, for the murder of police officer Aubrey Hawkins on December 24, 2000. His execution date was set on November 29, 2018. Murphy complains that the state of Texas permits only religious clerics who are employees of the Texas Department of Criminal Justice (TDCJ) to be physically present in the execution chamber at the time of an execution. He further complains that the TDCJ at present only employs chaplains who are Christian or Muslim, while acknowledging that the TDCJ contracts to bring chaplains and spiritual advisors of other religions into the prison facilities. Under the state’s procedures, chaplains and spiritual advisors who are not employees of the TDCJ may meet with an inmate on the

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execution date prior to entering the execution chamber and they may watch the execution from a viewing room, but they may not physically enter the execution chamber itself.

On March 20—eight days before his scheduled execution—Murphy petitioned the Texas Court of Criminal Appeals for a writ of prohibition seeking to prohibit his execution until the state allowed his preferred spiritual advisor—a Buddhist priest—to be physically present in the execution chamber at the time of execution. That petition was denied on March 25. On March 26—two days before his scheduled execution—Murphy filed a 42 U.S.C. § 1983 complaint and a motion for stay of execution with the federal district court, again seeking to prohibit his execution until the state allows his preferred spiritual advisor to be physically present in the execution chamber. His Section 1983 complaint alleged violations of the Establishment Clause, the Free Exercise Clause, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In a well-reasoned eleven-page Memorandum Opinion and Order, the district court denied the motion for a stay of execution as untimely. Murphy appeals the district court’s determination that he is not entitled to a stay of execution, filing his appeal with this court on March 27—one day before his scheduled execution.

“[W]e review a district court’s decision to deny a stay of execution for abuse of discretion.” *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013). “[A] stay of execution is an equitable remedy. 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.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). To be eligible for a stay of execution, Murphy must demonstrate: (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any harm that will result if the stay is granted; and (4) that the stay

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will not disserve the public interest. *See Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). However, “[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 (internal citation and quotation marks omitted). *See also Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (“A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.”). The Supreme Court recently emphasized, yet again, the importance of timeliness when moving for a stay of execution. *See Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (vacating a stay of execution granted by a circuit court when the applicant waited until ten days before the scheduled execution to file his claim).

As the district court rightfully recognized, the proper time for raising such claims has long since passed. Murphy’s execution date was set on November 29, 2018. By his counsel’s admission, he waited until February 28 to first request that the state allow Murphy’s preferred spiritual advisor to not just meet with him prior to entering the chamber and watch from the viewing room, but actually enter the execution chamber with him. He then waited until March 20—eight days before the scheduled execution—to raise his First Amendment and RLUIPA claims with the Texas Court of Criminal Appeals. Those claims were not raised before the federal district court until March 26—two days before the scheduled execution—and an appeal was not brought before this court until March 27—the day before the scheduled execution.

Murphy asserts that his allegations underlying this case are almost identical to those recently addressed by the dissenting Justices in *Ray*. *See* 139 S. Ct. at 661–62 (Kagan, J., dissenting). However, in making that assertion, without having timely sought factual development of his allegations

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and the state's execution chamber procedures, Murphy fails to acknowledge at least one significant difference. Unlike the situation described by the dissenting Justices in *Ray*, the policy of only permitting TDCJ-employed chaplains into the execution chamber at issue in this case has been in place since at least 2012 and is not ambiguous about presence in the execution chamber as distinct from in the adjacent viewing area. The district court determined that the policy is not confidential and that Murphy's counsel is an experienced death penalty litigator who knew, or should have known, about the policy well before the weeks immediately preceding the scheduled execution. However, even if we were to accept Murphy's current representation that he and his counsel did not have access to the text of that policy, his counsel was definitively notified of that provision by an email from the TDCJ's general counsel on March 5. Nonetheless, Murphy waited until March 20 to raise any related claims before the Texas Court of Criminal Appeals, and until March 26 to raise any such claims before the federal courts. Such delays are unacceptable under the circumstances.

This court also takes note, as did the district court, of the multiple warnings that Murphy's counsel has received in the past for filing last-minute motions. *See In re Dow*, No. WR-57,060-03, 2010 WL 2332420 (Tex. Crim. App. Jun. 9, 2010) (finding Dow failed to show cause for his untimely filing and warning that further untimely filings could result in sanctions). *See also In re Dow*, 481 S.W.3d 215 (Tex. 2015) (noting that the Texas Court of Criminal Appeals held Dow in contempt for his untimely filings and barred him from practicing before that court for one year).

"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." *Ruiz v. Davis*, 850 F.3d

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225, 229 (5th Cir. 2017). *See also* 5th Cir. R. 8.10; *Bible v. Davis*, 739 F. App'x 766, 770 (5th Cir. 2018) (unpublished); *Preyor v. Davis*, 704 F. App'x 331, 344 (5th Cir. 2017) (unpublished); *In re Edwards*, 865 F.3d 197, 209–10 (5th Cir. 2017); *In re Paredes*, 587 F. App'x 805, 826 (5th Cir. 2014) (unpublished); *Sepulvado v. Jindal*, 729 F.3d 413, 420–21 (5th Cir. 2013); *Brown v. Livingston*, 457 F.3d 390, 391 (5th Cir. 2006); *Reese v. Livingston*, 453 F.3d 289, 290–91 (5th Cir. 2006); *White v. Johnson*, 429 F.3d 572, 573–74 (5th Cir. 2005). As such, the district court did not abuse its discretion and Murphy's motion for a stay of execution is DENIED.



**Certified as a true copy and issued
as the mandate on Mar 27, 2019**

Attest: *Jyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

Appendix B

Stat. 1488, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2000bb of this title and Tables.

AMENDMENTS

2000—Subsec. (a). Pub. L. 106-274 struck out “and State” after “Federal”.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term “granting”, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub. L. 103-141, §7, Nov. 16, 1993, 107 Stat. 1489.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original “this Act”, meaning Pub. L. 103-141, Nov. 16, 1993, 107 Stat. 1488, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2000bb of this title and Tables.

CHAPTER 21C—PROTECTION OF RELIGIOUS EXERCISE IN LAND USE AND BY INSTITUTIONALIZED PERSONS

Sec.	
2000cc.	Protection of land use as religious exercise.
2000cc-1.	Protection of religious exercise of institutionalized persons.
2000cc-2.	Judicial relief.
2000cc-3.	Rules of construction.
2000cc-4.	Establishment Clause unaffected.
2000cc-5.	Definitions.

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would af-

fect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

(Pub. L. 106-274, §2, Sept. 22, 2000, 114 Stat. 803.)

SHORT TITLE

Pub. L. 106-274, §1, Sept. 22, 2000, 114 Stat. 803, provided that: “This Act [enacting this chapter and amending sections 1988, 2000bb-2 and 2000bb-3 of this title] may be cited as the ‘Religious Land Use and Institutionalized Persons Act of 2000’”.

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

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

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

(Pub. L. 106-274, §3, Sept. 22, 2000, 114 Stat. 804.)

§ 2000cc-2. Judicial relief**(a) Cause of action**

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

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

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

(d) Omitted**(e) Prisoners**

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

(f) Authority of United States to enforce this chapter

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

(g) Limitation

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

(Pub. L. 106-274, § 4, Sept. 22, 2000, 114 Stat. 804.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original "this Act", meaning Pub. L. 106-274, Sept. 22, 2000, 114 Stat. 803, which is classified principally to this chapter.

For complete classification of this Act to the Code, see Short Title note set out under section 2000cc of this title and Tables.

The Prison Litigation Reform Act of 1995, referred to in subsec. (e), is Pub. L. 104-134, title I, § 101(a) [title VIII], Apr. 26, 1996, 110 Stat. 1321, 1321-66, as amended. For complete classification of this Act to the Code, see Short Title of 1996 Amendment note set out under section 3601 of Title 18, Crimes and Criminal Procedure, and Tables.

CODIFICATION

Section is comprised of section 4 of Pub. L. 106-274. Subsec. (d) of section 4 of Pub. L. 106-274 amended section 1988(b) of this title.

§ 2000cc-3. Rules of construction**(a) Religious belief unaffected**

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

(b) Religious exercise not regulated

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

(c) Claims to funding unaffected

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

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

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

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

(e) Governmental discretion in alleviating burdens on religious exercise

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

(f) Effect on other law

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