

Nos. 19-7572 & 19A876

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IN THE  
**Supreme Court of the United States**

ABEL REVILLA OCHOA,

*Petitioner,*

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF  
CRIMINAL JUSTICE; LORIE DAVIS, DIRECTOR, CORRECTIONAL  
INSTITUTIONS DIVISION, TEXAS DEPARTMENT OF CRIMINAL JUSTICE;  
MICHAEL BUTCHER, WARDEN,

*Respondents.*

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

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**REPLY IN SUPPORT OF PETITION FOR A WRIT OF  
CERTIORARI AND APPLICATION FOR STAY OF EXECUTION**

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**REPLY IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI AND  
APPLICATION FOR STAY OF EXECUTION**

Respondents continue their attempt to evade the federal courts’ power to enforce the United States Constitution and federal law against state actors. They refer to judicial intervention—which, ironically, is *required* by their own policies and practices for a legal team member to film a death row inmate—as an attempt by the courts to “micromanage” the Texas prison system. (BIO.4). And they conclude that whether a prison can execute a civil rights plaintiff to evade judicial review of their unconstitutional actions is not a “special or important reason” for this Court to intervene. (BIO.4). Perhaps the best evidence of their lack of concern is that at no point in their brief do they even address the substance of Question Presented 1: whether they should be able to execute a death row inmate to evade judicial review of their unconstitutional policies and practices. Respondents simply assume that they have the power to do so and scoff at anyone—including the courts—who question them.<sup>1</sup>

Federal courts have the authority to rule on the constitutionality of a prison’s policies and practices. The very purpose of 42 U.S.C. § 1983 is to create a vehicle for citizens to seek a remedy for violations of their rights under the constitution or federal law. As a corollary, § 1983 also serves as a tool to hold state actors accountable for their unlawful conduct. That much is straightforward.

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<sup>1</sup> In a footnote, Respondents dispute that they laughed at the district court’s suggestion that they reach an agreement with Mr. Ochoa. (BIO.11). But the record reflects that they did. (R.252).

The more complicated issue here is how courts should handle a death row inmate's § 1983 suit where the harm at issue can only occur close in time to an execution. In a case like Mr. Ochoa's where the constitutional violation pertains to state interference in his clemency process, the timeframe to bring a § 1983 suit is limited to after his execution date was set and before the execution is carried out. The nature of such a suit creates complications with how to handle the case within the time constraints imposed by the execution. There is, and there must be, an avenue for such a death row inmate to secure a stay of execution pending the completion of his § 1983 suit to vindicate his constitutional right. *See, e.g., Bucklew v. Precythe*, 138 S. Ct. 1323 (2018) (granting a stay of execution pending disposition of a petition for writ of certiorari related to a § 1983 claim); *Skinner v. Switzer*, 569 U.S. 1033 (2010) (same). However, the Fifth Circuit's ruling below—that a state actor may evade review by carrying out the execution before the suit is resolved—essentially forecloses a death row inmate's opportunity to vindicate these types of rights.

Rather than addressing this important constitutional question, Respondents devote much of their briefing to rehashing various arguments they raised below. They continue to incorrectly insist this case is moot. (BIO.2–3, 13–20). It is not, as both lower courts recognized, (App.A; App.B), because Mr. Ochoa has not received the declaratory and injunctive relief he requested, (R.21). Respondents assert that Mr. Ochoa did not exhaust his administrative remedies, (BIO.21–25), even though prison administration informed him there was no available process to appeal the denial of the request to film, (R.196–97), which he could rely upon under Fifth Circuit

precedent. *Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015). And, as Respondents admit, the Fifth Circuit did not adopt their argument that the suit is time-barred. (BIO.26).

Respondents' belief is that a state actor interfering with a death-sentenced individual's attempt to submit evidence supporting his request for clemency is not "a valid constitutional claim." (BIO.27). This is an important constitutional question for this Court to resolve. Here, an injury in fact occurred when Respondents interfered with his ability to film the requested interview and submit it as part of his clemency petition. Respondents incorrectly assert this "does not mesh with the allegation in his Complaint." (BIO.17). In fact, that is precisely what Mr. Ochoa alleged in his Complaint: "Defendants have deprived Mr. Ochoa of his constitutional right to due process of law by interfering with the clemency process." (R.21).

Respondents do not dispute the implication of the Fifth Circuit's holding—that state actors can evade judicial review of unconstitutional policies and practices where the harm at issue can only occur close in time to an execution—but rather openly support it on multiple occasions in their brief. (BIO.5, 16, 18–19, 37, 38). In addition to arguing that Mr. Ochoa's execution serves as an irrefutable endpoint to the lawsuit on the backend, on the front end they argue that Mr. Ochoa actually filed his suit *too soon*. First, they claim he should have waited until after the clemency deadline passed, just 15 days before his execution. (BIO.17). Mr. Ochoa explained in his petition that such an argument makes no sense when Mr. Ochoa challenges the state's interference in the clemency process and not the Clemency Board's procedures.

(Pet.14). Second, Respondents argue that Mr. Ochoa should have waited even longer after the deadline to allow the prison to complete its two-step grievance process, (BIO.22)—despite the prison administration informing him that there was no available process to appeal the denial of the filming request, (R.196–97). While both arguments are incorrect from a legal standpoint, Respondents’ overall position advocates for a process that allows them to permanently evade review of their unconstitutional practices.

A death row inmate loses some, but not all, of his rights following his conviction. And the Texas prison system—whether they like it or not—is bound by the constitution and laws of this country. However, as it stands, the Fifth Circuit has foreclosed the opportunity for death row inmates to vindicate their constitutional rights in situations where the violation occurs close in time to their execution and allows the Texas prison system to evade judicial review of its unconstitutional policies and practices. In essence, the ruling creates a black box that no court may peer into in the final months of a death row inmate’s life. This is far from a request for “routine error correction.” (BIO.4). Instead, it is a request for this Court to intervene in the constitutional void created by the Fifth Circuit.

## **CONCLUSION**

For the foregoing reasons, the application for stay of execution and petition for a writ of certiorari should be granted.

Respectfully submitted this 6th day of February, 2020,

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by

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