OCTOBER TERM 2019

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN GUTIERREZ,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---
EXECUTION SCHEDULED FOR AFTER 7:00 PM EASTERN TIME, TUESDAY, JUNE 16, 2020

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CAPITAL CASE

QUESTIONS PRESENTED

Prior to March 28, 2019, Texas allowed inmates undergoing execution to have a State-employed chaplain (all of whom were Christian or Muslim) present in the execution chamber. Patrick Murphy alleged that this policy discriminated against Buddhist inmates like him. On March 28, 2019, this Court stayed Murphy's execution to consider his claim. *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019).

On April 2, 2019, Texas changed its policy. Under the new policy, Texas allows neither State-employed chaplains nor any other religious advisers to be present in the execution room. Petitioner, a Catholic, timely challenged the new policy as violating the First Amendment and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc–5 (2000). The district court found that Petitioner was likely to succeed on the merits, denied Defendants' motion to dismiss, and granted Petitioner's motion for a stay. The Fifth Circuit granted Defendants' motion to vacate the stay. This Court should grant this Petition, stay the execution, vacate the decision below, and remand to the district court to consider the merits of Petitioner's claims.

The questions presented are:

1. Under the RLUIPA, does the State's decision to deprive Mr. Gutierrez of the opportunity to be accompanied during his execution by a religious adviser employed by the prison substantially burden the exercise of his religion, so as to require the State to justify the deprivation as the least restrictive means of advancing a compelling governmental interest?

2. For purposes of the Free Exercise Clause, does the State's blanket policy of denying all prisoners the aid of a religious adviser at the time of the execution—adopted for the acknowledged purpose of avoiding the obligation to allow such a minister to a Buddhist prisoner—burden Mr. Gutierrez's exercise of religion without legitimate justification?

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Southern District of Texas, *Gutierrez v. Saenz et al.*, No. 1:19-CV-185. Stay of execution granted June 9, 2020.

Fifth Circuit Court of Appeals, *Gutierrez v. Saenz et al.*, No. 20-70009. Stay vacated June 12, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ruben Gutierrez respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Fifth Circuit's grant of the motion to vacate stay of execution.

OPINIONS BELOW

The opinion of the court of appeals vacating the district court's granting of the motion for stay of execution (A1–A8) (hereinafter "Panel Op.") is unreported. The orders of the district court denying in pertinent part the motion to dismiss the complaint (A9-A39) and granting the motion for stay of execution (A40–A42) are unreported (hereinafter "DCO" and "Stay Order" respectively).

JURISDICTION

The court of appeals issued its opinion vacating the stay of execution on June 12, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. §§ 2000cc–2000cc–5 is a lengthy statute that is appended hereto at Azz–qq. *See* Supreme Ct. Rule 14(f).

STATEMENT OF THE CASE

A. The Religious Liberty Interest Involved

In Christianity, the tradition of clergy presence and ministry at the time of death derives from Jesus Christ's execution and ministry to the men being crucified alongside him. *See Luke* 23:42-43 (assuring the repentant criminal, "today you shall be with me in Paradise"). The belief that a person's dying moments are critical to salvation has long persisted. *See*, *e.g.*, Ralph Houlebrooke, *Death, Religion, and the Family in England, 1480-1750* 147–49 (1998) ("The last moments of life were believed to be crucially important during the later Middle Ages. . . . [A]t this critical juncture, the Church offered help generally regarded as indispensable in making a safe departure from the world . . . .").

The presence of clergy at death has remained a crucial Christian religious practice through the present day. "The presence of a priest or deacon shows more clearly that the Christian dies in communion with the church," and is "intended to help the dying person, if still conscious, to face the natural human anxiety about death by imitating Christ in his patient suffering and dying." Liturgy Training Publications, *The Liturgy Documents Volume Two: Essential Documents for Parish Sacramental Rites and Other Liturgies* 228 (2d ed. 2012). The current pandemic has provided stark reminders that this and similar traditions remain a central part of modern religious life. As one chaplain said in explaining clergy efforts to see gravely ill covid-19 patients, "The whole point of the sacrament is a reminder that we are not

alone. . . . The church is present with this person, and God is present with this person." Elizabeth Dias, *The Last Anointing*, N.Y. Times (June 6, 2020), https://www.nytimes.com/interactive/2020/06/06/us/coronavirus-priests-last-rites.html.

Given this longstanding practice, it is not surprising that throughout American history, including when the First Amendment was adopted, clergy presence at the time and place of executions has been recognized as a fundamental interest of the condemned. *See* Stuart Banner, *The Death Penalty: An American History* 1 (2002) (recounting early nineteenth century execution where the condemned asked a clergyman to read his final words for him). This clerical role "was so routine that in 1791 William Smith could publish a guide-book for ministers [that contained] suitable devotions before, and at the time of Execution." *Id.* at 18.[1] These traditions were passed on for many generations. *See, e.g.*, Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 Buffalo L. Rev. 461, 471 n.25, 480, 505 n.187 (1995).

Texas had long followed this tradition by permitting clergy to minister to condemned prisoners in the execution chamber through the time of death. *See* Don Reid & John Gurwell, *Eyewitness: I Saw 189 Men Die in The Electric Chair* 37, 87, 212–13 (1973) (recounting instances where clergy ministered to condemned prisoners

[1] Unsurprisingly, these American traditions were similar to English practices during the colonial era. *See, e.g.*, Randall McGowen, *The Body and Punishment in Eighteenth-Century England*, 59 J. Mod. Hist. 651, 651 (1987) ("The condemned . . . were accompanied by a clergyman who shadowed their last moments urging them to repent or consoling them with the offer of divine forgiveness.").

in the electric chair); Charles C. Hill, *Condemned man prayed, reassured his 'mate' before lethal injection*, New Braunfels Herald Zeitung, Dec. 7, 1982, at 1 (recounting Islamic chaplains' presence and prayer in the execution chamber during first lethal injection in Texas). At numerous Texas executions, the chaplain "was he who stood in the death chamber with the warden, one hand resting on the condemned's leg." Pamela Collof, *The Witness*, Tex. Monthly (Aug. 12, 2014), https://www.texasmonthly.com/articles/the-witness/.[2] This right is especially important for the condemned, for whom the final moments offer a unique chance to prepare for "our heavenly homeland" and for pardon and redemption. *See* Catechism §§ 1525; 1501-–02 (effect of expected death on discernment).

Although the current execution protocol allows the condemned "visits with a [Texas Department of Criminal Justice] Chaplain(s), a Minister/Spiritual Advisor who has the appropriate credentials and his attorney(s) on the day of execution at the Huntsville Unit," ROA.62, these visits are limited to only a single hour that must be shared between those visitors: "Minister/Spiritual Advisor and attorney visits shall occur between 3:00 and 4:00 p.m. CST unless exceptional circumstances exist." ROA.63. These visits are not face-to-face, but instead conducted through multiple layers of wire mesh that make it difficult to see the condemned, let alone touch him. At least four guards stand watch no more than ten to fifteen feet away throughout

[2] Touch has long been integral to Christian ministry. *See, e.g.*, R.C. Sproul, *The Sense of Touch in Worship*, Ligonier Ministries (June 28, 2019), https://www.ligonier.org/blog/the-sense-of-touch-in-worship/ ("Jesus understood the importance of touching those to whom He ministered.") (discussing *Matthew* 8).

the full hour of the combined attorney and spiritual advisor visit. *See Murphy*, 139 S. Ct. at 1483 (Alito, J., dissenting from grant of application for stay) ("Visiting a living prisoner is not the same as watching from a short distance and chanting while a lethal injection is administered.").

Texas chaplains have recently confirmed under oath that, until the recent change in policy, they were able to stand in the execution chamber "[w]ithin inches, a foot maybe" from the condemned. Dep. of Thomas Brouwer, ECF No. 38-6, at 37, *Murphy v. Collier*, No. 4:19-cv-1106 (S.D. Tex.). The Reverend Carroll Pickett tells it like this:

> After they're strapped down and the needles are flowing and you've got probably forty-five seconds where you and he are together for the last time, and nobody—nobody—can hear what goes on there. And the conversations that took place in there were, well, basically indescribable. It was always something different. A guy would say "I want you to pray this prayer." . . . One of them would say "What do I say when I see God?"

StoryCorps, *Witness to an Execution* (Oct. 20, 2000), https://storycorps.org/stories/witness-to-an-execution/ (last visited June 11, 2020).

In light of these religious and historical traditions, current Texas clergy have expressed alarm at the Texas Department of Criminal Justice's ("TDCJ") new policy. *See, e.g.*, Editorial Board, *Let chaplains attend to the condemned*, Hous. Chron. (Aug. 12, 2019 3:38 PM), https://www.houstonchronicle.com/opinion/editorials/article/Let-chaplains-attend-to-the-condemned-Opinion-14293553.php. ("Standing behind a glass partition 'is no substitute for this direct ministry.'"); *Interfaith Statement in Response to the Texas Department of Criminal Justice's Decision to Remove*

Chaplains from the Execution Chamber (July 2019) (hereinafter "Interfaith Statement"),

https://drive.google.com/file/d/1v06HlnenFjWSuGaACFnJZbSTopYEaULk/view

("[W]e are united in recognizing that the right of condemned people to spiritual comfort at the moment of death is a longstanding and widely-recognized religious practice. . . . These rituals, stemming from sincerely-held religious beliefs, often require the direct assistance of clergy.").[3]

B. Course of Relevant Proceedings

Petitioner was convicted of capital murder in 1999, in the 107th Judicial District Court of Cameron County, Texas, and sentenced to death for the murder of Escolastica Harrison. In 2002, a divided Texas Court of Criminal Appeals ("CCA") affirmed the conviction and sentence. His state post-conviction appeals were denied.

Mr. Gutierrez sought federal habeas corpus review, which was ultimately denied. Both while the federal habeas proceedings were pending and after their denial, Mr. Gutierrez sought DNA testing, in an attempt to establish that he was not a principal in the murder of Ms. Harrison. Both of those requests were ultimately denied, although the state courts stayed a prior execution in 2019, in part in order to consider the second DNA testing appeal.

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[3] *See also Pope encourages group working to end use of death penalty*, Cath. News Agency (Feb. 27, 2019), https://www.catholicnewsagency.com/news/pope-encourages-group-working-to-end-use-of-death-penalty-89197 (Pope stating that, in executions, "there should at the very least be clergy available to hear a person's confession and offer reconciliation, even up to the moment of death").

The State of Texas scheduled the execution of Patrick Henry Murphy, a Buddhist, for March 28, 2019. At that time, TDCJ policy provided that inmates could have a State-employed chaplain (all of whom were Christian or Muslim) with them in the execution room at the time of their execution, but not any other spiritual adviser. A month prior to his scheduled execution, Murphy requested of prison authorities that his Buddhist minister be permitted to accompany him into the execution chamber. Consistent with its policy, TDCJ denied that request. Mr. Murphy filed suit under 42 U.S.C. § 1983, alleging that the refusal to permit a Buddhist spiritual adviser in the execution room violated his rights under the First Amendment and the RLUIPA.

On March 28, 2019, this Court stayed Mr. Murphy's execution. *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019). Justice Kavanaugh expressed his view that either of two "equal-treatment remedies" would cure the State's "denominational discrimination": either "(1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room." *Id.* (Kavanaugh, J., concurring in grant of application for stay).

Writing for himself and Justices Thomas and Gorsuch, Justice Alito expressed very different views. Justice Alito believed that the stay application, which was filed in this Court on the day of the scheduled execution, was dilatory and should have been denied for that reason. *Id.* at 1480–82 (Alito, J., dissenting from grant of application for stay). At the same time, Justice Alito recognized that Murphy's claims

"raise[] serious questions under both the First Amendment and the RLUIPA." *Id.* at 1482. And those questions would remain even if states adopted the policy of excluding religious advisers altogether: "If States respond to the decision on Murphy's stay application by banning all clerics from the execution room, that may obviate any conflict with the Establishment Clause, but a prisoner might still press free exercise claims." *Id.* at 1483 n.4; *see also id.* at 1484 (discussing claims under RLUIPA). As Justice Alito noted, the merits of such claims—including the validity vel non of possible state justifications for their policies—"are dependent on the resolution of fact-intensive questions that simply cannot be decided without adequate proceedings and findings at the trial level." *Id.* at 1481.

On April 2, 2019, in response to the decision on Murphy's stay application, TDCJ issued a revised Execution Procedure. ROA.56–64.[4] The revised procedure prohibits any religious or spiritual advisers from entering the execution chamber at the time of an execution: "TDCJ Chaplains and Ministers/Spiritual Advisors designated by the offender may observe the execution only from the witness rooms." ROA.63.

On June 27, 2019, the state trial court issued a warrant for Mr. Gutierrez's execution, scheduling it for October 30, 2019. Beginning in late July, Mr. Gutierrez and his counsel contacted TDCJ officials requesting an accommodation so that he could have a Christian chaplain present in the execution chamber during his

[4] Petitioner will cite to documents included in the Fifth Circuit record on appeal as "ROA." followed by the page number.

execution. Those requests were denied. *See* ROA.65–66. Mr. Gutierrez then filed a formal grievance, to which TDCJ never responded. ROA.67–68.[5]

On September 26, 2019, Mr. Gutierrez filed his original complaint under 42 U.S.C. § 1983, alleging that the revised policy violated his rights under the First Amendment and under the RLUIPA. Mr. Gutierrez also alleged violations of due process with respect to the denial of DNA testing (claims he does not present to this Court). Defendants moved to dismiss the complaint and Mr. Gutierrez responded. While the CCA was considering Mr. Gutierrez's DNA testing appeal, the district court stayed the proceedings.

On February 26, 2020, the CCA denied the DNA testing appeal. On February 28, 2020, the state trial court issued a new warrant, scheduling Mr. Gutierrez's execution for June 16, 2020. On April 22, 2020, Mr. Gutierrez filed an amended complaint.[6] Defendants again moved to dismiss and Mr. Gutierrez responded. On June 2, 2020, the district court issued DCO, in which it granted in part but denied in pertinent part the motion to dismiss.

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[5] In the courts below, Defendants contended that Mr. Gutierrez had failed to exhaust his administrative remedies because he did not pursue the matter after the prison failed to respond. The district court denied the Defendants' motion to dismiss on that ground, *see* DCO at 20-21, and the Fifth Circuit did not address it. For the first time in their opposition to the stay motion in district court, Defendants argued that the prison had not received the grievance. Neither of the courts below addressed that belated argument.

[6] The parties and the district court originally adopted a joint scheduling order under which the amended complaint would be filed on April 8, 2020. The district court granted Mr. Gutierrez's unopposed motion for a two week extension of time, requested due to constraints on counsel arising from the covid-19 pandemic.

The district court conducted a thorough and extensive review of the merits of the execution chamber claims. Its review was constrained by two factors—the limited record available on a motion to dismiss, *see, e.g.*, DCO at 27, and the lack of any directly controlling law. On the latter point, the district court noted that Defendants relied heavily on Justice Kavanaugh's suggestion that it would be permissible for the State to allow religious advisers "only in the viewing room, not the execution room." *Id.* at 22–23 (quoting *Murphy*, 139 S. Ct. at 1475) (Kavanaugh, J., concurring); *see also id.* at 23–24 (quoting *Murphy*, 139 S. Ct. at 1476) (statement of Kavanaugh, J.). But the district court recognized that Justice Alito expressed different views, including that the "'flimsy record' precluded any decision about whether Texas could safely accommodate Murphy's request to have his spiritual advisor in the execution chamber," and that there were "'unresolved factual issues' . . . about whether the current policy furthers TDCJ's 'compelling interest in security,' 'is narrowly tailored to serve that interest,' and 'can be sustained on that basis.'" DCO at 23 (quoting *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting from grant of application for stay)) (ellipsis in DCO). Accordingly, the district court concluded that Justice Kavanaugh's statements were not controlling on the motion to dismiss. *Id.* at 24–25, 29.

With respect to the Free Exercise Clause claim, the district court ruled that to state such a claim, a plaintiff "must allege sufficient facts showing a sincere religious belief that the official action or regulation substantially burdens." DCO at 27 (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). A prison policy nevertheless withstands First Amendment scrutiny if it is "'reasonably related to legitimate

penological interests.'" *Id.* (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)). The court found that Mr. Gutierrez had sufficiently pled that the "current TDCJ policy precludes his sincere desire to have a spiritual advisor present during his execution." *Id.*

Echoing Justice Alito, the district court found that there were unresolved factual issues about whether the revised policy was "reasonably related to legitimate penological interests":

> At the pleadings stage, the Court lacks information about how the requested relief would impact the way Texas conducts the execution of other inmates. This lawsuit has still not developed factual information relating to how many other faith groups are represented on death row, what security risks exist for allowing non-TDCJ spiritual advisors into the death chamber, and what rigor must attend training clergy for the execution process. Assuming that granting relief to Gutierrez would force Defendants to allow access to chaplains from all faith groups represented on death row, the pleadings do not give insight into what security concerns exists, how pervasive those risks may be, and why TDCJ cannot easily accommodate any rights while still maintaining security. Defendants' arguments about secondary ripples from the Gutierrez's rights are too speculative and undeveloped to dismiss this case on the pleadings.
>
> Simply, Defendants' cursory arguments about security concerns do not show that Gutierrez has failed to plead a claim on which relief can be granted.

DCO at 27.

With respect to the RLUIPA claim, the district court ruled that a plaintiff must initially show that the government policy "complained of imposes a 'substantial burden' on his religious exercise." DCO at 28 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 567 (5th Cir. 2004)) (quotation marks omitted). This "requires 'a case-by-case, fact-specific inquiry.'" *Id.* at 28–29 (quoting *Adkins*, 393 F.3d at 571). If the plaintiff

makes that showing, a "prison must 'prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest.'" *Id.* at 29–30 (quoting *Holt v. Hobbs*, 574 U.S. 352, 364 (2015)).

Defendants countered that the physical presence of a chaplain in the execution room was not "required for [Mr. Gutierrez] to exercise his religion." ROA.697. The district court found that this did not preclude the claim, as "Defendants have not identified any law sanctioning the dismissal of a RLUIPA claim based on religious devotion preferred by an inmate rather than compelled by his religion." DCO at 28; *see also id.* at 28 n.8 (quoting *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting from grant of application for a stay) (noting that Supreme Court has not decided that issue)). The district court found that Mr. Gutierrez's allegation that "prohibiting him 'from being guided at the time of death by a Christian chaplain is an explicit and substantial burden on religious exercise' provides a sufficient basis for his RLUIPA claim." *Id.* (quoting ROA.614–15).

The district court considered the security concerns advanced by Defendants with respect to executions of other, non-Christian inmates, should Mr. Gutierrez be granted relief. The court found, however, that Defendants had failed to prove exactly what those security concerns are, and whether the revised policy is the "least restrictive means" of furthering the security interest. The court found that it had "no specific facts before it concerning future security concerns possibly caused by future executions." DCO at 30. Accordingly, it denied the motion to dismiss the RLUIPA claim.

In responding to Defendants' motion to dismiss the amended complaint, Mr. Gutierrez expressly requested a stay of his execution. Defendants separately responded to that request. With respect to the execution chamber claims, Defendants argued primarily that Mr. Gutierrez was not entitled to a stay because he had purportedly failed to show a likelihood of success on the merits. ROA.947–63. Although Defendants argued that Mr. Gutierrez had failed to timely file his DNA testing claims, ROA.933–37, they made no such argument with respect to the execution chamber claims. Indeed, the complaint alleging the chamber claims was pending at the time the execution warrant was issued.

On June 9, 2020, the district court entered the stay order. ROA.991–93. The district court recounted the standards governing stays of execution (a matter as to which there was no dispute between the parties). ROA.992–93. The court ruled that the analysis in DCO showed that there were "outstanding, substantial, and novel legal and factual questions raised by Gutierrez that have survived a motion to dismiss." ROA.993. It ruled that Mr. Gutierrez had shown a likelihood of success on at least one of his claims, and that the other stay factors warranted a stay of execution. *Id.* Accordingly, it granted the motion for stay of execution.

Defendants immediately appealed. On June 11, 2020, Defendants filed a motion to vacate the stay in the Fifth Circuit. Defendants again argued that the stay should be vacated as to the DNA testing claims because they were purportedly untimely. Mot. to Vacate 15–18. Again, Defendants did not make any such argument with respect to the execution chamber claims, arguing instead that Mr. Gutierrez was

not likely to succeed on the merits of those claims, and that he would not be irreparably injured absent a stay. *Id.* at 27–41, 43. Mr. Gutierrez filed his opposition to the motion to vacate on June 12.

On June 12, 2020, the Fifth Circuit granted Defendants' motion to vacate the stay. With respect to the Free Exercise claim, the panel concluded that Justice Kavanaugh's statements in *Murphy* "made a valid appraisal of the issue." Panel Op. 7. While acknowledging that Mr. Gutierrez and amicus curiae Texas Conference of Catholic Bishops made "strong religious arguments," the panel ruled that Mr. Gutierrez was unlikely to succeed on the merits in light of Justice Kavanaugh's statements. *Id.*

With respect to the RLUIPA claim, the panel acknowledged that, as a result of Texas' revised policy, Mr. Gutierrez might "be denied the final measure of spiritual comfort that might be available." Panel Op. 8. Lacking the "final measure of spiritual comfort, however, did not rise to the level of a "substantial burden":

> As important as [being denied the final measure of spiritual comfort] is, government action does not rise to the level of a substantial burden on religious exercise if it *merely* prevents the adherent from enjoying some benefit that is not otherwise generally available.

Id. (citing *Adkins*, 393 F.3d at 570) (emphasis added).

Based on its conclusion that there was no substantial burden on religious exercise, the panel concluded that Mr. Gutierrez could not show a likelihood of success on the RLUIPA claim, and granted the motion to vacate. Panel Op. 8.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER DEPRIVING A CONDEMNED MAN OF SPIRITUAL AID DURING HIS EXECUTION IS A SUBSTANTIAL BURDEN ON HIS RELIGIOUS EXERCISE, AND TO ALLOW THE DISTRICT COURT TO DEVELOP AN APPROPRIATE RECORD AND GIVE CAREFUL CONSIDERATION TO THE FACT-INTENSIVE QUESTIONS INVOLVED.

Ruben Gutierrez sincerely believes that the presence of a Christian chaplain in the execution chamber will assist his passing from life to death and guide his path to the afterlife. No court has doubted the sincerity of this religious belief—a belief consistent with Christian teaching and historical practice. Prior to April 2019, the State of Texas would have allowed this practice, *see* DCO at 4, as chaplains have been present for hundreds of executions in Texas. But Texas changed the rules, not because Mr. Gutierrez's beliefs were less significant, or because the presence of the chaplain had created any security concerns over the years, but in order to defeat a charge of religious discrimination brought by another inmate who practiced Buddhism.[7] Texas decided to avoid the discrimination issue by taking away Mr. Gutierrez's religious freedoms. Such actions make a strong case that Texas has violated the RLUIPA.

[7] Texas has never claimed that the presence of a State-employed chaplain in the execution chamber, as Mr. Gutierrez has requested, poses any kind of security concern. Since the same chaplains who performed this role previously are still available and could be in the viewing room rather than the execution room, *see* DCO at 4; Stay Order 1–2, there is no fiscal interest in excluding them. Texas has asserted that the presence of ministers or spiritual advisers from outside the prison may raise such concerns. But those concerns do not bear on the question whether Mr. Gutierrez's religious exercise has been substantially burdened.

The RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . 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." 42 U.S.C. § 2000cc–1(a). RLUIPA defines "'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Holt*, 574 U.S. at 358 (quoting § 2000cc–5(7)(A)). And Congress specified that RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g).

Before passing the RLUIPA, Congress documented, in hearings spanning three years, that "'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Cutter v. Wilkerson*, 544 U.S. 709, 716–17 (2005) (citing legislative history). In *Cutter*, this Court explained that RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Id.* at 717. Furthermore, "RLUIPA . . . confers no privileged status on any particular religious sect and singles out no bona fide faith for disadvantageous treatment." *Id.* at 724.

RLUIPA "provide[s] very broad protection for religious liberty." *Holt*, 574 U.S. at 356 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). "In

RLUIPA, in an obvious effort to effect a complete separation from the First Amendment case law, Congress deleted reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Hobby Lobby*, 573 U.S. at 696 (quoting 42 U.S.C. § 2000cc–5(7)(A)). Thus, in the prison context, RLUIPA provides greater protections than the First Amendment. *See, e.g.*, *Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010) (citing *Lovelace v. Lee*, 472 F.3d 174, 199–200 (4th Cir. 2006)).

Based on its language, analysis under RLUIPA can be seen as a "three-act play." *Cavin v. Mich. Dep't of Corr.*, 927 F.3d 455, 458 (6th Cir. 2019). First, "the inmate must demonstrate that he seeks to exercise religion out of a 'sincerely held religious belief.'" *Id.* (quoting *Holt*, 574 U.S. at 361). Second, the inmate "must show that the government substantially burdened that religious exercise." *Id.* Upon satisfaction of these two steps, the burden then shifts to the government for the third act: it "must meet the daunting compelling-interest and least-restrictive-means test." *Id.*

In this case, the sincerity of Mr. Gutierrez's religious belief about the importance of the chaplain's presence at the time he is put to death has not been contested, even by the Fifth Circuit. Instead, without allowing the district court the opportunity to allow discovery and conduct fact finding, the Fifth Circuit held that Texas' refusal to allow Mr. Gutierrez's request did not substantially burden that religious exercise. Panel Op. 8. That ruling was inconsistent with this Court's

precedents and with the decisions by other courts in addressing RLUIPA claims; it certainly could not be reached "without adequate proceedings and findings at the trial level." *Murphy*, 139 S. Ct. at 1481 (Alito, J., dissenting from grant of application for stay).

In *Holt*, for example, this Court reviewed a record that had been fully developed and considered whether the prison's refusal to allow a Muslim inmate to grow a beard half an inch long, as he believed was a requirement of his religious faith, was a "substantial burden." This Court held that the prisoner "easily satisfied" the obligation to prove a "substantial burden" on his religious exercise. *Holt*, 574 U.S. at 361. The importance of ministry at the time of death is at least as weighty as the belief that one must have a beard. If the refusal to allow a beard creates a substantial burden, then the refusal to allow a chaplain to be present to pray with and guide an inmate to the afterlife as he dies is a fortiori a substantial burden.

Religious exercise is substantially burdened when the prison "prevents the plaintiff from participating in an activity motivated by his sincerely held religious belief." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014). In *Yellowbear,* Judge (now Justice) Gorsuch found a substantial burden where the prisoner was prevented from exercising his sincerely held religious belief that using a sweat lodge cleansed and purified his mind, spirit, and body. *Id.* Here, as in *Yellowbear*, Mr. Gutierrez is being prevented from participating in an activity motivated by his sincerely held religious belief.

The presence of a minister at the time of execution is an important aspect of Mr. Gutierrez's religious practice. The district court credited as sincere Mr. Gutierrez's belief that "'having a Christian chaplain present in the chamber would help to ensure his path to the afterlife.'" DCO at 28 (citing ROA.593). The Fifth Circuit, however, minimized that interest as "some benefit that is not otherwise generally available." Panel Op. 8. That characterization not only trivialized what is at stake, it also ignores the history of this case. A chaplain in the chamber *was* "generally available" to Mr. Gutierrez and all other inmates until the State decided to take that away in order to defeat Mr. Murphy's claim of discrimination. And when a prison bars access to a practice altogether, it substantially burdens that practice. *See Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) ("[T]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).").

Moreover, the Fifth Circuit's characterization purports to tell Mr. Gutierrez what his religion is, and, in particular, what aspects of it are central and important to him. That is contrary to this Court's law. *See Hobby Lobby*, 573 U.S. at 725 ("[O]ur 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'") (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 716 (1981)). Mr. Gutierrez believes that the presence of a minister in the execution chamber will "ensure" his "path to the afterlife." ROA.67–68. Respondents have substantially burdened Mr. Gutierrez's religion by forbidding that measure and insisting that he instead visit with a minister at some earlier time, alongside counsel,

and with physical barriers. That policy leaves the exercise of Mr. Gutierrez's religion materially incomplete. *See Haight*, 763 F.3d at 565 (the prison's decision to bar corn pemmican and buffalo meat "effectively bars the inmates from this religious practice and forces them to modify their behavior *by performing less-than-complete powwows with less-than-complete meals*") (emphasis added; citation and quotation marks omitted).

Policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements. *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013). Many mundane policies have been found to constitute substantial burdens. *See, e.g.*, *Fox v. Washington*, 949 F.3d 270, 281–82 (6th Cir. 2020) (prison's refusal to allow a group of white separatists to pray together on the Sabbath and holidays rather than as part of other religious services was a substantial burden on their professed Christian Identity religious beliefs); *Jones v. Carter*, 915 F.3d 1147, 1151–52 (7th Cir. 2019) (providing a Jewish inmate with only vegetarian meals that did not include meat substantially burdened his religious beliefs even though the prisoner had other options to obtain appropriate meat); *Ware v. La. Dep't of Corr.*, 866 F.3d 263, 269 (5th Cir. 2017) (policy banning dreadlocks was found to be a substantial burden). If all of these mundane policies constituted a substantial burden, then Mr. Gutierrez's sincerely held belief that the presence of a chaplain at the time of his death will help guide him to the afterlife has been substantially burdened as well.

Moreover, the focus of the analysis is on the individual—"the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt,* 574 U.S. at 363; *Hobby Lobby,* 573 U.S. at 726. The impact of the rule on other prisoners, such as *Murphy*, is not a factor in the analysis and not a legitimate reason for the rule.

While the Fifth Circuit focused on the presence of religious advisers before the execution and in the viewing room (as opposed to the execution room), Panel Op. 7, the question under RLUIPA is not whether a prisoner has alternative means for exercising his religious beliefs. Rather, the question is whether the particular rule imposes a substantial burden on the prisoner's religious exercise. *Fox,* 949 F.3d at 280 ("When determining the substantiality of a burden, we cannot look to 'whether the RLUIPA claimant is able to engage in other forms of religious exercise.'") (quoting *Cavin v. Mich. Dep't of Corr.*, 927 F.3d 455, 459 (6th Cir. 2019)). Thus, here, the Texas rule's allowance of a chaplain's presence in the viewing room does not mitigate the substantial burden imposed by his exclusion from the chamber.

Under RLUIPA, once a prisoner shows that his sincerely held belief has been substantially burdened, as Mr. Gutierrez has done here, the burden shifts to the government to show that the rule satisfies a compelling interest and that it is the least restrictive means for addressing that interest. *Holt*, 574 U.S. at 362. In this case, the Fifth Circuit did not reach this issue, while the district court properly recognized that further factual development on the issue was likely necessary. Even on this record, however, it is apparent that Texas' interest is not compelling, and that

the less restrictive means of employing the Christian chaplains who are ready and willing to do their work is readily available.

Thus, this Court should grant certiorari, vacate the Fifth Circuit's order, and remand this case to allow the district court to conduct any necessary hearings and to make appropriate fact findings. *See Murphy,* 139 S. Ct. at 1484 (Alito, J., dissenting from the grant of a stay) (RLUIPA claims require careful consideration of the interests of both prisoners and prisons); *see also Cutter*, 544 U.S. at 718 n.7; *id.* at 725 (noting undeveloped state of the record).

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER PROHIBITING CHAPLAINS FROM ENTERING THE EXECUTION ROOM BURDENS MR. GUTIERREZ'S EXERCISE OF RELIGION WITHOUT LEGITIMATE JUSTIFICATION.

When the United States adopted the Free Exercise Clause, clergy participation in executions was an indispensable civic and religious tradition. Among other things, this tradition sought to give the condemned every opportunity to repent and seek spiritual forgiveness before death. Today, this tradition remains essential to Catholic doctrine and practice. Particularly in light of Mr. Gutierrez's sincere Catholic faith, TDCJ's new policy will substantially burden his ability to exercise his religion up to and at the time of his death, in violation of the Free Exercise Clause.

The State fails to specify, let alone establish, any valid interest in preventing a member of the clergy from accompanying Mr. Gutierrez into the execution chamber. The State's age-old policy of permitting clergy presence (until last year) belies any such arguments and proves instead that a less restrictive alternative stands at the ready. The State acknowledges only one specific objective in denying clergy

accompaniment to Mr. Gutierrez: to advance the State's efforts to deny clergy accompaniment in another case. The State should not be allowed to deprive Mr. Gutierrez of religious liberty on the basis of such bootstrapped arguments.

A. TDCJ Policy Substantially Burdens a Sincere and Well Established Form of Religious Exercise.

"[T]he people of this nation have ordained in the light of history," Justice Owen Roberts wrote for a unanimous Court, that "[religious] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940). A State may restrict religious conduct only when "subject to regulation for the protection of society." *Id.* at 304. A State thus violates the Free Exercise Clause where, absent a countervailing interest, a person holds a sincere religious belief and the State substantially burdens his ability to practice his religion. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981).

Clergy participation in executions was a ubiquitous and important tradition at the nation's founding. *See* Statement of the Case, *supra*. The State has not disputed this history in its appellate briefing, and the Fifth Circuit simply overlooked the historical context, *see* Panel Op. at 5–7. In doing so, the State failed to give effect to the original meaning of the Free Exercise Clause. Because clergy's role in executions "was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding." *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 603 (2014) (Alito, J., concurring); *see also Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 875 (7th Cir.

2014) (Easterbrook, J.) ("[T]he meaning of the Constitution's religion clauses depends in part on historical practices. One cannot understand centuries-old language apart from the culture in which the language was written and originally operated."). Execution ministry was an "exercise" of religion then, and it remains so now.

Mr. Gutierrez is a sincere, practicing Catholic who seeks the presence of clergy to "help secure [his] path to the thereafter is ensured . . . ." ROA.68. Clergy are available and willing to accompany him to his execution, ROA.67, and clergy confirm the continuing religious importance of execution ministry. *See Interfaith Statement*. But the new TDCJ policy will prevent Mr. Gutierrez from praying with, receiving ministry from, and being accompanied by a chaplain in the execution chamber. ROA.63. As set forth above, the policy will therefore substantially burden his exercise of religion.

This Court has recognized communal prayer as a longstanding religious tradition worthy of First Amendment protection, *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), and Texas has long recognized that a condemned prisoner's prayer with a chaplain is integral in executions, Statement of the Case, § A, *supra*. Such "an unbroken practice . . . is not something to be lightly cast aside." *Marsh*, 463 U.S. at 790 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)). Quite the opposite, a prohibition on such a practice requires "a fact-sensitive [inquiry] that considers both the setting in which the prayer arises and the audience to whom it is directed." *Town of Greece*, 572 U.S. at 587. Just as legislative prayer has long served both a "religious tradition" and a "legitimate function" of government, *id.* at 583, so too execution

ministry continues to be a fundamental exercise of religion. In precluding Mr. Gutierrez from continuing that tradition, the State substantially burdened his exercise of religion.

B. The State Lacks, and in Any Event Has Not Proffered, Valid Countervailing Interests.

The Fifth Circuit ruled that Mr. Gutierrez could not meet the threshold set in *Turner v. Safley*, 482 U.S. 78, 89 (1987), for showing that a prison policy violates the Free Exercise Clause. Panel Op. 7. Mr. Gutierrez disputes that *Turner*'s relaxed scrutiny applies to a religious exercise, like execution ministry, that was well-accepted when the First Amendment was adopted.[8] But even under *Turner*, the TDCJ policy violates the Free Exercise Clause.

Turner established a four-factor test for determining whether a burden on a prisoner's religious rights is justified by countervailing State interests: 1) whether there is a valid, rational connection between the prison policy and a legitimate governmental interest; 2) whether the prisoner has "another avenue" to exercise the right; 3) whether accommodating the right will have a significant "ripple effect" on prison staff or resources; and 4) whether there is a ready alternative that fully accommodates the prisoner's rights. 482 U.S. at 89–91. The Fifth Circuit failed to conduct any analysis of any of these factors, instead conclusorily ruling that

[8] *See, e.g.*, *Town of Greece*, 572 U.S. at 603 (Alito, J., concurring) ("[I]f there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.").

"Gutierrez fails to make a strong showing of a likelihood of success in establishing that TDCJ's execution policy is not 'reasonably related to legitimate penological interests.'" Panel Op. 6 (quoting *Turner*, 482 U.S. at 89). Indeed, the Fifth Circuit did not identify exactly what penological interest the policy served. *Id.* The district court, on the other hand, aptly found that the State had not shown any record support for its contentions about the *Turner* factors, instead basing its contentions on speculation. DCO at 27. Moreover, the district court identified a number of factual questions that required additional development and hearings before a full analysis of the *Turner* factors could be undertaken. *Id.* at 26–27.

Under *Turner*, the district court was correct that the State has not established a legitimate penological basis for its new policy and that additional factual development was necessary. *Turner* upheld inter-inmate mail restrictions in light of evidence showing that such mail increased violence, escapes, and gang activity. 482 U.S. at 91. By contrast, *Turner* struck down a broad marriage restriction, finding that the State lacked sufficient penological interests, where "many religions recognize marriage as having spiritual significance [and] for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith," and where the State's avowed security concern derived from the possibility that "love triangles" might lead to violence. *Id.* at 96–97. Mr. Gutierrez's religious interests here are much more akin to marriage than to inter-inmate mail, and the State's avowed security concerns are entirely speculative, unlike those that this Court deemed inadequate in *Turner* despite an extensive factual record. *See* 482 U.S. at 91–99.

The State's briefing below conceded that its objective in denying clergy accompaniment to Mr. Gutierrez was to adopt a policy that would reinforce its effort to deny clergy accompaniment in another case, *see* Mot. to Vacate 33. This can hardly be a legitimate penological interest; avoiding one constitutional harm does not itself justify inflicting another. And the State has failed to specify any other penological objective of its policy. DCO at 27.

The remaining *Turner* factors confirm just how hard-pressed Texas is in defending exclusion of clergy from the execution chamber as serving any legitimate state interest of consequence. Clergy in the execution room pose no greater dangers, risks or expenses now than they did in 2018. In fact, TDCJ already has on staff clergy who are available and willing to accompany Mr. Gutierrez, just as they accompanied other prisoners at their executions under the old policy. The traditional policy worked fine, without incident or inconvenience. It therefore provides an "obvious, easy alternative[]" to accommodate Mr. Gutierrez's religious right, where returning to the traditional policy will not have a "a significant ripple effect" on prison guards or resources. *See Turner*, 482 U.S. at 90. And at this juncture, what bears emphasis is that the State has not proffered, let alone proven, any evidence to the contrary.

Finally, the religious practice at issue here is specific to clergy accompaniment at the time and place of death, it is deeply embedded in American history, and it is being completely denied to Mr. Gutierrez. Under the new TDCJ policy, he may not touch, converse with, or pray with any chaplain seated among spectators in a separate room, and so he cannot exercise the right by any "other avenue," *see id.*;

indeed, the chaplain's appearance through the plexiglass would be a stark reminder of the right that was taken away from him.

CONCLUSION

For all of the reasons set forth above and in Mr. Gutierrez's other submissions to this Court, this Court should grant the writ of certiorari and stay Mr. Gutierrez's execution. It should then either set the case for full briefing, or vacate and remand for further proceedings in the district court.

Respectfully submitted,

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