No. 19A1052
CAPITAL CASE

In the Supreme Court of the United States

RUBEN GUTIERREZ,

Petitioner,

v.

LUIS V. SAENZ; FELIX SAUCEDA, CHIEF, BROWNVILLE POLICE DEPARTMENT; 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 APPLICATION FOR STAY OF EXECUTION PENDING CONSIDERATION AND DISPOSITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, MOTION FOR LEAVE TO FILE IN COMPLIANCE WITH RULE 33.2, AND BRIEF *AMICUS CURIAE* OF THE TEXAS CATHOLIC CONFERENCE OF BISHOPS IN SUPPORT OF PETITIONER

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UNOPPOSED MOTION OF *AMICUS CURIAE* THE TEXAS CATHOLIC CONFERENCE OF BISHOPS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPLICATION

The Texas Catholic Conference of Bishops respectfully moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief as *amicus curiae* in support of Petitioner's application for a stay of execution. All parties have advised that they do not oppose the filing of the *amicus* brief.

The Texas Catholic Conference of Bishops is an unincorporated association consisting of the bishops of fifteen Catholic Dioceses in Texas and the Ordinariate of the Chair of St. Peter. Through this association, the various bishops speak with one voice on issues facing the Catholic Church in Texas.

The Bishops regularly advocate for both religious liberty and mercy and justice for prisoners, especially those on death row, before the Texas legislature and state and federal courts. *See, e.g.*, *Amici Curiae* Brief for Texas Catholic Conference of Bishops and Catholic Mobilizing Network, *Saldano v. Davis*, No. 19-5171 (U.S.) (death penalty matter); *Whole Woman's Health v. Smith*, 896 F.3d 362, 372-74 (5th Cir. 2018) (prevailing party in pro-life advocacy and religious autonomy matter); *Amici Curiae* Brief for Texas Catholic Conference et al., *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) (ministerial exception case); 2019 Legislative Agenda, TCCB, https://txcatholic.org/wp-content/uploads/2018/10/86th-Legislative-Session-Agenda-FINAL.pdf. Relevant to this application, the Bishops have advocated—on moral and legal grounds—for the re-

versal of the Texas Department of Criminal Justice's ("TDCJ") April 2019 decision to ban all chaplains, even TDCJ-employed clergy, from accompanying the condemned in the execution chamber.

The Bishops' deep familiarity with the history of the policy at issue, and extensive experience in the area of religious liberty generally, can assist the Court in deciding the motion before it, especially given the necessarily expedited schedule. The Bishops also have a unique perspective as a body of leaders of a religious community whose ministers attend to the dying and the imprisoned, including those on death row. *See, e.g., In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (*amicus* participation is appropriate "when the amicus has unique information or perspective") (citation omitted); *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (explaining ways by which *amici* with special experience or interests "may provide important assistance to the court"). Leave to file may therefore assist in ensuring the specific religious-rights claims raised here are addressed "in the way that the claims require and deserve," such that the expedited schedule does not obscure key issues. *Murphy v. Collier*, 139 S. Ct. 1475, 1485 (2019) (Alito, J., dissenting).

Therefore, and with the parties confirming their nonopposition, the Texas Catholic Conference of Bishops respectfully seeks leave to file the attached *amicus curiae* brief supporting reinstatement of the District Court's stay.

Respectfully submitted,

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MOTION OF *AMICUS CURIAE* TEXAS CATHOLIC CONFERENCE OF BISHOPS FOR LEAVE TO FILE BRIEF IN COMPLIANCE WITH RULE 33.2

In light of the emergency nature of the briefing, and to the extent not already permitted by the Court's COVID-19 order of April 15, 2020 regarding filings, the Texas Catholic Conference of Bishops respectfully moves for leave to file its *amicus curiae* brief in support of Petitioner's Application for Stay of Execution in compliance with Rule 33.2. Since no word or page count is specified for an amicus brief in Rule 33.2, the proposed brief complies with Rule 33.1 with regard to length (less than 6,000 words), and alternatively complies with the lowest page count applicable to documents under Rule 33.2 (15 pages).

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QUESTION PRESENTED

Do the First Amendment and the Religious Land Use and Institutionalized Persons Act require a prison system to provide a condemned prisoner with access to clergy in the execution chamber, where:

(1) the prisoner can be accommodated with clergy employed by that prison system that the prison has previously and recently allowed in the chamber without incident; and

(2) the prison system does not claim any harm to a compelling interest in being unable to apply its prohibition to the specific petitioning prisoner?

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INTEREST OF THE *AMICUS*[1]

The Texas Catholic Conference of Bishops is an unincorporated association consisting of the bishops of fifteen Catholic Dioceses in Texas and the Ordinariate of the Chair of St. Peter, providing a collective voice for the various bishops on issues facing the Catholic Church in Texas. As explained in its Motion for Leave, the Bishops frequently speak before the courts and legislature for both religious liberty and mercy and justice for prisoners, especially those on death row. The Bishops are intimately familiar with the history of the recent change to deny chaplains, and have a unique perspective as leaders of a religious community whose ministers attend to the Texas imprisoned. The Bishops submit this brief to ensure that this appeal's expedited pace, and contentious death-penalty debates, do not prevent the Court from adjudicating the important religious-liberty issues "in the way that the claims require and deserve." *Murphy v. Collier*, 139 S. Ct. 1475, 1485 (2019) (Alito, J., dissenting).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is an unusual, and unusually straightforward, case. Like condemned men have for thousands of years before him, Gutierrez sincerely believes that having a chaplain at the moment of his execution provides crucial help to his

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[1] No counsel for a party authored any portion of this brief. No one other than *amicus curiae* or its members made any monetary contribution intended to fund the preparation or submission of the brief. All parties have confirmed they do not oppose the filing of this brief.

soul. Almost a year ago, Gutierrez asked to have clergy in the chamber with him. But the Texas Department of Criminal Justice (TDCJ) refused, even though it would have granted the exact request just four months before. TDCJ refusal came under a blanket policy depriving all on death row clergy in their final moments—crucially, *regardless* of specific religious need or specific security consideration. And as the District Court stated, TDCJ has never suggested that it has a compelling reason to specifically deny *Gutierrez's* request—as opposed to all inmates' requests, or requests posing safety concerns.

That admission is decisive under RLUIPA. An absolute ban on Gutierrez's ability to engage in this religious exercise is a substantial burden for purposes of RLUIPA. And TDCJ has effectively conceded that it cannot meet RLUIPA's strict scrutiny test. Thus, the District Court's stay should be reinstated.

Two mistakes led this case to the Court. First, the Fifth Circuit failed to reach RLUIPA's strict scrutiny test, instead concluding that a blanket prohibition of even ancient religious practices—if not coercing someone to *violate* their faith—cannot be a substantial burden, only a withheld benefit. That conclusion is contrary to the unanimous opinions in *Holt* and *Cutter*. First, *Cutter* explains that prohibitions of practices available outside the prison walls function as "government-created burdens" on religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). And in *Holt*, this Court unanimously declined to ask whether main-

taining a half-inch beard was necessary to avoid violating a "dictate of [petitioner's] religious faith." *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015). It emphasized that being "able to engage in *other* forms of religious exercise," *id.* (emphasis added), does not change the burden inquiry, as RLUIPA protects "any exercise of religion." 42 U.S.C. § 2000cc-5(7)(A).

Second, TDCJ misunderstood the direction from this Court in *Murphy*—direction it concedes led it to create this policy. TDCJ thought this Court was indicating that equality of deprivation is an absolute defense to RLUIPA and Free Exercise claims, *even where* no compelling interest supports denial in a particular policy application. But this Court has unanimously affirmed that RLUIPA always "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt*, 574 U.S at 363 (citation omitted)

Here, TDCJ has *never* argued that allowing access to its own TDCJ Christian chaplains—still "willing" to accompany Gutierrez at death, ROA.805—poses *any* threat to safety or controlled access. ROA.827. TDCJ represented to this Court last year that its chaplains' "years of devoted service" ensured they were "truly dedicated to TDCJ's interests" and could be trusted in the chamber. TDCJ Opp. Stay at 22, *Murphy*, 139 S. Ct. 1475 (No. 18A985).

Rather, TDCJ only asserts that it has a compelling interest *as to other prisoners*, concerned that a court will compel chaplain access to *those* prisoners if an accommodation is granted here. ROA.827-28; see Fifth Circuit Mot. Vacate ("Mot. Vacate") 32, 34. So TDCJ relies on the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

This is not how RLUIPA functions. Yes, a neutral policy narrowly tailored to serve a compelling interest will ordinarily survive RLUIPA challenge—but not where applying the policy 'to the person' does not serve that interest. And per *Cutter*, granting an individual RLUIPA accommodation does not render the overall *policy* nonneutral and therefore open to constitutional attack. Rather, RLUIPA is designed to give exceptions to neutral and generally applicable regulations. If Gutierrez is granted access to a chaplain because it can be done readily and safely, other prisoners—of any faith—would still have to contend with any compelling interests TDCJ could show in applying the policy to them.

While RLUIPA resolves this case, one more error deserves correction. Where a policy was adopted for nonneutral reasons, such circumstances should displace *Turner*, as they displace *Employment Division v. Smith*, 494 U.S. 872 (1990), outside the prison walls. And in any event, Gutierrez should have prevailed under *Turner* when analyzing the policy as extended to *Gutierrez*, not all prisoners.

Emphasizing how readily TDCJ could offer Gutierrez a chaplain with no harm to its own interests also clarifies the practical reality of the case. Unlike capital challenges threatening a state's ability to impose a death sentence at all, TDCJ could moot Gutierrez's claims *at any time* by providing him the same chaplain access it would have gladly provided in March 2019. This Court should explain to TDCJ that even a policy supported by a compelling interest in *other* cases must bend where, as applied to a particular claimant, it becomes the sort of "unnecessary" or "arbitrary" restriction with which RLUIPA is concerned. *Cutter*, 544 U.S. at 716-17 (citation omitted).

ARGUMENT

I. TDCJ has not carried its burden under RLUIPA.

A. A prohibition on access to comfort of clergy at death substantially burdens Gutierrez's exercise.

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). The District Court noted that Gutierrez sincerely believes that the presence of clergy at death "would help to ensure his path to the afterlife," i.e., Heaven. ROA.805, ROA.829. And the Fifth Circuit acknowledged that his claim implicated "the final moment of spiritual comfort" that is "important" in the Christian tradition. Fifth Circuit Op. 8; *see id.* at 7 (acknowledging "strong religious arguments made by Gutierrez and" the Bishops).

"Important" is an understatement. From Christianity's beginning, priests have been present at the time of death to hear confessions, offer the Eucharist and administer last rites. *See*, *e.g.*, Catechism of the Catholic Church §§ 1524-1525 (concerning *viaticum* administered to those "at th[e] moment of 'passing over' to the Father"). The Catholic Catechism teaches over 1 billion Catholics, consistent with historic Christian tradition, that the final moments offer a unique final chance to prepare for "our heavenly homeland" and for pardon and redemption. *See* Catechism §§ 1525; 1501-1502 (effect of expected death on discernment); § 1013 (moment of death "decides [man's] ultimate destiny") The familiar Hail Mary seeks prayer for "us sinners, now and at the hour of our death." Saint Catherine of Siena is remembered as converting Niccolo di Toldo in prison and accompanying him on the execution block as the blade fell (as depicted in her monument by Castel Sant'Angelo), and Saint Teresa of Calcutta ("Mother Teresa") dedicated her ministry to the principle that "no one should die alone."

As the District Court noted, the record at this stage does not indicate that providing access to a chaplain sometime *before* execution identically serves Gutierrez's spiritual needs. *See Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting) (suggesting that allowing a practice "indistinguishable" within an inmate's beliefs from a prohibited one might alleviate a substantial burden). Rather, consistent with tradition, Gutierrez believes that attention in those final moments

"will help him" prepare for eternal life. *Id.* (recognizing this distinction in assessing Murphy's case); *see* ROA.829. And where practices are not indistinguishable, whether "other forms of religious exercise" remain available is outside "RLUIPA's 'substantial burden' inquiry." *Holt*, 574 U.S. at 361-62. The Fifth Circuit did not presume otherwise.

Where the Fifth Circuit erred was finding RLUIPA protects *only* against burdens in the form of "truly pressur[ing] the adherent to significantly modify his religious behavior *and* significantly violate his religious beliefs." Fifth Circuit Op. 8 (emphasis added; citation omitted) (describing TDCJ policy as "preventing the adherent from enjoying some benefit that is not otherwise generally available"). That is wrong on both scores.

First, "flatly prohibiting" Gutierrez from access to clergy in the execution chamber during his death *does* significantly modify his religious exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.); *see Holt*, 574 U.S. at 361 (if exercise is "grounded in a sincerely held religious belief," enforced prohibition "substantially burdens his religious exercise"). TDCJ is not merely making Gutierrez's religious practice more difficult. It is placing a direct, irrevocable prohibition on his sincere religious exercise, and at the most critical time for such exercise—when the soul is departing this world for the next. This Court has long recognized that, because prisons exercise "control" that is "severely disabling to private religious exercise," denying permission for a practice produces

"government-created burdens on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). The Fifth Circuit erred in not recognizing this reality. *See Yellowbear*, 741 F.3d at 55 (burden of "prevent[ion]" is "substantial").

Second, the panel's "significantly violate" standard is inconsistent with RLUIPA's text and this Court's precedent. RLUIPA protects "any exercise of religion, whether or not compelled by or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "Any" means "any," not just those judged "significant." On this record, there is no dispute that having clergy present at the time of execution is Gutierrez's exercise of religion. This Court has repeatedly "considered and rejected" arguments that second-guess religious beliefs or attempt to smuggle in an evaluation of importance. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). While TDCJ can introduce evidence of alternative-but-distinct accommodations for purposes of its strict scrutiny burden (e.g., efforts to pursue least-restrictive means), it does not lift the substantial burden on *this* religious exercise to argue Gutierrez might be "able to engage in other" exercises that, as here, fail to meet the claimant's sincere religious needs. *Holt*, 574 U.S. at 362.

Further, *Holt* stands directly contrary to the proposition that one must be asked to *violate* a tenet, rather than be forced to forego a spiritually meaningful practice one could engage in outside prison, to experience a substantial burden. *See Holt*, 574 U.S. at 362 (whether one's "religion would 'credit' him for attempting to follow his religious beliefs," such that the prohibition did not make him

violate his faith, was irrelevant under RLUIPA). Nor is any of this a surprise. If denying unemployment benefits is a substantial burden on religious exercise, *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), then unnecessarily denying a condemned man his only chance at an ancient religious rite is too.

B. TDCJ cannot satisfy strict scrutiny 'to the person.'

RLUIPA imposes an "exceptionally demanding" strict-scrutiny standard, obliging the government to provide that "denying [a burdening] exemption is the least restrictive means of furthering a compelling government interest." *Holt*, 574 U.S. at 364-65 (citation omitted); *see City of Boerne v. Flores*, 521 U.S. 507, 534 (1993) (calling this the "most demanding test known to constitutional law"). Crucially here, RLUIPA's standard—like RFRA's—requires "case-by-case consideration of religious exemptions to generally applicable rules," "scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431, 436; *see Holt*, 574 U.S. at 363 (citing same and considering the "marginal interest") (citation omitted)

TDCJ has all but admitted it lacks a compelling interest in *this* case. As the district court noted, "Defendants do not suggest that the relief Gutierrez requests . . . will pose any security threat in his *own* execution," only that others "may occur in other executions." ROA.827 (emphasis added); *see* Mot. Vacate 32, 34. Put differently, TDCJ's argument is the "classic rejoinder of bureaucrats

throughout history"—namely: "If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 436 (2006). But by law, strict scrutiny "scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 430-31 (2006). TDCJ did not suggest below that allowing *Gutierrez* comfort of clergy will harm its interests—nor could it have, when it has stated that the available chaplains' "years of devoted service" ensures they are "truly dedicated to TDCJ's interests" and could be trusted in the chamber. TDCJ Opp. Stay at 22, *Murphy*, 139 S. Ct. 1475 (No. 18A985). So TDCJ fails strict scrutiny.

TDCJ also fails under the least restrictive means prong, since it cannot show denying *Gutierrez* in-chamber clergy is the least restrictive means of promoting security. Again, TDCJ defends denying Gutierrez his rights not because *his* request jeopardizes prison security, but because *other* prisoners' requests in the future might. Mot. Vacate 33-35. This is the very definition of overinclusive. Moreover, until last year, TDCJ would have granted Gutierrez's request, further demonstrating a feasible, less restrictive alternative.

What remains of TDCJ's opposition relies on a misunderstanding of the concurrence in *Murphy*, both in its implications for RLUIPA claims and its understanding of neutrality.

First, the concurrence expressed the view that TDCJ's policy "likely" passed constitutional and RLUIPA muster under the facts and interests outlined in

Murphy. 139 S. Ct. at 1476 (Kavanaugh, J., concurring). But that opinion did not displace the 'to the person' standard. And it did not presume that RLUIPA would be satisfied even where an ordinary "compelling interest in controlling access to the execution room," *id.*, is not undercut by the requested accommodation, as demonstrated by TDCJ's pre-April 2019 practice. But here, TDCJ has not demonstrated any such compelling interest in this application, and if it had tried, the effort would have been undercut by its uninterrupted practice of allowing clergy in the execution chamber prior to April 2019.

Second, nothing in the concurrence suggests a case-specific, legally-mandated accommodation would "violate[] the Constitution's guarantee of religious equality" in the manner of a policy that facially discriminated between religions. *Id.* And of course, it would not—RLUIPA specifically contemplates that it would displace "neutral, generally applicable laws" in case-specific circumstances. *Holt*, 574 U.S. at 356. Such accommodations, even if granted to a person of a particular faith, do not thereby violate First Amendment guarantees of neutrality. *Cutter*, 544 U.S. at 720. If they did, "the classic rejoinder of bureaucrats" against case-specific exceptions would not be a Supreme Court punchline, but the rule of RFRA and RLUIPA. *O Centro*, 546 U.S. at 436. This Court should clarify that it is not. And should that clarification prompt TDCJ to rediscover its willingness to accommodate Gutierrez, all the better.

II. The Free Exercise Clause likewise protects Gutierrez's access to clergy.

A. Policies that target a particular religious practice receive strict scrutiny, even in prison.

"A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny"—that is, strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

In rejecting Gutierrez's Free Exercise claim, the Fifth Circuit relied solely on *Turner v. Safley*'s lenient standard. 482 U.S. 78 (1987). But *Turner* is inapplicable where the government's regulation is not neutral towards religion. *Id.* at 90 ("the governmental objective must be a legitimate and *neutral* one" for *Turner* to apply (emphasis supplied)). In this way, *Turner* acts as an analogue to *Smith*, which only governs neutral and generally applicable laws.

A government policy is not neutral when directly aimed at a religious practice. And "the historical background of the decision under challenge" is key to analyzing whether even a "subtle departure[] from neutrality" has occurred. *Masterpiece Cakeshop v. Colo. Human Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citations omitted). In *Central Rabbinical Congress v. NYC Department of Health & Mental Hygiene*, a New York regulation banned an Orthodox Jewish religious practice, *metzitzah b'peh*. 763 F.3d 183, 186 (2d Cir. 2014). Because the regulation was admittedly "prompted" by this specific practice, the Second Circuit applied strict scrutiny. *Id.* at 195. Similarly, in *Ward v. Polite*, the Sixth

Circuit held strict scrutiny applied where "[a]mple evidence support[ed] the theory that" an anti-referral policy never existed "until [Plaintiff] asked for a referral on faith-based grounds." 667 F.3d 727, 739 (6th Cir. 2012). Here, all agree TDCJ changed its policy in response to a prisoner's request for a Buddhist chaplain in *Murphy v. Collier*. Mot. Vacate 28-29. That does not mean the policy could never be defended from Free Exercise attack, where serious compelling interests support its application. But it does mean the right standard under the Free Exercise Clause is strict scrutiny—which TDCJ cannot satisfy on this record.

2. Even under *Turner*, TDCJ must grant Gutierrez's request.

Even under *Turner*'s deferential standard, Gutierrez should prevail. This Court considers: (1) whether a policy has a "valid, rational connection" to a "legitimate governmental interest"; (2) whether "alternative means are open" for "exercis[ing] the asserted right"; (3) the in-prison impact of an accommodation; and (4) whether there are "ready alternatives" to the regulation. *Overton* v. *Bazzetta*, 539 U.S. 126, 132 (2003) (internal quotations and citation omitted).

Legitimate government interest. The government's interest must be "neutral" towards First Amendment rights. *Turner*, 482 U.S. at 90; *Thronburgh v. Abbott*, 490 U.S. 401, 414-15 (1989). The D.C. Circuit has found this dispositive: "nothing can save a regulation that promotes an illegitimate or *non-neutral* goal." *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) (emphasis added). As explained, TDCJ's policy does not qualify as neutral. Regardless, no legitimate government

interest supports extending the policy to even those requests all agree will not "pose any security threat." ROA.827-28.

Alternative means. Gutierrez sincerely believes that a Christian chaplain's presence at the moments of death will help him reach Heaven. On this record, TDCJ does not provide alternative means to experience comfort of clergy to assist Gutierrez in his significant final moments of penitence.

Impact on prison resources and ready alternatives: Any impact from engaging existing TDCJ-employed chaplains for the relevant afternoon for work they were previously engaged in would be *de minimis*. And the ready alternative was, until recently, TDCJ policy.

III. Unlike most challenges to executions and related conditions, relief for Gutierrez poses no impediment to execution.

Finally, it would be a mistake to focus only the *legal* significance of how easily TDCJ could accommodate Gutierrez, to the exclusion of its practical significance. While the Bishops oppose the death penalty in all circumstances, honoring the religious liberty claim in this case does not pose a true impediment to the application of the death penalty. TDCJ can moot this claim and proceed with execution, at *any* stage and at *any* time, by allowing the chaplain access it would have readily allowed as a matter of policy in March 2019. The irony is that it is not clear that TDCJ even *wants* to deny Gutierrez the comfort of clergy, rather than merely seeking to insulate itself from claims by those it could not as readily accommodate. As explained, that relies on a mistaken understanding of this

Court's disposition in *Murphy* and the case-by-case nature of RLUIPA claims. This Court should set TDCJ on the right path, whether by reviving the District Court's stay or—if it thinks a stay inappropriate—entering a narrower injunction allowing TDCJ to proceed if it grants Gutierrez's chaplain request. *See Holland v. Florida*, 560 U.S. 631, 650 (2010) (courts' broad power to grant equitable relief is not limited to that granted by the district court). Such an injunction would at least protect Gutierrez's religious liberty in this most crucial moment.

CONCLUSION

The Court should uphold the stay, or alternatively, order TDCJ to provide Gutierrez with access to a Christian chaplain within the execution chamber.

JUNE 15, 2020.

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