No. 19-8695

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN GUTIERREZ,
Petitioner,

v.

LUIS SAENZ, et al.,
Respondents.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---

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Pursuant to Sup. Ct. R. 15.8, Petitioner Ruben Gutierrez files this Supplemental Brief in support of his Petition for a Writ of Certiorari in this capital case. Since Petitioner's last filing, the district court has determined, at this Court's direction, that "no serious security problems would result if a prisoner facing execution is permitted to have his chosen spiritual adviser in his immediate presence during the execution." Order at 2, *Gutierrez v. Saenz*, No. 19-cv-185 (S.D. Tex. Nov. 24, 2020), ECF No. 124 (hereinafter "Order").[1] In addition, this Court issued its decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020). Together, the district court's determination and *Cuomo* make clear that the Fifth Circuit erred in this case.

In light of this intervening matter, this Court should either grant the writ and summarily reverse, or grant the writ, vacate the judgment of the Fifth Circuit, and remand for further proceedings.

COURSE OF PRIOR PROCEEDINGS

On February 28, 2020, the Texas trial court issued a warrant, scheduling Mr. Gutierrez's execution for June 16, 2020. Mr. Gutierrez filed an amended complaint in the Southern District of Texas under 42 U.S.C. § 1983, alleging inter alia that Texas's execution protocol, which was revised in April 2019 to exclude chaplains from the execution chamber, violated his rights under the First Amendment and under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C.

[1] Mr. Gutierrez is separately filing a motion for leave to file the Order with this Court, with the Order attached thereto.

§§ 2000cc–2000cc–5 (2000). Defendants moved to dismiss the amended complaint. On June 2, 2020, the district court granted in part but denied in pertinent part the motion to dismiss. The district court thereafter stayed Mr. Gutierrez's execution.

Defendants appealed from the stay order and moved in the Fifth Circuit to vacate the stay of execution. On June 12, 2020, the Fifth Circuit granted the motion to vacate the stay, ruling in pertinent part that Mr. Gutierrez had failed to make a strong showing of likelihood of success with respect to his execution chamber claims. *Gutierrez v. Saenz*, 818 F. App'x 309, 313–14 (5th Cir. 2020).

Mr. Gutierrez sought certiorari review in this Court and requested a stay of execution. On June 16, 2020, this Court granted the stay of execution pending the disposition of the certiorari petition. *Gutierrez v. Saenz*, 207 L. Ed. 2d 1075, 1075 (2020). This Court also directed the district court to "promptly determine" whether "serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution." *Id.*

In compliance with this Court's directive, the district court conducted expedited discovery procedures. Following the completion of discovery, the parties briefed the issue and submitted evidence to the district court. On November 24, 2020, the district court issued its determination. Based on the evidence submitted by the parties and their legal arguments, the district court determined that "no serious security problems would result if a prisoner facing execution is permitted to have his chosen spiritual adviser in his immediate presence during the execution." Order at 2.

The Fifth Circuit had vacated the stay based on its view that Mr. Gutierrez failed to show a likelihood of success both with respect to establishing "that TDCJ's execution policy is not 'reasonably related to legitimate penological interests,'" *Gutierrez*, 818 F. App'x at 313 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)), and as to whether the "policy imposes a substantial burden on his religious exercise," *id.* at 314 (citation and quotation marks omitted). The district court's determination and this Court's decision in *Cuomo* show that both of the grounds for the Fifth Circuit's ruling are in error.

ARGUMENT

I. In Light of the District Court's Determination, the Fifth Circuit Clearly Erred.

Defendants have not sought to justify the revised execution policy on the basis of any problem with the former policy of allowing TDCJ employed chaplains in the execution chamber. Mr. Gutierrez has testified that, although he would prefer an outside adviser, he would be satisfied to have a TDCJ chaplain with him in the chamber. *See* Order at 11. Indeed, Defendants admit that there was no security or other problem with the former policy in hundreds of executions conducted before the protocol was changed in April 2019. *Id.* at 16–17. Instead, Defendants contended that—if they allowed spiritual advisers *not* employed by TDCJ in the chamber—security problems would ensue.[2] The district court, however, has now determined that even in that situation, "no serious security problems would result." Order at 2.

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[2] That issue was brought to the forefront by this Court's grant of a stay in *Murphy v. Collier*, 139 S. Ct. 1475 (2019), together with the opinions of various Justices respecting the stay. Based on Justice Kavanaugh's opinion in *Murphy*, Texas

The district court found that the Defendants failed to show "careful or extensive consideration by TDCJ officials of whether training or vetting outside clergy could minimize" any security risk. Order at 22. Moreover, the district court noted that the experience of the Federal Bureau of Prisons, which has allowed outside spiritual advisers to be present with the condemned prisoner in the execution chamber, shows that there are no serious security risks, and Defendants made no showing that the circumstances surrounding a federal execution differ from those in Texas. Order at 12–14, 23, 26. Furthermore, there was no showing by Defendants that "TDCJ sufficiently explored reasonable alternatives such as security accompaniment, training, and vetting that would minimize" concerns about the suitability of outside advisers. Order at 25. The district court concluded:

> [T]he evidence demonstrates (1) the amount of risk involved in allowing non-prison officials into the execution chamber is not so great that prison administration can summarily dismiss that alternative and (2) adequate processes and security can control the risk.

Order at 27.

Defendants also argued that the presence of a spiritual adviser not employed by TDCJ could reveal the identity of members of the lethal-execution team. Defendants, however, did not present any evidence to explain why they cannot take basic precautions to mitigate this risk. Order at 28. Accordingly, the district court

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apparently believed it had a binary choice between (1) excluding all clergy from the chamber, and (2) allowing all condemned prisoners the option of having a spiritual adviser of their choice in the chamber. *Cf. Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring in grant of application for stay).

found that there was a lack of evidence that serious security problems would result from allowing a chaplain or other spiritual adviser into the execution chamber. Order at 29. Thus, Defendants have not justified their failure "to safeguard an inmate's religious rights in the spiritually charged final moments of life." *Id.*

Even assuming that the Fifth Circuit properly applied the rational basis test to Mr. Gutierrez's First Amendment claims, *but see* Order at 17 (compelling interest test applies to RLUIPA claim), the district court's determination shows that Mr. Gutierrez has established a strong likelihood of success on both his RLUIPA and First Amendment claims. Thus, the Fifth Circuit's contrary ruling is in error.

II. In Light of *Cuomo*, the Fifth Circuit Clearly Erred.

The Fifth Circuit's ruling that banning all clergy from the chamber likely did not impose a substantial burden on Mr. Gutierrez's religious exercise is at least equally insupportable, as shown by this Court's intervening decision in *Cuomo*. In *Cuomo*, the Governor of New York argued that the public health crisis engendered by the COVID-19 pandemic justified severe restrictions on religious attendance at houses of worship in areas that were particularly hard-hit by the pandemic. This Court rejected that argument.

First, it ruled that the persons affected by those restrictions were likely to succeed in First Amendment challenges to the restrictions, because even public health measures could not withstand the applicable strict scrutiny. *Id.* at *1–2. Second, it noted that irreparable harm results from the "'loss of First Amendment freedoms, for even minimal periods of time.'" *Id.* at *3 (quoting *Elrod v. Burns*, 427

U.S. 347, 373 (1976) (plurality opinion)). Third, this Court found the public interest in an injunction clear because the restrictions, "by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." *Id.*

All of these observations apply to Mr. Gutierrez's claims. The district court's findings show that there is not a compelling interest for TDCJ's restrictions. Mr. Gutierrez will suffer irreparable harm if his First Amendment and RLUIPA rights are denied, even for a short period of time. And while Mr. Gutierrez is just a single person, the TDCJ policy completely bars him from receiving religious succor "in the spiritually charged final moments of life." Order at 28.

III. This Court Should Either Summarily Reverse the Fifth Circuit, or Vacate the Fifth Circuit's Decision and Remand to the District Court.

As shown above, the Fifth Circuit's errors are clear. This Court should summarily reverse. This case came here originally following litigation over whether a stay of execution was warranted. The basis for the Fifth Circuit's decision to vacate the stay has now evaporated. Summary reversal would enable the district court to proceed to determine the ultimate merits of Mr. Gutierrez's claim.

Alternatively, in light of the district court's findings and this Court's decision in *Cuomo*, this Court should grant the writ of certiorari, vacate the Fifth Circuit's decision, and remand for further proceedings. Granting the writ, vacating, and remanding is appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that

such a redetermination may determine the ultimate outcome" of the matter. *Lawrence v. Chater,* 516 U.S. 163, 167 (1996) *(per curiam)*.

Here, the district court's findings and the decision in *Cuomo* satisfy the *Lawrence* test. Ordinarily, when this Court vacates and remands, it returns the case to the court below for further proceedings. For two reasons, however, in the circumstances of this case the Court should remand to the district court.

First, in this case this Court asked the district court to make specific factual findings and supplement the record as the basis for its disposition of the certiorari petition. The district court's findings were to be returned to this Court; they are not even of record in the Fifth Circuit. And the district court's findings establish that the appropriate next step is for the case in the district court to proceed to judgment on the merits. The Order indicates that the district court is ready, willing, and able to so proceed.

Second, there is nothing for the Fifth Circuit to do at this time. The only case before the Fifth Circuit took the form of an appeal from the district court's stay order. That case is now moot. The certiorari petition and stay motion asked this Court either to set the case for briefing or to send it back to the district court for a resolution of the merits. *See* Pet. for Writ of Certiorari at ii. Unless this Court wants briefing and argument, a remand to the district court continues to be the proper alternative. Sending the case back to the Fifth Circuit in this posture would be a waste of time and effort. *See Pilon v. Bordenkircher*, 444 U.S. 1, 2–3 (1979) (per curiam) (vacating

and remanding to district court, where both district court and court of appeals had applied wrong standard).

Accordingly, this Court should grant the writ and either summarily reverse or vacate the Fifth Circuit's decision and remand to the district court for further proceedings.

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 either summarily reverse, vacate, and remand, or set the case for briefing and oral argument.

Respectfully submitted,

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