

No. 19-8695

IN THE
Supreme Court of the United States

RUBEN GUTIERREZ,
Petitioner,

v.

BRYAN COLLIER, et al.,
Respondents.

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

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Respondents¹ respectfully submit this supplemental brief regarding the intervening factual development that has taken place following this Court's June 16, 2020 Order. Sup. Ct. R. 15.8; *see Gutierrez v. Saenz, et al.*, Nos. 19-8695, 19A1052, 2020 WL 3248349, at *1.

Gutierrez filed an amended civil-rights complaint raising claims alleging TDCJ's revised execution policy, which does not permit TDCJ-employed chaplains or outside spiritual advisors to be present in the execution room during the execution process, violates his rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C. § 2000cc et seq.; *see* ECF No. 110-3 (Ex. B).² On June 9, 2020, the district court granted Gutierrez's motion to stay his then-scheduled execution. Order 3, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. June 9, 2020), ECF No. 57. Respondents appealed, and the Fifth Circuit vacated the stay. *Gutierrez v. Saenz*, 818 F. App'x 309, 313–15 (5th Cir. 2020). Gutierrez filed a petition for a writ of certiorari and an application for a stay of execution in this Court. On June 16, 2020, this Court granted a stay as to Gutierrez's religion claims and directed the district court to determine "whether serious security problems would result if a prisoner facing execution is permitted to choose the

¹ Respondents in this cause are Bryan Collier, Executive Director of the Texas Department of Criminal Justice (TDCJ), Bobby Lumpkin, Director of the TDCJ-Correctional Institutions Division (TDCJ-CID), and Billy Lewis, Warden of the TDCJ Huntsville Unit.

² Respondents cite to the exhibits submitted to the district court in *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex.), by referencing the ECF docket entry number and the Bates-stamped page number on the bottom of the pages.

spiritual adviser the prisoner wishes to have in his immediate presence during the execution.” *Gutierrez v. Saenz*, 2020 WL 3248349, at *1.

Following discovery and briefing, the district court concluded the evidence did “not demonstrate that serious security concerns would result from allowing inmates the assistance of a chosen spiritual advisor in their final moments.” Order 29, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Nov. 24, 2020), ECF No. 124 (Order). In reaching that conclusion, the district court failed to afford the requisite deference to the judgment of prison administrators in determining the appropriate and necessary measures to maintain security and failed to consider evidence supporting TDCJ’s judgment in implementing its revised execution protocol. For the reasons discussed below and in Respondents’ brief in opposition, Br. 11–33, *Gutierrez v. Saenz, et al.*, No. 19-8695 (June 15, 2020), the Court should deny Gutierrez’s petition for a writ of certiorari.

I. The District Court Did Not Afford the Requisite Deference.

In concluding serious security problems would not result if TDCJ were forced to permit an inmate’s chosen spiritual advisor to be present in the execution room during the inmate’s execution, the district court failed to afford the deference to prison officials this Court has explained is due. *See Holt v. Hobbs*, 574 U.S. 352, 369 (2015); *Cutter v. Wilkinson*, 544 U.S. 709, 717, 723 (2005). While acknowledging that such deference is required, the district court disregarded TDCJ’s well-justified conclusion that permitting outside spiritual advisors to attend an execution in the execution room would pose an unacceptable security risk. The district court

attempted to justify its refusal to defer to the judgment of the prison administrators, in part, by describing TDCJ's revision of its protocol as haphazard. Order 21–22. But the evidence shows TDCJ appropriately deliberated and considered the options available to it in the wake of this Court's order in *Murphy v. Collier*, 139 S. Ct. 1475 (March 28, 2019).³

TDCJ was aware of the implications of *Murphy* and worked to resolve the constitutional concerns. *See* ECF No. 110-8 (Ex. G) at 011–13. But the district court drew an unwarranted adverse inference that TDCJ's decision-making was not deliberate merely because it was done without delay. Order 22. In fact, TDCJ officials considered whether there were options available that would adequately mitigate the security risk an outside spiritual advisor could pose. *See* ECF No. 110-8 (Ex. G) at 010–19; ECF No. 110-16 (Ex. O) at 001–05. For example, TDCJ considered criminal background checks for outside spiritual advisors, *see* ECF No. 110-8 (Ex. G) at 013, a vetting process that evaluated the relationship between the offender and the outside spiritual advisor, *id.* at 016, and an interview process for spiritual advisors requesting to be in the chamber. *Id.* Former CID Director Lorie Davis,⁴ Director Collier, and Deputy Director Billy Hirsch discussed these and other means of managing the risk of having an outside spiritual advisor in the execution chamber. *Id.* at 010–19.

³ Relatedly, the district court faulted TDCJ for relying too heavily on Justice Kavanaugh's concurring opinion in *Murphy*. Order 4, 7. But as the Fifth Circuit recognized, Justice Kavanaugh's concurrence "made a valid appraisal of the issue" facing TDCJ. *Gutierrez v. Saenz*, 818 F. App'x at 314. The district court's criticism of TDCJ's similar assessment of its options is simply misplaced.

⁴ Former CID Director Davis recently retired. *See* Order 1 n.1.

Ultimately, the officials decided that these approaches would not sufficiently mitigate the substantial risk of having an outsider in the room. *See* ECF No. 110-15 at 003.

The district court erred in disregarding the evidence of TDCJ's deliberations. Order 22. In doing so, the district court gave undue weight to the testimony of Steve J. Martin, a former attorney for TDCJ who has not been so employed for more than thirty years. Order 22. The court even deferred to Mr. Martin's decades-old recollection of the layout of the execution room and his "doubt" regarding the security concerns raised by TDCJ rather than the judgment of the current officials who were involved in crafting the revised execution protocol.⁵ Order 28.

But Mr. Martin lacked the experience and training specific to the issue of security in the execution process. Mr. Martin was a correctional officer for about seventeen months in 1972–73. ECF No. 109-2 at A-654–56.⁶ In that capacity, he was never involved in the execution process and, since 1973, he has not held any position with a correctional facility where he provided custodial security supervision. ECF No. 109-2 at A-659, A-660; ECF No. 109-3 at A-841–843.

Mr. Martin served as General Counsel for TDCJ from 1981–85. ECF No. 109-2 at A-667. He attended three executions in 1985 and observed one from the adjacent

⁵ The district court declined to defer to the judgment of TDCJ's current officials, in part, because Mr. Martin explained that the execution protocol created in 1985 took several months to develop whereas the revised policy was issued days after *Murphy*. Order 7. It should be unsurprising, though, that an initial protocol would take longer to draft than a revision to one portion of the protocol spurred by a specific concern.

⁶ Gutierrez requested permission to seal portions of the exhibits he submitted to the district court. Mot. to Seal 2, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Sept. 22, 2020), ECF No. 108. Gutierrez did not ask to seal Mr. Martin's report or deposition. *Id.*

witness room. ECF No. 109-2 at A-709; 109-3 at A-833. At each execution, he was positioned in a room adjacent to the execution chamber and monitored the legal status of the pending execution. ECF No. 109-2 at A-708. Mr. Martin did not provide security supervision during those executions. ECF No. 109-2 at A-709. He has never consulted on any case involving execution procedures except the instant case. ECF No. 109-2 at A-687; A-688.

Further, Mr. Martin did not review any of TDCJ's policies that delineate the approval processes, vetting, or security measures relating to volunteers, spiritual advisors, or any other category of individuals. ECF No. 109-2 at A-745; A-746; ECF No. 109-3 at A-834–835.⁷ Again, the district court's reliance on Mr. Martin's outdated opinion reflects a failure to properly defer to the judgment of TDCJ's administrators.

Relatedly, the district court declined to give TDCJ's judgment the requisite deference because the Federal Bureau of Prisons (BOP) recently permitted inmates to have their chosen spiritual advisors present during their executions, apparently without incident. Order 23. The district court failed to acknowledge, however, that TDCJ's revised policy is consistent with the many states with execution protocols, *none* of which appear to allow a chaplain or outside spiritual advisor to be present in the execution room. ECF No. 110-23 (Ex. V); *see Holt*, 574 U.S. at 369 (explaining that

⁷ In his deposition, Gutierrez testified that the specific religious accommodation he seeks is for his outside spiritual advisor in the chamber to, *inter alia*, stand at his left-hand side between the door to the drug room and the gurney and place a hand on Gutierrez's left shoulder throughout the process. *See* ECF No. 110-6 (Ex. E) at 002–03, 006. Mr. Martin opined that Gutierrez's request would present significant security concerns and presumed that such a scenario would not be permitted. ECF No. 109-2 at A-720–722. This contradicts the district court's statement that Gutierrez's requested accommodation would not pose a security threat in his own execution. Order 16–17.

a court can consider the practice of prisons in many jurisdictions in evaluating a prison's challenged policy). Rather than considering evidence regarding the dozens of jurisdictions that do not permit the presence of religious advisors in execution rooms, the district court effectively treated BOP's execution protocol as dispositive and as setting a constitutional floor. The court's reasoning runs directly contrary to this Court's precedent requiring deference particularly in the area of prison security. *See Holt*, 574 U.S. at 369; *Cutter*, 544 U.S. at 720. And importantly, the limited evidence of the Federal government's few recent executions can hardly be the basis to conclude that no serious security problems would result from the presence of outside spiritual advisors, especially considering that the judgment of TDCJ officials is informed by having overseen a far greater number of executions.⁸

As discussed below, the evidence plainly supports TDCJ's judgment that serious security problems would result if an inmate were permitted to have a spiritual advisor of his choice to be present in the execution room during the execution. Considering that evidence, and giving the appropriate deference to TDCJ's judgment, this Court should deny Gutierrez's petition for a writ of certiorari. *See Holt*, 574 U.S. at 371 (Sotomayor, J., concurring) (courts may defer to prison officials' judgment when they offer a "plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them"); *Turner v. Safley*, 482 U.S. 78, 90 (1987).

⁸ Director Davis stated she had overseen thirty-three executions in her capacity as CID Director. ECF No. 110-16 (Ex. O) at 001.

II. The Evidence Supports TDCJ's Judgment That Serious Security Problems Would Result If It Were Forced to Permit Outside Spiritual Advisors to Be Present in the Execution Room During an Execution.

The district court answered this Court's security question "no" because (1) TDCJ-employed chaplains have not caused disruptions in the execution room, (2) outside spiritual advisors can be vetted and trained prior to attending an execution, (3) the risk to the anonymity of the drug team created by the presence of an outsider can be mitigated, and (4) speculation that an outsider would cause a security problem is insufficient. Order 2, 8–9, 13, 18, 20–25. As explained below, the persuasive evidence contradicts the district court's conclusion and supports TDCJ's judgment.

A. TDCJ's revised execution protocol is well supported.

Former Director of CID, Davis, provided testimony regarding TDCJ's revision of its protocol and the decision to allow only security personnel in the execution room. Davis explained that the execution process is intense. ECF No. 110-16 (Ex. O) at 002. Mistakes or disruptions cannot be tolerated, as there is no corrective action to remedy a miscarried execution. ECF No. 110-17 (Ex. P) at 003. The exclusion of individuals from the execution chamber who have not earned the trust and confidence of TDCJ through experience in corrections serves to minimize the risk of jeopardizing the execution process. *Id.* at 002–03. Likewise, there is no circumstance in which it would be safe for a non-TDCJ employee to be present in the execution room during an execution. *Id.* at 002.

Through careful and thoughtful consideration, Davis selected only trusted and capable TDCJ employees to serve a role in the pre-execution holding area or in the execution room. ECF No. 110-15 (Ex. N) at 003. Only certain TDCJ employees were deemed capable. *Id.* at 003–04; ECF No. 110-16 (Ex. O) at 002–03. TDCJ’s consideration of which employees were suited for that role was based on an employee’s demonstrated service in the TDCJ correctional context, disciplinary history, character, professionalism and good judgment, observations of the employee’s maturity and ability to maintain professional discretion, demonstrated ability to conduct himself or herself in a stressful situation such as reacting to a violent offender, and many other immeasurable factors. ECF No. 110-13 (Ex. L) at 004; ECF No. 110-15 (Ex. N) at 003–04; ECF No. (Ex. O) at 002–03.

Even with TDCJ’s protocols surrounding execution procedures, there have been disruptions immediately before and during executions. Some disruptions are initiated by the offender becoming aggressive and assaultive. ECF No. 110-16 (Ex. O) at 004–05. In other instances, disruptions have arisen from the inmate’s witnesses in the witness viewing room. During the execution of Billie Coble, witnesses in the offender’s witness room began banging on the plexi-glass during the execution procedure and became assaultive with officers, resulting in the removal of the witnesses and an arrest. *Id.* Media representatives have fainted in the witness rooms while observing executions. *Id.* at 5.

“Each of these instances exemplifies the reality that an individual’s behavior and reactions during the execution process cannot be anticipated.” *Id.* The district

court's decision not to credit the evidence of TDCJ's experience in responding to such situations and in crafting a protocol best suited to minimize them inside the execution room is unsupportable. And TDCJ's experiences show that its revised execution protocol is not grounded on mere speculation. *See Holt*, 574 U.S. at 371 (Sotomayor, J., concurring) (courts need not defer to policies of prison administrators that are "grounded on mere speculation") (citation omitted).

TDCJ's concerns are not hypothetical, as religious volunteers have committed security breaches. ECF No. 110-18 (Ex. Q) at 001; ECF No. 110-20 (Ex. S) at 001.⁹ The significant risks of allowing a non-TDCJ employee in the execution room include risks to the condemned inmate and to TDCJ employees. ECF No. (Ex. N) at 003-04; ECF No. (Ex. P) at 002. The unknown outsider could pull the intravenous lines out of the offender, taunt the victim's family, create a disruption, or assault the warden. ECF No. 110-17 (Ex. P) at 002–03. The non-TDCJ employee could also attempt to gain access to the execution drug room and jeopardize exposing the identities of the confidential drug team members. *Id.* Any of these actions would require the opening of the execution room door, which is itself an unacceptable security risk. *Id.*

Relatedly, prison officials may take prophylactic measures to avoid security problems rather than wait for a security breach. *Cf. Whitley v. Albers*, 475 U.S. 312, 322 (1986) (commenting that deference to prison officials extends to prophylactic or preventative measures intended to reduce breaches in prison security). The district

⁹ TDCJ documented 272 incidents in Fiscal Year 2019 wherein volunteers breached security protocols. ECF No. 110-20 (Ex. S) at 1. Despite volunteer training, criminal background checks, and a physical search for contraband upon entering any prison facility, volunteers smuggled contraband into prison on several occasions. *Id.*

court took the reverse course and required TDCJ to prove a negative. There is, of course, inherent difficulty in *proving* that a change in the execution process as applied to non TDCJ-employed individuals *will* cause a security breach. This difficulty in proving a negative is particularly high because TDCJ's execution security measures have succeeded to date. But the success of TDCJ's vetting and training of its TDCJ-employed chaplains to attend an execution is not, as the district court found, evidence that outsiders without the same vetting and training would not cause security problems. Order 3; *cf. Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work . . . is like throwing away your umbrella in a rainstorm because you are not getting wet."). TDCJ should not be put in the position of experimenting with a less secure protocol and risking a disruption in the execution room. TDCJ's decision, informed by its experiences detailed in the evidence presented to the district court, to allow only security personnel into the execution room is entitled to deference.

B. TDCJ's vetting and training processes cannot be duplicated for outside spiritual advisors in the context of attending executions.

The district court suggested that TDCJ could mitigate the potential for any security problem by conducting a background check on a non-TDCJ employee. Order 26. However, TDCJ's fluid consideration process for employees could not be duplicated for a person who is not a TDCJ employee. ECF No. 110-16 (Ex. O) at 003; ECF No. 110-15 (Ex. N) at 004. Indeed, not all TDCJ employees would be suited for the responsibility. ECF No. 110-16 (Ex. O) at 002–03; ECF No. 110-15 (Ex. N) at 003; ECF No. 110-12 (Ex. K) at 002–03; ECF No. 110-11 (Ex. J) at 008–09. A criminal background

check would do nothing to inform TDCJ of an outsider's character or judgment, professionalism, discretion, likelihood of causing a disruption during an execution, or their ability to handle a tense situation. ECF No. 110-16 (Ex. O) at 002–03. Nor would a criminal background check inform TDCJ of non-criminal disciplinary problems the individual may have had. *Id.*

The TDCJ employees who serve a role in the pre-execution or execution process are thoroughly trained and prepared. ECF No. 110-15 (Ex. N) at 003–05. For instance, all TDCJ-employed chaplains complete the same six-week pre-service officer training academy as TDCJ correctional officers. ECF No. 110-13 (Ex. L) at 005–06; ECF No. 110-8 (Ex. G) at 002. They also complete annual leadership training, and they work in a correctional institution with incarcerated offenders on a daily basis. ECF No. 110-13 (Ex. L) at 006; ECF No. 110-9 (Ex. H) at 002. Through training and experience, TDCJ employees learn how to recognize cues that an offender is becoming agitated and how to avoid escalation. ECF No. 110-16 (Ex. O) at 002. Before participating on the team that aided in execution procedures, each TDCJ-employed chaplain must first observe multiple executions and will shadow another chaplain in the areas outside the execution chamber. *Id.*; ECF No. 110-11 (Ex. J) at 008–09. But before being asked to join the team, the TDCJ-employed chaplain selected must have a history of service to TDCJ. ECF No. 110-11 (Ex. J) at 008–09. “[E]very day is training for a chaplain.” *Id.* at 009. Contrary to the district court's suggestion, Order 26, this training and preparation could not be replicated for a non-TDCJ employee. ECF No. 110-16 (Ex. O) at 002–03; ECF No. 110-15 (Ex. N) at 003.

The district court suggested the same process used to approve and train outside religious volunteers could be used to approve outside spiritual advisors to be present in the execution chamber. Order 26. But volunteers are not trained to provide security oversight over offenders. ECF No. 110-8 (Ex. G) at 008. Volunteers are not relied upon to respond to emergency situations at prison facilities other than to get themselves to a safe location in the event of a disruption. *Id.* In short, outside spiritual advisors receive no training at all. ECF No. 110 at 7. And while religious volunteers and contract chaplains do receive varying levels of training, that training is not equivalent to, and cannot simulate, the real-world experience and expertise that TDCJ-employed chaplains possess by virtue of working in a correctional institution day in and day out. *See* ECF No. 110 at 7.

The district court also suggested that a security accompaniment would minimize any security risk. Order 25. But a security escort could only react to disruptions, not prevent them altogether. ECF No. 109-2 at A-720–25. TDCJ's decision to be proactive rather than reactive to potential security problems during an execution is based on significant institutional experience and knowledge and should therefore be given due deference.

Importantly, a mandate that TDCJ allow outsiders into the execution room would likely require the agency to attempt to replicate its training and approval process in a short time. In Texas, an execution date can be scheduled to occur ninety-one days after the convicting court enters the order setting the execution date. Tex. Code Crim. Proc. art. 43.141(c). As an example, Director Davis explained, part of the

vetting and training process for individuals she considered approving to attend an execution in the execution room included observing a number of executions outside the room. ECF No. 110-15 (Ex. N) at 004; *see* ECF No. 110-13 (Ex. L) at 003. That training might not take place if, e.g., no executions were scheduled in the months prior to an inmate’s execution. Neither the Constitution nor RLUIPA require a prison to deviate so significantly from its normal vetting and training processes as to require the processes described above to be done in such a shortened time or abandoned altogether. *See* 18 U.S.C. § 3626(a)(1)(A).

C. The presence of outsiders could jeopardize the anonymity of the drug team.

One of TDCJ’s compelling penological interests in restricting access to the chamber is to protect the confidentiality of the members of the drug team. ECF No. 110-16 (Ex. O) at 004; Tex. Code of Crim. Pro. Art. 43.14(b); *Tex. Dep’t of Crim. Just. v. Levin*, 572 S.W.3d 671, 680–85 (2019) (concluding that disclosing the identity of people or companies involved in the execution-drug process would cause them a substantial risk of harm). The district court stated it “is reasonable to infer that the physical layout of the chamber creates some risk of disclosing the identity of the lethal-injection team.” Order 8. But the court disregarded that risk largely based on Mr. Martin’s dated recollections and limited experience from more than thirty years ago. Order 8, 28. TDCJ’s current administrators are owed more deference, and the evidence supports TDCJ’s judgment that the presence of an outsider would put the anonymity of the drug team at risk.

On the evening of an execution, the drug team finalizes the preparations for the procedures in the execution chamber before witnesses are allowed in the viewing rooms, ensuring the confidentiality of their identities and minimizing the risk of anyone attempting to intervene with the drug team's process. ECF No. 110-17 (Ex. P) at 002. The CID Director must open the door that separates the execution chamber from the drug room immediately before the offender says his final words and the lethal substance is administered. ECF No. 110-17 (Ex. P) at 002; ECF No. 110-7 (Ex. F) at 4 (depicting the door separating the drug room and the execution chamber). When the door to the drug room is opened, only the condemned and the Huntsville Unit Warden are in the execution chamber, rendering the chamber and drug room as secure as possible. ECF No. 110-17 (Ex. P) at 002. If a non-TDCJ employee were present in the execution chamber, he could observe the drug team, creating a risk that could not be sufficiently alleviated. *Id.* (“[U]nder no circumstance would it be safe or feasible to for the condemned’s clergyman or spiritual advisor [to] be present in the execution chamber.”). Director Davis also explained that the drug team’s anonymity could be jeopardized if an outsider were permitted to remain in the holding area outside the execution room past a certain time. ECF No. 110-15 (Ex. N) at 009–10. The district court did not acknowledge that risk. Order 27–29.

Importantly, TDCJ employees have a fiduciary duty to protect the confidentiality of information they learn by virtue of their employment with TDCJ and may be subject to disciplinary action up to and including termination, as well as criminal penalties, for disclosing confidential information. *See* Tex. Gov’t Code

§ 572.051 (state employee standards of conduct); Tex. Penal Code §§ 39.02 (Abuse of Official Capacity), 39.06 (Misuse of Official Information). These duties and consequences would not apply to an outsider. There are no ready alternatives to alleviate this substantial risk. ECF No. 110-17 (Ex. P) at 002.

III. This Court's Order in *Cuomo* Is Not Controlling.

Gutierrez argues in his supplemental brief that this Court's recent order enjoining the Governor of New York from enforcing an occupancy limit on religious services shows that the Fifth Circuit's order vacating the stay of Gutierrez's since-passed execution date was incorrect. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354, at *1–4 (Nov. 25, 2020). Not so. Most importantly, *Cuomo* did not involve a review of a prison policy, which as discussed above, includes deference not required in other First Amendment contexts. Second, Gutierrez's challenge to TDCJ's revised protocol is not based on disparate treatment, as was the challenge at issue in *Cuomo*. *Id.* at *2. Third, Gutierrez's challenge to the Fifth Circuit's order is now moot. Fourth, as explained in Respondents' brief in opposition, Gutierrez's religious practice—receiving last rites—can be performed under TDCJ's revised protocol without an outside spiritual advisor in the execution room. The evolving and increasingly intrusive nature of Gutierrez's requested religious accommodation does not undermine that fact. *See* ECF No. 110-6 (Ex. E) at 006. Thus, *Cuomo* does not bear on this Court's review of Gutierrez's petition.

CONCLUSION

Gutierrez's petition for a writ of certiorari should be denied.

Respectfully submitted,

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