

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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MARK O'KEEFE & DALE HARTKEMEYER (AKA SEIGEN), PETITIONERS

*v.*

WILLIAM P. BARR, ET AL.

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

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**PETITION FOR A WRIT OF CERTIORARI  
CAPITAL CASE – EXECUTIONS SCHEDULED FOR JULY 15 AND JULY 17, 2020**

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## QUESTION PRESENTED

Where a priest has a sacred religious duty to minister last rites to a prisoner under his pastoral care, does scheduling the prisoner's execution during a pandemic at significant risk to the priest's health and life violate his religious exercise rights under RFRA?

## **PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT**

The following list provides the names of all parties to the proceedings below:

Petitioners Mark O’Keefe and Dale Hartkemeyer (aka Seigen) were the appellants in the court of appeals.

Respondents William P. Barr, in his official capacity as Attorney General of the United States, Michael Carvajal, in his official capacity as Director of the Federal Bureau of Prisons, and T.J. Watson, in his official capacity as Complex Warden of the Federal Correctional Complex, Terre Haute, were the appellees in the court of appeals.

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**PETITION FOR A WRIT OF CERTIORARI**  
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Petitioners Fr. Mark O'Keefe and Rev. Seigen Hartkemeyer respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

**OPINIONS BELOW**

A copy of the order of the court of appeals is provided in the Appendix at B1. A copy of the opinion of the district court is provided in the Appendix at (App. C1-C8).

**JURISDICTION**

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 2000bb-1(c). The court of appeals had jurisdiction under 28 U.S.C. § 1292(a), and issued its order denying Petitioners' emergency motion to stay the executions pending appeal on July 15, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

**STATUTORY PROVISIONS INVOLVED**

42 U.S.C. § 2000bb *et seq.* is reproduced at App. E1-E2.

## STATEMENT OF THE CASE

Petitioners are two priests who serve as spiritual advisors for two federal prisoners, whose executions are scheduled for today, July 15 and Friday, July 17, 2020 at the United States Penitentiary in Terre Haute, Indiana. Both priests—one Roman Catholic and one Zen Buddhist—have a sincere religious belief that they must minister to these men under their spiritual care in their final hours, providing Catholic Last Rites and the Buddhist equivalent, respectively. Accordingly, both priests feel compelled by their faiths to be present at the respective executions. BOP regulations formally recognize that right, 28 C.F.R. § 26.4(c)(3)(i), reflecting longstanding historical practice in this country.

But the Federal Government has rendered effectively impossible their ability to fulfill this solemn religious obligation by scheduling the executions—just one month in advance—in the midst of the ongoing and deadly COVID-19 pandemic. Because both priests are in their 60s and are medically vulnerable, each is at heightened risk of suffering serious health complications or even death should he contract the virus. USP Terre Haute is currently experiencing an outbreak of COVID-19 among its prisoner population, and the Government recently disclosed that at least one person involved in setting up for the executions has tested positive for the disease. Add to that the facts that (1) each execution will entail an influx of hundreds of people—prison staff, witnesses, victims' and prisoners' family members, and press—from around the country and (2) the Death House where the executions will take place is poorly ventilated and comprises

small, cramped spaces where social distancing is impossible, and the risk for a super-spreader event is plain.

The Government has done little to address the risk to those who will attend. It has refused to conduct testing as a precautionary measure. It has not updated the ventilation system at the Death House, which is a prime factor for exacerbating the spread of COVID-19 indoors in cramped settings. Instead, the Government has offered only minimal precautions, agreeing to provide masks (not N-95 masks, for the most part), some other personal protective equipment, hand sanitizer, and temperature checks. For petitioners, whose presence is required on-site for hours, these precautions are entirely inadequate. Thus, they must make an impossible choice between fulfilling their religious duties and subjecting themselves to grave risk, or abandoning their essential obligations as priests. The Government's insistence on scheduling the executions during a pandemic, with no regard for their safety or the safety of others in attendance, places a substantial burden on Petitioners' ability to freely exercise their faith in accordance with their religious callings, and is plainly not the least restrictive means by which the Government may fulfill its objectives.

Petitioners challenged the Government's scheduling decision as an impermissibly infringement of their right to free exercise under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* Breaking with this Court's well established precedents, the district court denied petitioners' claims for injunctive relief, and the court of appeals denied Petitioners' request for an emergency stay of the executions pending appeal in a single-page order.

The district court’s holding denies Petitioners’ core free exercise rights as priests in a setting that this Court has routinely held to merit serious consideration for such rights. Indeed, this Court has recently issued a stay of execution pending a petition for certiorari in another case in which a state denied a priest access to offer Last Rites at an execution. *See Gutierrez v. Collier*, No. 19-8695 (June 16, 2020) (granting application for stay of execution pending disposition of petition for writ of certiorari and instructing district court to conduct further fact-finding regarding potential security concerns). Petitioners similarly ask this Court to hold that the Federal Government cannot substantially burden the exercise of this most profound religious rite—necessarily involving the presence of a spiritual advisor—without a compelling need to do so.

#### **A. The Historical Role of Clergy at Executions**

The Government jeopardizes a revered tradition in the United States of clergy presence in the last moments before and at the time of death of prisoners who are executed by the state. *See, e.g.*, Historical Newspaper Articles, *Hartkemeyer v. Barr*, Case No. 2:20-cv-00336-JMS-DLP (S.D. Ind.), ECF No. 60-3 at 1-3; *see also* Stuart Banner, *The Death Penalty: An American History* 1 (2002) (recounting execution where the condemned asked a clergyman to read his final words for him). This tradition derives, in the Christian tradition, from the Christian belief that a person’s dying moments are critical to salvation and that, just as Jesus Christ ministered to the men being crucified alongside him, *see Luke 23:42-43*, clergy must help the condemned to seek salvation. *See, e.g.*, Ralph Houlbrooke, *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 . . . .”<sup>1</sup> At the nation’s founding, a clergyman’s “execution sermon” from the scaffold went hand-in-hand with “the formulaic lives, last words, and dying confessions of the prisoner[.]” Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture 1776-1865* 26 (1989). 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.<sup>2</sup>

Federal executions have long recognized the hallowed place of clergy and followed this tradition. The first known federal execution, the hanging of Thomas Bird in 1790,<sup>3</sup> incorporated “solemn religious exercises.” *See Portland, Cumberland Gazette*, June 28, 1790 (*Hartkemeyer*, ECF No. 60-3 at 1). As in other executions of the day, the practice of federal executions contemplated ministry from and ritual performed by clergy up to the place and time of death. *See May 10, Vergennes Gazette & Vt. & N.Y. Advertiser*, May 29, 1800, ECF No. 60-3 at 2 (reporting federal executions in which condemned

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<sup>1</sup> The state of mind of a person at the moment of passing away is also very significant for karmic reasons in the Buddhist faith, and a priest’s ability perform final religious rituals is thus vital for many Buddhists to ensure a proper “liberation from the limitations and sufferings inherent in our condition as separate human beings.” App. G4-G5.

<sup>2</sup> 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.”).

<sup>3</sup> *See* “Historical Federal Executions,” United States Marshals Service, *available at* <https://www.usmarshals.gov/history/executions.htm> (last checked July 3, 2020).



prisoners were “attended to the place of execution” by clergymen, where they prayed and expressed contrition); *The Execution of Edward F. Douglass and Thomas Benson for the Murder of Ava A. Havens*, Bos. Herald, Jul. 28, 1851, at 1 (reporting federal executions in which clergymen accompanied and embraced prisoners on the gallows, and then conveyed their final declarations of innocence).

The tradition of clergy accompaniment during federal executions has since been incorporated into firing squads, see R. Michael Wilson, *Legal Executions in the Western Territories, 1847-1911*, 173 (2010); the gas chamber, see *Arthur Brown Executed In Gas Chamber*, Streater Daily Times-Press, Feb. 24, 1965 (*Hartkemeyer*, ECF No. 60-3 at 3); and electrocutions, as when a rabbi accompanied Ethel and Julius Rosenberg to the electric chair in 1953, see Jack Woliston, *Rosenbergs go silently to electric chair*, UPI (June 20, 1953), <https://www.upi.com/Archives/1953/06/20/Rosenbergs-go-silently-to-electric-chair/5084629411212/>.<sup>4</sup> Clergy have thus traditionally played a revered role in all manner of federal executions. Today, the role of clergy at execution is memorialized in BOP regulations that enable a prisoner to select a spiritual advisor as one of the few specifically designated individuals who “shall be present at the execution.” 28 C.F.R. § 26.4(c)(3)(i).

## **B. The Petitioners**

### *1. Father Mark O’Keefe*

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<sup>4</sup> See also Ari L. Goldman, *Rabbi Irving Koslowe, 80; Gave Rosenbergs Last Rites*, N.Y. Times, Dec. 8, 2000, at C15 (describing the same rabbi’s attendance at 17 executions where “[h]e would go into the execution chamber, stand opposite as the inmate was strapped into the electric chair, and stay until the end”).

Father Mark O’Keefe is a Roman Catholic priest, Order of St. Benedict. Before the COVID-19 pandemic, Fr. O’Keefe routinely ministered, as a Federal Bureau of Prisons (BOP)-accredited volunteer, to prisoners at the United States Penitentiary in Terre Haute, Indiana (USP Terre Haute), including to Dustin Honken. App. H1. Mr. Honken, a devout and pious Catholic for more than ten years, is scheduled for execution on July 17, 2020. *Id.*

On June 30, 2020, Mr. Honken designated Father O’Keefe as the spiritual advisor to attend his execution, and requested that Fr. O’Keefe accompany Mr. Honken in the execution chamber. *Id.* On or about July 5, 2020, the BOP approved this request. *Hartkemeyer*, ECF No. 60-2.

Catholicism requires Fr. O’Keefe’s presence at Mr. Honken’s execution to allow him to administer the holy sacraments prescribed by the Catholic Church for the dying, including the Last Rites, which can be performed only by an ordained Catholic priest. App. H1-H2. The Catholic Church teaches that the final moments offer a unique final chance for a priest to prepare the dying for “our heavenly homeland” and for pardon and redemption, as the moment of death “decides [man’s] ultimate destiny.” *Catechism of the Catholic Church* §§ 1013, 1525; *see also id.* §§ 1501-02, 1524. The guidance and accompaniment of a priest, and the Last Rites and the sacraments of the Eucharist and Confession which Fr. O’Keefe must administer to Mr. Honken help the dying avail themselves of the redemption offered by Jesus for eternal life with God. App. H2-H3, H5. *See also* Liturgy Training Publications, *The Liturgy Documents Volume Two: Essential Documents for Parish Sacramental Rites and Other Liturgies* 228 (2nd ed. 2012) (“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.”).<sup>5</sup>

Based on his ministry to Mr. Honken, consistent with Catholic teachings, and in honor of his religious duty as a Catholic priest, Fr. O’Keefe feels spiritually and morally bound to administer the sacraments and minister to Mr. Honken as he is put to death. App. H1-H3, H5. Consistent with Catholic teachings and his duty as a priest to perform the Last Rites, Fr. O’Keefe holds a sincere belief that he must assist Mr. Honken in availing himself of the redemption that the death of Jesus offers. App. H1-H3. Fr. O’Keefe wholly subscribes to the Catholic teachings that he is called upon to minister to those seeking God’s grace, particularly at the critical moment of death; doing so is one of the most important roles that a priest can possibly play in helping a member of the flock achieve salvation. App. H2-H3, H5. Fr. O’Keefe’s sincerely-held religious beliefs compel him to accede to Mr. Honken’s request to be present at his execution, to administer the sacraments necessary for salvation, and to prepare Mr. Honken to enter the next life in a state of God’s grace. App. H2-H3, H5.

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<sup>5</sup> 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 scheduling of Mr. Honken’s execution during the ongoing COVID-19 pandemic means that Father O’Keefe can exercise his sincerely-held religious beliefs and practices only by putting himself, and those he ministers to outside the prison, at grave risk. App. H1, H3-H6. At age 64, Fr. O’Keefe is at heightened risk of serious complications should he contract COVID-19. *Id.* ¶ 14. Exposure resulting from his attendance at the execution also imperils Fr. O’Keefe’s ministry to the nuns who are cloistered at the Carmelite Monastery in Terre Haute. *Id.* ¶ 19. As the Resident Chaplain for the nuns and as an essential part of his own religious practice, Fr. O’Keefe leads daily Mass for the nuns and offers them Communion. *Id.* Several of the nuns are over the age of 60, and a few are over 80. *Id.* Fr. O’Keefe understands that his presence at Mr. Honken’s execution will expose him to COVID-19 infection and even possibly death. *Id.* ¶ 20. He and the cloistered nuns to whom he ministers also understand, that if he continues to hold daily Mass for the nuns following Mr. Honken’s execution, as they have requested and as he feels obligated to do, he may also expose them to infection and even death. *Id.* As a consequence of the timing of Mr. Honken’s execution in the midst of the pandemic, Fr. O’Keefe must take life-threatening risks in order to carry out his sacred duties as a Catholic priest and as Mr. Honken’s spiritual advisor. *Id.*

2. *Reverend Seigen Hartkemeyer*

Reverend Seigen Hartkemeyer is a Zen Buddhist priest. App. G1. Ordained in 1983, he feels a religious calling to minister to prisoners, who are “too often denied Buddha’s immense compassion.” *Id.* ¶ 4. In connection with his ordination, Rev.

Hartkemeyer adopted the religious name “Seigen,” which means “Sacred Source.” *Id.* ¶ 2.

Rev. Hartkemeyer entered into a pastoral relationship with prisoner Wesley Purkey in January 2009 and has since visited with Mr. Purkey once a month, prior to the onset of the COVID-19 pandemic, to provide spiritual guidance and counseling consistent with the Zen Buddhist faith. *Id.* ¶¶ 7-8.

In 2013, Mr. Purkey designated Rev. Hartkemeyer as his official Minister of Record with the BOP. *Id.* ¶ 9. And, in November 2019, pursuant to federal regulations, Mr. Purkey designated Rev. Hartkemeyer as the spiritual advisor who “shall be present” at his execution, which was previously scheduled for December 13, 2019, at USP Terre Haute. *Id.* ¶ 16. Accordingly, Rev. Hartkemeyer planned to attend the December 2019 execution, consistent with his sincere religious belief that he has a sacred duty as Mr. Purkey’s priest to help ensure Mr. Purkey’s spiritual “liberation from the limitations and sufferings inherent in our conditions as separate human beings” as Mr. Purkey leaves this life. *Id.* ¶ 13. However, since learning that Mr. Purkey’s execution has been rescheduled to take place on July 15, 2020, during the pandemic, Rev. Hartkemeyer has felt substantial pressure to abandon his religious obligations as Mr. Purkey’s priest due to the grave risk to his health and life as a result of the Government’s decision to proceed during a pandemic. *Id.* ¶¶ 18, 29. Rev. Hartkemeyer is 68 years old and is vulnerable to lung-related illnesses, having suffered recurring bouts of severe bronchitis and pleurisy. *Id.* ¶¶ 26-27. He understands that these characteristics render him medically vulnerable for developing severe complications or dying if he were to contract COVID-19, and

accordingly has strictly limited his contact with others during the pandemic. *Id.* ¶¶ 26-28.

As Mr. Purkey’s priest, Rev. Hartkemeyer intends to deliver a sutra, or a chant with content and meaning, and a dharani, a mantra-like chant, during the execution to facilitate Mr. Purkey’s dying process and convey equanimity to him. *Id.* ¶ 14. The religious rituals that Rev. Hartkemeyer intends to perform are akin to the “last rites” performed by priests in Christian tradition. *Id.* ¶ 13. It is important that Mr. Purkey be able to see Rev. Hartkemeyer’s face during this process, to remind him of the many hours the two spent together and the teachings Rev. Hartkemeyer shared during that time. *Id.* ¶ 14. Rev. Hartkemeyer believes that his inability to perform his sacred pastoral duties would “constitute a troubling violation of [his] religious tenets and priestly obligations.” *Id.* ¶ 15.

### **C. Course of the Relevant Proceedings**

On June 15, 2020, “with the COVID-19 pandemic well underway,” the Department of Justice announced three back-to-back executions, including Mr. Purkey’s on July 15, 2020 and Mr. Honken’s on July 17, 2020, without adequate safety measures in place to combat the risks from this highly contagious and deadly respiratory disease spreading rampantly across the United States. *See Peterson v. Barr*, No. 2:20-cv-00350-JMS-DLP (July 10, 2020); App. I2-I3. The Government made this decision even though carrying out executions necessitates the “activation” of hundreds of individuals at the prison for several days in advance to coordinate and practice. *Hartkemeyer*, ECF No. 6-30 ¶¶ 5, 8. It ignored the clearly established CDC guidance that social distancing is a “cornerstone

of reducing transmission of respiratory diseases such as COVID-19.” App. I8.<sup>6</sup> It disregarded the heightened risk of transmission in prisons where nine of the ten largest outbreaks in the country have occurred. *Hartkemeyer*, ECF No. 7 at 4.<sup>7</sup> And, it did nothing to mitigate the specific and unique risk posed by the poor ventilation system at USP Terre Haute, which cannot adequately direct airflow outside and prevent recirculation. App. J3. It forged ahead with a plan that will bring hundreds of people to the prison in the face of BOP’s own policy, in effect since March 2020, suspending *all* visitation at *all* facilities because of public health risks. *Hartkemeyer*, ECF No. 6-6 ¶¶ 3-5, 11; App. G3-G4.

The Government disregarded the impact of COVID-19 cases at USP Terre Haute reported as of May 16, 2020—a month before the Attorney General’s announcement—and only a small fraction of prisoners and staff have been tested. Plaintiff’s Reply, ECF 62 at 7-8; *see also* Winter Decl. ECF 33-1, ¶ 7. When a staff member involved in execution preparations confirmed a positive test result on July 11, 2020, the Government still did not change course even though the staff member had exposed others at the prison

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<sup>6</sup> *See* Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, at 4 (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

<sup>7</sup> *See* John E. Dannenberg, *Prisons as Incubators and Spreaders of Disease and Illness*, Prison Legal News (Aug. 15, 2007) (discussing that jails and prisons “have become breeding grounds for infectious epidemics, with severe consequences for both prisoners and the public alike”), *available at* <https://www.prisonlegalnews.org/news/2007/aug/15/prisons-as-incubators-and-spreaders-of-disease-and-illness/>; Timothy Williams & Rebecca Griesbach, *San Quentin Prison was Free of the Virus. One Decision Fueled an Outbreak.*, N.Y. Times (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/san-quentin-prison-coronavirus.html>.

complex—including those slated to attend the executions or in designated locations where the spiritual advisors must go. *See generally* Winter Decl. ECF 77-1; Government’s Response to Order, ECF 81. Finally, the Government has not required staff at USP Terre Haute to adhere to the very mandate to wear masks that the Government suggests Rev. Hartkemeyer and Fr. O’Keefe should rely upon for their safety. *Hartkemeyer*, Winter Decl., ECF No. 77-1 ¶7; Winter Decl. ECF No. 33-1 ¶7. Indeed, reports confirm that, during the execution of Daniel Lewis Lee early in the morning of July 14, 2020, no one in the execution chamber with Mr. Lee’s spiritual advisor, including Mr. Lee, a U.S. Marshal, and two BOP officials, were wearing masks.<sup>8</sup>

The limited measures the Government belatedly devised to address the risk posed to Rev. Hartkemeyer and Fr. O’Keefe are inadequate to protect them from the substantial risk. Dr. Goldenson Supp. Dec. ECF No. 57 ¶ 20; Dr. Feffererman Decl., ECF No. 58 ¶ 16. All told, they include the provision of personal protective equipment (PPE)—a surgical face mask, gloves, gown and face shield—access to a shared sink, soap, and individual hand sanitizer. *See* Winter Decl., ECF No. 33-1 at ¶12. The Government will also provide an N-95 mask to the security escort—but no one else—and will attempt to limit the number of people in contact with Rev. Hartkemeyer. *Id.* ¶¶ 11-12. But the surgical masks to be provided to Rev. Hartkemeyer and Fr. O’Keefe will not eliminate the risk of possible infection because they do not protect the wearer; they protect others from the wearer, not the wearer from others. Dr. Goldenson Supp. Decl., ECF 57 ¶ 13.

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<sup>8</sup> *See* Michael Balsamo, *First federal execution in 17 years; another set Wednesday*, AP News (July 14, 2020), <https://apnews.com/638826b00bba1b389756126e4cfae97a>.



Further, the security escort's use of an N-95 mask provides limited, if any, extra protection to Rev. Hartkemeyer and Fr. O'Keefe beyond a typical mask because N-95 masks, unlike surgical masks, are designed to protect only the wearer, not those around the wearer. *Id.* And the Government has demonstrated an inability to enforce compliance of its mask regulations in any event. Winter Decl., ECF 77-1 ¶7. Indeed, the measures put in place by the Government "are inadequate to protect an individual who is vulnerable to COVID-19," according to Plaintiff's uncontested expert testimony. Dr. Goldenson Supp. Decl., ECF 57 ¶ 20. "Even with such measures in place, a vulnerable individual is still at risk of contracting COVID-19 and suffering serious illness as a result." *Id.*

Moreover, Rev. Hartkemeyer and Fr. O'Keefe will be forced to have repeated, close contacts in cramped quarters with BOP staff and others, both to visit Mr. Purkey and Mr. Honken and to be present during the execution. Floyd Decl. 6-24 ¶¶ 9-12; Hartkemeyer Decl., ECF 6-2 ¶¶ 19-25. The risk of airborne transmission of COVID-19 is "especially acute in indoor or enclosed environments, particularly those that are crowded and have inadequate ventilation." Dr. Goldenson Supp. Decl., ECF 57 ¶ 7 (quoting Lidia Morawska & Donald K. Milton, *It is Time to Address Airborne Transmission of COVID-19*, Clinical Infectious Diseases, ciaa939, <https://doi.org/10.1093/cid/ciaa939>). Prison facilities are such an environment. Dr. Goldenson Decl., ECF 6-25 ¶ 22. Without adequate ventilation, the risk of COVID-19 transmission remains high, particularly in the small, windowless building where the executions will take place. Dr. Goldenson Suppl. Dec, ECF 57 ¶ 12. Defendants have

taken no measures to ensure adequate social distancing and, more importantly, have refused to consider practical measures to improve the ventilation in the areas where Rev. Hartkemeyer and Fr. O'Keefe will be. *See* Response to Court's Order, ECF 81 at 3. Such measures include (1) ensuring sufficient and effective ventilation; (2) supplementing that ventilation with airborne infection controls; and (3) avoiding overcrowding. Dr. Goldenson Suppl. Decl., ECF 57 ¶ 7.

In response to the late-breaking diagnosis of the BOP staff member, the Government proposes only two additional steps: (a) to attempt to identify individuals with whom the BOP staff member was in contact, and (b) to prevent those identified from having direct contact with “inmates scheduled for execution, ministers of record, witnesses of the execution, attorneys, or press.” Response to Court's Order, ECF 81 at 5. These measures fail to mitigate the as yet unmeasured spread of and exposure to COVID-19 at the prison complex. Nor do they reduce other points of exposure for the medically vulnerable spiritual advisors. Dr. Goldenson Decl., ECF 6-25 ¶ 59, 61; Dr. Goldenson Suppl. Decl., ECF 80-1 ¶11. Further, the Government's plan to use screening measures the BOP has not updated since March 13, 2020, such as seeking self-reported symptoms, conducting temperature checks, and taking the other basic steps, are “insufficient to protect visitors from the risk of COVID-19” and cannot adequately screen for new, asymptomatic, or pre-symptomatic infections. Dr. Goldenson Decl. 6-25 ¶44. Indeed, they have already failed to do so.

#### **D. District Court Proceedings**

Petitioners brought suit in the district court challenging Respondents' scheduling of Mr. Purkey's and Mr. Honken's executions during the pandemic as government action that substantially burdens their free exercise rights in violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* Following expedited briefing, with supporting declarations, the district court denied petitioners' motion for a preliminary injunction, finding that Petitioners had not demonstrated that Respondents' actions amounted to a substantial burden under RFRA because the BOP has "unconstrained discretion to choose a date for the execution." *See Op.*, ECF No. 84 at 5. In reaching this conclusion, the district court ignored the plain-text statutory command that RFRA extends to "all Federal law," even those statutes that otherwise give the government broad latitude. 42 U.S.C. § 2000bb-3(a). Petitioners appealed, seeking an emergency stay of the Mr. Purkey's and Mr. Honken's executions pending resolution of the appeal.

#### **E. Appellate Proceedings**

On July 15, 2020, the court of appeals denied Petitioners' motion in a one-page order without issuing an opinion.

### **REASONS FOR GRANTING THE PETITION**

#### **I. THE COURT OF APPEALS'S HOLDING THAT RESPONDENTS' ACTION DOES NOT AMOUNT TO A SUBSTANTIAL BURDEN ON PETITIONERS' FREE EXERCISE RIGHTS IS CONTRARY TO THIS COURT'S PRECEDENTS**

This case presents a fundamental question of whether the federal government can unnecessarily force clergy to risk their health and lives in order to carry out their sacred obligations as spiritual advisors to prisoners facing execution. It warrants this Court's

immediate review because the decision below failed to respect the religious accommodation that RFRA requires.

The district court fundamentally erred in holding that the scheduling of an execution during a raging pandemic cannot amount to a substantial burden under RFRA because the BOP has “unconstrained discretion to choose a date for the execution.” *See* App. C6. The amount of discretion vested in the government is irrelevant as a matter of law. By its terms, RFRA’s reach extends to “all Federal law,” even those statutes that otherwise give the government broad latitude. 42 U.S.C. § 2000bb-3(a) (“This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise. . . .”); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (“RFRA operates as a kind of super statute, displacing the normal operation of other federal laws”); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, (2006) (“Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person’s exercise of religion, ‘even if the burden results from a rule of general applicability.’” (quoting 42 U.S.C. § 2000bb-1(a)). Whether a government decision is discretionary or not, RFRA applies if the government’s conduct substantially burdens a person’s exercise of religion.

A substantial burden exists when the Government puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987). Here, it is undisputed that Fr. O’Keefe’s and Rev. Hartkemeyer’s sincerely held religious beliefs *require them* to attend to the spiritual needs of Mr. Honken and Mr. Purkey, respectively, as these men face execution. The

Government’s conduct in setting the executions during a surging pandemic puts “substantial pressure” on the priests to modify or abandon entirely the performance of their sacred duties—in particular, the sacrament of the Catholic Last Rites (and similar Buddhist rituals) at the moment of death. Because the Government insists on executing Mr. Purkey and Mr. Honken this week, the priests can carry out this vital and essential task only if they accept grave risk to their health and their lives.

The district court failed to address controlling precedent that forcing a person to choose between his religion and his well-being is a substantial burden on the exercise of religion. See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“The ruling [disqualifying plaintiff from benefits because of her refusal to work on Saturday in violation of her faith] forces her to choose. . . . Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.”). There is no meaningful distinction between the priests here and the plaintiff in *Sherbert*—except that the stakes here (and the health and lives of Petitioners) are even higher. The Government did not order the Seventh-Day Adventist in *Sherbert* to work or not to work—that “choice” rested with the individual. But, a substantial burden existed because the Government undertook an action that forced the plaintiff to choose between the exercise of religion, on the one hand, and physical or economic well-being, on the other. There, as in *Thomas v. Review Bd. of Indiana Employment Div.*, 450 U.S. 707, 718 (1981), “[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” See also *McDaniel v. Paty*, 435 U.S. 618, 633, 593 (1978) (rejecting argument that “the law does not interfere with free exercise

[merely] because it does not directly prohibit religious activity”); *Burwell v. Hobby Lobby*, 573 U.S. 682, 725-26 (2014).

As a Roman Catholic priest, Father O’Keefe is morally and spiritually obligated, in the most sacred of duties, to minister to Mr. Honken at the time of death by administering the sacrament of Last Rites. O’Keefe Decl. ¶¶ 2-4, 12-14, 20, ECF No. 42-2 at 2, 4, 6. The Catholic Church teaches, and Father O’Keefe sincerely believes, that administering Last Rites is one of the most vital roles that a priest performs and is essential to salvation. *Id.* ¶¶ 7-13, 20. The Government imposes this burden on Father O’Keefe if he is to meet his religious obligations.<sup>9</sup>

Rev. Hartkemeyer has been Mr. Purkey’s priest for eleven years, and he believes he has a sacrosanct religious duty to be present at Mr. Purkey’s execution, where he must perform religious rituals (akin to Last Rites) to help guide Mr. Purkey as he leaves this life. Hartkemeyer Decl. ¶¶ 2-15, ECF No. 6-2 at 2-5. For Rev. Hartkemeyer, his failure to be present at Mr. Purkey’s execution to carry out these Buddhist rituals would “constitute a troubling violation of [his] religious tenets and priestly obligations.” *Id.* at ¶ 15.

By forcing each priest to assume the risk of contracting and spreading COVID-19 to honor his sacred duties, the Government has imposed a substantial burden on his exercise of religion. *See Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (a substantial

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<sup>9</sup> Father O’Keefe also is morally and spiritually obligated, as “an essential part of [his] ministry,” to administer Communion to elderly nuns at the Carmelite Monastery on a daily basis. (*Id.* ¶ 19.) Because the Government insists on executing Mr. Honken this week, Father O’Keefe must bear the burden not just of contracting COVID-19 himself, but spreading it to “those closest to [him] in the faith.” (*Id.* ¶ 20.)

burden exists when the government compels a person to “perform acts undeniably at odds with fundamental tenets of [his] religious beliefs”); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (substantial burden found where government action ‘put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs”).

Neither *Lyng* nor *Bowen*, relied on by Respondents and cited in the district court’s opinion, App. C4, requires this Court to hold otherwise. In *Lyng*, the government sought merely to make use of its own land; the plaintiffs, who had no ownership interest in the land and no legal right to be present on the land, had no protected interest to assert. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988). In *Bowen*, the government used a Social Security Number in its internal administration of benefits; the plaintiff had no right or obligation to be a part of that internal process. *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986).

Here, by contrast, setting an execution in the midst of a pandemic is more than just a matter of ordering the Government’s “internal affairs,” like the “size or color of the Government’s filing cabinets.” *Bowen*, 476 U.S. at 700. In fact, it is precisely because Respondents exercise total control over Mr. Purkey and Mr. Honken, including the environment for executions, that they have a special obligation to facilitate the spiritual relationship between them and their spiritual advisors. *See, e.g., Katcoff v. Marsh*, 755 F.2d 223, 235 n.4 (2d Cir. 1985) (explaining that the “provision by state and federal governments for chaplains in penal institutions” is a necessity “[s]ince government has deprived such persons of the opportunity to practice their faith at places of their choice”). Moreover, “the execution of a human being by the state is perhaps the most solemn and

significant act a government can perform. It should not be reduced to an invisible, bureaucratic function.” *United States v. Sampson*, 300 F. Supp. 2d 278, 280 (D. Mass. 2004), *aff’d*, 486 F.3d 13 (1st Cir. 2007).

Just as important, neither Fr. O’Keefe nor Rev. Hartkemeyer can be labeled an “incidental” bystander to the execution. As the priests with a sacred duty to minister condemned prisoners, each clergy fills a critical role that has been recognized throughout our Nation’s history, and is memorialized by Respondents’ own regulations. *See supra* p. 10; 28 C.F.R. §§ 26.4(b), 26.4(c)(3).

This Court very recently recognized the significance of a priest’s ability to engage in religious exercise at the moment of a prisoner’s execution. *See Gutierrez v. Collier*, No. 19-8695 (June 16, 2020) (granting stay of execution pending disposition of writ of certiorari). *Gutierrez* raises a question under RFRA’s sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, as to whether the state’s restriction of a priest’s ability to be present with a prisoner at the moment of execution amounts to a substantial burden on religious exercise. By issuing the stay, the Court demonstrated an understanding of the sacredness of the relationship between priest and prisoner at that moment, which is of ultimate spiritual concern to each.

Neither Fr. O’Keefe nor Rev. Hartkemeyer can be labeled an “incidental” bystander to the execution. The view that Petitioners are merely incidental bystanders is premised on an incorrect understanding of their spiritual relationship with Mr. Honken and Mr. Purkey. The relationship between a priest and the prisoner to whom he ministers



is not a one-way street that provides spiritual benefit only to the prisoners. Rather, the relationship between a priest and those to whom he ministers is mutual, and the spiritual bond runs both ways. *See, e.g.*, Prejean Decl., ECF No. 6-5, ¶¶ 5-8; Hartkemeyer Decl., ECF No. 6-2, ¶¶ 12-15. The nature of the spiritual connection between Father O’Keefe and Mr. Honken, and Rev. Hartkemeyer and Mr. Purkey, is one in which the religious liberty “interests of both parties are inextricably meshed.” *See Procunier v. Martinez*, 416 U.S. 396, 409 (1974). The religious exercise at issue in this case depends on the participation of both the priests and the prisoners, so an intrusion into their spiritual relationship at the moment of death “necessarily impinges on the interest of each.” *See id.* Fr. O’Keefe’s and Rev. Hartkemeyer’s RFRA claims, therefore, are based on the burdens *they* will suffer as a result of Defendants’ conduct, not the burdens suffered by the prisoners. *See id.* (“The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him. In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.”); *see also Turner v. Safley*, 482 U.S. 78, 97 (1987) (noting that state rule prohibiting prisoners from marrying implicated the interests of nonprisoners because it “may entail a consequential restriction on the [constitutional] rights of those” not incarcerated who wished to marry a prisoner).

By forcing Petitioners either to perform their duties under the serious threat of COVID-19, or forgo them altogether, Respondents’ conduct directly affects and regulates

each priest, imposing a substantial burden on his religious exercise. The safety protocols proposed by Respondents are insufficient to alleviate that burden. The health and lives of Fr. O’Keefe, Rev. Hartkemeyer, and those close to them will still be at grave risk if each petitioner attends the respective executions.

## II. THE COURT OF APPEALS’ HOLDING THAT RESPONDENTS HAVE DEMONSTRATED A COMPELLING INTEREST IS INCONSISTENT WITH THIS COURT’S PRECEDENT

In light of the burden imposed on Petitioners, the Government must demonstrate that its decision to schedule the executions during a pandemic—notwithstanding the extraordinary danger it poses to Fr. O’Keefe, Rev. Hartkemeyer, and everyone involved—is in “furtherance of a compelling governmental interest.” *See* 42 U.S.C. § 2000bb-1. Respondents’ burden is heavy, and even prison officials are not entitled to “unquestioning deference” by courts applying this prong of RFRA. *See Holt v. Hobbs*, 574 U.S. 352, 364 (2015).<sup>10</sup> Rather, courts must “look[] beyond broadly formulated interests justifying the general applicability of government mandates” and “scrutinize[] the asserted harm” of denying the relief or alternative course of action proposed by the religious claimant. *See O Centro*, 546 U.S. at 431; *see also Hobby Lobby*, 573 U.S. at 726 (noting that the governmental interest cannot be “couched in very broad terms”).

The Government cannot credibly argue that it has a compelling interest in moving forward with the executions immediately, when its own actions contradict that alleged interest. Where the Government has acted in a way that leaves “appreciable damage” to

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<sup>10</sup> Although *Holt* involved a RLUIPA claim, RFRA is RLUIPA’s “sister statute,” and both laws apply the same legal standard. *Holt*, 574 U.S. at 357-358.

its alleged interest, RFRA’s compelling-interest prong is not satisfied. *See O Centro*, 546 U.S. at 433 (“[A] law cannot be regarded as protecting an interest “of the highest order” . . . when it leaves appreciable damage to that supposedly vital interest unprohibited”) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993)). For years, the Government did not seek to effectuate the interests it now asserts. For example, Mr. Purkey was sentenced to death sixteen years ago, and his federal habeas review concluded in 2014. *Purkey v. United States*, 135 S.Ct. 355 (2014); *see also Purkey v. United States*, No. 19-3318, 2020 WL 3603779, at \*4 (7th Cir. July 2, 2020) (“For many years—to be exact, since March 18, 2003, when Louis Jones, Jr. was executed—the federal government has not carried out any executions.”). Mr. Honken’s execution has been subject to similar delays of the Government’s own making. Having delayed all these years in carrying out the death penalty, a further delay to accommodate the presence of clergy to perform essential ministry during the prisoners’ hour of greatest need does not interfere with any compelling interest on the part of the Government.

Moreover, the Government’s asserted interest in proceeding with the executions this week is undermined by the fact that the plan runs counter to other governmental interests. The Government’s supervisory role over the thousands of prisoners detained at USP Terre Haute prohibits the Government from showing deliberate indifference to the conditions of confinement of those individuals. *See, e.g., Banks v. Booth*, No. CV 20-849 (CKK), 2020 WL 3303006, at \*12 (D.D.C. June 18, 2020) (plaintiffs likely to succeed on constitutional deliberate indifference claims where Warden and Department of

Corrections Director failed “to take comprehensive, timely, and proper steps to stem the spread of the virus”). Holding an execution that requires an enormous influx of people contravenes the BOP’s bureau-wide policy of prohibiting visitation at prisons to reduce COVID-19 spread, including at the Terre Haute facility. The Government’s choice to schedule an execution at this time also frustrates compliance with its own regulations, as FCC Terre Haute has not allowed in-person visitation for months, including from legal counsel. Woodman Decl. ¶¶ 3-5, ECF No. 6-6 at 2-4.

### **III. THE DISTRICT COURT’S HOLDING THAT RESPONDENTS ARE USING THE LEAST RESTRICTIVE MEANS TO FURTHER THEIR INTEREST CONFLICTS WITH THIS COURT’S PRECEDENTS**

Where a less restrictive means “is available for the Government to achieve its goals, the Government *must* use it.” *Hobby Lobby*, 573 U.S. 682, 728 (2014) (emphasis added). RFRA’s “least-restrictive-means standard is exceptionally demanding, and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.” *Holt*, 574 U.S. at 364-65 (quoting *Hobby Lobby*, 573 U.S. at 728 (internal quotation marks omitted)). The Government must demonstrate that it has actually considered other, less restrictive measures and that they are inadequate before adopting the challenged practice. *See Holt*, 574 U.S. at 368-69 (ruling that government had failed to show that less restrictive means adopted by other prisons were inadequate for achieve its alleged security interests); *see also, e.g., Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 563–64 (1976) (holding that, before issuing a gag order on media publication of details relating to an upcoming high-profile trial, the Nebraska Supreme Court had improperly failed to

demonstrate the inadequacy of specified less restrictive alternatives). Here, the court of appeals failed to hold the Government to the exceptionally demanding standard imposed by RFRA's least-restrictive-means prong. As this Court has counseled, "courts must hold prisons to their statutory burden, and they must not 'assume a plausible, less restrictive alternative would be ineffective.'" *Holt*, 574 U.S. at 369 (quoting *United States v. Playboy Entertainment*, 529 U.S. 803, 824 (2000)).

Respondents argue that they cannot indefinitely suspend the Government's ability to execute Mr. Purkey and Mr. Honken, but that is not what Petitioners ask. Petitioners request that the execution be delayed only until a vaccine or effective treatment is developed so that they may safely attend the executions and carry out their religious obligations without risking their health and lives. Though it is not clear exactly when this will occur, Dr. Anthony Fauci, the Government's leading expert on the pandemic, testified last month that a vaccine was a "matter of when and not if" and could be available by the end of this year.<sup>11</sup>

Moreover, even if the executions are not delayed until an effective treatment or vaccine is available, there exists still another less restrictive measure available to

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<sup>11</sup> *COVID-19 vaccine a matter of 'when not if,' but must be produced safely: Fauci*, CBC (Updated June 23, 2020) <https://www.cbc.ca/news/world/dc-house-coronavirus-briefing-1.5623382>. See *Trump Administration's Operation Warp Speed Accelerates AstraZeneca COVID-19 Vaccine to be Available Beginning in October*, U.S. Dep't of Health and Human Servs. (May 21, 2020), <https://www.hhs.gov/about/news/2020/05/21/trump-administration-accelerates-astrazeneca-covid-19-vaccine-to-be-available-beginning-in-october.html>; see also *Fact Sheet: Explaining Operation Warp Speed*, U.S. Dep't of Health and Human Servs. (June 16, 2020), <https://www.hhs.gov/about/news/2020/06/16/fact-sheet-explaining-operation-warp-speed.html>.

Respondents than proceeding as currently planned: Respondents could, for example, take additional steps to ensure Petitioners' safety by addressing the risks in a much more robust way—in particular, making changes to the ventilation system, which would significantly decrease the risk of exposure and spread identified by Petitioners' expert, Dr. Goldensen. Goldenson Suppl. Decl. ¶ 12, ECF No. 57 at 3. Respondents do not deny this possibility; they just cannot make these changes on their current, inexplicably rushed timeline. ECF No. 81 at 3. But, as this Court has explained, postponement of a government event to an unspecified future time may be an appropriate less restrictive means. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563–64 (1976) (holding that, before issuing a gag order on media publication of details relating to an upcoming high-profile trial, the Nebraska Supreme Court had failed to make express findings that other measures, including “postponement of the trial to allow public attention to subside” would suffice). The Government's general assertions that it cannot delay these executions for any reason has not met its heavy burden. *See Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018) (“It is the government's burden to prove that these specific restrictions are the least restrictive means available to further its compelling interest. They cannot do so through general assertions of national security, particularly where plaintiffs have alleged that CBP is restricting First Amendment activities in traditional public fora such as streets and sidewalks.”); *see also Hobby Lobby*, 573 U.S. at 728 (“HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases”).

The Government’s interest is in carrying out the criminal sentences imposed—not in doing so on this particular date. That interest will not be diminished by a brief delay that accommodates Petitioners’ most sacred duties. The Government’s interest in carrying out the executions can be effectuated in a less restrictive way—namely, postponing the executions until a time at which it is not “effectively impracticable” for Fr. O’Keefe and Rev. Hartkemeyer to safely fulfill their sacred duties as spiritual advisors.

For all of these reasons, review is warranted, and this case offers an appropriate vehicle to consider and resolve these significant free-exercise questions and correct the errors of the courts below.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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