

No. ____

In the Supreme Court of the United States

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

Petitioners

v.

WILLIAM P. BARR, *et al.*,

EXECUTIONS SCHEDULED FOR JULY 15, 2020 AND JULY 17, 2020

**APPLICATION FOR STAY OF EXECUTIONS PENDING APPEAL
TO THE HONORABLE BRETT KAVANAUGH, AS CIRCUIT JUSTICE**

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APPLICATION FOR STAY OF EXECUTION

To the Honorable Brett Kavanaugh, Associate Justice of the Supreme Court of the United States and for the Seventh Circuit:

Petitioners Reverend Seigen Hartkemeyer and Father Mark O’Keefe respectfully request stays of execution scheduled for Wesley Purkey on July 15, 2020, and Dustin Honken on July 17, 2020, pending the Court’s consideration and disposition of the Petition for Writ of Certiorari filed along with this application.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

Petitioners seek review of the denial of a preliminary injunction issued by the District Court of the Southern District of Indiana on July 14, 2020 (attached as Appendix C), and the denial of a motion to stay executions pending appeal by the Seventh Circuit on July 15, 2020, (attached as Appendix B).

REASONS FOR GRANTING THE STAY

Father O’Keefe, a Roman Catholic Priest and member of the Order of St. Benedict, seeks to minister to Dustin Honken during Mr. Honken’s execution scheduled on July 17, 2020, and to offer him the sacraments prescribed by the Catholic Church for the dying. For Father O’Keefe, this is a sacred obligation, and one of the most important roles he performs as a Catholic priest— shepherding a soul into the next life in the grace of God. Rev. Hartkemeyer, an ordained Zen Buddhist priest is the long-time spiritual advisor to Wesley Purkey, who is scheduled for execution on July 15, 2020. Rev. Hartkemeyer has a sincere religious belief that he must be present at Mr. Purkey’s execution to deliver a sutra, or chant with content and meaning and a dharana, a mantra-like chant, to facilitate

Mr. Purkey's dying and cross-over processes. These religious rituals are akin to Last Rites in the Christian faith, and Rev. Hartkemeyer believes that his inability to conduct them at Mr. Purkey's moment of death would constitute a troubling violation of his priestly obligations.

Both priests, ages 64 and 68, are medically vulnerable to COVID-19 and thus at risk of serious illness or death should they become infected. By scheduling back-to-back executions at the height of the COVID-19 pandemic—at a facility with a known COVID-19 outbreak and where at least one staffer involved in the execution preparations has already tested positive for COVID-19—the Government has created a Hobson's choice for the priests: Their only option for fulfilling their religious duties is to subject themselves to grave and unacceptable risk of contracting the deadly virus. The Government's insistence on scheduling the executions during a pandemic, with no regard for manifest safety concerns, places an incredible burden on Petitioners' ability to freely exercise their faith in accordance with their religious duties as priests and is plainly not the least restrictive means by which the Government may fulfill its objectives. The Government's interest is in carrying out the executions, not in doing so *this week*, and it can wholly fulfill its interests while accommodating Petitioners' free-exercise rights by rescheduling them to a time when Petitioners need not risk their health and lives to carry out their sacred duties. At a minimum, a stay is warranted to ensure that this serious legal claim can be fully adjudicated. A brief delay that affords the courts time to adjudicate this claim fully will not harm the Government in any way and will avoid the irreparable injury to Petitioners' exercise of their religious obligations should the

prisoners be executed prior to the resolution of this case.

STANDARDS FOR A STAY OF EXECUTION

This Court considers four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009). In the context of a stay pending the Court’s ruling on a petition for certiorari, an applicant need show only a “reasonable probability” that this Court will grant certiorari and a “fair prospect” that the decision below will be reversed. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

ARGUMENT

I. Plaintiffs Have Shown A Likelihood of Success On Their RFRA Claims.

Father O’Keefe and Rev. Hartkemeyer are likely to succeed on their RFRA claims. They have shown that the Government’s actions “substantially burden [their] exercise of religion,” and the Government has not shown that its conduct “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

“RFRA operates as a kind of super statute, displacing the normal operation of other federal laws.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). It applies to all Federal law, and the implementation of that law, whether statutory or

otherwise. . .” 42 U.S.C. 2000bb-3(a). The Government’s decision to schedule Mr. Honken’s and Mr. Purkey’s executions during a deadly pandemic substantially burdens the religious exercise of Father O’Keefe and Rev. Hartkemeyer by forcing them either to abandon their religious duties as priests to attend the executions as the prisoners’ designated spiritual advisor or face the risk of serious illness or death as individuals especially susceptible to harm from COVID-19. This type of “substantial pressure” to modify or abandon their sacred religious exercise amounts to a substantial burden under this Court’s precedent. *See Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987).

The district court fundamentally erred in holding that the Government’s conduct did not impose a substantial burden of the priests’ religious exercise. The Seventh Circuit failed to address this error at all in its denial of a the priests’ motion for a stay. As this Court has held, a substantial burden exists when the Government puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Hobbie* 480 U.S. at 141. 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.

More specifically, controlling precedent makes clear 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”).

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. *See Hartkemeyer v. Barr*, Case No. 2:20-

cv-00336-JMS-DLP (S.D. Ind.), O’Keefe Decl., ECF No. 60-1, ¶¶ 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.¹

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. *See Hartkemeyer v. Barr*, Case No. 2:20-cv-00336-JMS-DLP (S.D. Ind.), Hartkemeyer Decl., ECF No. 6-2, ¶¶ 2-15. 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 G-5.

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

¹ 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.)

Neither *Lyng* nor *Bowen*, relied on by Respondents in the district court and cited in that court’s opinion, [see Appendix C] 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. Neither Fr. O’Keefe nor Rev. Hartkemeyer can be labeled an “incidental” bystander to the execution, as Respondents have argued below. 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., *Hartkemeyer v. Barr*, Case No. 2:20-cv-00336-JMS-DLP (S.D. Ind.), 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). As priests with a sacred duty to minister to the prisoners at their moment of death, each Petitioner fills a critical role that has been recognized throughout our Nation’s history, and is memorialized by Respondents’ own regulations. *See* 28 C.F.R. §§ 26.4(b), 26.4(c)(3).

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. 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. The uncontroverted expert evidence in this case makes clear that health and lives of both priests would be in grave danger should they attend the execution under these circumstances. *See Hartkemeyer v. Barr*, Case No. 2:20-cv-00336-JMS-DLP (S.D. Ind.), ECF Nos. 6-25, 57, 80-1, and 58.

The Government's interest is in carrying out the executions, not in carrying them out *at this moment*. There is no reason why the Government must proceed with the executions during a pandemic when the Government can fulfill its interest through the obvious, less restrictive alternative of delaying the executions until Rev. Hartkemeyer and Father O'Keefe can safely attend or until adequate protections are in place.

II. Father O'Keefe and Rev. Hartkemeyer Will Suffer Irreparable Harm In The Absence of a Stay of the Executions Pending Review, Including Permanent Loss of Their RFRA Claims.

Father O'Keefe and Rev. Hartkemeyer will suffer irreparable injury if the executions are not enjoined pending an opportunity for a full and proper adjudication and appellate review of their RFRA claims. In the absence of such relief, Father O'Keefe and Rev. Hartkemeyer will be put to the Hobson's choice of abandoning their sacred religious duties to guide their charges through death or doing so while shouldering the very serious

risks to life and limb associated with attending the executions this week. Temporary relief is imperative to prevent Petitioners' religious liberty claims from being overridden entirely by the action of the Government.

The loss of First Amendment rights, which RFRA is intended to protect, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). At age 64, Father O'Keefe is at an increased risk for severe illness from COVID-19, as are several of the cloistered nuns to whom he ministers daily, some of whom are over 80 years old. Without a stay, the only way Father O'Keefe could avoid this grave risk to himself and those close to him in the faith would be to shirk his solemn duty as a Catholic priest to administer the holy sacraments, including Last Rites, at Mr. Honken's execution.

The stakes are equally high for Rev. Hartkemeyer, who is medically vulnerable due to his age (68) and susceptibility to lung-related illness. After an eleven-year pastoral relationship with Mr. Purkey, Rev. Hartkemeyer has only one opportunity to guide him as he crosses over from this life. The government's choice to schedule Mr. Purkey's execution at this time puts Rev. Hartkemeyer to a wrenching and impossible choice: Abandon his religious duties to Mr. Purkey or risk his own life by attending the execution under unsafe conditions for a disease to which he is especially susceptible.

The risk of serious disability or death Petitioners face by ministering at the executions is also irreparable. See *Nat'l Ass'n of Farmworkers Organizations v. Marshall*, 628 F.2d 604 (D.C. Cir. 1980) (finding irreparable harm from health risks associated with exposure to toxic chemicals). The lower court record below is conclusive

that the procedures that will be used for this week’s executions, should they go forward as planned, will expose petitioners to a gravely high risk of serious health complications or even death—including risk of permanent disability and impairment. *See Hartkemeyer v. Barr*, Case No. 2:20-cv-00336-JMS-DLP (S.D. Ind.), Decl. of Dr. Nina Fefferman, ECF No. 58, ¶¶ 16-19; Decl. of Dr. Joe Goldenson, ECF No.57, ¶¶ 19-20. Nevertheless, the Government has refused to reschedule the executions or to take any important measure to reduce the risks to petitioners. *See, e.g., Hartkemeyer v. Barr*, Case No. 2:20-cv-00336-JMS-DLP (S.D. Ind.), ECF 81 at 3 (noting that BOP would not consider modifying its ventilation system because it could not accomplish it by its self-selected dates of execution).

B. Issuance of the temporary stay will not substantially injure the Government.

In contrast to the weighty and irreparable constitutional and physical harms that will befall Father O’Keefe and Rev. Hartkemeyer in the absence of a brief stay of the executions pending their appeal, Defendants cannot show significant injury from the brief postponement of the executions necessary to fully adjudicate this matter. While rescheduling the execution will force the Government to make alternative logistical arrangements, this inconvenience does not amount to substantial injury, particularly given the Government has already waited years to schedule Mr. Purkey’s and Mr. Honken’s executions. “[T]hat the government has not—until now—sought to” schedule Mr. Purkey’s and Mr. Honken’s executions “undermines any urgency surrounding” its need to do so on July 15, 2020, and July 17, 2020, respectively. *Osorio-Martinez v. Att’y Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018).

The Government's interest in carrying out the executions can be fully met once the immediate health crisis passes and the executions can be carried out safely. Whatever interest it has in proceeding immediately, after its own lengthy delays, cannot overcome the irreparable harms to Petitioners in having to choose between dutiful ministry to the condemned and their own physical health and welfare, and that of those to whom they minister.

C. The Public Interest Favors Temporary Injunctive Relief.

The public interest is served by temporary injunctive relief to prevent the violation of Rev. Hartkemeyer's and Father O'Keefe's religious freedom without full adjudication. Protecting religious freedoms is "always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). Broader public interests also favor the stay. The execution is a potential super-spreader event that threatens the health not only of the petitioners, but of all those with whom they come in contact. Proceeding with the executions now also poses risks to as the staff and witnesses in attendance, the surrounding community, and individuals across the country in places where individuals will travel from and return to after attending the executions an expert conclusion never contradicted by the Government. *See Hartkemeyer v. Barr*, Case No. 2:20-cv-00336-JMS-DLP (S.D. Ind.), ECF No. 1 at 13. Given the gravity of the interests involved, both in relation to religious freedom and public health, the public interest is served by staying Mr. Purkey and Mr. Honken's execution until the RFRA claims at issue in this appeal are resolved. *See Purkey*, 2020 WL 3603779, at *11 (finding public interest served by granting stay of execution pending appeal and observing that "[j]ust because

the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so.”).

CONCLUSION

For the reasons stated above, this Court should stay Mr. Purkey and Mr. Honken’s executions until the Court has had an opportunity to rule on Plaintiffs’ appeal from the denial of a preliminary injunction.

Dated: July 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 15, 2020, I caused the foregoing Application to be electronically served via email and first class mail on the following:

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