No. _____

In the Supreme Court of the United States

JEFFERSON DUNN,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
APPLICANT,

v.

WILLIE B. SMITH III,
RESPONDENT.

EMERGENCY APPLICATION TO VACATE INJUNCTION OF EXECUTION

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eleventh Circuit

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EXECUTION SCHEDULED THURSDAY, FEBRUARY 11, 6:00 P.M. CST.

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Less than twenty-four hours before the scheduled execution of Willie B. Smith III, a divided panel of the Eleventh Circuit Court of Appeals preliminarily enjoined the Alabama Department of Corrections (ADOC) and Commissioner Jefferson Dunn from executing Smith unless it allows Smith's outside spiritual advisor, Pastor Robert Paul Wiley, Jr., into the execution chamber.[1] The district court had rejected Smith's motion after conducting an evidentiary hearing, making extensive factual findings, and concluding that the ADOC's current protocol—in which Smith and his spiritual advisor can visit until Smith is led into the execution chamber and the advisor can watch the execution from the viewing room—is the least restrictive means by which the ADOC can keep the execution chamber secure.[2] The court of appeals second-guessed those findings, held that the district court abused its discretion by denying Smith relief, and granted Smith a last-minute injunction in a claim he raised less than two months ago, even though it became available to him nearly two years ago.

This Court should vacate the injunction. To preserve the security and solemnity of the execution, the ADOC has never allowed members of the public into the execution chamber. The ***only*** persons permitted in the execution chamber during an execution are members of the execution team—not family, not legal counsel, not even the Commissioner. Thus, an outside spiritual advisor may visit with the condemned

1. *Smith v. Comm'r, Ala. Dep't of Corrs.*, 21-10348 (11th Cir. Feb. 10, 2021).
2. *Smith v. Dunn*, 2:20-cv-1026-RAH, 2021 WL 358374, at *9–14 (M.D. Ala. Feb. 2, 2021).

prisoner on the day of his execution in the prisoner's cell and immediately before the prisoner goes into the execution chamber. And the condemned may invite his spiritual advisor to witness his execution from the adjacent viewing room, where he and his spiritual advisor will be able to see each other through two-way security glass. But in the interest of preserving the security and solemnity of the execution, the ADOC will not permit non-employees into the chamber itself.

1. Prior to April 2019, the ADOC execution team did include an institutional chaplain—an ADOC employee—who could enter the execution chamber and pray with the condemned inmate if the inmate wished. But in April 2019, the ADOC removed the chaplain from the execution team in response to two cases from this Court: *Dunn v. Ray*, 139 S. Ct. 661 (2019), and *Murphy v. Collier*, 139 S. Ct. 1475 (2019). In the first, an Alabama inmate named Domineque Ray did not want the chaplain in the chamber and requested that his spiritual advisor, a non-employee Muslim imam, be allowed to take his place. The Eleventh Circuit initially granted Ray's request for a stay of execution based on a potential equal-treatment Establishment Clause problem,[3] but this Court vacated the stay because of Ray's delay in bringing the challenge.[4]

3. *See Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 700–01 (11th Cir. 2019).

4. *See Dunn*, 139 S. Ct. at 661; *see also Murphy*, 139 S. Ct. 1475 at 1477 (Kavanaugh, J., joined by Roberts, C.J., respecting grant of application for stay) (acknowledging that "in granting Ray a stay, the Eleventh Circuit relied on an equal-treatment theory, on the idea that the State's policy discriminated against non-Christin inmates," but noting that "Ray did not raise an equal-treatment argument in the District Court or the Eleventh Circuit").

The second case, *Murphy*, involved an inmate in Texas who requested that a Buddhist spiritual advisor be allowed in the execution chamber with him. Though Texas provided state-employed Christian or Muslim religious advisors to condemned inmates, it refused Murphy's request because it did not have a state-employed Buddhist advisor it could offer. The Court granted the stay to allow for further factfinding and a full disposition of Murphy's claim.[5] Justice Kavanaugh wrote separately to provide Texas a path forward.[6] He explained that Texas could remedy the constitutional problem in at least one of two ways: "(1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room."[7] "A state may choose a remedy in which it would allow religious advisers only into the viewing room and not the execution room," he noted, "because there are operational and security issues associated with an execution by lethal injection" and States "have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions."[8]

2. Following *Murphy*, both Texas and Alabama chose the second of Justice Kavanaugh's options and amended their execution protocols to exclude their institutional chaplains from the execution chamber. Once Texas did so, Justice Kavanaugh,

5. *See Murphy*, 139 S. Ct. at 1475.
6. *See id.* at 1475–76 (Kavanaugh, J., concurring in grant of application for stay).
7. *Id.* at 1475.
8. *Id.* at 1475–76.

joined by Chief Justice Roberts, explained in a later writing that the new policy "solve[d] the equal-treatment constitutional issue."[9] He also wrote that "because States have a compelling interest in controlling access to the execution room . . . the new Texas policy likely passes muster under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, and the Free Exercise Clause," as well.[10]

Since these changes went into effect, inmates in Texas and Alabama have mounted challenges to the new protocols, raising claims under RLUIPA, the Establishment and Free Exercise Clauses of the First Amendment, and, in Alabama, the Alabama Religious Freedom Amendment (ARFA). In Texas, the most notable of these cases is *Gutierrez v. Saenz*, in which the Court stayed the execution to allow the district court time to consider, "based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution."[11] Once the lower court made its findings (it concluded that serious security problems would not result), the Court granted certiorari, vacated the Fifth Circuit's stay order, and remanded.[12] In Alabama, the first challenge came in

9. *Murphy*, 139 S. Ct. at 1476.
10. *Id.*
11. No. 19A1052 (U.S. June 16, 2020).
12. No. 19-8695, 2021 WL 231538 (U.S. Jan. 25, 2021) (mem.).

April 2019, when Charles Burton, a Muslim inmate, requested the presence of his imam in the execution chamber.[13]

3. Unlike Burton, Smith did not bring his claim when the ADOC changed its protocol. Or when he filed a different § 1983 action in November 2019—even though by then, he was represented by many of the same attorneys who represented Burton. Nor did he bring it nearly a year later when the State requested an execution date on October 27, 2020. And Smith did not bring his RLUIPA claim when the Alabama Supreme Court acted on December 1, 2020, to set his February 11, 2021, execution date. Instead, he waited until December 14, 2020, to bring the present challenge. As a result of Smith's delay, the district court had less than two months before Smith's execution to consider his claims.

The court acted with celerity. Unlike the district court in *Gutierrez*—which had granted the inmate a stay before conducting any factfinding[14]—the district court here quickly held a hearing on Smith's motion for a preliminary injunction, invited the parties to make evidentiary submissions, and requested briefs on the effect of the *Gutierrez* GVR. On February 2, 2021, the district court issued a fifty-seven-page memorandum opinion and order, complete with extensive factual findings, denying Smith's motion for a preliminary injunction. As Judge Jordan summarized in his dissent below, the district court explained that the ADOC had presented evidence

13. *See* Complaint, *Burton v. Dunn*, 2:19-cv-00242 (M.D. Ala. Apr. 4, 2019), ECF No. 1.

14. *See* Order at 3, *Gutierrez v. Saenz*, 1:19-cv-00185 (S.D. Tex. June 9, 2020), ECF No. 57.

showing "that having non-employees in the execution chamber when an inmate is being put to death would create security problems," that "requiring background checks and vetting for non-employee spiritual advisors can limit the broad choice that inmates currently have," that "background checks (including NCIC checks) and training of non-employee spiritual advisors can take time," and that the ADOC "cannot realistically hire, as employees, persons from all faiths to be in the execution chamber with inmates when they are being put to death."[15] "The district court concluded," Judge Jordan noted, " from this and other evidence, that the ADOC had considered alternatives to its ban on non-employee spiritual advisors being in the execution chamber—such as heightened background investigation procedures—but found those alternatives to be more restrictive of an inmate's ability to freely choose a spiritual advisor."[16] "And the court also explained that the ADOC had such strong interests in safety, security, and solemnity that it could not permit even a slight chance of interference with executions inside the chamber."[17]

4. Undeterred by the district court's factual findings, the panel majority reweighed the evidence and concluded that the district court abused its discretion when it found that Smith was unlikely to succeed on the merits of his claim and that the other equities tilted in the ADOC's favor. Creating a new if-someone-else-tries-it standard, the majority faulted the ADOC for not following the lead of the federal Bureau of Prisons—and only the federal Bureau of Prisons—because the BOP had

15. *See Smith*, 21-10348, slip op. at 22.
16. *Id.*
17. *Id.*

"on two occasions since July 2020" allowed spiritual advisors into the execution chamber without incident.[18] But this Court has never "suggest[ed] that RLUIPA requires a prison to grant a particular religious as soon as a few"—or one—"other jurisdictions do so."[19] The majority likewise faulted the ADOC for not accepting the "conceivabl[e]" alternative of running a background check on the spiritual advisor and admitting him into the execution chamber if he passed.[20] But the ADOC *did* present evidence showing why it rejected that standard; as the district court found, it's because prison employees who *had* passed background checks have proven to be security risks, which is why the execution team is hand-picked to include only the most trustworthy and experienced officers.[21] It is hard to imagine what more the ADOC could have produced to vindicate its "compelling interest in controlling access to the execution room."[22] When States have with near unanimity kept strangers out of execution chambers during executions, the majority's rule would require States to either (1) predict which strangers will do the unpredictable, or (2) wait until one of them does. The first option is impossible, and the second is untenable. Thus, if RLUIPA truly does still "afford[] prison officials ample ability to maintain security,"[23] the preliminary injunction entered by the court of appeals should be vacated.

18. *Id.*, slip op. at 13.
19. *Holt v. Hobbs*, 574 U.S. 352, 369 (2015)
20. *Smith*, 21-10348, slip op. at 22.
21. *Dunn*, 2021 WL 358374, at *10–11.
22. *Murphy*, 139 S. Ct. at 1477 (Kavanaugh, J., respecting grant of application for stay).
23. *Holt*, 574 U.S. at 369.

STATEMENT

A. Smith's crime, trial, and appeals

Smith robbed, kidnapped, and then executed Sharma Ruth Johnson in October 1991.[24] After refusing a plea bargain for life without parole, Smith was tried in Jefferson County. He was convicted of two counts of capital murder: murder during the course of a robbery[25] and murder during the course of a kidnapping.[26] Following the penalty-phase presentation of mitigation evidence, the jury recommended by a 10–2 vote that Smith be sentenced to death. The trial court imposed that sentence after a hearing on July 17, 1992.[27]

On direct appeal, the Alabama Court of Criminal Appeals initially ordered a remand regarding a potential *J.E.B. v. Alabama*[28] violation.[29] The trial court found no problem with the jury striking,[30] and on return to remand in 2002, the Court of Criminal Appeals affirmed Smith's conviction and death sentence.[31] The Alabama Supreme Court denied certiorari,[32] as did this Court later that year.[33]

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24. *Smith v. State*, 838 So. 2d 413 (Ala. Crim. App. 2002).
25. ALA. CODE § 13A-5-40(a)(2).
26. *Id.* § 13A-5-40(a)(1).
27. The sentencing order can be found at C. 148–67 in the trial transcript, available in Volume 1 of the habeas record filed in *Smith v. Thomas*, 2:13-cv-00557-RDP (N.D. Ala.).
28. 511 U.S. 127 (1994).
29. *Smith v. State*, 698 So. 2d 1166 (Ala. Crim. App. 1997).
30. *Smith*, 838 So. 2d at 425–26.
31. *Id.* at 477.
32. *Ex parte Smith*, No. 1011228 (Ala. June 28, 2002).
33. *Smith v. Alabama*, 537 U.S. 1090 (2002) (mem.).

Smith's state postconviction proceedings commenced in 2003.[34] The circuit court denied relief after a hearing, and the Court of Criminal Appeals affirmed in 2012.[35] The Alabama Supreme Court denied certiorari.[36]

In 2013, represented by counsel from Sidley Austin LLP (Chicago and Dallas) and Maynard Cooper & Gale P.C. (Birmingham),[37] Smith commenced federal habeas proceedings in the Northern District of Alabama.[38] Four years later, the district court entered a memorandum opinion denying the petition and dismissing it with prejudice.[39]

That same day, this Court issued its decision in *Moore v. Texas*[40] concerning Texas's method of determining intellectual disability, which the Court found to be incompatible with *Hall v. Florida*.[41] Following this decision, the district court vacated its order and reopened Smith's case for the purpose of considering *Moore*'s effect on Smith's *Atkins* claim. Four months later, the district court concluded that Smith was still not entitled to relief.[42]

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34. *Smith v. State*, 112 So. 3d 1108, 1113–14 (Ala. Crim. App. 2012).
35. *Id.* at 1130–36.
36. *Ex parte Smith*, 112 So. 3d 1152 (Ala. 2012).
37. By the conclusion of his habeas proceedings, Smith had been represented by counsel from Bradley Arant Boult Cummings LLP (Birmingham) and Shook, Hardy & Bacon LLP (Chicago) as well.
38. Petition for Writ of Habeas Corpus, *Smith v. Dunn*, 2:13-cv-00557-RDP, 2017 WL 3116937 (N.D. Ala. July 21, 2017), Doc. 1.
39. *Smith v. Dunn*, 2:13-cv-00557-RDP, 2017 WL 1150618 (N.D. Ala. Mar. 28, 2017).
40. 137 S. Ct. 1039 (2017).
41. 572 U.S. 701 (2014).
42. *Smith v. Dunn*, 2:13-cv-00557-RDP, 2017 WL 3116937, at *3 (N.D. Ala. July 21, 2017).

On May 22, 2019, after oral argument, the Eleventh Circuit affirmed.[43] This Court denied certiorari on July 2, 2020.[44]

B. 2019 amendment of Alabama's execution protocol and resulting challenges

In November 2018, the Alabama Supreme Court set the execution of Domineque Ray. Ray initiated § 1983 proceedings ten days before his scheduled February 2019 execution date, arguing that the exercise of his religious beliefs was being unduly burdened because the ADOC required the presence of the Holman institutional chaplain in the execution chamber and would not permit his Muslim spiritual advisor, a religious volunteer, to be with him instead.[45] The ADOC agreed to remove the chaplain from the chamber but refused to allow a "free-world," non-ADOC-affiliated volunteer to stand in his place.[46] The Eleventh Circuit granted Ray a stay of execution based on an equal-treatment Establishment Clause claim, but this Court vacated that order due to Ray's delay in bringing suit.[47] As a result, the execution proceeded as scheduled, with neither the chaplain nor the imam in the execution chamber.

As explained above, the following month, the Court granted a stay to Texas inmate Patrick Murphy, a Buddhist who had requested that his spiritual advisor or

43. *Smith v. Comm'r, Ala. Dep't of Corrs.*, 924 F.3d 1330 (11th Cir. 2019).
44. *Smith v. Dunn*, 141 S. Ct. 188 (2020) (mem.).
45. Complaint, *Ray v. Dunn*, 2:19-cv-00088 (M.D. Ala. Jan. 28, 2019), ECF No. 1.
46. *See* Memorandum Opinion at 11, 14, *Ray v. Dunn*, 2:19-cv-00088 (M.D. Ala. Feb. 1, 2019), ECF No. 21.
47. *Ray v. Comm'r, Ala. Dep't of Corrs.*, 915 F.3d 689, 703 (11th Cir. 2019) (granting stay); *Dunn v. Ray*, 139 S. Ct. 661 (2019) (vacating stay).

a comparable Buddhist reverend be present with him in the execution chamber. Texas's policy allowed either the prison's Christian or Muslim state-employed chaplain to be present but excluded all other spiritual advisors.[48] While Ray filed his challenge at the last minute, Murphy made a timelier request to have his spiritual advisor present.[49]

Concurring in the Court's grant of a stay to Murphy, Justice Kavanaugh wrote separately to suggest possible paths forward for Texas. He explained:

> In an equal-treatment case of this kind, the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward. For this kind of claim, there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room. A State may choose a remedy in which it would allow religious advisers only into the viewing room and not the execution room because there are operational and security issues associated with an execution by lethal injection. Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in medical procedures. States therefore have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions. The solution to that concern would be to allow religious advisers only into the viewing room.[50]

48. *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring).
49. *E.g.*, Matthew Schwartz, *Supreme Court Halts Execution of 'Texas 7' Inmate Denied Buddhist Spiritual Advisor*, NPR (Mar. 29, 2019, 6:50 AM), https://n.pr/3mmCpbK. Murphy also raised an equal-treatment claim, while Ray did not; the Eleventh Circuit granted a stay on that ground of its own accord. *See Murphy*, 139 S. Ct. at 1476–77 (Kavanaugh, J., statement regarding Justice Alito's dissent).
50. *Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring in grant of stay) (citations omitted).

Texas promptly amended its execution protocol in accord with Justice Kavanaugh's second option. Under its new policy, *no* religious personnel are permitted in the execution chamber, and ministers—whether state employees or volunteers—can observe executions only from a viewing room.[51]

Justice Kavanaugh, this time joined by Chief Justice Roberts, wrote again to commend Texas's response: "Texas now allows all religious ministers only in the viewing room and not in the execution room. The new policy solves the equal-treatment constitutional issue."[52] Justice Kavanaugh then went further, noting that "because States have a compelling interest in controlling access to the execution room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under [RLUIPA] and the Free Exercise Clause."[53]

Having received this guidance from members of the Court, the ADOC followed Texas's lead and likewise amended its execution protocol in April 2019. The condemned inmate may now receive contact visits from free-world clergy in the days before his execution, and his spiritual advisor may remain with him until he is

51. *See* TEX. DEP'T OF CRIM. JUST., EXECUTION PROCEDURE § V.F (Apr. 2019), https://files.deathpenaltyinfo.org/legacy/files/pdf/TX%20Execution%20Procedure%2004.02.2019.pdf.
52. *Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., statement regarding Justice Alito's dissent).
53. *Id.*

escorted to the execution chamber.[54] But all religious personnel, including the institutional chaplain, may view executions only from a witness room.[55]

In April 2019, Alabama inmate Charles Burton filed a 42 U.S.C. § 1983 complaint alleging violations of RLUIPA, ARFA (the Alabama Religious Freedom Amendment), and the Establishment and Free Exercise Clauses of the First Amendment.[56] That matter remains pending in the Middle District of Alabama.

C. The decisions below

Smith currently has three active 42 U.S.C. § 1983 actions. The present matter, his second, was filed on December 14, 2020—incidentally, the day that his first § 1983 action was dismissed.[57] This complaint, like Burton's, alleges violations of RLUIPA, ARFA, and the Establishment and Free Exercise Clauses of the First Amendment based on the April 2019 amendment to the execution protocol.[58] Smith also filed a motion for preliminary injunction. After a hearing on January 20, 2021, and in light of Smith's impending execution date, the court permitted the parties to make evidentiary submissions on January 22.[59]

On February 2, after also receiving briefs from the parties on the effect of this Court's GVR in *Gutierrez v. Saenz*,[60] the district court issued a fifty-seven-page

54. Doc. 27, Ex. B §§ VIII.B, IX.G.2.
55. *Id.* § IX.G.2.
56. Complaint, *Burton v. Dunn*, 2:19-cv-00242 (M.D. Ala. Apr. 4, 2019), ECF No. 1.
57. Doc. 1.
58. Smith also raised claims because he had been prohibited from attending church due to his "single walk" status. The ADOC agreed to allow Smith to attend services, thus mooting these claims. Doc. 32 at 2 n.2.
59. Docs. 26, 27.
60. No. 19-8695, 2021 WL 231538 (U.S. Jan. 25, 2021) (mem.).

memorandum opinion and order concerning Commissioner Dunn's motion to dismiss and Smith's motion for preliminary injunction. The court granted the Commissioner's motion to dismiss Smith's Establishment Clause claim, denied the motion to dismiss as to the remaining claims, and denied Smith's motion for preliminary injunction because Smith had not shown a substantial likelihood of success or carried the burden of persuasion as to the remaining factors.[61]

Smith filed an interlocutory appeal in the Eleventh Circuit. On the evening of February 10, the court of appeals reversed the district court's denial of injunctive relief and granted Smith's motion for preliminary injunction in a 2–1 decision.[62] The majority rightly rejected Smith's "narrow definition" of the government's interest—Smith said that the question was whether the ADOC had a "compelling government interest in barring Pastor Wiley" specifically from the execution chamber—and agreed with the district court that the ADOC "has a compelling interest of the highest order in preserving the solemnity, safety and security of its executions."[63] But the court of appeals disagreed with the district court when it came to the least-restrictive-means standard. It made two primary findings. First, it found that the district court had not given sufficient weight to the recent practice of the federal Bureau of Prisons, which "on two occasions since July 2020 . . . allowed the spiritual advisor of the prisoner's choice to be present in the execution chamber."[64] And second, it found that

61. Doc. 32 at 55–57.
62. *Smith v. Comm'r, Ala. Dep't of Corrs.*, 21-10348 (11th Cir. Feb. 10, 2021).
63. *Id.*, slip op. at 11–12.
64. *Id.*, slip op. at 13.

because it was "[c]onceivabl[e]" that the ADOC could conduct a heightened background investigation if the condemned inmate chose his spiritual advisor when his execution date was set, the district court abused its discretion by accepting the ADOC's reasoning for why it had not embraced that alternative.[65] Accordingly, the court of appeals held that the district court abused its discretion by denying Smith's motion for preliminary injunction, and it issued the injunction itself.

Judge Jordan dissented. He noted that "[i]f this were a plenary appeal, [he] might well agree with the court that the ADOC has failed to show under RLUIPA that it sought to accomplish its compelling security (and other) interests through the least restrictive means."[66] "But in an appeal from the grant or denial of a preliminary injunction," he explained, the court is to "review for abuse of discretion and generally [will] not render any definitive pronouncements on the merits."[67] He continued:

> The abuse of discretion standard generally allows for a "range of choice as to what [the district court] decides[.]" *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1169 (2017). *See also United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc) (the abuse of discretion standard permits a "range of choice so long as that choice does not constitute a clear error of judgment"). Given this deferential standard of review, I would affirm the district court's denial of injunctive relief to Mr. Smith.
>
> The district court explained that, in its view, RLUIPA's least restrictive means requirement does not mean or suggest that prison officials must refute every conceivable option or alternative. Given the current state of the law, that seems like a reasonable assessment to me. *See Holt v. Hobbs*, 574 U.S. 352, 371 (2015) (Sotomayor, J., concurring) (noting that "nothing in the Court's opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA's least restrictive means requirement"). *Accord Greenhill v. Clarke*, 944 F.3d

65. *Id.*, slip op. at 14–15 (first alteration in original).
66. *Id.*, slip op. at 20 (Jordan, J., dissenting).
67. *Id.*

> 243, 251 (4th Cir. 2019); *Fowler v. Crawford*, 534 F.3d 931, 940 (8th Cir. 2008); *Spratt* [*v. Rhode Island Dep't of Corrs.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007)].
>
> On the evidentiary side of the calculus, the ADOC put on evidence that having non-employees in the execution chamber when an inmate is being put to death would create security problems due to issues of trustworthiness and uncertainty about how such persons would behave or cope with the execution; that requiring background checks and vetting for non-employee spiritual advisors can limit the broad choice that inmates currently have in choosing their advisors; that background checks (including criminal NCIC checks) and training of non-employee spiritual advisors can take time; and that it cannot realistically hire, as employees, persons from all faiths to be in the execution chamber with inmates when they are being put to death. The district court concluded, from this and other evidence, that the ADOC had considered alternatives to its ban on non-employee spiritual advisors being in the execution chamber—such as heightened background investigation procedures—but found those alternatives to be more restrictive of an inmate's ability to freely choose a spiritual advisor. And the court also explained that the ADOC had such strong interests in safety, security, and solemnity that it could not permit even a slight chance of interference with executions inside the chamber.
>
> Whether the district court got RLUIPA's least restrictive means requirement right or wrong, I do not believe that its decision constitutes an abuse of discretion. *See Café 207, Inc. v. St. Johns County*, 989 F.2d 1136, 1137 (11th Cir. 1993) ("Whether the district court's determination of this point [i.e., substantial likelihood of success] is right or wrong, the record here indicates no abuse of discretion.").[68]

This emergency application to vacate the court of appeals' preliminary injunction followed.

68. *Id.*, slip op. at 20–23 (Jordan, J., dissenting).

REASONS FOR GRANTING THE APPLICATION

I. The court of appeals exceeded the scope of its abuse-of-discretion review.

The Court should vacate the Eleventh Circuit's preliminary injunction because the court of appeals exceeded the scope of its review of the district court's judgment.

As Judge Jordan noted in dissent, the court's standard of review of the grant or denial of a preliminary injunction is abuse of discretion.[69] This is not a new standard.[70] What should have been included in that deferential review was the district court's determination that Smith had failed to show a substantial likelihood of success as to his claim that the ADOC was not using the least restrictive means to accomplish its compelling interest of maintaining safety, security, and solemnity in the execution chamber.[71]

Here, the district court had evidence before it and made findings of fact—making this case very much unlike *Gutierrez*, where the district court granted an initial stay of execution before holding an evidentiary hearing. In Smith's case, although the district court did not have long to decide the case—Smith initiated this litigation on December 14, 2020, two weeks after his execution date was set—the court solicited evidentiary submissions from both parties, including affidavits, deposition transcripts from the *Burton* litigation, ADOC regulations, and other relevant documents.

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69. *Id.*, slip op. at 20 (Jordan, J., dissenting).

70. *See Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." (citation omitted)).

71. *Smith*, 21-10348, slip op. at 20–21 (Jordan, J., dissenting).

This is not a case of a district court making factual determinations from the bare pleadings.

Nor is this a case of a district court giving absolute deference to a department of corrections. The court found that Smith had established a substantial likelihood of success as to his claim that having his spiritual advisor with him in the execution chamber constituted a "religious exercise," the necessary first inquiry of a RLUIPA claim.[72] And the court made reasonable factual findings—and certainly findings within its discretion—as to whether the ADOC had a compelling governmental interest in the safety, security, and solemnity of the execution chamber and whether the regulation prohibiting free-world volunteers in the chamber was the least restrictive means of furthering that interest.[73]

In reviewing those findings, the court of appeals should have been guided by this Court's admonition that, under an abuse of discretion standard, the district court "has a wide range of choice as to what [it] decides, free from the constrains which characteristically attach whenever legal rules enter the decisionmaking process."[74] Instead, the panel majority substituted its own conclusions for those of the factfinder. As shown below, that was error because the district court's findings were rooted in the evidence and were reasonable under controlling law. The Eleventh Circuit's grant of preliminary injunction should thus be vacated.

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72. Doc. 32 at 16.

73. Doc. 32 at 23–34.

74. *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1169 (2017) (cleaned up) (quoting 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5166.1 (2d ed. 2012)).

II. The district court did not abuse its discretion by concluding that the ADOC's protocol provides the least restrictive means of keeping the execution chamber secure.

Based on the evidence presented to it, the district court was within its discretion to find that Smith was not likely to succeed on the merits of his RLUIPA claim.

RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person —
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.[75]

Under the RLUIPA, the plaintiff bears the burden to prove that the challenged practice substantially burdens his exercise of religion, and then the burden shifts to the defendant to prove that the practice is the least restrictive means of furthering a compelling governmental interest.[76]

Importantly, the Court has recognized that "while [RLUIPA] adopts a 'compelling governmental interest' standard, 'context matters' in the application of that standard."[77] Thus, "courts should not blind themselves to the fact that the analysis is conducted in the prison setting,"[78] but rather must apply RLUIPA's standard with "due deference to the experience and expertise of prison and jail administrators in

75. 42 U.S.C. § 2000cc-1(a).

76. *See Holt*, 574 U.S. at 360–61.

77. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (cleaned up) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

78. *Holt*, 574 U.S. at 364.

establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[79] Moreover, as Justice Sotomayor noted in her concurrence in *Holt*, "nothing in the Court's opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA's least restrictive means requirement."[80]

With this framework in mind, the district court was well within its discretion to deny Smith's motion for a preliminary injunction.

A. The State has a compelling governmental interest in the safety, security, and solemnity of executions.

One of the few proper findings the court of appeals panel made as to Commissioner Dunn's end of the RLUIPA analysis was that Commissioner Dunn established a likelihood of success on the merits of showing the existence of a compelling governmental interest.[81] The district court found that the ADOC has "a compelling interest in protecting the safety, security, and solemnity of the chamber, its occupants during an execution, and the execution process itself."[82] The Eleventh Circuit concurred:

> Smith argues that "the ADOC was required to present evidence that it has a compelling government interest in barring Pastor Wiley from the execution chamber." We reject his narrow definition of the government's interest. The ADOC's compelling interest is in maintaining safety, security, and solemnity during an execution. The prohibition on Pastor Wiley's presence, specifically, inside the execution chamber might promote the ADOC's compelling interest—but it is not the interest itself. *See Gutierrez v. Saenz*, 141 S. Ct. 127, 128 (2020) (mem.) (granting a stay of execution and directing the District Court to determine "whether serious security problems would result if *a* prisoner facing execution is

79. *Cutter*, 544 U.S. at 723.
80. *Holt*, 574 U.S. at 371 (Sotomayor, J., concurring).
81. *Smith*, 21-10348, slip op. at 11.
82. Doc. 32 at 23.

> permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution" (emphasis added)).[83]

The district court was well within its discretion in making this finding. As that court explained, "executions themselves are inherently emotionally charged events, which create the need for increased security and heightened safety precautions for everyone involved with an execution."[84] Thus, Commissioner Dunn, on behalf of the ADOC, is due deference in matters of prison security.

To carry his burden of establishing a compelling governmental interest, the Commissioner submitted much evidence to the district court, including "affidavits of ADOC employees, copies of ADOC administrative regulations, and excerpts of deposition testimony" from the *Burton* RLUIPA case also before the district court.[85]

The district court made a number of factual findings based on this evidence. First, the court found that the ADOC protocol permits only trained members of the execution team into the chamber during an execution. The court explained:

> These individuals have not only undergone the standard ADOC employee background investigation process, but they have been personally selected by the warden based on their experience and demonstrated trustworthiness during their time as ADOC employees. These individuals are trained in the ADOC's execution protocol and take part in an in-person walk-through of the execution procedure before carrying out each execution. As a result of this vetting, training, and demonstrated trustworthiness, the execution team constitutes the only individuals permitted by the ADOC protocol to be present in the chamber during the execution; all other individuals are excluded, including the warden himself, the ADOC Commissioner, other ADOC employees, and ADOC legal counsel. The ADOC credits this

83. *Smith*, 21-10348, slip op. at 11–12.

84. Doc. 32 at 23.

85. *Id.* at 24–25.

> exclusionary policy with its demonstrated history of secure, efficient, and dignified executions.[86]

While non-employee medical professionals are used in the IV Team, the district court explained that these individuals do not remain in the execution chamber during an execution.[87]

Second, the court found that disturbances have arisen around executions in the past:

> The ADOC further argues that these strict security measures largely result from both anticipated and actual disturbances leading up to scheduled executions. The ADOC notes, for example, that during the 2010 execution of Holly Wood, his sisters, who were seated in the viewing room, "began to scream and violently bang on the glass window" of the execution chamber. In 2017, during the execution of Torey McNabb, McNabb's brother threatened law enforcement, his mother had to be reprimanded for her behavior in the viewing room, and McNabb used his final words to curse the ADOC. That same year, death row inmates at Holman protested a fellow inmate's execution by staging "a coordinated refusal to obey orders." Then, in 2019, in the moments before the execution of Christopher Price, Price refused to leave his cell and enter the execution chamber, threatening to "take out" anyone who came into his cell, thereby resulting in his forced extraction.[88]

This evidence shows what can go wrong around an execution even with the ADOC's security measures in place. These instances show how high tensions can run during an execution—and how security measures are necessary to protect the security of the execution chamber, the ADOC employees, the visitors to the prison, and the other inmates. As Justice Kavanaugh noted, "Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in

86. *Id.* at 26.
87. Doc. 32 at 26 n.17.
88. *Id.* at 27 (footnote and citations omitted).

medical procedures. States therefore have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions."[89]

Third, the district court also found that the ADOC has a specific interest in excluding religious advisors from the execution chamber. In response to Smith's argument that the history of the institutional chaplain attending executions undermines the ADOC's compelling interest, the district court explained:

> Despite these incidents involving non-ADOC employees, Smith argues that the ADOC's history of allowing an ADOC-employed prison chaplain in the execution chamber undercuts the ADOC's argument that the presence of a spiritual advisor implicates a compelling security interest. But the ADOC also has presented evidence showing that security concerns exist even with ADOC-employed chaplains and religious volunteers. Holman's long-serving chaplain provided testimony that a previous prison chaplain was fired after smuggling contraband into the prison. The chaplain further testified that multiple religious volunteers have been reprimanded or banned from returning to the prison for breaking prison rules. Thus, the ADOC posits that even ADOC-employed or affiliated chaplains can pose a risk inside the prison.[90]

Moreover, the Holman chaplain is an ADOC employee, and he was trained as a member of the execution team as part of his job. This level of training is not provided to religious volunteers, nor can it be. The execution team is composed of ADOC employees who work and train together, whereas religious volunteers are just that—volunteers. Spiritual advisors are not invited to execution rehearsals, and the ADOC has no way of determining either their intentions or their mental fortitude.

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89. *Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring in stay).

90. Doc. 32 at 27–28. As a point of clarity, the "previous prison chaplain" was an assistant chaplain, a top-ranking religious volunteer, instead of an employee. *See* Doc. 27, Ex. F at 2; *id.*, Ex. G at 73.

Fourth, in light of all the evidence presented by the Commissioner, the district court found that the ADOC "has a compelling governmental interest 'of the highest order' in preserving the solemnity, safety and security of its executions as well as a 'moral obligation to carry out executions with the degree of seriousness and respect that the state-administered termination of human life demands.'"[91] Then it explained why:

> Given the evidence concerning security threats during executions—both experienced and anticipated—the vetting of execution team members, and the history of disciplinary problems with ADOC-employed chaplains and religious volunteers, combined with the inherently emotional nature of executions, the court finds that the ADOC has a compelling interest in maintaining safety, security, and solemnity during its executions, including what transpires during the execution and who is allowed inside the execution chamber.[92]

The district court considered Smith's evidence but found it insufficient to dissuade the court from its conclusion that Commissioner Dunn had established a compelling governmental interest. Smith offered as an expert witness Emmitt Sparkman, who spent forty-one years working in state and private prisons in Texas, Kentucky, and Mississippi. Sparkman opined that there would be no heightened security risk in allowing free-world volunteers into the execution chamber.[93] But he admitted that when he worked in a penal setting, he never had occasion to admit a non-employee to the execution chamber or to study the risks of doing so. And he admitted that had such a request been made while it was his job to maintain prison security, he would

91. Doc. 32 at 29 (quoting *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 507 U.S. 520, 546 (1993)).

92. *Id.* at 29–30.

93. Doc. 32 at 28.

have first looked to see what other States were doing.[94] As documented below, no State allows free-world volunteers into execution chambers.

The Commissioner, in turn, presented the testimony of a former warden and now senior ADOC official with thirty-eight years of experience in the ADOC system.[95] Simply put, she disagreed with Sparkman's opinion—and she explained why. She noted outbursts that have occurred in the execution setting, but attributed the lack of more serious breaches of security or solemnity to the careful measures ADOC has taken to secure the process.[96] She is one of the "experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise."[97] Thus, the district court did not abuse its discretion as to this claim, and the Eleventh Circuit properly agreed on this point.

B. ADOC uses the least restrictive means to secure its compelling interest.

While the Eleventh Circuit was willing to grant at least the existence of a compelling governmental interest, it erred by grossly overstepping the bounds of its abuse of discretion inquiry and discrediting the district court's conclusion that Commissioner Dunn showed a substantial likelihood of success as to the "least restrictive means" portion of the RLUIPA inquiry.

A review of the district court's findings is in order at this point. The district court, quoting *Holt*, explained that for the ADOC to satisfy RLUIPA, it was required

94. Doc. 27, Ex. I at 55–59.
95. Doc. 27, Ex. E ¶ 1.
96. *Id.* ¶¶ 9, 16, 18, 26.
97. *Holt*, 574 U.S. at 364.

"not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest."[98] However, the court continued, "[n]othing within the Supreme Court or Eleventh Circuit's RLUIPA decisions appear to suggest . . . that prison officials must refute every conceivable option to satisfy the least restrictive means requirement."[99]

Then the district court discussed the classification levels of individuals who minister to inmates—from the institutional chaplain, an ADOC employee "subject to education, experience, and reference requirements," to the religious volunteers, who need only undergo a training program and pass a background check.[100] Spiritual advisors such as Pastor Wiley fall outside that structure:

> The final level are spiritual advisors, who are likewise non-ADOC employees and are subject to background investigations akin to those conducted for visitors at the facility. These advisors can be anyone the inmate chooses, even a family member, and do not have to be ordained or educated in any particular religion. Spiritual advisors previously unaffiliated with Holman are treated as visitors on the premises and do not undergo any training.
>
> The ADOC contends that its relaxed requirements for spiritual advisors give death-sentenced inmates the maximum possible freedom in choosing the person they wish to provide comfort and guidance in the inmate's final days and hours. The ADOC argues that allowing a free-world advisor not previously known to the ADOC inside the execution chamber would require a heightened background investigation to

98. Doc. 32 at 30 (quoting *Holt*, 574 U.S. at 364).

99. *Id.*; *see also Holt*, 574 U.S. at 369 ("We do no suggest that RLUIPA requires a prison to grant a particular religious exemption as soon as a few other jurisdictions do."); *id.* at 371–72 (Sotomayor, J., concurring) ("[N]othing in the Court's opinion suggests that prison officials must refute every conceivable opinion to satisfy RLUIPA's least restrictive means requirement. Nor does it intimate that officials must prove that they considered less restrictive alternatives at a particular point in time.").

100. Doc. 32 at 31.

> evaluate the advisor's "character, ability to follow orders, and connection to the inmate . . . ." Holman's chaplain testified that background investigations of ADOC employees sometimes take months to complete. Consequently, there is no guarantee that an inmate's chosen advisor could undergo a more extensive background investigation in time to be present at the execution. Subjecting spiritual advisors to interviews, training, and heightened background investigation procedures, or requiring advisors to prove a certain level of education and experience, has the potential to restrict which individuals could be approved as spiritual advisors. There is also no guarantee that an inmate's chosen spiritual advisor will pass a background check or vetting. The ADOC tries "to give the inmate as much latitude as possible in selecting a spiritual advisor." Additional vetting, which might limit an inmate's choice of spiritual advisor, would not further this end.[101]

So it is that the district court concluded, "Based on the current record, it appears substantially unlikely that the ADOC could further its compelling security interest while allowing untrained, 'free-world' spiritual advisors to be physically present inside the execution chamber."[102] This conclusion was reasonable and within the district court's discretion.

The Eleventh Circuit panel disagreed, stating, "unless the ADOC has proved that it cannot accommodate Pastor Wiley's presence in . . . Smith's execution chamber, it must allow him to be there."[103] The court emphasized that "Smith presented evidence that on two occasions since July 2020, the federal BOP has allowed the spiritual advisor of the prisoner's choice to be present in the execution chamber"; that the BOP was able to approve inmate-requested spiritual advisors within two weeks of an execution; and that spiritual advisors did not cause disruptions.[104] The

101. *Id.* at 31–33 (citations and footnote omitted).
102. *Id.* at 33.
103. *Smith*, 21-10348, slip op. at 13.
104. *Id.*, slip op. at 13–14.

panel thus remarked, "The practices of other prison systems, like the BOP, is highly probative of whether less restrictive measures can be pursued without compromising a compelling interest," and it chastised the district court for "not consider[ing] the BOP policy in reaching its decision."[105]

But the district court *did* consider the BOP—specifically, the fact that neither party introduced "detailed information regarding the BOP's practice or policy, the security measures the BOP implements prior to approving an advisor's presence, the timeline and procedure of selecting and approving an advisor, the details of what a spiritual advisor can and cannot do inside the chamber or where the advisor can stand, or what measures BOP has in place inside the execution chamber to account for the risks presented by an outside individual's presence at the time of execution."[106]

Moreover, while the Eleventh Circuit fixated on the BOP's sudden, unexplained decision to allow free-world spiritual advisors into its execution chamber, the panel conveniently ignored the fact that of the jurisdictions that currently permit execution by lethal injection, *only* the BOP specifically allows non-employee spiritual advisors into the execution chamber.[107] Of the other twenty-five jurisdictions,

105. *Id.*, slip op. at 14.

106. Doc. 32 at 28 n.19.

107. The execution protocols cited below are available online. *State-by-State Lethal Injection Protocols*, DPIC, https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols (last visited Feb. 10, 2021).

several—including Idaho,[108] Nevada,[109] North Carolina,[110] Tennessee,[111] and Texas[112]—are clear in their public protocols that the condemned's spiritual advisor is not permitted in the chamber. Others, such as Georgia,[113] Indiana,[114] Kentucky,[115] Louisiana,[116] Mississippi,[117] Ohio,[118] Oklahoma,[119] and South Dakota,[120] make provision for visits by spiritual advisors but do not give them a place in the execution chamber. This is a commonsensical rule: given the security concerns and the scrutiny surrounding executions, departments of corrections have a legitimate interest in carrying out safe and respectful procedures, and prohibiting free-world individuals from

108. IDAHO DEP'T OF CORRS., EXECUTION PROCEDURES 16 (Jan. 6, 2012).
109. NEV. DEP'T OF CORRS., EXECUTION MANUAL § 110.01(E) (June 11, 2018).
110. N.C. DEP'T OF PUB. SAFETY, EXECUTION PROCEDURE MANUAL FOR SINGLE DRUG PROTOCOL (PENTOBARBITAL) § V(E)(2) (Oct. 24, 2013).
111. TENN. DEP'T OF CORR., LETHAL INJECTION EXECUTION MANUAL 50 (July 5, 2018).
112. TEX. DEP'T OF CRIM. JUST., EXECUTION PROCEDURE § V(F).
113. GA. DEP'T OF CORRS., GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON LETHAL INJECTION PROCEDURES §§ I.A.8, II.B.6 (July 17, 2012).
114. IND. DEP'T OF CORR., EXECUTION OF DEATH SENTENCE §§ G.10, L.1 (Jan. 22, 2014). Indiana permits a spiritual advisor to remain with the inmate until 10 p.m., while executions are generally carried out after midnight.
115. 501 KY. ADMIN. REGS. 16:001 § 1(2) (2020); 501 KY. ADMIN. REGS. 16:290 § 2(1) (2020); 501 KY. ADMIN. REGS. 16:300 § 4(9)(c)(3) (2020).
116. LA. DEP'T OF PUB. SAFETY & CORRS., DEPARTMENT REGULATION NO. C-03-001 § 7(D)(5) & Attachment E, § 3(H) (Mar. 12, 2014); *see* LA. STAT. ANN. § 15:570(A)(5) (2014) ("A priest or minister of the gospel, if the convict so requests it.").
117. MISS. DEP'T OF CORRS., CAPITAL PUNISHMENT PROCEDURES (REVISED) 11, 19 (Nov. 15, 2017).
118. OHIO DEP'T OF REHAB. & CORR., EXECUTION §§ VI(A)(5)(e), VI(E)(7), VI(G)(1), VI(I)(3) (Oct. 7, 2016).
119. OKLA. DEP'T OF CORRS., EXECUTION PROCEDURES §§ VI(C)(4), VI(F)(9)(a) (Feb. 20, 2020).
120. S.D. DEP'T OF CORRS., EXECUTION OF AN INMATE §§ IV(4)(G), IV(7)(G), IV(8)(F) (July 21, 2018).

being in direct proximity to the condemned at the moment of his death is a minimally burdensome rule that furthers this interest.

Continuing its analysis, the Eleventh Circuit stated that it was "conceive-abl[e]" that the ADOC could conduct a background check on an inmate's outside spiritual advisor before allowing the outsider into the chamber.[121] The court then faulted the ADOC for purportedly "provid[ing] no evidence that adopting this alternative . . . would undermine its compelling interest in security."[122] But the panel got its facts wrong.

A senior ADOC official with over thirty-eight years' experience averred that simply passing a background check had never been sufficient to earn an ADOC employee—much less a visitor—a place in the execution chamber.[123] Rather, the ADOC has deemed it necessary to limit access to the execution chamber to those experienced correctional officers whom the warden has found to be particularly trustworthy.[124] This judgment is bolstered by the fact that even some volunteers and employees who have passed background checks have proven to be security risks.[125]

And if the panel believed that more evidence was required, the court got the law wrong. After all, ADOC employees—the "experts in running prisons and evaluating the likely effects of altering prison rules"[126] —cited examples from their

121. *Smith*, 21-10348, slip op. at 15.
122. *Id.*
123. Doc. 27-6 ¶ 11.
124. *Id.* ¶ 11.
125. *See* Doc. 32 at 27–28.
126. *Holt*, 574 U.S. at 364.

experience and explained that opening up the execution chamber to even vetted outsiders would unacceptably threaten ADOC's compelling interest in conducting secure and solemn executions. This is not mere speculation about hidden contraband in a half-inch beard. It's the considered judgment of the people who have spent decades in the "dangerous prison environment," where 'regulations and procedures' are needed to 'maintain good order, security and discipline, consistent with consideration of costs and limited resources.'"[127] But the Eleventh Circuit's rule gives such judgments little weight, and instead requires States to either (1) predict the unpredictable, or (2) wait until it happens. The first option is impossible, and the second is untenable. If RLUIPA truly does still "afford[] prison officials ample ability to maintain security,"[128] then the preliminary injunction entered by the court of appeals should be vacated.

III. The district court's conclusion that that the balance of the preliminary injunction factors weighed in favor of Commissioner Dunn was well within its discretion.

The court of appeals, erroneously acting to "correct the [district] court's conclusion," found that the balance of the equities favored Smith.[129] In so doing, it again overstepped the boundaries of its review and denied the district court the deference it was due.

127. *Id.* at 370 (Sotomayor, J., concurring) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005)).

128. *Holt*, 574 U.S. at 369.

129. *Smith*, 21-10348, slip op. at 19.

As to the second factor (irreparable harm to Smith) and the fourth (public interest), the district court found the Commissioner's position more persuasive than Smith's:

> The court agrees with Smith that carrying out executions in an unconstitutional manner would result in irreparable injury and fails to serve the public interest. But that is not the case here.
>
> As the court already has noted, Smith is not being deprived of the opportunity to practice his Christian faith. The ADOC's policy of requiring his spiritual advisor to view Smith's execution from an adjacent room, mere feet away and separated only by a glass barrier, does not substantially burden Smith's religious exercise. Because he is not being coerced to violate his religious beliefs, he will not suffer irreparable injury, and the public's interests will not be harmed. Instead, the court finds that the state of Alabama's strong interest in enforcing its criminal judgments and the public interest in seeing capital sentences completed both weigh heavily in favor of denying a preliminary injunction in this case. *See In re Blodgett*, 502 U.S. 236, 239 (1992) (per curiam).[130]

The district court also took into account the untimeliness of Smith's RLUIPA claim:

> What's more—as Smith has himself noted—Smith has been on death row for two decades and was on death row when the ADOC amended its execution protocol almost two years ago. In fact, Smith is represented by the same legal counsel who filed an identical lawsuit on behalf of another death-sentenced inmate on April 4, 2019. Smith could have requested relief much earlier than weeks prior to his execution. He could have brought this action in April 2019 immediately after the change in protocol. Or contemporaneously with the claims in his initial § 1983 suit filed before another judge in this District. Although not fatal, "a delay in seeking a preliminary injunction of even only a few months . . . militates against a finding of irreparable harm." *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).[131]

130. *Id.* at 55.

131. *Id.* at 56 (citation edited, footnote omitted).

The district court's conclusions were reasonable and well within its discretion, and the court of appeals erred by reversing that court's judgment. Smith unduly delayed in filing this lawsuit, and he is not entitled to the benefit of extraordinary relief. "[T]he State's strong interest in enforcing its criminal judgments"[132] extends to finally carrying out Smith's just sentence—now, nearly thirty years after the commission of Smith's heinous crime.

CONCLUSION

The Court should vacate the decision below.

Dated: February 11, 2021

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132. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).