

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

JEFFERSON DUNN,

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Applicant,

v.

WILLIE B. SMITH III,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
AND BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS*
CURIAE IN SUPPORT OF RESPONDENT

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Pursuant to Supreme Court Rule 37.2(b), The Rutherford Institute respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Respondent's opposition to Applicant's Emergency Motion and Application to Vacate Stay of Execution. Counsel for Applicant and for Respondent have consented to the filing of this brief.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute is keenly interested in the protection of individuals' civil liberties from infringement by the government. The issue presented in this case—whether a State may prohibit a spiritual advisor from accompanying an inmate into the death chamber during his execution—implicates significant statutory and constitutional religious protections. The Rutherford Institute brings a particularized analysis to the issues presented in this case, and its experience in these matters will assist the Court in reaching a just resolution.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

February 11, 2021

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INTEREST OF *AMICUS CURIAE*¹

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 39-year history, including *Snyder v. Phelps*, 562 U.S. 443 (2011)², and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). The Institute is keenly interested in the protection of individuals' religious freedoms. The issue presented in this case— whether a State may prohibit a spiritual advisor from accompanying an inmate into the death chamber during his execution—implicates significant statutory and constitutional protections. The Institute brings a particularized analysis to the issues presented in this case, and its experience in these matters will assist the Court in reaching a just resolution.

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

² See *Snyder*, 562 U.S. at 448 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

This case involves a recent policy of the Alabama Department of Corrections (“ADOC”) that prohibits the presence of an inmate’s spiritual advisor in the execution chamber on the purported basis that doing so is the least restrictive means of preserving the “security” and “solemnity” of the execution. The ADOC’s policy runs afoul of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (“RLUIPA”), as well as the First Amendment’s Free Exercise Clause and the Fourteenth Amendment. Because the execution can be carried out without substantially burdening Mr. Smith’s sincerely held religious beliefs, the Court should affirm the holding of the Eleventh Circuit.

ARGUMENT

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.

42 U.S.C. § 2000cc-1(a). The institutionalized-persons provisions provide “very broad protection” to prisoners’ religious liberties, prohibiting state and local institutions from placing arbitrary or unnecessary restrictions on their practices. *Holt v. Hobbs*, 574 U.S. 352, 356 (2015).

Here, the ADOC has prohibited Pastor Wiley, Mr. Smith’s personal spiritual advisor, from being present in the execution chamber when Mr. Smith is executed,

despite the fact that Mr. Smith’s sincerely held religious beliefs require Pastor Wiley’s presence through the laying of hands at the moment of death. There is no dispute that these beliefs are genuine. *See Smith v. Ala. Dep.’t of Corrections*, No. 21-10348, slip op. at 7 (11th Cir. Feb. 10, 2021) (holding that “we do not in any way doubt Smith’s sincerely held religious beliefs.”). Such in-person ministry, including the laying of hands, is protected activity under RLUIPA. *See Holt*, 574 U.S. at 360-61 (“RLUIPA protects any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” (quotations omitted)). While such religious beliefs need not be uncontroversial for protection under RLUIPA and the First and Fourteenth Amendments, a July 2019 statement from scores of faith leaders demonstrates the significance of Mr. Smith’s request:

[W]e are united in recognizing that the right of condemned people to spiritual comfort at the moment of death is a longstanding and widely-recognized religious practice. Each faith tradition marks this sacred moment in different ways, including anointing, singing, praying and chanting, and laying on of hands. These rituals, stemming from sincerely-held religious beliefs, often require the direct assistance of clergy.

Interfaith Statement in Response to the Texas Department of Criminal Justice’s Decision to Remove Chaplains from the Execution Chamber (July 2019) (on file with author). Indeed, as here, the Interfaith Statement goes on to state that “[t]he significance of the physical presence of a chaplain at a condemned person’s last moment is difficult to overstate.” *Id.* Accordingly, ADOC’s alternative – that Smith receive his ministry in another room – “is no substitute for this direct ministry.” *Id.* There can therefore be no dispute that ADOC’s refusal to allow Pastor Wiley to

provide in-person ministry to Mr. Smith at the moment of his execution constitutes a substantial burden on Mr. Smith's religious exercise.

The question confronting this Court is whether the ADOC's policy serves a compelling interest and is the least restrictive means of achieving that interest. *Amicus* accepts that the ADOC has a compelling interest in maintaining security in its institutional facilities, but its refusal to allow Pastor Wiley into the execution chamber – in violation of Mr. Smith's religious beliefs – is not the least restrictive means of furthering that interest. *See Holt*, 574 U.S. at 365 (“If a less restrictive means is available for the Government to achieve its goals, the Government must use it.”).

The evidence below is clear that the ADOC could accommodate Mr. Smith's request that Pastor Wiley be present in the execution chamber to perform in-person ministry. The federal Bureau of Prisons (“BOP”) allows spiritual advisors to be present in the execution chamber. *See Smith*, No. 21-10348, slip op. at 13 (“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. . . . [U]nder the BOP's policy, the BOP was able to approve the prisoner's request for their spiritual advisor about two weeks before their scheduled execution.”). Significantly, and the ADOC does not dispute, the BOP has followed this procedure “without any problems.” *Id.* at 15. If the BOP allows in-person ministry in the execution chamber, there is no reason why the ADOC cannot (and the ADOC does not cite to any differences between the ADOC and BOP that demonstrate

how or why the ADOC could not implement the same policy as the BOP). Indeed, the Eleventh Circuit found it “troubling that the District Court ignored this highly probative evidence” and that it was “especially concerning because the ADOC conceded that it could undertake those very same measures.” *Id.* at 14. That should end the matter.

The ADOC’s Emergency Application to Vacate Injunction of Execution does nothing to change this fact. While the ADOC focuses on the “security” and “solemnity” of executions, it fails to show how or why Pastor Wiley’s presence would impact the execution. In fact, the ADOC fails to list a single concern about Pastor Wiley. Moreover, the ADOC’s examples demonstrate just the opposite – that disruptions around executions occur far more often outside of the execution chamber:

- “[D]uring 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.’”
- “[I]n 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.”

ADOC Br. 22 (citing *Smith*, No. 21-10348, slip. op. at 26) (emphases added and quotations omitted).

Significantly, all of these examples involved conduct *outside* the execution chamber. ADOC points to no evidence that Pastor Wiley would engage in similar conduct or it would somehow be unfeasible for ADOC to conduct a background check of Pastor Wiley or provide him with training (although what “training” ADOC believes Pastor Wiley would require is left unanswered). In fact, ADOC could have done this well before its application reached the Court, but chose not to do so.

Put simply, the ADOC’s argument that it is employing the least restrictive means to facilitate its interests is demonstrably false. Rather, the ADOC’s policy represents its preference for how it wishes to conduct the execution. This is insufficient.

CONCLUSION

For the foregoing reasons, and those stated by Respondent, Applicant’s Emergency Application to Vacate Injunction of Execution should be denied.

February 11, 2021

Respectfully submitted,

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