

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN HENRY RAMIREZ,

Plaintiff-Appellant,

v.

Bryan Collier, Executive Director, Texas Department of Criminal Justice; Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division; Dennis Crowley, Warden, TDCJ, Huntsville, TX,

Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:21-cv-2609, Hon. David Hittner, Judge Presiding

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CAPITAL CASE QUESTIONS PRESENTED

1. Under the Free Exercise Clause and Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc–2000cc–5 (2000), does the State’s decision to allow Ramirez’s pastor to enter the execution chamber, but forbidding the pastor from laying his hands on his parishioner as he dies, substantially burden the exercise of his religion, so as to require the State to justify the deprivation as the least restrictive means of advancing a compelling governmental interest?

2. Under the Free Exercise Clause and Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc–2000cc–5 (2000), does the State’s decision to allow Ramirez’s pastor to enter the execution chamber, but forbidding the pastor from singing prayers, saying prayers or scripture, or whispering prayers or scripture, substantially burden the exercise of his religion, so as to require the State to justify the deprivation as the least restrictive means of advancing a compelling governmental interest?

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Panel Opinion of United States Court of Appeals for the Fifth Circuit Denying Petitioner's Motion to Vacate Order of the United States District Court for the South District of Texas; 21-70004; 2021 WL 4047106 (September 6, 2021).

Southern District of Texas Order Denying Motion to Stay Execution; 4:21-CV-2609 (September 2, 2021).

TABLE OF CONTENTS

Capital Case.....	I
Questions Presented.....	i
Related Proceedings in Lower Federal Courts	II
Table of Contents.....	III
Table of Authorities	IV
Petition for a Writ of Certiorari.....	1
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved.....	1
Statement of the Case	2
Reasons for Granting the Petition.....	8
This Court Should Grant Certiorari to Decide Whether Depriving a Condemned Man of Spiritual Aid During His Execution is a Substantial Burden on His Religious Exercise, When the Operationalization of This Exercise is Only That His Pastor (Already Allowed in the Execution Chamber) be Allowed to Lay His Hands on His Parishioner as he Dies, and Vocalize Prayers and Scripture, When Neither of These Two Actions Would Interrupt the Executioner’s Work.....	8
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

<i>Dunn v. Ray</i> , — U.S. —, 139 S. Ct. 661 (2019)	10
<i>Dunn v. Smith</i> , 141 S. Ct. 725 (2021)	12, 13
<i>Gutierrez v. Saenz</i> , — U.S. —, 141 S. Ct. 127 (2020)	10, 11
<i>Gutierrez v. Saenz</i> , 818 F. App'x 309 (5th Cir. 2020)	11
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015)	8, 9
<i>Murphy v. Collier</i> , — U.S. —, 139 S. Ct. 1475 (2019)	10

STATUTES

28 U.S.C. § 1254(1) (2018)	1
42 U.S.C. § 1983 (2018)	1
42 U.S.C. §§ 2000cc–2000cc–5 (2018)	2, 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ramirez respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Fifth Circuit's opinion denying his motion to stay execution.

OPINIONS BELOW

The Court of Appeals' *per curiam* opinion denying the motion to stay (A1-16) is published. The order from the Southern District of Texas (A17-25) denying the motion to stay is not published.

JURISDICTION

The court of appeals issued its opinion execution on September 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

The Religious Land Use and Institutionalized Persons Act of 2000 is codified at 42 U.S.C. §§ 2000cc–2000cc–5. RLUIPA provides that the government shall not “impose a substantial burden” on an inmate’s “religious exercise” unless the government shows that imposing such a burden can withstand strict scrutiny, meaning the policy “(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).

STATEMENT OF THE CASE

A. The Religious Liberty Interest Involved

Upon death, Christians believe they will either ascend to heaven or descend to hell. For this reason, religious instruction and practice are most needed at the time of death. *See, e.g.*, 2 Timothy 1:6, “For this reason I remind you to kindle afresh the gift of God which is in you through the

laying on of my hands.” This is the most important at the moment of his death. To Christians, the messages conveyed by God are known as the Word. The Word is God. (See John 1:1 “In the beginning was the Word, and the Word was with God, and the Word was God.” (King James).) The vocalization of prayers and exhortations are integral to the Christian faith. (See, e.g., John 1:23 (“He [John the Baptist] said, I am the voice of one crying in the wilderness, Make straight the way of the Lord, as said the prophet Esaias.” (King James).)

Pastor Dr. Dana Moore is an ordained minister who leads a congregation of roughly 200 people at Second Baptist Church in Ramirez’s hometown of Corpus Christi, Texas. See <https://2bc.org/about-us/>. A Ph.D. theologian, Dr. Moore has ministered to Ramirez in the Texas prison since 2016 when Ramirez was accepted as a member at Second Baptist Church. See Graham, Ruth, “On Death Row in Texas, a Last Request: A Prayer and ‘Human Contact’” NEW YORK TIMES August 30, 2021 (available online at <https://www.nytimes.com/2021/08/30/us/on-death-row-in-texas-a-last-request-a-prayer-and-human-contact.html>).

According to an affidavit Pastor Moore submitted in the federal district court, he must lay his hands on Ramirez’s body as he dies as part

of his ministrations. Like all clerics, Pastor Moore vocalizes prayers and scriptures. But the Respondents will not allow Pastor Moore to lay his hands on Ramirez's body as the poison courses through his veins. Nor will Moore be allowed to sing prayers, say prayers or scriptures, whisper prayers or scriptures, move his mouth, or do anything other than stand silently in a corner of the execution chamber.

In other words, Respondents are imposing what may be fairly described as an unholy Trinity of constitutional violations: 1) vocal prayer by a spiritual minister is prohibited as a member of his Church and his flock is dying; 2) a pastor may not read Scripture from the *Bible* aloud to his dying parishioner, and 3) Ramirez will not be allowed to hear any of the spiritual words of comfort by his Church and minister, or the Word of God, or the Holy Scriptures, all banned by Respondents.

B. Course Of Relevant Proceedings

1. Trial and Appellate Proceedings in State Court

John Henry Ramirez was convicted and sentenced to death in 2008 for the 2004 killing of Pablo Castro in Nueces County, Texas. The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and death sentence on direct appeal. *Ramirez v. State*, No. AP-76,100 (Tex. Crim.

App., March 16, 2011). In 2012, the TCCA denied state post-conviction relief, after evidentiary hearing and upon the trial court's report and recommendation. *Ex parte Ramirez*, No. WR-72,735-03 (Tex. Crim. App., October 10, 2012).

2. Federal Habeas

Mr. Ramirez timely filed a petition for writ of habeas corpus in the federal district court. The district court denied relief and a certificate of appealability. *Ramirez v. Stephens*, No. 2-12-CV-410 (S.D. Tex., June 10, 2015).

Mr. Ramirez filed notice of appeal to the United States Court of Appeals for the Fifth Circuit. That court denied a request for certificate of appealability on February 4, 2016. 641 Fed. Appx. 312 (5th Cir. 2016). This Court denied a request for certiorari review on October 3, 2016. 137 S. Ct. 279.

Texas set an execution date on February 2, 2017. On January 27, 2017, Mr. Ramirez moved to substitute counsel and stay the execution date. The Southern District of Texas granted Mr. Ramirez's motion on January 31, 2017. On August 20, 2018, Mr. Ramirez filed a motion for relief from judgment in the United States District Court. The District

Court denied. Mr. Ramirez appealed to the Fifth Circuit, which denied the request for a certificate of appealability on June 26, 2019. 780 Fed. Appx. 110 (5th Cir. 2019). This Court denied certiorari review on March 2, 2020. 140 S. Ct. 1273

3. First Execution is Cancelled After Ramirez Files Spiritual Advisory Suit Under Section 1983

Texas set another execution date of September 9, 2020. In August 2020, Mr. Ramirez filed a “spiritual advisor” claim under Section 1983. This was assigned Southern District cause number 2:20-cv-205. Thereafter, Ramirez and the Texas Attorney General’s Office agreed to withdraw the death warrant in exchange for Ramirez’s withdrawal of then pending civil litigation. Specifically, the Attorney General’s Office and Ramirez reached bargain in which the state agreed to withdraw the execution date in exchange for Ramirez’s agreement to non-suit without prejudice his section 1983 case and to dismiss a funding request under 18 U.S.C. § 3599(f). On August 14, 2020, Nueces County District Court Judge Bobby Galvan of the 94th Criminal District Court withdrew the September execution date in an order in accord with the joint motion to cancel the execution. Subsequently, Ramirez withdrew his funding

motion and filed a motion to non-suit without prejudice to his matters pending in federal court.

4. Ramirez Renewed His 1983 Suit After a New Execution Date Was Scheduled

On August 10, 2021, Ramirez filed a 1983 suit similar to the one filed one year earlier. This time an affidavit from Pastor Moore was attached as an exhibit. Thereafter, the General Counsel of the TDCJ sent counsel a letter on official agency letterhead stating that Pastor Moore would not be allowed to vocalize any prayers in the execution chamber. Ramirez amended his petition to inform the trial court of the functional policy which will control the September 8 execution.

On August 18, 2021, Ramirez filed a motion for a stay of execution in the district court. On September 2, 2021, the district court denied Ramirez's motion. On September 6, 2021, the Fifth Circuit affirmed. Judge Dennis issued a lengthy dissent.

REASONS FOR GRANTING THE PETITION

This Court Should Grant Certiorari to Decide Whether Depriving a Condemned Man of Spiritual Aid During His Execution is a Substantial Burden on His Religious Exercise, When the Operationalization of This Exercise is Only That His Pastor (Already Allowed in the Execution Chamber) be Allowed to Lay His Hands on His Parishioner as he Dies, and Vocalize Prayers and Scripture, When Neither of These Two Actions Would Interrupt the Executioner’s Work.

A. Doctrinal Framework and Baseline Principles

Ramirez sincerely believes that the presence of Pastor Moore in the execution chamber, Dr. Moore’s laying on of hands on him as he dies, and the vocalization of prayers and scripture, will assist his passing from life to death and will guide his path to the afterlife. No court has doubted the sincerity of this religious belief—a belief consistent with Christian teaching and historical practice.

RLUIPA grants “expansive protection for religious liberty,” affording an inmate with “greater protection” than the relevant First Amendment precedents. *Holt v. Hobbs*, 574 U.S. 352, 358, 361 (2015). RLUIPA provides that the government shall not “impose a substantial burden” on an inmate’s “religious exercise” unless the government shows that imposing such a burden can withstand strict scrutiny, meaning the

policy “(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). RLUIPA utilizes a burden-shifting framework. *Holt*, 574 U.S. at 360–62. As an initial matter, Petitioner Ramirez bears the burden of showing that a government policy substantially burdens his religious exercise. *Id.* at 360–61. If he does so, then the burden shifts to the State to show that its policy can withstand RLUIPA’s strict scrutiny standard. *Id.* at 362. This Court has characterized the standard as “exceptionally demanding.” *Id.* at 364. “[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Id.* at 365.

B. “Religious Exercise” Includes The Ministrations That Pastor Moore Would Exercise By Laying His Hands on the Body and Vocalizing Christian Prayers

Under RLUIPA, “religious exercise” is defined broadly to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). “[A] prisoner’s request for an accommodation must be sincerely based on a religious belief and not some other motivation.” *Holt*, 574 U.S. at 360–61. Ramirez’s receipt of physical touching- and hearing prayers imparted by

Pastor Moore to confer spiritual blessings when death is imminent are clearly “exercise[s] of religion.”

C. “Substantial Burden” Is Established Through This Court’s Recent Precedents

The next question is whether TDCJ’s prohibitions on physical touch and vocalized prayers qualifies as a substantial burden. Recently, this Court has considered a number of cases regarding spiritual advisors and executions. *See Dunn v. Ray*, — U.S. —, 139 S. Ct. 661 (2019); *Murphy v. Collier*, — U.S. —, 139 S. Ct. 1475 (2019); *Gutierrez v. Saenz*, — U.S. —, 141 S. Ct. 127 (2020); *Dunn v. Smith*, — U.S. —, 141 S. Ct. 725 (2021).

In his dissent, Judge Dennis explained his interpretation of these cases as follows:

The two most recent cases—*Gutierrez v. Saenz* and *Dunn v. Smith*—address spiritual advisor claims brought pursuant to RLUIPA and are especially relevant to this case. In both cases, the Supreme Court addressed policies—one in Texas and one in Alabama—that prohibited the presence of any spiritual advisor in the execution chamber. Of course, Ramirez’s challenge to the current TDCJ policy is related, though not identical, to Gutierrez’s or Smith’s; after the *Gutierrez* case, Texas changed its policy to allow the presence of a spiritual advisor in the execution chamber. Regardless, because the material facts in all three cases are substantially similar, both *Gutierrez* and *Smith* support the conclusion that

Ramirez has made a strong showing that the current policy imposes a substantial burden on his religious exercise.

In *Gutierrez*, a panel of our court vacated the district court's grant of a stay of execution. The panel determined that, while a policy prohibiting the presence of a spiritual advisor in the execution chamber may have "denied the final measure of spiritual comfort that might be available," such a policy "does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from enjoying some benefit that is not otherwise generally available." *Gutierrez v. Saenz*, 818 F. App'x 309, 314–15 (5th Cir. 2020) (citing *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004), vacated, — U.S. —, 141 S. Ct. 1260, 209 L.Ed.2d 4 (2021)). Days later, the Supreme Court granted *Gutierrez* a stay and directed the district court in that case to make factual findings regarding "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." *Gutierrez*, 141 S. Ct. at 127.

The Court did not provide reasons. However, the grant of a stay and the scope of the Court's directive to the district court strongly suggests that the Court determined that *Gutierrez* had satisfied his initial burden of showing a substantial burden on his religious exercise. After the district court made findings that no security problem would result, the Supreme Court granted certiorari, vacated our court's panel decision, and remanded the case for consideration on the merits. *Gutierrez v. Saenz*, — U.S. —, 141 S. Ct. 1260, 1261, 209 L.Ed.2d 4 (2021). Again, had the Court thought that the policy did not impose a substantial burden on religious exercise, there would have been no reason for vacatur or remand. The

Supreme Court's rulings in *Gutierrez* are thus necessarily a rejection of the panel's reasoning in that case.

In *Smith*, the Court denied Alabama's motion to vacate an injunction prohibiting the execution of Willie Smith without his minister present in the execution chamber. 141 S. Ct. at 725. While the Court did not provide reasons, Justice Kagan did so in a concurrence joined by Justices Breyer, Sotomayor, and Barrett. The concurrence stated that, by barring the presence of his minister in the execution chamber, "Alabama's policy substantially burden[ed] Smith's exercise of religion" because Smith understood his minister's presence in the execution chamber as integral to his faith and part of his spiritual search for redemption, and because "[t]he sincerity of those religious beliefs is not in doubt." *Id.* at 725 (Kagan, J., concurring). The concurrence concluded with the broad statement that "[t]he law guarantees Smith the right to practice his faith free from unnecessary interference, including at the moment the State puts him to death." *Id.* at 726.

Similar to *Smith*, in this case Ramirez alleged, *inter alia*, that the laying on of hands by Pastor Moore is "in accordance with" his "faith tradition," is "necessary to bless [him] at the moment of his death," and that the practice of audible prayer combined with physical touch is based in "Christian scripture." First Amended Complaint at 5-6, ¶17-19. Additionally, Ramirez submitted an affidavit from Pastor Moore stating that the practice of touch has "significance and power," that when he "pray[s] with others in a crisis situation, [he] holds their hand or put[s] [his] hand on their shoulder," and that this is "a significant part of our faith tradition." First Amended Complaint, Exh 2. Similar to *Smith*, the district court in this case did not question the sincerity of Ramirez's religious beliefs, and neither do I. Thus, following *Gutierrez* and *Smith*, because the current policy prohibits

Ramirez from engaging in sincerely-held religious practices, it also imposes a substantial burden on his religious exercise.

In light of *Gutierrez* and *Smith*, it was an abuse of discretion for the district court to determine that Ramirez had not made a strong showing that the TDCJ policy imposes a substantial burden on his religious exercise. For the same reasons, both *Gutierrez* and *Smith* support Ramirez's argument that he has made a strong showing of likely success on the merits and is therefore entitled to a stay. Crucially, once Ramirez makes his initial showing under RLUIPA, the burden shifts to the State to prove that the policy satisfies the statute's strict scrutiny test. *See Holt*, 547 U.S. at 362.

Panel Opinion, A9-13 (footnote omitted).

D. Was This Court's Use of the Word "By His Side" a Maladroit Figure of Speech?

[T]he Eleventh Circuit was right to bar Alabama from executing Smith without his pastor *by his side*. The law guarantees Smith the right to practice his faith free from unnecessary interference, including at the moment the State puts him to death.

Dunn v. Smith, 141 S. Ct. 725, 726 (2021) (emphasis added).

In their Response brief in the Fifth Circuit, the Respondents explained that any fault here really lies with Justice Kagan's maladroit

use of a trifling “figure of speech”: “[H]e asks the Court to read into Justice Kagan’s ‘by his side’ figure of speech with him.”

Ramirez contends that these three rather straightforward words mean what they say: “by his side” does not admit to an interpretation of standing silently and mooted in the opposite corner of the room.

E. There Exist an Abundance of Less Restrictive Alternatives

In nothing filed in this litigation over the past month has anyone with TDCJ explained how the speaking of words of prayer or scriptures by Dr. Moore interferes, unnecessarily or otherwise, with the execution function. This is a problem because the total ban on prayer and scripture ignores many less restrictive alternatives.

If Pastor Moore cannot lay on his hands on Mr. Ramirez as he dies, he could sing his prayers and read scripture while standing next to the gurney. If Pastor Moore cannot stand next to the body, he could sing prayers and read scripture standing away. If he cannot sing and read from that precise point, he can sing and read farther away. If he cannot sing and read, Pastor Moore can say prayers and scriptures. If he cannot

Speak too loudly, he can whisper the prayers and scripture in Ramirez's ear as he loses consciousness.

But no less restrictive alternative cognizes a security rationale requiring the execution chamber to become a godless vacuum.

CONCLUSION

For all of the reasons set forth above and in Mr. Ramirez's other submissions to this Court, this Court should grant the writ of certiorari and stay Mr. Ramirez's execution. It should then either set the case for full briefing, or vacate and remand for further proceedings in the district court.

Respectfully submitted,

/s/ Seth Kretzer

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