Nos. 21-5592 & 21A33

IN THE

Supreme Court of the United States

JOHN HENRY RAMIREZ,
Petitioner,

v.

BRYAN COLLIER, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit,
and Application for Stay of Execution

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD MARSHALL
Chief, Criminal Appeals Division

JENNIFER WREN MORRIS
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
jennifer.wren@oag.texas.gov

Counsel for Respondents

CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari to review a RLUIPA claim based on a prison's execution policy that does not accommodate an inmate's religious preference despite the absence of any other less restrictive policy from another jurisdiction that might accommodate it?

2. Should this Court grant a stay of execution where a plaintiff strategically shifted his litigation posture when TDCJ accommodated his initial religious request, even though he fails to demonstrate a substantial likelihood of success on the merits of his claims?

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BRIEF IN OPPOSITION

Respondents, officials for the Texas Department of Criminal Justice (TDCJ), submit this brief in opposition to the petition for a writ of certiorari and application for a stay of execution filed by John Ramirez.

STATEMENT OF THE CASE

I. Ramirez's Offense and Postconviction Challenges

On July 19, 2004, Ramirez robbed and murdered Pablo Castro, stabbing him twenty-nine times in a convenience store parking lot. Leaving Castro to die, Ramirez robbed a second victim at knifepoint and attempted a third. He then fled to Mexico, where he evaded arrest for three-and-a-half years. *See Ramirez v. Stephens*, 641 F. App'x 312, 314 (5th Cir. 2016). His conviction and death sentence were affirmed on direct appeal and state habeas relief was denied. *Ramirez v. State*, No. AP-76100, 2011 WL 1196886, at *1 (Tex. Crim. App. 2011); *Ex parte Ramirez*, No. WR-72.735-03 (Tex. Crim. App. Oct. 10, 2012) (unpublished order).

Ramirez then turned to the federal forum, but collateral relief was denied by the district court. *Ramirez v. Stephens*, No. 2:12-cv-410, 2015 WL 3629639 (S.D. Tex. June 10, 2015) On appeal, Ramirez was unable to obtain a certificate of appealability. *Ramirez v. Stephens*, 641 F. App'x (5th Cir. 2016), *cert. denied,* 137 S. Ct. 279.

II. TDCJ's Execution Procedures and Ramirez's Requests for Accommodations Thereunder

In 2019, this Court stayed TDCJ Inmate Patrick Murphy's execution based on his 42 U.S.C. § 1983 claims challenging TDCJ's refusal to permit a Buddhist spiritual advisor in the execution chamber while permitting Christian or Muslim chaplains to be present. *Murphy v. Collier*, 139 S. Ct. 1475 (2019). Finding TDCJ's former policy unconstitutional for its denominational discrimination, Justice Kavanaugh provided two potential solutions: TDCJ could allow all inmates to have an advisor of their religion in the execution chamber, or it could exclude all such advisors from the chamber, allowing them in the witness viewing room instead. *Id.* at 1475–76 (Kavanaugh, J., concurring).

A. Post-*Murphy* policy

Shortly after Murphy's execution was stayed, TDCJ changed its protocol such that no religious advisors were permitted in the execution chamber. Pl.'s Ex. 1 at 8, *Ramirez v. Lumpkin*, No. 2:12-cv-410, DE 99-1. To accommodate inmates' religious practices, TDCJ facilitated visitation on execution day with a TDCJ chaplain or an outside spiritual advisor. During the execution, the advisor was allowed to be present in the witness viewing room. Pl.'s Ex. 1 at 8, *Ramirez v. Lumpkin*, No. 2:12-cv-410, DE 99-1.

TDCJ's post-*Murphy* policy formed the basis of several § 1983 complaints—including Ramirez's in August last year—alleging that their spiritual advisor's exclusion from the chamber violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First Amendment. Compl., *Ramirez v. Collier*, et al., 4:21-cv-2609, DE 1 (S.D. Tex. Aug. 7, 2020); Compl., *Gutierrez v. Saenz,* et al., No. 1:19-cv-185, DE 1 (S.D. Tex. Sept. 26, 2019); Compl., *Busby v. Collie*r, *et al.*, No. 4:21-cv-297, DE 1 (S.D. Tex. Jan. 29, 2021) (with intervenor plaintiffs Quintin Jones and Ramiro Ibarra); Compl., *Gonzales v. Collier*, No. 4:21-cv-828, DE 1 (S.D. Mar. 12, 2021). Gutierrez obtained a stay of execution based on his § 1983 complaint. *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020). And after this Court declined to vacate a stay based on Alabama's similar policy,[1] the State agreed to withdraw Ramirez's previous execution date in exchange for his nonsuit of his § 1983 complaint. Notice Non-Suit Without Prejud. at 2, *Ramirez v. Collier et al.*, No. 2:20-cv-205, DE 2 (S.D. Tex. Aug. 14, 2020). TDCJ's adoption of its current execution policy followed.

B. Current policy

TDCJ published a revised Execution Procedure on April 21, 2021, which delineates a process for the approval of an inmate's spiritual advisor to be

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[1] *See Dunn v. Smith*, 141 S. Ct. 725 (2021).

present in the execution chamber at the time of the execution. Defs.' Ex. 1, *Ramirez v. Collier*, No. 4:21-cv-2609, DE 13-1. The following process applies:

- "Upon the inmate's receipt of the Notification of Execution Date . . ., the inmate shall have thirty (30) days to submit a request in writing to the Death Row Unit Warden to have a TDCJ Chaplain or the inmate's spiritual advisor present inside the execution chamber during the inmate's scheduled execution."
- "The inmate's spiritual advisor must be included on the inmate's visitation list and have previously established an ongoing spiritual relationship with the inmate demonstrated by regular communications or in-person visits with the inmate before the inmate's scheduled execution date."
- The death-row inmate must provide the Death Row Unit Warden with contact information for the spiritual advisor, after which the warden will contact the spiritual advisor.
- Within fourteen (14) days of being contacted by the Death Row Unit Warden, the spiritual advisor will provide specific credentials demonstrating his official status as a spiritual advisor.
- TDCJ will perform a background check on the spiritual advisor.
- Before approval to be in the execution chamber, "the spiritual advisor must satisfactorily complete a two (2) hour, in-person orientation with a staff member of the Rehabilitation Programs Division a minimum of ten (10) days before the inmate's scheduled execution date."

If denied the presence of his requested spiritual advisor, the inmate may appeal to the Director of the TDCJ Criminal Institutions Division. Defs.' Ex. 1, DE 13-1 at 4.

C. Ramirez's requests for TDCJ's accommodations

1. Ramirez's asserted religious needs in 2020

Ramirez filed the above-mentioned § 1983 complaint challenging TDCJ's former policy on August 7, 2020. In it, he explicitly disavowed any need for his

pastor's touch in the execution chamber. Compl. at 5, *Ramirez v. Collier*, No. 4:21-cv-2609, DE 1 (S.D. Tex. Aug. 7, 2020). He has since changed his position.

2. Ramirez's asserted religious needs in 2021

After the 94th District Court of Nueces County issued an order on February 5, 2021, setting Ramirez's execution for September 8, 2021, it released Ramirez from any obligation he had pursuant to his agreement with the State:

> On August 12, 2020, Judge Tagle entered an order granting discovery in *Gutierrez v. Saenz et al.*, 1:19-cv-00185. The state of law regarding § 1983 actions alleging . . . RLUIPA violations will certainly be in a different place by the time any future death warrant is entered against Ramirez; at that point, Ramirez will re-calibrate any new 1983 petition he seeks to bring.

Notice of Non-Suit Without Prejud. at 2, *Ramirez v. Collier*, et al., No. 2:20-cv-205, DE 2.

On April 12, 2021, Ramirez submitted a step 1 grievance with TDCJ, in which he complained, as he did in preparation for his previous § 1983 complaint, about his pastor's exclusion from the execution chamber. Pl.'s Ex. 4 at 1, *Ramirez v. Lumpkin*, No. 2:12-cv-410, DE 99-4; Compl. at 5, *Ramirez v. Collier*, et al., 2:20-cv-205, DE 1. Ramirez said nothing about a need for physical contact. On April 14, 2021, TDCJ denied his step 1 grievance. Pl.'s Ex. 4 at 2, *Ramirez v. Lumpkin*, No. 2:12-cv-410, DE 99-4. On April 16, Ramirez filed a step 2 grievance. And on May 4, 2021, TDCJ responded, providing him

with instructions on how to proceed to ensure his chosen spiritual advisor's presence in the chamber with him. Pl.'s Ex. 4 at 5; *Ramirez v. Lumpkin*, No. 2:12-cv-410, DE 99-4.

A month after TDCJ agreed to accommodate Ramirez's request, Ramirez's counsel emailed TDCJ General Counsel, Kristen Worman, requesting that Pastor Moore be allowed to make physical contact with Ramirez during his execution. Defs.' Ex. 2, *Ramirez v. Collier*, 4:21-cv-2609, DE 13-2. Nine days later, Ms. Worman responded that TDCJ does not allow an inmate's spiritual advisor to touch him after they enter the execution chamber. Defs.' Ex. 2, *Ramirez v. Collier*, 4:21-cv-2609, DE 13-2.

On June 14, 2021, Ramirez filed a step 1 grievance, complaining that his advisor would not be able to make physical contact with him during his execution, and, on July 2, 2021, TDCJ denied it. Pl.'s Ex. 4 at 3–4, *Ramirez v. Lumpkin*, No. 2:12-cv-410, DE 99-4. Ramirez subsequently filed a step 2 grievance, which was also denied.

On June 17, 2021, Ramirez submitted a written request to the warden for his spiritual advisor, Pastor Dana Moore, to be present with him in the chamber during his execution. TDCJ verified Pastor Moore's credentials and completed his background check. Pastor Moore attended the required execution orientation and was cleared to go into the chamber with Ramirez during his execution. If he engages in any behavior found to be disruptive to

the execution procedure, he is subject to removal from the Huntsville Unit. Defs. Ex. 1, *Ramirez v. Collier*, No. 4:21-cv-2609, DE 13-1 at 10.

On August 10, 2021, Ramirez filed suit against TDCJ pursuant to § 1983 and RLUIPA, based on TDCJ's denial of his request for his pastor to make physical contact with him during his execution. Compl., *Ramirez v. Collier*, 4:21-cv-2609, DE 1. After amending his complaint, *see* First Am. Compl., DE 5, Ramirez sought a stay of execution pending its resolution, Mot. Stay Exec., DE 11.

On the day Defendants' response to his motion for stay was due—and without the court's leave—Ramirez filed a second amended complaint to raise new and unexhausted challenges regarding TDCJ's denial of his August 16 request for his pastor to pray aloud with him during the execution. Sec. Am. Compl., DE 12. Defendants responded to Ramirez's motion for stay. Defs.' Opp. Pl.'s Mot. Stay Exec., DE 13. And Ramirez filed a reply, adding his new, unexhausted challenges to TDCJ's verbal restrictions as support for his motion. Reply Resp. Mot. Stay Exec., DE 14. Upon the Court's leave, Defendants filed a surreply responding to Ramirez's new arguments in his reply. Order Granting Defs.' Mot. Leave File Sur-reply, DE 17; Defs.' Surreply Pl.'s Mtn. Stay Exec., DE 18. The district court denied Ramirez's motion for stay of execution, and Ramirez appealed. The Fifth Circuit affirmed the district

court and denied Ramirez's motion for stay of execution. Op. Den. Stay Exec., *Ramirez v. Collier*, et al., No. 21-70004 (5th Cir. Sept. 6, 2021).

Denying his motion for stay of execution primarily because he failed to establish a likelihood on the success of the merits of his claims, Chief Judge Owen noted another consideration that also justified its denial:

> I also note that in Ramirez's prior 42 U.S.C. § 1983 suit, he asserted that "Pastor Moore need not touch [him] at any time in the execution chamber." Ramirez's present demand that Pastor Moore be permitted to lay hands on him throughout the execution process and until death has occurred, raises concern that Ramirez's change in position has been asserted to delay his execution. Though I do not doubt the sincerity of Ramirez's religious beliefs or those of his pastor, the shifting of Ramirez's litigation posture indicates that the change in position is strategic and that delay is the goal. I do not doubt that Ramirez desires his spiritual advisor to touch him and to pray aloud with and over him until Ramirez's life is ended. But to raise this desire as a constitutional or statutory violation after previously disavowing the need for physical contact during the execution process means that the district court's exercise of discretion was not an abuse of discretion.

Op. Den. Stay Exec. 4 (Owen, C.J., concurring).

Ramirez now seeks certiorari review in this Court and moves the Court to stay his execution.

REASONS FOR DENYING THE PETITION AND A STAY

As to the petition for writ of certiorari, the district court did not abuse its broad discretion in denying Ramirez's stay-of-execution request and the Fifth Circuit did not err in affirming that decision. The appellate court focused

its analysis on Ramirez's failure to demonstrate the likely success of his RLUIPA and First Amendment claims. Also supporting its opinion—and as the district court found—Ramirez fails to show irreparable harm or that the equities favor him. For these reasons, the Court should deny review along with Ramirez's motion for stay of execution.

ARGUMENT

I. The Standard Governing Stay Requests

"Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy *all* of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill*, 547 U.S. at 584 (emphasis added). "Both the State and the victims of crimes have an important interest

in the timely enforcement of a sentence." *Id.* And courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585.

To the extent that declining to issue a stay is a compelling reason for certiorari review, *see* Sup. Ct. R. 10, review of such a decision is deferential and should only be overturned "when the lower courts have clearly abused their discretion." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., concurring).

II. The Lower Courts Did Not Clearly Abuse Their Discretion in Denying a Stay of Execution.

Aside from the single mention included in the opinion Ramirez copies and pastes into his brief, he does not argue that the lower courts abused their discretion in denying a stay. And they did not. The courts below properly applied the law, even when Ramirez did not. *See* Mot. Stay Exec., No. 4:21-cv-2609, DE 14, Order Den. Stay Exec. at 5–9, No. 4:21-cv-2609, DE 23 at 5–9; Appellant's Br., No. 21-70004; Op. Den. Stay Exec., *Ramirez v. Collier*, et al., No. 21-70004 (5th Cir. Sept. 6, 2021). Following leads from Judge Dennis's dissenting opinion in the court below, Ramirez starts anew on the day before his scheduled execution. But still, he fails, as the Fifth Circuit's denial of a stay is supported by the law and the evidence. Hardly the "clearl[] abuse[of]

discretion" that calls for this Court's intervention, this Court should deny Ramirez's petition for certiorari. *See Dugger*, 485 U.S. at 947 (O'Connor, J., concurring).

A. Ramirez failed to show a likelihood of success on the merits, let alone the required substantial showing.

In piecemeal fashion, Ramirez challenged TDCJ's execution protocol for its failure to accommodate his requests for his pastor's verbal prayer and physical contact with him during his execution. He claimed that by not accommodating him, TDCJ violated RLUIPA and the Free Exercise Clause. *See* Appellant's Br., *Ramirez v. Collier*, et al., No. 21-70004. Pl.'s Compl., *Ramirez v. Collier*, et al., No. 4:21-cv-2609, DE 1; Pl.'s Am. Compl., DE 5; Pl.'s Sec. Am. Compl., DE 12. The district court found he failed to make a strong showing of a violation under either. Op. Den. Stay Exec. at 3, No. 21-70004; Order Den. Stay Exec. at 5–8, DE 23. The Fifth Circuit agreed, with Chief Judge Owen explicitly so stating and Judge Higginbotham speaking to the complexities and risks involved in the process and TDCJ's precision in addressing them. Op. Den. Stay Exec. at 3, 6. With Judge Dennis's dissent, Ramirez argues that he has made a substantial showing of a violation under RLUIPA, which they both appear to read to require prison administrators to suffer real consequences to prove the risks they bear to courts before they may

take measures to mitigate them. *See* Op. Den. Stay Exec. at 7–16 (Dennis, J., dissenting).

1. Ramirez's challenge to TDCJ's denial of his verbal-prayer request is unexhausted.

Accepting the Prison Litigation Reform Act's (PLRA's) prefiling exhaustion requirement, Ramirez claimed in the court below that he met it. Appellant's Br. at 3. He asserted his initial physical-contact challenges together with his subsequent verbal-prayer challenges to represent that "[h]e . . . properly exhausted all administrative remedies available to him under institutional policy." Appellant's Br. at 3. But his exhaustion of a challenge to one part of TDCJ's execution procedure does not preemptively exhaust all those that follow. Indeed, the exhaustion requirement was enacted "to 'affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *See Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (quoting *Woodford v. Ngo*, 548 U.S. 81, 87–88 (2006)). Ramirez's exhaustion of his no-contact challenge did not provide TDCJ with an opportunity to resolve the verbal-restriction challenge he did not make.

When Ramirez filed his § 1983 complaint in the district court, he had never asked TDCJ—through any channel—to permit his pastor to pray aloud with him during his execution. Less than one week from his execution, he still has not exhausted this challenge through the grievance system that he must.

Tex. Gov't Code Ann. § 501.008 (West 2021) (establishing prison grievance system as exclusive avenue for exhaustion); *Moussazadeh v. Tex. Dep't of Justice*, 703 F.3d 781, 788 (5th Cir. 2012) (setting out two-step prison grievance process); *Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) ("Under our strict approach, we have found that mere 'substantial compliance' with administrative remedy procedures does not satisfy exhaustion."); *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001) (explaining that a prisoner must "pursue the grievance remedy to conclusion" to properly exhaust his claims).[2] Having failed to file a step 1 and step 2 grievance on his request for his pastor's audible prayer during his execution, Ramirez is too late now. *Seal*, 702 F.3d at 788. Whatever their merits, the PLRA mandates dismissal of Ramirez's claims challenging TDCJ's policy prohibiting spiritual advisors from speaking during executions. *Id.*[3] Relief on claims whose merits cannot be reached is neither likely nor substantial.

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[2] Six days after Ramirez filed his complaint, his counsel wrote a letter to TDCJ's general counsel, asking her to accommodate Ramirez's request for his pastor to pray aloud during his execution. This request, however, does not exhaust Ramirez's claim. *See* Tex. Gov't Code Ann. § 501.008.

[3] While this Court granted stays in *Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019) and *Gutierrez v. Saenz*, 141 S. Ct. 127 (2020), for apparently unexhausted claims, it did not overturn its longstanding precedent regarding mandatory exhaustion under the PLRA. The stays in those cases reflect equitable action taken to avoid repetitious challenges to impermissible policy that, notably, no longer applies. The new protocol does not pose a "religious equality problem" at all, and certainly none that require "prompt resolution." *See Murphy v. Collier*, 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of stay). Nor does Ramirez offer any

2. Ramirez's claims are unlikely to succeed on their merits.

Ramirez asserts that he is likely to succeed on the merits of his RLUIPA claim. Mot. Stay 3. Drawing from the Court's concurring and dissenting opinions and the implications he reads from its silence, Ramirez asserts he has established that TDCJ's no-contact and verbal-restrictions on outside spiritual advisors substantially burdens his religious exercise. Pet. Cert. 10–13. And with his own list—offering six different ways to violate the restrictions he challenges—Ramirez asserts he has shown an abundance of less restrictive alternatives. Pet. Cert. 14. But his arguments disregard the parts of RLUIPA that cut against him.

a. The RLUIPA claim

Under RLUIPA, a state cannot substantially burden an inmate's sincere religious exercise unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a). RLUIPA requires the inmate to initially prove that the state's policy imposes a substantial burden on his sincere religious exercise. A substantial burden is one that requires a petitioner "to 'engage in conduct that seriously violates [his] religious beliefs.'" *Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (quoting *Burwell v.*

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reason why challenges to a State's execution protocol regarding spiritual advisors—and only those—would be categorically exempt from the *mandatory* PLRA exhaustion requirement. *See Ross*, 136 S. Ct. at 1858; *Valentine v. Collier*, 956 F.3d 797, 804–05 (5th Cir. 2020) (vacating injunction against TDCJ, in part, because plaintiffs failed to exhaust under PLRA); (Elrod, J., dissenting).

Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014). But a policy "does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit . . . not . . . generally available or acting in a way that is not otherwise generally allowed." *Adkins*, 393 F.3d at 570 (citing *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450–51 (1988)).

Even if an inmate proves a policy substantially burdens his religious practice, it does not violate RLUIPA if it is the "least restrictive means" of furthering a compelling security interest. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Though its exacting language suggests otherwise, this standard is particularly sensitive to prison security concerns. *Id.* at 723. It allows prison administrators to take prophylactic measures to prevent or reduce such risks before they occur. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 322 (1986). And it requires courts to exercise "due deference to the experience and expertise of prison administrators in establishing . . . procedures to maintain . . . order, security and discipline, consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 723.

i. TDCJ's refusal to accommodate Ramirez's requests does not substantially burden his religious exercise.

Defendants maintain that Ramirez fails to establish that TDCJ's refusal to accommodate his requests substantially burdens his religious exercise. Only

the dissent in the lower court explicitly addressed the issue. *See* Op. Den. Stay Exec. 8–12. Copying and pasting the dissent, Ramirez claims that, he establishes a substantial burden by alleging one. *See* Pet. 10–13. From *Dunn*'s[4] concurrence and *Gutierrez*'s[5] silence, Judge Dennis concluded that "the Court" determined that a state's exclusion of a spiritual advisor from the execution chamber substantially burdens religious exercise. Cert. Pet. 11 (citing Op. Den. Stay Exec. at 9–13). Drawing a line the majority of the Court has not, Justice Dennis interpreted Alabama's imposition of a substantial burden to hinge upon the Smith's religious sincerity and assertion that his minister's presence was "integral to his faith." Op. Den. Stay Exec. at 11. Judge Dennis went too far.

Applying Judge Dennis's substantial-burden framework—which requires no burden at all—Ramirez challenges TDCJ's policy remedying the former policy's exclusion. Having availed himself of TDCJ's accommodation allowing him to choose a pastor to accompany him into the chamber, Ramirez argues that it substantially burdens his religious exercise because it restricts the pastor's behavior inside the chamber. Like Smith, Ramirez asserts his religious sincerity and claims his pastor's physical touch and audible prayer

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[4] *Dunn v. Smith*, 141 S. Ct. 725 (2021).

[5] *Gutierrez v. Saenz*, 141 S. Ct. 1260 (2021).

are necessary to his faith tradition. *See* Pet. Cert. 12. But Judge Dennis and Ramirez have it wrong.

If all it takes to establish a substantial burden is sincerity and an integral belief, a plaintiff could establish a state's substantial burden to his religious exercise by saying so. To be sure, this Court has held that courts should not inquire into religious sincerity or centrality, thereby relieving Ramirez from any need to prove either. *See Hobby Lobby*, 573 U.S. at 725 (declining to ascertain whether sincerely held beliefs "are mistaken or insubstantial"). And considering RLUIPA's explicit ambivalence about "whether or not [religious exercise is] compelled by, or central to, a system of religious belief," it is curious that Judge Dennis imputes centrality into the statute's burden. His contention that a plaintiff might demonstrate the *state's* imposition of a substantial burden with *his* assertion of the centrality of *his* beliefs is itself difficult to follow, and even more when considered alongside the statute's explicit disregard therefor.

The problem with Judge Dennis's analysis is that it confuses RLUIPA's broadening of protected religious behavior with a softening of the petitioner's burden in establishing the state's violation thereof. *After* an inmate establishes his religious sincerity in the requested accommodation, he must show that the state's policy substantially burdens his religious exercise. This Court's substantial burden jurisprudence draws the line in a different place than

Judge Dennis did. Looking to the prison's policy and its impact—as opposed to the inmate's level of conviction—the Court has found that a prison policy substantially burdens an inmate's religious exercise where it requires him "to 'engage in conduct that seriously violates [his] religious beliefs.'" *Holt v. Hobbs*, 574 U.S. at 361 (quoting *Hobby Lobby*, 573 U.S. at 720; *see also Murphy v. Collier*, 139 S. Ct. at 1484 (Alito, J., dissenting) (noting that substantial burden in previous cases were based on "regulations that compel[led] an activity . . . practitioner's faith prohibits").[6]

That a state may not impose policies coercing an inmate to do what his religious tenants forbid does not mean that it must accede to his every religious demand. By design, prisons impede inmates' freedom to behave as they might wish, which, necessarily limits some of their religious behavior. When an

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[6] For more than a decade, the circuits have followed the Court's substantial-burden precent. *Adkins v. Kaspar*, 393 F.3d 559, 569–70 (5th Cir. 2004) (holding government action "creates a substantial burden under RLUIPA if it truly pressures the adherent to modify his religious behavior and significantly violate his religious beliefs"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 91 (D.C. Cir. 2017) (same); *New Doe Child #1 v. Congress of United States*, 891 F.3d 578, 590 (6th Cir. 2019) (same); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("resulting from pressure that tends to force adherents to forego religious precepts or . . . [tends to] mandate [] religious conduct"); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (a significantly great restriction or onus upon [religious] exercise"); *Civil Liberties Union for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th 2003) ("[a burden] that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

inmate seeks a special religious accommodation, as Ramirez does, the Court has not instructed as to when a prison's refusal to submit rises to the level of a substantial burden to religious exercise. Certainly, a prison would not impose a substantial burden in declining to transport an inmate to an off-campus service on the day of his execution. Nor would it do so in declining to provide him with religious paraphernalia in the execution chamber.[7] As in incarceration, restrictions are inherent in execution. Determining whether a state's refusal to accommodate rises to the level of a substantial burden turns—not on an inmate's religious sincerity—but instead, on the context in which the policy applies, as well as its broader impact on the inmate's religious exercise.

The district court found TDCJ's current protocol "accommodate[s] Ramirez's religious needs." Order Den. Stay Exec. at 6, DE 23. And it does. Ramirez is allowed to visit with his pastor from 8:00 a.m. to 12:00 p.m. at the Polunsky Unit on the morning of his execution,[8] and then again at the Huntsville Unit from 3:00 to 5:00 p.m. prior to his execution. Defs.' Ex. 1 at 7–8; DE 13-1; DE 14 at 11. For up to six hours, then, Ramirez's chosen pastor may read scriptures and pray aloud with him. *See* DE 14 at 11. And when it is time for his sentence to be carried out, Ramirez himself may pray aloud as a

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[7] Under Judge Dennis's analysis, both would so long as the requesting inmates proclaim their religious sincerity and the centrality of their requests to their faiths.

[8] Ramirez may also choose to visit with his family members during this time.

final statement while his chosen pastor stands with him in the execution chamber. Defs.' Ex. 1 at 11; DE 13-1.[9]

TDCJ is not forcing or enticing Ramirez to do anything. Having amended its policy to facilitate up to six hours of religious visitation and to allow inmates to choose the spiritual advisor who will stand with them in the final moments of their lives, TDCJ drew a line inside the execution chamber. And while this line may limit accommodations believed to enhance Ramirez's blessing, it neither forces him to do what his religious tenants forbid, nor pressures him to modify his religious behavior, as he lies on the gurney in restraints. *See Holt*, 574 U.S. at 361; *Hobby Lobby*, 573 U.S. at 725–26 (discussing Court's findings that non-coercive policies did not substantially burden individuals in their practice of religion); *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450–51 (1988) (stating that policies that have "incidental effects . . . which may make it more difficult to practice religions" do not require the state's justification, provided they do not coerce individuals to violate their religious

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[9] In his dissent, Judge Dennis asserts that the measures TDCJ has taken to accommodate Ramirez's religious exercise are irrelevant because *Holt* made clear that a state could not remedy its substantial burden by providing alternative means of religious practice. But in *Holt*, the substantial burden was established—by a prison rule that required an inmate to shave his beard despite his religious tenants forbidding it—and the Court found the substantial burden could not be remedied by the prison's provision of a prayer rug and other accommodations. Here, Defendants have not required Ramirez to do anything that violates his faith. That they have also gone to great lengths to accommodate his religious exercise is relevant—not to undo a substantial burden already imposed, but to reiterate that none has been.

beliefs); *Murphy v. Collier*, 139 S. Ct. at 1484 (Alito, J., dissenting) (noting that substantial burden in previous cases were based on "regulations that compel[led] an activity . . . practitioner's faith prohibits"); *accord Brown*, 929 F.3d at 229.

If passing without another's benediction and spiritual hands upon him violates his religion, one would have expected Ramirez to say so. But he still has not. What he does say is that he is sincere. But under the Court's controlling precedent, Ramirez's sincerity does not establish that the state acted in a manner that substantially burdens his religious exercise. *See e.g., Hobby Lobby*, 573 U.S. at 724 (distinguishing sincerity and substantial burden inquiries). Ramirez's complaint establishes that TDCJ's policy prevents him from enjoying a benefit in the execution chamber that it appears none do, irrespective faith. *See* Pet. Cert. at 8 (claiming that accommodation will "assist his passing" and "guide his path to the afterlife"). Ramirez needs more than the incidental effects he has shown. *See Holt*, 574 U.S. at 361; *Hobby Lobby*, 573 U.S. at 725–26; *accord Adkins*, 393 F.3d at 570 (applying *Lyng* to hold policy preventing adherent from enjoying some benefit not generally available is not a substantial burden).

Finally, Ramirez's case is distinct from those of the Texas inmates who preceded him for two reasons. First, the burden Murphy and Gutierrez suffered from TDCJ's previous policies was necessarily greater than the one

Ramirez claims. Second, Murphy and Gutierrez challenged policies that deprived them of a benefit enjoyed by other similarly situated inmates—with Murphy establishing a deprivation due to his faith, and Gutierrez establishing a retrospective deprivation under the previous policy. Ramirez identifies no inmate, in Texas or anywhere, whose chosen spiritual advisor has been permitted to touch and pray with him as his execution was carried out.

Ramirez fails to make a strong showing that TDCJ's uniform restrictions on outside spiritual advisors substantially burden his—or anyone's—religious exercise. *See, e.g.*, *Adkins*, 393 F.3d at 570; *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450–51 (1988). While the lower court did not explicitly so find, its denial of the stay finds support in Ramirez's failure to make a strong showing that he meets his burden on this factor.

ii. Ramirez fails to make a strong showing rebutting that TDCJ's policy satisfies the least restrictive means test.

In addition to the strong showing of TDCJ's imposition of a substantial burden to his religious exercise, Ramirez must make a strong showing that the State will not meet its burden of establishing that the policy is the "least restrictive means" furthering a compelling security interest. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). The lower court found that he did not. Deferring to this Court's recent comparative analysis of state and federal prison policies, the appellate court explained that Ramirez failed to identify

any jurisdiction in which outside spiritual advisors are permitted to pray aloud and make physical contact with an inmate during his execution. Op. Den. Stay Exec. at 3–4 & n.4 (Owen, C.J., concurring) (citing Justice Kagan's and Kavanaugh's comparisons in their respective concurring and dissenting opinions in *Smith*, 141 S. Ct. at 726–27), 5–6 & n.8 (Higginbotham, J., concurring) (citing Federal Bureau of Prison (BOP) and various state policies reflecting universal reluctance to allow individuals access to the execution chamber beyond the medical team). He fails again in this Court.

Well aware, he takes a different tact to shift the blame and his burden to Respondents. He asserts that "over the past month" no one from TDCJ has explained how Dr. Moore's audible speaking might interfere with the execution. Cert. Pet. 14. To be clear, one month ago, Ramirez had not even asked TDCJ if his pastor could pray aloud during his execution. The first time he made any argument that might warrant the response to which he claims he is entitled was in his reply brief in the appellate court. And still, today, on the eve of his execution, he has not taken any steps to exhaust his claim through the proper channels "to 'affor[d TDCJ the] time and opportunity to address complaints internally." *See Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (quoting *Woodford v. Ngo*, 548 U.S. 81, 87–88 (2006)). Ramirez's counsel asked TDCJ for the first time on August 16, 2021—six days after he filed his § 1983 complaint and two days before he filed his stay motion—whether it would allow

his pastor to pray aloud during his execution. Upon TDCJ's prompt response, informing counsel that its policy prohibits such, Ramirez asked the federal district court to intervene, two weeks prior to his execution. Pl.'s Sec. Am. Compl., DE 12. Now, on the eve of his execution, he asks this Court to intervene based on a list, in which he proposes six different ways to verbally disrupt the execution process. Pet. Cert. 14–15.

Ramirez's list of six violations to TDCJ's verbal restriction does not help him establish the likely success of his claim, as required for the stay he seeks. *Hill*, 547 U.S. at 584 (emphasis added). To the extent that his half-hearted argument is a nod to Justice Dennis's assertion that RLUIPA's burden-shifting framework somehow releases him from his instant burden for the stay he seeks, it is misinformed. While RLUIPA's burden shifts in the normal course of proceedings, this is not that. That Ramirez failed to file his § 1983 complaint in time to "allow [for] consideration of the merits without . . . a stay" results in a "strong presumption against the grant of a stay." *Nelson*, 541 U.S. at 649–50. To overcome the presumption, he must, among other factors, demonstrate a substantial showing of the likelihood of success on the merits of *his* claim in support of *his* request for a stay. This likelihood-of-success-on-the-merits burden he carries does not shift to the Respondents to require them to show a strong likelihood that their defense will prevail in order to avoid a stay. If it did, Ramirez would be entitled to a stay based on the inverse of his burden,

whereas *Hill* makes plain that he is not. 547 U.S. at 584.[10] To demonstrate a strong likelihood he will prevail, Ramirez must show a strong likelihood that Respondents will not meet their burden (assuming Ramirez meets his burden in the first place). As shown below, he fails.

In the lower courts, Ramirez called the security interests informing TDCJ's current execution "hypothetical," "illusory," and "invisible." Pl.'s Am. Compl. at 11–13, DE 5; Appellant's Br. At 25. Since TDCJ has accommodated his chosen pastor's presence in the chamber and devoted its resources to mitigate associated risks, he suggests that there are none. *See, e.g.*, Appellant's Br. at 13, 25; Pet. Cert. 14. But as the lower court recognized, RLUIPA defers to the expertise of prison officials who create intricate and exacting execution protocols to reduce risks, Op. Deny Stay Exec. at 5–6 (Higginbotham, J., concurrence), not to petitioners who disregard the risks they do not bear.

Both the BOP and TDCJ understand the real risk posed when outside spiritual advisors are invited into the execution chamber. *See* Order re Security Risks at 13, *Gutierrez v. Saenz et al.*, No. 1:19-cv-185, DE 124 (noting BOP's no-contact and verbal restrictions placed on spiritual advisor during

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[10] And it certainly does not, as Justice Dennis suggests, require Respondents to establish their burden without qualification. Such burden shifting at this stage would saddle the State—prejudiced by Ramirez's late filing—with an absolute burden to refute Ramirez's claim. If a stay is granted based on the State's failure to conclusively meet its burden, Ramirez is necessarily absolved of his own.

execution). The courts below properly recognized that prisons have a compelling interest "in maintaining an orderly, safe, and effective process when carrying out an irrevocable, and emotionally charged, procedure." Op. Den. Stay Exec. at 4; Order Den. Stay Exec. at 7 (citing *Murphy v. Collier*, 139 S. Ct. 1475, 1475-76 (2021) (Kavanaugh, J., concurring)); *see also* Order re Security Concerns at 19, 24, *Gutierrez*, No. 1:19-cv-185, DE 124. Indeed, the Justices on this Court who have written or signed an opinion on the issue have acknowledged that allowing an outsider into the chamber poses a security risk. *See Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring); *Smith*, 141 S. Ct. at 725–26 (Kagan, J., concurring, joined by Breyer, J., Sotomayor, J., and Barrett, J.) and (Kavanaugh, J., dissenting); *accord* Order re Security Concerns at 19, *Gutierrez*, No. 1:19-cv-185, DE 124 (recognizing that "precaution requires precisely crafted policy" for executions). To mitigate this risk, they have offered potential solutions, sanctioning the BOP's execution policy as one of them. *Dunn*, 141 S. Ct. at 726.

Following this advice, TDCJ implemented its current policy, which tracks the BOP's risk-mitigation protocol for executions involving outside spiritual advisors in the chamber. Both impose physical contact and verbal restrictions that preclude the accommodations Ramirez seeks. Ramirez fails to acknowledge the BOP's policy at all, much less that it is, in all relevant parts, the same as the one he complains of.

To show that the BOP's and TDCJ's policies are not the least restrictive means to further their security interests, Ramirez needs to identify, at the very least, a policy less restrictive. Having none, he mischaracterizes Respondents' arguments below and refers to figurative language in a concurring opinion as a holding of the Court. Pet. Cert. 13–14 (quoting *Smith*, 141 S. Ct. at 726). Respondents maintain that the concurring opinion is not controlling and that Ramirez's speculation—about the literal distance Justice Kagan envisioned between an inmate and his advisor when she wrote that walls could not separate them—does not establish a less-restrictive policy that every state must follow. Further, the size of the execution chamber exposes Ramirez's hyperbole for what it is. As can be seen from the photographs of the chamber, Ramirez will be on the gurney in the middle of the chamber, while his pastor stands in his "immediate physical presence," less than half the gurney's length away from him. *See* Defs.' Supp. Ex. 1-A, DE 21.

What remains is Ramirez's exaggeration of TDCJ's policy to "require[e] the execution chamber to become a godless vacuum." Pet. Cert. 15. But Justice Kagan's and Justice Kavanaugh's recent discussion of the BOP's policy (with same relevant restrictions) leaves a different impression, as it was cited as the "less restrictive" model policy that effectively mitigates the risk of an outsider's presence in the chamber. *See Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring); *Smith*, 141 S. Ct. at 725–26 (Kagan, J., concurring, joined by

Breyer, J., Sotomayor, J., and Barrett, J.) and (Kavanaugh, J., dissenting). If the Court's Justices knew of a policy less restrictive than the BOP's, none mentioned it. *See Smith*, 141 S. Ct. at 725–26. And because Ramirez does not either, he fails to establish a strong showing of likely success on his RLUIPA claim.

If the Court intervenes to override the policy it advised TDCJ to enact, it is sure to entangle itself and its lower courts in the details of a complex process. *But* see *Cutter*, 544 U.S. at 726 ("Should inmate requests for religious accommodations . . . jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."); *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (noting that federal courts are not to become "enmeshed in the minutiae of prison operations"); *Odneal v. Pierce*, 2009 WL 2982781, at *5 (S.D. Tex. Aug. 27, 2009) ("The Fifth Circuit has explained that federal courts 'are not to micromanage state prisons.'") (quoting *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004)); *cf. Udey v. Kastner*, 805 F.2d 1218, 1221 (5th Cir. 1986) ("We believe that the probable proliferation of claims, and the concomitant entanglement with religion that processing *multiple* claims would require, does constitute a problem that the state has a good reason to avoid.") (emphasis in original). More inmate accommodation requests will be sure to follow—as Ramirez and Gutierrez have proven—in which federal courts will be asked to micromanage the details of where a spiritual advisor may stand, what they

may say, what they may touch, and how they may be guarded. This Court should decline Ramirez's invitation to entangle itself in the minutia of a highly sensitive and secure process that requires elevated control and precision by prison administrators.[11]

Chief Judge Owen correctly found that TDCJ met its burden of establishing its current policy is the least restrictive means of furthering its interest "in the maintaining its orderly, safe, and effective execution procedure." Op. Den. Stay Exec. 4 (Owen, C.J., concurring). Having now declined three opportunities to challenge Respondents' assertions, Ramirez fails to make a strong showing that he will prevail on the merits of his RLUIPA claim. The lower court's denial of Ramirez's motion for a stay was proper, not an abuse of discretion.

b. The Free Exercise claim

Even the dissent in the lower court concluded that Ramirez failed to make a strong showing of likelihood of success on his First Amendment claim. Op. Deny Stay Exec. at 8 (Dennis, J., dissenting). Having failed to identify the governing standard for his claim in either of the courts below, Ramirez fails again in this Court. Nonetheless, it applies: Where a plaintiff claims a prison

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[11] *See, e.g.*, Order at 3, *Gutierrez v. Saenz, et al.*, No. 1:19-cv-185, DE 172 (addressing Gutierrez's request for his advisor to pray uninterrupted for several minutes while touching his shoulder before the lethal injection is administered until he is pronounced dead).

regulation violates his rights under the Free Exercise Clause, courts must apply *Turner*'s reasonableness test. *Turner v. Safley*, 482 U.S. 78 (1987). Under this test, the challenged "regulation is valid if it is reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349 (citing *Turner*, 482 U.S. 78, 89 (1987)); *Brown v. Collier*, 929 F.3d 218, 232 (5th Cir. 2019).

Given the Court's recognition of the security risk posed by an outsider's presence in the execution chamber and proposed mitigation thereof, it would be difficult—if not impossible—to argue that TDCJ's policy is not "reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349 (citing *Turner*, 482 U.S. 78, 89 (1987)); *Brown v. Collier*, 929 F.3d 218, 232 (5th Cir. 2019). Where the BOP prohibits outside advisors from verbally disrupting the execution, Ramirez calls TDCJ's similar prohibition an "unholy Trinity of constitutional violations." *Compare* Order re Security Concerns at 13, *Gutierrez*, No. 1:19-cv-185, DE 124, *with* Pet. Cert. 3. And where Justice Kagan suggests that states might mitigate risks by requiring outside advisors to take a penalty-backed pledge before entering the chamber,[12] Ramirez argues that TDCJ's is a "religious gag order," Appellant's Br. at 27–28, that "violat[es] the First Amendment's religious protections by violating its free speech protections." Reply Resp. Mtn. Stay Exec. at 9–10, DE 14. He threatened in the

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[12] *Dunn v. Smith*, 141 S. Ct. at 726 (Kagan, J., concurring).

district court that TDCJ cannot "get away with" requiring his pastor to take such a pledge. Reply Resp. Mot. Stay Exec. at 10, DE 14.

Ramirez's hyperbole does not enhance the likelihood of the success of his Free Exercise claim. Nor does his multiplication of TDCJ's purported violations based a singular verbal restriction. If TDCJ is imposing an "unholy Trinity of constitutional violations" as Ramirez alleges, *see* Pet. Cert. 4, then the BOP must also be. But given the Court's recent recognition of the BOP's restrictions mitigating legitimate penological interests, Ramirez cannot make a strong showing of a single—much less triple—constitutional violation based on TDCJ's imposition of the same restrictions.

The lower court properly applied the law to find Ramirez failed to make a substantial case of his First Amendment claim. Op. Den. Stay Exec. at 3 (Owen, C.J., concurring), 8 (Dennis, J., dissenting). Accordingly, it did not abuse its discretion in denying a stay on that basis.

B. The State demonstrated that the balance of the equities weighed heavily in its favor.

The district court found that the remaining stay "factors [did] not tip the scales in [Ramirez's] favor," Order Den. Stay Exec at 9, DE 23. While the appellate court did not explicitly speak to the balance, Chief Judge Owen noted one factor that weighs heavily against Ramirez. *See* Order Den. Stay Exec. at 4. Ramirez finally weighs in on the balance in his motion for stay, but it does

not change the outcome. *See* Stay Mot. The equities still favor Defendants, and, thus, support the lower courts' denial of a stay.

1. Delay, opportunism, and a presumption against a stay

Ramirez asserts that Respondents "commended [his] alacrity in litigating his complaint." Mot. Stay 4. But as the tone of the parties' briefs at this stage suggests, Respondents did not make any such commendation in the lower court or anywhere. Ramirez goes on to proclaim his diligence in filing his now-pending § 1983 complaint based on the § 1983 complaint he nonsuited last year. Mot. Stay at 5. Defendants agree that the dismissed suit bears on the equities in this case, but they interpret its impact to the balance differently.

Perhaps if Ramirez's previous and now-pending § 1983 complaints raised the same claims, he could make his recycled-diligence argument with some level of credibility. But his claims in the respective complaints are different in a way that evinces a dilatory motive. *See* Op. Den. Stay Exec. at 4 (Owen, C.J., concurring). Although Respondents do not question Ramirez's religious faith, he cannot dispute that his religious needs changed the moment TDCJ accommodated them. When he complained of his pastor's exclusion from the chamber last year, he explicitly stated that "Pastor Moore need not touch [him] at any time in the execution chamber." Compl. at 5, *Ramirez v. Collier*, No. 2:20-cv-205, DE 1. When TDCJ adopted its current protocol and informed Ramirez of the measures he needed to take to ensure Pastor Moore's presence

in the chamber, Ramirez changed his posture to assert that he had a religious need for the physical touch he previously claimed he did not. *Compare* Compl. at 5, *Ramirez v. Collier*, No. 2:20-cv-205, DE 1 ("Pastor Moore need not touch [him] at any time in the execution chamber."), *with* Compl. at 5, *Ramirez v. Collier*, No. 2:20-cv-205, DE 1 (S.D. Tex. Aug. 7, 2020), *with* Am. Compl. at 5, DE 5 ("Pastor Moore needs to lay his hands on Mr. Ramirez in accordance with his and Mr. Ramirez's faith tradition.").

Accepting Ramirez's desire for his pastor's touch and prayer, Chief Judge Owen read his shifting litigation posture to indicate strategic delay of his execution. Op. Den. Stay Exec. at 4 (Owen, C.J., concurring). His grievances that document the shift occur just after TDCJ informed him it would accommodate his pastor's presence in the chamber and leave little room for doubt.

Ramirez attempts to shift the blame with misrepresentations. He claims that "TDCJ has prevaricated between four (4) different policies concerning spiritual advisors in the execution chamber," when in reality there have been only two. In the lower courts, he attempted to explain his shift in position by tying his request for physical contact to the change in TDCJ's policy. But he never offered an explanation as to why he would not have requested contact under the previous policy that necessarily precluded it. If the Court stays Ramirez's execution so that TDCJ may once again amend its policy to allow

physical contact, Respondents can reasonably expect that Ramirez would move the goalposts yet again. As the district court in *Gutierrez* observed of Gutierrez's identically shifting request for accommodations, "The onus is not on the [] Defendants to guess or assume what claims [the inmate] will ultimately seek. The onus [is] on [the inmate] to request the specific relief he need[s] from the beginning." *See* Order Dismiss Spiritual Advisor Claim as Moot at 10, *Gutierrez v. Saenz, et al.*, No. 1:19-cv-185, DE 172.

Turning to Ramirez's filing of his pending § 1983 complaint, Respondents acknowledge that he did not wait until the eleventh hour or the eve of his execution to file. But they also assert that he did not file in time for the pre-execution resolution he seems to believe he is entitled to. Shifting the blame, Ramirez implies that his agreement to nonsuit his previous complaint somehow absolves him of his future obligation to file any subsequent complaint to allow sufficient time for its resolution without a stay. Mot. Stay 5. But that was not part of the agreement (nor does it make sense standing alone). *See* Not. Non-Suit Without Prej. at 2, *Ramirez v. Collier et al.*, No. 2:20-cv-205, DE 2.

The state court's February 5, 2021, order resetting Ramirez's execution terminated any obligation he may have had to the State. Yet Ramirez waited four months before requesting from TDCJ the accommodation he now seeks. For Ramirez's delay, he expresses his expectation for Respondents to make up

for his lost time by waiving their entitlement to service and time to answer or plead in exchange for waiver. *See* Mot. Stay 6. Additionally, on the eve of Respondents' deadline to respond to his stay motion, Ramirez shifted his litigation posture yet again, supplementing his claims with his latest challenge to TDCJ's verbal restrictions in the chamber. Pl.'s Sec. Am. Compl., DE 12. He then asserted his new challenges in his reply brief as support for his motion to stay his execution. Pl.'s Reply Resp. Mot. Stay, DE 14.

Ramirez—not TDCJ—is responsible for the timing of his suit, along with the briefing schedule and resolution that follows. Similarly, the consequences of his piecemeal briefing, resulting from his ever-shifting demands for religious accommodations, are his to bear. His complaints about the adequacy of TDCJ's response to his arguments should be viewed with skepticism and checked against the timing and substance of his pleadings. *See, e.g.*, Pet. Cert. 14 (complaining that, in the past month, Defendants never responded to an argument he made the first time in his appellate reply brief).

Ramirez's failure to file his complaint in time to "allow [for] consideration of the merits without . . . a stay" invokes the "strong presumption against the grant of a stay." *Nelson*, 541 U.S. at 649–50. His failure to assert his complaints from the beginning should also counsel against a stay.

2. The parties' respective interests

Another argument raised for the first time in his appellate reply brief, Ramirez asserts that he will be irreparably injured if a stay is not granted. Stay Mot. 6; Appellant's Reply Br. 13. His arguments require background that he omits.

a. Pastor Moore's breach of TDCJ's nondisclosure agreement and the parties' reactions thereto

When he attended TDCJ's mandatory spiritual advisor orientation for executions, Pastor Moore signed a nondisclosure agreement, promising not to disclose the names of any TDCJ employees he learned through his participation as a spiritual advisor in Ramirez's execution. As soon as he could, he did precisely what its terms forbid, sending a photograph of the agreement, which included one such employee's name, to Ramirez's counsel. Ramirez's counsel then filed a photograph of agreement on the district court's public docket. To protect the anonymity of the TDCJ employee named in the agreement, Respondents moved to seal Ramirez's reply, which he opposed.

Respondents noted that, while Ramirez may not respect TDCJ's interest in protecting the anonymity of its employees who play a role in the execution process, it is not up to him or his pastor to violate protocol where they perceive the risk to be benign. They further asserted that Pastor Moore's violation of the agreement raises questions about his trustworthiness in complying with

TDCJ's prohibitions against physical contact and audible prayer in the execution chamber—which are also driven by security interests Ramirez does not respect. *See, e.g.*, DE 5 at 11; DE 12 at 13.

Hardly an expression of remorse or mistake, Ramirez suggested that Pastor Moore's breach might implicate TDCJ for asking him to sign the agreement in the first place. Wrong about that, he also falsely alleged that TDCJ "manhandle[ed]" or prohibited Pastor Moore from consulting with counsel. He also preemptively claimed that, by not filing a "motion to exclude" Pastor Moore from the execution chamber, Defendants implicitly found that he poses no risk of any kind. Correcting Ramirez's erroneous belief that the process would involve litigation in the federal forum, Respondents directed him to the applicable policy:

> Both Moore and Ramirez are on notice that "any behavior" by the spiritual advisor "deemed by the CID Director or designee to be disruptive to the execution procedure shall be cause for immediate removal from the Huntsville Unit." Defs.' Ex. 1 at 4, 10, DE 13-1. This discretion continues up to and throughout the execution itself. Defs.' Ex. 1 at 4, 10. That neither the Warden nor the Director have decided to exclude Moore from the execution is of no legal consequence.

Appellee's Br. at 8 n.3.

b. Ramirez's interpretation of Respondents' notice

Ramirez now informs this Court that Defendants have "given strong indication that they will ultimately end up excluding Pastor Moore from the

execution chamber no matter what," and "at this very moment, [Respondents] are threatening to eject Moore from the execution chamber." Mot. Stay 6–7. To prove it, he directs the Court to Respondents' policy referenced above. From the notice, Ramirez infers Respondents malevolent and calculating intent to exclude Pastor Moore and warns that they are ready to do so tonight if the pastor so much as breathes through his mouth. Mot. Stay 8. Ramirez's allegations are as fantastic as they sound.

As the district court properly found, Respondents' concerns regarding Pastor Moore's breach of confidentiality agreement were warranted. Respondents took the measures necessary to protect the TDCJ employee's anonymity and responded to Ramirez's incendiary arguments in a measured and straightforward manner. Ramirez's assertions are baseless. Respondents' policy is simply the "penalty backed pledge" suggested by Justices of this Court in *Smith*, 141 S. Ct. at 726 (Kagan, J., concurring), and does not prove irreparable injury. Respondents merely expect Pastor Moore to honor the promise he made to obey the rules during Ramirez's execution.

c. The real irreparable injury analysis

The district court found that "by not making a strong showing that his claims have merit, Ramirez likewise has not shown a possibility of irreparable injury." Order Den. Stay Exec. at 9, DE 23. Indeed, he cannot show he will suffer irreparable injury absent a stay because his claims will fail in any event.

See, e.g., *Ochoa v. Collier*, 802 Fed. App'x 101, 106 (5th Cir. 2020); *Walker v. Epps*, 287 F. App'x at 375.

Further, Ramirez fails to show irreparable injury, as TDCJ's policy provides him with precisely what he asked for just one year ago. However long-standing the religious tradition, such is insufficient to establish a harm personal to Ramirez, who only began to prioritize the practice when it provided a basis for stalling his third scheduled execution. And even if Ramirez's dilatoriness does not bear on his sincerity, TDCJ's accommodations adequately mitigate whatever speculative harm he may claim based on his unfulfilled request for physical touch and audible prayer. *See Walker v. Epps*, 287 Fed. App'x 317, 376 (5th Cir. 2008) (quoting *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (stating that "[s]peculative injury is not sufficient" to demonstrate irreparable harm).

Any potential harm that may result from TDCJ's refusal to accommodate Ramirez's opportunism is not substantial enough to overcome the State's and victims' interest "in the timely enforcement of [Petitioner's] sentence." *Hill*, 547 U.S. at 548; *Nelson*, 541 U.S. at 649–50. The district court was correct to find that the equities do not tip in Ramirez's favor. Neither it nor the appellate court abused its discretion in denying a stay of execution.

III. The Court Should Deny Ramirez a Stay of Execution.

All the above arguments are relevant to whether this Court should exercise its discretion regarding a stay of execution. In brief, and as discussed more thoroughly above, Ramirez has failed to prove a substantial likelihood of success on his claims. He also fails to prove irreparable harm, and that his interest in his pastor's audible prayer and hands upon him outweighs the State's interest in executing his sentence for the murder he committed more than fifteen years ago. Like the district and circuit court properly did, this Court too should refuse Ramirez a stay of execution.

CONCLUSION

Ramirez has shown no error in the lower court's affirmance of a denial of stay of execution, and he fails to show independent entitlement to such a stay in this Court. A writ of certiorari should not issue, and Ramirez's stay requests should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jennifer Wren Morris
JENNIFER WREN MORRIS
Assistant Attorney General
State Bar No. 24088680
Counsel of Record

Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
jennifer.wren@oag.texas.gov

Attorneys for Respondents