No. 21-5592

IN THE

Supreme Court of the United States

JOHN H. RAMIREZ,

Petitioner,

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. PETITIONER DILIGENTLY PURSUED HIS RELIGIOUS-EXERCISE ACCOMMODATION AND EXHAUSTED AVAILABLE GRIEVANCE PROCEDURES AS TDCJ SHIFTED SPIRITUAL-ADVISOR RULES TO EXCLUDE MORE RELIGIOUS BEHAVIOR FROM THE EXECUTION CHAMBER	1
A. TDCJ Employees Incrementally Unveiled New Piecemeal Restrictions On Religious Exercise That Appear Nowhere In The April 2021 Execution Protocols, Announcing Them Only Through Informal Communications With Petitioner And His Counsel	2
B. The PLRA Poses No Obstacle To Petitioner's Claims	8
II. UNABLE TO SATISFY RLUIPA, THE STATE REWRITES THE STATUTE TO FLIP ITS BURDEN ONTO PETITIONER	13
III. THE COURT SHOULD REMAND RATHER THAN CONDUCT A "FIRST VIEW" OF NEW AND UNTESTED EVIDENCE	18
CONCLUSION	22

TABLE OF AUTHORITIES

Page(s)

CASES

Bucklew v. Precythe, 139 S. Ct. 1112 (2019)............. 14

Cutter v. Wilkinson, 544 U.S. 709 (2005).................. 18

Dunn v. Smith, 141 S. Ct. 725 (2021)........................ 17

Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).................. 16

Gutierrez v. Saenz, 141 S. Ct. 127 (2020) (mem.).. 21

Hill v. McDonough, 547 U.S. 573 (2006) 19

Holt v. Hobbs, 574 U.S. 352 (2015) 17

Johnson v. Blair, 628 S.W.3d 375 (Mo. 2021), *cert. denied*, 2021 U.S. LEXIS 4947 (Oct. 5, 2021) 17

Murphy v. Collier, 139 S. Ct. 1475 (2019) 3

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).. 14

Procunier v. Martinez, 416 U.S. 396 (1974).............. 17

Ross v. Blake, 578 U.S. 632 (2016)............ 9, 11, 12, 13

Walker v. Epps, 287 Fed. App'x 371 (2008) 8

Woodford v. Ngo, 548 U.S. 81 (2006) 9

CONSTITUTION AND STATUTES

U.S. Const. amend. I 7, 18, 22

U.S. Const. amend. VIII 14

42 U.S.C. § 1997e(a) 8

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C. § 2000bb–1(b) 14

42 U.S.C. § 2000cc–2(b) 13, 14

LEGISLATIVE MATERIALS

139 CONG. REC. 26,414 (1993) 14

146 CONG. REC. 16,699 (2000) (joint statement of drafters, Sens. Hatch & Kennedy) 1

S. REP. NO. 103-111, (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1899 14

RULES

FED. R. CIV. P. 15(a) 7

FILINGS IN OTHER COURTS

Brief of Defendants-Appellees, *Ramirez v. Collier*, No. 21-70004 (5th Cir. Sept. 3, 2021) 15

Defs. Collier, Lumpkin, and Crowley's Mot. to Dismiss Pursuant to Rule 12(b)(6), *Ramirez v. Collier*, No. 4:21-cv-02609 (S.D. Tex. Oct. 18, 2021), ECF 28 .... 13, 19

Notice of Non-Suit Without Prejudice, *Ramirez v. Collier*, No. 2:20-cv-00205 (Aug. 14, 2020), ECF 2 7

Order, *Gutierrez v. Saenz*, No. 1:19-CV-00185 (S.D. Tex. Nov. 24, 2020), ECF 124 .... 20, 21

Page(s)

OTHER MATERIALS

TEX. DEP'T OF CRIM. JUST., OFFENDER ORIENTATION HANDBOOK (2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf 4, 11

ARGUMENT

I. PETITIONER DILIGENTLY PURSUED HIS RELIGIOUS-EXERCISE ACCOMMODATION AND EXHAUSTED AVAILABLE GRIEVANCE PROCEDURES AS TDCJ SHIFTED SPIRITUAL-ADVISOR RULES TO EXCLUDE MORE RELIGIOUS BEHAVIOR FROM THE EXECUTION CHAMBER.

The State has forced petitioner to chase a moving target to obtain relief from the substantial burdens on his sincere religious beliefs imposed by TDCJ's rapidly evolving, written—and unwritten—restrictions on spiritual advisors' religious behavior during executions. Petitioner's efforts to secure federally protected in-chamber religious exercise have been responses to the State's tactics, not empty pursuits of delay.

The State makes no effort to hide its disrespect for the religious exercise of death-row inmates like petitioner who seek spiritual comfort in their final moments. It views condemned inmates only as nuisances who "piggyback on one another's lawsuits to make ever-increasing demands on the State." Resp. Br. 18. Indeed, the State demeans petitioner's consistent pursuit of Pastor Moore's ministrations as a "game of ecclesiastical whack-a-mole." *Id.* 37. The State's flippant attitude toward the religious-liberty rights guaranteed even to death-row inmates is disturbing. It smacks of the ignorance and prejudice that drove Congress to enact RLUIPA. *See* 146 CONG. REC. 16,699 (2000) (joint statement of RLUIPA's drafters, Sens. Hatch & Kennedy) (observing that "prison officials sometimes impose frivolous or arbitrary rules" on inmates' religious exercise, "[w]hether from indifference, ignorance, bigotry, or lack of resources").

Although it is possible, as the State argues and this Court has on occasion observed, that death-row inmates may engage in litigation to extend their lives, the record here tells a different story. Any delay has been of the State's own making. It offered to withdraw petitioner's 2020 execution date in exchange for dismissal of then-pending religious-liberty litigation on file mere days. The State then rescheduled petitioner's execution and, two months later, changed execution protocols concerning spiritual advisors. And then incrementally and only informally—through petitioner's conversation with TDCJ's Director of Chaplaincy and an email inquiry from petitioner's counsel to TDCJ's General Counsel—the State began imposing additional, unwritten restrictions on in-chamber, religious behavior that appear nowhere in its 2021 execution procedures and contradict what TDCJ has traditionally permitted in-chamber spiritual advisors to do. As TDCJ imposed these new constraints, petitioner fully exhausted available grievance procedures and complied with the PLRA.

A. TDCJ Employees Incrementally Unveiled New Piecemeal Restrictions On Religious Exercise That Appear Nowhere In The April 2021 Execution Protocols, Announcing Them Only Through Informal Communications With Petitioner And His Counsel.

The State acknowledges that it changed practices in the past two years in response to religious-liberty challenges from death-row inmates and "this Court's suggestions of what the law may require." Resp. Br. 31 n.16. But instead of providing inmates of diverse faiths equal access to religious behavior traditionally

allowed for decades in hundreds of TDCJ executions,[1] the State's strategy, in different forms, has been to achieve parity by ratcheting *down* the religious exercise it tolerates from anyone.

That approach manifested itself in the State's 2019 about-face after *Murphy v. Collier*, 139 S. Ct. 1475 (2019), when it chose to remedy apparent religious discrimination by banning all spiritual advisors from the execution chamber, irrespective of religious or TDCJ affiliation. Resp. Br. 4-5; JA 31, 42-43. In response, numerous inmates sought to preserve a right to ministrations at the time of execution that has been exercised for centuries. *See* Resp. Br. 5; Amicus Br. of Becket Fund 3-19.

When the State set petitioner's September 8, 2021 execution date, TDCJ's post-*Murphy* blanket prohibition against in-chamber spiritual-advisor presence applied. JA 31, 42-43. So petitioner filed the requisite Step 1 and Step 2 TDCJ grievance forms, requesting Pastor Moore's presence in the chamber. *Id.* 50-51 (Apr. 11, 2021), 54-55 (Apr. 18, 2021). Spiritual-advisor presence was not some newfangled concept; it arose against the backdrop of TDCJ's pre-2019 practice allowing spiritual advisors in the chamber to touch and audibly pray over condemned inmates in their final moments. *See supra* n.1.

[1] *See* Petr. Br. 29-33; Amicus Br. of Former Prison Officials 5-11; Amicus Br. of U.S. 2-3; Amicus Br. of Spiritual Advisors/Former Corrections Officials 13-14 (all documenting Texas's longstanding in-chamber religious practices of touch and audible prayer by TDCJ's spiritual advisors who were present but represented only certain faiths).

By late April 2021, it seemed that mounting pressure on TDCJ to accommodate inmates' religious-liberty rights had succeeded not only in restoring pre-2019 in-chamber-presence practices, but also in extending them to all spiritual advisors—whether TDCJ employees or not. Execution protocols adopted on April 21, 2021, establish procedures to designate a non-TDCJ spiritual advisor to be present inside the chamber during the execution. JA 134-37. Because this new policy was announced while petitioner's April 18 Step 2 grievance was pending, TDCJ notified him of the new procedures, specifically quoting the amendment and urging petitioner to act "as soon as possible" in light of his looming execution. *Id*. 55 (May 4, 2021).

Nowhere in the new protocols is there any prohibition on a spiritual advisor's touching an inmate or audibly praying during an execution. *See id.* 133-52. Petitioner does not know whether TDCJ adopted new restrictions when it changed its policy in April 2021 and just failed to tell anyone, or whether it altered its policy as the execution date approached.

Petitioner was therefore surprised when TDCJ's Director of Chaplaincy informed him on June 8 that Pastor Moore would be prohibited, while in the chamber, from "laying on hands" during petitioner's execution. *Id.* 52-53. That revelation prompted petitioner—well within the 15-day deadline imposed by TDCJ's grievance procedures[2]—to file a Step 1 grievance specifying the in-chamber religious practices he wanted Pastor Moore to perform: "That I be

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[2] TEX. DEP'T OF CRIM. JUST., OFFENDER ORIENTATION HANDBOOK 74 (2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf (HANDBOOK).

ALLOWED to have my Spiritual Advisor 'lay hands on me' and pray over me while I am being executed? THANK YOU!" *Id.* 53 (June 11, 2021).

TDCJ formally responded on July 2, 2021, saying: "At this time, a Spiritual Advisor is not allowed to touch an inmate while inside the execution chamber. No further action is warranted." *Id.*[3] Petitioner timely submitted a Step 2 grievance on July 8, *id.* 155-56, just 3 days after TDCJ's July 2 response was returned to him. *Id.* 52-53.[4]

Tellingly, TDCJ's response did not quote or even mention the April 21 protocols in announcing this touch prohibition. *See id.* 53. Nor could it. The protocols include no such prohibition or limitation on a spiritual advisor's in-chamber touch. *See id.* 133-52. Moreover, TDCJ's response said nothing about any silence requirement constraining Pastor Moore's in-chamber prayer over petitioner. *See id.* 53.

That silence requirement was announced 42 days after petitioner's Step 2 grievance in an August 19, 2021 email from TDCJ's General Counsel to petitioner's counsel, *id.* 103, after the current lawsuit had been

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[3] On the day TDCJ's Director of Chaplaincy told petitioner about the no-touch rule, petitioner's counsel emailed TDCJ's General Counsel to explain the importance in petitioner's faith of laying on hands and to request that Pastor Moore be allowed to touch petitioner during the execution. JA 153-54. TDCJ's General Counsel responded by email on June 17, 2021, 6 days after petitioner submitted his Step 1 grievance requesting touch and prayer, stating that TDCJ "does not allow the spiritual advisor to touch the inmate once inside the execution chamber" and therefore "would not honor your client's request." *Id.* 153.

[4] The record includes petitioner's July 8, 2021 Step 2 grievance, JA 155-56, but not TDCJ's denial. The denial is part of petitioner's grievance file lodged by the State.

initiated on August 10 and amended on August 16. JA 1-2 (Dkt. 1, 5). As the General Counsel noted, she was responding to a question in petitioner's counsel's August 16 email, "*asking whether* Mr. Ramirez's spiritual advisor is to remain silent upon entering the chamber and where the spiritual advisor will be standing throughout the procedure." *Id.* 103 (emphasis added). She responded: "At this time, the TDCJ does not allow the spiritual advisor to pray out loud with the inmate once inside the execution chamber." *Id.* With that informal confirmation, petitioner's counsel filed a second amended complaint on August 22 to address the new audible-prayer prohibition announced just 20 days before petitioner's scheduled execution. *Id.* 84-85.

The State constructs a false narrative of delay that ignores TDCJ's own tactical choices, including the many changes TDCJ made to its spiritual-advisor policy as petitioner faced an execution date of September 9, 2020, and then a re-set date of September 8, 2021. The State also offers misleading math. For example, the State claims that petitioner "waited 240 days after dismissing his 2020 lawsuit to file a new grievance," Resp. Br. 15, but omits that it *urged* petitioner to dismiss that lawsuit in exchange for withdrawal of the execution date due to COVID-19 concerns, and *the State* then waited 178 days before resetting petitioner's execution. *See* Pet. App. 7-8; JA 71.[5]

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[5] Without citing support, the State erroneously suggests that petitioner, in the parties' August 11, 2020 agreement, agreed to be bound by the August 2020 complaint in any future litigation. Resp. Br. 19-20. However, the State expressly concedes the opposite, claiming that petitioner's counsel's statements regarding the agreement (an agreement *the State* initiated) left options open in some sort of confession of delay. The targeted

The State's counting logic is off again when it argues that petitioner should have filed a new, expressly touch-specific grievance within 15 days of May 4, 2021, the date "he learned that TDCJ would permit Pastor Moore's presence in the chamber." Resp. Br. 26. It is true that on May 4 TDCJ signed its response informing petitioner that the April 2021 amended execution procedures now allowed even non-TDCJ spiritual advisors in the execution chamber and that petitioner should designate his spiritual advisor quickly. *See* JA 55. But TDCJ did not inform petitioner on May 4 that his designated spiritual advisor, while present in the execution chamber, would not be permitted to touch him. *See id*. That revelation came instead on June 8, 2021, when TDCJ's Director of Chaplaincy told petitioner that Pastor Moore would not be permitted to touch petitioner in the execution

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language—that "Ramirez will re-calibrate any new 1983 petition" in light of the "state of the law regarding § 1983 actions alleging Religious Land Use and Institutionalized Persons Act (RLUIPA) violations" at the time a new death warrant issues—responsibly reflects intent to follow this Court's developing jurisprudence, not gamesmanship. *See* Notice of Non-Suit Without Prejudice, No. 2:20-cv-00205 (Aug. 14, 2020), ECF 2, *discussed in* Resp. Br. 20.

The State did not and could not rely on or bind petitioner to a single, inaccurate sentence about touch in the 2020 complaint that was withdrawn just days after it was filed and thus never amended (as is a matter of right, FED. R. CIV. P. 15(a)); indeed, the sentence contradicts petitioner's own statements in TDCJ grievances and in discussions and prayer with Pastor Moore over the past 4 years. JA 52-53, 155-56; *see also id.* 47. If the State wants to question petitioner's beliefs about the role of touch in his faith, petitioner is ready on remand to present, and be cross-examined on, the in-chamber religious exercise he requests, as TDCJ has accommodated depositions in other capital cases arising under RLUIPA and the First Amendment. *See infra* Part III.

chamber. *Id.* 52. Within 3 days of receiving that information, petitioner timely filed a grievance expressly requesting that Pastor Moore "lay on hands" and "pray over" petitioner in the execution chamber. *Id.* 52-53.

Those mischaracterizations of the record pervade the State's brief. And the State also makes contradictory arguments—for example, criticizing petitioner for filing this litigation both too late and too early. *Compare, e.g.*, Resp. Br. 15, *with id.* 28.[6] During the period between petitioner's September 9, 2020 and re-set September 8, 2021 execution dates, TDCJ made changes it did not always announce, either in its execution procedures or when responding to petitioner's grievances. And that left petitioner guessing as TDCJ imposed new restrictions on in-chamber religious exercise that petitioner discovered only through informal exchanges with TDCJ employees. The State cannot have it both ways, accusing petitioner of delay when it is the State that changed the rules repeatedly—even within weeks of the execution date.

B. The PLRA Poses No Obstacle To Petitioner's Claims.

Petitioner met the PLRA's requirement that he exhaust available administrative remedies, 42 U.S.C. § 1997e(a), and he complied with TDCJ's "deadlines

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[6] Having waited 33 days for TDCJ to respond to his July 8 Step 2 grievance, petitioner was within a month of his September 8, 2021 execution date when he initiated this litigation, *see* JA 1 (Dkt. 1), fearful that waiting longer to file would invite the heads-I-win-tails-you-lose arguments the State makes here and jeopardize judicial resolution of his religious-liberty claims. *See, e.g.*, *Walker v. Epps*, 287 Fed. App'x 371, 376-77 (2008) (King, J., dissenting) (collecting opinions denying stays of pending litigation sought within a few days, or 27 days, or even 10 weeks prior to an execution date).

and other critical procedural rules." *Woodford v. Ngo*, 548 U.S. 81, 90-91, 93 (2006). He diligently pursued his religious-exercise accommodation within TDCJ's grievance process, using TDCJ's forms and following its 2-step-grievance rules to provide more than ample notice of what he was seeking. But TDCJ's application of hypertechnical interpretations to petitioner's filed grievances and delay in revealing its execution-chamber restrictions rendered any administrative remedy effectively unavailable. And because the PLRA requires inmates to exhaust only "available" remedies, when a remedy is not available, as here, "the inmate has no obligation to exhaust the remedy." *Ross v. Blake*, 578 U.S. 632, 643-44 (2016).

Petitioner completed TDCJ's requisite Step 1 and Step 2 grievances not just once but twice during the five months of rapidly evolving written and unwritten policies that TDCJ incrementally disclosed after the State re-set petitioner's execution date for September 8, 2021:

- ***April 11*:** petitioner submits a Step 1 grievance requesting that Pastor Moore be present in the execution chamber 9 days after TDCJ's Director of Chaplaincy tells petitioner that Pastor Moore cannot be present. JA 50-51.
- ***April 14*:** within 3 days, TDCJ denies the Step 1 grievance. *Id.* 51.
- ***April 18*:** just 4 days after TDCJ denies the Step 1 grievance, petitioner files his Step 2 grievance. *Id.* 54-55.
- ***May 4*:** TDCJ responds, informing petitioner that its April 21 amended execution procedures allow him to designate a spiritual advisor. *Id.* 55.

- ***June 11*****:** after learning on June 8 from TDCJ's Director of Chaplaincy that Pastor Moore will not be allowed to touch petitioner in the chamber, petitioner files a new Step 1 grievance within 3 days, expressly asking that Pastor Moore "'lay hands on me' & pray over me while I am being executed." *Id.* 52-53.
- ***July 2*****:** TDCJ denies the Step 1 grievance, saying touch is not allowed. The denial says nothing about prayer. *Id*. 53.
- ***July 8*****:** 6 days after the denial, petitioner files a Step 2 grievance, elaborating that "[t]he laying on of hands during a time of sickness OR at the time of death, is a practice in my Faith," requesting again that his spiritual advisor "lay hands on me" and "pray over me during my upcoming execution." *Id.* 155-56.

This timeline confirms petitioner's adherence to the requirements of TDCJ's 2-step grievance process as his execution date neared.

Although the State contends that the August 10 original complaint that initiated this litigation came too close to petitioner's execution date, Resp. Br. 15-16, the State also contends that it came too early because TDCJ had not yet denied the Step 2 grievance filed on July 8. *Id*. 28. That denial was signed on August 16. *See* Lodged Grievance File 13a. Notably, it took TDCJ only 16 days to resolve petitioner's prior Step 2 grievance that was pending while TDCJ amended its execution protocols on April 21, JA 55, but it took TDCJ more than twice as long—39 days—to perfunctorily deny the July 8 Step 2 grievance, when petitioner's scheduled execution date was less than a month away. And the issue had persisted for months

unresolved only because TDCJ kept changing its mind and announcing new, unwritten restrictions on in-chamber religious exercise.

As this Court recognized in *Ross*, "when prison administrators thwart inmates from taking advantage of a grievance process through machination [or] misrepresentation," they render the administrative remedy unavailable. 578 U.S. at 644. TDCJ's actions—informing petitioner that he could designate his spiritual advisor to be present in the execution chamber, but then revealing additional restrictions only incrementally and informally as petitioner's execution neared—are just the sort of machination and misrepresentation that leave prisoners without any available administrative remedy. Under its own grievance rules, TDCJ has 40 days from receipt of the grievance to respond to each of the Step 1 and Step 2 grievances, HANDBOOK, *supra*, at 74, yet it informed petitioner of its no-touch rule 93 days before his execution date and revealed its audible-prayer ban 21 days before his execution date. Petitioner still attempted to comply with TDCJ's grievance rules, but no administrative remedy was realistically available.

Moreover, the State's persistence in pushing non-exhaustion of "vocalization" is stunning. Resp. Br. 28-30. Petitioner's requests not just for "prayer," but specifically for Pastor Moore to "pray *over me*," were plainly requests for audible prayer as a matter of both common meaning and common sense. JA 52-53, 155-56 (emphasis added); Petr. Br. 21-23; Amicus Br. of PLRA Scholars 15-16; Amicus Br. of U.S. 12-14.[7]

[7] *See also* Amicus Br. of Becket Fund 3-15; Amicus Br. of CLS *et al.* 8; Amicus Br. of First Liberty 2; Amicus Br. of Former

Having been put on notice—through the Step 1 and Step 2 grievances—that petitioner was requesting prayer, TDCJ had the resources and the responsibility *under its own grievance procedures* to seek clarification if it allowed silent but not audible prayer. Each TDCJ Unit has an investigator, and the prison can "conduct an investigation" as part of the grievance process. HANDBOOK, *supra*, at 73-74. But TDCJ never bothered.

Nor did TDCJ's response to petitioner's Step 1 grievance mention prayer. JA 53. TDCJ sidestepped the issue rather than provide meaningful consideration or even a hint that it somehow interpreted "pray over me" as a request for silence. Similarly, when TDCJ denied petitioner's Step 2 grievance seeking such prayer, along with laying on hands, the denial discussed only touch and disclosed nothing about a silent-prayer requirement. *See* Lodged Grievance File 13a.[8] TDCJ's failure to engage, much less resolve, an issue the grievance plainly raised can hardly be called a failure to exhaust by petitioner. To the contrary, TDCJ's actions render its grievance system "so opaque" that "no ordinary prisoner can discern or navigate it," providing an unavailable remedy that need not be exhausted. *Ross*, 578 U.S. at 643-44.

TDCJ's gaming is evident in multiple respects. It expected petitioner to read the minds of TDCJ policymakers to predict *unwritten* restrictions on a designated spiritual advisor's in-chamber religious

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Prison Officials 2; Amicus Br. of Spiritual Advisors/Former Corrections Officials 6.

[8] TDCJ first informed petitioner that in-chamber prayer had to be silent in its General Counsel's August 19 email, 9 days after this litigation began. JA 103-04. Within 3 days of receiving that email, petitioner's counsel amended the live pleading to incorporate a challenge to that new silent-prayer rule. *Id.* 84-86.

behavior; it insisted on hyper-specificity in the face of common sense; and it neglected provisions in its own grievance procedures that contemplated investigations of grievances as needed. TDCJ's unwillingness fairly to engage the substance of petitioner's grievances rendered its process an unavailable dead end to which the PLRA's exhaustion requirement does not apply. *See id*.[9]

II. UNABLE TO SATISFY RLUIPA, THE STATE REWRITES THE STATUTE TO FLIP ITS BURDEN ONTO PETITIONER.

As in both courts below, the State attempts to shift the burden of proof on whether its policy is the least restrictive means of furthering a compelling governmental interest—a burden RLUIPA's text clearly places on the State. 42 U.S.C. § 2000cc–2(b). It not only cites requirements inapplicable to RLUIPA claims, but also contends petitioner should have proposed "less restrictive" solutions to concerns the State raises for the first time in its brief. Even if petitioner could somehow have predicted what the State would say after this Court granted certiorari, despite its lower-court filings offering no particularized concerns about either touch or audible prayer, it is the State's burden

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[9] The first business day after filing its merits brief, the State filed a motion to dismiss in the district court that includes non-exhaustion arguments and attached evidence. Defs. Collier, Lumpkin, and Crowley's Motion to Dismiss Pursuant to Rule 12(b)(6) at 9-14, *Ramirez v. Collier*, No. 4:21-cv-02609 (S.D. Tex. Oct. 18, 2021), ECF 28. A remand will allow the parties to litigate exhaustion arguments fully and fairly before the district court in which the State currently seeks relief. *See also infra* Part III.

to demonstrate that no less restrictive means exists. *See id*.

The State misleadingly cites inapplicable standards in suggesting that it does not bear the burden of demonstrating its policy is the least restrictive means of furthering a compelling interest. For example, it says "it is the prisoner's burden to show a 'feasible and readily implemented alternative,'" Resp. Br. 41 (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019)), but the Eighth Amendment method-of-execution context of *Bucklew* is inapposite to the religious-liberty question under the statutorily dictated burdens established by RLUIPA.

The State also erroneously points to *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987), in contending that "there must be a plausible, effective alternative that TDCJ has improperly refused to adopt." Resp. Br. 41. *O'Lone* predates RLUIPA and was superseded by clear language in both RFRA and RLUIPA that places the burden on the defendant. 42 U.S.C. §§ 2000bb–1(b), 2000cc–2(b). In fact, Congress specifically intended that RFRA "restore traditional protection afforded to prisoners' claims prior to *O'Lone.*" S. REP. NO. 103-111 at 10 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1899; *see also* 139 CONG. REC. 26,414 (1993) (Senate vote rejecting a proposed amendment that would have excluded prisoners' free-exercise claims from RFRA's compelling-interest standard). And by placing the "burden of persuasion" on the government, RLUIPA makes the matter even clearer. 42 U.S.C. § 2000cc-2(b).

Even if the text of RLUIPA did not explicitly place the burden of persuasion on the State, it would have been effectively impossible for petitioner to have proposed less restrictive alternatives for addressing

the State's concerns in the lower courts: Until its merits brief in this Court, the State never specified how a spiritual advisor's touch and audible prayer could cause problems in the execution chamber. The State's Fifth Circuit brief opposing a stay of execution says only that states have a "strong interest in 'controlling access to' their execution chambers and in ensuring 'that the execution occurs without any complications, distractions, or disruptions.'" Brief of Defendants-Appellees at 23, *Ramirez v. Collier*, No. 21-70004 (5th Cir. Sept. 3, 2021) (quoting JA 161). And in opposing certiorari, the State said only that "prisons have a compelling interest 'in maintaining an orderly, safe, and effective process when carrying out an irrevocable, and emotionally charged, procedure.'" Br. Opp. 26 (quoting JA 180).

No prior filing in the lower courts or this Court mentioned a spiritual advisor's proximity to restraints or IV lines, whether a spiritual advisor would block witnesses' views, or the process by which the medical team listens for problems with the execution procedure. In short, the State never specified a problem for which petitioner could suggest a less restrictive alternative.[10]

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[10] At this late date, the State wishes to argue about specific governmental interests in "security" (at 37-38), "preventable suffering" (at 38-39), "victim trauma" (at 39-40), and avoiding audible distractions (at 46-47). But the only evidence it cites to support its assertion of those interests are declarations created after the grant of certiorari and then lodged with this Court, an exhibit from another pending case (also filed after the grant of certiorari in this case), and the complaint in a third pending case. Resp. Br. 37-40, 46-47. Petitioner never had access to this evidence in the lower courts, much less the opportunity to conduct discovery. Nor did he have notice as to the aspects of the execution procedure the State believed would be endangered by adding audible prayer and the laying on of hands to the passive

When only the State knows what it thinks could go wrong at an execution, it makes sense that the State has the burden to demonstrate that restricting the free exercise of religion is the least restrictive means to prevent the perceived problem. *See Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (confirming that the government's burden does not shift when a person seeks pretrial equitable relief in connection with a statutory religious-liberty claim, which in that case arose under RFRA's same compelling-interest/least-restrictive-means test).

It is also curious that the State raises concerns now about touch and audible prayer interfering with the view of witnesses or the ability of the medical team to listen and watch for signs of problems with the medical procedure. Throughout hundreds of executions prior to 2019, spiritual advisors engaged in precisely those behaviors, and the State never contended that the actions of touching the condemned inmate and praying aloud impeded the process in any way. *See* Petr. Br. 29-33; Amicus Br. of Former Prison Officials 5-11; Amicus Br. of U.S. 2-3; Amicus Br. of Spiritual Advisors/Former Corrections Officials 13-14. Nor has it identified a single instance of touch or audible prayer that ever compromised a medical team's ability to monitor the execution procedure. The State has contended that advisors in the past were not "outsiders," but that labeling at most could go to security concerns (of course, non-TDCJ spiritual advisors can be screened) and training (non-TDCJ spiritual advisors also can be trained). The State has not and cannot explain how touch becomes a greater impediment to sight or how

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presence of an outside advisor (which the State concededly permits).

audible prayer muffles more sound when a non-TDCJ spiritual advisor performs those religious practices.

The State's efforts to distinguish not only its own past, but also the practices of other jurisdictions, cannot be reconciled with this Court's precedent. Resp. Br. 43 (arguing that it should not be required "to justify its refusal to adopt" accommodations permitted by Alabama and by the federal prison system, on the ground that "those jurisdictions are in the minority"). This Court has made clear that "the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction," *Procunier v. Martinez*, 416 U.S. 396, 414, n.14 (1974), even if the accommodations have not been implemented by "the vast majority" of jurisdictions. *See Holt v. Hobbs*, 574 U.S. 352, 368 (2015). Moreover, it is not at all clear that the majority of jurisdictions that practice capital punishment would not accommodate petitioner's requests. The State cites some 15 states as not permitting spiritual advisors in the execution chamber, Resp. Br. 43-44, but the only state other than Texas to have carried out an execution since this Court's order in *Dunn v. Smith*, 141 S. Ct. 725 (2021), is Missouri, and there was no indication in that case that the prisoner requested the presence of a spiritual advisor. *See Johnson v. Blair*, 628 S.W.3d 375 (Mo. 2021), *cert. denied*, 2021 U.S. LEXIS 4947 (Oct. 5, 2021).

Nor does the State claim that any of the other states' regulations have been challenged by prisoners who wish to have their spiritual advisors touch or pray over them during their executions. The only jurisdictions other than Texas to have addressed similar requests—Alabama and the federal system—have accommodated them. Petr. Br. 34-37. This, along with the identical

practices of TDCJ chaplains in the Texas execution chamber prior to 2019, indicates that TDCJ's restrictions are not the least restrictive means of furthering a compelling governmental interest.

III. THE COURT SHOULD REMAND RATHER THAN CONDUCT A "FIRST VIEW" OF NEW AND UNTESTED EVIDENCE.

Throughout the State's brief, one thing is clear: After failing to put on any evidence in either the district court or the court of appeals to support its argument that it should prevail on petitioner's RLUIPA claim, the State now wants this Court to rely on newly presented—and newly created—evidence to reject petitioner's arguments for a preliminary injunction pending resolution of the merits of his challenges to restrictions on his religious-liberty rights.[11] The State complains about supposed omissions in petitioner's evidence—at the pleading stage—while at the same time attempting to originate its own merits record out of whole cloth in this Court. But as this Court observed in *Cutter v. Wilkinson*, "we are a court of review, not of first view." 544 U.S. 709, 718 n.7 (2005). Rather than consider factual matters based on untested evidence presented by only one side, this Court should remand for the district court to enter a preliminary injunction and proceed with petitioner's

[11] Petitioner asserted both RLUIPA and First Amendment claims and never waived the latter, as the State wrongly asserts in three sentences tacked onto the last page of its brief. Resp. Br. 48. To the contrary, petitioner expressly preserved his First Amendment claim, Petr. Br. 10 n.2; and, consistent with this Court's September 10 briefing instructions, streamlined the analysis to focus on the RLUIPA questions this Court specified because his RLUIPA and First Amendment claims request the same relief. *See id.*

RLUIPA case, in which the State defendants filed a Motion to Dismiss on October 18, 2021, the next business day after filing a merits brief in this Court. *See* Defs.' MTD, *supra* n.9, at 1; *see also* Petr. Br. 44-47 (discussing *Hill v. McDonough*, 547 U.S. 573 (2006), and equitable relief pending development of merits on remand).

After producing no evidence on the question in the lower courts, the State now wishes to use a prison employee's declaration—lodged under seal less than a week ago—to claim that petitioner wanted to meet with Pastor Moore only because of his court case, insinuating insincerity of belief. *See* Resp. Br. 34 (citing Lodged Redacted Decl. ¶ 8). Even if testimony about how petitioner wanted to use the last moments he was permitted to communicate with his family before entering the execution chamber were probative of petitioner's beliefs about the religious exercise necessary *within* the execution chamber—where the declarant confirms petitioner would be allowed to see Pastor Moore, Redacted Decl. ¶ 5—this sealed declaration presents a serious problem: Petitioner has never been given an opportunity to test this evidence. Not only has the State not made the declarant available for deposition; it did not even reveal his name to petitioner's counsel until October 19, 2021. And, tellingly, the declarant confirmed that petitioner did pray with him and even took his hand during prayer, facts that bolster the sincerity of petitioner's belief. Redacted Decl. ¶ 6. Of course, the place to test the reliability and relevance of this new, double-edged evidence is not in this Court—it is on remand, in the district court where the State is still filing motions.

At the same time the State relies on newly created evidence in this Court, it complains about the precision

of the evidence attached to petitioner's complaint regarding his sincere religious beliefs. Resp. Br. 33-34. It argues that petitioner's attorney should have attached an affidavit from petitioner instead of an affidavit from Pastor Moore. *See id.* Yet this Court has direct evidence of petitioner's beliefs in the form of petitioner's signed statements on the grievances he filed through the prison system. JA 52-53 ("It is part of my faith to have my spiritual advisor lay hands on me anytime I am sick or dying."); *id.* 155-56 ("The laying on of hands during a time of sickness OR at the time of death, is a practice in my Faith"; "I wish to have my Spiritual Advisor 'lay hands on me' to pray over me during my upcoming execution."). And an affidavit from petitioner's pastor for the past 4 years—the person petitioner wishes to have minister to him during his execution—is clearly probative of petitioner's sincere religious beliefs. *See* Petr. Br. 6-8.

On remand, both sides may depose petitioner and other witnesses regarding petitioner's sincere religious beliefs. Petitioner could testify about his beliefs, his relationship with Pastor Moore, and how his beliefs have led him to minister at the prison by creating a religious library for other death-row inmates and selecting scripture to be read on a prison radio station. Telephone conversation between petitioner's counsel, S. Kretzer, E. Busby, and L. Eskow, and Pastor D. Moore (Oct. 18, 2021) (notes on file with counsel). All of this discovery would be proper in the district court, in the pending RLUIPA case.[12]

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[12] Discovery in the district court may include depositions of both the death-row prisoner and TDCJ officials. *See, e.g.*, Order at 31-32, *Gutierrez v. Saenz*, No. 1:19-CV-00185 (S.D. Tex. Nov. 24, 2020), ECF 124 (listing depositions). Notably, the district court in *Gutierrez* allowed discovery and still issued its order on

Much like its argument about the sincerity of petitioner's religious beliefs, the State's entire argument on compelling governmental interest and least restrictive means is based on evidence created and lodged after certiorari was granted. *See supra* Part II (noting that the State never specified in the courts below what problems an outside advisor could cause in the chamber by praying aloud and touching a condemned inmate, but it expects petitioner to have predicted and anticipatorily rebutted hypothetical, unasserted rationales). Again, the State complains about evidence not produced by petitioner below while simultaneously claiming its *own* need to offer new evidence because "this case comes to the Court on an underdeveloped record that lacks the evidence necessary to completely address the Court's questions." Letter from Texas Solicitor General J. Stone to Court (Sept. 22, 2021).

This Court should decline the State's invitation to evaluate in the first instance whether the State's policy is actually the least restrictive means of furthering a compelling governmental interest—especially based on newly created, untested evidence. Questions posed to Lumpkin, Guerrero, and other relevant witnesses are likely to produce probative information that is not now available to this Court. Therefore, this Court should remand with instructions for the district court to develop a proper evidentiary record to permit resolution of petitioner's religious-liberty claims and, pending resolution of these issues, preliminarily enjoin the State from executing petitioner in violation of

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the security question less than 6 months after this Court directed the district court on remand to analyze the security-risk question. *See id.*; *see also Gutierrez v. Saenz*, 141 S. Ct. 127, 128 (2020) (mem.).

religious-exercise rights protected by RLUIPA and the First Amendment. *See* Petr. Br. 44-47.

CONCLUSION

The judgment of the court of appeals should be reversed. This Court should remand with instructions for the district court to hold an evidentiary hearing on petitioner's religious-exercise claims and to issue a preliminary injunction pending resolution of the merits of petitioner's RLUIPA and First Amendment claims, prohibiting TDCJ from executing petitioner in a manner that violates his religious liberty.

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