No. 21A33

In the Supreme Court of the United States

JOHN HENRY RAMIREZ,

Petitioner,

v.

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

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON 8 ½ BY 11-INCH PAPER, OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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MOTION OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Becket Fund for Religious Liberty respectfully moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief as *amicus curiae* in support of Petitioner's application, without 10 days' advance notice to the parties as ordinarily required.

In light of the expedited briefing schedule—with the case docketed today in advance of an execution tomorrow—it was not feasible to give 10 days' notice, but *amicus* was nevertheless able to obtain a position on the motion from the parties. All parties have consented to the filing of the *amicus* brief.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions, and has represented—among others—agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, in lawsuits across the country and around the world.

Relevantly to this application, Becket has often defended—both as counsel and as *amicus curiae*—prisoners' free exercise of religion. See, *e.g.*, *Holt* v. *Hobbs*, 574 U.S. 352 (2015) (as counsel, obtained religious beard accommodation for observant Muslim prisoner in Arkansas); *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013) (obtained kosher diet for observant Jewish prisoner); *Moussazadeh* v. *Texas Dep't of Crim. Just.*, 703 F.3d 781, 784 (5th Cir. 2012) (same); *Benning* v. *Georgia*, 391 F.3d 1299, 1302 (11th Cir. 2004) (same); *Jones* v. *Slade*, No. 20-15642 (9th Cir. argued Aug. 31, 2021) (filed *amicus* brief in support of Muslim prisoner seeking access to religious texts). It has also filed as *amicus* in key

emergency-docket applications on the chaplaincy issue. See *Dunn* v. *Smith*, 141 S. Ct. 725 (2021); *Murphy* v. *Collier*, 139 S. Ct. 1475 (2019).

As an organization focused solely on religious liberty, Becket takes no position on the administration of the death penalty in general or Ramirez's crime in particular. Rather, Becket seeks leave to submit this brief in order to clarify the law of religious liberty in this fraught area of law, and out of concern that the time-compressed nature of this appeal and others like it may obscure the important religious liberty issues at stake.

Respectfully submitted.

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MOTION OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER

In light of the emergency nature of the briefing, the Becket Fund for Religious Liberty respectfully moves for leave to file its *amicus curiae* brief in support of Petitioner's Emergency Motion and Application to Stay Execution on 8 ½ by 11-inch paper rather than in booklet form.

Respectfully submitted.

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QUESTION PRESENTED

Do the First Amendment and the Religious Land Use and Institutionalized Persons Act require a prison system to allow clergy ministering in the execution chamber to engage in audible prayer, provided that the prayer is nondisruptive?

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The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Becket has often defended prisoners' exercise of religion. See, *e.g.*, *Holt* v. *Hobbs*, 574 U.S. 352 (2015) (obtained religious beard accommodation for observant Muslim prisoner in Arkansas); *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013) (obtained kosher diet for observant Jewish prisoner); *Moussazadeh* v. *Texas Dep't of Crim. Just.*, 703 F.3d 781, 784 (5th Cir. 2012) (same); *Benning* v. *Georgia*, 391 F.3d 1299, 1302 (11th Cir. 2004) (same); *Jones* v. *Slade*, No. 20-15642 (9th Cir. argued Aug. 31, 2021) (Muslim prisoner seeking access to religious texts; *amicus*). It has also filed as *amicus* in emergency-docket applications regarding clergy access. See *Dunn* v. *Smith*, 141 S. Ct. 725 (2021); *Murphy* v. *Collier*, 139 S. Ct. 1475 (2019).

As an organization focused solely on religious liberty, Becket takes no position on the administration of the death penalty in general or Ramirez's crime in particular. Becket instead submits this brief in order to clarify the law of religious liberty

[1] No counsel for a party authored any portion of this brief. No one other than *amicus curiae* or its members made any monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

in this constitutionally fraught area, and out of concern that the time-compressed nature of this appeal may obscure the important religious liberty issues at stake.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The right of a condemned person to the comfort of clergy—and the corresponding right of clergy to comfort the condemned—are among the longest-standing and most well-recognized religious exercises known to civilization. And in multiple emergency-docket cases, this Court has spoken clearly on these rights in the modern death chamber: comfort of clergy is a religious exercise, and prohibiting it is subject to strict scrutiny. And as four Justices have stated, past experience strongly suggests it can be provided safely. *Dunn* v. *Smith*, 141 S. Ct. 725, 726 (2021) (Kagan, J., joined by Breyer, Sotomayor, and Barrett, JJ., concurring). So this litigation does not concern *whether* John Ramirez is executed, but *what happens before* Ramirez is executed. Indeed, after *Dunn* was decided, both Alabama and Texas—the two states whose policies were challenged in *Murphy*, *Gutierrez*, and *Dunn*—decided to "allow spiritual advisors into the execution room, as other States and the Federal Government have done." *Dunn*, 141 S. Ct. at 727 (Kavanaugh, J., dissenting).

But old habits can be hard to break. During the litigation below, the Texas Department of Criminal Justice abruptly added a rule that would bar clergy from praying aloud. By a letter dated August 19, it took the position not only that the chaplain would have a "No-Contact" policy, but also a "No-Speaking" policy—which Texas now explains as disallowing *any* "audible prayer" with and for the condemned. See Defs' Surreply Opp. Stay at 3, 4, No. 4:21-cv-2609 (S.D. Tex. Aug. 30,

2021), ECF 15-1. This last-minute, gratuitous restriction is barred by the First Amendment and the Religious Land Use and Institutionalized Persons Act, for two reasons.

First, the tradition of comfort of clergy as expressed from before the founding of our Nation has always included respectful, nondisruptive—but audible—prayer at the time of execution. Such expression was key to both the solace and spiritual help sought by the condemned and the guiding role the clergy sought to provide. It beggars belief that an interpretation of the First Amendment's text and structure that is grounded even in part on history and tradition would have nothing to say about the ability of ministering clergy to pray aloud.

Second, the question of RLUIPA's application to audible clergy prayer has been asked and answered by this Court across three cases, with Patrick Murphy, Ruben Gutierrez, and Willie Smith alike all seeking audible prayer in some form as part of their access to clergy. The State's attempted analogy between its no-speaking policy and the Bureau of Prisons' entirely sensible bar on disruptive conduct fails on its face, and is particularly odd in light of evidence that prayer *has* been allowed in the execution chamber without incident in multiple jurisdictions, including the federal government and Texas itself in the past. Had the district court correctly put the burden of strict scrutiny on TDCJ and not Ramirez, an injunction against prohibiting respectful, nondisruptive, audible prayer in the chamber would have followed naturally from this Court's guidance. This Court should provide that relief.

ARGUMENT

I. History and tradition support a construction of comfort-of-clergy that includes audible prayer.

Few religious rituals have a longer historical pedigree than comfort of clergy for the dying, and particularly the condemned. In England and her colonies, this practice long predated and continued through the Founding. "[I]n the seventeenth and eighteenth centuries," capital punishment was understood "to facilitate the criminal's repentance," with the theological idea that "d[ying] in the proper frame of mind" could determine "one's eternal fate." Stuart Banner, *The Death Penalty: An American History* 16 (2009). For that reason, ministers would constantly be "instruct[ing]," "direct[ing]," and "pray[ing] with" the condemned up until death. *Id.* at 18; see, *e.g.*, Randall McGowen, *The Body and Punishment in Eighteenth-Century England*, 59 J. Mod. Hist. 651, 651 (1987) ("The condemned * * * were accompanied by a clergyman who shadowed their last moments urging them to repent or consoling them with the offer of divine forgiveness.") William Smith's 1791 guidebook for ministers, *The Convict's Visitor*, specifically provided "*suitable devotions before, and at the time of Execution*" to provide guidance for this "routine" ministry. Banner, *supra*, at 18 (italics in original). And the founding generation was very familiar with these practices due to their experiences during the Revolution. See, *e.g.*, George Washington, General Orders, (June 9, 1777), reproduced in *Founders Online*, National Archives, https://perma.cc/XU7H-XXUV ("The prisoners under sentence of death, to prepare for execution, to morrow at 12 o'clock * * * The criminals to be attended with such Chaplains, as they choose.").

As public hangings remained a spectacle through the Civil War era and beyond, it was common for ministers to continue to "le[a]d prayers" for the condemned, and those assembled to watch, right up until the condemned person was hanged, even as the practice of a full sermon fell out of practice. *Id.* at 159; see, *e.g.*, Daniel A. Cohen, *Pillars of Salt, Monuments of Grace* 3-5 (2006) (describing role of Cotton Mather, Benjamin Colman, and other "notable[]" Puritan ministers in professionalizing the "execution sermon" that developed from the English "gallows sermons" before it). And the Catholic practices that accompany death are well-known to involve speech and action, with the priest audibly praying "the liturgy of Viaticum" that "the Lord Jesus Christ protect you and lead you to eternal life." Fr. John C. Kasza, *Understanding Sacramental Healing (Anointing and Viaticum)* 223 (2007); see Catechism of the Catholic Church §§ 1501-1502, 1524-1525 (discussing *viaticum* and the effect of expected death on discernment).

Similarly, many non-Christian traditions also promote or require audible prayer in certain contexts. See, *e.g., Murphy* v. *Collier,* 139 S. Ct. 1475, 1484 (2019) (Alito, J., dissenting) (Buddhist prisoner believed "that he will be reborn in the Pure Land only if he succeeds in remaining focused on Buddha while dying and that the chants of a Buddhist priest will help him in this endeavor"); Shulchan Arukh, *Orach Chayim* 62:3, 101:2 (Jewish prayers must be said aloud, though in a way designed not to disrupt other congregants).

At this stage of the litigation, Ramirez's complaint tracks the same concern with being prepared by a clergyman to "ascend to heaven" rather than "descend to hell"

"at his exact time of death" that was at issue in this historical tradition, and in prior cases confronted by this Court. Am. Compl. ¶ 50, No. 4:21-cv-2609 (S.D. Tex. Aug. 22, 2021), ECF 12. See *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting) (for some faiths, time with clergy "shortly before death" may be "indistinguishable" from support at moment of death, but assuming substantial burden since analysis "may be different" where clergy's presence "will help" the condemned attain afterlife).

It is a commonplace that historical tradition informs the scope of constitutional protections. Professor Michael McConnell has observed that "[h]istory plays an especially important role in constitutional interpretation when, as here, formal doctrine seems to have strayed from the fundamental values of the constitutional provision." Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 827 (2012). Given that focus on history, and the long tradition of audible prayer by clergy at the moment of death, the scope of the constitutional right is clear—audible prayer should be allowed.

II. This Court's previous orders resolve the RLUIPA question.

There is a separate reason audible prayer is required: This Court's past emergency-docket cases on death-chamber chaplaincy have *already* addressed the audible prayer question under RLUIPA. Patrick Murphy originally sought access for his Buddhist priest in the chamber specifically so that the priest could "chant[] while a lethal injection is administered" to assist him in "remaining focused on Buddha while dying." *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting). Ruben Gutierrez defended his request for a chaplain to this Court by noting that "communal prayer [is]

a longstanding religious tradition worthy of First Amendment protection" and that "Texas has long recognized that a condemned prisoner's prayer with a chaplain is integral in executions." Pet. for Writ of Certiorari at 24, *Gutierrez* v. *Saenz*, No. 19-8695 (S. Ct.), cert. granted, 141 S. Ct. 1260 (2021). And Willie Smith all along argued that "Pastor Wiley's presence in the execution chamber, praying with him and holding his hand, would ease the transition between the worlds of the living and the dead." Opp. to Application to Vacate Injunction at 1, *Dunn* v. *Smith*, No. 20A128 (S. Ct.) (cleaned up), application to vacate injunction denied, 141 S. Ct. 725 (2021). Each time the Court ruled for the prisoner.

In short, the repeated emergency-docket relief granted by this Court—particularly in *Gutierrez* and *Smith*—would have meant little if states could end-run the religious exercise of actual concern. And even summary orders can "clearly dictate[]" the outcome of a later case where the facts and government defendant are identical. *Gateway City Church* v. *Newsom*, 141 S. Ct. 1460, 1460 (2021).

Texas's distinction between *Dunn* v. *Smith* and this case turns on its claim (1) that the federal Bureau of Prisons "prohibits outside advisors from verbally disrupting the execution" and (2) that a "prohibition[] against * * * audible prayer" is a "similar prohibition." Appellees' Br. at 22, 28, No. 21-70004 (5th Cir. Sept. 3, 2021). But as this Court explained in another context, a well-justified prohibition on "harassment" is not similar to, and does not justify, a prohibition on "personal, caring, consensual conversations" or other calm speech. *McCullen* v. *Coakley*, 573 U.S.

464, 489, 496 (2014). So no court would have trouble crafting an injunction that permitted ordinary, non-disruptive audible prayer.

In any event, Texas's comparison also fails to account for the well-known fact that audible prayer *does* take place in federal executions, including multiple times last year, and *has* taken place in Texas and other jurisdictions for decades, all without incident.[2] This Court need not ignore this well-documented practice. Accordingly, the State has not carried its burden to show that no "means less restrictive" than a ban on speaking will serve its interests. *Dunn*, 141 S. Ct. at 726 (Kagan, J., concurring) (quoting *Holt* v. *Hobbs*, 574 U.S. 352, 369 (2015)).

CONCLUSION

This Court should enjoin the State's restrictions on audible prayer. Alternatively, it should stay the execution pending full consideration of the issues raised.

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[2] See, *e.g.*, Mary Milz, *The nun of death row stands against the death penalty while providing spiritual companionship to the condemned*, NBC WTHR 13 (Dec. 17, 2020), https://perma.cc/P8YT-L4XB (Catholic nun "softly recit[ed] the Divine Mercy Chaplet" in execution chamber in response to prisoner's request "to pray it out loud with him"); Via Ryckaert et al., *Wesley Ira Purkey executed in Terre Haute*, Indianapolis Star (July 16, 2020), https://perma.cc/Q467-T7EU (describing chaplain "with his hands before his face in prayer" within the chamber in federal execution); Dick Reavis, *Charlie Brooks' Last Words*, Texas Monthly (Feb. 1983), https://perma.cc/KM2N-3GUD (describing Muslim minister's audible prayer, and prisoner's chanting, in execution chamber during Texas's first lethal injection); StoryCorps, *Witness to an Execution* (Oct. 20, 2000), https://perma.cc/4XFJ-3L8X, at 16:00 (audio of Rev. Carroll Pickett discussing prayer, counseling, and other "conversations" provided in the last "probably forty-five seconds" for various inmates in the chamber by the chaplain); *Ray* v. *Commissioner*, 915 F.3d 689, 692 (11th Cir.) ("[d]uring the execution, Chaplain Summers, a Christian, will kneel at the side of the prisoner and pray with him if the inmate requests prayer," so as to "provide prayer, spiritual support and comfort at the moment of death" and has done so from 1997 to 2019), stay vacated on other grounds, 139 S. Ct. 661, 661 (2019); Lynn Waltz, *Death Walk Chaplain Russ Ford Has Accompanied 19 Condemned Murderers to Virginia's Electric Chair*, The Virginian-Pilot (Virginia Tech archive) (Aug. 28, 1994), https://perma.cc/PA75-TPQZ (recounting chaplain's audible counseling, including "that there was a part of [the condemned] that would never die," to two condemned prisoners immediately prior to "the roar of electricity" into the electric chair).

September 7, 2021

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