

No. A \_\_\_\_\_

In the  
Supreme Court of the United States

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STEPHEN DALE BARBEE,  
*Petitioner.*

v.

BRYAN COLLIER, BOBBY LUMPKIN, DENNIS CROWLEY  
Texas Department of Criminal Justice,  
*Respondents*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit**

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**APPLICATION FOR A STAY OF EXECUTION**  
**PRESENTED TO THE HONORABLE SAMUEL A. ALITO, JR.**  
**AS CIRCUIT JUDGE**

**STEPHEN DALE BARBEE IS SCHEDULED  
TO BE EXECUTED ON NOVEMBER 16, 2022, AT 6 P.M. CENTRAL TIME**

**To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court  
of the United States and Circuit Justice for the Fifth Circuit:**

Stephen Dale Barbee was convicted of capital murder and is facing an execution date of November 16, 2022. (*See Appendix A*). As detailed in his accompanying petition for writ of certiorari, on November 11, 2022, the Fifth Circuit Court of Appeals reversed the district court's grant of a preliminary injunction on the State's interlocutory appeal of that injunction and remanded the matter to the district court. *Barbee v. Collier*, No. 22-70011.

### **A. Relevant Background.**

The accompanying petition for *certiorari* relates to an ongoing complaint under 42 U.S.C. § 1983, filed on September 21, 2021 in the United States District Court for the Southern District of Texas, alleging the violation of Barbee’s rights under RLUIPA. *Barbee v. Collier*, No. 4:21-cv-3077 (S.D. Tex.). (ROA.7-63).<sup>1</sup> On September 28, 2021, Barbee filed a motion for a stay of execution (ROA.79-99); and on October 4, 2021, respondents Collier, Lumpkin and Crowley (hereafter “TDCJ”) filed an opposition to the stay motion. (ROA.132-185). On October 7, 2021, the district court issued a 19-page “Order Staying Execution.” (ROA.315-332) (Appendix B). On November 29, 2021, the district court stayed and administratively closed the case. (ROA.370-371).

On March 24, 2022, this Court decided *Ramirez v. Collier*, 142 S. Ct. 1264 (2022), and on April 5, 2022, the district court ordered the case reopened and directed the parties to file a proposed joint briefing schedule by April 15, 2022. (ROA.376). However, on May 5, 2022, instead of filing a proposed briefing schedule as ordered by the district court, TDCJ moved for an accelerated briefing schedule. (ROA.383-387).

Despite the fact that the district court had yet to set a briefing schedule, on May 27, 2022 TDCJ then filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1), following their own proposed, but not adopted, schedule. (ROA.393-405). TDCJ attached to the motion to dismiss an affidavit, dated May 26, 2022, by Bobby Lumpkin, Director of the Correctional

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<sup>1</sup> “ROA” refers to the Electronic Record on Appeal filed in the Fifth Circuit Court of Appeals.

Institutions Division of the Texas Department of Criminal Justice, one of the named defendants in this lawsuit, stating that he had “reevaluated the requests made by Stephen Barbee that his spiritual advisor be permitted to lay hands on him when he is in the execution chamber and to audibly pray during the execution process” and that “Barbee’s spiritual advisor will be permitted to lay hands on Barbee on a lower extremity after Barbee is secured to the gurney in the execution chamber and the IV lines are in place.” Affidavit of Bobby Lumpkin, Director of the Texas Dept. of Criminal Justice, Correctional Institutions Division, Ex. A to Defendants’ Motion. (ROA.403). Thus, Mr. Barbee’s explicit request that his religious advisor be permitted to hold his hand in the chamber (ROA.348) was not granted. A subsequent and contradictory “reevaluation” of this policy by Mr. Lumpkin allowed the previously-denied hand-holding.(ROA.449).<sup>2</sup> The current TDCJ execution protocol, which was adopted on April 21, 2021 and remains in effect, does not appear to permit even these partial concessions. (ROA.33-44).

Despite the district court’s stay of execution, on July 15, 2022, the State, through the Tarrant County District Attorney’s Office, moved for the trial court to set an execution date for Mr. Barbee in late October. *State v. Barbee*, No. 1004856R, 213th Judicial District

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<sup>2</sup> This was a 2-step “reevaluation.” Last year, TDCJ opposed both audible prayer and all touching by Mr. Barbee’s spiritual advisor. (ROA.157, 171-172). The first reevaluation was in TDCJ’s motion to dismiss, filed on May 27, 2022, where Defendant Lumpkin for the first time conceded that audible prayer was now allowed and “Barbee’s spiritual advisor will be permitted to lay hands on Barbee on a lower extremity after Barbee is secured to the gurney...” (ROA.403, Affidavit of Bobby Lumpkin dated May 26, 2022). Their second reevaluation was on August 17, 2022. In TDCJ’s reply to Barbee’s response to the motion to dismiss, Defendant Lumpkin again changed his position and stated that “I have nevertheless approved Barbee’s request for handholding.” (ROA.449).

Court, Tarrant County, “State’s Third Motion For Court To Enter Order Setting Execution Date.” (ROA.546-553).

In the ongoing RLUIPA litigation in the federal district court, on September 15, 2022, that Court ordered the parties to “provide briefing in ten (10) days which discusses whether issuing an injunction in this case, as requested by Barbee in his complaint, would be appropriate.” (ROA.471). On September 26, 2022, the parties submitted their briefs. (ROA.472-483 (TDCJ); ROA.484-494 (Barbee)). On November 3, 2022, the district court denied TDCJ’s motion to dismiss and issued the preliminary injunction that is the subject of this petition. (ROA.571-587) (App.011-018).

TDCJ appealed the injunction to the Fifth Circuit Court of Appeals, and on November 11, 2022, that Court vacated the preliminary injunction and remanded the case to the district court “for further proceedings consistent with this opinion.” (App.007).

### **B. Reasons for Granting the Stay.**

This Court has jurisdiction to enter a stay under 28 U.S.C. § 1651, 28 U.S.C. § 2101(f) and Supreme Court Rule 23. A stay can be entered “[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on a writ of certiorari.” 28 U.S.C. § 2101(f).

Supreme Court Rule 10 (“Considerations Governing Review on Certiorari”) states that one of “the reasons the Court considers” in determining whether to grant certiorari is when “(c) ...a United States court of appeals...has decided an important federal question in

a way that conflicts with relevant decisions of this Court.”

Such is the situation here, as the Fifth Circuit Court of Appeals has ignored this Court’s clear directives in *Ramirez* that called for the very remedy the injunction orders, for the “State [to] adopt clear rules in advance” to prevent “last-minute resort to the federal courts, *Ramirez*, 142 S. Ct. at 1283. TDCJ’s intransigence and “stubbornness,” in the words of the district court (ROA.582), in following the dictates of *Ramirez* have led to this “last-minute” litigation and the underlying lawsuit. The Fifth Circuit also held that the injunction was “improper under the Prison Litigation Reform Act (“PLRA”) because it goes beyond relief for Barbee himself.” See App.006, (quoting *Ball v. LeBlanc*, 792 F.3d 584 at 598-99 (5th Cir. 2015)). The Fifth Circuit’s logic dictates that courts cannot fashion injunctions that provide any protection to individuals who are not parties in the lawsuit at issue. This approach—perhaps informed by an emerging concern with judicial use of “nationwide” or “universal” injunctions—goes too far in limiting judicial authority.

This Court has used four factors in guiding its discretion in issuing a stay:

1) whether the applicant has shown a strong likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether the stay will substantially injure the opposing parties; and 4) whether the public interest weighs in favor of a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Particularly in death penalty cases, stays should be granted to ‘give non-frivolous claims of constitutional error the careful attention they deserve,’ and when a court cannot “resolve the merits [of a claim] before the scheduled

date of execution...to permit due consideration of the merits.” *Barefoot v. Estelle*, 463 U.S. at 888-889.

**1. A Reasonable probability that this Court will grant certiorari.**

In the context of a stay pending certiorari to this Court, the applicant need only show a “reasonable probability” that this Court will grant certiorari and a “fair prospect” that the decision below will be reversed. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

Mr. Barbee has not yet completed his RLUIPA litigation, the basis of the district court’s 2021 stay of execution. The Fifth Circuit’s holding is also in conflict with the standards for overturning an injunction and for challenging an interlocutory order. A party challenging an interlocutory order must show “serious, perhaps irreparable, consequence[s],” because the 28 U.S.C. § 1292(a)(1) “exception is a narrow one.” *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 480 (1978) (internal quotation marks and citation omitted); *see also Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). The Fifth Circuit never showed how the issuance of this order constituted “serious, perhaps irreparable” consequences for TDCJ and this omission undermines this Court’s well-settled jurisprudence disfavoring interlocutory challenges. The very fact that it is an interlocutory order weighs heavily against any finding of irreparable harm at this juncture, as TDCJ could simply continue to litigate the matter in the district court and then appeal if the result was not satisfactory for them. The Fifth Circuit bypassed this hurdle by failing to consider the context of the order.

The additional factors mentioned above, the Fifth Circuit's disregard of this Court's directives in *Ramirez* and the misreading of the PLRA are discussed more fully in Mr. Barbee's accompanying petition for writ of certiorari.

## **2. Irreparable injury.**

Mr. Barbee is petitioning for certiorari on the eve of his execution scheduled for November 16, 2022. There is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted. *Wainwright v. Booker*, 473 U.S. 935, 935 n. 1 (1985) (mem.) (Powell, J, concurring). Irreparable injury "is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985).

Additionally, as the Fifth Circuit's decision in vacating the injunction was a ruling on an interlocutory order, the failure to grant a stay will mean that his underlying RLUIPA lawsuit will not be resolved and his religious rights will be left unprotected.

## **3 & 4. No substantial injury to the State and the public interest favors granting the stay.**

When the government is the opposing party, the final elements of the stay analysis merge. *Nken*, 556 U.S. at 435. There will be no substantial harm to TDCJ if they have to re-schedule Mr. Barbee's execution until the resolution of his RLUIPA lawsuit in the district court. And it is not in the public interest for an execution to proceed under a death warrant that is void on its face because it is based on untruthful statements. The issuance of a stay here will serve both the public and the State's interest in seeing that justice is done because, as the district court found, TDCJ's concessions do not adequately protect Mr. Barbee's

religious rights.

A stay of execution will give this Court the opportunity to examine the record and rule on the application of *Ramirez* to Mr. Barbee's case without the time-pressure of an impending execution. A stay is warranted here.

**PRAYER FOR RELIEF**

For the reasons above and for those stated in his petition for writ of certiorari, Mr. Barbee respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed petition for a writ of certiorari.

Dated: November 14, 2022.

Respectfully submitted,

*s/s A. Richard Ellis*

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A. Richard Ellis\*  
Texas Bar No. 06560400  
75 Magee Drive  
Mill Valley, CA94941  
(415) 389-6771  
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Maureen Scott Franco  
Federal Public Defender  
Western District of Texas  
Tivon Schardl  
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919 Congress, Suite 950  
Austin, TX 78701  
(737) 207-3008

tivon\_schardl@fd.org

Attorneys for Stephen Dale Barbee

\*Counsel of Record,  
Member, Supreme Court Bar

## CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that on November 14, 2022, I have served electronically a true and correct copy of the foregoing “Application For Stay of Execution” upon opposing counsel, Mr. Stephen Hoffman, Attorney General’s Office for the State of Texas, P.O. Box 12548, Austin, TX 78711-2548 (stephen.hoffman@oag.texas.gov).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

*/s/ A. Richard Ellis*

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**A. Richard Ellis**  
Attorney at Law  
Texas Bar No. 06560400  
75 Magee Avenue  
Mill Valley, CA 94941  
Attorney for Petitioner

# APPENDIX A



TARRANT COUNTY

**Thomas A. Wilder**  
*District Clerk*

August 12, 2022

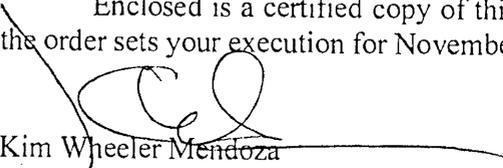
sent via regular U.S. Mail

Stephen Dale Barbee  
TDCJ #00999507  
Polunsky Unit  
3872 FM 350 South  
Livingston, Texas 75803

RE: Order Setting Execution Date

Dear Sir:

Enclosed is a certified copy of this Court's Order signed August 12, 2022. Please note that the order sets your execution for November 16, 2022.

  
Kim Wheeler Mendoza  
Deputy District Clerk  
Tarrant County, Texas

/noc

Enclosure:

Cc:

Debra Gibbs, Director  
Records & Classification  
PO Box 99  
Huntsville, Texas 77340

Deana Williamson  
Court of Criminal Appeals  
PO Box 12308  
Austin, Texas 78711

A. Richard Ellis  
Attorney at Law  
75 Magee Avenue  
Mill Valley, California 94941-4532

Stephen Hoffman  
Assistant Attorney General,  
Criminal Appeals Division  
P. O. Box 12548  
Austin, Texas 78711

Sharen Wilson  
Tarrant County District Attorney  
401 W. Belknap  
Fort Worth, Texas 76196-0101

Benjamin Wolf  
Office of Capital Writs  
1700 N. Congress Ave., #460  
Austin, TX 78701



A CERTIFIED COPY  
ATTEST: 08/12/2022  
THOMAS A. WILDER  
DISTRICT CLERK  
TARRANT COUNTY, TEXAS  
BY: /s/ Kim Wheeler-Mendoza

THE STATE OF TEXAS

VS.

CAUSE NO. 1004856R

STEPHEN DALE BARBEE

§  
§  
§  
§  
§  
§

IN THE 213TH DISTRICT

COURT OF

TARRANT COUNTY, TEXAS

### DEATH WARRANT

To the Director of the Correctional Institutions Division of the Texas Department Of Criminal Justice at Huntsville, Texas, or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Correctional Institutions Division of the Texas Department of Criminal Justice or in the event of the death or disability or absence of both the Director of the Correctional Institutions Division of the Texas Department Of Criminal Justice and the Warden of the Correctional Institutions Division of the Texas Department Of Criminal Justice, to such person appointed by the Board of Directors of the Correctional Institutions Division of the Texas Department Of Criminal Justice, Greetings:

Whereas, on the 23RD day of FEBRUARY, A.D. 2006, in the 213TH District Court of Tarrant County, Texas, STEPHEN DALE BARBEE was duly and legally convicted of the crime of Capital Murder, as fully appears in the judgment of said Court entered upon the minutes of said court as follows, to-wit: Judgment attached and,

Whereas, on the 27TH day of FEBRUARY, A.D., 2006 the said Court pronounced sentence upon the said STEPHEN DALE BARBEE in accordance with said judgment fixing the time for the execution of the said STEPHEN DALE BARBEE for any time after the hour of 6:00 p.m. on WEDNESDAY, the 16TH day of NOVEMBER, A.D., 2022, as fully appears in the sentence of the Court and entered upon the minutes of said Court as follows, to-wit: Sentence attached.

These are therefore to command you to execute the aforesaid judgment and sentence any time after the hour of 6:00 p.m. on WEDNESDAY, the 16TH day of NOVEMBER, A.D., 2022, by intravenous injection of substance or substances in a lethal quantity sufficient to cause death and until the said STEPHEN DALE BARBEE is dead.

Herein fail not, and due return make hereof in accordance with law.

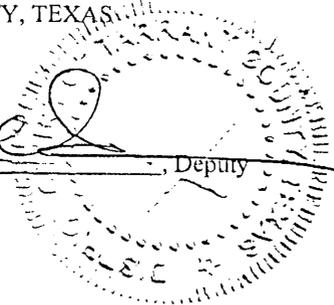
Witness my signature and seal of office on this the 12TH day of AUGUST, A.D., 2022.

Issued under my hand and seal of Office in the City of Fort Worth, Tarrant County Texas this 12TH day of AUGUST, 2022.



THOMAS A. WILDER,  
CLERK OF THE DISTRICT COURTS OF  
TARRANT COUNTY, TEXAS

BY  Deputy





A CERTIFIED COPY  
ATTEST: 08/12/2022  
THOMAS A. WILDER  
DISTRICT CLERK  
TARRANT COUNTY, TEXAS  
BY: /s/ Kim Wheeler-Mendoza

RETURN OF THE DIRECTOR OF THE TEXAS DEPARTMENT OF CORRECTIONS

Came to hand, this the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_ and executed the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_ by the death of

STEPHEN DALE BARBEE

DISPOSITION OF BODY:

DATE:

TIME:

CORRECTIONS

DIRECTOR OF TEXAS DEPARTMENT OF

BY: \_\_\_\_\_



A CERTIFIED COPY  
ATTEST: 08/12/2022  
THOMAS A. WILDER  
DISTRICT CLERK  
TARRANT COUNTY, TEXAS  
BY: /s/ Kim Wheeler-Mendoza

1004856R

Death Warrant and Execution Order for STEPHEN DALE BARBEE was hand-delivered by the Sheriff of Tarrant County to Texas Department of Criminal Justice, Classification and Records on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Received by:

Delivered by:

\_\_\_\_\_  
Bryan Collier, Executive Director  
Texas Department of Criminal Justice

\_\_\_\_\_  
Sheriff



A CERTIFIED COPY  
 ATTEST: 08/12/2022  
 THOMAS A. WILDER  
 DISTRICT CLERK  
 TARRANT COUNTY, TEXAS  
 BY: /s/ Kim Wheeler-Mendoza

FILED  
 THOMAS A WILDER, DIST. CLERK  
 TARRANT COUNTY, TEXAS

AUG 12 2022

TIME 12:20p  
KW DEPT

Cause No. 1004856R

THE STATE OF TEXAS

§  
§  
§  
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IN THE 213TH JUDICIAL

v.

DISTRICT COURT OF

STEPHEN DALE BARBEE

TARRANT COUNTY, TEXAS

DUPLICATE ORDER SETTING EXECUTION DATE

Before the Court is the State's Third Motion for Court to Enter Order Setting Execution Date, filed on July 15, 2022. The Court finds that the motion should be **GRANTED** and a date of execution be set in this case.

I.

Defendant Stephen Dale Barbee was convicted of capital murder on February 23, 2006, for intentionally causing the deaths of Lisa Underwood and Jayden Underwood during the same criminal transaction. After the jury returned an affirmative answer to the future dangerousness special issue and a negative answer to the mitigation special issue, this Court sentenced the Defendant to death by lethal injection on February 27, 2006.

The Court of Criminal Appeals of Texas affirmed the Defendant's conviction and death sentence on direct appeal on December 10, 2008, and the Supreme Court of the United States denied his petition for a writ of certiorari on October 5, 2009. *See Barbee v. State*, 2008 WL 5160202 (Tex. Crim. App. 2008) (unpublished), *cert.*



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DISTRICT CLERK  
TARRANT COUNTY, TEXAS  
BY: /s/ Kim Wheeler-Mendoza

*denied*, 558 U.S. 856, 130 S.Ct. 144, 175 L.Ed.2d 94 (2009). The Court of Criminal Appeals of Texas denied the Defendant's original state application for writ of habeas corpus on January 14, 2009, and his subsequent application on May 8, 2013. *See Ex parte Barbee*, 2009 WL 82360 (Tex. Crim. App. 2009) (unpublished); *Ex parte Barbee*, 2013 WL 1920686 (Tex. Crim. App. 2013) (unpublished).

The United States District Court for the Northern District of Texas, Fort Worth Division, denied the Defendant's petition for writ of habeas corpus on July 7, 2015. *See Barbee v. Stephens*, 2015 WL 4094055 (N.D. Tex. 2015) (unpublished). The United States Court of Appeals for the Fifth Circuit denied the Defendant's certificate of appealability in part on November 23, 2016, and affirmed the denial of his petition for writ of habeas corpus on March 21, 2018. *See Barbee v. Davis*, 660 Fed. Appx. 293 (5th Cir. 2016); *Barbee v. Davis*, 728 Fed. Appx. 259 (2018). The Supreme Court of the United States denied the Defendant's petition for writ of certiorari on November 19, 2018. *See Barbee v. Davis*, 2018 WL 3497292 (2018). There is currently nothing before this Court to prevent an execution date from being set.

## II.

This Court previously set an order for the Defendant's execution on October 2, 2019. *See Order Setting Execution Date*. On September 23, 2019, the Court of Criminal Appeals stayed the Defendant's execution so that it could consider a claim that the Defendant suffered structural error due to his trial counsel improperly



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BY: /s/ Kim Wheeler-Mendoza

overriding his Sixth Amendment right to insist that counsel maintain his innocence. *See* Order Staying Execution. On February 10, 2021, the Court of Criminal Appeals dismissed the Defendant's claim because it was previously legally available and because it did not allege facts entitling him to relief. *Ex parte Barbee*, \_\_\_ S.W.3d \_\_\_, 2021 WL 476477, at \*8 (Tex. Crim. App. February 10, 2021). Mandate was issued on March 8, 2021.

### III.

This Court re-set the defendant's execution for October 12, 2021. See Order Setting Execution Date. On October 1, 2021, the defendant filed an application for writ of habeas corpus alleging that recent disclosures regarding the medical examiner buttress his innocence claim and raise questions about the fairness of his trial and that the execution protocol used by the Texas Department of Criminal Justice (TDCJ) will subject him to cruel and unusual punishment due to his well-documented arm immobility and range-of-motion disabilities. *See Ex parte Barbee*, 2021 WL 4713629, at \*1 (Tex. Crim. App. October 8, 2021). The Court of Criminal Appeals dismissed this application because the defendant failed to make a *prima facie* showing on his first allegation and his second allegation raises a non-cognizable claim. *See Ex parte Barbee*, 2021 WL 4713629, at\*1. There is no state court impediment to setting the defendant's execution.



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TARRANT COUNTY, TEXAS  
BY: /s/ Kim Wheeler-Mendoza

#### IV.

On September 21, 2021, the defendant filed a federal lawsuit pursuant to 42 U.S. §1983 alleging that TDCJ will carry out his execution in a manner that will violate his religious rights because they will prevent his chosen spiritual advisor from having physical contact and praying with him during the execution process. *See Barbee v. Collier*, 566 F.Supp.3d726,729 (S.D.Tex. 2021). On October 7, 2021, the United States District Court stayed the defendant's execution until the State allows his chosen spiritual advisor in the execution chamber, authorizes contact between Barbee and his spiritual advisor, and allows his spiritual advisor to pray during the execution. *See Barbee v. Collier*, 566 F.Supp.3d at 738-39. In granting this stay, the Court recognized the pendency of an identical claim involving identical decisions by the same prison officials before the United States Supreme Court in *Ramirez v. Collier*. *See Barbee v. Collier*, 566 F.Supp.3d at 735.

On March 24, 2022, the United States Supreme Court issued its *Ramirez* decision holding that, under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA):

1. Prison officials cannot impose a total ban on audible prayer by spiritual advisors; rather, they may only impose reasonable restrictions such as limiting the volume or requiring silence during critical points in the execution process and allowing the spiritual advisor to speak only with the inmate; and



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BY: /s/ Kim Wheeler-Mendoza

2. Prison officials cannot impose a categorical ban on religious touching; rather, they may only require that the touching not interfere with either the insertion of the IV line or the medical team's unobstructed view of that line during the execution process.

*Ramirez v. Collier*, \_\_\_ U.S. \_\_\_, 142 S.Ct. 1264, 1280-81, 212 L.Ed.2d 262 (2022).

Given this guidance from the United Supreme Court regarding spiritual advisors in the execution chamber, there is no federal court impediment to setting the defendant's execution.

V.

**IT IS THEREFORE EVIDENT** that Defendant has exhausted his avenues for relief through the state and federal courts, and further there are no stays of execution in effect in this case.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the Defendant, Stephen Dale Barbee, who has been adjudged to be guilty of capital murder as charged in the indictment and whose punishment has been assessed by the verdict of the jury and judgment of the Court at **DEATH**, shall be kept or taken into the custody of the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice until the **16<sup>th</sup> DAY OF NOVEMBER 2022**, upon which day, at the Correctional Institutions Division of the Texas Department of Criminal Justice, at some time after the hour of six o'clock p.m., in a room designated by the Correctional



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BY: /s/ Kim Wheeler-Mendoza

Institutions Division of the Texas Department of Criminal Justice and arranged for the purpose of execution, the said Director, acting by and through the executioner designated by said Director, as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of the Defendant, Stephen Dale Barbee, until Stephen Dale Barbee is dead. Such procedure shall be determined and supervised by the said Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

**IT IS FURTHER ORDERED** that the Clerk of this Court shall issue and deliver to the Sheriff of Tarrant County, Texas, a **Death Warrant** in accordance with this sentence and Order, directed to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, at Huntsville, Texas, commanding the said Director, to put into execution the Judgment of Death against Stephen Dale Barbee.

**The Sheriff of Tarrant County, Texas IS HEREBY ORDERED**, upon receipt of said Death Warrant, to deliver said Warrant to the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, Huntsville, Texas together with Defendant Stephen Dale Barbee.



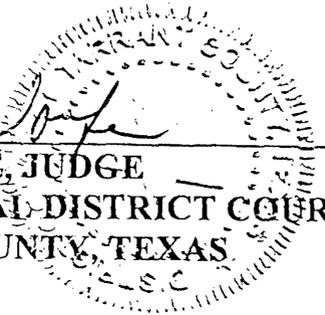
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THOMAS A. WILDER  
DISTRICT CLERK  
TARRANT COUNTY, TEXAS  
BY: /s/ Kim Wheeler-Mendoza

**IT IS FURTHER ORDERED** that the Clerk of this Court shall immediately deliver a copy of this order, by first-class mail, e-mail, or fax not later than the second business day after the Court enters the order, *see* **TEX. CODE CRIM. PROC. ART. 43.141(b-1) (1) & (2)**, to:

- a. Defendant's attorney of record, Mr. A. Richard Ellis, 75 Magee Avenue, Mill Valley, California 94941-4532 (a.r.ellis@att.net);
- b. The attorney who represented the Defendant in the most recently concluded stage of a state or federal post-conviction proceeding;
- c. Mr. Ben Wolff, Director, Office of Capital and Forensic Writs, 1700 N. Congress Ave., Suite 460, Austin, Texas, 78701 (Benjamin.Wolff@ocfw.texas.gov);
- d. Mr. Stephen Hoffman, Assistant Attorney General, Criminal Appeals Division, P.O. Box 12548, Austin, Texas 78711 (Stephen.Hoffman@oag.texas.gov); and
- e. The post-conviction unit of the Tarrant County Criminal District Attorney's Office, all within the same time frame.

SIGNED this 12<sup>th</sup> day of August 2022.

  
CHRIS WOLFE, JUDGE  
213TH JUDICIAL DISTRICT COURT  
TARRANT COUNTY, TEXAS



# APPENDIX B

566 F.Supp.3d 726  
United States District Court, S.D. Texas, Houston Division.

Stephen BARBEE, Plaintiff,

v.

Bryan COLLIER and Bobby Lumpkin  
and Dennis Crowley, Defendants.

CIVIL ACTION NO. 4:21-CV-3077

I

Signed 10/07/2021

### Synopsis

**Background:** Christian inmate, who was scheduled for execution by lethal injection and whose attempts to obtain state and federal post-conviction relief were unsuccessful, brought § 1983 action, alleging that execution protocol, as implemented by Texas Department of Criminal Justice (TDCJ), would prevent inmate's chosen spiritual advisor from having physical contact and praying with him during execution process in violation of Free Exercise Clause and Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Inmate moved for stay of execution.

**Holdings:** The District Court, Kenneth M. Hoyt, J., held that:

TDCJ failed to establish inmate's action was untimely and dilatory;

grants of certiorari review by United States Supreme Court weighed in favor of finding inmate was likely to succeed on merits of claims;

inmate was likely to prevail on merits of argument that TDCJ's prohibition was not least restrictive means of furthering interests of prison security;

inmate's failure to bring action when TDCJ adopted written execution protocol did not indicate religious exercise was insincere;

public interest weighed in favor of granting stay; and

granting stay would not substantially harm TDCJ.

Motion granted.

### Attorneys and Law Firms

\*729 Allen Richard Ellis, Attorney at Law, Mill Valley, CA, for Plaintiff.

Stephen Matthew Hoffman, Edward Larry Marshall, Office of the Attorney General, Austin, TX, for Defendants.

### ORDER STAYING EXECUTION

Kenneth M. Hoyt, United States District Judge

On February 23, 2006, a jury in Tarrant County, Texas convicted Stephen Dale Barbee of capital murder for killing his pregnant girlfriend and her seven-year-old son. Pursuant to the jury's answers to Texas' special issue questions, the convicting court sentenced him to death. Barbee has unsuccessfully availed himself of state and federal post-conviction remedies. The State of Texas has set Barbee's execution for October 12, 2021.

On September 21, 2021, Barbee filed this lawsuit under 42 U.S.C. § 1983 claiming that Texas will carry out his execution in a manner that will violate his religious rights. (Docket Entry No. 1). Specifically, Barbee complains that the Texas Department of Criminal Justice (TDCJ) will prevent his chosen spiritual advisor from having physical contact and praying with him during the execution process. Barbee argues that these limitations will violate the First Amendment's Free Exercise Clause and substantially burden the exercise of his religion in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc et seq.

With the fast-approaching date, Barbee has moved for a stay of execution. (Docket Entry No. 6). The Defendants oppose any \*730 stay. (Docket Entry No. 9). For the reasons discussed below, the Court stays Barbee's execution.

### **I. Background**

Texas adopted lethal injection as its sole method of execution in 1982. In 1985, Texas promulgated an official execution policy in which a TDCJ-employed chaplain attended to the condemned inmate's spiritual needs during an execution. During that time, a prison chaplain could have physical contact and pray with the condemned as the execution

proceeded. For over thirty years, no inmate asked for an outside spiritual advisor to be present in his execution.

In early 2019, Texas inmate Patrick Henry Murphy sued because TDCJ protocol would not allow the spiritual advisor of his choice—a Pure Land Buddhist priest—in the execution chamber. *Murphy v. Collier*, 4:19-cv-1106 (S.D. Tex.). The United States Supreme Court stayed Murphy's execution on March 28, 2019. *Murphy v. Collier*, — U.S. —, 139 S. Ct. 1475, 203 L.Ed.2d 633 (2019). That same day, Justice Kavanaugh entered a concurring statement which proposed that “there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room.” *Id.* (Kavanaugh, J., concurring). Five days later, TDCJ revised its execution protocol to exclude all spiritual advisors, even prison-employed chaplains, from the execution chamber.

On September 26, 2019, Ruben Gutierrez filed a civil-rights lawsuit claiming that TDCJ's new policy violated his religious rights by barring his spiritual advisor from the execution chamber. *Gutierrez v. Saenz*, 1:19-cv-185 (S.D. Tex.). The Supreme Court ultimately stayed Gutierrez's execution. Along with the stay, the Supreme Court assigned the District Court a task: “promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have *in his immediate presence* during the execution.” *Gutierrez v. Saenz*, — U.S. —, 141 S. Ct. 127, 128, 207 L.Ed.2d 1075 (2020) (emphasis added).

After the submission of evidence on the question of security, the District Court in *Gutierrez* entered an order specifically “finding that the extensive evidence submitted by the Parties does not demonstrate that serious security concerns would result from allowing inmates the assistance of a chosen spiritual advisor in their final moments.” *Gutierrez v. Saenz*, 1:19-cv-185 (S.D. Tex.), (Docket Entry No. 124). The Supreme Court subsequently accepted the findings and remanded the *Gutierrez* case for adjudication of claims regarding the presence of a spiritual advisor in the execution chamber. *Gutierrez v. Saenz*, — U.S. —, 141 S. Ct. 1260, 1261, 209 L.Ed.2d 4 (2021).

On April 21, 2021, TDCJ adopted a new execution protocol which, with certain preliminary requirements, will allow an inmate's chosen spiritual advisor to accompany him during an execution. The new protocol gives precise details about the qualifications, background check, and training of an inmate's spiritual advisor. The protocol also specifies that the spiritual advisor “will be escorted into the execution chamber” and may be “present in the execution chamber.” (Docket Entry No. 1, Exh. B).<sup>1</sup> The 2021 execution protocol is silent about a spiritual advisor's role inside the execution chamber. The written policy \*731 does not say that a spiritual advisor will have any constraint placed on the spiritual assistance he or she may provide the inmate as the execution proceeds.

<sup>1</sup> With that change, the District Court recently dismissed Gutierrez's lawsuit because Texas now allows a spiritual advisor's presence in the execution chamber. *Gutierrez v. Saenz*, 1:19-cv-185 (S.D. Tex.), (Docket Entry No. 172).

TDCJ officials have apparently placed informal limitations on what the advisor may do upon entry to the death chamber. As inmates have submitted their requests for a spiritual advisor to attend their execution, prison officials have sent letters or other communications indicating that they would not allow the spiritual advisor to pray with or touch the inmate as the execution proceeds. Texas inmates have recently filed lawsuits complaining that TDCJ's implementation of its new policy violates their religious rights.

Parallel litigation has arisen in Alabama. One Alabama inmate sued because he wanted his spiritual advisor “to pray with [him], hold his hand, and otherwise touch [him] at the moment of his death.” *Smith v. Dunn*, 516 F.Supp.3d 1310 (M.D. Ala. 2021). The Eleventh Circuit entered an order staying the inmate's execution based on his religious-liberty claims. See *Smith v. Commissioner, Alabama Department of Corrections*, 844 F. App'x 286, 295 (11th Cir. 2021). The Eleventh Circuit specifically found that the inmate had made a prima facie showing that the exercise of his religion would be substantially burdened because he “will be unable to hold [his spiritual advisor's] hand and pray with him in his final moments. This required change in the way [the inmate] carries out his religious practices ....” *Smith v. Commissioner, Alabama Department of Corrections*, 844 F. App'x 286, 291 (11th Cir. 2021). The Supreme Court denied Alabama's motion to vacate the stay. See *Dunn v. Smith*, — U.S. —, 141 S. Ct. 725, 209 L.Ed.2d 30 (2021).

The Supreme Court's stay of execution in *Smith* prompted the Alabama prison system to accommodate the inmate's

religious requests. The parties subsequently filed a joint motion to dismiss the *Smith* litigation when the prison agreed to allow the “Plaintiff’s chosen spiritual advisor into the execution chamber and will permit him to anoint Plaintiff, hold Plaintiff’s hand, and pray with him ....” *Smith v. Dunn*, 2:20-CV-1026-RAH (M.D. Ala. June 17, 2021) (Order granting Joint Motion to Dismiss, Docket Entry No. 58).<sup>2</sup>

<sup>2</sup> The federal government has also allowed physical contact and audible prayer during recent executions. *Brief for the United States as Amicus Curiae Supporting Neither Party, Ramirez v. Collier*, No. 21-5592 (US) (filed Sept. 2021), at 24-25.

Like Alabama, Texas now allows an inmate’s chosen spiritual advisor into the execution chamber. Texas inmates, however, are currently litigating what assistance a spiritual advisor may provide during the execution process. Recently, another Texas death row inmate, John H. Ramirez, sued because of those limitations. While TDCJ had approved Ramirez’s request for a chosen spiritual advisor to be by his side, prison officials informed him that his spiritual advisor could neither touch him nor engage in audible prayer during the execution. *Ramirez v. Collier*, 4:21-cv-2609 (S.D. Tex.). The United States Supreme Court recently stayed Ramirez’s execution. *Ramirez v. Collier*, — U.S. —, 142 S.Ct. 50, 50, 210 L.Ed.2d 1019 (2021). In briefing that the parties will complete by November 1, 2021, the Supreme Court instructed as follows:

The parties are directed to submit briefs that address whether petitioner adequately exhausted his audible prayer claim under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). The parties \*732 are also directed to address whether petitioner has satisfied his burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to demonstrate that a sincerely held religious belief has been substantially burdened by restrictions on either audible prayer or physical contact. The parties are further directed to address whether the government has satisfied its burden under RLUIPA to demonstrate its policy is the least restrictive means of advancing a compelling government interest. Finally, the parties [are] directed to address the type of equitable relief petitioner is seeking, the appropriate standard for this relief, and whether that standard has been met here. See *Hill v. McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006) (setting forth a four-factor test for equitable relief). The parties may address other relevant issues, avoiding repetition of discussion in prior briefing.

*Ramirez v. Collier*, — U.S. —, 142 S.Ct. 53, 53, 210 L.Ed.2d 1021 (2021). In short, the *Ramirez* proceedings may clarify what technical requirements an inmate must meet in filing such litigation, what burden he must satisfy in showing an imposition on his religious worship, whether TDCJ has sufficiently justified its limitation on its new policy, and what relief is available in similar situations.<sup>3</sup>

<sup>3</sup> Given the short time in which Ramirez filed suit before his execution date, the factual record before the district court was sparse, particularly regarding any security interest in limiting physical contact and prayer in the execution chamber. The Supreme Court stayed Ramirez’s execution and oral argument will proceed in November, but the Supreme Court is not a trial court. It is unclear how the action currently pending before the Supreme Court will conclusively resolve the fact-intensive questions involved in deciding a RLUIPA claim. See *Moussazadeh v. Texas Dept. of Criminal Justice*, 703 F.3d 781, 795 (5th Cir. 2012) (highlighting the importance of a district court developing the rich factual record necessary to resolve an RLUIPA claim).

## II. Barbee’s Lawsuit

With that background, Barbee filed this lawsuit on September 21, 2021. (Docket Entry No. 1). Barbee states that he “is a devout Christian and has been throughout his life.” (Docket Entry No. 1 at 8). Barbee has designated Barry Brown of the Salvation Army as his spiritual advisor. (Docket Entry No. 1 at 9). Barbee wants Mr. Brown “to be physically present in the chamber, to audibly pray and to physically touch Mr. Barbee in order to confer ministrations and a spiritual blessing upon him at the time of his death.” (Docket Entry No. 1 at 9).

It appears that Mr. Brown may have been the first one to inform Barbee on September 7, 2021, that TDCJ would not allow physical contact and audible prayer during his execution. (Docket Entry No. 1 at 10). On September 15, 2021, Barbee sought an accommodation of his religious practices through the prison grievance system. “The Texas prison system provides a two-step process for filing grievances, and a prisoner must pursue a grievance through both steps to satisfy the exhaustion requirement.” *Bangmon v. Alexander*, 2021 WL 3477490, at \*3 (5th Cir. 2021). On September 16, 2021, Barbee’s step one grievance was denied as follows: “At this time the spiritual advisor is not allowed to touch the inmate or speak out loud once inside the execution chamber. No further action is warranted at this time.” (Docket

Entry No. 1 at 10). Barbee's step two grievance was pending at the time he filed the lawsuit. (Docket Entry No. 1 at 10).<sup>4</sup>

4 On the same day that TDCJ denied his step one grievance, an individual from the Office of General Counsel-TDCJ informed Barbee's attorney that any complaints about the policy would be addressed only through the prison grievance process.

\*733 Barbee filed suit under 42 U.S.C. § 1983 raising two claims: TDCJ's execution protocol violates (1) the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq. ("RLUIPA") and (2) his First Amendment right to Free Exercise of religion by inhibiting his ability to practice his religion. Barbee asks for relief in the form of a "declaratory judgment that TDCJ's 'No Speaking' and 'No Contact' policies violate Mr. Barbee's rights" under the Free Exercise Clause and RLUIPA. Barbee also requests "[a] preliminary and permanent injunction prohibiting Defendants from executing [him] until they allow his spiritual advisor not only to be present with him in the chamber, but to pray audibly with him and have physical contact with him in order to confer a blessing upon him." (Docket Entry No. 1 at 13). The Court must consider whether to stay Barbee's impending execution so that this lawsuit may go forward.

### III. Analysis

The Defendants' opposition to a stay of execution makes two arguments. First, the Defendants argue that Barbee filed this lawsuit so late that it would be inequitable for the litigation to proceed. Second, the Defendants argue that Barbee has not met the legal standards necessary to stay this execution.

#### A. Timeliness

The Defendants argue that the Court should deny the motion to stay because Barbee was dilatory in filing his lawsuit. The Supreme Court has observed that "a number of federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day." *Hill v. McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006); see also *Bible v. Davis*, 739 F. App'x 766, 770 (5th Cir. 2018) (denying a late-filed lawsuit as a "a dilatory tactic" that "therefore warrants no equitable relief"). The Supreme Court has recognized the "significant" problems created when death-row inmates delay in filing their § 1983 suits, stating that "federal courts can and should protect States from dilatory or speculative suits." *Hill*, 547 U.S. at 585, 126 S.Ct. 2096.

The Defendants contend that Barbee filed without diligence because his "lawsuit was brought five months after TDCJ amended its execution protocol to its current form and two-and-a-half months after Barbee's execution was first scheduled." (Docket Entry No. 9 at 1). The Defendants premise their argument, however, on the belief that an inmate would know from the official TDCJ execution protocol that a spiritual advisor could not engage in physical contact and audible prayer in the execution chamber. But the 2021 execution protocol as written does not limit what a spiritual advisor will do in the execution chamber.<sup>5</sup> An inmate reading the 2021 execution protocol would have no reason to believe that TDCJ would prevent his spiritual advisor from praying or having physical conduct in the execution chamber.

5 The closest the official policy comes to regulating the spiritual advisor's actions is its statement that behavior which is "disruptive to the execution procedure shall be cause for immediate removal." Nothing would alert an inmate that prayer or physical contact could be a form of disruptive behavior.

Despite the Defendants' argument that they "had no control over when Barbee filed this lawsuit," an inmate cannot sue to remedy a limitation of which he has no notice. (Docket Entry No. 9 at 21). The record to date does not clarify when Barbee should have been aware that TDCJ officials would make the decisions they did. \*734 The Defendants have not produced any document or other evidence showing that they informed him about the limitations challenged in this lawsuit when they implemented the 2021 protocol or when Barbee first requested a spiritual advisor. Perhaps Barbee should have been aware when John Henry Ramirez filed a recent similar lawsuit, but even Ramirez himself did not learn about the prohibition on audible prayer until the middle of August. (Docket Entry No. 1, Exhibit C); see also *Ramirez v. Collier*, 4:21-cv-2609 (S.D. Tex.) (Docket Entry No. 12). Because the Defendants do not base their limitation on any written policy, Barbee would not know how prison officials would conduct his own execution until they told him.

Because the Defendants based their actions on the opinions of prison officials rather than written policy, an inmate will not know what to expect until so informed. Barbee apparently first learned about the limitations in his own execution only a short time before he filed the instant lawsuit. The Court finds the Defendants' arguments about the timeliness of this lawsuit to be without merit.

## B. Stay of Execution

A full review of the circumstances suggests that a stay of execution is appropriate in this case. While Barbee's briefing regarding a stay mentions both of his claims, the parties' arguments more fully discuss his RLUIPA claim. The Court, therefore, will focus its analysis on whether Barbee has met the stay requirements in the context of the RLUIPA standard. In doing so, however, the Court finds that the same logic would allow for a stay on his First Amendment claim.

### 1. *Nken* Standard

A prisoner condemned to death, however imminent that death may be, has no automatic entitlement to a stay of execution. See *McFarland v. Scott*, 512 U.S. 849, 858, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994). "A stay of execution is an equitable remedy that is not available as a matter of right." *Wood v. Collier*, 836 F.3d 534, 538 (5th Cir. 2016). A court considering a motion to stay an execution must consider the four factors outlined in *Nken v. Holder*, 556 U.S. 418, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009): "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest." *In re Campbell*, 750 F.3d 523, 534 (5th Cir. 2014) (quotation omitted).

### 2. Likelihood of Success on the Merits

Of the stay-of-execution factors, the likelihood of success on the merits and irreparable harm are "the most critical." *Nken*, 556 U.S. at 434, 129 S.Ct. 1749. In evaluating the first factor, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken*, 556 U.S. at 434, 129 S.Ct. 1749 (quotation marks omitted); see also *Texas Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020). Courts describe the movant's burden as requiring a "strong" or "substantial" likelihood of success. See *In re Garcia*, 756 F. App'x 391, 396 (5th Cir. 2018); *Sells v. Livingston*, 561 F. App'x 342, 343 (5th Cir. 2014); *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013). The likelihood-of-success factor weighs in Barbee's favor.

The Defendants make three arguments against a stay. First, the Defendants argue that Barbee has not exhausted state remedies, a precursor to relief under civil rights law. Second, the Defendants assert that their interpretation of TDCJ written protocol does not substantially burden Barbee's \*735 exercise of his religion. Third, the Defendants argue that the current interpretation of their policy is the least restrictive means of furthering their compelling interest.

Before turning to the Defendants' arguments, however, the Court observes that the *Ramirez* case pending before the Supreme Court will address the precise issues raised by Barbee's lawsuit. Under circumstances similar to those in the instant lawsuit, the Supreme Court stayed Ramirez's execution and granted *certiorari* review.<sup>6</sup> The Defendants have not identified any meaningful difference between the circumstances that led to a stay in the *Ramirez* case and those in the instant one. The Defendants correctly state the law: "[t]he [Supreme] Court's grant of certiorari in a capital case does not cause us to deviate from circuit law, nor is it grounds for a stay of execution." *Cantu v. Collins*, 967 F.2d 1006, 1012 n.10 (5th Cir. 1992). The Supreme Court, however, has not only granted review of a somewhat-similar issue or comparable constitutional claim it has granted review of identical claims involving identical decisions by the same prison officials as in this case. The Court cannot turn a blind eye to the fact that the Supreme Court will most likely stay this case because of its close kinship with the *Ramirez* case.

<sup>6</sup> The Supreme Court's action in *Ramirez* was consistent with the earlier litigation arising from Alabama which resulted in that State allowing for physical contact and prayer in the execution chamber.

Turning to the Defendants' arguments, they first contend that the Prison Litigation Reform Act ("PLRA") bars federal review of Barbee's claims because he did not properly exhaust available administrative remedies before filing suit in federal court. See 42 U.S.C. § 1997e(a). The Supreme Court has emphasized that exhaustion of all administrative procedures is mandatory before an inmate can file any suit. See *Jones v. Bock*, 549 U.S. 199, 212, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). Requiring inmates to exhaust remedies through the prison grievance process serves to "give[ ] officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004).

Texas employs a two-step grievance process that first allows a Warden to address problems and then permits an inmate to

appeal to TDCJ Central Grievance Office. Barbee filed his prison grievance on September 15, 2021, only a week after first learning from his spiritual advisor about limitations in the execution chamber. According to his pleadings, Barbee filed suit before receiving a denial of his step two grievance. (Docket Entry No. 1 at 10). Because Barbee did not wait to hear that prison officials denied his step two grievance, the Defendants ask this Court to let his execution go forward.

Exhaustion has been a reoccurring theme in the lawsuits challenging Texas' approach to spiritual advisors in the execution chamber. In another case, one court found:

There is no indication in the record that filing a prison grievance for review by a warden and then administrative staff would be productive when they have no ability to change TDCJ execution protocol. It appears that Murphy has effectively satisfied the spirit of the exhaustion rule. Dismissing this action for failing to file prison grievances when the issues have already been passed upon by the TDCJ director and the state courts would prioritize hollow formality over the religious rights of a man condemned to die soon.

*Murphy v. Collier*, 423 F.Supp.3d 355, 359 (S.D. Tex. 2019). The Fifth Circuit has similarly deemphasized the exhaustion requirement \*736 in similar cases, primarily because the Supreme Court has stayed the execution of inmates who have not fully complied with the technical exhaustion requirements. See *Murphy v. Collier*, 942 F.3d 704, 709 (5th Cir. 2019). Because the Supreme Court has explicitly requested briefing on exhaustion in *Ramirez*, the Court finds that it would be inappropriate to deny a stay on that basis at this juncture.

The Defendants' remaining two arguments against a stay contend that Barbee will not experience a substantial burden on the exercise of his religion and that they now employ the least restrictive means of furthering a compelling interest. RLUIPA provides in part that: "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless it furthers "a compelling governmental interest," and does so by the "least restrictive means." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (quoting 42 U.S.C. § 2000cc-1(a)(1)-(2)). Notwithstanding the Defendants' arguments to the contrary,<sup>7</sup> Barbee's pleadings do not give any reason to doubt his sincerely held religious beliefs. The information before the Court suggests that Barbee will be able to carry his initial RLUIPA responsibility of showing

that TDCJ's limitations in the execution chamber substantially burden the exercise of his religion. See *Adkins v. Kaspar*, 393 F.3d 559, 567 (5th Cir. 2004); see also *Smith v. Commissioner, Alabama Department of Corrections*, 844 F. App'x 286, 291 (11th Cir. 2021) (finding a substantial burden in the denial of a similar request). If the Supreme Court thought that TDCJ's limitations on spiritual advisors did not impose a substantial burden on religious exercise, the Supreme Court would not have stayed Ramirez's execution. The Supreme Court's stay in *Ramirez* is necessarily a rejection of the Defendants' argument that their limitations do not burden an inmate's religious exercise.<sup>8</sup>

7 The Defendants argue: "Barbee's plainly dilatory claim cannot satisfy RLUIPA's sincerity prong. If touching and audible prayer in the chamber were important to Barbee, he could have filed suit when the current protocol was adopted—or even during last-minute litigation pertaining to his 2019 execution date. The belated nature of this lawsuit strongly suggests that these practices were not significant to him until he apprehended—after Ramirez's stay—that requesting an accommodation could potentially delay his execution." (Docket Entry No. 9 at 29). The Court declines to accept the inferences proposed by the Defendants. The Defendants cannot persuasively argue that any inmate wanting physical contact or audible prayer should have filed suit when TDCJ enacted its protocol when that written protocol does not contain the limitations at issue in this lawsuit.

8 The Defendants argue that they should prevail because they are "not forcing or enticing Barbee to do anything." (Docket Entry No. 9 at 31). Even though they "limit conduct inside the execution chamber," the Defendants argue that they do "not force an inmate to do what his religious tenets forbid." (Docket Entry No. 9 at 31). Under the Defendants' reasoning, a prison may place any restriction on an inmate's religious practice so long as they do not compel any action against religious belief. This understanding of RLUIPA lacks foundation in the statute's text or Supreme Court precedent. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (applying comparable RFRA to prohibition of a controlled substance); *Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (discussing prison regulation of religious outerwear); see also *Ware v. Louisiana Department of Corrections*, 866 F.3d 263 (5th Cir. 2017) (discussing prison regulation involving dreadlocks). When the prison prohibits religious activity, religious exercise is substantially burdened. See *Yellowbear v.*

*Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.) (stating that “flatly prohibiting Mr. Yellowbear from participating in an activity motivated by a sincerely held religious belief” could impose a substantial burden); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (“[A]n outright ban on a particular religious exercise is a substantial burden on that religious exercise.”).

\*737 The Court recognizes that TDCJ has a compelling interest in maintaining security, particularly in the context of an execution. Issues of prison security are “peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence ... that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.” *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Courts generally defer to the judgment of prison officials. *See O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (“[W]e have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators ....”). Still, the Defendants must prove that their limitations are the least restrictive means of furthering a compelling governmental interest. *See Davis v. Davis*, 826 F.3d 258, 264 (5th Cir. 2016); *see also Sossamon v. Texas*, 563 U.S. 277, 281, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011). This is an “exceptionally demanding” standard. *Holt v. Hobbs*, 574 U.S. 352, 362, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015).

As it now stands, the record is thin on whether the Defendants may be able to meet this burden. The Defendants have supplied a declaration from Bobby Lumpkin, Director of the Correctional Institutions Division of TDCJ. (Docket Entry No. 10, Exh. C). Mr. Lumpkin provides several reasons for the policy: the spiritual advisor may “frustrate the execution” by creating a disruption, may try to stop the execution by pulling IV lines, may hinder the execution team’s ability to see or hear the inmate as he dies, may block the witnesses’ view of the execution process, and may impede access to the inmate should something go awry with the execution. (Docket Entry No. 10, Exh. C). Yet the record before the Court still provides little information on which to assess whether prison officials have employed the least restrictive means of accomplishing their valid concerns for security.

TDCJ now completely bars a religious accommodation they once permitted, and one which other jurisdictions such as Alabama permit notwithstanding the presence of free-world

spiritual advisors in the execution chamber. During the three decades in which TDCJ allowed prison clergy to participate in executions, spiritual advisors would touch and pray with the inmates. Many of the concerns expressed by Mr. Lumpkin existed when TDCJ clergy participated in executions. The information before the Court does not explain how the prison system allowed TDCJ chaplains to touch the inmate and pray while not blocking the sight of the execution team, preventing the witnesses from seeing the procedure, creating too much noise, or standing in the way should an emergency arise.

Other concerns exist whether or not the spiritual advisor could touch the inmate. The record now before the Court is too sparse to explain why the background check, training, and threat of criminal prosecution for a non-prison individual cannot adequately minimize risk, especially in comparison to the minimal execution-specific training formerly given to prison chaplains. These are questions that require factual development and time. And these questions undercut the Defendants’ argument that they currently employ the least restrictive means of ensuring security and order.

The Supreme Court in *Ramirez* has instructed the parties to “address whether the government has satisfied its burden \*738 under RLUIPA to demonstrate its policy is the least restrictive means of advancing a compelling government interest.” *Ramirez v. Collier*, — U.S. —, 142 S.Ct. 53, —, 210 L.Ed.2d 1021 (2021). The Court hesitates to make a determinative declaration on a matter currently pending before the Supreme Court. Further, the pleadings suggest that the issues raised by this case are rich and fact-intensive; the record now before the Court is too shallow to sustain the Defendants’ blanket prohibition on audible prayer and physical contact. The Court finds that Barbee has met the first *Nken* factor by showing a likelihood of success on the merits.

### 3. Other Factors

The remaining *Nken* factors do not tip the scales toward allowing the scheduled execution to go forward. In a capital case, “the possibility of irreparable injury weighs heavily in the movant’s favor, especially when his claim has some merit.” *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) (quotation omitted); *see also Gutierrez v. Saenz*, 818 Fed. App’x 309, 314 (5th Cir. 2020). On one hand the public has an “in timely enforcement of the death sentence,” *United States v. Vialva*, 976 F.3d 458, 462 (5th Cir. 2020), but on the other hand the “[p]ublic interest is never served by a

state's depriving an individual of a constitutional right." *Kite v. Marshall*, 454 F. Supp. 1347, 1351 (S.D. Tex. 1978). Courts have recognized that "because RLUIPA enforces the First Amendment and must be construed broadly to protect religious exercise, a RLUIPA violation is in the public interest and tips the balance of harms in the plaintiff's favor." *Smith*, 844 F. App'x at 294. Finally, granting of a stay would harm the Defendants only in that they could not conduct Barbee's execution on their current schedule. The Defendants have not pointed to any other injury they would suffer if the Court provides time to decide the important questions in this case. The Court finds that the *Nken* factors weigh in favor of staying Barbee's execution.

#### IV. Other Pending Motions

Two motions are outstanding in this case. Barbee has filed an opposed Motion for Expedited Briefing on Motion for Stay of Execution. (Docket Entry No. 7). Because the parties have sufficiently briefed the relevant issues in a prompt manner, the Court **DENIES** Barbee's motion as **MOOT**.

The Defendants have filed an unopposed Motion for Leave to File Response in Excess of Page Limits. (Docket Entry No. 8). The Court **GRANTS** the Defendants' motion.

#### V. Conclusion

The issues raised by this lawsuit are "not simple, and they require a careful consideration of the legitimate interests of both prisoners and prisons." *Murphy*, 139 S. Ct at 1484 (Alito, J., dissenting). Barbee's "claims are dependent on the resolution of fact-intensive questions that simply cannot be decided without adequate proceedings and findings at the trial level." *Id.* This Court cannot answer those questions in the short time remaining before the looming execution date. Staying Barbee's execution will allow time to explore and resolve serious factual issues concerning the balance between his religious rights and the prison's valid concerns for security.

The Court, therefore, **GRANTS** Barbee's motion to stay his execution. (Docket Entry No. 6). The State may not carry out Barbee's execution until the State allows his chosen spiritual advisor in the execution chamber, authorizes contact between Barbee and his spiritual advisor, and allows \*739 his spiritual advisor to pray during the execution.

It is so ORDERED.

#### All Citations

566 F.Supp.3d 726