

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOHN H. RAMIREZ,)
)
 Petitioner,)
)
 v.) No. 21-5592
)
 BRYAN COLLIER, EXECUTIVE DIRECTOR,)
)
 TEXAS DEPARTMENT OF CRIMINAL)
)
 JUSTICE, ET AL.,)
)
 Respondents.)

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JOHN H. RAMIREZ,)

Petitioner,)

v.) No. 21-5592

BRYAN COLLIER, EXECUTIVE DIRECTOR,)

TEXAS DEPARTMENT OF CRIMINAL)

JUSTICE, ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, November 9, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 a.m.

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3 the Petitioner.

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7 neither party.

8 JUDD E. STONE, II, Solicitor General, Austin, Texas;
9 on behalf of the Respondents.

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P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next today in Case 21-5592, Ramirez versus Collier.

Mr. Kretzer.

ORAL ARGUMENT OF SETH KRETZER

ON BEHALF OF THE PETITIONER

MR. KRETZER: Mr. Chief Justice, and may it please the Court:

Across Texas's 572 executions spanning four decades, the State's policy was to allow a spiritual advisor to be present in the execution chamber to lay hands on a condemned inmate and to audibly pray.

In 2019, that long-standing practice changed suddenly when the State chose to forbid any religion advisor from the execution chamber. Ramirez and other inmates fought to preserve their religious exercise rights to spiritual advisor presence, and while these challenges proceeded, the State withdrew Ramirez's 2020 execution date in exchange for withdrawal of his Section 1983 petition.

Six months later, the State reset

1 Ramirez's execution, followed two months after
2 that by a reversion to allowing in chambers
3 spiritual advisor presence. The State then
4 waited to reveal -- months more to reveal first
5 a ban on touch; only later, it banned the spoken
6 word.

7 Either the State merely delayed
8 revealing these new restrictions or, worse,
9 added them piecemeal while Ramirez sought
10 redress through the grievance system. Either
11 way, the State's actions rendered that system
12 unavailable under the PLRA. The State now
13 argues that Ramirez's resort to litigation came
14 somehow far too late but also six days too
15 early.

16 TDCJ's own history and practices, as
17 well as the current approaches of the federal
18 government and states like Alabama, prove that
19 Texas's restrictions on touch and prayer are not
20 the least restrictive means of furthering its
21 proffered execution interests.

22 Mr. Ramirez should prevail as a matter
23 of law under RLUIPA. If the Court determines,
24 however, that the State should be allowed
25 another chance to attempt to meet its burden,

1 this Court should remand for an evidentiary
2 hearing in which both sides may develop the
3 record.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Counsel, has Mr.
6 Ramirez always requested that hands be laid on
7 him?

8 MR. KRETZER: The answer to your
9 question, Justice Thomas, is that is Mr.
10 Ramirez's religious belief. There is a sentence
11 in the petition I filed in the year 2020 which
12 turned out, in light of facts ultimately learned
13 by me, to have been incorrect. That was only on
14 file for two days before the State asked me to
15 dismiss it without prejudice.

16 When the matter was refiled, and I had
17 an affidavit from Pastor Moore, it was reflected
18 appropriately. It would have been amended at
19 the time.

20 JUSTICE THOMAS: Well, I mean, that's
21 an affidavit from Pastor Moore.

22 MR. KRETZER: Yes.

23 JUSTICE THOMAS: We're talking about
24 Mr. Ramirez now.

25 If we think that Mr. Ramirez has

1 changed his request a number of times and has
2 filed last-minute complaints that, as -- and
3 that is -- and -- and -- and if we assume that
4 that's some indication of gaming the system,
5 what should we do with that with respect to
6 assessing the sincerity of his beliefs?

7 MR. KRETZER: I think, Justice Thomas,
8 you can assess the sincerity of Mr. Ramirez's
9 belief by looking at the best evidence that
10 there is in the record, which is a seriatim, one
11 handwritten, signed grievance after another
12 repeatedly requesting the same thing --

13 JUSTICE THOMAS: Yeah, but I'm --

14 MR. KRETZER: -- the administrations
15 of Pastor Moore.

16 JUSTICE THOMAS: -- but you have
17 people filing grievances --

18 MR. KRETZER: Yes.

19 JUSTICE THOMAS: -- in non-religious
20 contexts, and that's not evidence of their
21 religious beliefs. It's evidence that,
22 obviously, they don't -- obviously don't want to
23 be executed. And they -- and in some instances,
24 they're gaming the system.

25 I guess my question is, can one's

1 repeated filing of complaints, particularly at
2 the last minute, not only be seen as evidence of
3 gaming of the system but also of the sincerity
4 of religious beliefs?

5 MR. KRETZER: Well, Justice Thomas, I
6 can certainly see how a hypothetical inmate
7 perhaps filing a last-minute such request might
8 so be construed. I can only speak as Mr.
9 Ramirez's attorney, and I do not play games.
10 There's no dilatory tactics in this case.

11 When the State set the execution date
12 in the year 2020, I filed the 1983 lawsuit, and
13 the State asked me to dismiss it without
14 prejudice. When the State filed again -- got a
15 new death warrant in the year 2020, it was only
16 -- Mr. Ramirez immediately filed grievances.
17 There was no waiting there. And the State
18 responded by handing him a copy of this new
19 policy they promulgated on April 21, 2021.

20 Mr. Ramirez has always, Justice
21 Thomas, filed these grievances within days of
22 learning -- in that case, he learned from the
23 director of chaplaincy that there would be this
24 no touch requirement that was suddenly imposed
25 in the year 2021.

1 And yet, it was the State that
2 delays -- there is, I think, a very alarming
3 intention you see in the Riley affidavit the
4 state lodged in their materials where she said
5 that as the execution date gets quicker, the
6 State regards these grievances and tries to
7 process them all the faster.

8 That's not at all what happened here,
9 Justice Thomas. Mr. Ramirez filed his request
10 in -- level 2 grievance in July of 2021. The
11 State sat on this for six weeks, until we were
12 right on the cusp of the execution.

13 I would contend, if there's any delay
14 here, Justice Thomas, it's on the part of the
15 State. There's no insincerity as to Mr.
16 Ramirez's consistently stated beliefs, and Mr.
17 Ramirez has repeatedly asked as quickly as
18 possible for the least -- relief, as he is
19 required to, from the prison system.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Counsel, what
22 is your client's position on -- is it touch
23 anywhere on his body that will satisfy his
24 religious needs?

25 MR. KRETZER: Yes, that's correct.

1 Pastor Moore, when he lays his hands on the --
2 his congregants, can touch anywhere on the body.
3 So, for example, Pastor Moore can touch Mr.
4 Ramirez's foot, an extremity on the complete far
5 end of the body from the point at which the IV
6 line will be inserted into his arm. So, yes,
7 that would satisfy the religious exercise.

8 CHIEF JUSTICE ROBERTS: How would you
9 analyze the case -- is it -- would it be any
10 different than how you're analyzing it, in your
11 case, if the religious conviction were somewhat
12 different and the hand had to be on the
13 forehead, on the heart, something like that?

14 MR. KRETZER: I can certainly see how
15 it might be a little closer and yet, in such a
16 religious exercise, if that was, in fact, what
17 the religious exercise generally was, such as we
18 have with Pastor Moore and his congregants, then
19 touching on the other side of the body I still
20 don't think would present a problem because
21 there's no touch anywhere near the IV.

22 For example, if the prison -- the IV
23 is in one arm and the prison doctor's ultimately
24 to touch the other arm to monitor pulse, there
25 would be no problem with Pastor Moore touching

1 that other arm. Similarly, with the head -- as
2 the heart. These are still places pretty far
3 removed, not as far away as the foot that I
4 mentioned, but still pretty far removed from the
5 point at which that IV will be injected.

6 CHIEF JUSTICE ROBERTS: Well, I don't
7 think either the hand or the heart is very far
8 removed from the IV injection site.

9 MR. KRETZER: They're obviously closer
10 to the IV injection site than the foot is. And
11 yet, I think the important point, Chief, Mr.
12 Chief Justice, is that under RLUIPA, the courts
13 are not allowed to rewrite the religious
14 exercise for the inmate so as to accommodate
15 their religious exercise, as that term is
16 narrowly defined under RLUIPA is that as the
17 inmate and his religious precepts dictate.

18 Mr. Ramirez does not need any place
19 other on the body even closer to the IV site to
20 be touched, just the same as Mr. Ramirez's
21 religious exercise is not satisfied by what the
22 State proposes.

23 CHIEF JUSTICE ROBERTS: Right. I'm --
24 I'm trying to get a sense of your stand -- the
25 standard of review as applied in this situation

1 and how, I mean, would -- what would the
2 analysis be if, for example, his religious
3 beliefs required three -- three people to be
4 present?

5 MR. KRETZER: Yes. The -- just -- Mr.
6 Chief Justice, RLUIPA is specifically designed
7 to take these matters of religious exercise up
8 on an inmate-by-inmate basis.

9 This Court has said in several cases
10 the classic rejoinder of bureaucrats throughout
11 history, if I make an exception for you, I have
12 to make it for everyone. So no exceptions.

13 CHIEF JUSTICE ROBERTS: It's very
14 eloquent.

15 (Laughter.)

16 MR. KRETZER: It was not my words.
17 The -- the -- the logic being that this does
18 have to be taken up on an inmate-by-inmate
19 basis. If some inmate had a genuinely held,
20 sincere religious observance and it was to be
21 established that this needed to be done at a
22 particular point in the body, I guess that might
23 be a different case.

24 But, to answer your question directly,
25 the standard is exactly that from the statute,

1 to take it up on an inmate-by-inmate --

2 JUSTICE KAVANAUGH: That'll --

3 MR. KRETZER: -- basis instead
4 of categorically.

5 JUSTICE KAVANAUGH: -- that'll be the
6 next case, and then there will be the next case
7 after that and the next case after that where
8 people are moving the goalposts on their claims
9 in order to delay executions. At least that's
10 the State's concern.

11 And kind of four issues you need to
12 run through. Sincerity, Justice Thomas's
13 questions get at that. Substantial burden. It
14 can't just be a burden. It has to be a
15 substantial burden. And then too I want to ask
16 about compelling interest, the State's
17 compelling interest and least restrictive means.

18 So let me just focus on the compelling
19 interest because I think the State's compelling
20 interest here is challenging for us to analyze
21 because I think it is in reducing risk, risk of
22 something going wrong in the execution chamber.

23 And I think the State is saying, we
24 want the risk to be zero of a problem. That's
25 when they were excluding everyone following our

1 equal treatment principle that we enshrined in
2 -- in Murphy or enforced.

3 MR. KRETZER: Okay.

4 JUSTICE KAVANAUGH: So we want the
5 risk to be zero.

6 Now that it looks like, okay, well,
7 there has to be someone allowed in the execution
8 room, a religious minister, we want the risk to
9 be as close to zero as possible of something
10 going wrong.

11 Why isn't that a compelling interest
12 when the State says we want the risk to be as
13 close to zero as possible, and, if we allow
14 touching and -- and the like, the risk
15 increases?

16 And you might say: Ah, there's really
17 still not too much of a risk, it's okay, but the
18 State is saying: No, we want the risk to be
19 low.

20 How do we as a Court say, no,
21 actually, State, your compelling interest in
22 reducing the risk to close to zero, it's not
23 good enough, it's not compelling? How do we do
24 that?

25 MR. KRETZER: Yes, Justice Kavanaugh.

1 My answer is somewhat different than as you
2 phrased it at the end of the question.

3 I do not dispute at all the State's
4 palpable interest in having a secure
5 environment. Prisons are all about risk --

6 JUSTICE KAVANAUGH: It's about risk.

7 MR. KRETZER: Yes, I understand.

8 JUSTICE KAVANAUGH: It's about degree
9 of risk.

10 MR. KRETZER: Yes.

11 JUSTICE KAVANAUGH: And we all agree
12 in the security, and I appreciate your answer on
13 that, but the State is saying we want the risk
14 to be really close to zero of a problem.

15 And you're saying you can do this and
16 without a problem, and the State's saying that
17 increases the risk of a problem. And I don't
18 think you can dispute that. It does increase
19 the risk of a problem some. But you can -- you
20 might want to respond to that.

21 MR. KRETZER: My answer, Justice
22 Kavanaugh, would be this: I mean, risk as a
23 statistical matter is based in empirical data.
24 We have a vast empirical dataset of hundreds of
25 executions --

1 JUSTICE KAVANAUGH: That --

2 MR. KRETZER: -- spanning four
3 decades.

4 JUSTICE KAVANAUGH: I'm sorry, that
5 doesn't -- that doesn't move me at all because
6 those were state chaplains who were officials of
7 the state, which was the whole point, right?
8 That's what created the equal treatment problem
9 to begin with. Those were largely Christian,
10 right?

11 MR. KRETZER: Yes.

12 JUSTICE KAVANAUGH: And that created
13 the equal treatment problem. So that doesn't
14 work.

15 What they're worried about is someone
16 from the outside coming in. And you never know.
17 And it's a very fraught -- Judge Higginbotham's
18 concurrence is a very fraught situation with a
19 lot of potential for issues. At least the State
20 thinks so.

21 And I don't know how we, sitting here
22 -- we haven't -- we're not in the execution
23 room, we don't know -- how we can question the
24 State's interest in keeping the risk of a
25 problem close to zero.

1 I think you're saying, ah, the risk
2 isn't that much. But how do we analyze that?

3 MR. KRETZER: Well, the answer,
4 Justice Kavanaugh, is that while I certainly
5 understand the State's logic, we hire the
6 prison-employed chaplains, ergo, we could fire
7 them or not renew their contract, there are
8 substantial laws on the books in every state
9 criminalizing interference with a law
10 enforcement officer in the disposition of his
11 duties.

12 There is not a single example in
13 history for any spiritual advisor, and the state
14 allowed these, you know, as a matter of course,
15 has ever interrupted a proceeding.

16 What the State can do, to answer your
17 question directly, Justice Kavanaugh, is exactly
18 that which Pastor Moore did. He went and drove
19 hundreds of miles to visit with these folks at a
20 particular location. He signed a penalty-backed
21 pledge.

22 We know the State believes that Pastor
23 Moore was safe to be in the execution chamber.
24 On September 8, the execution leading up to when
25 this Court granted the stay, he sat there all

1 day. We know the State --

2 JUSTICE KAVANAUGH: Can I -- that's
3 about the facts of this case, and I understand
4 it, but I was asking a case -- we're going to --
5 you know, if we rule in your favor here, this is
6 going to be a heavy part of our docket for years
7 to come, would be my sense given the history of
8 death penalty litigation, which we'll -- we'll
9 deal with as it comes.

10 But, on least restrictive
11 alternatives, I want to ask about that. Your
12 basic point on that is, if another state does
13 it, that helps show that there's a less
14 restrictive alternative.

15 And I guess what if a state allows, to
16 use the Chief Justice's example, multiple people
17 in the room? Does that mean every state has to
18 do it?

19 MR. KRETZER: No.

20 JUSTICE KAVANAUGH: If the -- your
21 answer is no to that?

22 MR. KRETZER: Okay. Yes, my answer to
23 that would be no. Under RLUIPA --

24 JUSTICE KAVANAUGH: Okay. And how
25 about if another state allows bread and wine in

1 the execution room right before the execution?
2 Does every state have to do that because it's a
3 less restrictive alternative?

4 MR. KRETZER: No, there is not a, I
5 don't know, greatest common denominator or least
6 common denominator.

7 JUSTICE KAVANAUGH: And if -- and if
8 another state allows the minister to kind of hug
9 the inmate, does every other state have to do
10 that?

11 MR. KRETZER: No. One state doing a
12 first mover does not calibrate a national
13 standard ipso facto.

14 JUSTICE KAVANAUGH: And why -- how
15 could we as a Court say actually two people no,
16 one person yes? Like, what neutral principle
17 are we relying on there when other states do it
18 and we say, well, other states do it, but that's
19 not the least restrictive alternative?

20 MR. KRETZER: Justice Kavanaugh, I
21 don't think there will be a micromanagement
22 problem. No one is asking federal courts to
23 micromanage.

24 I think the issue will remain that you
25 will still have the most recent national

1 standards as demonstrated -- maybe not national
2 standards -- empirical basis, what we see the
3 federal government did just last year, and the
4 State of Alabama has changed its rules just in
5 the last six months and carried out such an
6 execution only two weeks ago.

7 And I -- perhaps I could point out the
8 State of Alabama actually affords more religious
9 exercise in that execution of Willie Smith --

10 JUSTICE KAVANAUGH: That's --

11 MR. KRETZER: -- than Mr. Ramirez's
12 question.

13 JUSTICE KAVANAUGH: -- you're making
14 the argument that I'm -- that I'm a bit
15 concerned about. And you -- you make strong
16 arguments, so I'm not -- I'm just testing them
17 here.

18 The argument I'm concerned about is,
19 once you get one state doing this, every other
20 state has to follow. And then, when you get the
21 two, you know, I've already -- already said it,
22 and you citing Alabama from two weeks ago,
23 that's going to happen over and over over the
24 next few years, I would imagine, maybe not,
25 where states are being sued by inmates in the

1 last days before an execution saying: Another
2 state does it different. I want this.

3 Now how do we deal with that?

4 MR. KRETZER: Sure. Under RLUIPA, a
5 state certainly can get to some point where they
6 have inhibitions greater than perhaps their
7 sister states. But, if a state wants to do
8 that, they would have to show evidence in the
9 record when the burden shift. After the
10 plaintiff satisfied his first prong under
11 RLUIPA, they would have to show that we studied
12 this issue or we come to a conclusion, an
13 informed conclusion, that we need to reach a
14 different result.

15 In the Ramirez case, there was no
16 evidence of risk put into the record. If a
17 state like Texas and if this Court does --

18 JUSTICE KAVANAUGH: Well, the risk is
19 inherent in having another person in the room, I
20 think, but you're not saying we can -- if we
21 rule for you in this case, the concern about
22 future litigation would go away if you're saying
23 there's kind of a bright line because there's a
24 historical practice of audible prayer and
25 touching, but we're not looking for anything

1 else in the execution room.

2 But you can't say that, can you?

3 MR. KRETZER: I don't know that I --
4 that I would agree with that, Justice Kavanaugh,
5 respectfully, because I think perhaps what the
6 State has done here is recreated, they've come
7 full circle, back to the same issue which
8 impelled the opinion in Murphy, by which I mean
9 if TDCJ chaplains, those employees, are able to
10 touch and pray, and now there's a new rule the
11 State has so told us in -- in a seriatim fashion
12 last summer, that the outside non-TDCJ employees
13 are not allowed to touch and pray, now you have
14 a new form of denominational discrimination.

15 JUSTICE ALITO: But out -- over the
16 last couple of years, we have had a whole series
17 of stay applications that present issues that
18 are related to the one that is presented here,
19 and each one has been different. Like virtually
20 every application for a stay of execution, they
21 come to us at the last minute, the day before,
22 sometimes the day of. And what you have said so
23 far suggests to me that we can look forward to
24 an unending stream of variations.

25 So you would be satisfied -- you have

1 told us you would be satisfied if Pastor Moore
2 touches Mr. Ramirez's foot. But what's going to
3 happen when the next prisoner says that I have a
4 religious belief that he should touch my knee?
5 He should hold my hand? He should put his hand
6 over my heart? He should be able to put his
7 hand on my head? We're going to have to go
8 through the whole human anatomy with a series of
9 -- of cases.

10 And you haven't said anything about
11 what you want exactly with respect to audible
12 prayer. What type of prayer? When? How loud?
13 What exactly do you want to start out with?

14 MR. KRETZER: Yes, let me touch --
15 Justice Alito, start with audible prayer. Yes,
16 prayer, as we -- should be non-disruptive,
17 audible prayer in the ordinary style of how
18 people pray.

19 When, to answer your question
20 directly, Justice Alito, is after the in -- the
21 pastor and the warden come in together after the
22 drug team has already inserted the IV line. So
23 --

24 JUSTICE ALITO: And you want it
25 throughout the execution? You want it up to the

1 point where the prisoner loses consciousness or
2 dies?

3 MR. KRETZER: Yes. The pastor can
4 step away. What they agreed to do in Alabama is
5 before -- after the prisoner passes, when the
6 conscious -- the pastor steps away when the
7 unconsciousness assessment is performed and then
8 remains when the drapes are closed and removal
9 and so forth.

10 So the prayer, to answer your
11 question, Justice Alito, yes, would be after the
12 lethal injection begins and then until --

13 JUSTICE ALITO: Okay. Well, that's --

14 MR. KRETZER: -- the point in time he
15 passes in a non-disruptive way.

16 JUSTICE ALITO: -- that's helpful.

17 So can you -- can you say anything to
18 us to relieve us of the fear that we are going
19 to get an unending stream of variations about
20 both of these things, about touching different
21 parts of the body, about the type of prayer, the
22 -- the singing, chanting, number of people in
23 the room? Are we just -- is this just what's
24 going to happen?

25 The lower courts are going to have to

1 deal with this on the eve of every execution,
2 and we're going to get these at the very last
3 minute and have to decide them. The difference
4 between the -- the factual information presented
5 to us in these briefs and what we received in
6 all of the previous stay applications is like
7 night and day.

8 MR. KRETZER: Well, Justice Alito, I
9 could talk about timing, and then I'll switch in
10 just a second.

11 With regard to timing, in Mr.
12 Ramirez's case, the 1983 petition was filed a
13 month in advance of the execution date. And the
14 district judge entered a scheduling order when
15 the motion for stay would be filed, the
16 response/reply. So all those proceeded very
17 much apace, and the Fifth Circuit ruled within a
18 few days. So everything proceeded here on a
19 listed schedule.

20 When we go --

21 JUSTICE ALITO: Well, how far in
22 advance of the execution did it come here?

23 MR. KRETZER: The Fifth Circuit, I
24 believe their opinion issued on Labor Day. The
25 Court was obviously -- early that morning. I

1 wrote the stay application the following day.
2 The next day, the State responded, and I
3 followed the reply that same day. So it all --

4 JUSTICE ALITO: And when was the --
5 how far in advance of the execution day was
6 that?

7 MR. KRETZER: I believe the execution
8 date's a Tuesday, the -- the 8th was a Tuesday
9 -- I don't have a calendar in front of me -- but
10 I believe that was correct. So I filed -- no,
11 it was the 7th. So I -- the Fifth Circuit
12 opinion issued on the 6th, the stay application
13 was filed on the 7th, the State responded in the
14 middle of the day of the 8th, and the reply was
15 filed later that same day.

16 JUSTICE ALITO: Well, we get these at
17 the very last minute and we're going to continue
18 to get them at the very last minute.

19 MR. KRETZER: Well, I don't know that
20 -- Justice Alito, that you necessarily -- I -- I
21 don't know that you necessarily will get them at
22 the last minute. I think it has to be
23 remembered that Mr. Ramirez, starting back when
24 his execution was first scheduled, started to
25 file step 1, step 2 grievances. Then the State

1 changed their policy.

2 The State then proceeded to list these
3 restrictions in seriatim in this piecemeal
4 fashion that came from a letter from the general
5 counsel and so forth. If the State is so
6 worried about these things coming up in the last
7 minute, all they have to do is actually tell us
8 what the rules are. In other words, there's not
9 a single thing in the prison manual that anyone
10 can see or in the form that Pastor Moore was
11 told to sign that says what he could or could
12 not do. If the State would simply tell us what
13 they want instead of having -- make us try to
14 figure out by guessing, these would not --

15 JUSTICE ALITO: All right. Well, we
16 can --

17 MR. KRETZER: -- come in so late.

18 JUSTICE ALITO: -- you know, you and
19 -- and -- and Texas can argue about who did what
20 when and all of that, and it's relevant to some
21 of the issues.

22 But, to get back to my point about the
23 unending stream of variations, I -- I take it
24 what you said is, well, each one of these is
25 different, factually different; prisoners have

1 different religious beliefs; each one has to be
2 analyzed separately.

3 MR. KRETZER: Well --

4 JUSTICE ALITO: Different states,
5 different execution chambers, different sizes,
6 different religious beliefs, each one will
7 present its own unique question.

8 MR. KRETZER: Justice Alito, I'm sorry
9 --

10 JUSTICE ALITO: Maybe that's the way
11 it has to be.

12 MR. KRETZER: Justice Alito, I mean,
13 I'm sorry, I'm not an expert on religion, I
14 don't know all the religions in the world, but I
15 think similar concerns voiced in this Court in
16 the early Religious Freedom Restoration Act
17 cases, in the Church of Lukumi and so forth, no
18 -- even in the Holt v. Hobbs case, the question
19 was specifically asked: Are these issues going
20 to bubble up one half-an-inch beard at a time?

21 They're not going to present in that
22 order. I don't think any religion has striated
23 that there must be a touch on this particular
24 piece of the body. What we're talking about
25 here is a laying-on-of-hands doctrine that the

1 minister does with all of his congregants as
2 they're nearing the point in time that they die.

3 If some other inmate has a
4 well-established, sincerely held belief and that
5 can be -- bear their burden under RLUIPA on the
6 first prong, then perhaps that will be or it
7 will not be their --

8 JUSTICE ALITO: Well, do you think in
9 -- in RLUIPA a court can say you are whatever,
10 you are a -- a Catholic, and so I am going to
11 see what the teaching of the Catholic Church is
12 on this question? Is that the way this is --
13 this is resolved? Or --

14 MR. KRETZER: No.

15 JUSTICE ALITO: -- can the prisoner
16 say, well, yes, I'm a Catholic, but I have my
17 own personal beliefs about this? Would we not
18 have to honor that person's own sincere,
19 individual, perhaps unique religious beliefs?
20 Isn't that the way RLUIPA works?

21 MR. KRETZER: To answer your question,
22 the first part of your question, Justice Alito,
23 no, what you said is exactly opposite to RLUIPA.
24 No, you cannot inquire as to the centrality or
25 ultimate correctness theologically of a --

1 JUSTICE ALITO: Right.

2 MR. KRETZER: -- sincerely held
3 religious belief. I think the point was made in
4 the Tenth Circuit in Yellowbear that the
5 question for federal district courts in that
6 first prong of RLUIPA is really just, is the
7 inmate trying to perpetrate a fraud on the
8 court? Are they lying to try to get some
9 benefit they would otherwise not be entitled to
10 in the secular context?

11 Once they do that, the burden shifts
12 to the state. RLUIPA is written this way. And
13 all the equities, the victims and so forth, were
14 all taken into account and cognized by Congress
15 in the statute passed nearly unanimously over 20
16 years ago.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas, anything further?

20 JUSTICE THOMAS: No.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer?

23 Justice Alito? No?

24 Justice Sotomayor?

25 JUSTICE SOTOMAYOR: Counsel, under the

1 Turner standard, a generalized security interest
2 would have been enough to defeat a claim.
3 RLUIPA changed that, and whether we like it or
4 not, it requires the state to address each
5 individual person's need. And a risk analysis
6 that talks generally about a compelling need is
7 not -- not the standard that RLUIPA sets. The
8 standard is, is something that you're proposing
9 going to interfere with this execution?

10 Now I looked at the pictures that I
11 was provided, and the other side gave a bunch of
12 reasons. They said it'll block the view. But I
13 saw the picture of the prison, and the window at
14 least by the foot doesn't block the view. So
15 where you want to stand is not going to block
16 the view.

17 They have fears that a unknown pastor
18 could -- and this goes to Justice Kavanaugh's
19 concern -- that an unknown pastor could go to
20 the IV line, could go to the manacles, et
21 cetera. But the manacles are nowhere near
22 there. The minister has a person standing with
23 him.

24 I'm assuming that your argument is
25 that every security risk they present is just

1 not presented by these facts, correct?

2 MR. KRETZER: Correct, yes.

3 JUSTICE SOTOMAYOR: And going back to
4 the response that Justice Kavanaugh and Justice
5 Alito have expressed, it's not us that have to
6 worry about the individualized treatment.
7 Congress has told us that that's what
8 petitioners are entitled to, correct?

9 MR. KRETZER: Yes.

10 JUSTICE SOTOMAYOR: And prisons have
11 to work in good faith to accommodate those
12 needs?

13 MR. KRETZER: They're supposed to,
14 yes.

15 JUSTICE SOTOMAYOR: They waited a
16 month to tell you -- six weeks to tell you they
17 wouldn't permit the touching or praying. That's
18 not working in good faith is what you're saying?

19 MR. KRETZER: I never heard, Justice
20 Sotomayor, a word about no prayer until I got
21 that letter on August 19.

22 JUSTICE SOTOMAYOR: All right. So
23 they can say what it is early and tell people,
24 if you have an objection, come in and tell us
25 what you need within a certain amount of time,

1 correct?

2 MR. KRETZER: Yes.

3 JUSTICE SOTOMAYOR: That's what you've
4 said?

5 MR. KRETZER: Yes.

6 JUSTICE SOTOMAYOR: So they can avoid
7 last-minute requests by simply setting
8 reasonable guidelines, correct?

9 MR. KRETZER: They could, yes.

10 JUSTICE SOTOMAYOR: And acting
11 expeditiously?

12 MR. KRETZER: Yes.

13 JUSTICE SOTOMAYOR: They're the ones
14 who waited close to the execution date, correct?

15 MR. KRETZER: Yes, Justice --

16 JUSTICE SOTOMAYOR: That's your point?

17 MR. KRETZER: Yes.

18 JUSTICE SOTOMAYOR: All right. Thank
19 you, counsel.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?
21 Justice Gorsuch, anything further?
22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: I do have several
24 questions. Judge Higginbotham said in his
25 concurring opinion: "While lethal injection may

1 seem straightforward, the actual administration
2 of the drugs and pronouncement of death is both
3 delicate and fraught with difficulties, as
4 evidenced by the responses of regulatory bodies
5 and the experience of this Court with mishaps in
6 execution by lethal injection.

7 "In short, the complexities attending
8 the administration of drugs in the execution
9 procedure and its failures expose the risks of
10 non-medical hands on the body of a person
11 undergoing the procedure."

12 Why do you think Judge Higginbotham's
13 wrong?

14 MR. KRETZER: Well, it's not that I
15 think he's wrong, Justice Kavanaugh. These --
16 Pastor Moore is definitionally not a doctor.
17 His hands would be on the body. So, in that
18 sense, his -- you know, it would be non-medical
19 hands on the body.

20 The way Judge Higginbotham construed
21 it, though, was no hands means no hands. It's a
22 direct quote, I believe, from his opinion. And
23 yet, we know that that would not be true under
24 the State's own logic with a TDCJ chaplain who
25 has touched the -- I believe there's testimony

1 that he touched the leg, the calf, so forth, for
2 years.

3 JUSTICE KAVANAUGH: And that goes to
4 the risk question that I talked about earlier
5 because that person has been an employee.

6 But second question on sincerity, to
7 follow up on Justice Alito's questions, this is
8 a potential huge area of future litigation
9 across a lot of areas, sincerity of religious
10 claims, and how do we -- how do we question
11 those?

12 Some things that people have talked
13 about are the incentives someone might have to
14 be insincere, behavioral inconsistencies --
15 Justice Thomas's questions got at that with the
16 complaint -- the religious tradition of the
17 practice.

18 Are those -- what do we look at to
19 check sincerity? Because that's a very awkward
20 thing for a judge to do to say: I want to look
21 into the sincerity of your claim, but our case
22 law says we must do that.

23 MR. KRETZER: Well, Justice --

24 JUSTICE KAVANAUGH: How do we do that?

25 MR. KRETZER: Yes, Justice Kavanaugh.

1 I would argue, yes, while federal judges, you
2 know, obviously would be very worried to look at
3 the religiosity, the correctness of the
4 religious aspects of the claim, federal district
5 courts judge sincerity, in a manner of speaking,
6 all the time. Credibility determinations are
7 made by district judges in every motion to
8 suppress.

9 JUSTICE KAVANAUGH: It's a -- it's a
10 little more awkward, I think you would admit,
11 for a judge to tell someone you're claiming that
12 you believe this is a matter of religion, but I
13 think you're lying. That's -- that's hard to
14 do. Do you agree with that?

15 MR. KRETZER: Well, I don't know that
16 I do, Justice Kavanaugh. I mean, district
17 judges have to, unfortunately, say they believe
18 in a suppression hearing, for example, a case
19 agent or any other manner of law enforcement
20 witness is not telling the truth.

21 Many experts testify in white collar
22 cases on causality. Expert people have to
23 testify about things all the time in a district
24 court on a Daubert challenge, for example, and
25 has to decide whether or not it's sincere.

1 Maybe not sincere as to religious
2 beliefs to be sure. It might be a somewhat more
3 rare circumstance. But those sort of
4 credibility determinations are made on a daily
5 basis in federal courts in this country.

6 JUSTICE KAVANAUGH: Okay. Two more.
7 Sorry, I'll try to be succinct. Justice
8 Sotomayor is quite right in saying that Congress
9 put this standard in place, the strict scrutiny
10 standard. I think the difficulty of applying it
11 is one of the reasons some of us in -- in Fulton
12 had concerns about what might replace Smith.

13 And this case is a good illustration,
14 I think, of the problems that can arise trying
15 to apply a strict scrutiny standard. But just
16 on the relationship of compelling interests
17 versus least restrictive alternative, and when
18 it goes to risk, I mean, I'm still having
19 problems with they're saying we should keep the
20 risk to zero, and you're saying, no, you should
21 tolerate a little more risk because Alabama does
22 it.

23 MR. KRETZER: No, just --

24 JUSTICE KAVANAUGH: And -- and -- or
25 because other states do it. And I just, as a

1 judge, don't know. You might be right. They
2 might be right. I don't know of a neutral
3 principle, how to -- how to resolve that where
4 they're saying we want the risk lower, we want
5 the risk to be lower than our next-door -- or
6 the state, state, another state.

7 MR. KRETZER: Justice Kavanaugh, I
8 think I'd have to very respectfully disagree
9 with the premise of that last part of the
10 question, which is that a non-TDCJ employee
11 chaplain necessarily carries with him some
12 appreciable additional level of risk.

13 I can say I attach --

14 JUSTICE KAVANAUGH: Okay. Can I stop
15 you right there? I don't see how you can say
16 that. There's another human being, to go back
17 to Judge Higginbotham, in the execution room in
18 about the most fraught situation anyone could
19 imagine, especially if the person is, by
20 definition, close to the inmate, spiritually,
21 friends, and they're about to die and be put to
22 death.

23 And the idea that we can predict how
24 another human being will react in that situation
25 and be sure, as you're saying, that the person's

1 not going to react in a way that they would
2 never react in any other situation, I just don't
3 -- I don't know. You might be right and -- and
4 we'll see, I guess, if -- if you prevail here,
5 how -- how this plays out.

6 But I'm -- it's not my decision, and
7 as a judge, I don't know how I prioritize your
8 assessment of that over the State's.

9 MR. KRETZER: Well, the way I can say
10 that, to answer your question, Justice
11 Kavanaugh, you asked me how I can say that.

12 The way I can say that is that it is
13 incredibly well documented, every single time
14 anyone, a minister, a reporter, or anybody else
15 goes to see a prisoner, Pastor Moore has been
16 going to see, for example, Mr. Ramirez for five
17 years, longer than I've been his lawyer --

18 JUSTICE KAVANAUGH: I'm not
19 questioning --

20 MR. KRETZER: -- there's never been an
21 incident.

22 JUSTICE KAVANAUGH: I'm sorry to
23 interrupt. I'm not questioning the current
24 pastor at all involved in this case, so I don't
25 mean to do that.

1 And the last question, I'll finish
2 with this, is just the victims. I mean, we
3 haven't mentioned -- we've gone a long time and
4 we haven't mentioned the victim's family, who
5 filed a brief here, and they've had to go
6 through now four-and-a-half years of postponed
7 executions.

8 And their brief says: "In Maria's
9 eyes, Ramirez gets all this publicity like he
10 just won a gold medal, while she and her family
11 are going through all this pain and suffering
12 each time they're told Ramirez will be executed,
13 only to have the courts put a hold on it."

14 You know, we -- we have to think about
15 the -- the victim's family members too with
16 this, oh, it's going to be a stay here and a
17 stay there and a stay there. And each time
18 they're -- they're -- they're brought to the
19 execution room decades after the -- the crime,
20 where their father was, you know, beaten to
21 death and stabbed to death in a parking lot.

22 I mean, I just think we -- that's all
23 by way of saying that as a legal point to it, if
24 we're going to rule for you, I think we need
25 some clear lines so, as Justice Alito says,

1 we're not putting future victims' families in
2 the same position of time after time having
3 these delays.

4 MR. KRETZER: Justice Kavanaugh, I
5 have nothing but the greatest sympathy for the
6 family of Pablo Castro. I grieve for them. I
7 feel horribly for their loss.

8 Victims certainly do have an interest
9 in -- public interest in the proceedings and
10 finality of executions of judgment and so forth.
11 All those victims' interests were specifically
12 taken into account by Congress when it passed
13 the RLUIPA.

14 And that was not even a newfangled
15 concept 20 years ago some now when the RLUIPA
16 was passed. The brief the amicus of the Becket
17 Fund filed where they showed the historical
18 examples of where pastoral or spiritual guidance
19 has been given throughout history to people as
20 risible as the Nazis, and the point was made it
21 was not a luxury afforded for who those people
22 were but something that religion affords in
23 larger society because of who the society is.

24 And Congress accounted for all of that
25 when it passed the statute, and that's how the

1 equities are to be balanced out.

2 JUSTICE KAVANAUGH: Thank you. I
3 appreciate your good answers. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: I just have one
7 question. So Justice Kavanaugh has been asking
8 you about how strict scrutiny would apply here,
9 and Justice Kavanaugh said that the compelling
10 interest that the State has is in the reduction
11 of risk because, understandably, the state wants
12 that risk to be zero because the consequences of
13 a botched execution are quite high.

14 I think how we define the compelling
15 interest matters a lot for how the strict
16 scrutiny analysis plays out. So I'm just
17 wondering how you would characterize the State's
18 interests. Would you characterize it the way
19 that Justice Kavanaugh does, or do you have a
20 different articulation of how you think the
21 compelling interest should be described?

22 MR. KRETZER: I think I would
23 characterize it, respectfully, slightly
24 differently than Justice Kavanaugh did, Justice
25 Barrett, and that is that the compelling

1 interest is in an execution that is done in the
2 humane way, in the safe way, for all the
3 circumstances that have been discussed here and
4 further in the briefs.

5 If the State, though, is going to --
6 the compelling interest, to answer your question
7 directly, is directed towards how they have
8 chose to frame the execution, the -- for
9 instance, the size of the execution chamber.
10 The prison chose the size of that execution
11 chamber. Under RLUIPA, a prison entity can be
12 required to spend --

13 JUSTICE BARRETT: Well, that's not --

14 MR. KRETZER: -- some money to
15 alleviate --

16 JUSTICE BARRETT: -- the compelling
17 interest, right? That -- that goes to how the
18 State is structuring the execution and how it
19 chooses to carry it out.

20 I mean, the compelling interest may be
21 prison security or, you know, as you say, the
22 humanity -- carrying -- carrying out the
23 execution in a humane and safe way. But the
24 size of the execution chamber, I don't think, is
25 the compelling interest, right?

1 MR. KRETZER: I would agree. The
2 compelling interest is in the safety of -- I
3 mean, that's what prisons do. They're risk
4 management operations.

5 I guess one could construct a
6 perfectly safe operation where no one --
7 lawyers, reporters, anybody -- was ever allowed
8 to see an inmate. Prisons are tasked with
9 managing risk. One has to show the ID and a
10 background check and paperwork and so forth,
11 which the state is free to and did and is doing,
12 of any pastor who wants to come in for these
13 circumstances.

14 So, yes, the State absolutely has a
15 compelling interest. I embrace it completely.
16 And yet, that compelling interest, if they're
17 going to then go to the next step, the State,
18 it's not that they could not necessarily do
19 something different than other states or the
20 federal government is doing, but --

21 JUSTICE BARRETT: But you're talking
22 about least restrictive alternatives.

23 MR. KRETZER: Okay.

24 JUSTICE BARRETT: I just wanted to
25 know --

1 MR. KRETZER: Okay, yes.

2 JUSTICE BARRETT: -- about compelling
3 interest. You answered the question. Thank you
4 very much.

5 MR. KRETZER: Yes.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Feigin.

9 ORAL ARGUMENT OF ERIC J. FEIGIN FOR
10 THE UNITED STATES, AS AMICUS CURIAE

11 MR. FEIGIN: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 As the submissions to this Court,
14 including today, reflect, there are continuing
15 factual disputes on many issues that we think
16 ultimately warrant a remand. And we'd like to
17 think that better explaining the federal
18 experience may be helpful for further review.

19 We agree that Texas can vindicate its
20 compelling interests by substantially limiting
21 physical contact with the inmate and
22 vocalization by a spiritual advisor in the
23 highly choreographed and sensitive execution
24 procedure.

25 But our recent experiences suggest

1 that a categorical ban, like Texas appears to
2 have, isn't the least restrictive means for
3 doing so. To justify such a ban, Texas would
4 have to offer -- its experts would have to offer
5 state-specific reasons why it's necessary.

6 I -- I'm happy to take the Court's
7 questions, but one way in which I might be a
8 little helpful is just to tease apart the word
9 "execution," which I think is just used as an
10 overarching term in both some of the briefing
11 and in -- especially in media reports.

12 There are really two relevant phases
13 that occur when both the inmate and his
14 spiritual advisor are in the execution chamber
15 together, separated by -- before the drugs are
16 administered and during the administration of
17 the drugs. And, obviously, the second part,
18 which, in our experience, takes about five to
19 eight minutes, is the more sensitive portion of
20 the procedure.

21 So we do think it's helpful to think
22 about this case in terms of maybe a little bit
23 like a box. He's making two claims, one for
24 physical contact, one for vocalization. And
25 there are two parts, as relevant here, of the

1 procedure, one before the drug and one during
2 the drug.

3 We think Texas has a very strong
4 argument to resist physical contact during the
5 administration of the drug. And we have not
6 allowed that.

7 We think, conversely, that Petitioner
8 has a fairly strong argument that -- for
9 vocalization before the administration of the
10 drug. In fact, if you look at page 16a,
11 paragraph 11 of the Lumpkin declaration, I don't
12 think they even really address why they couldn't
13 accommodate that.

14 And then the other two boxes,
15 vocalization during the administration of the
16 drug -- and I can talk a little bit more about
17 that later -- and physical contact before
18 administration of the drug are a little bit more
19 indeterminate and could benefit from some
20 further factual findings.

21 I apologize, Justice Thomas. You
22 appeared to want to ask a question.

23 JUSTICE THOMAS: Well, I think you're
24 -- you've come close to answering it because I'm
25 interested in what would be precisely in this

1 context the State of Texas -- I know you've
2 generically talked about it -- what would be the
3 least restrictive means in this case?

4 MR. FEIGIN: Well, Your Honor, I can't
5 answer that question definitively, in part
6 because I -- I really do think it depends on
7 some factual circumstances that I don't know and
8 certainly aren't in the record.

9 I can share what the federal
10 experience has revealed. We have -- although it
11 isn't the way we would have necessarily ideally
12 set up the procedure, we've allowed vocalization
13 sayings essentially throughout. Obviously,
14 someone can't interrupt the marshal while
15 they're announcing the judgment or when
16 something -- someone else is speaking. But
17 we've allowed vocalization essentially
18 throughout, through both phases of the
19 execution. And we've allowed physical contact
20 one time briefly before the execution -- before
21 the administration of the drugs began.

22 In every instance where we've had a
23 spiritual advisor in the chamber, the spiritual
24 advisor has been well away from the inmate as
25 the drugs are actually administered.

1 JUSTICE THOMAS: So do you -- and the
2 next claim would be that -- you know, obviously
3 a little more contact. But I want to ask you
4 something that's different, okay?

5 So we have RFRA and we have RLUIPA.
6 And the -- we, normally, in -- under RFRA would
7 rarely discuss the sincerity of beliefs. Is
8 that analysis different under RLUIPA,
9 considering the opportunities for gaming the
10 system?

11 MR. FEIGIN: I -- I think sincerity is
12 quite relevant under, frankly, both statutes,
13 Justice Thomas, but I think you're quite right
14 that in the RLUIPA context, there may be
15 particularized incentives for someone to falsely
16 claim a religious belief.

17 And some of those concerns are
18 manifest here and would need to be developed a
19 little bit further. Obviously, it raises one
20 red flag that something different was claimed in
21 the 2020 litigation, and now we have the states
22 lodging -- and that's what I was also citing
23 earlier, the states lodging, and at page 25a of
24 the redacted declaration, you can see the
25 representation is made that on the day he

1 thought he was going to be executed, the only
2 reason he wanted to meet with Pastor Moore was,
3 he represented, because of the pending
4 litigation, which raises further sincerity
5 concerns.

6 We took sincerity as a given here
7 because the lower courts did. They, as we
8 understand it, essentially just considered the
9 narrow tailoring analysis and almost nothing
10 else past that.

11 JUSTICE THOMAS: Thank you.

12 MR. FEIGIN: But we do think that's a
13 -- an issue here.

14 JUSTICE THOMAS: Thank you.

15 JUSTICE SOTOMAYOR: Mr. Feigin, what
16 is insincere about -- there's steps to this.
17 There's a certain amount of time in which an
18 inmate is given with his family, correct? And
19 presumably with the pastor if he wants it before
20 the execution? Correct?

21 MR. FEIGIN: Yes, Your Honor.

22 JUSTICE SOTOMAYOR: And here he
23 decided not to have the pastor there. Correct?

24 MR. FEIGIN: I -- I believe his -- if
25 I'm understanding the declaration correctly,

1 Your Honor, I believe his pastor was there but
2 he chose not to meet with him.

3 JUSTICE SOTOMAYOR: He wanted to meet
4 with his family. How does that take away from
5 his desire to have the pastor at -- in the
6 execution chamber when he's dying? Because the
7 whole purpose of the religious belief is that
8 you should have a pastor to help guide you to
9 the other place.

10 MR. FEIGIN: So, Your Honor, I am not
11 suggesting how a court should come out if it
12 considered these facts. I am simply suggesting
13 that given the combination of facts -- and, in
14 fact, Petitioner in the reply brief said he
15 would welcome a hearing at which he can have a
16 chance to explain or maybe even --

17 JUSTICE SOTOMAYOR: Do you have any --

18 MR. FEIGIN: -- cross-examine these
19 facts.

20 JUSTICE SOTOMAYOR: Do you have any
21 reason why we shouldn't order -- enter an order
22 like we did in Murphy, which is send it back,
23 let these issues be threshed out, but let Texas
24 decide whether it wants to execute him in the
25 meantime? Because it does seem as though

1 sending it back would cause delay, but it's
2 within Texas's freedom to choose to accommodate
3 him and go ahead, correct?

4 MR. FEIGIN: Well, Your Honor, I think
5 essentially we -- we don't disagree that the
6 Court should simply remand. I'd add that
7 there's been no dispute with the representation
8 in our brief, so I take it to be correct under
9 Texas law, though I'm no expert in it, that --
10 pages 32 and 33 of our brief, that under Texas
11 law, there'd have to be a 90-day waiting period
12 between a court setting a new execution date and
13 the actual execution, which means there would be
14 at least 90 days to develop a further record on
15 some of these issues.

16 And also, regardless of whether there
17 was proper exhaustion here or whether the
18 absence of exhaustion could be excused as
19 unavailable, I do think there are some
20 continuing factual matters that the parties
21 might be able to work out between themselves, as
22 far as the -- exactly what Petitioner is
23 requesting and exactly what he would be
24 satisfied with and how far the State can go to
25 accommodate that.

1 That's exactly why exhaustion is so
2 important, because it not only allows for some
3 consensual resolution but might really
4 crystallize the dispute into a dispute of a much
5 smaller nature, either -- we're just talking
6 about one of the boxes I mentioned earlier or
7 maybe even just a small --

8 JUSTICE SOTOMAYOR: That seems --

9 MR. FEIGIN: -- component of one.

10 JUSTICE SOTOMAYOR: -- useless here
11 because they didn't give a response for six
12 weeks.

13 MR. FEIGIN: Well, Your Honor --

14 JUSTICE SOTOMAYOR: They never
15 attempted to engage in accommodation.

16 MR. FEIGIN: Well, Your Honor, I think
17 that goes to whether the grievance process was
18 properly exhausted and whether they were on
19 notice that there was specific requests for
20 vocalization and at what point Petitioner was
21 aware that that would be limited, which are also
22 factual issues that could be explored.

23 But -- and perhaps I am being overly
24 optimistic about the degree of accommodation
25 that could be reached between the parties, but I

1 do think that further development during at
2 least that 90-day period and possibly longer --
3 as you noted, it's obviously under Texas's
4 control when it decides to set the execution
5 date and carry out the execution --

6 Some further degree of development in
7 the lower courts would be tremendously helpful,
8 not only so the courts can properly resolve
9 this, but also for purposes of the parties
10 themselves.

11 JUSTICE KAGAN: Mr. Feigin --

12 CHIEF JUSTICE ROBERTS: Mr. Feigin --
13 go ahead.

14 I don't understand how the prison
15 officials and then judges are supposed to assess
16 sincerity. I mean, it is certainly
17 understandable that as death approaches, inmates
18 may have, you know, different religious views
19 than they did before and want to take those into
20 account.

21 I mean, let's say a week before a
22 prisoner comes in and says: I want to become a
23 member of a particular church because I think I,
24 you know, need that to be saved.

25 And the period, the -- the training,

1 the whatever, the initiation is three months,
2 and it's very sincere. What -- what happens
3 then?

4 MR. FEIGIN: Well, Your Honor, if a
5 Court believes it's very sincere, I'm not --

6 CHIEF JUSTICE ROBERTS: We have -- we
7 have no reason to doubt the sincerity.

8 MR. FEIGIN: Well, I think that's
9 somewhat how the lower courts took this case. I
10 think it is difficult to determine sincerity.
11 It's nevertheless a requirement that the statute
12 --

13 CHIEF JUSTICE ROBERTS: Even if --

14 MR. FEIGIN: -- imposes --

15 CHIEF JUSTICE ROBERTS: -- he says,
16 you know, the process for me to reach the point
17 under which I feel that I can, you know, the
18 religion would benefit me is three months?

19 MR. FEIGIN: Well, Your Honor, I think
20 there are -- if I could take this out a little
21 bit and just talk about the universe of
22 religious claims for a second, this is a
23 particularly, for reasons you just mentioned,
24 difficult subset of that.

25 But, just generally, I think it is a

1 very robust requirement that courts have been
2 able to use to eliminate certain frivolous
3 claims, like my religion requires me to be a
4 marijuana distributor or something to that
5 effect.

6 I think it gets somewhat more
7 difficult, Your Honor, in -- in this context,
8 and I -- it might well require something like an
9 evidentiary hearing here.

10 And I think what makes -- I think
11 there will be cases in which sincerity has
12 certain red flags on it. And I think this case
13 may or may not be one of those, but in a case
14 where it does appear that the inmate has a
15 sincere religion belief, the Court would have to
16 proceed to the further steps. Now there --

17 CHIEF JUSTICE ROBERTS: Thank you.
18 Justice Kagan?

19 JUSTICE KAGAN: May I ask more about
20 the BOP experience? I mean, as I understand it,
21 there were 13 recent executions, in 11 there
22 were spiritual advisors there.

23 You said that all of them, you allowed
24 vocalization throughout the process, but in only
25 one was there touching, and that before the

1 drugs were administered. Is that basically --
2 did I get that right?

3 MR. FEIGIN: Yes, Your Honor, with --
4 with two very small caveats. It's a little bit
5 unclear, just because no one was focusing on
6 this when they made their records, it's a little
7 bit unclear whether all the vocalization
8 included vocalization during the administration
9 of the drugs. It may have; it may not have.

10 And also I think in one case it was
11 just conversation before and not actual --

12 JUSTICE KAGAN: Here's what I would
13 like to know. I guess I would like to get a
14 little more texture about how the process played
15 out.

16 In other words, you know, when you got
17 these requests, what -- you being the BOP, what
18 did -- what did the BOP do? Were there
19 discussions? Were there requests that were
20 rejected? Were -- were -- how does this all get
21 managed in -- in the experience of the BOP?

22 As I understand it, none of these ever
23 came to a court. Is that -- is that right?

24 MR. FEIGIN: That's --

25 JUSTICE KAGAN: I mean, they all came

1 to a court, but not with respect to the
2 religious claims.

3 MR. FEIGIN: That's correct, Your
4 Honor. There were some RFRA claims with the
5 recent executions, but they didn't relate to
6 this specific issue.

7 JUSTICE KAGAN: So how does this all
8 get done?

9 MR. FEIGIN: Essentially, Your Honor,
10 we resolve them informally. We have discussions
11 with the inmates and/or their spiritual advisor
12 about what it was that they were proposing and
13 internal discussions about what could be
14 accommodated. I don't think we accommodated
15 every single request that was made.

16 JUSTICE KAGAN: What kind of requests
17 did you reject?

18 MR. FEIGIN: Your Honor, I'm not aware
19 of any specific requests that we rejected, but
20 my general understanding is there may have been
21 requests that we did not -- I don't want to --
22 my -- my concern is representing to the Court
23 that we accommodated everything that was
24 requested of us.

25 I'm not certain I could make that

1 representation, but everyone was clearly
2 satisfied enough that we avoided last-minute
3 litigation.

4 JUSTICE KAVANAUGH: There was no -- no
5 touching, right?

6 MR. FEIGIN: There was no touching
7 during --

8 JUSTICE KAVANAUGH: So if someone had
9 requested touching like Petitioner --

10 JUSTICE KAGAN: There was touching in
11 one; is that -- is that correct?

12 MR. FEIGIN: There was -- may I, Your
13 Honor?

14 JUSTICE KAGAN: There was -- wasn't
15 there communion given in one and the use of holy
16 oils?

17 MR. FEIGIN: Well, Your Honor, our
18 recollection of that one is a little bit
19 different from -- from Father O'Keefe's
20 recollection of it, but there was -- our
21 recollection is there was at least some
22 touching, but that was during the period before
23 the administration of the drugs.

24 And we don't think it was communion in
25 the sense of giving someone a wafer on the

1 tongue or anything to that effect.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. Justice Thomas?

4 JUSTICE THOMAS: No.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer?

7 Justice Alito?

8 JUSTICE ALITO: Yeah, Mr. Feigin, I do
9 have a number of questions.

10 RLUIPA, like RFRA, like the pre-Smith
11 free exercise jurisprudence of this Court
12 requires an individualized determination.
13 That's been the law for a long time. RFRA's
14 been on the books for a long time. It's a
15 completely regrettable standard. It is
16 regrettable it wasn't extended to the Free
17 Exercise Clause but it is individualized.

18 And what would be most helpful here, I
19 think, is if we could at least identify sort of
20 a gold standard, not to preclude individualized
21 variations, but a -- a -- something that will
22 generally be sufficient to take into account
23 religious demands regarding the two things that
24 are at issue here, touching and vocalization,
25 and accommodation of the State's interest.

1 And we could look to the BOP, doesn't
2 get to specify what the First Amendment requires
3 or what RLUIPA requires, but it's a starting
4 point. And so if you -- you've said what has
5 happened in the past. If there are federal
6 executions in the future, what will the BOP do?

7 Will it -- will its policy be
8 generally -- will its policy be no touching
9 during the execution, vocalization allowed
10 throughout the -- the execution, so long as it
11 doesn't interfere with other communications that
12 have to take place?

13 MR. FEIGIN: Your Honor, I don't think
14 -- I can't quite represent accurately under any
15 circumstances exactly what BOP --

16 JUSTICE ALITO: All right. Let me --

17 MR. FEIGIN: -- would do in that case.

18 JUSTICE ALITO: That's unfair, an
19 unfair question. So let me -- let me look back.

20 That was what BOP apparently thought
21 was appropriate during the executions that took
22 place last year.

23 MR. FEIGIN: Well, Your Honor, I want
24 to be a little bit more nuanced about that. I
25 think what the BOP was doing was making

1 individualized judgments about each particular
2 case and then were kind of mapping out a -- how
3 that shaped out if you look at the entire
4 universe of the 13.

5 JUSTICE ALITO: Well, I wonder if you
6 could be a little more helpful. What does the
7 BOP regard as sufficient to satisfy its
8 interests in security and in having executions
9 carried out without any interference?

10 MR. FEIGIN: Well, Your Honor, if we
11 wanted to have the risk be absolutely zero,
12 there would be no spiritual advisor in the
13 chamber whatsoever.

14 However, BOP was able to carry out 11
15 executions with a spiritual advisor in the
16 chamber. It had a security person next to the
17 spiritual advisor at all times. Everything was
18 -- the position of the spiritual advisor varied
19 with the phase of the execution, as I have
20 described earlier.

21 The BOP does do some auditory
22 monitoring during the administration of the
23 drugs, in particular, listening for any drip
24 from the IV lines. And it is also listening for
25 a particular snoring sound from the prisoner

1 that would indicate the pentobarbital is working
2 as it is supposed to and it -- the chanting and
3 praying sometimes could interfere with that.

4 The BOP may do with visual and EKG
5 monitoring and nothing went wrong when they --
6 when they did that, fortunately.

7 The BOP, I think, did not get a
8 request to physically touch the inmate during
9 the administration of the drugs. I think they
10 would have very, very substantial concerns about
11 that because of the risk of either advertent or
12 inadvertent disruption of the IV lines.

13 That risk may be low, but the harm, as
14 Justice Barrett was mentioning earlier, would be
15 extremely high. Also, unlike an -- an actual
16 prison employee, like a state or federal
17 chaplain, the outside spiritual advisor would
18 need to be removed if the medical team had to
19 come in, and that in itself could cause delay or
20 -- or problems.

21 And, frankly, Your Honor, I -- I also
22 think blocking the witnesses' views, which, you
23 know, now you're requiring two people, the
24 outside spiritual advisor and the security
25 person, is a legitimate concern here because one

1 of the purposes of capital punishment is to
2 provide some closure to the victims. And, of
3 course, we believe the inmate's family should be
4 able to witness this as well. And blocking
5 either of them from fully viewing the inmate at
6 the time of the execution is an important
7 factor.

8 JUSTICE ALITO: All that is helpful.
9 Now, to follow up a little bit, we
10 have a picture of the execution room that Texas
11 uses. I don't know whether the execution room
12 that the federal government has is a matter of
13 public record, anything about it, but can you
14 tell us whether there's anything that is
15 materially different about the -- what the
16 federal -- about the room that the federal
17 government uses or the procedures that would
18 suggest that the considerations in Texas should
19 be different from the considerations in Terre
20 Haute?

21 MR. FEIGIN: As to the chamber, Your
22 Honor, ours has about twice the square footage
23 of what I understand Texas's is, which is what
24 enables us to have the spiritual advisor about
25 nine feet away during the administration of the

1 drugs.

2 Before the administration of the
3 drugs, the spiritual advisor was advised to
4 stand at a line that's taped on the floor that's
5 about 28 inches away from the gurney. I don't
6 know that the precise procedures we've used
7 there would be feasible for Texas with its
8 smaller chamber.

9 I'm also not entirely clear on what
10 Texas's monitoring equipment exactly looks like
11 or the positioning of its windows. We have
12 separate galleries for the victim and inmate
13 witnesses, as well as the federal official
14 witnesses, and then another one for the medical
15 team. And they all need to be able to see in
16 for one reason or another.

17 And then there's auditory monitoring
18 equipment and medical monitoring equipment that
19 may differ there as well that may raise some
20 concerns too.

21 JUSTICE ALITO: I'm sorry to take up
22 so much time. If I could just ask one more
23 question. It relates to something that, to my
24 mind, is related to this, although it's a
25 different subject, and -- and that is I'm

1 interested in BOP practice regarding religious
2 services during a typical weekend.

3 So, on a Friday, Saturday, Sunday, in
4 a federal prison, what religious services, if
5 any, are prisoners allowed to attend? Do you
6 know the answer to that?

7 MR. FEIGIN: Your Honor, not -- not as
8 I stand here today, no.

9 JUSTICE ALITO: All right. Thank you
10 very much.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor, anything further?

13 Justice Kagan?

14 JUSTICE KAVANAUGH: I have a few
15 follow-ups. I share Justice Alito's desire to
16 have a -- what I would call a bright-line rule
17 or -- or something, some guidelines, if -- if
18 Petitioner's position were to prevail here, and
19 it's helpful, your explanation, of what happened
20 in the federal executions. But I want to make
21 sure, following up on Justice Kagan's questions,
22 I understand what happened.

23 There was no touching except in one,
24 is that correct?

25 MR. FEIGIN: That is our recollection,

1 Your Honor, yes.

2 JUSTICE KAVANAUGH: There was someone
3 present in 11 of the 13?

4 MR. FEIGIN: Yes.

5 JUSTICE KAVANAUGH: Okay. And they
6 spoke aloud in all 11 of those?

7 MR. FEIGIN: In one of them, there
8 appears to have just been conversation before
9 the administration --

10 JUSTICE KAVANAUGH: Okay.

11 MR. FEIGIN: -- of the drugs.

12 JUSTICE KAVANAUGH: And I --

13 MR. FEIGIN: In --

14 JUSTICE KAVANAUGH: Sorry, keep going.

15 MR. FEIGIN: I'm sorry. In the rest
16 of them, there was at least some prayer. And,
17 again, because of the somewhat underdetermined
18 word "execution," it's not entirely clear
19 whether the prayer was during the entire period
20 or just during the portion as the witnesses were
21 coming in and the spiritual advisor and the
22 inmate were alone with the federal officials.

23 JUSTICE KAVANAUGH: And if I'm
24 interpreting you correctly, but correct --
25 correct me if I'm wrong, you have much more

1 concern -- you're okay with someone being in the
2 room or at least BOP was, during these, okay
3 with audible? It doesn't seem like you're okay
4 as you stand here today with someone touching
5 during the execution, putting to the side the --
6 or maybe you don't want to put it to the side --
7 the question of what the execution is.

8 MR. FEIGIN: Well, Your Honor, just to
9 be clear, I mean, I'm not quite sure I'd
10 represent that we were okay with it. It was
11 just BOP was able to accommodate it.

12 JUSTICE KAVANAUGH: Okay.

13 MR. FEIGIN: And I think BOP would
14 have a vastly greater degree of concern for the
15 reasons I mentioned earlier about accommodating
16 a request to have the spiritual advisor in
17 physical contact with the inmate.

18 I mean, if I could just emphasize one
19 thing that I think really came out in the
20 Gutierrez litigation after this Court remanded,
21 is that Texas, you know, points out, and I think
22 they point it out here but not to the same
23 degree, even -- it's not just a matter of not
24 trusting a spiritual advisor. It's a very
25 fraught circumstance.

1 You don't know how someone's going to
2 react in that circumstance. I mean, I -- I -- I
3 realize this probably wouldn't happen to most
4 people, but someone could faint, someone could
5 stumble, and it -- you could jostle the lines.
6 That might or might not disrupt them. But, if
7 that were to happen in the middle of the
8 pentobarbital, all of the problems in, for
9 example, the Lockett execution in Oklahoma were
10 because the IV was going into the tissue as
11 opposed to into the vein, and anything going
12 wrong here would be catastrophic.

13 JUSTICE KAVANAUGH: And then, to
14 follow up on Justice Barrett's question and my
15 earlier questions about the risk, the State's
16 compelling interest in reducing the risk to zero
17 or as close to zero as possible given what we've
18 mandated under RLUIPA, you said, I think, at the
19 beginning, the state would need state-specific
20 reasons to justify that.

21 And I'm wondering how a state could
22 say: We have a state-specific reason for
23 wanting to reduce the risk to as close to zero
24 as possible.

25 MR. FEIGIN: Well, I think this is

1 where Holt's and Cutter's emphasis on
2 substantial deference to prison administrators'
3 expertise comes in. We certainly do not think
4 that courts should be micromanaging prison
5 procedures. But I -- I think Holt identifies
6 the practices of other jurisdictions as at least
7 another least restrictive means that the state
8 needs to, in Holt's words, give persuasive
9 reasons why it can't follow.

10 So, if a number of other
11 jurisdictions, and, here, the federal government
12 and Alabama, have been able to allow outside
13 spiritual advisors, I think what Texas would
14 need to do but hasn't done yet and may or may
15 not be able to do is to say things that are of
16 the nature of what I was discussing earlier with
17 Justice Alito: We have different monitoring
18 equipment. We -- our chamber is not the same
19 size as the federal government's. We rely more
20 heavily on certain types of monitoring than the
21 federal government does.

22 And I also think they could
23 legitimately decide to tolerate a lower degree
24 of risk than the federal government was willing
25 to accommodate. I think --

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett, anything further?

3 MR. FEIGIN: I'm sorry.

4 JUSTICE BARRETT: Yes, Mr. Feigin, I
5 just have two quick questions. One is to follow
6 up. I think Justice Kavanaugh was asking a very
7 important question about how do we define the
8 state interest. And I -- I feel like you gave
9 him a lot of examples of least restrictive
10 alternatives but maybe not the compelling
11 interest.

12 MR. FEIGIN: Sure.

13 JUSTICE BARRETT: I'm just wondering
14 if it's legitimate to define it as trying to get
15 to zero percent risk, because, you know, Justice
16 Alito asked you about services on the weekends.
17 I -- I think -- it's my understanding, I might
18 be wrong -- that BOP and -- and state prisons
19 too do allow some religious services, perhaps
20 because of RLUIPA. If they said we want the
21 risk of prison rioting or fighting to be
22 zero percent, that would permit the prison,
23 right, to say there can never be any kind of
24 prayer service or gathering.

25 But, if the compelling interest were

1 defined differently, like, for example, to say
2 maintaining prison security, then that wouldn't
3 rule out those kinds of gatherings.

4 And so, here, if -- if the prison
5 defines the compelling interest in saying like,
6 well, we in Alabama want a zero percent risk or
7 we in Texas want only a 2 percent risk, that
8 permits them to -- to altogether bar the
9 spiritual advisor from the chamber, right,
10 because there's not going to be any, you know,
11 lesser restrictive alternative that's going to
12 get you there. It always -- it's -- inherently
13 carries a risk.

14 So how would the federal government
15 articulate what the acceptable state compelling
16 interest is?

17 MR. FEIGIN: Well, I think RLUIPA kind
18 of presupposes that you can't ever get to
19 zero percent risk on anything for the reasons
20 that you just mentioned, Justice Barrett.

21 I -- I do think courts are interfering
22 a little bit too much under the Holt standard if
23 they're kind of micromanaging between, like -- I
24 mean, not that anyone could ever get precise
25 empirical numbers, but, like, 10 and 5 percent

1 risk.

2 But I -- I -- I think, just to answer
3 your question directly, the question you asked
4 my friend directly, we think the compelling
5 interest here in this particular context is in
6 carrying out the execution procedure
7 effectively, and -- which both means making sure
8 it goes correctly for the prisoner and also
9 making sure the purposes of the judgment are
10 satisfied.

11 And obviously even having a spiritual
12 advisor in the chamber does create some degree
13 of risk, even if they are nine feet away, but I
14 -- I think courts could probably set a minimum
15 bar on risk tolerance. And one place to look is
16 the experience of other jurisdictions.

17 I think courts should be very hesitant
18 outside of that to start suggesting that these
19 kinds of things need to be allowed. But if you
20 see that other jurisdictions are permitting
21 them, it places under Holt at least somewhat of
22 a modest burden on the state to give some
23 reasons, which would themselves get deference
24 for their administrators, as to why they
25 couldn't similarly accommodate it.

1 And they may well have such reasons
2 here.

3 JUSTICE BARRETT: One other just brief
4 question. Justice Kagan was asking you about
5 how BOP carries out these executions and
6 determines its standards. And you said it was
7 an individualized process with respect to each
8 of the inmates.

9 Presumably, though, BOP had to make
10 some decisions about standards that would apply
11 to each one. Like you mentioned there was tape
12 on the floor and the spiritual advisor had to
13 stand on the tape or that there would be a
14 security officer present.

15 Was there any kind of discussion or
16 consultation with prison administrators or
17 experts before the 11 executions were carried
18 out to decide, well, these are, you know, this
19 is the minimum. They can't get any closer than
20 this tape on the floor.

21 MR. FEIGIN: Your Honor, I am not
22 precisely sure why they decided on that specific
23 distance. I think they wanted them close for --
24 want to allow them to be close for that portion
25 of it, but not too close.

1 The concern there was simply making
2 sure that the security official would still be
3 in position to try to stop the advisor from
4 doing something that might interfere with the
5 execution.

6 I -- I don't know the precise content
7 of the discussions that BOP had ahead of time
8 but there was clearly a great deal of thinking.
9 Even -- even during periods where federal
10 executions are in a moratorium, they rehearse
11 this essentially semi-annually, what the
12 procedures are going to look like. It's a very
13 choreographed procedure with a lot of thought
14 into it.

15 JUSTICE BARRETT: Thank you.

16 MR. FEIGIN: Sorry, Mr. Chief Justice.
17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 General Stone.

21 ORAL ARGUMENT OF JUDD E. STONE, II,
22 ON BEHALF OF THE RESPONDENTS

23 MR. STONE: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 Petitioner has twice received the

1 extremely exceptional remedy of having his
2 execution halted at the last minute. Each time
3 he litigates a right of execution date he
4 receives another lengthy reprieve.

5 This Court should not countenance the
6 delay of a fourth execution date.

7 Ramirez claims that he has
8 consistently sought the same relief, namely his
9 pastor's touch and audible prayer throughout his
10 piecemeal litigation.

11 There are two problems with that
12 assertion. First, it's false. Ramirez
13 disclaimed in 2020 that he wanted pastoral
14 touch. And in April 2021, Texas gave Ramirez
15 all that he had been looking for at that time,
16 his pastor's presence in the execution chamber.

17 Second, Ramirez' assertion makes his
18 litigation conduct inexplicable. If Ramirez was
19 aware the entire time that he wanted pastoral
20 touch and audible prayer, then he has no excuse
21 for failing to timely raise and grieve those
22 requests.

23 Ramirez tries to excuse both his
24 failures to -- both his delays and his failures
25 to exhaust by claiming he only learned he

1 wouldn't be permitted touch or audible prayer in
2 June and August of this year, respectively.

3 Again, false. The -- the State's
4 execution procedures publicly available as of
5 this April state that a pastor may "observe the
6 inmate's execution." An observer's role is
7 passive, not interactive.

8 Ramirez knew his pastor's observation
9 and his pastor's participation were distinct
10 because he himself distinguished them. Ramirez
11 stated in August that he assumed his pastor
12 could not audibly pray, and he distinguished
13 touch from presence in his 2020 suit.

14 Ramirez has delayed in seeking
15 accommodations, reversed his litigation
16 positions, and raised his claim seriatim, all
17 for the purposes of delay.

18 This Court should put an end to these
19 tactics once and for all. I welcome the Court's
20 questions.

21 CHIEF JUSTICE ROBERTS: Counsel, how
22 would you deal with the hypothetical I was
23 raising earlier, which is, you know, a few days
24 before execution the prisoner says I have
25 decided I need to convert to a particular faith

1 and the process takes three months, and there's
2 a -- there's religion in which that is true,
3 that it takes three months.

4 What -- what -- would you -- what
5 would you do?

6 MR. STONE: Certainly, Your Honor. So
7 for purposes of -- and I assume that this
8 prisoner is raising a RLUIPA claim and asking
9 for a preliminary injunction against his
10 execution?

11 CHIEF JUSTICE ROBERTS: Yeah, because
12 it takes three months, and that's what his --
13 the faith that he wants to pursue takes.

14 MR. STONE: Well, Your Honor, first, I
15 think the -- the Court would have to determine
16 whether or not that was a sincere conversion.

17 CHIEF JUSTICE ROBERTS: Well, but
18 right. That's --

19 MR. STONE: Right.

20 CHIEF JUSTICE ROBERTS: -- what I'm
21 asking you.

22 MR. STONE: That's right.

23 CHIEF JUSTICE ROBERTS: How would you
24 -- what would you do to make sure you've
25 accommodated that concern?

1 MR. STONE: The court would go -- go
2 into a pretext inquiry as discussed in the RFRA
3 context in footnote 28 of Hobby Lobby. It would
4 look into factors like, for example, how is this
5 individual -- how has this individual behaved in
6 the past? Have they made any similar --

7 CHIEF JUSTICE ROBERTS: Well, he had a
8 conversion experience. I suspect impending
9 death focuses people's concerns on religion in a
10 way they may not have been before. And with
11 death imminent, he decided he needed this --
12 needed to pursue this route to salvation.

13 MR. STONE: On just those facts alone,
14 Your Honor, it would sound to me that, with
15 nothing else, that -- that the individual might
16 be seeking delay of his execution because
17 several days beforehand he is requesting a
18 multi-month process. But I think that would be
19 a -- a credibility determination and that would
20 be --

21 CHIEF JUSTICE ROBERTS: Well, but --
22 yeah, I understand that. But how would you do
23 that? I mean, it is a factually plausible
24 thing. I mean, people convert, and particularly
25 in times of stress. There is a church that

1 requires three months. Maybe he's not sincere
2 but how do you tell?

3 MR. STONE: You look at other
4 collateral circumstances, such as whether or not
5 there had been previous contact with a pastor
6 that, you know, sort of engendered a spiritual
7 relationship beforehand, whether or not the
8 person had raised similar claims beforehand and,
9 if so, when relative to previous execution
10 dates.

11 Whether or not this is, in fact, the
12 kind of -- whether or not this individual has
13 brought other basically pretextual or baseless
14 lawsuits, I think these would all be the kinds
15 of facts and circumstances that would help a
16 district court make the familiar inquiry as to
17 whether or not basically they are being lied to,
18 the same pretext inquiry that occurs in
19 virtually every area of law.

20 Undoubtedly because this is a very
21 sensitive area of law and a very sensitive area
22 of human experience, it's going to require --
23 it's going to require an examination of a lot of
24 facts and circumstances around the individual.

25 And it may be the case that district

1 judges making this factual determination for the
2 first time are going to tend to give some
3 deference to an individual on the surface of
4 things.

5 But Congress has placed that initial
6 burden on the individual trying to show
7 sincerity. So at a minimum that person has to
8 start by adducing some proof that they have a
9 sincere need.

10 JUSTICE BARRETT: General Stone, can I
11 ask you, you just said that the April 2020
12 policy said that the -- that the prisoner could
13 have a spiritual advisor observe in the room.

14 Could you direct me to where it says
15 that? Because I am looking at the policy and it
16 talks about the spiritual advisor being present
17 in the room. And I think that's a significant
18 difference.

19 So does it say observe?

20 MR. STONE: It's the April 2021
21 policy, Justice Barrett. Let me get you that
22 page.

23 JUSTICE BARRETT: I'm -- I'm sorry. I
24 am looking at the April 2021 policy. Maybe you
25 could get that for me.

1 MR. STONE: Of course. It's on page
2 149 of the Joint Appendix, of the Joint
3 Appendix.

4 In Part D, Part 1, it says, to read
5 the relevant quote: "If requested by the
6 inmate" -- towards the bottom it says "will be
7 escorted into the execution chamber by an agency
8 representative to observe the inmate's
9 execution."

10 JUSTICE BARRETT: Okay. Thank you
11 very much.

12 JUSTICE BREYER: Well, I mean, I have
13 gone through -- or we have in my chambers the
14 dates. And there is an argument about this. I
15 mean, they say, look, in -- you used to allow
16 spiritual advisors in. No problem. Then you
17 decided in 2019, no, they can't come in.

18 So in 2020, after we got through with
19 it, he says, please, let them in. Okay? And he
20 doesn't say anything about laying on of hands
21 because, you know, letting them in is better
22 than nothing. You say, no, they can't come in.

23 Then we get to 2022, and he says, come
24 on, let him in. And you say, okay, we'll let
25 him in.

1 And at that point they say: Huh,
2 pretty good, fine, and we want the hands and the
3 audible prayer, too. That's what you used to
4 do.

5 And you say: Ha, you didn't ask for
6 that before. Of course they didn't. They felt
7 they couldn't get in at all. And so now you're
8 asking for it. All right. The answer is no.

9 All right. So here we are. And --
10 and -- and as I go through this, I think they
11 have a point. Maybe you have a point. What are
12 we supposed to do, send it back for that?

13 MR. STONE: Two points, Your Honor.

14 I think there are at least two clear
15 places where Mr. Ramirez certainly should have
16 had notice that he needed to look into this.
17 The first one is in 2019, when TDCJ first
18 changed its policies --

19 JUSTICE BREYER: Yes.

20 MR. STONE: -- partially in response
21 to this Court's decision in Murphy. At that
22 point, TDCJ's policy was no pastors in the
23 chamber at all.

24 JUSTICE BREYER: Yeah.

25 MR. STONE: Because what he wanted was

1 not only a pastor in the chamber but other
2 things that are sort of logically subsequent to
3 that, by being told you may not have a pastor in
4 the chamber, he's being told you may not have
5 any of those other things too.

6 JUSTICE BREYER: Well, I mean, it's
7 very technical and it's excellent lawyering,
8 but, you know, you sit there and you read it,
9 and you used to let them in, and now he reads it
10 and it says no, they can't come in. And we have
11 the case still, and, finally, it gets out of
12 here, and you go back and, no, they can't come
13 in.

14 So, obviously, he says, please, let
15 him in. And then, finally, when you change and
16 let them in, he says, by the way, we would like
17 hands plus -- I'm just repeating myself -- hands
18 plus audible prayer. That's what you used to
19 do.

20 Now -- now, as I say it like that, you
21 know, it sounds as if they had been fairly
22 reasonable. But, as you say, well, you say, but
23 they didn't really ask for it. I say, okay, you
24 have a point. And -- and so my question was,
25 what do we do about that? And I have a question

1 on the merits too, but go ahead with that.

2 MR. STONE: Sure. Well, Your Honor,
3 this Court's rule, as articulated in Hill and in
4 Bucklew, places the obligation on the capital
5 inmate who's going to raise claims to do so in a
6 diligent manner so as to not require equitable
7 relief staying his execution. He's under that
8 burden and an obligation -- a burden of bringing
9 claims diligently includes a burden to
10 investigate.

11 JUSTICE BREYER: Okay. Okay. I got
12 your point.

13 MR. STONE: Right.

14 JUSTICE BREYER: Now, on the merits,
15 I'd like to know this: Do you have any idea how
16 many executions have there been -- let's go back
17 a hundred years, okay -- where they did let
18 spiritual advisors in somewhere? I don't care,
19 United States, do it as you want, what --
20 depending on what you know. They let the
21 spiritual advisors in, there was a physical
22 touching, and there was audible prayer.

23 Was the answer zero? Was the answer
24 --

25 MR. STONE: Certainly not.

1 JUSTICE BREYER: No? Certainly not?

2 MR. STONE: Certainly not zero.

3 JUSTICE BREYER: What -- what -- what
4 was the answer about? Can you guess?

5 MR. STONE: It was commonplace in
6 executions --

7 JUSTICE BREYER: Okay.

8 MR. STONE: -- in Texas between 1982
9 and 2019.

10 JUSTICE BREYER: Okay. So someplace
11 it's commonplace. In how many of those did the
12 audibility and the physical touching create the
13 execution going astray? Are you aware of any?

14 MR. STONE: No, Your Honor --

15 JUSTICE BREYER: Okay.

16 MR. STONE: -- though I would point
17 out --

18 JUSTICE BREYER: So we have experience
19 and there's never been a problem. All right.
20 That's -- that's what you think. I mean, I
21 don't know if you think it, but, I mean, at
22 least that's the best you can answer.

23 MR. STONE: I -- I would also add an
24 important -- an important distinction, Your
25 Honor, is that for every one of those

1 circumstances, the individual is a TDCJ
2 employee. And it turns out TDCJ is a
3 correctional institution dealing with the
4 extraordinarily charged and choreographed area
5 of -- of a death chamber.

6 There is a very significant difference
7 between having an outsider with no relationship
8 whatsoever --

9 JUSTICE KAGAN: Are you aware in any
10 other states of an execution going astray
11 because of an outside spiritual advisor?

12 MR. STONE: No, Justice Kagan, though
13 I do -- we reached out to other states, and
14 because this is very new in the handful of
15 jurisdictions that allow it, I'm not surprised
16 that we have none of them. This is the sort of
17 thing we would anticipate to be a very low
18 likelihood of occurring. It just has a
19 catastrophic potential of potential damage if it
20 did.

21 JUSTICE BARRETT: Given that
22 catastrophic risk, the question that I asked Mr.
23 Feigin and your friend on the other side about
24 what the definition of the State's compelling
25 interest is, could you give us yours?

1 MR. STONE: Of course, Your Honor. I
2 think Justice Kavanaugh accurately or almost
3 accurately summarizes that we're attempting to
4 minimize risk almost all the way to zero, as --
5 as much as we reasonably can.

6 I -- I take the point that you have
7 that if that's the State's compelling interest
8 going forward in all sorts of contexts, that
9 that sounds an awful lot like a license for the
10 State to just reject religious claims.

11 I think the Court's -- the Court's
12 articulated deference in *Holt v. Hobbs* and other
13 similar cases and the sort of span of that
14 deference is what does a lot of work in this
15 case. So, for example, this Court rejected
16 deference to these sorts of claims of minimizing
17 risk in *Holt* precisely because the policy was
18 under-inclusive, it seemed incredibly hard to
19 believe that contraband could be held in a
20 half-inch beard, situations like that.

21 To the extent that you have a -- a
22 correctional institution saying that we have to
23 ban -- we have to ban all church services
24 because there's too high of a chance of a riot,
25 there's -- it sounds in that hypothetical it's

1 just a very bad ends/means fit between the thing
2 that was ultimately chosen and the -- and the
3 pursuit of the sort of minimization of risk or
4 at least a policy that appears to be sacrificing
5 a whole lot of potential RFRA rights.

6 And in that case, I think that the
7 Court's deference to the stated security
8 concerns of -- of the administrative -- of the
9 -- of the agency should be a lot lower, if only
10 because, like I said, you've got this very
11 over-inclusive sort of policy. And these
12 over-inclusion and under-inclusion analyses are
13 very typical of when this Court says, well, we
14 defer to prison administrators as experts, but
15 we're not sure about this particular policy.

16 I think that would take care of at
17 least a lot of the concerns that you have.

18 JUSTICE KAVANAUGH: You have to think
19 about the risk together with the harm, correct?

20 MR. STONE: That's exactly right. So
21 --

22 JUSTICE KAVANAUGH: So the risk is
23 low, but the potential harm, as you used the
24 word, and I think Mr. Feigin agreed with this,
25 catastrophic or some adjective similar to that,

1 so those two things need to be thought about
2 together?

3 MR. STONE: That's exactly right, Your
4 Honor. Texas being unwilling to tolerate a very
5 small amount of risk in the death chamber, where
6 a tiny amount of risk can lead to a situation
7 that would be -- that would create intolerable
8 pain for an inmate or an intolerable amount of
9 reliving of suffering for a victim -- for the
10 victim's families or any of these very high --

11 JUSTICE KAVANAUGH: What -- what about
12 --

13 MR. STONE: -- sort of very high
14 negative value problems.

15 JUSTICE KAVANAUGH: -- what about Mr.
16 Feigin's description of the experience and then
17 our effort to balance the competing interests
18 here under a test, the strict scrutiny test,
19 that is difficult to apply here, as I think
20 everyone would acknowledge? The advisor's
21 allowed in the room. There can be audible
22 prayer before the drugs are administered. No
23 touching. Is that something Texas could live
24 with?

25 MR. STONE: Well, Your Honor, one of

1 the major problems is -- was alluded to in the
2 -- in the logistics of the federal execution
3 room is that it's just much, much larger than
4 Texas's. I might point out that's one major
5 difference because, in Texas, we can
6 functionally only have about three people. It's
7 about a 9-by-12 room. Most of one wall is taken
8 up by windows for the inmate -- for -- rather,
9 for witnesses on behalf of the inmate's
10 families. The other is witnesses of the
11 victim's. On the other side, we have a large
12 window for the medical team to view and IV lines
13 coming in. So the much smaller space makes it
14 much more difficult to navigate.

15 In terms of the sort of -- in terms of
16 your sort of general point that I think you're
17 getting at as to whether or not Texas might be
18 able to accommodate something that was
19 significantly less intrusive of a request, Texas
20 is obligated under -- under RFRA and RLUIPA to
21 take these prison requests one at a time.

22 In the event that someone said, I want
23 a five-second blessing and then my pastor can
24 step outside, that would be obviously something
25 that would be much less intrusive, that would --

1 that would bear much less of a risk and that
2 Texas would have to have an awfully good reason
3 to refuse.

4 The reason why that doesn't work here
5 is because Mr. Ramirez is insistent that he's
6 wanted the same thing the whole time. He's
7 wanted touch and prayer the entire duration of
8 the -- of the execution from beginning all the
9 way to end.

10 JUSTICE KAVANAUGH: Well, that goes --

11 JUSTICE KAGAN: The size of the room
12 did not prevent many, many chaplains in Texas's
13 history from providing both touch and prayer, is
14 that right?

15 MR. STONE: No, Justice Kagan, but it
16 did indirectly in that when we had chaplains in
17 the room, we didn't need to have another
18 security officer in the room. And so the fact
19 that we have a volunteer coming into the room,
20 the chaplain has to now be -- now has to be
21 accompanied by a security officer, which
22 required us to take out the warden.

23 So it did change -- it did change how
24 we had to run the room, but the chaplain himself
25 did not add to the risk, no.

1 JUSTICE KAVANAUGH: That was, again,
2 the state official, right? The state --

3 MR. STONE: Yes, Your Honor, It was.

4 JUSTICE KAVANAUGH: -- official
5 chaplain.

6 MR. STONE: That's right.

7 JUSTICE KAVANAUGH: That's different
8 -- at least to me, that's a somewhat different
9 situation. It may not be to others.

10 You were switching, though, to
11 sincerity in this case, and I get you have a
12 whole argument about sincerity in this case, but
13 we may also have to opine on compelling interest
14 and least restrictive alternatives.

15 Just on the -- looking to other
16 states, how do we do that? You know, Alabama
17 does it. Why can't Texas? That's the argument
18 -- I -- I'm simplifying, but that's kind of the
19 argument on the other side as to some of this.
20 Your response?

21 MR. STONE: Sure, Your Honor. In
22 particular with Alabama, I think the Court,
23 however it's going to set down rules, needs to
24 make sure it's really engaging in an
25 apples-to-apples comparison.

1 The request in Alabama was much
2 briefer. I understand that it was a brief touch
3 with holy oils to essentially administer the
4 last rights, and that's something significantly
5 less intrusive risk-wise than what's being
6 presented in Texas.

7 All else equal, if someone in Texas
8 were to -- if someone in Texas were to present
9 that same request as in Alabama, the fact
10 Alabama was able to provide it would be a piece
11 of evidence, not necessarily dispositive, but at
12 least something to the extent that Alabama has a
13 similar execution protocol and a similar
14 execution room.

15 JUSTICE KAGAN: General, why isn't the
16 inquiry really exactly how Holt laid out the
17 inquiry? In other words, you know, in Holt, the
18 prison officials came in and said men can put
19 contraband in their beards and we have a
20 security interest in preventing that.

21 And what the Court said was, you know
22 what, I mean, that might be, but we're going to
23 look around at other states, see what other
24 practices are. To the extent most other states
25 or many other states can deal with the security

1 interests in a way that also respects religious
2 interests of the inmate, then we're going,
3 essentially, to, you know, say to the state why
4 not you too?

5 And in all of that, there is an
6 appropriate level of deference given to prison
7 officials, but there's also an appropriate level
8 of respect given to the inmate with religious
9 convictions, as commanded by Congress.

10 MR. STONE: I don't think we're very
11 far apart, Justice Kagan. I think that to the
12 extent that we're dealing with many states that
13 are similarly situated as in having the same
14 kind of execution protocol and similarly
15 substantial execution rooms, that if many states
16 had that same experience that, in fact, there
17 wasn't a risk or the -- the risk didn't manifest
18 after a long period of time, that would be
19 powerful evidence that a given state, for
20 example, Texas in this case, couldn't
21 legitimately say we can't do this without
22 unacceptably adding to our risk.

23 I was speaking more specifically that
24 to the extent that this Court is going to look
25 at other states as like examples for purposes of

1 -- of engaging exactly that kind of state
2 comparison that you bring up, Justice Kagan,
3 that the Court's making sure it's getting like
4 things like.

5 And the kind of fact that might fall
6 by the wayside for purposes of comparison is the
7 federal government has just a much larger
8 chamber. And that's an important fact. Whether
9 or not it should be sufficient to justify a
10 policy -- a policy difference in one or many
11 cases, that's obviously going to be
12 case-specific and up to this Court.

13 But that's what I sort of was
14 exhorting, was that you can't take one
15 particular institution or one particular
16 execution as dispositive for that analysis.

17 JUSTICE SOTOMAYOR: Counsel --

18 JUSTICE ALITO: If Mr. -- if Mr.
19 Ramirez is going to be executed, would a new
20 execution date have to be set?

21 MR. STONE: Yes, Justice Alito.

22 JUSTICE ALITO: And that would -- that
23 would have to be at least 90 days from when?

24 MR. STONE: As a practical matter,
25 Your Honor, first of all, a date has to be -- a

1 state court has to be petitioned to set another
2 date. No state court in Texas is going to do
3 that while this Court has a case on the merits
4 pending regarding you have an execution.

5 After that occurs, it would be at
6 least 91 days from when the trial judge is --
7 grants the motion. As a practical matter, it
8 tends to be about four to seven months, as this
9 Court could see regarding Mr. Ramirez's dates.

10 JUSTICE ALITO: And would there be any
11 reason why Mr. Ramirez could not exhaust any
12 grievances he has about the way the execution
13 will be carried out during that period?

14 MR. STONE: Well, Your Honor, I
15 believe he actually -- so he hasn't exhausted
16 either of the two as of right now. The
17 exhaustion came after he'd filed loss -- the --
18 his lawsuit regarding physical touch.

19 So I believe, if that were dismissed
20 for exhaustion, that would be without prejudice
21 or at least with leave to refile based on the
22 district court's analysis of that.

23 The other audible claim -- audible
24 prayer one, he's had notice of that for more
25 than 15 days. This Court in Woodford has noted

1 that a prisoner has to engage in exhaustion
2 proper, not just exhaustion simpliciter. And
3 because TDCJ's consistent policy is that you
4 have to raise a first step grievance within 15
5 days of the arising of the problem, his refusal
6 to do so would mean he couldn't exhaust that
7 one.

8 JUSTICE SOTOMAYOR: Counsel, I
9 understand that prisoners -- you don't have any
10 rules that say prisoners can't pray out loud
11 during the execution, correct?

12 MR. STONE: No, Your Honor. And, in
13 fact --

14 JUSTICE SOTOMAYOR: All right. So you
15 tolerate their noise.

16 Number two, you were talking about the
17 fact that you didn't understand his request in
18 -- in June to "touch and pray over me," that it
19 would be verbal.

20 How was he supposed to understand from
21 the word "observe" in your April -- in your
22 April 21 change of execution policy that
23 "observe" meant no touching and no praying?
24 Observing, it had happened before.

25 So all I'm suggesting to you is you

1 can defend your position. He's defended his.
2 To me, prayer, silent prayer, you don't have to
3 ask permission for.

4 I suspect that many of your people in
5 that room, even though they're DOJ employees,
6 also pray silently, and no one would question
7 that their prayer would be in their head.

8 So all I'm suggesting is lack of
9 clarity exists on both sides, but you can fix
10 yours by making your rules clearer. He tried to
11 fix his by filing a grievance less than a month,
12 weeks after you announced your policy on May 4.

13 You returned his grievance saying your
14 spiritual advisor can come. Weeks later,
15 Petitioner's counsel e-mails you and asks you if
16 touching will be allowed. June 11, three days
17 later, Petitioner files his grievance and says
18 "allow Moore to touch and pray over me."

19 You deny that almost a month later,
20 July 2. And on July 8, he files a grievance,
21 but you don't respond to that over a month
22 later. What were you doing six weeks later?

23 MR. STONE: Your Honor, if I recall
24 correctly, we responded in 36 days. TDCJ's
25 manual state that these grievances can take up

1 to 40 days to respond. We try to be faster.

2 TDCJ receives quite a few --

3 JUSTICE SOTOMAYOR: What was so slow
4 -- why were you so slow here? The execution's
5 going to be in September. If you don't want
6 there to be delay, what took you so long?

7 MR. STONE: Well, Your Honor, TDCJ
8 still responded within the amount of time that
9 the manual says --

10 JUSTICE SOTOMAYOR: Yeah, but at some
11 point, that becomes ineffective as a remedy --

12 MR. STONE: Well --

13 JUSTICE SOTOMAYOR: -- if you're going
14 to butt up against the execution date purposely.

15 MR. STONE: -- respectfully, Your
16 Honor, I think that means that Ramirez was under
17 an obligation to bring his grievance earlier.

18 At a very minimum, passing by the
19 public announcement of the changed protocols,
20 passing by the fact he had notice of everything
21 he would have needed to bring his RLUIPA
22 lawsuits in 2019, he received actual notice in
23 the form of his returned grievance saying you
24 may have your pastor --

25 JUSTICE SOTOMAYOR: On May -- in May.

1 MR. STONE: May 4, I believe, that's
2 right.

3 JUSTICE SOTOMAYOR: And within weeks
4 he filed his grievance --

5 MR. STONE: He's in May --

6 JUSTICE SOTOMAYOR: -- in the same
7 amount of time that you took to deny it.

8 MR. STONE: He's in May 2021, Your
9 Honor, and he has a September execution date.
10 He waits to file his first grievance not May
11 6th, 7th, 8th, 9th. He waits until the middle
12 of June. So he takes a third of the time he has
13 left for purposes of figuring out whether or not
14 he's entitled to the extremely exceptional stay
15 of an -- of an execution at the last minute.

16 He spends it not grieving. Then he
17 gets a grievance in. Then TDCJ takes much less
18 than the 40 days back.

19 JUSTICE SOTOMAYOR: Thirty-six, four
20 days less. Thirty-six days.

21 MR. STONE: In the first return, in
22 the return of the June grievance, I believe we
23 -- we received it on the -- on the 14th. We
24 returned it on July 5 for that first step
25 grievance, so far faster than 40 days. We

1 returned it certainly diligently.

2 Then he files a Step 2 on the 8th.
3 And then we end up filing 36 days -- we end up
4 returning it to him 36 days later, and he's
5 already sued.

6 At a bare minimum, if -- if Mr.
7 Ramirez thought that the grievance process was
8 unavailable, which he'd be incorrect about
9 legally and descriptively, at a minimum, then he
10 shouldn't have waited until the very end to
11 bring his lawsuit.

12 If he was going to go and file a
13 lawsuit regardless of whether or not he'd
14 received a second step grievance response, then
15 he should have done everyone a favor and sued in
16 May.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas, anything further?

20 JUSTICE THOMAS: No questions.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer?

23 Justice Alito?

24 Justice Sotomayor?

25 Justice Gorsuch?

1 Justice Barrett? No?

2 Thank you very much, counsel.

3 Rebuttal, Mr. Kretzer.

4 REBUTTAL ARGUMENT OF SETH KRETZER

5 ON BEHALF OF THE PETITIONER

6 MR. KRETZER: Yes, Mr. Chief Justice.

7 I think perhaps one of the most alarming things
8 that my friend General Stone said in his
9 argument was that the TDCJ now has the
10 affirmative power under their logic to
11 front-run, impede, cut off, whatever you want to
12 call it, the ability to file a 1983 case by
13 their delay of the Level 2 exhaustion.

14 The three most catalytic pages of this
15 entire record and the lodged materials, 11, 12,
16 and 13, it's also at page 53 of the Joint
17 Appendix, and this is where Mr. Ramirez filed --
18 this was in June that he said the "and pray over
19 me" language, it was denied in boilerplate on
20 July 2.

21 The August 19 -- 16 denial -- this is
22 on page 13 -- has the exact same language.
23 Someone literally just took the same typewriter
24 and put the exact same thing and stamped there
25 on August 16. It sat there for six weeks.

1 This page 13 appears in the lodged
2 grievance file. It's not in the Joint Appendix
3 because it was never received by the attorney.
4 In other words, TDCJ, Mr. Stone said they can
5 take up -- we returned it in 36 days. We have
6 40.

7 Under their own internal protocols,
8 they could give themselves another 40 days to
9 respond to it, in which case they would have
10 returned the Level 2 grievance after Mr. Ramirez
11 was already executed.

12 That is the implication of how they
13 are trying to construe exhaustion in this case.
14 And there were several questions to me in my
15 opening about what would the larger implications
16 be for other cases.

17 If this Court adopts Mr. Stone's
18 logic, I predict you will see the word go out to
19 prisons across the country that they now have
20 this wonderful tool to insulate their policies,
21 whatever they may be, from federal review under
22 1983 because they can put off the Level 2
23 grievance as long as they care to.

24 I would point out -- Justice
25 Kavanaugh, you asked me in my opening about the

1 risk of, as you perceived, the non-TDCJ employee
2 chaplains being greater than TDCJ employee
3 chaplains. I would just point out that the drug
4 team members are not TDCJ employees. And the
5 botched executions you've heard about from both
6 sides, most famously Mr. Lockett in Oklahoma,
7 those botched executions were apparently caused
8 by these individuals who were not TDCJ
9 employees.

10 If the real concern is the compelling
11 interest, the safety of -- the security
12 protocols of the execution, I would submit
13 history has shown that it's these non-TDCJ
14 employees -- non-prison employees, in these
15 other cases, that have caused these executions,
16 not anything caused by any chaplain.

17 There simply exists -- as far as
18 everyone has looked for a hundred years, Justice
19 Breyer or longer, there is not a single instance
20 of any chaplain ever causing any such
21 disturbance.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 The case is submitted.

25

1 (Whereupon, at 12:54 p.m., the case
2 was submitted.)
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