

IN THE  
**Supreme Court of the United States**

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JOHN H. RAMIREZ,  
*Petitioner,*

v.

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

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

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**BRIEF OF  
FORMER PRISON OFFICIALS  
AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are former prison officials familiar with execution protocols. Each *amicus* has participated in or witnessed multiple executions, and two *amici* have helped craft execution protocols. Collectively, *amici* have witnessed more than 400 executions, most of which were performed by the Texas Department of Criminal Justice (“TDCJ”).

Steve J. Martin is a career corrections professional with nearly 50 years of experience in confinement operations. He began his career as a correctional officer for TDCJ and, after earning his juris doctor, eventually became TDCJ’s General Counsel and Executive Assistant to the Director. In that role, Mr. Martin helped develop programs for death row inmates. He also witnessed approximately four executions.

Michelle Lyons is a former spokesperson for TDCJ. In that capacity (and as a death-row reporter for the Texas newspaper the *Huntsville Item* before that), she witnessed and was TDCJ’s public face for nearly 300 executions.

Dora Schriro is a former Director of two state correctional systems – the Missouri Department of Corrections and the Arizona Department of Corrections. In these roles, Dr. Schriro served as the State’s liaison to the Supreme Court of the United States. She oversaw revision of each state system’s execution protocols and participated in more than 40 executions.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief.

*Amici* take no position on the administration of the death penalty in general or petitioner's crimes in particular. *Amici* instead submit this brief to aid the Court in evaluating the lawfulness of TDCJ's policies prohibiting spiritual advisors from, in the condemned's last moments, (1) physically touching the condemned and (2) praying audibly. *Amici* address whether those prohibitions constitute the least restrictive means available to the State to achieve some compelling interest. Based on *amici's* expertise and experience, *amici* respectfully submit that the answer is no: less restrictive means exist, for the reasons that follow.

### INTRODUCTION

Petitioner John Ramirez does not ask for his life, only the right to spiritual comfort during his last moments. Specifically, he wants his spiritual advisor (1) to lay hands on him and (2) to pray audibly, but reverently, in his last moments.

These practices were common in the State of Texas until recently. Texas has executed 572 people since 1982. See TDCJ, *Death Row Information* (last updated July 1, 2021), [https://www.tdcj.texas.gov/death\\_row/dr\\_executed\\_offenders.html](https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html). In most of those executions, TDCJ permitted spiritual advisors to lay hands on the condemned during the execution. Likewise, up until recently, it was common for TDCJ to permit the spiritual advisor to audibly pray at the time of death. Never did these practices cause a disruption or security threat during the execution.

Petitioner requested the same spiritual comfort during his execution that those who came before him received. But TDCJ denied that request, taking the novel position that allowing a spiritual advisor to make physical contact with him or to pray out loud during the execution would pose an undue security



threat. TDCJ now argues that its unconditional refusal to allow these practices is the least restrictive means available to ensure the security of the execution process.

*Amici* disagree.

### SUMMARY OF ARGUMENT

The Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) states that the government shall not “impose a substantial burden” on an inmate’s “religious exercise” unless that burden can withstand strict scrutiny, meaning the policy must be “the least restrictive means of furthering [a] compelling governmental interest.” 42 U.S.C. § 2000cc-1(a).<sup>2</sup> That standard is “exceptionally demanding.” *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (Kagan, J., concurring in denial of application to vacate injunction) (quoting *Holt v. Hobbs*, 574 U.S. 352, 364 (2015)). “If *any* less restrictive means is available for the Government to achieve its goals, then the Government must use it.” *Id.* (quoting *Holt*, 574 U.S. at 365) (emphasis added).

Here, means less restrictive than TDCJ’s absolute ban are available for achieving a secure execution. TDCJ’s own past practices, as well as the current and past practices of other jurisdictions, show this. *Amici* also identify, based on their experience, numerous potential protocols short of an absolute ban that TDCJ could use to protect the security and dignity of the

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<sup>2</sup> *Amici* understand that the Court first must consider whether TDCJ’s policy “substantially burdens” the free exercise of petitioner’s religion. If the Court so finds, then TDCJ will have to prove that its policies are necessary for TDCJ to achieve a “compelling governmental interest” and that the policies are “the least restrictive means” of doing so. Given *amici*’s expertise, this brief focuses exclusively on the “least restrictive means” prong of the analysis.

execution chamber while accommodating petitioner's religious beliefs.

*First*, decades of past practice in Texas and other jurisdictions confirm that less restrictive means can preserve the security of the execution while also allowing a spiritual advisor to touch the condemned and audibly pray during an execution. Between 1982 and 2019, a chaplain would physically touch the condemned during the majority of executions in Texas. Likewise, Texas and other jurisdictions historically have allowed spiritual advisors to pray audibly during executions. "The presence of a chaplain in the execution chamber did not cause any security incident during those years." Order at 3, *Gutierrez v. Saenz*, No. 1:19-cv-00185, ECF No. 124 (S.D. Tex. Nov. 24, 2020). This long history of safely allowing a spiritual advisor to lay hands on and pray with the condemned as he lay dying "shows that a prison may ensure security without barring" these practices. *Dunn*, 141 S. Ct. at 725 (Kagan, J., concurring in denial of application to vacate injunction).

*Second*, TDCJ's execution protocols already allow a spiritual advisor to stay with the condemned in the execution chamber during the execution. The marginal risk (if any) of permitting a spiritual advisor also to lay his hands on the condemned and audibly pray is miniscule at most and may be neutralized and safely managed through proper protocols. These protocols could include:

- Providing a security escort for the spiritual advisor to guard against mischief;
- Reasonably restricting where the spiritual advisor may stand in the execution chamber;
- Reasonably restricting where the spiritual advisor may touch the condemned;

- Reasonably restricting when the spiritual advisor may begin laying hands on the condemned;
- Reasonably restricting when the spiritual advisor may pray;
- Reasonably restricting the volume of the spiritual advisor's prayers;
- Requiring the spiritual advisor to stop speaking whenever the condemned or a prison official speaks.

Protocols such as these are far less restrictive than TDCJ's absolute ban and would, in *amici's* experience, allow a spiritual advisor to lay hands on and audibly pray with the condemned during his execution without threatening the security of the procedure.

### **ARGUMENT**

TDCJ's ban on spiritual advisors' laying hands on the condemned and praying aloud during an execution is not the least restrictive means of ensuring a smooth and secure execution. Texas and other jurisdictions historically have permitted these practices without incident. And numerous less restrictive procedures exist that TDCJ could implement to accommodate these practices while still achieving a smooth and secure execution.

#### **I. TDCJ'S AND OTHER JURISDICTIONS' PAST PRACTICES PROVE THAT TDCJ CAN ACHIEVE A SECURE EXECUTION THROUGH LESS RESTRICTIVE MEANS THAN PROHIBITING A SPIRITUAL ADVISOR FROM LAYING HANDS ON THE CONDEMNED AND AUDIBLY PRAYING**

This Court often looks to past practice to determine "the need for a particular type of restriction." *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*,

490 U.S. 401 (1989). If a given practice occurred without incident over many years in many places, then restrictions on that practice are of dubious necessity. For example, in *Dunn v. Smith*, 141 S. Ct. 725 (2021), this Court sustained the condemned’s challenge to Alabama’s refusal to allow his pastor to enter the execution chamber. Justice Kagan’s concurrence explained that this was in part because the “past practice, in Alabama and elsewhere,” of “allow[ing] clergy members . . . to attend an inmate’s execution” “suggest[ed] that Alabama could satisfy its security concerns through a means less restrictive’ than its current prohibition.” *Id.* at 725-26 (Kagan, J., concurring in denial of application to vacate injunction) (quoting *Holt v. Hobbs*, 574 U.S. 352, 368-694 (2015)) (brackets omitted).

Here, both Texas and other jurisdictions historically have permitted a condemned man’s spiritual advisor to lay hands on and audibly pray with the condemned as he dies. This long history, and the complete absence of related security incidents, shows that TDCJ can preserve the security of petitioner’s execution without banning petitioner’s pastor from engaging in those activities.

#### **A. Texas And Other Jurisdictions Have A Long History Of Safely Allowing Spiritual Advisors To Lay Hands On The Condemned During Executions**

Texas has a long history of permitting a condemned man’s spiritual advisor to lay hands on him during his execution. Before 2019 (when TDCJ amended its execution policies to ban clergy from the execution

chamber<sup>3</sup>), this practice was actually the norm. Ms. Lyons, one of the *amici* here, personally witnessed nearly 300 executions performed by TDCJ between 2000 and 2012. According to her, a chaplain touched the condemned man as he died during all but two or three of those executions. Interview with Michelle Lyons, via Zoom (Sept. 21, 2021) (notes on file with counsel).

Many TDCJ chaplains have spoken publicly of this practice over the course of decades, making clear that it was the norm from 1982 (when Texas resumed executions in the modern era) until 2019. Reverend Carroll Pickett, for example, was a TDCJ chaplain from 1980 to 1995 and ministered to 95 executed inmates. He would “stand right next to [the condemned]” in the execution chamber and “put [his] hand on their right leg where [he] could feel a pulse.” Carroll Pickett, *Texas prison chaplain: ‘I’ve come to see the death penalty as totally wrong,’* The Guardian (June 26, 2013).<sup>4</sup> Sometimes, Rev. Pickett even held condemned men’s hands as they were being put to death. *See Chaplain Discusses ‘Death House’ Ministry*, NPR, Fresh Air Podcast at 7:39-8:00 (May 19, 2008).<sup>5</sup>

Rev. Pickett’s successor, Jim Brazzil, continued this practice. Chaplain Brazzil normally would “rest[.]” his hand on the condemned man’s leg during the execution. Michael Graczyk, *Death Row’s last human touch*,

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<sup>3</sup> In April 2021, in response to this Court’s decision in *Dunn*, TDCJ amended its policy to again permit clergy to enter the execution chamber.

<sup>4</sup> *See* <https://www.theguardian.com/world/2013/jun/27/capital-punishment-texas-pickett>.

<sup>5</sup> *See* <https://www.npr.org/templates/story/story.php?storyId=90526632>.

Seattle Times (Oct. 6, 2000).<sup>6</sup> He recounted how he would “*usually* put my hand on their leg right below their knee, you know, and I usually give ‘em a squeeze” to “let ‘em know I’m right there.” *Witness to an Execution*, Story Corps, Podcast at 7:03-11 (Oct. 20, 2000) (emphasis added from text in transcript).<sup>7</sup>

The practice of laying hands on the condemned in the execution chamber continued until 2019. In June of that year, a TDCJ chaplain testified that, prior to TDCJ’s 2019 amendment to the execution protocol, the spiritual advisor present at the execution “always” asked the condemned man if he would like the spiritual advisor to make physical contact during the execution. Dep. Tr. of Wayne Moss at 18:25-19:16, *Murphy v. Collier*, No. 4:19-cv-01106, ECF No. 38-8 (S.D. Tex. July 19, 2019). According to the chaplain, the condemned men “more times than not” accepted this invitation. *Id.*

Thus, between 1982 and 2019, the vast majority of the more than 550 inmates executed in Texas died with the hands of a spiritual advisor resting on them. And out of these hundreds of instances, not once did the spiritual advisor’s touch cause a security incident. This long history shows that Texas does not need an absolute prohibition on spiritual advisors’ laying hands on the condemned to maintain the security and dignity of the execution chamber.

Texas’s history is not unique in this regard. Other jurisdictions likewise long have afforded the condemned the right of human contact in their last moments. In Alabama, for example, “the Chaplain

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<sup>6</sup> See <https://archive.seattletimes.com/archive/?date=20001006&slug=TT1S1QUC3>.

<sup>7</sup> See <https://storycorps.org/stories/witness-to-an-execution/>.

may . . . touch the inmate’s hand as a lethal cocktail of drugs is administered.” *Ray v. Commissioner, Alabama Dep’t of Corr.*, 915 F.3d 689, 696-97 (11th Cir.), *stay vacated on other grounds*, 139 S. Ct. 661, 661 (2019).

*Amici* also urge the Court to consider *amici*’s considerable experience, which includes representing TDCJ in the media, drafting execution protocols, and witnessing hundreds of executions. In most of those executions, a chaplain touched the condemned man as he died. In none of the executions did the spiritual advisor’s touch pose a security threat or disrupt the execution in any way.

In light of (1) TDCJ’s 37-year-long tradition of allowing spiritual advisors to touch the condemned during executions (without incident), (2) other jurisdictions’ history of allowing the same practice (without incident), and (3) *amici*’s own experiences witnessing this practice (without incident), TDCJ’s assertion that only an absolute ban on spiritual advisors’ touching the condemned can guarantee the security of an execution has no merit. *See Dunn*, 141 S. Ct. at 726 (Kagan, J., concurring in denial of application to vacate injunction) (“Nowhere, as far as I can tell, has the presence of a clergy member . . . disturbed an execution. That record ‘suggests that [Texas] could satisfy its security concerns through a means less restrictive’ than its current prohibition.”) (quoting *Holt*, 574 U.S. at 368-69).

**B. Texas And Other Jurisdictions Have A Long History Of Safely Allowing Spiritual Advisors To Pray And Converse With The Condemned During Executions**

Texas has a long, uneventful history of allowing spiritual advisors to pray and speak out loud during

executions. Indeed, at the very first execution Texas carried out after reinstating the death penalty in 1982, the condemned man's spiritual advisor spoke to him in the execution chamber. The condemned man chanted a verse from the Qur'an as part of his last statement, after which his spiritual advisor (who was not a TDCJ employee) said to him, "May Allah admit you to paradise." Dick Reavis, *Charlie Brooks' Last Words*, Texas Monthly (Feb. 1983). The spiritual advisor's contribution caused no disruption. *Id.*

During his 15-year tenure as a TDCJ chaplain, Rev. Pickett also prayed with the condemned in their last moments:

The time came, and . . . he crawled up and he said, "hold my hand." And I said "alright, are you ready?" We started repeating [the prayer] "The Lord is my Shepard," and the drug went to work. So I went ahead and finished it as he was dying.

*Chaplain Discusses 'Death House' Ministry*, NPR, Fresh Air Podcast at 7:39-8:00. Rev. Pickett's experience shows that TDCJ allowed spiritual advisors not just to pray with the condemned man as he died, but also to have unscripted conversations. *See Witness to an Execution*, Podcast at 16:02-18 (recounting how "[a]fter [the condemned man is] strapped down and the needles are flowing you've got probably forty-five seconds where you and he are together for the last time," and how "the conversations that took place [during that time]" were "always something different"). Again, this went on for decades without security incidents occurring.

Other jurisdictions likewise permit audible prayer and other communication between the condemned and a spiritual advisor during the execution. For example, in September 2020, the Federal Bureau of



Prisons allowed Sister Barbara Battista to “recit[e] the Divine Mercy Chaplet” during an execution. Mary Milz, *The nun of death row stands against the death penalty while providing spiritual companionship to the condemned*, NBC WTHR 13 (Dec. 17, 2020).<sup>8</sup> The condemned man “asked [her] to keep praying it and to pray it out loud with him.” *Id.* She did, and the condemned man died without incident. *Id.* Alabama also permits a spiritual advisor to converse and pray with the condemned inside the execution chamber. *See* Jt. Mot. To Dismiss at 4 n.13, *Smith v. Dunn*, No. 2:20-cv-01026-RAH, ECF No. 57 (M.D. Ala. June 16, 2021) (Alabama allows a spiritual advisor to “talk with [the condemned] prior to the execution” and, “[a]fter the execution begins, [to] pray with [the condemned]”).

These past practices demonstrate that TDCJ could perform an efficient, safe execution without prohibiting the condemned man’s spiritual advisor from praying audibly. *See Dunn*, 141 S. Ct. at 725-26 (Kagan, J., concurring in denial of application to vacate injunction).

## **II. LESS RESTRICTIVE MEANS EXIST FOR TDCJ TO ACHIEVE ITS ALLEGED SECURITY INTEREST IN ENSURING AN EFFICIENT EXECUTION**

TDCJ’s current execution protocol permits spiritual advisors to accompany the condemned to the execution chamber and stand by him until he is pronounced dead. Allowing a spiritual advisor to (1) gently touch the condemned man and (2) pray aloud during the

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<sup>8</sup> *See* <https://www.wthr.com/article/news/local/nun-of-death-row-sister-barbara-battistaterre-haute-federal-penitentiary/531-c692ca5c-c82c-45d5-9e03-1929c90b9cf1>.

execution adds little, if any, marginal risk. Managing that hypothetical, marginal risk does not require banning those historical practices. Instead, TDCJ could incorporate any number of less restrictive measures into its execution protocols. Such measures would ensure the security and precision of the execution by creating a controlled, predictable environment while still allowing the spiritual advisor to touch the condemned and pray out loud. To better explain these alternatives, an overview of TDCJ's current execution protocol may assist the Court.

#### **A. TDCJ's Current Execution Protocol**

TDCJ's execution protocol addresses every moment of the condemned's final day. That day includes special visitation hours, a final meal, a shower, and a fresh change of clothes. *See* TDCJ's Execution Procedure at 9, *Gutierrez v. Collier*, No. 1:21-cv-00129, ECF No. 1-2, Ex. 2 (S.D. Tex. Aug. 25, 2021) ("Execution Procedure"). At 6:00pm, security personnel escort the condemned to the execution chamber. *Id.* at 10. The photograph on the next page (which respondents attached to their surrepley in opposition, *see* No. 4:21-cv-02609, ECF No. 21-1 (S.D. Tex. Aug. 31, 2021)) is of that chamber.



Upon entering the chamber, the condemned is placed on the gurney. *See* Execution Procedure at 10. His head is placed where the pillow appears, and his arms are extended on the narrow planks perpendicular to the gurney. The security personnel immediately secure him to the gurney in this position using the leather straps shown on the gurney: three for the torso, two for the legs, and one for each of his arms, thus fully immobilizing him.

Next, the medical team inserts the intravenous (“IV”) drip. *See id.* The IV enters the execution chamber through the small square hole in the wall next to the window on the left side of the photograph. The medical team inserts two IVs, one in each arm. The IVs are connected; the single apparatus runs from the small square hole on the left side of the room to the condemned man’s left arm, and then underneath the gurney to his right arm.

When the medical team has secured each IV, it begins injecting a saline solution. *See id.* The Correctional Institutions Division (“CID”) Director, the Warden, and the medical professional then confirm that the saline solution is flowing properly. *See id.*

At that point, security personnel escort the spiritual advisor into the room. *See id.*<sup>9</sup> TDCJ’s execution

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<sup>9</sup> TDCJ’s execution procedure requires the spiritual advisor to meet vetting, training, and other requirements before he or she may attend an execution. *First*, “[t]he inmate’s requested spiritual advisor must be included on the inmate’s visitation list and have previously established an ongoing spiritual relationship with the inmate.” Execution Procedure at 3. *Second*, the spiritual advisor must provide his “credentials to the Death Row Unit Warden,” including a Minister Identification Card, or license or ordination certificate, which are meant to “verify[] the individual’s official status as a spiritual advisor.” *Id.* at 3-4. *Third*, the spiritual advisor must pass a TDCJ background check.

procedure does not specify where in the small room the spiritual advisor may stand. But, in the experience of *amici*, the spiritual advisor typically stands on the right side of the gurney near the lower-half of the condemned man's body.

Next, the witnesses enter the witness rooms, *see id.*, which are located behind the bars depicted on the right side of the photograph. There is a witness room for victims and a separate witness room for the condemned man's witnesses.

When the witnesses are settled, the CID Director "give[s] the order to commence with the execution." *Id.* at 11. The Warden then "allow[s] the inmate to make a brief, last statement." *Id.* After the final statement, the Warden "instruct[s] the drug team to induce, by syringe, substances necessary to cause death": "100 milliliters of solution containing 5 grams of Pentobarbital." *Id.* at 10, 11.

After an appropriate amount of time has passed, a physician will enter the chamber and pronounce the condemned man dead. *Id.* at 11. At that point, the spiritual advisor "will be escorted from the execution chamber, and the witnesses shall be escorted from the witness room." *Id.*

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*Id.* at 4. *Fourth*, after the vetting procedures, the spiritual advisor "must satisfactorily complete a two (2) hour, in-person orientation with a staff member of the Rehabilitation Programs Division." *Id.* Finally, even after this vetting and training, TDCJ retains a final security veto: "If the spiritual advisor is determined to be a security risk, the Huntsville Unit Warden . . . may deny the inmate's request for the spiritual advisor to be present inside the execution chamber during the inmate's scheduled execution." *Id.* This all occurs before the day of execution. As such, the spiritual advisor in the execution chamber is necessarily a known figure whom TDCJ has vetted, trained, and deemed not to be a security threat.

**B. TDCJ Could Amend Its Protocol To Allow For Physical Contact Between The Spiritual Advisor And The Condemned And Audible Prayer Without Jeopardizing The Execution Process**

TDCJ already allows spiritual advisors to stand in the immediate presence of the condemned, and, because any threats posed by the spiritual advisor's touch and audible prayer readily can be mitigated by simple amendments to TDCJ's execution procedure, it is clear that TDCJ's ban on these practices is not the least restrictive means available to achieve TDCJ's alleged security interest.

A policy is not the least restrictive means of achieving security goals when the policy is "substantially underinclusive" with regard to conduct "pos[ing] similar risks." *Holt*, 574 U.S. at 367. Here, there is no appreciable difference between (a) the presence of a spiritual advisor in the execution chamber and (b) the presence of a spiritual advisor in the execution chamber who lays his hands on the condemned and prays aloud during the execution. Because this Court previously has struck down bans on the former, it also should find unlawful bans on the latter.

The positioning of the spiritual advisor within the chamber supports treating touching and praying as minimally intrusive. Spiritual advisors who have participated in executions in Texas have described just how close they are to the condemned as the execution takes place: "[w]ithin inches, a foot maybe." Dep. Tr. of Thomas Brouwer at 36:23-37:1, *Murphy v. Collier*, No. 4:19-cv-01106, ECF No. 38-6 (S.D. Tex. July 19, 2019); *see also* Resps. Br. in Opp. at 27 (acknowledging how, during an execution, spiritual advisors stand in the condemned man's "immediate

physical presence”). From a security perspective, the difference between a spiritual advisor being a foot (or less) away from the condemned, and a spiritual advisor reaching out to gently touch the dying man, is marginal.<sup>10</sup> Because these practices “pose similar risks,” and the former is permitted, the latter should be permitted as well. *Holt*, 574 U.S. at 367 (inconsistent grooming policy); *see also, e.g., Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.) (prison lacked a compelling interest in refusing lock downs for religious needs when it used lock downs for medical needs); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (prison had no compelling interest in a 10-book limit when it allowed substantial additional reading material of other types); *Spratt v. Rhode Island Dep’t of Corr.*, 482 F.3d 33, 40, 42 (1st Cir. 2007) (prison lacked a compelling interest in stopping inmates from preaching on grounds that “leaders in prison” are dangerous, where inmates could “become leaders under other circumstances”).

Similarly, TDCJ allows for every person in the execution chamber – except the spiritual advisor – an opportunity to speak and expressly allows the condemned to pray aloud. To ensure an orderly process, the execution protocol makes clear precisely when each individual may speak, and for what

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<sup>10</sup> In fact, far from posing additional risk, *amici* maintain that permitting a spiritual advisor’s touch and prayer could calm the condemned man and the death chamber as a whole, resulting in a more peaceful and precise execution. *Cf.* Expert Rep. of Steve J. Martin at 5-6, *Gutierrez v. Saenz*, No. 1:19-cv-00185, ECF No. 109, at A835-36 (S.D. Tex. Sept. 22, 2020) (“The presence of a spiritual advisor in the physical presence of the condemned could even enhance the level of safety and security in the execution chamber by creating a calming/comforting effect on the condemned prisoner.”).

purpose. *See* Execution Procedure at 11. Given this reality, it is not at all clear why the spiritual advisor would be prohibited from speaking (or praying) once all others have finished.

Should the Court find that minor physical contact may present a security threat (even though the spiritual advisor is already standing “inches, maybe a foot,” away from the condemned) or that a simple prayer may pose a threat (even though others are permitted to speak and pray in the chamber), then *amici* submit that TDCJ can mitigate these hypothetical threats through targeted amendments to its execution protocol.

For example, TDCJ could codify its past practice of permitting spiritual advisors to make contact with the condemned by specifying in the protocol where on the condemned man’s body the spiritual advisor may touch.<sup>11</sup> Crafting the execution protocol to specify where the spiritual advisor may make contact would avoid any unpredictable disruptions TDCJ may fear. Likewise, TDCJ could specify in the protocol when the spiritual advisor may initiate contact.

In addition, TDCJ could require that security personnel attend the execution. While TDCJ’s current

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<sup>11</sup> Historically, Texas permitted the spiritual advisor to both hold the hand of the condemned man, *see Chaplain Discusses ‘Death House’ Ministry*, NPR, Fresh Air Podcast at 7:39-8:00, and touch the condemned man’s leg or ankle, *see* Michael Graczyk, *Death Row’s last human touch*, Seattle Times (Oct. 6, 2000); *Witness to an Execution*, Podcast at 16:02-18; *In Texas, Frequency of Executions Makes Grisly Task Seem Routine*, Chi. Trib. (May 25, 1997); Dep. Tr. of Wayne Moss at 18:25-19:16, *Murphy v. Collier*, No. 4:19-cv-01106, ECF No. 38-8 (S.D. Tex. July 19, 2019). Because no disruptions resulted from those incidents of physical contact, it would make sense for the restriction to include at least those bodily areas.



execution protocol does not require security personnel within the chamber, TDCJ's former CID Director, Lorie Davis, recently testified that security personnel are present in the witness rooms. Dep. Tr. of Lorie Davis at 47:11-23, *Murphy v. Collier*, No. 4:19-cv-01106, ECF No. 38-7 (S.D. Tex. July 19, 2019). Director Davis deemed this security measure – meaning, the presence of security personnel in the witness rooms – a success, explaining that a spiritual advisor seated in a witness room never has caused a disturbance during an execution. *See id.* at 46:22-47:23. TDCJ could apply this proven measure in the execution chamber itself, thereby mitigating any chance of a disturbance caused by the spiritual advisor. Indeed, under the current execution procedure, security personnel must escort spiritual advisors to and from the execution chamber. As such, requiring one to remain in the chamber to maintain physical security would be a readily available solution.

TDCJ likewise could amend its execution protocol to allow for a spiritual advisor's audible prayer without risking disruption to the execution. Currently, TDCJ's execution protocols make clear who may speak and when, which ensures the precision and predictability of the execution. TDCJ simply could amend the protocol to permit the spiritual advisor to pray at a designated point in the execution, likely after the Warden gives the final order to perform the execution. Specific guidance as to when the spiritual advisor may speak would ensure that the spiritual advisor would not speak over any vital instructions or the condemned man's last statement. Again, this solution – written into the execution protocol itself following reasoned deliberation – would be consistent with TDCJ's interest in keeping the execution process predictable and nondisruptive.

Likewise, TDCJ could consider placing reasonable limitations on the volume of the spiritual advisor's prayer. That way, if a disruption occurs, all present would be aware and would be able to hear further instructions. Similarly, TDCJ could require that the spiritual advisor cease speaking in the (unlikely) event something does go awry, to allow for the Warden, the CID Director, or the security personnel to take control of the situation.

Ultimately, *amici's* proposed less restrictive means are just a subset of the many ways in which TDCJ could mitigate the speculative security threat posed by practices that, for decades, resulted in no security incidents at all. The availability of these less restrictive means shows that TDCJ's current policy is *not* the least restrictive means available for achieving a secure execution. TDCJ's blanket ban therefore violates RLUIPA.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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