No. 21-5592

In the Supreme Court of the United States

JOHN H. RAMIREZ, *Petitioner*,

v.

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

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

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

This brief addresses the following question from this Court's September 10, 2021 order:

"[W]hether petitioner has satisfied his burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to demonstrate that a sincerely held religious belief has been substantially burdened by restrictions on *** physical contact."

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to codify one of our Nation's most cherished traditions: "expansive protection for religious liberty." *Holt* v. *Hobbs*, 574 U.S. 352, 358 (2015). The statute accomplishes that protection by defining "'religious exercise' capaciously" and by instructing courts to construe the entire statute "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Ibid.* (citing 42 U.S.C. §2000cc-5(7)(a); *id.* §2000cc-3(g)).

Despite RLUIPA's "capacious" and "broad" language, some lower courts have failed to heed Congress's mandate and have actively circumvented RLUIPA's protections by adopting an anemic view of what constitutes a "substantial burden" on religious exercise under the statute. In those courts' view, the government does not substantially burden religious exercise unless it (a) denies a person governmental benefits, as in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), or (b) coerces individuals or institutions via civil or criminal penalties, as in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). See, *e.g.*, *Navajo Nation* v. *U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008).

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[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of it, nor did any person or entity, other than *Amicus* and its counsel, make a monetary contribution to fund its preparation or submission. *Amicus* is not publicly traded and has no parent corporations. No publicly traded corporation owns 10% or more of *Amicus*.

This case provides the Court a good opportunity to correct that grievous error. And *Amicus* Protect the First Foundation (PT1) is interested in this case not just because of its importance to the religious freedom of inmates on death row, but also because it gives the Court a chance to clarify that RLUIPA's "substantial burden" trigger is not as limited as some lower courts have held. To the contrary, government *can* substantially burden religion in far more varied and ingenious ways than denying benefits or coercing individuals or institutions via civil or criminal penalties. It should go without saying that making it impossible to observe one's faith at the moment one is executed by the state is as substantial a burden as they come.

PT1 is a nonprofit, nonpartisan organization that advocates for protecting First Amendment principles both in cases involving constitutional interpretation and in cases, like this one, that involve the proper interpretation of First Amendment-adjacent statutes like RLUIPA. No matter how this Court decides the ultimate issues presented here, *Amicus* believes the Court should take the opportunity to make clear that the term "substantial burden" is broad enough to include government action that deprives or limits a person's ability to participate in activities or rituals required by his or her faith.

SUMMARY OF ARGUMENT

I. The Religious Land Use and Institutionalized Persons Act (RLUIPA) was enacted to protect the religious rights of prisoners from being substantially burdened by the government. Such burdens come in many forms. They may, of course, arise in cases involving government coercion, as in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), or in cases involving the government deprivation of benefits for religious reasons, as in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). But those two examples are just that—examples. They did not—and could not—capture the universe of possible ways that a creative or inattentive government can substantially burden religious exercise.

In the First Amendment context, for example, this Court has made clear that government action that precludes or limits religious exercise is a burden on that exercise. The Sixth and Tenth Circuits have likewise made that clear in the RLUIPA context. Yet the Ninth Circuit has held, consistent with Texas' contention here, BIO 15-22, that the burdens addressed in *Yoder* and *Sherbert* present an exhaustive list of possible burdens on religious exercise. *Navajo Nation* v. *U.S. Forest Serv.,* 535 F.3d 1058, 1063 (9th Cir. 2008). They are wrong.

This Court should use the opportunity presented by this case to correct any misreading of RLUIPA that denies that the term "substantial burden" is broad enough to include government action that limits or deprives a person of the right to participate in religious exercise. That broader reading not only follows common sense, but is also faithful to the text of the statute, to this Court's resolution of Free Exercise

cases, and to the ways that other courts, like the Sixth and the Tenth Circuits, have interpreted the term.

II. On the merits of Petitioner's claim: Many faiths value having priests or other religious leaders physically touch believers for many reasons. Just one of the many reasons for that practice is to help those caught in a state of sin to repent.

The laying on of hands for that purpose has a history going at least as far back as Moses. In Vayikra (Leviticus), God instructed Moses to have religious leaders touch an animal before sacrificing it and explained that the sacrificial act was performed to atone for the sins of the people.

The laying on of hands has similar meaning in many Christian traditions today. It is used to convey blessings, authority, healing, and forgiveness to the person who receives the rite.

In carrying out the practice, religious leaders in many faiths are believed to stand in the place of the divine. Ramirez's claim that he believes physical touch to be necessary at the moment of his death is supported by this long tradition.

III. Because Ramirez has a sincere belief that his pastor should be allowed to lay hands on him as he dies, this Court should hold that the deprivation of that right substantially burdens the exercise of his religion.

ARGUMENT

I. Government Action That Denies Someone The Ability To Engage In A Particular "Religious Exercise"—As Broadly Defined By RLUIPA—Substantially Burdens Religion.

The text and purpose of RLUIPA require that the term "substantial burden" be interpreted broadly to encompass any government action that prevents, limits, or bars a person from engaging in conduct pursuant to his religious convictions. While not all those government actions are necessarily forbidden, they are all subject to heightened scrutiny to ensure that such actions are not without a genuine and important need or with an excessive imposition on religious exercise.

1. RLUIPA provides religious persons with "greater protection for religious exercise than is available under the First Amendment." *Holt,* 574 U.S. at 357, 361. It prohibits the government from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution," 42 U.S.C. §2000cc-1(a), and it defines "religious exercise" broadly to include both acts a religion compels and those it does not. *Id.* §2000cc-5(7); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 748 (2014) (Ginsburg, J., dissenting) (interpreting the RLUIPA amendment to mean that "courts should not question the centrality of a particular religious exercise"). Whether a person can engage in other forms of religious exercise is not relevant to the inquiry. *Holt*, 574 U.S. at 361-362. Congress mandated that this provision "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted[.]" 42 U.S.C. §2000cc-3(g).

That rule of construction applies to the "chapter" as a whole, and therefore requires a broad and protective reading of what constitutes a substantial burden. *Ibid.*

Under RLUIPA's broad definition, there can be no question that the physical touch Ramirez seeks from his pastor constitutes religious exercise. Indeed, as explained below in Section II, such physical touching has a long history in Christianity, Judaism, and other religious traditions.

Whether government action constitutes a substantial burden on Ramirez's religious exercise—the next question in the RLUIPA calculus—should be no harder to answer. Given the broad definition of religious exercise as including even incidental aspects of a religion, it makes no sense to read the statute to permit even full prohibitions of self-evidently important end-of-life practices. A full prohibition on religious practice, therefore, such as that contemplated by Texas here, is a "substantial burden" on that practice.

2. Beyond being compelled by the text, such an understanding is also supported by this Court's Free Exercise cases, in which the Court has already recognized the harm imposed by government action that bars religious activity. In *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, for example, this Court faced a challenge to a New York executive order that would cause the "great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat [to] be barred" from doing so. 141 S. Ct. 63, 67-68 (2020) (per curiam). This Court correctly recognized that the Executive Order, "by effectively barring many from attending religious services," struck "at the very heart of the First Amendment's guarantee of religious

liberty." *Id.* at 68. To the Court, it was no answer that "those who are shut out may in some instances be able to watch services on television" because Catholics could not take communion from their couches and "there are important religious traditions in the Orthodox Jewish faith that require personal attendance." *Ibid.* In other words, the complete deprivation of one form of religious exercise was no less a burden because of the existence of less-perfect alternatives. See also *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("[T]he loss of free exercise rights for even minimal periods of time" is irreparable injury.).

Because RLUIPA provides religious persons with even "greater protection for religious exercise" than the First Amendment, *Holt*, 574 U.S. at 357, it follows that "barring" a religious exercise, which strikes "at the very heart of *** religious liberty," is a substantial burden under RLUIPA just as it is under the Free Exercise Clause. *Roman Cath. Diocese*, 141 S. Ct. at 68.

3. Cases in the Tenth and the Sixth Circuits have resolved RLUIPA claims consistent with this Court's recent understanding of substantial burdens. Indeed, as then-Judge Gorsuch wrote in 2014, if the government "prevents the plaintiff from participating in [religious] activity motivated by a sincerely held religious belief," giving the plaintiff no "degree of choice in the matter," that "easily" comprises a substantial burden on religious exercise. *Yellowbear* v. *Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.).

Like the Tenth Circuit, the Sixth Circuit has properly applied this broad understanding of "substantial burden." In a case in which prison policy prohibited Wiccans from group worship and use of

ritualistic items, the court explained that "[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Cavin* v. *Mich. Dep't of Corr.*, 927 F.3d 455, 458 (6th Cir. 2019) (citation omitted).

This case, like *Yellowbear*, shows how preventing a person from exercising his or her religion is not merely a substantial burden, but a complete bar on vital religious practices. The greater restriction of a complete bar should, and does, "easily" meet RLUIPA's substantial-burden bar. See *Yellowbear*, 741 F.3d at 56.

4. The Ninth Circuit, in contrast, has wrongly departed from the broad and text-based interpretation of "substantial burden" employed in this Court's free-exercise cases and in the Sixth and the Tenth Circuit's cases applying RLUIPA and the Religious Freedom Restoration Act (RFRA). In *Navajo Nation* v. *United States Forest Service*, the Ninth Circuit held that "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert* [v. *Verner*, 374 U.S. 398 (1963)]) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions ([*Wisconsin* v.] *Yoder* [,406 U.S. 205 (1972)])." 535 F.3d at 1069-1070 (interpreting RFRA).

The consequences of this anemic reading of "substantial burden" are readily apparent. Just this year, in *Apache Stronghold* v. *United States*, for example, a district court applying that standard held that government action that would destroy Oak Flat, a ceremonial ground held sacred by the Apache Stronghold for generations, was not a substantial burden on their right

to worship there. 519 F. Supp. 3d 591 (D. Ariz. 2021). The *Apache Stronghold* court cited *Navajo Nation* to conclude that violations of RFRA (which employs the same legal standard as RLUIPA) are "found only in very limited situations." *Id.* at 605. And because neither *Sherbert*'s benefit denial nor *Yoder*'s coercion were present when the government planned to destroy a sacred site by transferring it to a mining company, the Ninth Circuit held that the plaintiffs had failed to show that their religious exercise had been substantially burdened. *Id.* at 607. Another district court reached a similar conclusion last year for the same reasons when it considered destroying Mount Hood, a site sacred to the Yakama Nation. *Slockish* v. *U.S. Fed. Highway Admin.*, No. 3:08-cv-01169-YY, 2020 WL 8617636, at *38 (D. Or. Apr. 1, 2020), R. & R. adopted in part, rejected in part on other grounds sub nom. *Slockish* v. *Fed. Highway Admin.*, No. 3:08-cv-01169-YY, 2021 WL 683485 (D. Or. Feb. 21, 2021).

These cases show the harms that flow from an incorrect and cabined interpretation of "substantial burden." To prevent such harms, this Court should—in this case—clarify that the understanding of "substantial burden" that it has applied in the Free Exercise Clause context, and that has been adopted by the Sixth and Tenth Circuits, is correct. A "substantial burden" under RLUIPA includes any action that limits or deprives a religious person from engaging in what the person views as a religious obligation or duty.

II. In Many Faiths, The Laying On Of Hands Is An Important Religious Sacrament.

Proper application of RLUIPA's "substantial burden" standard is especially important here, given Ramirez's statement that the laying on of hands by his pastor is important to his faith. Ramirez is not alone in that belief; many religions recognize the laying on of hands as an important religious sacrament. The practice was followed in one form or another and for numerous reasons since ancient times, and its importance has continued today.[2]

1. Descriptions of the laying on of hands date to the first century, when Roman educator Marcus

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[2] *Jewish Practices and Rituals: Rabbinic Ordination*, https://www.jewishvirtuallibrary.org/rabbinic-ordination-semikha (last visited Sept. 24, 2021); *Laying on of hands*, http://thecatholiccommentator.org/pages/?p=45173 (last visited Sept. 24, 2021); Ronald Hanko, *What About Laying On of Hands?*, Protestant Reformed Churches in America (Mar. 2021), http://www.prca.org/resources/publications/cr-news/item/2041-what-about-laying-on-of-hands; Diocese of the Mid-Atlantic Anglican Church in N. Am., *Diocesan Policy on Confirmation, Reception and Reaffirmation* (Oct. 10, 2019), https://www.anglicandoma.org/s/DOMA-Confirmation-Reception-Reaffirmation-Policy-101019.docx; W.J. McGlothlin, *The Laying On of Hands - A Forgotten Chapter in Baptist History*, http://baptisthistory-homepage.com/ky.mcglothin.lay.hands.html (last visited Sept. 24, 2021); The Church of Jesus Christ of Latter-Day Saints, *Laying On of Hands*, https://tinyurl.com/LDSLayingOnHands (last visited Sept. 24, 2021); St. John's Lutheran Church, *Instructions for Healing Assistants: Healing Prayer with the Laying on of Hands & Anointing with Oil*, http://stjohnsdsm.org/instruction-shealingassistants (last visited Sept. 24, 2021); United Methodist Church, *Glossary: laying on of hands*, http://ee.umc.org/what-we-believe/glossary-laying-on-of-hands (last visited Sept. 24, 2021); Robert M. Johnston, *Whose Hands on Your Head?*,

Fabius Quintilinaus described this practice: "The Hand of God is divine power; transmission of spirit; protection; justice. The Great Hand depicts supreme power, the Deity. The hand pushes away evil and trouble."[3] Because the hand is a symbol of power (spiritual and temporal), of action, of strength and protection, the "belief that the hands of religious leaders" had beneficial power "existed from ancient times; hence the laying on of hands."[4]

2. In Christianity today, the laying on of hands serves many functions. It has been used to convey blessings, to heal the sick, to confer authority, and to give the gift of the Holy Spirit.[5] But the practice has also been used for the reasons Ramirez emphasizes, including for the "reconciliation of penitents" and to provide "forgiveness."[6]

The rite of the imposition or laying on of hands accordingly holds particular significance for those

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AdventistToday.org (Aug. 26, 2020), https://atoday.org/whose-hands-on-your-head/; Sheldon C. Good, *Examples of worship practices that use consent*, Anabaptist World (Feb. 17, 2020), https://anabaptistworld.org/examples-worship-practices-use-consent/; Church of the Brethren, *Practices*, https://www.brethren.org/about/practices/ (last visited Sept. 25, 2021); Jim Pim, *Suffering and healing, in* Quaker faith & practice 21.72 (5th ed. 2013), https://qfp.quaker.org.uk/passage/21-72/.

[3] J.C. Cooper, *An Illustrated Encyclopedia of Traditional Symbols* 78 (1988).

[4] Jack Tresidder, *Symbols and their Meanings* 22 (2000).

[5] Everett Ferguson, *Laying on of Hands*, *in* 2 Encyclopedia of Early Christianity 669, 669-671 (2nd ed., Everett Ferguson ed., 1997).

[6] *Id.* at 670.

believed to be living in a state of sin or apostasy, and it is filled with important religious symbolism. Indeed, Christian believers have used it for "healing, absolution and benediction."[7] And they believe that the laying on of hands symbolizes "possessing and transferring power" from God by "the placing of God's hand *** upon the one so blessed[,]" because "[t]he priesthood holder" or clergy is a "symbol of the divine."[8]

3. The Jewish faith also recognizes this practice. Both in ancient times and now, the laying on of hands has been either necessary to, or synonymous with, the glory or presence of God being present, or the bestowal of a divine gift. In the Torah, the symbolism of the laying on of hands most regularly relates to the ritual sacrifice of an animal offered "to atone" for the sins of the people.[9] As part of the sacrifice, the leader would touch the animal, at which point it would be acceptable to the Lord for sacrifice.

According to Jewish tradition, the laying on of hands was also the way that Moses passed God's authority to Joshua. The Torah teaches that Joshua was

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[7] A. Eustace Haydon, *Laying on of hands*, *in* An Encyclopedia of Religion 438, 438 (Vergilius Ferm ed., 1945).

[8] Alonzo L. Gaskill, *The Lost Language of Symbolism* 44 (2003).

[9] *Vayikra* 1:4. https://www.chabad.org/library/bible_cdo/aid/9902/jewish/Chapter-1.htm (last visited Sept. 25, 2021).

"full of the spirit of wisdom, because Moses had laid his hands upon him."[10]

In short, in instances of both animal sacrifice and for passing on God's authority,[11] the laying on of hands was an essential step, listed explicitly in the Torah.

The rite of the laying on of hands thus carries significant and established theological meaning to many believers, including Ramirez. Through physical touch, these individuals seek healing, blessing, penitence, and the feeling of God's power.[12] And, given the traditional significance of the laying on of hands, it is natural that Ramirez would seek it as he faces death—as a legitimate and especially meaningful exercise of his faith.

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[10] *Devarim* 34:9, https://www.chabad.org/library/bible_cdo/aid/9998/showrashi/true/jewish/Chapter-34.htm#lt=primary (last visited Sept. 25, 2019).

[11] But see Lawrence A. Hoffman, *The Laying Of Hands*, New York Jewish Week (Apr. 19, 2017, 11:51 AM), https://jewishweek.timesofisrael.com/the-laying-of-hands/ (recognizing the theory that the practice of "rabbinic ordination" originated with Joshua's ordination, but arguing that the "laying on of hands is altogether a modern innovation").

[12] See *Mark* 5:25-34.

III. Allowing Texas To Execute Ramirez While Preventing His Pastor From Performing The Sacrament Of Laying On Of Hands Is A Substantial Burden On Ramirez's Religious Exercise.

Having established that (1) government action that deprives a person of the ability to engage in a religious exercise constitutes a substantial burden of that exercise under RLUIPA, and (2) countless Americans of diverse faith groups—including Ramirez—consider the laying on of hands a sacred religious sacrament, it logically follows that allowing Texas to execute Ramirez while barring his pastor from performing this rite constitutes a substantial burden on Ramirez's final religious exercise. Under RLUIPA's plain language, that conclusion holds even if physical touch is neither "compelled by, [n]or central to," his faith. 42 U.S.C. §2000cc-5(7)(a).

Nor is there any doubt that Texas's policy would deprive Ramirez of the exercise of the laying on of hands, because it would not allow Ramirez's pastor to come closer than the corner of the execution chamber. Pet. 4 ("Respondents will not allow Pastor Moore to lay his hands on Ramirez's body as the poison courses through his veins. Nor will Moore be allowed to *** do anything other than stand silently in a corner of the execution chamber."); Stay Appl. 3 ("Pastor Moore is compelled to stand in his little corner of the room like a potted plant even though his notarized affidavit explains that laying his hands on a dying body[—]and vocalized prayers during the transformation from life to death[—]are intertwined with the ministrations he

seeks to give Ramirez as part of their jointly subscribed system of faith.").

Because Texas's policy will deprive Ramirez of the ritual of the laying on of hands, the Court should recognize that Ramirez has met his burden of proving that Texas's policy constitutes a substantial burden on his religious exercise. The lower courts can then proceed to engage in the more detailed scrutiny required by RLUIPA and test whether Texas's prohibition has a valid basis, supported by evidence, that can survive the statutory test designed to provide broad protection for religious exercise.

CONCLUSION

Regardless whether Texas's prohibition on physical touch could ultimately survive strict scrutiny, this Court should take this chance to confirm the proper interpretation of RLUIPA and hold that Ramirez has met his burden of proving that Texas's policy forbidding his pastor from laying hands on him as he passes from this world to the next imposes such a burden on his final religious exercise.

Respectfully submitted,

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