

No. 21-5592

In The
Supreme Court of the United States

—◆—
JOHN HENRY RAMIREZ,

Petitioner,

v.

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

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

—◆—
BRIEF FOR PETITIONER
—◆—

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton St.
Austin, TX 78705

SETH KRETZER
Counsel of Record
LAW OFFICES OF SETH KRETZER
9119 South Gessner
Suite 105
Houston, TX 77074
(713) 775-3050
seth@kretzerfirm.com

ERIC J. ALLEN
ALLEN LAW OFFICES
4200 Regent St.
Suite 200
Columbus, OH 43219

September 27, 2021

QUESTIONS PRESENTED

1. Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5, and Free Exercise Clause, does the State's decision to allow petitioner's pastor to enter the execution chamber, but forbid the pastor from laying his hands on his parishioner as petitioner dies, substantially burden the exercise of petitioner's religion, so as to require the State to justify the deprivation as the least restrictive means of advancing a compelling governmental interest?
2. Under RLUIPA and the Free Exercise Clause, does the State's decision to allow petitioner's pastor to enter the execution chamber, but forbid the pastor from singing prayers, saying prayers or scripture, or whispering or otherwise vocalizing prayers or scripture, substantially burden the exercise of petitioner's religion, so as to require the State to justify the deprivation as the least restrictive means of advancing a compelling governmental interest?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	3
STATEMENT.....	4
I. BACKGROUND OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT	4
II. FACTUAL BACKGROUND	6
A. Petitioner’s Sincere Christian Beliefs Lead Him To Request That Pastor Moore Lay Hands On Petitioner And Pray Over Him At His Time Of Death.....	6
B. TDCJ Shifts Its Policy, Practices, And Traditions Concerning Spiritual Advisors And Religious Behavior In The Execution Chamber After This Court Decides <i>Murphy</i>	8
III. PROCEDURAL HISTORY	10
SUMMARY OF ARGUMENT	14

TABLE OF CONTENTS—Continued

	Page
ARGUMENT	17
I. TDCJ’S PROHIBITION AGAINST AUDIBLE PRAYER AND LAYING ON HANDS DURING PETITIONER’S EXECUTION VIOLATES RLUIPA	17
A. RLUIPA’s Protections Are Broad.....	17
B. Forbidding Pastor Moore From Audibly Praying And Laying Hands On Petitioner During His Execution Imposes A Substantial Burden On Petitioner’s Sincere Religious Beliefs.....	20
II. TDCJ’S BLANKET PROHIBITION AGAINST AUDIBLE PRAYER AND PHYSICAL CONTACT IS NOT THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST	24
A. The State Has No Compelling Interest In Prohibiting Pastor Moore’s Audible Prayer And His Laying Hands On Petitioner In The Execution Chamber	24
B. TDCJ Cannot Satisfy RLUIPA’s Requirement That It Demonstrate That Forbidding In-Chamber Audible Prayer And Contact Between Spiritual Advisors And Condemned Inmates Is The Least Restrictive Means Of Furthering Its Security Interests During Executions.....	27

TABLE OF CONTENTS—Continued

	Page
C. TDCJ’s Past Practices, Execution Policies Elsewhere, And Common Sense Demonstrate That Texas Has Less Restrictive Means Of Furthering Any Security Interests Regarding Executions	28
1. Texas has allowed both laying on of hands and audible prayer during executions	29
2. Other jurisdictions permit laying on of hands and audible prayer in the execution chamber.....	34
III. PETITIONER SATISFIED PLRA EXHAUSTION REQUIREMENTS.....	38
A. Through Grievances And Litigation, Petitioner Has Consistently Challenged TDCJ’s Refusal To Allow Pastor Moore To Lay Hands On Petitioner And Audibly Pray During Petitioner’s Execution.....	38
B. TDCJ Has Played Fast And Loose, Implementing Quick Policy Changes To Evade Religious-Liberty Accommodations That RLUIPA Requires	40

TABLE OF CONTENTS—Continued

	Page
IV. IF THE STATE PERSISTS IN REFUSING PETITIONER’S REQUESTS FOR CORE RELIGIOUS PRACTICES IN THE EXECUTION CHAMBER, THIS COURT SHOULD TEMPORARILY ENJOIN THE STATE FROM EXECUTING PETITIONER IN A MANNER THAT VIOLATES RLUIPA AND REMAND FOR PROCEEDINGS ON A PERMANENT INJUNCTION THAT REQUIRES THE STATE TO ACCOMMODATE PETITIONER’S SINCERELY HELD RELIGIOUS BELIEFS	44
CONCLUSION.....	48

TABLE OF AUTHORITIES

	Page
CASES	
<i>Barr v. Roane</i> , 140 S. Ct. 353 (2019) (mem.).....	17, 44
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	5, 6, 24, 28
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	4, 19
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	6, 25
<i>Dunn v. Smith</i> , 141 S. Ct. 725 (2021).....	13, 19, 20
<i>Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006).....	6, 13, 24, 25, 46
<i>Gutierrez v. Saenz</i> , 141 S. Ct. 127 (2020) (mem.).....	9, 13, 20
<i>Hill v. McDonough</i> , 547 U.S. 573 (2006)	44, 45, 46
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015)	<i>passim</i>
<i>Murphy v. Collier</i> , 139 S. Ct. 1475 (2019) (mem.).....	9, 28, 41
<i>Ross v. Blake</i> , 136 S. Ct. 1850 (2016)	43
<i>Tanzin v. Tanvir</i> , 141 S. Ct. 486 (2020).....	19
<i>United States v. Playboy Ent. Grp., Inc.</i> , 529 U.S. 803 (2000).....	28
<i>United States v. Seeger</i> , 380 U.S. 163 (1965).....	18
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	25
CONSTITUTION AND STATUTES	
U.S. CONST. amend. I	<i>passim</i>
28 U.S.C. § 1254(1).....	1

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 1983	2, 3, 11, 41
42 U.S.C. § 1997e(a)	3, 38, 43
42 U.S.C. § 2000bb–1(b)	5
42 U.S.C. § 2000cc–1(a)	<i>passim</i>
42 U.S.C. § 2000cc–2(b)	2, 15, 24, 27, 46
42 U.S.C. § 2000cc–3(g)	18
42 U.S.C. § 2000cc–5(7)(A)	2, 18
TEX. CODE CRIM. PROC. ANN. art. 43.20 (1965)	8
 LEGISLATIVE ACTS AND LEGISLATIVE MATERIALS	
Prison Litigation Reform Act, 42 U.S.C. § 1997e <i>et seq.</i>	<i>passim</i>
Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb <i>et seq.</i>	<i>passim</i>
Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc <i>et seq.</i>	<i>passim</i>
146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch & Kennedy)	5, 24, 28
 FILINGS IN OTHER LITIGATION	
6/24/19 Brouwer Tr. <i>filed in Murphy v. Collier</i> , No. 4:19-cv-1106 (S.D. Tex. July 19, 2019), ECF No. 38-6	32
6/24/19 Jones Tr. <i>filed in Murphy v. Collier</i> , No. 4:19-cv-1106 (S.D. Tex. July 19, 2019), ECF No. 38-4	32

TABLE OF AUTHORITIES—Continued

	Page
6/24/19 Moss Tr. filed in <i>Murphy v. Collier</i> , No. 4:19-cv-1106 (S.D. Tex. July 19, 2019), ECF No. 38-8.....	32
Defendants’ Response to Plaintiff’s Response to Order to Show Cause, <i>Honken v. Barr et al.</i> , No. 2:20-cv-00342-JRS-DLP (S.D. Ind. July 16, 2020), ECF No. 17	36
Joint Motion to Dismiss, <i>Smith v. Dunn</i> , No. 2:20-cv-01026-RAH (M.D. Ala. June 16, 2021), ECF No. 57.....	34, 35
Motion for Preliminary Injunction for Father Mark O’Keefe, <i>Hartkemeyer v. Barr et al.</i> , 2020 WL 8084514 (S.D. Ind. July 9, 2020) (No. 2:20-cv-00336-JMS-DLP), ECF No. 65	36
Order, <i>Gutierrez v. Saenz</i> , at 12-15, No. 1:19-cv-00185 (S.D. Tex. Nov. 24, 2020), ECF No. 124	37
 OTHER MATERIALS	
AT THE DEATH HOUSE DOOR (Kartemquin Films 2008)	31
 THE BIBLE (New International Version)	
<i>Acts</i> 4	22
<i>Acts</i> 19	21
<i>Daniel</i> 10	21
<i>Isaiah</i> 28.....	22
<i>James</i> 5.....	21, 22
<i>Luke</i> 4.....	21

TABLE OF AUTHORITIES—Continued

	Page
<i>Matthew 25</i>	7
<i>Psalms 101</i>	22
Elizabeth Bruenig, <i>The State of Texas v. Jesus Christ</i> , THE ATLANTIC (Sept. 22, 2021), https://www.theatlantic.com/ideas/archive/2021/09/texas-v-jesus/620144/	22, 40
Kim Chandler, <i>Alabama: Pastor Can Hold Inmate’s Hand During Execution</i> , ASSOCIATED PRESS (Sept. 9, 2021), https://apnews.com/article/religion-alabama-executions-5126823b8e8eb10bcbc682584cb3495a	34
Pamela Colloff, <i>The Witness</i> , TEX. MONTHLY (Sept. 2014), https://www.texasmonthly.com/articles/the-witness/	30
CORR. INST. DIV., TEX. DEP’T CRIM. JUST., EXECUTION PROCEDURE (2012), https://static.texastribune.org/media/documents/TDCJ_Execution_Protocol_07-09-2012_Final.pdf	8
JOHN T. FORD, SAINT MARY’S PRESS GLOSSARY OF THEOLOGICAL TERMS (2006)	22
Derek L. Gaubatz, <i>RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions</i> , 28 HARV. J.L. & PUB. POL’Y 504 (2004)	4
Ruth Graham, <i>On Death Row in Texas, a Last Request: A Prayer and ‘Human Contact,’</i> N.Y. TIMES (Aug. 30, 2021), https://www.nytimes.com/2021/08/30/us/on-death-row-in-texas-a-last-request-a-prayer-and-human-contact.html	6, 7

TABLE OF AUTHORITIES—Continued

	Page
BILL J. LEONARD, <i>BAPTISTS IN AMERICA</i> (Columbia Univ. Press 2005)	7
MICHELLE LYONS, <i>DEATH ROW, TEXAS: INSIDE THE EXECUTION CHAMBER</i> (2018)	31
JAMES MADISON, <i>Memorial and Remonstrance Against Religious Assessments</i> , in 2 <i>THE WRITINGS OF JAMES MADISON</i> (G. Hunt ed. 1901)	18
Michael W. McConnell, <i>The Origins and Historical Understanding of Free Exercise of Religion</i> , 103 <i>HARV. L. REV.</i> 1409 (1990)	18
Carroll Pickett, <i>Texas Prison Chaplain: ‘I’ve Come to See the Death Penalty as Totally Wrong,’</i> <i>GUARDIAN</i> , https://www.theguardian.com/world/ 2013/jun/27/capital-punishment-texas-pickett	29, 31
CARROLL PICKETT & CARLTON STOWERS, <i>WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN</i> (2002)	29, 31
David Powlison, <i>An Invitation to Speak Up!</i> , 29 <i>J. BIBLICAL COUNSELING</i> 2 (2015)	22
Daniel Silliman, <i>Can This Texas Pastor Lay Hands on an Inmate During Execution?</i> , <i>CHRIS- TIANITY TODAY</i> (Aug. 23, 2021), https://www. christianitytoday.com/news/2021/august/ramirez- execution-death-row-dana-moore-prayer-hands- touch.html	6, 7, 21
StoryCorps, <i>Witness to an Execution</i> (Mar. 8, 2017), https://storycorps.org/podcast/storycorps- 496-witness-to-an-execution/	33

OPINIONS BELOW

The Fifth Circuit’s opinion (Pet. App. A1) is available at 2021 WL 4047106. The opinion of the Southern District of Texas (Pet. App. A17) is unreported.

**JURISDICTION**

The Fifth Circuit issued its opinion on September 6, 2021. The petition for a writ of certiorari and application for a stay of execution both were filed in this Court on September 7, 2021. This Court granted a stay and also granted the petition on September 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

The First Amendment provides in relevant part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. CONST. amend. I.

RLUIPA’s “General rule” provides:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of

general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a). RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* § 2000cc–5(7)(A).

RLUIPA prescribes the applicable “Burden of persuasion” for the cause of action it creates:

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff’s exercise of religion.

Id. § 2000cc–2(b).

Under the Prison Litigation and Reform Act (PLRA), “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any

jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).



INTRODUCTION

Petitioner’s RLUIPA and section 1983 First Amendment suit does not challenge his conviction, his death sentence, or the State’s chosen method of execution. Instead, petitioner seeks a narrow, but vitally important, remedy essential to his religious faith: He asks the State to allow his chosen spiritual advisor, Pastor Dana Moore, to perform ministrations in the execution chamber that include laying hands on petitioner and audibly praying over and with petitioner during the final moments of petitioner’s life.

Petitioner’s request lies at the core of his sincere religious beliefs, and the State cannot demonstrate a compelling governmental interest that cannot be furthered through means less restrictive than flatly prohibiting the religious behavior petitioner requests in the execution chamber. The State’s policy that allows petitioner’s pastor to be present in the execution chamber but forbids traditional religious behavior in the form of laying on hands and audible prayer is nonsensical as a practical matter; and it disrespects religious practices that have long histories not only in many faiths, but also in the State’s own execution chamber, where spiritual advisors in the past have been permitted to lay on hands and audibly pray

during executions. RLUIPA and the First Amendment Free Exercise Clause forbid the State's current prohibition, requiring instead that the State accommodate petitioner's request to be executed in a manner consistent with his sincere religious beliefs.

◆

STATEMENT

I. BACKGROUND OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

RLUIPA, 42 U.S.C. § 2000cc *et seq.*, has its roots in the Religious Freedom Restoration Act (RFRA). Congress passed RFRA in 1993 as a response to this Court's Free Exercise jurisprudence, which some critics argued had narrowed constitutional protections. *See* 42 U.S.C. § 2000bb *et seq.*; *e.g.*, Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 504, 505, 509 (2004). Although RFRA remains in effect as to the federal government and federal statutes, this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), held that RFRA was unconstitutional as applied to the states. In response, Congress passed RLUIPA in 2000. Gaubatz, *supra*, at 510-12.

Unlike RFRA, RLUIPA includes special protections for prisoners' religious-liberty interests. As the Act's sponsors explained, "[f]ar more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials"

and, as such, “[i]nstitutional residents’ right to practice their faith is at the mercy of those running the institution.” 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch & Kennedy). In particular, RLUIPA’s drafters were concerned that “prison officials sometimes impose frivolous or arbitrary rules” on inmate’s religious exercise, “[w]hether from indifference, ignorance, bigotry, or lack of resources.” *Id.*

Both RLUIPA and its sister statute, RFRA, “provide very broad protection for religious liberty.” *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). Indeed, the definition of “religious exercise” in both RFRA and RLUIPA is more expansive than this Court’s interpretation of that phrase in its First Amendment jurisprudence. *See Hobby Lobby*, 573 U.S. at 696.

The substantive standard for protecting religious exercise under both RLUIPA and RFRA, within the distinct contexts to which each statute applies, is the same. *Compare* 42 U.S.C. § 2000cc–1(a) (RLUIPA’s “General rule,” quoted *supra* at 1-2), *with id.* § 2000bb–1(b) (RFRA’s statement that the “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest”).

Because Congress included in RLUIPA the same “compelling governmental interest/‘least restrictive means test’” from RFRA, *Cutter v. Wilkinson*, 544 U.S. 709, 717 (2005), RLUIPA “allows prisoners ‘to seek religious accommodations pursuant to the same standard as set forth in RFRA,’” *Holt*, 574 U.S. at 358 (quoting *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). Thus, this Court cites RFRA and RLUIPA jurisprudence interchangeably when discussing that standard. *See, e.g., Holt*, 574 U.S. at 362-63 (citing *Hobby Lobby* for the proposition that RLUIPA’s compelling-governmental-interest test, like RFRA’s, requires analysis of the law as it relates to the claimant at issue).

II. FACTUAL BACKGROUND

A. Petitioner’s Sincere Christian Beliefs Lead Him To Request That Pastor Moore Lay Hands On Petitioner And Pray Over Him At His Time Of Death.

Petitioner has always believed in God. Ruth Graham, *On Death Row in Texas, a Last Request: A Prayer and ‘Human Contact’*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/30/us/on-death-row-in-texas-a-last-request-a-prayer-and-human-contact.html>. But it was in prison that petitioner “came to salvation” through spiritual guidance and became a devout Christian. Daniel Silliman, *Can This Texas Pastor Lay Hands on an Inmate During Execution?*, CHRISTIANITY TODAY (Aug. 23, 2021), <https://www.christianitytoday.com/news/2021/august/ramirez-execution-death-row-dana->

moore-prayer-hands-touch.html; JA 47 (Affidavit of Pastor Dana Moore). For the past four years, petitioner has been a member of the same church, the Second Baptist Church in Corpus Christi, Texas. JA 46-47; *see also* Graham, *supra* (describing the church's acceptance of petitioner as a member even though he could not join in person because "there was no question . . . that [petitioner] was qualified").

Pastor Moore of Second Baptist Church has guided petitioner in religious counseling and spiritual advice since 2016. JA 47. Throughout the last four years, Pastor Moore has regularly made a drive of more than 300 miles to pray with petitioner through the plexiglass window in the prison's visiting room. *See id.*; Graham, *supra*. Pastor Moore described petitioner as "somebody who had been transformed by Jesus Christ." Silliman, *supra*. The pastor's prayers and laying on of hands at the moment of death are significant to petitioner's and Pastor Moore's faith because, like many Christians, they believe they will either ascend to heaven or descend to hell at the moment of death. *See* JA 47; *Matthew* 25:46 ("Then they will go away to eternal punishment, but the righteous to eternal life.").¹ Accordingly, petitioner has pursued an accommodation of his sincere religious beliefs—through both TDCJ grievances and this

¹ Bible quotations throughout petitioner's opening brief come from the New International Version, which is the version Pastor Moore preaches from and uses personally. Baptist faith maintains a "commitment to the Bible as the sole authority for faith and practice." BILL J. LEONARD, *BAPTISTS IN AMERICA* 66 (Columbia Univ. Press 2005).

litigation, following TDCJ's denial of his requests, *see infra* at 11-13, 38-43—asking that Pastor Moore be allowed to perform ministrations in the chamber while petitioner is executed.

B. TDCJ Shifts Its Policy, Practices, And Traditions Concerning Spiritual Advisors And Religious Behavior In The Execution Chamber After This Court Decides *Murphy*.

Prior to 2019, the Texas Department of Criminal Justice (TDCJ) not only permitted but required the presence of a chaplain in the execution chamber. *See* CORR. INST. DIV., TEX. DEP'T CRIM. JUST., EXECUTION PROCEDURE (2012) 8, https://static.texastribune.org/media/documents/TDCJ_Execution_Protocol_07-09-2012_Final.pdf (“The Huntsville Unit Chaplain or a designated approved TDCJ Chaplain *shall* accompany the offender while in the Execution Chamber.” (emphasis added)). This policy was in accordance with Article 43.20 of the Texas Code of Criminal Procedure, which since 1965 has listed both “chaplains of the Department of Corrections” and “the spiritual advisor of the condemned” as persons who “may be present at the execution.” TEX. CODE CRIM. PROC. ANN. art. 43.20 (1965). As extensively discussed *infra*, Part II.C.1, chaplains’ presence in the execution chamber routinely involved their laying hands on condemned inmates as they died.

In April 2019, TDCJ changed its policy to ban the presence of spiritual advisors in the execution

chamber, including TDCJ chaplains. JA 31, 42-46. That change followed this Court's stay in *Murphy v. Collier*, 139 S. Ct. 1475 (2019), with TDCJ choosing to forbid all spiritual advisors from being present in the execution chamber rather than accommodate advisors from a broader range of faiths than TDCJ chaplains represented. See JA 42-45.

Things changed again in response to this Court's opinion roughly a year later in *Gutierrez v. Saenz*, 141 S. Ct. 127, 128 (2020) (mem.), which stayed the execution of a different Texas inmate seeking to have his spiritual advisor in the execution chamber. After this Court directed the district court in *Gutierrez* to consider "whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution," TDCJ shifted its policy again. Its April 2021 revised Execution Procedure, which remains in effect, permits an inmate to request a TDCJ Chaplain or personal spiritual advisor to be "present inside the execution chamber during the inmate's scheduled execution." JA 134-36.

Like the Execution Procedure that preceded TDCJ's 2019 switch, the new 2021 policy does not include a prohibition on either audible prayer or physical touch by a spiritual advisor while present in the execution chamber. See *id.* 133-52. Nonetheless, in June 2021, the TDCJ Director of Chaplaincy informed petitioner that the new policy would prohibit petitioner's spiritual advisor from laying hands on

him in the chamber at petitioner's execution scheduled for September 8, 2021. JA 52-53.

That was not the last change. TDCJ communicated to petitioner yet another new restriction after he filed suit challenging the no-contact rule: In response to an email from petitioner's attorney, TDCJ's General Counsel announced that its policy was also to prohibit audible prayer in the execution chamber. JA 103-04 (August 19, 2021 Letter from TDCJ General Counsel Kristen Worman, stating: "At this time, the TDCJ does not allow the spiritual advisor to pray out loud with the inmate once inside the execution chamber.").

III. PROCEDURAL HISTORY

Petitioner John Henry Ramirez has been an inmate on death row in Texas since his conviction in 2008. Pet. App. A17. This lawsuit does not challenge petitioner's conviction or his death sentence. It instead challenges TDCJ's refusal to allow Pastor Moore to audibly pray and lay hands on petitioner in the execution chamber, consistent with both of their sincerely held religious beliefs. JA 87-92, 95-102. Petitioner contends that TDCJ's failure to accommodate his free exercise of religion violates RLUIPA and the First Amendment. JA 95-102.²

² Petitioner's RLUIPA and First Amendment claims seek the same relief, JA 101-02, so petitioner's brief frames arguments in terms of RLUIPA's requirements to streamline the analysis.

This conflict has been brewing for some time. When petitioner faced an earlier execution date of September 9, 2020, TDCJ refused to grant Pastor Moore access to the execution chamber. JA 60-63. Petitioner pursued relief through TDCJ grievances and then filed suit under RLUIPA and section 1983 in August 2020 in the Southern District of Texas. JA 56-57, 62-70. That suit never proceeded, however, because the State offered to withdraw the execution date in exchange for petitioner's nonsuit of the August 2020 complaint. JA 71.³

Then, in February 2021, the State set a new execution date of September 8, 2021. Pet. App. A7. After two months of pursuing relief through grievance procedures, and with his execution date less than a month away, petitioner filed the current lawsuit, again in the Southern District of Texas, on August 10, 2021. JA 84-102; *see also infra* pp. 38-43. Although TDCJ had announced in April 2021 that spiritual advisors could be present in the execution chamber, TDCJ officials denied the religious-exercise accommodation

³ In the current lawsuit, Chief Judge Owen, concurring below, did not question petitioner's sincere beliefs concerning Pastor Moore's audible prayer and laying on hands in the execution chamber, but she did note that the withdrawn 2020 complaint had included a sentence stating that Pastor Moore need not touch petitioner. Pet. App. A3 (Owen, C.J., concurring). Because petitioner accepted TDCJ's cancellation of his execution date in exchange for the nonsuit, there was never an amendment to align the allegations in the complaint with petitioner's sincere beliefs and his requests in his underlying grievances, and no court or TDCJ official took action or otherwise relied on the withdrawn sentence. *See* JA 71.

petitioner has consistently sought: authorization to have Pastor Moore audibly pray and lay hands on him in the execution chamber. JA 52-53, 103-04, 155-56. So petitioner again challenged TDCJ's policy as a violation of RLUIPA and the First Amendment. JA 84-102.

On August 18, 2021, with petitioner's execution date just three weeks away, he filed a Motion for Stay of Execution pending resolution of his RLUIPA and First Amendment claims. *See* JA 73-83. Petitioner's Second Amended Complaint—the live complaint in this litigation—was filed four days later. JA 84.⁴ It names three defendants: Bryan Collier, TDCJ's Executive Director; Bobby Lumpkin, Director of TDCJ's Correctional Institutions Division; and Dennis Crowley, Warden at Huntsville Prison. *See id.*⁵ The Second Amended Complaint seeks a declaration that TDCJ's policy as amended violates petitioner's First Amendment Free Exercise rights, a declaration that the policy violates RLUIPA, and a permanent injunction prohibiting TDCJ from executing petitioner until TDCJ allows Pastor Moore to lay hands on petitioner and audibly pray or read scripture during petitioner's execution. JA 101-02.

⁴ Petitioner previously had filed a First Amended Complaint six days after the initial filing, JA 14; and six days after that he filed the Second Amended Complaint. JA 84. Amidst the flurry of pre-execution efforts, the Southern District of Texas transferred the case to a different district judge. JA 1.

⁵ Petitioner's brief refers to the three defendants collectively as "the State."

On August 10, 2021, the district court denied the motion to stay petitioner’s execution. Pet. App. A25. Petitioner appealed the denial and asked the Fifth Circuit to stay the September 8 execution and remand for further proceedings. See Brief for the Appellant, *Ramirez v. Collier*, No. 21-70004 (5th Cir. Sept. 2, 2021). In a per curiam opinion, the Fifth Circuit affirmed. See Pet. App. A1-2. All members of the panel wrote separate opinions, with Chief Judge Owen and Judge Higginbotham concurring and Judge Dennis dissenting. *Id.* A3, A5, A7.⁶

Judge Dennis concluded in his dissent that this Court’s decisions in *Gutierrez*, 141 S. Ct. 127, and *Dunn v. Smith*, 141 S. Ct. 725 (2021), “support the conclusion that Ramirez has made a strong showing that the current policy imposes a substantial burden on his religious exercise.” Pet. App. A10. He emphasized that “it is not Ramirez’s burden—even at this early stage of litigation—to disprove that the State is utilizing the least restrictive means; rather, it is the State’s burden to show that its policy uses the least restrictive means and therefore satisfies RLUIPA’s strict scrutiny standard.” Pet. App. A13 (quoting this Court’s determination in *O Centro*, 546 U.S. at 429, that, under RLUIPA’s sister statute RFRA, “the burdens at the preliminary injunction stage track the burdens at trial”). Accordingly, the district court in

⁶ Judge Dennis agreed that petitioner was not entitled to a stay on his First Amendment claim but he “strongly disagree[d] that Ramirez has not shown his entitlement to a stay as to his RLUIPA claim.” Pet. App. A8.

petitioner’s case had committed “legal error, and therefore an abuse of discretion, because the district court placed the burden on the wrong party.” Pet. App. A13. Judge Dennis reasoned that the State had offered only “general concerns about security” that failed to satisfy its burden under RLUIPA to demonstrate why its blanket prohibition against physical contact and audible prayer was the least restrictive means of furthering a compelling interest “as applied specifically to Ramirez.” Pet. App. A14-15. Thus, in Judge Dennis’s view, petitioner had made a strong showing that he was likely to succeed on the merits of his RLUIPA claim. *Id.* A15.⁷

◆

SUMMARY OF ARGUMENT

RLUIPA’s expansive protection of prisoners’ religious liberty requires the State to accommodate petitioner’s request to have Pastor Moore with him in the execution chamber, audibly praying and laying hands on him in the final moments of his life. These ministrations are deeply rooted in petitioner’s sincere religious beliefs and reflect the fundamental

⁷ At the time of this brief’s filing, the State has a pending request filed on September 21, 2021, to lodge with this Court four new pieces of testimonial evidence that were signed between September 14 and September 21, 2021, as if this Court were holding a mini-trial—but without cross-examination. Petitioner has opposed the request and will not address the State’s proposed new evidence unless this Court requests that the State lodge the new testimony. If that occurs, petitioner will file a supplemental brief addressing the lodgings.

importance of prayer, song, and human touch as powerful expressions of Christian faith. To deny them imposes a substantial burden on petitioner's free exercise of religion.

The State cannot carry its burden under RLUIPA to demonstrate that its prohibition against audible prayer and physical contact between Pastor Moore and petitioner in the execution chamber is the least restrictive means of furthering a compelling governmental interest. Generalized concerns about security do not suffice under RLUIPA. The statute instead requires the State to articulate, and prove, not only a compelling interest related to the specific religious accommodation petitioner requests, but also that the State cannot further that interest through less restrictive means. 42 U.S.C. §§ 2000cc-1(a), -2(b).

The State has not come close to articulating a compelling security interest particularized to petitioner's requested accommodation. Nor could it, given TDCJ's determination that it is possible for spiritual advisors to be present within the tight confines of the execution chamber without creating a security risk sufficient to prohibit that practice. JA 134-37. TDCJ can accommodate a request for audible prayer and non-disruptive physical touch from a spiritual advisor who is already permitted to be inside the execution chamber, and thus necessarily within close proximity to the condemned inmate strapped to the gurney. *See* JA 167-69, 172-74 (chamber photos).

Far from a hypothetical possibility, TDCJ's ability to accommodate the in-chamber religious exercise

petitioner requests is a firm reality grounded in TDCJ's own extensive history prior to 2019 of allowing audible prayer and physical touch from spiritual advisors in the execution chamber, as documented *infra* Part II.C.1 and as recounted by *amici* supporting petitioner who have participated in or witnessed such practices during TDCJ executions. And recent examples of religious accommodations in other jurisdictions (Alabama and the federal system) that confirm that condemned inmates' religious practices can be respected without compromising governmental security interests when jurisdictions align execution protocols with the least restrictive means of furthering security objectives, as RLUIPA requires.

Petitioner has consistently requested that Pastor Moore be present in the chamber to audibly pray and lay hands on petitioner during petitioner's execution, satisfying TDCJ's grievance-procedure requirements as to both aspects of the religious exercise petitioner requests. Despite acknowledging that petitioner generally exhausted his religious-accommodation grievances within the meaning of the PLRA, the State carves out a single aspect it argues is unexhausted: petitioner's request that Pastor Moore's in-chamber prayer specifically be *audible*. The State's hyper-technical and out-of-left-field limitation—announced in an email from TDCJ's General Counsel only after petitioner exhausted grievances and filed suit when facing an execution date roughly a month away—is absurd on many levels. It disregards the common

understanding of Christian prayer, which is overwhelmingly spoken out loud unless specified as silent; and it takes a “gotcha” approach to the PLRA’s exhaustion requirement that the statute and this Court’s precedent prohibit.

Petitioner is not requesting a blanket stay of his execution. He seeks to enjoin the State from executing him in a manner that violates the Free Exercise accommodations that RLUIPA requires. If the State persists in prohibiting protected religious practices in the chamber during petitioner’s execution, petitioner seeks a remand—in which this Court can order the courts below to act with “appropriate dispatch,” *Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (mem.)—to litigate his entitlement on the merits to a permanent injunction protecting his religious-liberty rights. And to preserve these rights while proceedings below are underway, petitioner asks this Court to temporarily enjoin the State from executing him in a manner that violates RLUIPA.

◆

ARGUMENT

I. TDCJ’S PROHIBITION AGAINST AUDIBLE PRAYER AND LAYING ON HANDS DURING PETITIONER’S EXECUTION VIOLATES RLUIPA.

A. RLUIPA’s Protections Are Broad.

Petitioner’s requests fall well within RLUIPA’s “expansive protection for [prisoners’] religious liberty.” *Holt*, 574 U.S. at 358. Congress mandated that

RLUIPA “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [the statute] and the Constitution.” 42 U.S.C. § 2000cc-3(g). And “religious exercise” is defined broadly to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* § 2000cc-5(7)(A). Significantly, it is individuals who determine which exercises of a given religion are meaningful. *See United States v. Seeger*, 380 U.S. 163, 185-86 (1965) (restricting courts’ evaluation of an individual’s religious beliefs to asking “whether the beliefs professed . . . are sincerely held and whether they are, in [the plaintiff’s] own scheme of things religious”); *see also* JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785) (“The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”), *in* 2 THE WRITINGS OF JAMES MADISON 184 (Gaillard Hunt ed. 1901), *quoted in* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453 (1990).

While a substantial burden on the exercise of religion may take the form of compelling a prisoner to take an action that violates his religious tenets, *see, e.g., Holt*, 574 U.S. at 352-53 (invalidating rule prohibiting prisoners from growing beards), it is not necessary for a state to “forc[e] or entic[e],” Br. Opp. 20, a prisoner to do anything to violate his rights under RLUIPA. This Court has made clear that acts

undertaken by the government with no direct effect on a plaintiff's behavior can constitute substantial burdens on the exercise of religion. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020) (pointing to cases involving the destruction of a prisoner's religious literature and an autopsy in violation of religious beliefs as substantial burdens); *see also Boerne*, 521 U.S. at 530 (noting that "[m]uch of the discussion" at the hearings regarding RFRA concerned reports of autopsies performed in violation of religious beliefs). It is only necessary that the government's action interfere with an individual's attempts to follow sincerely held religious beliefs. And members of this Court have specifically recognized that RLUIPA "guarantees [an inmate] the right to practice his faith free from unnecessary interference, including at the moment the State puts him to death." *Smith*, 141 S. Ct. at 726 (Kagan, J., joined by Breyer, Sotomayor, Barrett, J.J., concurring in denial of application to vacate injunction).

While this Court has not ruled directly on the application of RLUIPA to a prisoner's request for a spiritual advisor of his choice to be present in the execution chamber, it has upheld a stay of execution granted by a lower court on that ground, *Smith*, 141 S. Ct. 725, and issued a stay of execution in a similar case, with direction to the district court to "promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to

have in his immediate presence during the execution.” *Gutierrez*, 141 S. Ct. at 128. In the former case, Justice Kagan, joined by three other members of this Court, noted that “leaving inmates to die without spiritual attendance” substantially burdens those inmates’ exercise of religion. *Smith*, 141 S. Ct. at 725 (Kagan, J., joined by Breyer, Sotomayor, Barrett, J.J., concurring in denial of application to vacate injunction).

B. Forbidding Pastor Moore From Audibly Praying And Laying Hands On Petitioner During His Execution Imposes A Substantial Burden On Petitioner’s Sincere Religious Beliefs.

Petitioner has consistently asked for the ministration of Pastor Moore at the time of petitioner’s death. Such ministration would include Pastor Moore’s laying hands on petitioner and audibly praying over petitioner during the execution procedure—religious behavior firmly rooted in petitioner’s Christian beliefs. *See supra* at 6-8. There is no reason to doubt the sincerity of petitioner’s beliefs, and neither court below did so. Pet. App. A4, A21.

Petitioner’s specific request that Pastor Moore lay hands on him during the execution procedure is integral to his Christian expectations of ministration at the time of death. Petitioner explained in his June 11, 2021 grievance that “it is a part of my faith to have

my spiritual advisor lay hands on me anytime I am sick or dying.” JA 52. And Pastor Moore explained that when he prays with those in crisis, he holds their hands or puts his hand on their shoulder. JA 47. Touch is an integral part of petitioner’s and Pastor Moore’s “faith tradition as Baptists.” *Id.* To petitioner and Pastor Moore, “[t]ouch is spiritually important . . . [because] Jesus healed by touching.” See Silliman, *supra*. And the Bible teaches that physical touch facilitates spiritual healing. See *Luke* 4:40 (“[T]he people brought to Jesus all who had various kinds of sickness, and laying his hands on each one, he healed them.”); *Acts* 19:6 (“When Paul placed his hands on them, the Holy Spirit came on them[.]”); *Daniel* 10:18-19 (“[T]he one who looked like a man touched me and gave me strength. ‘Do not be afraid . . .,’ he said. ‘Peace! Be strong now; be strong.’”).

Similarly, petitioner’s specific request that Pastor Moore audibly pray over him at the time of execution reflects the fundamental importance of prayer and song as powerful means of expressions in the Christian faith. See, e.g., *James* 5:16 (“The prayer of a righteous person is powerful and effective.”); *Daniel* 10:19 (“When he spoke to me, I was strengthened”); *James* 5:14 (“Let them call the elders of the church to pray over them and anoint them with oil in the name of the Lord.”); see also *infra* Part III (detailing petitioner’s exhaustion of his audible-prayer request). Christians believe that through the guidance of “prayer offered in faith[,] . . . the Lord will raise them up. If they have sinned, they will be forgiven.”

James 5:15. And to petitioner—and across Christian denominations—prayers are meant to be spoken out loud and songs are meant to be sung. See, e.g., *Isaiah* 28:23 (“Listen and hear my voice . . . hear what I say.”); *Acts* 4:24 (“[T]hey raised their voices together in prayer to God.”); *James* 5:13 (“Let them sing songs of praise.”). Indeed, more than 95% of the psalms “express or invite audible words.” David Powlison, *An Invitation to Speak Up!*, 29 J. BIBLICAL COUNSELING 2, 2 (2015). When Christians pray, the “standard practice” is to pray aloud “so as to be heard by the Person with whom you are talking.” *Id.* at 4. And “the speaking of the prayer is a sign of continuity with what someone has received before, which are the words of Christ in scripture and handed down through the ages.” Elizabeth Bruenig, *The State of Texas v. Jesus Christ*, THE ATLANTIC (Sept. 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/texas-v-jesus/620144/> (quoting Russell Moore, “a longtime Christian ethicist with special expertise in Baptist and other American Low Church traditions”).

Silent prayer is the exception, not the rule. Powlison, *supra*, at 3; Bruenig, *supra*. As the Psalms state: “I will sing of your love and justice; to you, LORD, I will sing praise.” *Psalms* 101:1; see also JOHN T. FORD, SAINT MARY’S PRESS GLOSSARY OF THEOLOGICAL TERMS 154 (2006) (the word “psalm” derives “from the Greek psalmos,” meaning “a song *sung* to harp” (emphasis added)). Common religious practice—and the theological reality of Biblical prayer—therefore dictates that the word “prayer” signifies audible prayer unless

the qualifying adjective “silent” precedes the word “prayer.”

Prohibiting Pastor Moore from praying aloud or laying hands on petitioner at the time of petitioner’s death substantially burdens petitioner’s exercise of religion. And that burden is no less substantial because the pastor may stand silently in the execution chamber. That kind of thinking is misguided, not only as a matter of religious practice, but also as a matter of law. “RLUIPA’s ‘substantial burden’ inquiry asks whether the government has substantially burdened religious exercise . . . , not whether the RLUIPA claimant is able to engage in other forms of religious exercise.” *Holt*, 574 U.S. at 361-62. TDCJ’s prohibition against audible prayer and laying on hands prevents petitioner from practicing his sincere beliefs at the moment he dies—clearly a substantial burden on his exercise of religion.

II. TDCJ'S BLANKET PROHIBITION AGAINST AUDIBLE PRAYER AND PHYSICAL CONTACT IS NOT THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST.

A. The State Has No Compelling Interest In Prohibiting Pastor Moore's Audible Prayer And His Laying Hands On Petitioner In The Execution Chamber.

The State's bare assertion that it has an interest in prison security during executions does not come close to carrying its burden under RLUIPA. *See* 42 U.S.C. §§ 2000cc-1(a), -2(b). This kind of "broadly formulated interes[t]" is antithetical to the statute. *See Holt*, 574 U.S. at 362 (quoting *Hobby Lobby*, 573 U.S. at 726, in turn quoting *O Centro*, 546 U.S. at 430-31). The State instead must articulate a compelling security interest related to petitioner's specific circumstances and his specific religious-accommodation request. *See Holt*, 574 U.S. at 362-63. As this Court has observed, RLUIPA "contemplates a "more focused" inquiry and "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Id.* at 363 (quoting *Hobby Lobby*, 573 U.S. at 726, in turn quoting *O Centro*, 546 U.S. at 430-31). Indeed, "[t]he compelling interest test is a standard that *responds to facts and context.*" 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch & Kennedy on

RLUIPA (emphasis added)); *see also Holt*, 574 U.S. at 366 (noting that the Arkansas Department of Corrections’ policy violated RLUIPA “as applied in the circumstances present” in that case). Courts must look “beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.” *O Centro*, 546 U.S. at 431; *see also id.* (analogizing to *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Old Order Amish and Conservative Amish Mennonite believers who had graduated the eighth grade from further compulsory attendance at public schools)).

Any argument that an exception based on a sincere religious belief would “open the door” to additional exceptions has no place in the compelling-interest analysis. *See Cutter*, 544 U.S. at 723 n.11. This Court has made clear that “the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody” does not apply to RFRA (or RLUIPA), because the statute itself was designed to create exceptions to otherwise-applicable rules. *See O Centro*, 546 U.S. at 436.

In this case, the State has the burden to demonstrate “a compelling governmental interest.” 42 U.S.C. § 2000cc–1(a). It has not and cannot articulate a specific, security-related reason why Pastor Moore cannot audibly pray or lay hands on petitioner. The State points to its general interest “in maintaining an orderly, safe, and effective process when carrying out

an irrevocable, and emotionally charged, procedure.” Br. Opp. 26. But it does not explain how audible prayer or touching of *any* part of the prisoner’s body—even his legs or feet when the injection line is in his arm—jeopardizes that interest. *See infra* at 30-32 (describing chaplains’ practice of touching prisoners on the leg during executions). In addition, TDCJ approved advisors’ “immediate physical presence” within the tight confines of the chamber, Br. Opp. 27 (citing photos of chamber interior); JA 167-69, 172-74 (photos), and TDCJ has not explained how Pastor Moore’s being only inches or at most a couple of feet closer to petitioner would create a new and different security concern that could justify the substantial burden TDCJ’s blanket prohibition imposes on petitioner’s sincere religious beliefs.⁸

⁸ An extended discussion of the Texas execution-chamber procedure and whether laying on of hands or audible prayer during the procedure presents a security concern can be found in the Brief of Former Prison Officials as Amici Curiae in Support of Petitioner (Sept. 27, 2021), with David Frederick as counsel of record.

B. TDCJ Cannot Satisfy RLUIPA's Requirement That It Demonstrate That Forbidding In-Chamber Audible Prayer And Contact Between Spiritual Advisors And Condemned Inmates Is The Least Restrictive Means Of Furthering Its Security Interests During Executions.

Because TDCJ has no particularized compelling interest regarding petitioner's religious-liberty requests, it cannot meet its burden under RLUIPA and no further analysis is required. But, even if it articulated a compelling security interest tied specifically to petitioner's requests, it could not carry its additional burden under RLUIPA to provide concrete reasons why its policy is the least-restrictive means to further that interest. *See* 42 U.S.C. § 2000cc-2(b).

RLUIPA explicitly states that "the government shall bear the burden of persuasion" on the least-restrictive means standard. *Id.* And a court cannot "defer[] to . . . prison officials' mere say-so that they could not accommodate petitioner's request." *Holt*, 574 U.S. at 369. While prison officials may be experts on prison operations, a court's respect for that expertise "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Id.* at 364. As the sponsors of RLUIPA explained, "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's

requirements.” 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch & Kennedy) (discussing the importance of strengthening religious-liberty protections for prisoners)).

The least-restrictive-means test is “‘exceptionally demanding’ and requires the government to ‘sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].’” *Holt*, 574 U.S. at 364 (quoting *Hobby Lobby*, 573 U.S. at 728). Indeed, “if a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Holt*, 574 U.S. at 365 (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000)). The State here cannot satisfy its heavy burden under the least-restrictive-means test—especially since, as discussed *infra*, religious-liberty requests like petitioner’s had been routinely accommodated by TDCJ itself for years prior to *Murphy*, *see infra* Part II.C.1, as well as by other jurisdictions that enforce the death penalty. *See* Part II.C.2.

C. TDCJ’s Past Practices, Execution Policies Elsewhere, And Common Sense Demonstrate That Texas Has Less Restrictive Means Of Furthering Any Security Interests Regarding Executions.

A long history and tradition of allowing ministrations during executions—including a spiritual

advisor's physical touch and audible prayer while a condemned inmate is dying—supports petitioner's requests. Although RLUIPA does not require "a prison to grant a particular religious exemption as soon as a few other jurisdictions do so," *Holt*, 574 U.S. at 369, the fact that other jurisdictions honor similar requests for religious accommodations means that the State here "must, at minimum, offer persuasive reasons why it believes that it must take a different course." *Id.* No credible, much less persuasive, reasons exist here—especially given Texas's own long history and tradition of allowing spiritual advisors to lay hands on condemned inmates and audibly pray in the chamber during executions.

1. Texas has allowed both laying on of hands and audible prayer during executions.

TDCJ has historically and routinely allowed prison chaplains to audibly pray and lay their hands on death-row inmates while present in the chamber during executions. See Carroll Pickett, *Texas Prison Chaplain: 'I've Come to See the Death Penalty as Totally Wrong'*, GUARDIAN, <https://www.theguardian.com/world/2013/jun/27/capital-punishment-texas-pickett> (Dating back to Texas's first execution by lethal injection in 1982, chaplains' "presence" in the execution chamber has included prayer and physical touch.). Former TDCJ spokesperson and execution witness Michelle Lyons has discussed this practice frequently and described it as a noncontroversial ancillary of TDCJ

executions. Pamela Colloff, *The Witness*, TEX. MONTHLY (Sept. 2014), <https://www.texasmonthly.com/articles/the-witness/> (Lyons “noted in particular the small courtesies that the prison staff extended to the condemned, as when . . . the chaplain placed his hand on the right leg of the restrained prisoner,” and that “during [Pastor Jim Brazzil’s] six-year tenure, it was he who stood in the death chamber with the warden, one hand resting on the condemned’s leg”).⁹

Lyons, who witnessed almost 300 executions during her time at TDCJ, *id.*, wrote a memoir that discussed executions at the Texas State Penitentiary and many routine instances of spiritual advisors laying hands on death-row inmates during executions, including the following recollections:

- describing the execution of an unidentified inmate who “would have been aware of the warden hovering by his head, and the chaplain, whose hand was rested just below his knee”;
- explaining that “[e]xecution in Texas was a clinical process; there was even a certain decorum about it, what with the

⁹ It is petitioner’s understanding that Ms. Lyons and other former prison officials and spiritual advisors from not only Texas, but also other jurisdictions—including individuals familiar with the BOP’s policies and practices at federal executions—will share their experiences as amici participating in at least two briefs related to historical accommodations of religious practices in execution chambers.

chaplain placing his hand on the inmate’s knee”;

- discussing the silence that followed the lethal injection as lasting “five or six minutes” after which, “[t]he warden would remain by the inmate’s head, and Chaplain Brazzil would still have his hand on the inmate’s knee.”

MICHELLE LYONS, *DEATH ROW, TEXAS: INSIDE THE EXECUTION CHAMBER* 3, 77, 118 (2018).

Several TDCJ chaplains have also documented TDCJ’s historical and routine practice of allowing prison chaplains to touch condemned prisoners and audibly pray during executions. Former TDCJ chaplain Rev. Carroll Pickett—who served as a chaplain for 95 inmates who were executed in Texas—recalled, “I would stand right next to them and put my hand on their right leg where I could feel a pulse. That way, they always knew someone was with them to the very end.” Pickett, *supra*. He details other interactions like this in a 2008 documentary based on his memoir. *AT THE DEATH HOUSE DOOR* (Kartemquin Films 2008) (featuring Rev. Pickett’s recalling Carlos DeLuna’s execution, at which Pickett “held [DeLuna’s] right hand, he was squeezing very tight as they inserted the needle . . . I moved down to touch his leg right above his ankle”); *see also* CARROLL PICKETT & CARLTON STOWERS, *WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN* 74 (2002) (He “placed a hand on [the inmate’s] ankle as [Warden] Pursley recited the

orders of the state that required the execution to take place.”).

And, in court documents, Chaplain Wayne Moss stated that TDCJ chaplains were allowed to place a hand on inmates and “indicate a presence” during executions prior to April 2019. *See* 6/24/19 Moss Tr. at 19:4-8, *filed in Murphy v. Collier*, No. 4:19-cv-1106 (S.D. Tex. July 19, 2019), ECF No. 38-8. Chaplains Thomas Brouwer and Timothy Jones also stated that prison chaplains were permitted to pray with TDCJ inmates during an execution. *See* 6/24/19 Brouwer Tr. at 30:25-31:3, *filed in Murphy v. Collier*, No. 4:19-cv-1106 (S.D. Tex. July 19, 2019), ECF No. 38-6; 6/24/19 Jones Tr. at 24:15-20, *filed in Murphy v. Collier*, No. 4:19-cv-1106 (S.D. Tex. July 19, 2019), ECF No. 38-4.

Stories like these abound from multiple sources:

- Chaplain Jim Brazzil stating, “I usually put my hand on their leg right below their knee, you know, and I usually give ‘em a squeeze, let ‘em know I’m right there”;
- John Moritz, witness and reporter for the *Fort Worth Star Telegram*, noting that “[t]he warden will stand at the head of the condemned man and the chaplain will generally be standing with his hand on the condemned person’s knee”;
- Rev. Pickett stating that “[a]fter they’re strapped down and the needles are flowing and you’ve got probably forty-five seconds where you and he are together for the last time, and nobody—nobody—can

hear what goes on there. And the conversations that took place in there were, well, basically indescribable. It was always something different. A guy would say ‘I want you to pray this prayer.’”).

StoryCorps, *Witness to an Execution*, at 09:59, 11:42, 18:56 (Mar. 8, 2017), <https://storycorps.org/podcast/storycorps-496-witness-to-an-execution/>.

TDCJ’s historical tradition of allowing spiritual advisors to touch inmates and audibly pray during executions demonstrates that its 2021 policy is not the least restrictive means of satisfying any asserted security interest. It makes no practical difference that Pastor Moore is not a TDCJ employee; TDCJ has already instituted training and background checks to address any security concerns it might have about a non-employee in the execution chamber. JA 135-37. In addition, this Court has noted the State’s potential right to revoke “an accommodation if the claimant abuses the exemption in a manner that undermines the prison’s compelling interest.” *Holt*, 574 U.S. at 369. TDCJ cannot carry its burden under RLUIPA to demonstrate why less restrictive means could not achieve security interests in light of TDCJ’s own historical practices and common-sense realities.¹⁰

¹⁰ Current and former prison officials from Texas and other states in a brief filed today also suggest a number of less-restrictive alterations Texas could make to its execution procedures to address any audible-prayer or physical-touch-related security concerns. *See* Brief of Former Prison Officials as Amici Curiae Supporting Petitioner (Sept. 27, 2021).

2. Other jurisdictions permit laying on of hands and audible prayer in the execution chamber.

TDCJ's long history of accommodating religious-liberty requests in the execution chamber is also reflected in the practices of other jurisdictions that enforce the death penalty, including Alabama and—contrary to the State's unsupported representations in the courts below about BOP executions, *see* Pet. App. A3—even the federal government.

Alabama, which enforces the death penalty, not only recently reversed its policy restricting spiritual advisors' access to executions chambers, but also expressly authorized ministration practices that require physical contact with condemned inmates and audible prayer. Kim Chandler, *Alabama: Pastor Can Hold Inmate's Hand During Execution*, ASSOCIATED PRESS (Sept. 9, 2021), <https://apnews.com/article/religion-alabama-executions-5126823b8e8eb10bc682584cb3495a>. Specifically, Alabama announced that the state will not only allow spiritual advisors into the execution chamber, but also allow advisors to: “anoint the inmate’s head with oil; pray with the inmate and hold his hand as the execution begins, as long as the adviser [sic] steps away before the consciousness assessment is performed; and remain in the execution chamber until the curtains to the witness rooms are drawn.” *Id.*; Joint Motion to Dismiss, at 4 n.13 & Ex. D, *Smith v. Dunn*, No. 2:20-cv-01026-RAH (M.D. Ala. June 16, 2021), ECF No. 57

(documenting warden’s approval of religious practices that “will allow Plaintiff’s chosen spiritual advisor into the execution chamber and will permit him to anoint Plaintiff, hold Plaintiff’s hand, and pray with him”).

In one instance, an Alabama warden approved a spiritual advisor’s written plan for religious behavior in the execution chamber but added specific limitations on the timing of certain actions: “Approved, with the understanding that the Spiritual Advisor will limit his conversations with the Condemned to the time period beginning with the Spiritual Advisor’s entry to the Execution Chamber to the moment the curtains are opened to the witness rooms, just prior to the execution. Further, the Spiritual Advisor will cease any physical contact (i.e., holding the inmate’s hand) before the consciousness assessment test is performed.” *Id.* Ex. D; *see also id.* at 4 n.13 (confirming that, in accord with the warden’s instructions, “[t]he spiritual advisor may talk with Plaintiff prior to the execution, though general conversation should end when the curtains open. After the execution begins, he may pray with Plaintiff and hold his hand. He will be instructed to step away before the consciousness assessment.”). Alabama’s recently adopted approach confirms states’ ability to accommodate religious practices in the execution chamber without compromising prison interests in security during the procedure, in light of the condemned inmate’s and his spiritual advisor’s particular religious requests.

The federal government has also recently accommodated an inmate's request for religious exercise in the execution chamber that included a spiritual advisor's audible prayer and physical contact. Specifically, responding to a request from federal death-row inmate Dustin Honken, who was executed on July 17, 2020, the BOP agreed to allow Father O'Keefe, Honken's chosen Catholic priest, to pray with Honken in the chamber "up to and even after his death." *See* Defendants' Response to Plaintiff's Response to Order to Show Cause, at 4, *Honken v. Barr et al.*, No. 2:20-cv-00342-JRS-DLP (S.D. Ind. July 16, 2020), ECF No. 17. The BOP further agreed to allow Father O'Keefe to administer Last Rites in the execution room, reversing its previous Last Rites position that allowed physical touch only in the holding cell of the execution facility. Motion for Preliminary Injunction for Father Mark O'Keefe, at 5-6, *Hartkemeyer v. Barr et al.*, No. 2:20-cv-00336-JMS-DLP, 2020 WL 8084514 (S.D. Ind. July 9, 2020), ECF No. 65 ("BOP has reassessed its previous position and agrees to grant Honken's request, subject to certain limitations. Specifically, after Honken is restrained and the IV lines are established, Father O'Keefe will be escorted into the execution room to administer Last Rites to Honken for a reasonable period of time that does not unduly delay the proceedings.").

Father O'Keefe's experience during the Honken execution—including his in-chamber physical contact with Honken—is detailed in the American Civil Liberties Union's amicus brief on which Father

O’Keefe is a signatory, along with other spiritual advisors who participated in federal executions and describe the in-chamber religious exercises in which they participated. *See* Amicus Brief of ACLU (Sept. 27, 2021).¹¹

To be sure, petitioner does not suggest that the BOP uniformly permits the type of in-chamber religious exercise that occurred during Honken’s execution. But the BOP’s accommodation of Honken’s request for in-chamber physical contact reflects the type of particularized consideration required by RLUIPA, and it confirms the practical feasibility of allowing a spiritual advisor to provide ministrations in the chamber during the course the execution procedure without compromising security interests. *Cf.* Order, *Gutierrez v. Saenz*, at 12-15, No. 1:19-cv-00185 (S.D. Tex. Nov. 24, 2020), ECF No. 124 (detailing examples of in-chamber spiritual-advisor activity during federal executions that did not undermine the government’s security interest).

¹¹ As Chief Judge Owen noted below, the State claimed, without support, that the BOP prohibits physical contact during executions and restricts spiritual advisors’ verbal communications in the execution chamber. Pet. App. A3. Chief Judge Owen looked for support herself but could not find any. *Id.* The BOP’s accommodation of Dustin Honken’s request to have Father O’Keefe audibly pray and touch him in the execution chamber demonstrates that no such blanket BOP prohibition on in-chamber contact or spiritual verbalization exists. Additional examples appear in the *Gutierrez* filing cited above, and in the ACLU’s amicus brief referenced above. The BOP clearly does not take a blanket approach to requests from condemned inmates to engage with spiritual advisors in the execution chamber.

III. PETITIONER SATISFIED PLRA EXHAUSTION REQUIREMENTS.

A. Through Grievances And Litigation, Petitioner Has Consistently Challenged TDCJ's Refusal To Allow Pastor Moore To Lay Hands On Petitioner And Audibly Pray During Petitioner's Execution.

Petitioner satisfied the PLRA's requirement that he exhaust all "such administrative remedies as are available" before bringing an action relating to "prison conditions." 42 U.S.C. § 1997e(a). Throughout the history of petitioner's 2020 and 2021 TDCJ grievances and RLUIPA and First Amendment claims, petitioner has pursued the same core religious-liberty relief—to have Pastor Moore present in the death chamber to do what petitioner's faith requires and expects a pastor to do when present during a parishioner's final moments of life: to lay hands on the parishioner and to audibly pray as that parishioner dies. *See* JA 50-55, 56-57, 62-70, 84-102, 155-56.¹²

The State carves out a single religious behavior that it claims is unexhausted within petitioner's ongoing efforts not to be executed in a manner that substantially burdens his sincerely held religious beliefs—a "request for his pastor to pray aloud with

¹² TDCJ had not returned petitioner's 2020 grievance when the subsequently nonsuited 2020 complaint was filed with his execution date just a month away, so that grievance was not part of that only partially developed record. *See* JA 62-63, 71.

him during the execution.” Br. Opp. 7, 12 (conceding “Ramirez’s exhaustion of his no-contact challenge” but contending TDCJ had no “opportunity to resolve the verbal-restriction challenge [petitioner] did not make”). The State’s argument is perplexing both in terms of the record and as a matter of common sense and common religious practice.

Although the State contends that petitioner “never asked TDCJ—through any channel—to permit his pastor to pray aloud with him during his execution,” Br. Opp. 12, petitioner’s June 11, 2021 grievance—filed roughly a month before the original complaint in the current lawsuit—expressly contradicts the State’s assertion. The June 11, 2021 grievance requested prayer in addition to laying on hands as part of the religious behavior expected from petitioner’s pastor while present in the execution chamber. *See* JA 52-53. Specifically, in response to a question on TDCJ’s grievance form that requires inmates to describe the “Action Requested to resolve your Complaint,” petitioner stated: “That I be ALLOWED to have my Spiritual Advisor ‘lay hands on me’ & *pray over me* while I am being executed? THANK YOU!” JA 53 (emphasis added).¹³

¹³ The brief in opposition acknowledges that petitioner exhausted TDCJ grievance procedures in connection with his June 11, 2021 request. Br. Opp. 6-7; *see also* JA 50-55 (April 2021 Step 1 and Step 2 grievances and June 11, 2021 Step 1 grievance; petitioner’s July 8, 2021 Step 2 grievance, submitted before this litigation commenced, is not in the record because TDCJ did not return it to petitioner until at least August 16, just 23 days before his execution date). The State’s exhaustion

If the State is suggesting that petitioner's June 11, 2021 request should be read as having sought only *silent* prayer while Pastor Moore lays hands on petitioner during petitioner's execution, that unnaturally cabined interpretation takes a "gotcha" approach that not only erects unreasonable, hypertechnical barriers to exhaustion, *see infra* Part III.B, but also reflects an insensitivity to religion and ignorance of prevailing religious norms. As previously discussed, petitioner's Christian faith directs audible prayer. *See supra* I.B; Bruenig, *supra* ("In almost every scenario and every Christian gathering, the form of prayer is audible. Silent prayer is a minority, and is actually not what's prescribed for the vast majority of Christians throughout time." (quoting Esau McCaulley, a professor of the New Testament at Wheaton College)).

B. TDCJ Has Played Fast And Loose, Implementing Quick Policy Changes To Evade Religious-Liberty Accommodations That RLUIPA Requires.

The State has made relief a moving target for petitioner, who has had to pursue numerous challenges to the substantial burdens on his sincere religious beliefs that TDCJ's rapidly shifting execution policies imposed. Petitioner's TDCJ grievances and litigation in 2020 and 2021 have been reactions to strategic

argument concerns only what petitioner's 2021 requests encompassed, applying an unrealistically stringent interpretative standard that the PLRA does not require and that this Court should reject as a matter of fact, law, and logic.

changes TDCJ made to its spiritual-advisor practices in light of this Court's evolving, execution-related RLUIPA jurisprudence.

As discussed *supra* Part II.C.1, TDCJ historically allowed its spiritual advisors to be present in the execution chamber and to lay hands on condemned inmates and audibly pray during executions. As the State acknowledges, TDCJ changed its longstanding protocols in response to the stay in *Murphy*, 139 S. Ct. 1475, choosing to forbid all spiritual advisors from being present in the execution chamber rather than accommodate advisors from a broader range of faiths than TDCJ chaplains represented. *See* Br. Opp. 2; JA 42-43.

Because TDCJ's post-*Murphy* change eliminated spiritual-advisor presence during executions, petitioner's 2020 administrative submissions to TDCJ officials appropriately challenged that new presence prohibition—a change that inherently also eliminated the laying on of hands and the audible prayer that TDCJ historically allowed in the execution chamber when spiritual advisors were present. *See* JA 62-63. The August 2020 litigation that followed those grievances never fully developed because, as the State acknowledges, it offered to withdraw petitioner's execution date in exchange for his nonsuiting his section 1983 complaint. *See* Br. Opp. 3; JA 71.

After petitioner received notice of a new execution date on February 5, 2021, he diligently pursued requests to have Pastor Moore present in the chamber by again exhausting TDCJ grievance procedures with

submissions on April 11 and April 18. JA 50-55. He also sought clarification directly from TDCJ's Director of Chaplaincy and, through his attorney, TDCJ's General Counsel's Office. JA 52-53, 103-04.

After TDCJ changed its policy yet again on April 21, 2021, JA 133-37, it provided petitioner with a May 4 grievance response, advising him that spiritual advisors once again could resume presence in the execution chamber and that he should request an advisor as soon as possible. JA 54-55. But then, the next month, petitioner learned from TDCJ's Director of Chaplaincy that, in a departure from past TDCJ practice, petitioner's spiritual advisor would not be permitted to touch petitioner while present in the execution chamber. *See* JA 52-53. Petitioner therefore filed a new TDCJ grievance within three days—the June 11, 2021 grievance discussed above that expressly ties spiritual-advisor presence back to pre-*Murphy* TDCJ practices and expectations, stating that the relief he seeks is: “That I be ALLOWED to have my Spiritual Advisor ‘lay hands on me’ & *pray over me* while I am being executed? THANK YOU!” *See id.* (emphasis added).

The first time petitioner learned that his spiritual advisor's “prayer” in the chamber would have to be *silent* was when TDCJ General Counsel revealed that new qualification in an August 19, 2021 letter to petitioner's counsel—nine days after petitioner's August 10, 2021 complaint had been filed in the Southern District of Texas and less than three weeks before his September 8, 2021 execution date. JA 1,

103-04. The silent-prayer rule appears nowhere in TDCJ's current, written execution policy. *See generally* JA 133-52.

At every turn, TDCJ has moved the ball rather than grant petitioner access to the sincere religious practices that his faith requires—and that TDCJ has historically permitted in the execution chamber. TDCJ's theory of exhaustion renders its grievance system an effectively unavailable “dead end”—a Sisyphean repetition of futile exhaustion and re-exhaustion that the PLRA precludes. *See Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016) (noting that exhaustion is not required where administrative remedies, though “officially on the books, [are] not capable of use to obtain relief,” with officials “consistently unwilling to provide any relief to aggrieved inmates”); *see also* 42 U.S.C. § 1997e(a) (prisoners must exhaust “such administrative remedies as *are available*” (emphasis added)). This Court should reject the State's attempt to manipulate its policies and grievance system into a trap for condemned inmates who comply with grievance procedures and provide prison officials ample opportunity to attempt good-faith resolution of inmates' objections to being executed in a manner that substantially—and unnecessarily—burdens their sincere religious beliefs in violation of RLUIPA.

IV. IF THE STATE PERSISTS IN REFUSING PETITIONER'S REQUESTS FOR CORE RELIGIOUS PRACTICES IN THE EXECUTION CHAMBER, THIS COURT SHOULD TEMPORARILY ENJOIN THE STATE FROM EXECUTING PETITIONER IN A MANNER THAT VIOLATES RLUIPA AND REMAND FOR PROCEEDINGS ON A PERMANENT INJUNCTION THAT REQUIRES THE STATE TO ACCOMMODATE PETITIONER'S SINCERELY HELD RELIGIOUS BELIEFS.

Petitioner's suit does not seek an open-ended stay of execution. It seeks to enjoin the State from executing petitioner *in a manner that disrespects petitioner's sincere religious beliefs in violation of RLUIPA*. JA 101-02; *cf. Hill v. McDonough*, 547 U.S. 573, 580-81 (2006) (observing that inmate's request to enjoin the State's intended manner of execution left open other procedures to execute him, thus, "[u]nder these circumstances, a grant of injunctive relief could not be seen as barring the execution of [that inmate's] sentence"). If the State persists in refusing to accommodate petitioner's sincere religious beliefs regarding end-of-life ministrations in the execution chamber, as required by RLUIPA, petitioner seeks a remand to fully litigate his right to a permanent injunction that would require the State to allow these core religious practices in the execution chamber.

Should the State's refusal necessitate such a remand, this Court can direct the courts below to act with "appropriate dispatch." *Roane*, 140 S. Ct. 353. Such a directive would ensure meaningful

consideration of federal protections of religious liberty while also advancing the State’s “important interest in timely enforcement of [petitioner’s] sentence.” *See Hill*, 547 U.S. at 584. And, to ensure that petitioner is not executed in a manner that violates RLUIPA while remand proceedings are ongoing, this Court should temporarily enjoin TDCJ from executing petitioner without allowing Pastor Moore not only to be present in the chamber where petitioner is executed, but also to lay hands on petitioner and to audibly pray during the lethal-injection procedure that will result in petitioner’s death.

The equities favor petitioner. His religious-liberty-grounded requests are not “dilatory or speculative.” *Id.* at 585 Petitioner has consistently pursued his pastor’s presence in the chamber so that Pastor Moore can administer the religious practices required by petitioner’s faith as petitioner dies—the pastor’s laying hands on petitioner and audibly praying over petitioner as the State’s lethal-injection procedures end petitioner’s life. *See supra* pp. 6-10, 38-43. It is the State that has prolonged litigation of this issue, withdrawing its 2020 execution date in exchange for dismissal of petitioner’s original suit and promulgating multiple inconsistent policies when it comes to religious-liberty requests from condemned inmates. *See supra* 28-37, 40-43; JA 71.

Petitioner’s requests stem directly from his sincerely held religious beliefs and practices, which are shared by many religions. *See supra* Part I.A. His

requests are concrete, not speculative, and are firmly rooted in RLUIPA requirements the State cannot overcome—especially given the State’s long tradition of allowing *the very same religious behavior petitioner requests*. See *supra* Part II.C.I; *cf. O Centro*, 546 U.S. at 428 (emphasizing that when a RFRA plaintiff asserting a substantial burden on a sincere religious belief seeks pretrial relief in the form of a preliminary injunction, *the government* must “demonstrate that the application of the burden to the [plaintiff] would, more likely than not, be justified by the asserted compelling interests”). Thus, petitioner’s chance of success on the merits is significant. See *Hill*, 547 U.S. at 584.

Nor would the temporary injunction petitioner requests pending resolution of proceedings on remand provide a pathway for abuse by future capital litigants who, the State may fear, seek only delay. RLUIPA inherently imposes a limiting principle that guards against such tactics: It is a statute rooted in concreteness and specificity that would demand an inmate’s identification, and proof, of a sincerely held religious belief that a state’s execution procedures would substantially burden; and it would demand that the State identify, and prove, a compelling interest particularized to the request at hand that is unachievable by less restrictive means. 42 U.S.C. §§ 2000cc–1(a), –2(b); *cf. O Centro*, 546 U.S. at 435-36 (rejecting the government’s “slippery-slope concerns”—“the classic rejoinder of bureaucrats throughout history”—regarding exceptions required by RFRA’s prescribed balance between “religious liberty

and competing prior governmental interests”). RLUIPA provides no universal pathway for delay if petitioner is permitted to pursue his faith-based claim.

Petitioner’s RLUIPA suit seeks to achieve one thing: accommodation of the religious practices his faith requires in his dying moments. This Court should ensure that the State does not execute petitioner in a manner that violates his sincerely held religious beliefs and RLUIPA’s requirements.



CONCLUSION

The judgment of the court of appeals should be reversed. This Court should remand with instructions for the district court to hold an evidentiary hearing on petitioner's Free Exercise claims, and the Court should issue a temporary injunction pending resolution of proceedings on the merits of petitioner's claims, prohibiting TDCJ from executing petitioner in a manner that violates RLUIPA's requirements.

Respectfully submitted,

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton St.
Austin, TX 78705

SETH KRETZER
Counsel of Record
LAW OFFICES OF SETH KRETZER
9119 South Gessner
Suite 105
Houston, TX 77074
(713) 775-3050
seth@kretzerfirm.com

ERIC J. ALLEN
ALLEN LAW OFFICES
4200 Regent St.
Suite 200
Columbus, OH 43219

September 27, 2021