

No. 21-5592

In the Supreme Court of the United States

JOHN H. RAMIREZ, PETITIONER

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DE-
PARTMENT OF CRIMINAL JUSTICE ET AL., RESPONDENTS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF OF SPIRITUAL ADVISORS AND FORMER
CORRECTIONS OFFICIALS AS *AMICI CURIAE*
SUPPORTING PETITIONER**

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INTEREST OF *AMICI CURIAE**

Amici curiae are a group of spiritual advisors who have been present in the death chamber during executions and a group of corrections experts who have more than 150 years of experience in prison administration, collectively, and have witnessed or overseen more than 50 executions. Although *amici* come from different backgrounds, follow different faiths, and hold different views on the death penalty, they share a commitment to ensuring that individuals facing death via execution are not denied the opportunity to observe their faith as fully as possible in their final moments. *Amici* believe that allowing the support of a spiritual advisor in the execution chamber during the execution process is critical to respecting the dignity and religious-freedom rights of the prisoner. And *amici*'s experiences show that prohibiting spiritual advisors from praying aloud and "laying of hands" on a prisoner during an execution is not necessary from a security standpoint and thus not the least restrictive means of advancing the State's interests, as required by the Religious Land Use and Institutionalized Persons Act.

Clergy and Spiritual Advisors

Father Mark O'Keefe is a Roman Catholic priest and a member of the Order of St. Benedict (Ordo Sancti Benedicti). He was present in the death chamber as a spiritual advisor when the federal government executed Dustin Honken in July 2020. While in the death chamber, before

* Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* affirm that all parties have filed blanket letters of consent to the filing of amicus briefs with the Clerk's Office.

the administration of lethal drugs, Father O’Keefe was permitted to perform last rites for Mr. Honken, which included giving communion, praying aloud, and touching and anointing him with holy oils.

Sister Barbara Battista is a Roman Catholic Sister and a member of the Sisters of Providence of Saint Mary-of-the-Woods, Indiana. She served as the spiritual advisor for Keith Dwayne Nelson in August of 2020 and William Emmett LeCroy in September of 2020 when they were executed by the federal government. While in the execution chamber, she was allowed to speak with both men and pray audibly with Mr. LeCroy throughout the duration of the execution.

Dr. Yusuf Nur is an Associate Professor at Indiana University at Kokomo and a local Muslim leader. He served as the spiritual advisor for two recent federal executions: the execution of Orlando Hall in November 2020 and the execution of Dustin Higgs in January 2021. Both times, he was present in the execution chamber and permitted to pray audibly.

Rev. Dale Hartkemeyer (aka Seigen) is a Buddhist priest and served as the longtime spiritual advisor for Wesley Purkey, who was executed by the federal government in July 2020. During the execution, Rev. Hartkemeyer stood in the chamber and was permitted to audibly chant a sutra until Mr. Purkey died.

Rev. Bill Breeden is a Unitarian Universalist minister. He witnessed a federal execution in January 2021 as the designated Minister of Record for Corey Johnson. He was present in the death chamber and delivered audible prayers.

Sister Helen Prejean is a Catholic nun who has served as a spiritual advisor for six executions in different

states. At the 1997 execution of Joseph O'Dell in Virginia, she was permitted to visit with Mr. O'Dell in the death chamber, stand near his head with her hand on his shoulder, and pray out loud.

Corrections Officials

Justin Jones spent 36 years with the Oklahoma Department of Corrections, where he served as Director from 2005 through 2013. He has also served as the Chair of the Commission on Accreditation for the American Correctional Association. He has witnessed or overseen 28 executions.

Dan Pacholke is the former Secretary of the Washington State Department of Corrections, the top position within the Department. He served in the Department for 33 years. He is a co-author of *Keeping Prisons Safe: Transforming the Corrections Workspace* (2014). He has witnessed three executions and overseen one execution.

Emmitt Sparkman is the former Deputy Commissioner of Institutions for the Mississippi Department of Corrections. His career in adult and juvenile corrections spans over 46 years. He has held line and management positions in Texas, Kentucky, and Mississippi. He has witnessed or overseen 17 executions.

Eldon Vail is the former Secretary of the Washington State Department of Corrections. He has more than 40 years of experience in the field of corrections and has served as an expert witness in numerous prison-related cases across the country. He has witnessed or overseen three executions.

SUMMARY OF ARGUMENT

John Henry Ramirez is to be executed. In his final moments, he wishes to have Dana Moore, his pastor of five

years, pray aloud and lay hands on him. But the State has denied that right to Mr. Ramirez. The State will allow Pastor Moore to stand in the execution chamber and nothing else. Pastor Moore cannot speak, pray out loud, or lay hands upon Mr. Ramirez as he confronts his imminent death and takes his last breaths.

The State’s complete ban on audible prayer and the “laying of hands” on Mr. Ramirez violates the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq., which was enacted “to provide very broad protection for religious liberty” by subjecting the State to strict scrutiny whenever it substantially burdens a prisoner’s religious exercise. *Holt v. Hobbs*, 574 U.S. 352, 356-57 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)).

Barring spiritual advisors from praying audibly and physically touching prisoners during an execution denies those about to die their right to faith-based solace and religious practice when it matters most, and it unquestionably constitutes a substantial burden on religious exercise. As the spiritual-advisor *amici* can affirm, their role in the execution chamber is not simply to stand by mutely, but to *minister* to the prisoner as he meets death, providing spiritual comfort and a final opportunity for the individual to engage with his faith at the most critical time.

The State’s complete ban on audible prayer and physical touch is also not the least restrictive means of furthering the government’s security interests. Under RLUIPA, “[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.” *Holt*, 574 U.S. at 368 (quoting *Procunier v. Martinez*, 416 U.S. 396, 414, n.14 (1974), *overruled by Thornburgh v. Abbot*, 490 U.S. 401 (1989)). The historical practice of prison

chaplains in and outside of Texas, as well as *amici*'s experiences with numerous executions in other jurisdictions, demonstrate that the religious practices Mr. Ramirez has requested can be and have been implemented without jeopardizing the integrity of the execution. The contrary judgment of the Fifth Circuit should be reversed.

ARGUMENT

THE STATE'S REFUSAL TO ALLOW MR. RAMIREZ'S PASTOR TO AUDIBLY PRAY AND LAY HANDS ON HIM VIOLATES RLUIPA.

RLUIPA provides that “[n]o government shall impose a substantial burden on the religious exercise” of a prisoner unless the State “demonstrates that [the] 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). Once an individual shows that the State’s action imposes a substantial burden on his religious exercise, the burden shifts to the State to show its policy is the least restrictive means of furthering a compelling government interest. *See Holt v. Hobbs*, 574 U.S. 352, 362–63 (2015).

In this case, the State has substantially burdened Mr. Ramirez’s religious exercise by denying his final religious requests and is unable to demonstrate why doing so is the least restrictive means of achieving a compelling governmental interest.

A. The State’s Policy Imposes a Substantial Burden on Mr. Ramirez’s Religious Exercise.

RLUIPA defines “religious exercise” broadly to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. §

2000cc-5(7)(A). Of course, “a prisoner’s request for an accommodation must be sincerely based on a religious belief.” *Holt*, 574 U.S. at 360-61.

Mr. Ramirez believes that his pastor’s “laying of hands” on him as he dies, while vocalizing prayers and scripture, will guide him to the afterlife. Compl. in 4:21-cv-02609, Doc. 12, Ex. 2 (S.D. Tex.) (Aff. of Pastor Moore). This belief is consistent with the Christian tradition, which has long held as a central tenet that a person’s dying moments are critical to salvation and that, just as Jesus Christ ministered to the men being crucified alongside him, *see Luke 23:42-43*, clergy must help the condemned to seek salvation. “The last moments of life were believed to be crucially important during the later Middle Ages. . . . [A]t this critical juncture, the Church offered help generally regarded as indispensable in making a safe departure from the world . . .” Ralph Houlbrooke, *Death, Religion, and the Family in England, 1480-1750* 147–49 (1998).

The sincerity of Mr. Ramirez’s belief likewise is not in doubt. Yet Respondents maintain that denying his last religious requests is not a substantial burden on Mr. Ramirez’s religious practice. They offer two arguments, both of which are erroneous.

1. Respondents argue that they have done enough to satisfy Mr. Ramirez’s religious requests. Br. in Opp. at 19-20, *Ramirez v. Collier*, No. 21-5592 (Sept. 8, 2021). Respondents note that, under current Texas Department of Criminal Justice (TDCJ) protocol, Mr. Ramirez can meet with his pastor before the execution. *Id.* But “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. Any accommodations the State may make before the execution

do not reduce the burden on Mr. Ramirez’s fundamental religious need to have his pastor guide him to the afterlife *while* he is being put to death. Thus, under RLUIPA, the fact that Mr. Ramirez may have other ways to exercise his faith is irrelevant. What matters is whether *this* particular religious belief is sincere, and whether he is prevented from exercising it at this spiritually critical moment. Both of those requirements are undoubtedly met.

2. Respondents further argue that RLUIPA only proscribes states from imposing policies that coerce a person to do what his religious tenets forbid. Br. in Opp. at 18, *Ramirez v. Collier*, No. 21-5592 (Sept. 8, 2021). In Respondents’ view, because the State does not force Mr. Ramirez to violate his religious beliefs, the State has not run afoul of RLUIPA. That is not the law.

The text of RLUIPA is not so narrow as to limit its application to coercion. It broadly prohibits states from imposing “a substantial burden” on “religious exercise,” 42 U.S.C. § 2000cc-1(a), and defines religious exercise as “*any* exercise of religion.” 42 U.S.C. § 2000cc5(7)(A) (emphasis added). RLUIPA is to “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g). And, Congress enacted RLUIPA—and its sister, RFRA—specifically in response to this Court’s holding that “neutral” and “generally applicable laws that incidentally burden the exercise of religion” do not run afoul of the Free Exercise Clause. *Holt*, 574 U.S. at 356-57. The State’s proposal is at odds with the plain language of RLUIPA and the very purpose of the statute.

Moreover, if RLUIPA only proscribed coercing prisoners to disobey their religion, it would not protect *any*

religious requests at the time of death. A policy forbidding pastors even from being in the building during an execution would survive challenge. But this Court already rejected that erroneous reasoning in *Dunn v. Smith*. 141 S. Ct. 725 (2021) (mem.). There, Alabama argued that it could bar all clergy members from the execution chamber in the name of security. The Court disagreed. Writing for four Justices, Justice Kagan explained that “[t]he law guarantees [an incarcerated person] the right to practice his faith free from unnecessary interference, including at the moment the State puts him to death.” *Id.* at 726 (Kagan, J. concurring). Because Smith believed that his minister’s presence was integral to his faith and essential to his spiritual search for redemption, Alabama’s policy excluding his minister from the execution chamber substantially burdened his religious exercise under RLUIPA. *Id.* at 725.

Respondents contend that *Holt* supports the notion that RLUIPA proscribes only conduct that coerces a prisoner to disobey his religion. Br. in Opp. at 18-21, *Ramirez v. Collier*, No. 21-5592 (Sept. 8, 2021). But *Holt* discusses coercion because that was the issue in that case, not because it is the *only* state activity proscribed by RLUIPA. If anything, the State’s actions in this case are *worse* than the actions in cases involving coercion. In those cases, there may be some dispute about the extent of coercion and the degree of interference with religious rights. See, e.g., *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (the coercion must “truly pressure[] the adherent to significantly modify his religious behavior”); *New Doe Child #1 v. Cong. of U.S.*, 891 F.3d 578, 590 (6th Cir. 2018) (coercion requires “substantial pressure”). But where, as here, the State imposes an outright, prohibition on the religious activity sought, there can be no question that religious exercise is substantially burdened. See *Yellowbear*

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

Respondents argue that if denying Mr. Ramirez’s requests imposed a substantial burden, then so too would denying a request to transport an individual to an off-campus church or to provide him with religious paraphernalia during the execution. Br. in Opp. at 19, *Ramirez v. Collier*, No. 21-5592 (Sept. 8, 2021). This argument is just “another formulation of the ‘classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.’” *Holt*, 574 U.S. at 368 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). As this Court explained in *Holt*, it has “rejected a similar argument in analogous contexts.” *Id.*

By completely denying Mr. Ramirez’s request to have his pastor lay hands on him, while vocalizing prayers and scripture, as he dies, the State is substantially burdening his free exercise of religion. RLUIPA forbids TDCJ from doing so.

B. The State’s Justifications for Denying Mr. Ramirez’s Requests Do Not Withstand Strict Scrutiny.

Once Mr. Ramirez establishes that his “exercise of religion is grounded in a sincerely held religious belief” and that the government’s action “substantially burden[s] that exercise of religion,” the burden “shift[s]” to the gov-

ernment to show that substantially burdening the religious exercise of the “particular claimant,” *Holt*, 574 U.S. at 361-63, is “the least restrictive means of furthering [a] compelling interest.” 42 U.S.C. § 2000cc-1. Texas’s policy of barring Mr. Ramirez from hearing prayers and having the touch of his pastor in his last moments “must withstand strict scrutiny.” *Dunn*, 141 S. Ct. at 725 (Kagan, J., concurring). That standard is “exceptionally demanding.” *Holt*, 574 U.S. at 364 (citation omitted). Even where a state asserts a “compelling interest,” RLUIPA “does not permit” the Court to give the state “unquestioning deference.” *Id.* at 363-64. “[C]onclusory statements about the need to protect inmate security” do not meet a governmental entity’s burden under RLUIPA. *Spratt v. R.I. Dep’t of Corr.*, 482 F.3d 33, 40 n.10 (1st Cir. 2007). Nor do conclusory statements about the efficacy of other, less restrictive alternatives. RLUIPA “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.” *Id.* (alteration in original) (internal quotation marks omitted). And, “[i]f 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)) (emphasis added). This prong of the analysis requires at a minimum “some consideration [of] less restrictive alternatives,” *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012), accompanied by some “explanation . . . of significant differences” that “render” the less restrictive policies “unworkable,” *Spratt*, 482 F.3d at 42 (considering less restrictive policies of other jurisdictions); accord *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). The restrictive policy must be supported by “reasoned judgment” and demonstrated by facts. *Spratt*, 482 F.3d

at 42 n.14. And, courts must “look[] beyond broadly formulated interests justifying the general applicability of government mandates” and “scrutinize[] the asserted harm” of denying the relief or alternative course of action proposed by the religious claimant. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. at 431; *see also* 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (“policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RLUIPA’s] requirements”).

Respondents have not and cannot meet that burden here. *Amici* have either overseen the security of executions or have been spiritual advisors present in execution chambers. Consistent with the historical practice in Texas, *amici* all agree that the relief requested by Mr. Ramirez would not be disruptive and that any concerns by the state can be addressed through the implementation of basic protocols.

1. *Spiritual Advisors Have Long Played a Role in Executions.*

1. There is a longstanding tradition of spiritual advisors providing prayer and support in the last moments before, and at the moment of, death of those executed by the state. At the Founding, a clergyman’s “execution sermon” from the scaffold went hand-in-hand with “last words[] and dying confessions of the prisoner.” Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865* 26 (1989). This clerical role “had become so formulaic that, in 1791, William Smith . . . published a guide for ministers [that contained] Suitable Devotions Before, and at the Time of Execution.” *Id.* at 40 (internal quotation marks

omitted); *see also* Historical Newspaper Articles, *Hartkemeyer v. Barr*, No. 2:20-cv-00336 (S.D. Ind.), ECF No. 60-3, at 1-3.¹ These vocal devotions were spiritually critical for both the prisoner being executed and the clergy ministering to them.

Federal executions have long recognized the hallowed place of spiritual advisors and followed this tradition. The first known federal execution, the hanging of Thomas Bird in 1790,² incorporated “solemn religious exercises.” *See Portland, Cumberland Gazette*, June 28, 1790 (*Hartkemeyer*, ECF No. 60-3, at 1). The practice of federal executions contemplated ministry from, and ritual performed by, clergy up to the place and time of death.³ The policy of incorporating clergy into federal executions continues today, as illustrated by the recent federal executions witnessed earlier this year and last year by five of the spiritual-advisor *amici*.

¹ Unsurprisingly, these American traditions were similar to English practices during the colonial era. *See, e.g.*, Randall McGowen, *The Body and Punishment in Eighteenth-Century England*, 59 J. Mod. Hist. 651, 651 (1987) (“The condemned . . . were accompanied by a clergyman who shadowed their last moments urging them to repent or consoling them with the offer of divine forgiveness.”).

² *See* “Historical Federal Executions,” United States Marshals Service, <https://www.usmarshals.gov/history/executions.htm> (last visited Sept. 27, 2021).

³ *See May 10*, Vergennes Gazette & Vt. & N.Y. Advertiser, May 29, 1800, *Hartkemeyer*, ECF No. 60-3, at 2 (reporting federal executions in which condemned prisoners were “attended to the place of execution” by clergymen, where they prayed and expressed contrition); *The Execution of Edward F. Douglass and Thomas Benson for the Murder of Ava A. Havens*, Bos. Herald, Jul. 28, 1851, at 1 (reporting federal executions in which clergymen accompanied and embraced prisoners on the gallows).

Allowing spiritual advisors to deliver audible prayers during an execution and place their hands on an individual during their final moments has also been common practice in Texas specifically. For example, there have been repeated reports of chaplains touching the prisoner's leg or ankle during an execution to offer spiritual comfort. *See, e.g., Murphy v. Collier*, No. 4:19-cv-01106 (S.D. Tex.), ECF No. 38-8, at 19:4-8 (Excerpt of TDCJ Chaplain Wayne Moss's testimony) ("[W]e'd put our hand, like, on their ankle, kind of just to indicate a presence, you know, so that they would feel that someone was there with them."). Former TDCJ chaplain Jim Brazzill, who was present in the death chamber for more than 100 executions, has explained, "I usually put my hand on their leg right below their knee. And I usually give them a squeeze and let them know that I'm right there." *All Things Considered: Witness to an Execution*, NPR (Oct. 12, 2000); *see also* Pamela Colloff, *The Witness*, Tex. Monthly (Sept. 2014), <https://www.texasmonthly.com/articles/the-witness/>, ("[Mr. Brazzill] had perhaps the most difficult job of all; during his six-year tenure, it was he who stood in the death chamber with the warden, one hand resting on the condemned's leg, and it was he who closed prisoners' eyes once they lost all sign of life."). Similarly, former TDCJ chaplain Richard Lopez described his practice of placing his hands on an individual's ankles as he receives the injection "until death occurs." *INTO THE ABYSS* (IFC Films 2011); *see also* Salatheia Bryant, *Chaplains Offer Faith to Those on Death Row*, Hous. Chron. (July 30, 2007), <https://www.chron.com/life/houston-belief/article/Chaplains-offer-faith-to-those-on-death-row-1806245.php> (describing Mr. Lopez as standing at an individual's "feet quietly commending her spirit to God" as she took her last breath).

Former TDCJ Chief Spokesperson Michelle Lyon, who witnessed 278 executions in Texas, described this practice as one of “the small courtesies that the prison staff extended to the condemned.” Colloff, *The Witness*, (noting that “the chaplain placed his hand on the right leg of the restrained prisoner, just below the knee, to reassure him during his final moments.”). “By placing their hand on the inmate's body at the time of injection, [spiritual advisors] emphasize the importance of being there because they believe no one should have to die alone.” Walter C. Long, *The Constitutionality and Ethics of Execution-Day Prison Chaplaincy*, 21 Tex. J. on C.L. & C.R. 1, 3 (2015) (footnote omitted).

2. The experiences of the *amici* spiritual advisors and clergy affirm what has been proven through the above history and the practices of TDCJ chaplains—spiritual advisors can audibly pray and touch an individual without putting security at risk during an execution.

Father Mark O’Keefe served as Dustin Honken’s “minister of record” during a federal execution last year. Because he was a regular volunteer at the federal prison, he had already undergone a background check. On the day of the execution, Father O’Keefe was screened thoroughly by security and accompanied by an agent escort at all times—except for the brief period during which he accepted Mr. Honken’s final confession. When it was time for the execution to begin, Father O’Keefe was led to the execution chamber. Mr. Honken was already strapped to a gurney with an IV inserted into his body, wires attached to him that appeared to be for a heart monitor, and an oxygen gauge placed on his finger. In the presence of prison officials and the agent escort, Father O’Keefe went to Mr. Honken to administer his last rites. Father O’Keefe gave him his final communion, placing a host on Mr. Honken’s

tongue, putting holy oil on his head and hands, and delivering several prayers out loud. Though he stepped back while the lethal drugs were administered, after Mr. Honken was pronounced dead, Father O'Keefe again went to his body, blessed him, and prayed out loud. Vocal prayer and touch are an important part of Catholic practice and were essential to Father O'Keefe's ministry during the execution. For example, one of the basic things that Catholic priests are trained to do when they visit someone in the hospital is to touch the patient (with permission) while praying aloud because it establishes a sacred bond. Indeed, the last rites are not valid without touching. And audible prayer provides spiritual assurance and comfort to those listening.

Sister Barbara Battista attended the federal executions of Keith Dwayne Nelson and William Emmett LeCroy last year as their minister of record. Before she was accepted as a minister of record for Mssrs. Nelson and LeCroy, she was required to undergo a background check. On the days of the executions, she was subjected to extensive security screenings, including taking off her shoes, going through a metal detector, and being searched with a security wand. Sister Battista was present in the death chambers during both executions, along with the executioner, a federal marshal, and a high-ranking prison official who stood by her throughout the proceedings. Although Mr. Nelson did not request that she pray audibly for him, Sister Battista was permitted to speak with him while he lay strapped to the gurney, conveying messages from family and friends and other thoughts. As the lethal drugs were administered to Mr. Nelson, she prayed silently, moving her lips. After Mr. Nelson died, she was permitted to pray aloud over his body and touch parts of it to anoint him with sacred oils. Mr. LeCroy, by contrast, asked Sister Battista, to pray vocally for him. During his

execution, she prayed out loud, reciting portions of the Divine Mercy Chaplet, which she and Mr. LeCroy had previously discussed. He joined at times until the lethal drugs were administered. She continued her audible prayers until he stopped breathing, after which she blessed his body and, as with Mr. Nelson, anointed him with oils. While neither Mr. Nelson nor Mr. LeCroy requested physical touch, Sister Battista views human touch in this context an act of love and care that provides spiritual comfort during the individual's return to God and religious affirmation that the individual—despite any misdeeds—is loved by God. Based on her experiences during the recent federal executions, Sister Battista believes she or other spiritual advisors could provide this comfort, where requested, without interfering with the execution.

Dr. Yusuf Nur was present in the execution chamber for the federal executions of Orlando Hall in 2020, and Dustin Higgs in 2021. Like the other spiritual advisors at recent federal executions, he was subjected to the background check required to become a minister of record and went through a security search before each execution. In addition, he was assigned a security escort who accompanied him into the death chamber for both executions. During the executions, Dr. Nur recited aloud the Surah Yaseen, a prayer in which the prayer giver asks for forgiveness of all sins before death. Both men joined him in praying. After Messrs. Hall and Higgs died, Dr. Nur went to their bodies, where he was able to touch them while reciting out loud the Salat al-Janazah, an Islamic funeral prayer that asks God for forgiveness on behalf of the deceased. The ability to deliver verbal prayers in this context was critical: It allowed the two men to spiritually connect with Dr. Nur and exercise their faith in their final moments, as well as receive Dr. Nur's religious affirmations of assurance, kindness, and compassion. Although

Dr. Nur did not have the opportunity to touch the men before their deaths, he believes he could have done so without disrupting the execution and that this act would have played a vital role in offering spiritually soothing comfort to the men, affirming their humanity after they had been denied the benefit of any human touch for years or decades.

Rev. Dale Hartkemeyer served as the spiritual advisor for Wesley Purkey during a 2020 federal execution. He also was subject to stringent security protocols before attending the execution, and he was accompanied by an escort who stayed near him throughout the proceeding. When Rev. Hartkemeyer entered the execution chamber, Mr. Purkey was strapped to a gurney with an IV inserted. He was permitted to stand next to Mr. Purkey to greet him and talk with him before the proceeding began. Once officials began to administer the lethal drugs to Mr. Purkey, Rev. Hartkemeyer chanted audibly, repeating a sutra (Buddhist scripture) until the executioner announced the time of death. He was then invited to stand next to Mr. Purkey's body and resume his chanting. The ability to chant vocally as Mr. Purkey passed was vital as a spiritual matter: For Buddhists, a person's state of mind at the moment of death, when their consciousness transitions, is significant for karmic reasons. Rev. Hartkemeyer's presence and chanting provided spiritual consolation and compassion to help Mr. Purkey attain peace of mind and equanimity as he left this life. Without Rev. Hartkemeyer's presence and chanting, Mr. Purkey would have been less likely to achieve the full liberation and peaceful transition that death represents in the Buddhist faith.

Rev. Bill Breeden was present in the execution chamber for the federal execution of Corey Johnson in January

2021. As a minister of record for another prisoner on death row, Rev. Breeden had already submitted to a background check. Like the other spiritual advisors who attended federal executions, he went through a metal detector and was searched before being admitted to the prison. In addition, the prison chaplain escorted him to the death house, where a member of the execution team walked with him into the execution chamber and stood next to him during the entire process. As Mr. Johnson lay strapped to the gurney, Rev. Breeden prayed aloud, giving thanks for Mr. Johnson's life. Rev. Breeden believes the ability to do so was critical to his ministry. For him, praying internally is a personal affair, but praying vocally allowed him to connect with Mr. Johnson and offer him spiritual comfort as well as a reminder of his humanity as he passed from this world. Though he was kept at a distance from Mr. Johnson during the execution, Rev. Breeden was permitted to place his hands on Mr. Johnson's heart after he died and bless him with another audible prayer. Mr. Johnson did not specifically request that Rev. Breeden touch him during the execution. But for those who do ask, Rev. Breeden believes that denying the request has profound spiritual implications because touch is spiritually healing, as made clear by *Acts* 8:14 (New King James) ("Then Peter and John placed their hands on them, and they received the Holy Spirit.") and *Mark* 10:13-16 (English Standard Version) ("And they were bringing children to him, that he might touch them; and the disciples rebuked them. But when Jesus saw it, he was indignant, and said to them, 'Let the children come to me; do not hinder them, for to such belongs the kingdom of God. . . .' And he took them in his arms and blessed them, laying his hands on them.").

Sister Helen Prejean witnessed the Virginia execution of Joseph O'Dell in 1997. Immediately before the execution began, she was permitted to visit Mr. O'Dell in the death chamber. He was strapped tightly to a gurney with IVs in both arms when she arrived. Sister Prejean stood near his head with her hand on his shoulder and prayed out loud. For Sister Prejean, the ability to touch Mr. O'Dell while praying was a religious affirmation of Mr. O'Dell's humanity and conveyed to him the message that he still retained his dignity as a child of God as he passed over into death. Sister Prejean believes that spiritual advisors should be permitted to touch and pray aloud with those being executed and can do so without disruption to the execution.

In none of the instances discussed above did *amici*'s audible prayers or the touching of the prisoner cause any issues with the execution. Rather, in *amici*'s experience, vocal prayer and physical touch can have a calming effect, connecting individuals to the spiritual advisor on a fundamental level and providing them with a final opportunity to connect with and practice their faith as they die.

Tellingly, despite all of these instances of audible prayer and physical touching during executions by spiritual advisors and chaplains—both in Texas and elsewhere—“[n]owhere . . . has the presence of a clergy member (whether state-appointed or independent) disturbed an execution.” *Dunn*, 141 S. Ct. at 726 (Kagan, J., concurring).

2. *The Presence of Spiritual Advisors Does Not Pose a Security Concern.*

1. The experiences of *amici* who have served as corrections leaders likewise counsel in favor of granting Mr. Ramirez's request. Combined, these *amici* have observed

or overseen more than 50 executions and all agree that Mr. Ramirez's religious practices can be accommodated while maintaining an orderly and secure execution. The primary concern with conducting any execution, they confirm, is the proper administration of the IV. As long as spiritual advisors, like all other participants, remain clear of the IV lines, their prayers or touch would not cause any issues with the execution. The corrections *amici* agree that security screenings and proper physical placement of the spiritual advisor can adequately mitigate any security concerns.

Mr. Justin Jones worked at the Oklahoma Department of Corrections for more than 35 years, serving as the department's director from 2005 to 2013. During his tenure as director, Mr. Jones oversaw 28 executions and was in the viewing chamber for 27 of these executions. Although Mr. Jones does not recall an individual requesting that a spiritual advisor be present in the death chamber itself during the execution, he would have granted the request if he had received one. He does not believe that an advisor's presence in the execution chamber, or that advisor's audible prayer or physical touch, would interfere with the execution. In his experience, in addition to conducting security screenings of the advisor, allowing the spiritual advisor to stand at and touch the shoulders, ankles, or feet of the individual, depending on the layout of the particular room, would mitigate any security risks.

Mr. Dan Pacholke worked at the Washington State Department of Corrections for 33 years, starting as a corrections officer and retiring as secretary, the highest position within the department. He has witnessed three executions and overseen one during his career, which included responsibility for the security of those proceed-

ings. Mr. Pacholke does not recall an individual requesting that a spiritual advisor be present in the chamber during any executions carried out under his supervision, though he would have granted the request if he had received one. Consistent with other *amici*, in Mr. Pacholke's experience, the proper placement of the IV line is the chief concern during executions. Audible prayer does not affect this concern in any way, and is not disruptive, and he believes it should be permitted. Moreover, he believes that, through adequate security measures, such as screenings, training, and background checks, as well as specific instructions to the advisor on where to stand during the execution, touch requests like Mr. Ramirez's can easily be accommodated with little risk of disruption. Specifically, physical touch during an execution would not be disruptive as long as the advisor places his hands on the individual's shoulder, ankles, or feet so as to avoid any interference with the IV.

Mr. Emmitt Sparkman has more than forty-six years of experience working in adult and juvenile institutional and community corrections. Among other positions, he served as the Deputy Commissioner of Institutions for the Mississippi Department of Corrections from 2002 to 2013. Mr. Sparkman also served as Superintendent of Mississippi State Penitentiary, known as Parchman, where the state's executions are carried out. In his role, Mr. Sparkman helped draft Mississippi's protocols for lethal injections, which he and his department modeled after Texas's protocols. Mr. Sparkman oversaw 17 state executions and chaplains were routinely allowed in the execution chamber. In his experience, the presence of a religious adviser has a calming effect on the individual being executed which may lead to fewer disruptions. During the execution, the chaplain would enter the chamber after the indi-

vidual was secured on a gurney and would talk to the individual, pray, and/or recite religious verses. These activities never interfered with an execution. Further, with proper security screening, he believes spiritual advisors may safely place their hands on an individual's shoulders, ankles, or feet.

Mr. Eldon Vail served as the Secretary of the Washington State Department of Corrections from 2007 to 2011. He has more than 30 years of experience at the Department, starting as a corrections officer. He has overseen three executions, sitting in the chamber during one of them. In that execution, Mr. Vail recalls a spiritual advisor being present in the room, near the individual's feet, and praying audibly throughout the process. Neither the advisor's presence nor his prayer was disruptive to the execution. To the contrary, in Mr. Vail's experience, the presence and prayer of the spiritual advisor had a calming effect on the prisoner. Mr. Vail does not believe that the individual requested his advisor lay hands on him. But if he had made this request, Mr. Vail would have accommodated it and allowed the spiritual advisor to touch either the prisoner's feet, ankles, or shoulder. He would have mitigated security concerns by thoroughly vetting the advisor and setting out expectations for the advisor prior to the event.

2. Given the long history of spiritual care during executions and the experiences of *amici*, it is not surprising that Respondents do not identify any particular concerns raised by Mr. Ramirez's requests. In fact, they concede that Mr. "Ramirez himself may pray aloud as a final statement" in the execution chamber. Br. in Opp at 19-20, *Ramirez v. Collier*, No. 21-5592 (Sept. 8, 2021). Respondents do not—nor could they credibly—explain why Pastor Moore's audible prayers pose a security concern but Mr.

Ramirez’s do not. Nor do Respondents identify why Pastor Moore’s physical touch poses a risk of any kind, particularly in light of the history from Texas and other jurisdictions recounted above.

Indeed, the record in *Gutierrez v. Saenz* establishes that the State could easily accommodate Mr. Ramirez’s requests. There, this Court granted a stay of execution when Mr. Gutierrez requested that his spiritual advisor be present in the execution chamber. This Court directed the district court to determine on remand “whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution.” *Gutierrez v. Saenz*, 141 S. Ct. 127, 128 (2020) (mem.). Relying on detailed findings of facts regarding executions in Texas, the district court concluded unequivocally that allowing Mr. Gutierrez to have the assistance of a spiritual advisor would not interfere with the execution. See *Gutierrez v. Saenz*, No. 1:19-CV-00185 (S.D. Tex.), ECF No. 124 (Nov. 24, 2020).

Mr. Gutierrez made clear that he wanted “his spiritual advisor to place his hand on [Mr.] Gutierrez’s shoulder and pray out loud throughout the execution.” *Id.* at 11. In the context of that request, the district court determined that the “evidence . . . does not demonstrate that serious security concerns would result from allowing inmates the assistance of a chosen spiritual advisor in their final moments” and that “[t]he Texas prison administration cannot blindly abdicate its obligation to safeguard an inmate’s religious rights in the spiritually charged final moments of life.” *Id.* at 29. The district court highlighted that, between 1982 and March 2019, the presence of a chaplain in the execution chamber did not cause a security incident in any of the 560 executions Texas conducted. *Id.* at 3.

The court also cited the testimony of Steve J. Martin, a former TDCJ general counsel who helped develop Texas's original prison execution protocols for the lethal injection. Mr. Martin testified that the execution chamber is one of the most predictable and safe environments in a prison setting. *Id.* at 23.

In the context of prison management, the TDCJ execution process, from a safety and security standpoint, is not materially laden with greater risks of harm to staff, prisoners, and the public than any number of other commonplace activities, processes, practices, protocols and regulations that are present and occur on a daily basis in the prison setting. . . . The TDCJ execution process, *including the presence of a spiritual advisor of the condemned prisoner's choosing*, represents the most predictable and highly controlled environment in a prison setting.

Id. at 23 (emphasis added).

As in Mr. Gutierrez's case,⁴ Mr. Ramirez's requests do not pose a risk to the State that cannot be ameliorated through other security measures short of an outright denial.

⁴ Mr. Gutierrez's execution date has been vacated pending the resolution of Mr. Ramirez's appeal. *See Gutierrez v. Collier*, No. 1:21-CV-00129 (S.D. Tex.), ECF No. 5.

3. *The State’s Complete Ban on Audible Prayer and “Laying of Hands” Is Not the Least Restrictive Alternative.*

Rather than explaining what specific compelling interests are implicated by Mr. Ramirez’s requests and why less restrictive means cannot alleviate those concerns, Respondents instead attempt to shift the burden to Mr. Ramirez. Respondents contend that it is Mr. Ramirez’s obligation to affirmatively identify a less restrictive policy. Br. in Opp. at 22–29, *Ramirez v. Collier*, No. 21-5592 (Sept. 8, 2021). But this Court has made clear that, under RLUIPA, it is *the State* that must come forward with explanations for why a less restrictive alternative is not available. *Holt*, 574 U.S. at 364. The State has failed to carry that burden here.

In any event, a less restrictive policy is self-evident. It is the one Mr. Ramirez requested—to have Pastor Moore utter prayers during Mr. Ramirez’s execution while placing his hands on Mr. Ramirez as a final blessing. A number of executions have been carried out in just this way, including in Texas, without incident. Pastor Moore has already completed spiritual advisor training by TDCJ—an extra security measure not even required for the *amici* spiritual advisors who witnessed the recent federal executions—and will be subject to stringent security screenings upon arriving at the TDCJ facility on the day of the execution. In addition to the orientation Pastor Moore attended, under TDCJ protocol, outside spiritual advisors must pass a security background search before the scheduled execution date.⁵ Respondents approved Mr.

⁵ See Robert Arnold, *Here Are the Rules Spiritual Advisors Must Follow To Be Present Inside Texas Execution Chamber*, KPRC Hou.

Ramirez’s request to have Pastor Moore in the chambers, acknowledging that his presence does not pose a heightened security concern. On the day of the execution, Pastor Moore could stand at Mr. Ramirez’s side and touch his shoulder on the side not receiving the injection or stand at his feet and touch his ankles, far away from the site of the injection, to alleviate any concerns about disruption.

Moreover, in *amici*’s experience, outside spiritual advisors present in the execution chamber are sometimes assigned an “escort” who does not leave the advisor’s side. That individual could even stand next to the spiritual advisor as they lay hands on the prisoner, further minimizing any risk of disruption to the execution. Adopting practices like these, which are used by other “well-run institutions,” is just one of many options that Texas could pursue to protect its security interests while also allowing Mr. Ramirez and others who will be executed to exercise their faith one final time in their last moments, in accordance with their sincerely held religious beliefs. *See Holt*, 574 U.S. at 368; *see also Dunn*, 141 S. Ct. at 726 (Kagan, J., concurring) (noting that the state may “do a background check on the minister; it can interview him and his associates; it can seek a penalty-backed pledge that he will obey all rules.”). But “[w]hat the State cannot do, consistent with strict scrutiny, is simply presume that every clergy member will be untrustworthy—or otherwise said, that only the harshest restriction can work.” *Id.*

(April 24, 2021), <https://www.click2houston.com/news/investigates/2021/04/24/here-are-the-rules-spiritual-advisors-must-follow-to-be-present-inside-texas-execution-chamber/>.

CONCLUSION

For the foregoing reasons, the State's policy violates RLUIPA, and the decision below should be reversed.

Respectfully submitted,

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