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Establishing a Right to Last Rites: Examining Death Row Inmates' Right to Clergy Presence in the Execution Chamber in *Gutierrez v. Saenz*

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> *Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.*[1]

I. Introduction

Ruben Gutierrez is a Texas prisoner on death row and a practicing Catholic.[2] With his execution date imminent, he learned that the prison system in which he is incarcerated had just changed its execution policy.[3] Suddenly, Mr. Gutierrez's priest could no longer accompany him into the execution chambers, contrary to the previous policy allowing for such clergy presence.[4] In his final moments, the prison would not allow him to receive what some call "Last Rites"—a traditional prayer practice of the Catholic faith[5]—nor receive the spiritual comfort of his priest's presence as the State carries out his execution.[6] Mr. Gutierrez felt this deprivation was an infringement on his right to practice his religion and to have peace in his final moments.[7]

In its last few terms, the United States Supreme Court has shown an interest in the religious rights of prisoners, including prisoners facing execution.[8] The Court, however, has yet to clearly articulate what religious rights prisoners retain up to their last moments in the execution chambers. The Court's recent summary dispositions in favor of prisoners' religious rights show a strong inclination to potentially rule in a future term that prisoners have a right to a spiritual advisor's presence with them in the execution chamber when it is a sincere exercise of the prisoners' religion.[9] The congressional intent behind the federal Religious Land Use and Institutionalized Persons Act of 2000, and the last two decades of caselaw since its enactment, support this right of prisoners. Prisons in all states with

1. Turner v. Safley, 482 U.S. 78, 84 (1987).
2. Gutierrez v. Saenz, No. 1:19-cv-00185, slip op. at 9 (S.D. Tex. Nov. 24, 2020).
3. *See id.* at 4–5.
4. Gutierrez v. Saenz, 818 F. App'x 309, 313 (5th Cir. 2020).
5. *Gutierrez*, No. 1:19-cv-00185, slip op. at 11.
6. *Gutierrez*, 818 F. App'x at 314.
7. *See id.* at 313.
8. *See* Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.); Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.); Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.).
9. *See supra* note 8.

the death penalty should follow in this trend of restoring religious rights and revise their execution policies to allow clergy to be present during executions.

This Note argues that death row inmates should have the right to the presence of clergy[10] during their final moments in the execution chamber. Part II of this Note details the legal history of prisoners' religious rights, including under the First Amendment's Free Exercise Clause and under the Religious Land Use and Institutionalized Persons Act. Part III explains the Fifth Circuit's decision in *Gutierrez v. Saenz* and its path to the United States Supreme Court. Part IV further analyzes *Gutierrez*, examines the need for and apparent willingness of the Supreme Court to provide guidance to prisons across the nation, and suggests ways to mitigate prison security concerns. Lastly, Part V reiterates the importance of deciding the religious rights issues associated with prisoner executions.

II. Legal Landscape

A. Prisoners' First Amendment Right to the Free Exercise of Religion

The First Amendment's Free Exercise of Religion Clause restricts the government from prohibiting a citizen's free exercise of religion.[11] Courts have long held that this right is so fundamental that prisoners institutionalized in the United States retain the right, even though they are not physically free citizens.[12] The United States Supreme Court has ruled that the Fourteenth Amendment incorporates the right to Free Exercise as well.[13] Thus, prisoners housed in state-run institutions may bring First Amendment Free Exercise claims against state prison officials through 42 U.S.C. § 1983,[14] widely expanding the Clause's applicability. Under Free Exercise protections, both federal and state prisons are constitutionally bound.[15]

10. The term "clergy" is used in this Note and in the court proceedings discussed herein to include spiritual advisors, priests, chaplains, and other professional religious leaders.

11. U.S. CONST. amend. I.

12. *See, e.g.*, Cruz v. Beto, 405 U.S. 319, 321–22 (1972); Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

13. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

14. 42 U.S.C. § 1983.

15. *See id.*

Just as many constitutional protections are not absolute, a prisoner's free exercise of religion is not without reasonable limitations.[16] The leading Supreme Court case qualifying and guiding prisoner constitutional claims against prisons, including Free Exercise claims, is the 1987 case *Turner v. Safley*.[17] In *Turner*, inmates sought to get married, but a prison policy prohibited marriage.[18] The Court recognized that marriage was a constitutional right that had many benefits—including often being a religious exercise—and held that the marriage ban was not reasonably related to any legitimate prison interest.[19] The marriage ban failed the first prong of a four-prong test the Court laid out:

> (1) whether a logical nexus exists between a prison policy or regulation that substantially burdens a prisoner's religious exercise and the government's asserted reason and legitimate, neutral interest for enacting the policy or regulation;
>
> (2) whether the prison can furnish "alternative means" of accomplishing the prisoner's religious exercise other than the means requested;
>
> (3) to what extent the prison's potential accommodation of the religious exercise will impact guards, other prisoners, and prison resources in general; and
>
> (4) whether there is a feasible alternative to the policy or regulation.[20]

In *Turner*, the prison argued that "love triangles" raised a security concern, but the Court found that a marriage ban was an exaggerated response and that any rivalries stemming from "love triangles" were likely to develop with or without formal marriage.[21] The Court has applied the *Turner*

16. *See* Turner v. Safley, 482 U.S. 78, 95–96 (1987) (stating that the right to marry, as an exercise of religious faith, is "subject to substantial restrictions as a result of incarceration").

17. *Id.*

18. *Id.* at 82.

19. *Id.* at 96.

20. *Id.* at 89–90.

21. *Id.* at 98.

framework to several cases since its issuance,[22] and the circuit courts use it frequently.[23]

When considering the first prong, a court that concludes the nexus between the prison's policy and the prison's interest is remote enough to render the policy "arbitrary or irrational" should invalidate the policy.[24] The prison's interest—its objective or reason for the policy—must be neutral and legitimate.[25] The Supreme Court provided guidance for this prong in *Pell v. Procunier*, explaining that objectives such as deterrence, rehabilitation, and security were all legitimate and neutral.[26]

The second prong is an inquiry into whether alternative avenues exist for religious practice.[27] For example, the Court upheld a policy that required inmates to remain outside during part of the day and thus prevented Muslim inmates from attending a Friday afternoon indoor religious service, finding that the Muslim inmates were still able to participate in numerous other Muslim ceremonies.[28]

Under the third prong, the court asks how requiring a policy accommodation to allow the prisoner's requested exercise of religion would impact the prison individually and potentially other prisons.[29] When considering an accommodation's impact, courts should give reasonable deference to prison officials due to their expertise and close understanding of their own institutions.[30] Courts do not, however, give total deference to officials—courts subject challenged decisions and policies to constitutional examination.[31] A minimal impact on the prison is likely to assist the prisoner's Free Exercise claim, while a broad, negative impact may authorize the prison to restrict the prisoner's free exercise.[32]

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22. *See* Overton v. Bazzetta, 539 U.S. 126, 132–36 (2003).

23. *See, e.g.*, Small v. Wetzel, 528 F. App'x 202, 209–10 (3d Cir. 2013); Butts v. Martin, 877 F.3d 571, 584–85, 587 (5th Cir. 2017); Wall v. Wade, 741 F.3d 492, 499–501 (4th Cir. 2014).

24. *See Turner*, 482 U.S. at 89–90; Bell v. Wolfish, 441 U.S. 520, 539 (1979).

25. *Turner*, 482 U.S. at 90.

26. 417 U.S. 817, 822–23 (1974).

27. *Turner*, 482 U.S. at 90.

28. O'Lone v. Est. of Shabazz, 482 U.S. 342, 350–52 (1987) ("The record establishes that respondents are not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations. . . . We think this ability on the part of respondents to participate in other religious observances of their faith supports the conclusion that the restrictions at issue here were reasonable.").

29. *See Turner*, 482 U.S. at 90–92.

30. *Id.* at 85.

31. *Id.* at 84.

32. *See id.* at 92, 98.

The fourth prong involves a search for alternatives to the policy that would allow for the religious exercise but still protect the prison's interest.[33] To evaluate alternatives under the fourth prong, the *Turner* Court considered the prison's resources, staff capability, and potential risks of alternatives.[34] If a reasonable alternative readily exists, and therefore all four prongs support the prisoner's claim, the court should strike down the prison's restrictive policy.[35] Overall, the policy of the *Turner* test is that courts should ensure prison restrictions on religious exercise are not an exaggerated or unnecessary response to a security goal or other objective.[36]

B. Religious Land Use and Institutionalized Persons Act

Congress has expanded the religious rights of prisoners by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[37] Under this federal statute, the government cannot arbitrarily impose a substantial burden on a prisoner's religious exercise, "even if the burden results from a rule of general applicability."[38] If the government does impose some burden, it must show 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."[39]

Dozens of prisoners have litigated RLUIPA claims.[40] The Supreme Court held that the RLUIPA legislation lawfully expanded religious protections for prisoners, accommodating expressions beyond the minimal allowances of the First Amendment.[41] The Court also confirmed that RLUIPA applies to both federal and state prisons.[42]

Using the requirements stated in the statute's text, the Court in *Cutter v. Wilkinson* detailed a three-prong framework for evaluating RLUIPA

33. *Id.* at 90–91.
34. *Id.* at 91–93.
35. *See id.* at 98, 100.
36. *See id.* at 97–98.
37. 42 U.S.C. § 2000cc-1.
38. *Id.* § 2000cc-1(a).
39. *Id.* § 2000cc-1(a)(1)–(2).
40. *See generally* John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. §§ 2000cc et seq.)*, 181 A.L.R. FED. 247 §§ 3, 7, 10, 11 (2002) (listing adjudications involving RLUIPA).
41. Cutter v. Wilkinson, 544 U.S. 709, 719–20 (2005).
42. *Id.* at 720–21 (referencing state government institutions "in which the government exerts a degree of control unparalleled in civilian society").

claims.[43] In accordance with the statute's text, the first prong of the test is the "substantial burden" inquiry.[44] While courts should look at the facts of each case, a prison's imposition of a substantial burden on a prisoner, often in the form of a policy or regulation, must be more than just an inconvenience to the prisoner.[45] Rather, the burden must rise to the level of a pressure to violate beliefs or modify religious expressions.[46] In evaluating the prisoner's religious exercise at issue, the act is not required to be an exercise that is central or highly important to a religion; rather, the act may be *any* exercise of a person's sincere religious belief.[47]

The second prong of the *Cutter* test analyzes whether the prison's claimed "compelling governmental interest" justifies the substantial burden.[48] Under the third and final prong, the imposed burden must be the least restrictive means available;[49] if other means to further the compelling interest are available that would be less restrictive to the prisoner's exercise of religion, the prison must show the alternative means are too onerous.[50] Thus, the prison must prove that its policy or regulation is valid because it lacks other feasible means of achieving its compelling interest.[51]

One of the most noteworthy RLUIPA claims to reach the Court arose in 2015 in *Holt v. Hobbs*.[52] An Arkansas state prisoner practicing the Muslim faith brought a claim under RLUIPA, alleging that the state prison's grooming policy of banning prisoners' growing of beards was a substantial burden to the exercise of his Muslim faith.[53] The Supreme Court agreed, applying the *Cutter* framework.[54] The Court held that the grooming policy did substantially burden the petitioner's valid religious exercise, satisfying

43. *See id.* at 720.

44. *Id.* at 715–16.

45. *See id.* at 722–23.

46. *Compare id.* at 714, 722 (indicating that drug laws restricting sacramental use of peyote and military dress codes prohibiting use of a Jewish yarmulke had not substantially burdened religious conduct) *with* Holt v. Hobbs, 574 U.S. 352, 361–62, 369 (2015) (holding that a prison substantially burdened a Muslim prisoner's religion by prohibiting him from growing a beard, a practice that the prisoner believed was mandated by his religious faith).

47. 42 U.S.C. § 2000cc-5(7)(A).

48. *See Cutter*, 544 U.S. at 715.

49. *Id.*

50. 4 W. COLE DURHAM ET AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 35:5 (2020).

51. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728–30 (2014) (finding the least-restrictive-means standard was not met where a defendant failed to demonstrate that other, less-restrictive means were not feasible).

52. 574 U.S. 352 (2015).

53. *Id.* at 355–56.

54. *Id.* at 357, 369.

the first prong, and that the burden was without proper justification, satisfying the second prong.[55] The policy was in place as a security measure, both to prevent prisoners from hiding contraband in beards and to ensure guards were able to consistently recognize prisoners by avoiding the changing appearance facial hair may cause.[56] The Court found, however, that the policy did not sufficiently further these security measures, and other feasible means less restrictive on prisoner expression were available to further the interest in security.[57] The *Holt* Court also reemphasized the congressional intent behind RLUIPA, noting that the statute was meant to provide broadened protections for prisoners' religious expressions.[58] Consequently, the prison had to permit the Muslim prisoner to grow a one-half-inch beard as an expression of his religious belief.[59]

C. Circuit Split in Defining "Substantial Burden"

Holt may have caused more confusion than clarity on one issue: the circuit courts are split in defining what impositions or restrictions substantially burden a prisoner's religious exercise, relevant to the first prongs of both the *Turner* and *Cutter* tests.[60] The Second, Third, Fourth, and Sixth Circuits focus on whether a prison policy or regulation exerts "substantial pressure" on a prisoner to modify his normal exercise of religion.[61] The Fifth, Seventh, and Eighth Circuits, however, have established a reasonableness inquiry and emphasize other factors, such as intentional interference and how fundamental the exercise is to the religion.[62]

The Tenth Circuit has taken a more unique approach and has established its own test, focusing largely on the sincerity of the prisoner's religious belief.[63] While the RLUIPA inquiry must not concern the "centralness" of a

55. *Id.* at 356.
56. *Id.* at 363, 365.
57. *Id.* at 364–65, 367.
58. *Id.* at 356.
59. *Id.* at 369.
60. *See* DURHAM ET AL., *supra* note 50, § 35:5 (indicating a circuit split on the "substantial burden" test); *see also* Khan v. Barela, 808 F. App'x 602, 615 n.12 (10th Cir. 2020) (explaining that Congress intended RLUIPA's substantial burden definition to be consistent with the Free Exercise jurisprudence definition of substantial burden, so the court used essentially the same test for both claims).
61. *See* DURHAM ET AL., *supra* note 50, § 35:5.
62. *Id.* (citing Garner v. Muenchow, 715 F. App'x. 533, 536 (7th Cir. 2017) and Van Wyhe v. Reisch, 581 F.3d 639, 656 (8th Cir. 2009)).
63. *Id.*

belief, it does not bar inquiry into the sincerity of a professed belief.[64] The Supreme Court has given some guidance on sincerity of belief, holding that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," but they should not be so outlandish as to be clearly non-religious.[65] Simply put, inquiry into sincerity involves assessing credibility subjectively, asking whether the prisoner actually holds the belief he professes.[66]

In the Tenth Circuit case *Khan v. Barela*, a Muslim prisoner claimed that the prison substantially burdened his religious exercise when it would not allow him a clock or prayer schedule and purposely only served him ham and bread during the Ramadan holiday, knowing Muslims cannot eat pork.[67] The court easily found that the prisoner possessed a sincerely held religious belief due to his proclamation of the Islamic faith and desire to firmly adhere to its five pillars, including prayer, diet, and observation of Ramadan.[68]

The Tenth Circuit detailed three methods in which prisons impose substantial burdens: (1) a prison prevents conduct motivated by a sincerely held belief; (2) a prison substantially pressures a religious prisoner to refrain from conduct motivated by a sincere belief, or to engage in conduct conflicting with a sincere belief; and (3) a prison demands conduct prohibited by a sincerely held belief.[69] Further, the court clarified that "a burden can be 'substantial' even if it does not compel or order the claimant to betray a sincerely held religious belief."[70] In *Khan*, the Muslim prisoner

64. Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) ("RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion . . . .").

65. Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714–15 (1981).

66. *See* United States v. Seeger, 380 U.S. 163, 186 (1965) (enumerating an exception from First Amendment protection for a "'merely personal' moral code"); Mosier v. Maynard, 937 F.2d 1521, 1526 (10th Cir. 1991) (stating that a "way of life . . . based upon purely secular considerations" is not protectable as a religious belief); Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014) (determining that the sincerity inquiry is, in essence, a question of whether one's claim to hold a religious belief is fraudulent); *see also* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1253 (2017) ("The Constitution forbids the government from determining the accuracy or plausibility of a claimant's religious beliefs, but not from adjudicating the sincerity with which the claimant holds them. Courts can and should evaluate a claimant's sincerity, when an opponent puts it in issue, to protect others from the costs of accommodating insincere religious claims.").

67. Khan v. Barela, 808 F. App'x 602, 605 (10th Cir. 2020).

68. *Id.* at 614.

69. *Id.* at 614–15.

70. *Id.* at 615 (quoting *Yellowbear*, 741 F.3d at 55).

was substantially burdened by at least the first two methods.[71] First, the prison's depriving him of a clock and prayer schedule prevented him from praying at the times necessary to his religious practice.[72] Second, the prison's provision of only religiously prohibited food, without alternatives, presented pressure to engage in conduct against his sincere beliefs.[73] While the Tenth Circuit dismissed the prisoner's RLUIPA claim on purely technical grounds,[74] it found his Free Exercise claim a plausibly pled substantial burden on his sincere religious beliefs.[75]

The Tenth Circuit's substantial burden framework provided a sound analysis tending to favor the prisoner's legitimate, sincere beliefs. Generally, since the enactment of RLUIPA, courts have followed this trend in deciding many cases in favor of prisoners, expanding prisoners' religious rights.[76] This expansion, however, has not necessarily been the trend when death-row prisoners seek to exercise their religious rights during their executions, and prisons argue even more forcefully for deference to ensure security.[77] In the last two terms, four death-row prisoner religious exercise cases have made it to the Supreme Court, with hopes the Court will resolve

71. *Id.* at 614–15.

72. *See id.* at 614.

73. *Id.* at 615.

74. *Id.* at 605–06 (noting the prisoner had requested damages rather than equitable relief, and RLUIPA's only remedy is equitable relief).

75. *Id.* at 615–16.

76. *E.g.*, Moussazadeh v. Tex. Dep't Crim. Just., 703 F.3d 781, 790, 792 (5th Cir. 2012); Ali v. Stephens, 822 F.3d 776, 785, 794 (5th Cir. 2016); Ware v. Louisiana Dep't Corr., 866 F.3d 263, 268, 274 (5th Cir. 2017); Couch v. Jabe, 679 F.3d 197, 200–01, 204 (4th Cir. 2012); Fox v. Washington, 949 F.3d 270, 280 (6th Cir. 2020); Native Am. Council of Tribes v. Weber, 750 F.3d 742, 749–50 (8th Cir. 2014); Nance v. Miser, 700 F. App'x 629, 633 (9th Cir. 2017) (mem.); *see also* John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. §§ 2000cc et seq.)*, 181 A.L.R. Fed. 247 § 8 (2002 & Supp. 2021).

77. *See, e.g.*, Ray v. Dunn, No. 2:19-CV-88-WKW, 2019 WL 418105, at *5–6 (M.D. Ala. Feb. 1, 2019) ("The State has compelling interests 'of the highest order' in maintaining the solemnity, safety, and security of Ray's execution[,] . . . so strong that the State cannot permit even a slight chance of interference with an execution."), *rev'd*, 915 F.3d 689 (11th Cir. 2019), *vacated*, 139 S. Ct. 661 (2019) (mem.); Murphy v. Collier, 942 F.3d 704, 707 (5th Cir. 2019) (focusing on the State's justifications for its disparate treatment of prisoners' religious practices rather than on whether Murphy's individual right was substantially burdened).

the question of what religious rights prisoners retain in the execution chambers.[78]

D. Murphy v. Collier

In March 2019, Texas death-row inmate Patrick Henry Murphy requested that the United States Supreme Court grant his application for stay of execution.[79] The Buddhist prisoner brought claims under the First Amendment and RLUIPA, based on Texas's refusal to allow a Buddhist priest into the execution chambers.[80] The Supreme Court overturned the Fifth Circuit's denial of a stay of execution, granting the stay unless Texas would permit a Buddhist priest into the chambers to accompany Mr. Murphy.[81]

Justice Kavanaugh issued a concurring opinion and concluded that Texas's policy was likely discriminatory because it allowed Christian and Muslim priests into the execution chambers, but not Buddhist priests, or clergy of other religions.[82] Justice Kavanaugh suggested that a change in the Texas Department of Criminal Justice ("TDCJ") policy to either allow or bar all clergy from the execution chambers, regardless of religious affiliation, might cure the issue in *Murphy*.[83]

III. Statement of the Case: Gutierrez v. Saenz

Following from *Murphy v. Collier* and the TDCJ's resulting changed policy, another Fifth Circuit case, *Gutierrez v. Saenz*,[84] made its way to the Supreme Court of the United States.[85] Mr. Gutierrez, a Texas death-row

78. Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.); Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.); Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.).

79. *Murphy*, 139 S. Ct. at 1475.

80. *Id.* at 1478 (Alito, J., dissenting).

81. *Id.* at 1475.

82. *Id.* at 1476 (Kavanaugh, J., concurring).

83. *Id.* at 1475–76 (Kavanaugh, J., concurring) (framing the policy as a violation of equal treatment, but likely not a violation of RLUIPA or the Free Exercise Clause). A month after the TDCJ revised the policy, Justice Kavanaugh, joined by Chief Justice Roberts, issued an additional statement in support of the revision, forecasting compliance with RLUIPA and the Free Exercise Clause due to the prison's compelling security interest. *Id.* at 1476–77.

84. 818 F. App'x 309 (5th Cir. 2020).

85. Gutierrez v. Saenz, 141 S. Ct. 1260 (2021).

inmate, challenged the TDCJ's new policy for violating his religious exercise rights.[86]

A. Facts and Procedural History

Before *Murphy v. Collier*, in accordance with a TDCJ policy adopted in the 1980s, Texas had allowed TDCJ chaplains to accompany inmates into the execution chamber and remain through the inmates' final moments.[87] But a few days after the TDCJ heard the Supreme Court's rulings and opinions in *Murphy v. Collier*, it decided to act on Justice Kavanaugh's suggestion and change its execution chamber policy.[88] On April 2, 2019, TDCJ officials promulgated a revised policy that prohibited any and all clergy presence in the execution chamber during executions: "TDCJ Chaplains and Ministers/Spiritual Advisors designated by the offender may observe the execution *only from the witness rooms*."[89]

Ruben Gutierrez is a practicing Catholic inmate, convicted and on death row in Texas for the murder of Escolastica Harrison.[90] Promptly after receiving his execution date and learning that the prison now prohibited his priest's presence and Last Rites prayer during his execution, he filed prison grievances and eventually a complaint in federal court.[91] Mr. Gutierrez challenged the revised TDCJ execution policy as violating his religious rights.[92] Although the new policy allowed a prisoner to meet with a TDCJ-employed or otherwise approved spiritual advisor *before* the execution process begins, it did not allow a chaplain into the execution chambers with the prisoner.[93] As Mr. Gutierrez correctly noted, the prison previously allowed clergy presence in the chamber, but it now only allows its own security staff into the chamber.[94] Mr. Gutierrez, as a prisoner awaiting execution, claimed this newly revised TDCJ policy violates his First

86. *Gutierrez*, 818 F. App'x at 311.

87. Gutierrez v. Saenz, No. 1:19-cv-00185, slip op. at 3–4 (S.D. Tex. Nov. 24, 2020).

88. *Id.* at 3 n.3.

89. *Id.* at 4–5 (emphasis added).

90. *Id.* at 9; *Gutierrez*, 818 F. App'x at 311.

91. *See Gutierrez*, No. 1:19-cv-00185, slip op. at 4–5, 9 (noting that the prison policy changed on April 2, 2019, and Mr. Gutierrez filed his complaint on September 26, 2019); *Gutierrez*, 818 F. App'x at 311.

92. *Gutierrez*, 818 F. App'x at 311.

93. *Id.* at 313.

94. *Id.*

Amendment right to free exercise of religion.[95] Additionally, he purported to have a claim under the more expansive RLUIPA.[96]

At the trial court level, the United States District Court for the Southern District of Texas found that Mr. Gutierrez's claims had merit to survive the TDCJ's motion to dismiss, and the court stayed his execution on June 9, 2020, to allow him to litigate his religious claims.[97] The Texas Attorney General's Office appealed and moved to vacate the stay on grounds that Mr. Gutierrez's claims were without merit.[98] The Fifth Circuit reviewed the case for abuse of discretion and disagreed with the district court, vacating the stay and reinstating the execution.[99]

B. The Fifth Circuit's Reasoning

The Fifth Circuit applied four factors the United States Supreme Court has set out for granting a stay:

(1) whether the prisoner has made a strong case that he may succeed on his claims;

(2) whether the prisoner will be "irreparably injured" if not granted stay;

(3) whether a stay would substantially injure other interested parties; and

(4) public interest.[100]

The first two factors—the prisoner's likelihood of success and his potential for irreparable injury—are the weightiest.[101]

The court first evaluated Mr. Gutierrez's likelihood for success on his First Amendment claims. The Fifth Circuit, in accordance with the lower court and circuit precedent, applied the *Turner* framework to Mr. Gutierrez's Free Exercise claim and concluded that he failed to make a strong showing for success on the merits.[102] Specifically, Mr. Gutierrez argued that the TDCJ's old policy would have allowed a TDCJ-employed Christian chaplain to accompany him into the chambers, satisfying his

95. *Id.*
96. *Id.*
97. *See id.* at 311.
98. *Id.* at 312.
99. *Id.* at 314–15.
100. *Id.* at 311 (citing Nken v. Holder, 556 U.S. 418, 434 (2009)).
101. *Nken*, 556 U.S. at 434.
102. *Gutierrez*, 818 F. App'x at 313–14.

asserted right.[103] The TDCJ changed its policy upon the suggestion of Justice Kavanaugh in *Murphy v. Collier* to permit no clergy.[104] Without systematically walking through the *Turner* factors, the court instead summarily concluded that, despite Mr. Gutierrez's "strong religious arguments," his legal arguments were lacking, as he was "unlikely to establish that TDCJ's execution policy is not 'reasonably related to legitimate penological interests.'"[105]

The court then evaluated the RLUIPA claim.[106] Under the federal statute, a government actor cannot substantially burden a prisoner's exercise of religion unless the government furthers its own compelling interest using the least restrictive means available.[107] Mr. Gutierrez argued that the TDCJ policy imposed a substantial burden—namely, that he would not be able to have spiritual comfort and guidance from a chaplain while dying, which is a practice of his Catholic faith.[108] The court held that Mr. Gutierrez also failed on this claim to show the state had imposed a substantial burden on his faith because the policy fell short of "truly pressur[ing] the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[109] The court noted that the practice Mr. Gutierrez requested was perhaps a "spiritual comfort" that is a benefit not otherwise available.[110]

According to the court, Mr. Gutierrez failed on the first of the four stay factors: he had not made a strong showing on his First Amendment or RLUIPA claims.[111] The court quickly disposed of the final three factors, concluding that the district court erred in granting Mr. Gutierrez a stay of execution.[112] Thus, the court vacated the stay.[113]

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103. *Id.* at 314.

104. Gutierrez v. Saenz, No. 1:19-cv-00185, slip op. at 4–5 (S.D. Tex. Nov. 24, 2020); *see also* Murphy v. Collier, 139 S. Ct. 1475, 1476–77 (2019) (mem.) (Kavanaugh, J., concurring).

105. *Gutierrez*, 818 F. App'x at 314 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

106. *Id.*

107. *Id.*; 42 U.S.C. § 2000cc-1(a).

108. *See Gutierrez*, 818 F. App'x at 314.

109. *Id.* (quoting Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004)).

110. *Id.*

111. *Id.* at 313–14.

112. *Id.* at 314–15.

113. *Id.* at 315.

C. Appeal to the Supreme Court

Mr. Gutierrez persisted in pursuing his claims on the merits; he appealed to the United States Supreme Court for an emergency stay of execution and petitioned for certiorari on his claims.[114] The Supreme Court reviewed the petition for emergency stay of execution and granted Mr. Gutierrez's stay, pending the Court's decision on whether to grant certiorari on the Fifth Circuit case.[115]

The Court also provided a surprising additional instruction to the trial court, the Southern District of Texas: "The District Court should 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."[116] Legal journalists have noted this special instruction from the Court, indicating it "follows a series of disputes from last term that caused rifts among the justices over what religious rights prisoners have in their final moments."[117]

D. The District Court's Finding

Following the Supreme Court's order, the United States District Court for the Southern District of Texas considered evidence and briefs from both parties on the issue of potential security concerns posed by the presence of outside spiritual advisors in the execution chamber.[118] In deciding this narrow question, the district court issued a written opinion, which included its reasoning and a summary of both parties' submitted evidence after expedited discovery.[119]

The district court, evaluating the evidence submitted, emphasized the differences in the development of the TDCJ's 1985 execution policy and the development of the new 2019 policy.[120] Specifically, the 1985 policy, which allowed TDCJ chaplains in the chamber, took months to develop and went through several drafts.[121] "In contrast, the TDCJ implemented its April

114. *See* Gutierrez v. Saenz, 141 S. Ct. 127, 127–28 (2020) (mem.).

115. *Id.*

116. *Id.* at 128.

117. Jerome Ashton, *Supreme Court Halts Execution Without Chaplain in Death Chamber*, BLOOMBERG L. (June 17, 2020, 6:27 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-halts-execution-without-chaplain-in-death-chamber.

118. Gutierrez v. Saenz, No. 1:19-cv-00185, slip op. at 1 (S.D. Tex. Nov. 24, 2020).

119. *See generally id.*

120. *Id.* at 3–7.

121. *Id.* at 3–4, 7.

2019 policy without any comprehensive study or intense review."[122] While the TDCJ now claims security concerns were the main reason for disallowing spiritual advisors into the chamber, only "some discussion was had about security risks."[123] Further, the TDCJ provided no evidence of "*specific* security concerns [it] discussed."[124] The court also noted Mr. Gutierrez's evidence of previously approved TDCJ chaplains' willingness to participate in his final moments[125] and the Federal Bureau of Prisons' allowance of approved clergy into federal execution chambers.[126]

On November 24, 2020, the district court issued its finding that "no serious security problems would result if a prisoner facing execution is permitted to have his chosen spiritual adviser in his immediate presence during the execution."[127] The court also concluded that the TDCJ raised no evidence of relevant, documented security incidents involving clergy; rather, the TDCJ merely raised "speculative concerns" regarding only outside advisors.[128] Lastly, the court found that the change in policy "was not driven by research, careful study, or meaningful evaluation."[129] The court found that TDCJ officials gave great weight to Justice Kavanaugh's concurring statement in *Murphy*, supposedly interpreting it as a directive, not just a suggestion.[130] Justice Kavanaugh opined that the TDCJ had at least two means to possibly remedy the *Murphy* Establishment Clause issue: either allow *all* religious advisors into the execution chambers, or allow *none*.[131] The TDCJ clearly implemented the latter suggestion, prohibiting the presence of all religious advisors during executions.[132] The district court filed these conclusions with the Supreme Court, and the parties thereafter filed supplemental briefs at the Supreme Court.[133]

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122. *Id.* at 7.
123. *Id.*
124. *Id.* (emphasis added).
125. *Id.* at 10.
126. *Id.* at 12–13.
127. *Id.* at 1–2.
128. *Id.* at 2.
129. *Id.*
130. *Id.* at 7 (citing Murphy v. Collier, 139 S. Ct. 1475, 1480 (2019) (Kavanaugh, J., concurring)).
131. *Murphy*, 139 S. Ct. at 1476–77 (Kavanaugh, J., concurring).
132. *Gutierrez*, No. 1:19-cv-00185, slip op. at 4.
133. *See* Supplemental Brief in Support of Petition for Writ of Certiorari, Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.) (No. 19-8695); Supplemental Brief, *Gutierrez*, 141 S. Ct. 1260 (2021) (mem.) (No. 19-8695).

E. Current Status Before the Supreme Court

In briefing to the Supreme Court, Texas argued it has a security-based interest in keeping uncleared and unnecessary persons out of the chambers.[134] Mr. Gutierrez, however, argued that Texas's old policy allowing clergy in the execution chambers existed for decades with no security incidents.[135] On January 25, 2021, approximately two months after the requested district court findings on security concerns, the Supreme Court granted certiorari but summarily disposed of the case, not ruling definitively on the existence of a right to clergy presence.[136] The Court did rule in Mr. Gutierrez's favor, however, vacating the Fifth Circuit's order and remanding the case back to the district court with instructions to rule on the merits of the religious claims[137] in light of the district court's factual finding of "no serious security problems."[138]

IV. Analysis

A. The History and Evolution of the TDCJ Policy

In Texas's response to Mr. Gutierrez's petition for certiorari, Texas claimed that prison security is unarguably a compelling government interest, but it also acknowledged that *Murphy* prompted the change in the policy.[139] Mr. Gutierrez noted that the change was for the "acknowledged purpose of avoiding the obligation to allow . . . a minister to a Buddhist prisoner."[140] Because the TDCJ only employed Christian, Jewish, Native American, and Muslim Chaplains, but not a Buddhist Chaplain, the TDCJ argued that its only options after the Supreme Court's holding in *Murphy* were to either hire chaplains for each of the twenty-five different religions represented on Texas's death row,[141] or allow no chaplains in the chamber.[142] Mr. Gutierrez argued that the TDCJ essentially attempted to avoid accommodating prisoners at the risk of denying their rights to free

134. *See* Brief in Opposition at 26, *Gutierrez*, 141 S. Ct. 1260 (2021) (mem.) (No. 19-8695).

135. *See* Petition for Writ of Certiorari at 15, *Gutierrez*, 141 S. Ct. 1260 (2021) (mem.) (No. 19-8695).

136. *Gutierrez*, 141 S. Ct. at 1260–61.

137. *Id.*

138. Gutierrez v. Saenz, No. 1:19-cv-00185, slip op. at 2 (S.D. Tex. Nov. 24, 2020).

139. Brief in Opposition, *supra* note 134, at 14, 24.

140. *Gutierrez*, No. 1:19-cv-00185, at 5 n.8.

141. *See id.* at 4, 9.

142. *Id.* at 4.

religious exercise.[143] He argued that "chaplains have been present for hundreds of executions in Texas. But Texas changed the rules . . . in order to defeat a charge of religious discrimination brought by another inmate [Mr. Murphy] who practiced Buddhism."[144]

B. Merits of Petitioner's Religious Exercise Claims

Mr. Gutierrez argued the new TDCJ policy deprived him of the long-allowed "religious consolation" that a priest provides to the dying, which the TDCJ previously recognized and provided to hundreds of death-row inmates.[145] He argued that the new policy substantially burdened his exercise of religion, forcing him to modify his religious practice and preference, which is "his belief that the presence of a chaplain in the execution chamber will aid his passage from this life to the next and assist him in reaching Heaven."[146]

The substantial-burden inquiry is the first prong in evaluating both RLUIPA and Free Exercise claims.[147] Applying the Tenth Circuit's methodical approach significantly helps in this inquiry,[148] especially as applied to death-row inmates. Society has grown more concerned with humane and peaceful executions, and an approach favoring a prisoner's exercise of a sincere religious belief during execution is in accord with a peaceful and humane death.[149] The Tenth Circuit inquiry first requires the prisoner to show a sincerely held religious belief.[150] Mr. Gutierrez emphasized that the lower courts did not contest or question the sincerity of his belief that clergy presence at death would assist him in reaching Heaven, as it is a reasonable and common belief established in Christian tradition.[151] While it did not question the sincerity of the belief, the Fifth Circuit did seemingly minimize it as "some benefit that is not otherwise

143. Petition for Writ of Certiorari, *supra* note 135, at 15.

144. *Id.*

145. Reply in Support of Petition for Writ of Certiorari at 3, Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.) (No. 19-8695).

146. *Id.* at 5.

147. *See* DURHAM ET AL., *supra* note 50, § 35:5.

148. *See, e.g.*, Khan v. Barela, 808 F. App'x 602 (10th Cir. 2020); Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014).

149. *See* Brief Amicus Curiae of the Texas Catholic Conference of Bishops in Support of Petitioner at 2, Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.) (No. 19-8695).

150. *See* DURHAM ET AL., *supra* note 50, § 35:5

151. Petition for Writ of Certiorari, *supra* note 135, at 19; Brief Amicus Curiae of the Texas Catholic Conference of Bishops, *supra* note 149, at 7, 14.

generally available."[152] Mr. Gutierrez claims this assessment was unwarranted and that it ignored the fact that the TDCJ's old policy *did* make prison chaplains generally available to all inmates in the execution chamber.[153]

The second part of the Tenth Circuit's substantial-burden inquiry is clearly satisfied. The TDCJ prevented conduct motivated by Mr. Gutierrez's sincerely held belief or put substantial pressure on him to refrain from the conduct motivated by his sincere belief, amounting to a substantial burden either way.

Respondents at the TDCJ dispute Mr. Gutierrez's claim that his religious exercise was substantially burdened, arguing the prison still allowed inmates to meet with clergy *before* entering the execution chambers, permitting religious exercise, not substantially burdening it.[154] They claimed the new restriction barring clergy from the execution chambers would only be a substantial burden if they were preventing an act a prisoner's religion dictated or demanded, not just a religious consolation.[155] Mr. Gutierrez claimed this argument was contrary to the weight of caselaw, which concludes the religious exercise does not have to be central to the religion to be sincerely held.[156]

C. Merits of the Respondent's Security Concerns Defense

In both RLUIPA and Free Exercise inquiries, the prison must show they have a legitimate interest justifying any substantial burden on prisoners' religious exercise. Respondent TDCJ officials argued that the TDCJ, as a prison administrator, should receive deference when "establishing necessary regulations to maintain security" and the prison policy fit this security interest.[157] The TDCJ bolstered this request for deference with a federalism argument, claiming the Court should not be involved in the TDCJ's "screening and approval of requested spiritual advisors, e.g., in the event TDCJ determines a particular spiritual advisor does not meet its criteria."[158] The TDCJ emphasized the particular experience and training of

152. Gutierrez v. Saenz, 818 F. App'x 309, 314 (5th Cir. 2020).

153. Petition for Writ of Certiorari, *supra* note 135, at 19.

154. Brief in Opposition, *supra* note 134, at 18–19.

155. *See id.* at 20–21 (arguing that Catholicism does not mandate contemporaneous administration of last rites as a person is dying).

156. Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

157. Brief in Opposition, *supra* note 134, at 10.

158. *Id.* at 25 (citing *Cutter*, 544 U.S. at 726; Lewis v. Casey, 518 U.S. 343, 362 (1996) (supporting the proposition that "federal courts are not to become 'enmeshed in the minutiae

its own chaplains, which qualified them to be present in the chamber before 2019, and that outside clergy would not have the requisite training, which raises a security concern.[159] The TDCJ also sought to avoid outside clergy becoming aware of the identities of anyone part of the lethal injection team, as anonymity is important to the integrity of the execution process.[160] The Court initially seemed to find some merit to these TDCJ concerns as well, based on its order to the district court regarding the security argument, but it is unlikely these concerns could withstand further court scrutiny.

Petitioner Gutierrez argued these concerns are speculative and that his situation did not implicate these "outside clergy" concerns, as he would be satisfied with a previously acceptable and TDCJ-employed priest attending his execution.[161] The TDCJ stated in its *Murphy v. Collier* brief that TDCJ chaplains are "truly dedicated to TDCJ's interests" and act professionally in the execution chambers.[162] In providing evidence to the district court, the TDCJ also could not produce any evidence of security problems arising from chaplain behavior in the execution chamber under its former policy allowing chaplains in the chamber.[163] In fact, over the course of 560 executions guided by the former policy, there were no chaplain security incidents.[164] Additionally, evidence showing TDCJ chaplains received extremely minimal execution chamber-specific training[165] combined with the lack of TDCJ chaplain incidents led the district court to conclude that even outside clergy presence in the chamber did not pose serious security concerns.[166]

D. Federal and Other State Execution Chamber Policies

As the district court noted, since the federal government began carrying out executions again in 2020, it has executed thirteen people[167] and has

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of prison operations'"); Gates v. Cook, 376 F.3d 323, 338 (5th Cir. 2004) (supporting the proposition that "federal courts 'are not to micromanage state prisons.'")).

159. *See* Gutierrez v. Saenz, No. 1:19-cv-00185, slip op. at 11–12, (S.D. Tex. Nov. 24, 2020).

160. *Id.* at 24.

161. *Id.* at 11 n.10; Supplemental Brief in Support of Petition for Writ of Certiorari, *supra* note 133, at 4.

162. Reply in Support of Petition for Writ of Certiorari, *supra* note 145, at 7.

163. *Gutierrez*, No. 1:19-cv-00185, at 7.

164. *Id.* at 3.

165. *Id.* at 26. The preparatory "training" for TDCJ chaplains selected for execution chamber duties consisted essentially of just a walk-through. *Id.*

166. *Id.* at 29.

167. *Capital Punishment.*, FED. BUREAU PRISONS, https://www.bop.gov/about/history/

allowed at least ten of them to have the clergy of their choice present in the execution chamber, following a request and advanced approval.[168] Ultimately, the *Gutierrez* district court found the federal execution policy held great weight against the TDCJ's argument and the TDCJ did not "distinguish between the circumstances surrounding a federal execution and one in Texas."[169] Before the execution of federal prisoner Daniel Lewis Lee, a follower of the Asatru pagan religious sect, Lee requested his priestess be allowed into the execution chamber with him.[170] The Federal Bureau of Prisons agreed, provided the priestess with written instructions, and promised to follow up with her "to further discuss logistical details and answer any questions."[171] The prison staff escorted the priestess into the chamber and the execution was carried out without incident.[172] Even those most familiar with the TDCJ policy recognize that the Federal Bureau of Prison's policy is a successful example of "how it is possible to allow outside spiritual advisors of an inmate's choice under specific guidelines and accompanied by security escorts."[173]

While most states have either outlawed the death penalty or do not actively use it, some states that do actively use the death penalty have allowed clergy into the execution chambers.[174] Several state execution policies, including Oklahoma's policy as written, do not expressly bar clergy from the chambers but also do not expressly allow for clergy in the chambers.[175] Oklahoma seemingly allowed clergy, including outside clergy,

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federal_executions.jsp (last visited Nov. 8, 2021).

168. *Id.* at 12–13; Dunn v. Smith, 141 S. Ct. 725, 726 (2021) (mem.) (Kagan, J., concurring).

169. *Gutierrez*, No. 1:19-cv-00185, at 23.

170. *Id.* at 12–13.

171. *Id.* at 13.

172. *See id.*; Michael Balsamo, *First Federal Execution in 17 Years; Another Set Wednesday*, AP NEWS (July 14, 2020), https://apnews.com/article/health-arkansas-in-state-wire-ar-state-wire-virus-outbreak-638826b00bba1b389756126e4cfae97a.

173. *Id.* at 12.

174. Maryland, Georgia, Texas, and Tennessee allowed chaplains in the execution chambers in 2014. *State Weighs Allowing Inmates' Own Clergy During Execution*, CUMBERLAND TIMES-NEWS (Aug. 7, 2014), https://www.times-news.com/news/local_news/state-weighs-allowing-inmates-own-clergy-during-execution/article_3bff0c86-338f-5b81-b6e7-29b5139b1b17.html.

175. Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, and South Dakota neither explicitly permit nor bar clergy from the execution chamber. Opposition to Emergency Application to Vacate Injunction of Execution at 15 n.10, Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.); *see also* OKLA. DEP'T OF CORR., EXECUTION PROCEDURES § VI(C)(4) (2020).

until an event in which an outside clergyperson arrived at the prison wearing an ankle monitor—apparently having been on probation for a crime.[176] While this may seem the exact kind of security incident states like Texas wish to avoid by prohibiting clergy altogether, a simple preparatory security measure, such as a background check on the clergyperson, would prevent such an incident. Until Texas changed its policy in 2019, the state was a prime example for ensuring safe executions while still allowing chaplain presence and effectively preserving religious freedom.[177]

The federal government's advance security measures, including background screenings and providing instruction, have proven efficient and successful while still furthering prisons' valid interests in security. States wishing to carry out executions have these proven alternative means to ensure security—means much less restrictive than completely barring clergy. Justice Kagan's concurring opinion in *Dunn v. Smith*, the most recent Supreme Court case ruling on the clergy issue against an Alabama prison, is forceful and prophetic:

> [P]ast practice, in Alabama and elsewhere, shows that a prison may ensure security without barring all clergy members from the execution chamber. . . . Nowhere, as far as I can tell, has the presence of a clergy member (whether state-appointed or independent) disturbed an execution. That record "suggests that [Alabama] could satisfy its security concerns through a means less restrictive" than its current prohibition.[178]

E. Gutierrez *Resolved?*

Within a few months of the Supreme Court's remand of Mr. Gutierrez's case back down to the district court with instructions to rule on the merits of the religious claims, and shortly following the Court's February 2021 direction in *Dunn v. Smith*, the TDCJ backtracked its execution policy.[179]

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176. Brian Witte, *Md. Weighs Allowing Inmates' Own Clergy at Death*, WASH. TIMES (July 19, 2010), https://www.washingtontimes.com/news/2010/jul/19/md-clergy-death-chamber-proposal/.

177. *See id.*; *Gutierrez*, No. 1:19-cv-00185, at 3. Before Texas changed its policy, no chaplain had caused an incident in any of Texas's executions since 1982. *Id.*

178. Dunn v. Smith, 141 S. Ct. 725, 725–26 (2021) (mem.) (Kagan, J., concurring) (quoting Holt v. Hobbs, 574 U.S. 352, 368–69 (2015)).

179. Dallas Morning News Editorial, Opinion, *Texas Wisely Ends Its Indefensible Policy of Barring Clergy from the Execution Chamber*, DALL. MORNING NEWS (May 5, 2021, 8:18 AM), https://www.dallasnews.com/opinion/editorials/2021/05/05/texas-wisely-ends-its-indefensible-policy-of-barring-clergy-from-the-execution-chamber/ [hereinafter *Texas Wisely*

On April 21, 2021, it announced reinstatement of authorized clergy presence in the state's execution chamber, this time explicitly allowing a prisoner's selected outside spiritual advisor if cleared in advance.[180] Although the change in policy in effect granted Mr. Gutierrez his requested relief and rendered his claims moot, the Supreme Court's hesitancy in pronouncing a broad rule as of spring 2022 still may leave states with the option to proceed with executions without clergy presence.

In November 2021, the Supreme Court heard oral arguments in *Ramirez v. Collier*, in which another Texas death row prisoner claimed his RLUIPA rights would be violated by the TDCJ if he were denied his pastor's touch and audible prayer in the execution chamber.[181] The Court ruled in favor of the prisoner, holding that he was likely to succeed on his RLUIPA claims and that Texas, on the record presented to the Court, had not shown that denying the prisoner's specific request was the least restrictive means of furthering the state's compelling interest.[182] The Court emphasized that RLUIPA claims require case-by-case consideration, but it also advised states to implement policies addressing clergy issues likely to arise in executions:

> If spiritual advisors are to be admitted into the execution chamber, it would also seem reasonable to require some training on procedures, including any restrictions on their movements or conduct. When a spiritual advisor would enter and must leave could be spelled out. If the advisor is to touch the prisoner, the State might also specify where and for how long. And, as noted, if audible prayer is to occur, a variety of considerations might be set forth in advance to avoid disruption. It may also be reasonable to document the advisor's advance agreement to comply with any restrictions. If States adopt clear rules in advance, it should be the rare case that requires last-minute resort to the federal courts.[183]

Ends]; Amy Howe, *Court Blocks Execution, Will Weigh in on Inmate's Religious-Liberty Claims*, SCOTUSBLOG (Sept. 8, 2021, 10:47 PM), https://www.scotusblog.com/2021/09/court-blocks-execution-will-weigh-in-on-inmates-religious-liberty-claims/.

180. *Texas Wisely Ends*, *supra* note 179.

181. Ramirez v. Collier, 142 S. Ct. 1264, 1274 (2022).

182. *Id.* at 1281.

183. *Id.* at 1283 (citation omitted).

V. Conclusion

The Supreme Court's recent orders in favor of prisoners' religious rights should prompt prison policy revisions throughout the states, especially considering the Court's recognition of the *Gutierrez* district court's findings favoring clergy presence in execution chambers. In the absence of an outright ruling declaring clergy presence a right or a clear directive from Congress declaring such, all state prisons should certainly see the Court's recent decisions as a guide and Texas's back-and-forth policy revision incident as a warning. While Oklahoma and other states that the Court has not directly ordered to allow clergy presence may choose to continue to bar clergy—and consequently risk further expensive litigation on the issue—perhaps the more reasonable and proactive policy going forward is to expressly allow clergy presence upon profession of a sincere religious belief. The Tenth Circuit's sincerity approach should guide prison administrators and courts in the inquiry. Because of the conflict between federal and state execution policies and the rising number of prisoner claims involving the fundamental right to free exercise, there may still be need for the Supreme Court to define clearly what religious rights prisoners enjoy when the State carries out capital punishment. Until the Court makes a direct ruling applicable to all prisons, prisons should take the proactive approach and revise their policies to allow for clergy presence. This approach would follow the trend of modern courts granting more and more religious freedoms to prisoners since RLUIPA's enactment in 2000. Government should not unjustifiably infringe on anyone's right to a peaceful death.

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