THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT AND LIMITS OF RELIGIOUS ADVISORS WITHIN THE EXECUTION CHAMBER

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ABSTRACT

A prisoner's right to free exercise of religion within the execution chamber has been considered across time through both legislative and judicial action. The Supreme Court will take up the issue again in *Ramirez v. Collier*. Ramirez, a prisoner awaiting execution, argues that his execution must be stayed because Texas' policy of prohibiting religious advisors from touching prisoners in their final moments or speaking aloud in the execution chamber violates the Religious Land Use and Institutionalized Persons Act (RLUIPA) as well as the First Amendment right to freedom of religion. This Note provides a historical analysis of the Supreme Court's prior interpretations of cases concerning RLUIPA, including the Court's most recent decision in *Dunn v. Smith*. Moreover, the Author argues that Texas' current policies concerning religious advisors in execution chambers violate RLUIPA and thus, Ramirez's execution must be stayed. Ultimately, this Note argues that while Texas does have a compelling state interest in maintaining the security of prisons, the prohibitions placed on the conduct of religious leaders in execution chambers is not the least restrictive means of achieving that interest and as a result it constitutes a substantial burden on inmates' ability to practice sincerely held religious beliefs.

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INTRODUCTION

The issue of prisoners' free exercise of religion in the execution chamber has developed through both congressional statutes and case law. The Supreme Court will again address prisoners' religious rights in the execution chamber in *Ramirez v. Collier*, expected to be decided in 2022.[1] Ramirez, a prisoner awaiting execution by the State of Texas for a fatal stabbing during a robbery, argues that his execution must be stayed. Ramirez is not challenging his conviction—rather, he asserts that Texas' policies within the execution chamber violate federal law and his First Amendment rights.[2] Ramirez argues Texas's policy of allowing a religious advisor to be present in the execution chamber at the time of execution but restricting that religious advisor from touching the prisoner or saying prayers aloud violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[3] in addition to his First Amendment right to freedom of religion. This case will require the Supreme Court to weigh the state's interest in maintaining security in the execution chamber against a prisoner's religious rights during their final moments. This Note argues that Texas's restrictions on religious advisor touch and speech within the execution chamber violate RLUIPA, as these restrictions are not the least restrictive means of furthering any compelling state interest, and thus Ramirez's execution should be stayed until the policy is amended.

Part I of this Note provides a historical review of the Supreme Court's interpretation of RLUIPA case law, including an analysis of the Supreme Court's most recent RLUIPA case. Part II sets out the background of *Ramirez v. Collier*, the current RLUIPA case pending before the Court. Part III proposes the argument that Texas's execution chamber policies violate RLUIPA and thus Ramirez's execution must be stayed.

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1. *See Ramirez v. Collier*, 142 S. Ct. 1264 (2022). The Supreme Court found Ramirez was likely to succeed on his RLUIPA claims and instructed the District Court to grant preliminary injunctive relief should Texas refuse to allow audible prayer or religious touch during Ramirez's execution. The substance of this note was written prior to the Supreme Court's opinion and an editorial decision has been made to maintain the original scholarship.

2. *Id.* at 1272. *See also* Pete Williams, *Supreme Court to Weigh in on religious rights of prisoners facing execution*, NBC NEWS (Nov. 9, 2021, 1:33 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-weigh-religious-rights-prisoners-facing-execution-n1283502 [https://perma.cc/S46C-PBC2].

3. *Ramirez*, 142 S. Ct. at 1272.

I. HISTORICAL REVIEW OF RLUIPA

A review of the case law addressing prisoners' religious rights in the execution chamber is informative for determining the limits of those rights. Part A addresses the creation of RLUIPA, Part B addresses the constitutionality of RLUIPA and the Cutter Test, Part C addresses application of RLUIPA to states' execution chamber policies, and Part D addresses the Supreme Court's most recent application of the RLUIPA to a state's execution chamber policies.

A. Creation of RLUIPA

In 1990, the Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* that generally applicable rules which only inadvertently infringe upon religious rights would no longer receive strict scrutiny review.[4] At issue in *Smith* was Oregon's decision to outlaw the use of peyote, a plant that the defendants used in their religious practice. The defendants were terminated from their jobs for their use of the outlawed plant and were consequently denied unemployment benefits.[5] The Court concluded the First Amendment had not been violated because the "prohibition of the exercise of religion" was not the purpose of the law, but rather an incidental effect of a generally applicable and otherwise valid provision—thereby making the strict scrutiny standard of review unwarranted.[6] This holding was a marked deviation from the typical application of strict scrutiny review for religious exercise claims.

Congress was concerned about the Court's departure from strict scrutiny review and thus enacted the Religious Freedom Restoration Act ("RFRA") in 1993 in an effort to ensure protections for religious exercise.[7] However, RFRA was not successful in ensuring such protections universally. In 1997, the Supreme Court limited RFRA to apply only to federal claims in *City of Boerne v. Flores*.[8] The Court determined that the

4. *Emp. Div., Dep't of Hum Res. of Or. v. Smith*, 494 U.S. 872 (1990).
5. *Id.* at 874.
6. *Id.* at 878.
7. *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997).
8. *Id.* at 536.

Act was an overextension of Congress's enforcement power under Section Five of the Fourteenth Amendment.[9]

In response to this restriction of RFRA, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in 2000 to ensure adequate protections for state and local religious exercise claims.[10] RLUIPA is "less sweeping than [the] RFRA" and invokes "federal authority under the Spending and Commerce Clauses."[11] The legislation applies to institutionalized persons, such as those in prisons,[12] and requires the government to not impose a "substantial burden on the religious exercise" of a prisoner unless the government can demonstrate that the burden furthers a compelling state interest and is the "the least restrictive means of furthering" that interest.[13] Religious exercise is defined broadly within the statute to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"[14] but substantial burden is left wholly undefined.[15] Thus, while it is clear from the statute that a religious exercise need not be central to the religion to be protected, it has been left to the courts to determine what is considered a "substantial burden" imposed by the State.[16]

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9. *Id.*

10. *See* 42 U.S.C. § 2000cc-1.

> (a) General rule
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

11. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005).

12. Section three of RLUIPA specifically addresses prisoners' religious exercise rights. *See* 42 U.S.C. § 2000cc-1. *See also* Caroline Koch, *Dead Wrong: Texas Tests the Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act by Banning Spiritual Advisors from Execution Chambers*, 69 AM. U. L. REV. F. 125, 142 (2020).

13. 42 U.S.C. § 2000cc-1(a).

14. *Id.* § 2000cc-5.

15. See Bret Matera, *Divining a Definition: "Substantial Burden" in the Penal Context Under a Post-*Holt *RLUIPA*, 119 COLUM. L. REV. 2239, 2239 (2019) for an analysis of Circuit Courts' interpretation of what constitutes a substantial burden.

16. 42 U.S.C. § 2000cc-1.

B. Constitutionality of RLUIPA and the Cutter Test

Since its passage, RLUIPA has proven to be an influential statute for the protection of prisoners' religious exercise rights. In 2005, the Supreme Court held RLUIPA to be constitutional in *Cutter v. Wilkinson*, the first RLUIPA case to reach the Court.[17] The plaintiffs were current and former inmates in Ohio who alleged the State had violated RLUIPA by failing to accommodate the exercise of their religion by denying them access to religious texts, preventing them from adhering to appearance requirements of their religion, and failing to provide access to a religious leader of their faith, among other claims.[18] The State responded with a facial challenge to RLUIPA, arguing that it improperly advanced religion and thus violated the Establishment Clause.[19] The Sixth Circuit agreed with the State, holding RLUIPA unconstitutional and reasoning it made "religious prisoners' rights superior to those of nonreligious prisoners," "might 'encourag[e] prisoners to become religious in order to enjoy greater rights,'" and "impermissibly advance[ed] religion by giving greater protection to religious rights than to other constitutionally protected rights."[20] The plaintiffs appealed and the Supreme Court took up the case.[21]

The Supreme Court reversed the Sixth Circuit and held that section three of the RLUIPA, which specifically addresses a prisoner's ability to freely practice their religion, did not "exceed the limits of permissible government accommodations of religious practices" and was constitutional.[22] The Supreme Court then remanded the case "to be evaluated based on whether the (1) substantial burden was (2) in furtherance of a compelling governmental interest and was (3) the least restrictive means of achieving that compelling governmental interest."[23] These three criteria became known as the *Cutter* test and are now used to determine if state policy violates RLUIPA.[24]

17. *Cutter*, 544 U.S. at 725.
18. *Id.* at 712-13.
19. *Id.* at 713.
20. *Id.* at 718.
21. *Id.* at 718-19.
22. *Id.* at 714.
23. Koch, *supra* note 12, at 144.
24. *Id.* at 130.

In 2015, the Supreme Court took up another RLUIPA case. In *Holt v. Hobbs*, the Supreme Court held that the Arkansas Department of Correction had violated RLUIPA by restricting a prisoner from growing a half-inch beard.[25] Applying the *Cutter* test, the Court found the plaintiff's practice of growing a half-inch beard, an exercise of his Muslim religion, was a sincerely held religious belief that was substantially burdened by the prison's policy of requiring him to shave his beard completely.[26] Further, the Court reasoned that the grooming policy neither advanced the state's compelling interest in preventing prisoners from hiding contraband in their hair[27] nor was it the least restrictive[28] means of preventing hidden contraband.[29]

C. Supreme Court Application of RLUIPA to State Execution Chamber Policies

Recently, the Supreme Court has ruled on multiple cases concerning RLUIPA and prisoners' access to religious advisors in the execution chamber. In February of 2019, the Supreme Court granted the application to vacate a stay of execution of a death sentence in *Dunn v. Ray*.[30] Previously, the Eleventh Circuit had found Ray's RLUIPA claim, which challenged the prison's policy of "keeping all clerics other than the prison Chaplain out of the execution chamber," likely to succeed on the merits and thus granted Ray a stay of execution.[31] Upon review, the Supreme Court did not address RLUIPA claim, but instead granted the application to vacate because Ray had waited too long to seek relief.[32] Thus, it remained unclear whether RLUIPA required religious advisors other than the prison chaplain to be admitted into the execution chamber.

In March of 2019, the Supreme Court granted a stay of execution on the basis of a RLUIPA violation in *Murphy v. Collier*.[33] In that case, Texas's

25. *Holt v. Hobbs*, 574 U.S. 352, 352 (2015).
26. *Id.* at 361.
27. *Id.* at 363.
28. *Id.* at 365.
29. *Id.*
30. *Dunn v. Ray*, 139 S. Ct. 661(2019).
31. *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 694-95 (11th Cir. 2019).
32. *Dunn*, 139 S. Ct. at 661.
33. *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019).

prison policy allowed Christian and Muslim inmates to have a spiritual advisor in the execution chamber but barred any other religious advisors.[34] All non-Christian and non-Muslim spiritual advisors could only be present in the viewing room, not the execution chamber.[35] The Supreme Court held the State could not carry out Murphy's execution unless they permitted his Buddhist spiritual advisor, or another Buddhist advisor of the State's choosing, to be "in the execution chamber during the execution."[36]

In his concurrence, Justice Kavanaugh asserted that states have a compelling interest in controlling the execution chamber and, in order to avoid religious challenges, should either "allow all inmates to have a religious advisor of their religion in the execution room" or exclude all advisors from the execution chamber.[37] Five days after the Supreme Court's grant of stay in *Murphy v. Collier*, Texas changed its prison policies to exclude all religious advisors from the execution chamber.[38] In a statement following his concurrence, Justice Kavanaugh stated that this new policy "would likely pass muster under" RLUIPA as the State had a "compelling interest in controlling access to the execution room."[39]

The *Ray* and *Murphy* decisions raised questions about how the Court would respond to a prison policy barring *all* religious advisors from the execution chamber. In February of 2020, after *Ray* and *Murphy*, the American University Law Review published an article predicting that such a policy would violate the RLUIPA.[40] The author, Caroline Koch, analyzed Texas's policy of banning religious advisors from the execution chamber.[41] Koch asserted that under the strict scrutiny test required by RLUIPA, the Texas policy would impose a substantial burden on prisoner's religious exercise during the last moments of their life, that Texas was embellishing its security interests, and that there are less restrictive means available.[42] Koch emphasized that RLUIPA defines religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of

34. *Id*. (Kavanaugh, J., concurring).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 1476 (Kavanaugh, J., statement respecting grant of stay).
39. *Id.*
40. Koch, *supra* note 12, at 125, 127-33.
41. *Id.* at 129-30.
42. *Id.* at 149-55.

religious belief."[43] Further, she asserted prohibiting the presence of a religious advisor in the execution chamber would be a substantial burden on the protected right to freely exercise religion, even if such access was not specifically required by the religion.[44] Koch stated that Texas's security concerns were based on "speculation or exaggerated fears," as there was no support cited for such concerns.[45] Koch proposed multiple less restrictive means to maintain security in the execution chamber, such as hiring and training spiritual advisors who would represent the religions practiced by the limited number of prisoners on death row or allowing prisoners' own spiritual advisors to be present.[46]

Koch's prediction that a policy barring religious advisors from the execution chamber would violate RLUIPA was confirmed just the next year in *Dunn v. Smith,* when Alabama's prison policy—which mirrored that of Texas in excluding all religious advisors from the execution chamber—was challenged.[47]

D. Dunn v. Smith: The Supreme Court's Most Recent Decision Regarding Religious Advisors in the Execution Chamber

Willie B. Smith was convicted of murder in 1991 and sentenced to death.[48] He was on death-row and in the custody of the Alabama Department of Corrections ("ADOC"); his execution was set for February 11, 2021.[49] In December of 2020, Smith brought a RLUIPA challenge, along with other claims, in the Middle District of Alabama asking the Court to require ADOC to allow Smith's religious advisor in the execution chamber during his execution.[50]

Before April of 2019, Alabama had allowed the prison's Christian chaplain into the execution chamber, while no other religious advisors were allowed such access.[51] Alabama changed its policy in April of 2019 after

43. *Id.* at 153-54.
44. *Id*.
45. *Id.* at 154.
46. *Id.* at 155.
47. *Dunn v. Smith*, 141 S. Ct. 725 (2019).
48. *Smith v. Comm'r, Ala. Dep't of Corr.*, 844 F. App'x 286, 287 (11th Cir. 2021).
49. *Id.*
50. *Id.*
51. *Id.*

Ray and *Murphy*.[52] Alabama's updated policy barred all religious advisors from the execution chamber,[53] similar to the Texas policy Justice Kavanaugh said would likely not violate RLUIPA.[54]

Smith brought suit in District Court claiming the ADOC's policy violated his rights under RLUIPA, the Alabama Religious Freedom Amendment ("ARFA") of the Alabama Constitution, and the Establishment and Free Exercise clauses of the First Amendment.[55] The District Court dismissed the Establishment Clause claim, but considered the RLUIPA, Free Exercise Clause, and ARFA claims.[56] The District Court denied Smith's motion for a preliminary injunction and determined that Smith had failed to show a substantial likelihood of success on the merits of his claims.[57] Smith appealed the District Court's denial of the motion for a preliminary injunction concerning his RLUIPA and ARFA claims to the Eleventh Circuit.[58]

The Eleventh Circuit found that Smith was likely to succeed on his RLUIPA claim and granted a preliminary injunction requiring the ADOC to allow Smith's religious advisor to be present in the execution chamber at the time of the execution.[59] The Eleventh Circuit first considered whether Smith had established a prima facie RLUIPA claim and found both elements satisfied: 1) Smith was engaged in a religious exercise and 2) the religious exercise was substantially burdened by the ADOC's policy.[60] RLUIPA provides "broad protection of religious exercise," and the Eleventh Circuit—agreeing with the District Court—found Smith's religious belief of needing his spiritual advisor at his side during his death sincere and constituted a religious exercise as required by RLUIPA.[61]

52. *Id.* (citing *Dunn v. Ray*, 139 S. Ct. 661 (2019); *Murphy v. Collier*, 139 S. Ct. 1475 (2019)).
53. *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021).
54. *See Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of stay).
55. *Smith*, 844 F. App'x at 287.
56. *Id.*
57. *Id.* at 288.
58. *Id*.
59. *Id.* at 294-95.
60. *Id.* at 290-91.
61. *Id*. at 289-90. "We begin our discussion of Smith's RLUIPA claim by noting that we do not in any way doubt Smith's sincerely held religious beliefs" and "we agree with the District Court's conclusions that Smith's practice of Christianity and his belief that his pastor should be physically present with him in the execution chamber constitute a religious exercise for the purposes of a RLUIPA claim." *Id.* at 290.

Next, the Eleventh Circuit, disagreeing with the District Court's findings, determined that Smith's religious exercise was substantially burdened by ADOC's policy.[62] The District Court had improperly considered whether Smith's beliefs were simply a preference of one type of religious exercise over another and if there were alternatives available to practice the religion.[63] The Eleventh Circuit stated such questions are not relevant to RLUIPA claims[64] and determined that because Smith was not able to have his pastor present in the execution chamber, the ADOC policy required him to change his religious practice in a manner that substantially burdened his religious exercise. [65]

As the Eleventh Circuit determined Smith had established a prima facie case, RLUIPA required the ADOC to justify the policy of denying prisoners access to religious advisors in the execution chamber by proving both that the policy furthers a compelling state interest and is the least restrictive means available.[66] The Eleventh Circuit, agreeing with the District Court, found that states have a well-established compelling interest in maintaining security and order within their prisons and specifically within the execution chamber.[67] However, the Eleventh Circuit found the District Court had abused its discretion when considering the ADOC's policy to be narrowly tailored.[68] The District Court had not engaged in an inquiry into whether less restrictive measures existed and there was evidence that other similar institutions, such as the Federal Bureau of Prisons, allowed spiritual advisors into the execution chamber while still maintaining security.[69] The ADOC had no explanation for why other institutions were able to maintain security while allowing spiritual advisors into the execution chamber but it could not.[70] Thus, the Eleventh Circuit determined the ADOC had failed to prove its burden as required by RLUIPA.[71]

The Eleventh Circuit concluded that Smith was likely to succeed on his RLUIPA claim, as he had successfully established a prima facie case and

62. *Id.* at 291.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 289, 291.
67. *Id.* at 291-92
68. *Id.* at 292.
69. *Id.*
70. *Id.*
71. *Id.*

the ADOC had failed to meet its burden of proving its policy was the least restrictive means of furthering the State's compelling interest to maintain security.[72] The Eleventh Circuit then succinctly determined that Smith had satisfied all other elements required to grant injunctive relief, reversed the District Court's ruling, and granted Smith injunctive relief, thus requiring the ADOC to allow Smith's pastor into the execution chamber at the time of Smith's death.[73]

Judge Adalberto Jordan's dissent from the Eleventh Circuit's opinion was grounded in the standard of review which he believed to be required in an appeal from a denial of a preliminary injunction.[74] The judge stated that a "deferential standard of review" was owed to the District Court's RLUIPA analysis and that the District Court's interpretation of "RLUIPA's least restrictive means requirement to not mean that prison officials must refute every conceivable option or alternative" was a "reasonable assessment."[75] However, Judge Jordan did not fully endorse the District Court's RLUIPA analysis and concluded his dissent by stating, "Whether the district court got RLUIPA's least restrictive means requirement right or wrong, I do not believe that its decision constitutes an abuse of discretion."[76]

Alabama quickly appealed to the Supreme Court, hoping to vacate the Eleventh Circuit's injunction.[77] In February of 2021, in a one-sentence opinion, the Supreme Court denied Alabama's application to vacate the Eleventh Circuit's injunction.[78] Justice Thomas would have granted the application and Justice Kavanaugh and the Chief Justice also dissented from the denial.[79]

Justice Kagan authored a concurrence which Justices Breyer, Sotomayor, and Barrett joined.[80] Justice Kagan reiterated RLUIPA's strict-scrutiny test and determined Smith's religious exercise was substantially burdened by Alabama's policy.[81] Justice Kagan acknowledged that prison security is a compelling state interest but doubted religious advisors pose

72. *Id.* at 293.
73. *Id.* at 294-95.
74. *Id.* at 295 (Jordan, J., dissenting).
75. *Id.*
76. *Id.*
77. *Dunn v. Smith*, 141 S. Ct. 725 (2021).
78. *Id.* at 725.
79. *Id.* at 725-26.
80. *Id.* at 725 (Kagan, J., concurring).
81. *Id.*

any actual danger to the security of the execution chamber.[82] The Justice described the least restrictive means standard as "exceptionally demanding" and ultimately determined Alabama's policy fell short of the standard.[83] She referenced other institutions' ability to maintain security with religious advisors in the execution chamber and other procedures in support of the determination that Alabama's policy was not the least restrictive means possible of maintaining prison safety.[84] As Alabama did not meet the strict scrutiny standard required by the RLUIPA, Justice Kagan stated "the Eleventh Circuit was right to bar Alabama from executing Smith without his pastor by his side."[85]

Joined by the Chief Justice, Justice Kavanaugh dissented from the denial of the application to vacate the injunction.[86] Justice Kavanaugh asserted that he would have granted the application to vacate the injunction because "the State's policy is non-discriminatory and, in my view, serves the State's compelling interests in ensuring the safety, security, and solemnity of the execution room."[87] The Justice did not address the least restrictive means requirement and concluded his dissent by advising states to "figure out a way to allow spiritual advisors into the execution room, as other States and the Federal Government have done" in order "to avoid months or years of litigation delays because of this RLUIPA issue."[88]

After the Supreme Court denied the request to vacate the injunction, Alabama and Smith eventually reached a settlement.[89] The State allowed Smith's pastor to "anoint Smith's head with oil, pray with Smith, and hold his hand, as long as the pastor moved out of the way before the execution

82. "Nowhere, as far as I can tell, has the presence of a clergy member whether state-appointed or independent disturbed an execution." *Id.* at 726.

83. *Id.* at 725 (quoting *Holt v. Hobbs*, 574 U.S. 352, 364 (2015)).

84. *Id.* at 726 ("The State can 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.").

85. *Id.*

86. *Id.* at 726 (Kavanaugh, J., dissenting).

87. *Id.*

88. *Id.* at 727.

89. *U.S. Supreme Court Stays Texas Execution, Agrees to Review Contours of the Right to Religious Exercise in the Execution Chamber*, DEATH PENALTY INFORMATION CENTER (Sep. 9, 2021), https://deathpenaltyinfo.org/news/u-s-supreme-court-stays-texas-execution-agrees-to-review-contours-of-the-right-to-religious-exercise-in-the-execution-chamber [https://perma.cc/P6TK-P7HE].

team performed its consciousness check."[90] The pastor was also required to remain in the execution chamber until the execution was completed.[91]

Dunn v. Smith provided much needed direction to prisons and cleared up the uncertainty left in the wake of *Murphy* and *Ray* about whom states must allow in the execution chamber to comply with RLUIPA. As determined by *Dunn v. Smith*, at minimum states must allow religious advisors into the execution chamber. Questions remain, however, about the State's ability to limit the conduct of such advisors within the execution chamber and maintain RLUIPA compliance.

II. BEFORE THE SUPREME COURT: RAMIREZ V. COLLIER

The Supreme Court is now faced with determining just how much a state may limit a religious advisor's conduct in the execution chamber in *Ramirez v. Collier*. On September 8, 2021, the Supreme Court halted Texas's execution of John Ramirez in order to review his case.[92] Ramirez, who was convicted in 2004 of stabbing Pablo Castro to death during a robbery, is not challenging his conviction.[93] Instead, Ramirez argues that Texas's policy of allowing a religious advisor into the execution chamber, but restricting the advisor from touching the prisoner or praying aloud, violates RLUIPA.[94]

Texas previously had a policy restricting all spiritual advisors from the execution chamber, but the policy was changed following the Supreme Court's ruling in *Dunn v. Smith*.[95] Texas's revised policy allows a spiritual advisor into the chamber but restricts them from laying hands on the inmate or audibly praying.[96] The Fifth Circuit Court of Appeals denied Ramirez's

90. *Id.*
91. *Id.*
92. *Id.*
93. Robert Barnes, *Supreme Court seems split on condemned man's request for pastor at execution*, WASH. POST (Nov. 9, 2021, 6:53 PM), https://www.washingtonpost.com/politics/courts_law/john-henry-ramirez-execution/2021/11/09/a83e13cc-4196-11ec-9ea7-3eb2406a2e24_story.html [perma: https://perma.cc/A8G3-TWLJ].
94. *Ramirez v. Collier*, 10 F.4th 561, 563 (5th Cir.), *cert. granted*, 142 S. Ct. 50 (2021).
95. *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (Kagan, J., concurring).
96. *Ramirez*, 10 F.4th at 563.

motion to stay the execution[97] and Ramirez appealed to the Supreme Court, which granted review.[98]

The Court heard oral arguments for *Ramirez v. Collier* on November 9, 2021. Many of the Justices' questions were similar to the concerns expressed in the concurrence and dissent of *Dunn v. Smith*. While Justice Gorsuch made no comment, Justice Kavanaugh expressed concern about the safety risk an outside spiritual advisor posed.[99] Chief Justice Roberts and Justice Alito pondered whether the particular kind of physical contact—a hand touching a foot or a forehead—would lead to a plethora of cases having to address contact over the entire human anatomy.[100] Further, Justices Breyer and Kagan questioned if there had even been any issues with physical contact between spiritual advisors and prisoners in the past,[101]while Justice Barrett asked if the state concern argued here would extend to keep prisoners from gathering for religious services.[102] The Supreme Court is expected to issue an opinion on the case in 2022.[103]

III. ARGUMENT: SPIRITUAL ADVISORS MUST BE PERMITTED TO PRAY AUDIBLY AND LAY HANDS ON INMATES IN THE EXECUTION CHAMBER

Considering the Supreme Court's prior holdings and interpretation of RLUIPA, Ramirez should be successful in his claim. *Dunn v. Smith* is particularly illustrative of the direction the Court is heading in these cases.

First, both the Eleventh Circuit and the Supreme Court correctly applied RLUIPA to Willie Smith's case and were correct in asserting that Smith's rights would be violated unless provided access to his religious advisor in the execution chamber at the time of his execution. As asserted by the majority opinion in the Eleventh Circuit and by Justice Kagan, Smith wanting his Pastor in the execution room to hold his hand and aid in his "transition between the worlds of the living and the dead" was a religious

97. *Id.*
98. *Ramirez*, 142 S. Ct. at 50.
99. Barnes, *supra* note 92.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See Ramirez*, 142 S. Ct. at 1264.

exercise under the RLUIPA.[104] Alabama's policy of excluding religious advisors from the execution chamber not only substantially burdened this exercise, but completely denied it by barring Smith's pastor from the execution chamber during the final moments of Smith's life. Thus, Smith established a prima facie case under the RLUIPA.

The Eleventh Circuit and Justice Kagan were also correct in determining that Alabama failed to meet the strict scrutiny test required by the RLUIPA. While Alabama has a compelling interest in maintaining security in prisons and "preserving the solemnity, safety and security of its executions,"[105] there have been no instances of spiritual advisors disrupting procedure in the execution chamber.[106] Thus, it is unclear from where Alabama's concerns about disruptive spiritual advisors stems. It seems possible that there is actually no such fear, but that Alabama simply chose to mirror Texas's 2019 policy of excluding religious advisors from the execution chamber—a decision which had garnered support from Justice Kavanaugh in *Murphy*.[107] In his concurrence in *Murphy*, Justice Kavanaugh suggested states may avoid equal treatment claims by barring all religious advisors from the execution chamber and that such policy would likely be upheld under a RLUIPA challenge.[108] A majority of the Court clearly disagreed with Justice Kavanaugh that such a bar would not violate RLUIPA.[109]

Even if Alabama has a compelling interest here, a total bar to religious advisors in the execution chamber is not the "least restrictive" means of maintaining security within the execution chamber.[110] For example, Justice

104. *Dunn v. Smith*, 141 S. Ct. 725 (2021) (Kagan, J., concurring).
105. *Smith v. Comm'r, Ala. Dep't of Corr.*, 844 F. App'x 286, 292 (11th Cir. 2021).
106. *Dunn v. Smith*, 141 S. Ct. 725, 726 (2021).
107. *Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019) (Kavanaugh, J., statement respecting grant of stay)

> Texas now allows all religious ministers only in the viewing room and not in the execution room. The new policy solves the equal-treatment constitutional issue. And because States have a compelling interest in controlling access to the execution room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under the Religious Land Use and Institutionalized Persons Act of 2000.

108. *Id.* at 1476 (Kavanaugh, J., concurring).
109. *See Dunn v. Smith*, 141 S. Ct. 725, 726 (2021).
110. *See* 42 U.S.C. § 2000cc-1 (requiring state restrictions to be the least restrictive means of furthering the compelling governmental interest).

Kagan suggests running background checks on and interviewing religious advisors.[111] While such procedures may cost prisons money, the expenditure cannot be too great as Alabama executes so few people each year.[112] Also, other prisons' ability to maintain security while allowing religious advisors into the execution chamber suggests that Alabama prisons are capable of doing the same.[113] These are only a few options available to prisons to secure their execution rooms while also allowing prisoners access to their religious advisors. As there are less restrictive means available to maintain security, Alabama's policy fails to meet the "exceptionally demanding" strict scrutiny standard of RLUIPA.[114]

Taking stock of *Dunn v. Smith*, other states have recently changed their policies concerning religious advisors in the execution chamber. In November of 2021, Oklahoma changed its policy to allow spiritual advisors into the execution chamber.[115] The policy allows the spiritual advisor to lay hands upon the inmate and to pray or read aloud during the execution if the spiritual advisor passes a background check.[116] Alabama also changed its policy following *Dunn v. Smith*, and now allows an inmate to have a spiritual advisor present in the execution chamber.[117]

Second, while Texas's policy of allowing religious advisors into the execution chamber complies with the Supreme Court's holdings in *Murphy* and *Dunn v. Smith*, it does not comply with RLUIPA requirements. RLUIPA, as proclaimed by the Supreme Court in *Cutter*, requires states that are substantially burdening a sincerely held religious belief or exercise to do so in the least restrictive means possible when in furtherance of a

111. *Id.* at 726 (Kagan, J., concurring).

112. Alabama has executed only 13 people since 2014. *Executions*, ALA. DEPT. OF CORR., http://www.doc.state.al.us/Executions (last visited Oct. 29, 2022) [https://perma.cc/ZN8M-LV92].

113. *See Smith v. Comm'r, Ala. Dep't of Corr.*, 844 F. App'x 286, 292 (11th Cir. 2021) (using the federal BOP's policy of allowing spiritual advisors into the execution chamber as an example of other institutions' ability to maintain safety and allow prisoner's religious exercise).

114. *Dunn*, 141 S. Ct. at 725 (Kagan, J., concurring).

115. Nolan Clay, *Oklahoma to allow death row inmates a personal spiritual leader in the execution chamber*, OKLAHOMAN (Nov. 23, 2021, 8:02 AM), https://www.oklahoman.com/story/news/2021/11/23/oklahoma-let-spiritual-advisors-execution-chamber/8730678002/ [https://perma.cc/8Z58-95QN].

116. *Id.*

117. Kim Chandler, *Alabama to allow spiritual advisor at inmate's execution*, AP NEWS (Feb. 25, 2021), https://apnews.com/article/alabama-executions-us-supreme-court-b-smith-courts-13d5f7c0d9102d6af6ddb23f2086e041 [https://perma.cc/MF77-74WA].

compelling government interest.[118] Here, it is clear that Ramirez has a sincerely held religious belief. In *Dunn v. Smith*, Justice Kagan stated in her concurrence that there was little doubt that the inmate who requested the presence of his religious advisor in the execution chamber sincerely held those beliefs.[119] Most of the cases which address the application of RLUIPA, both inside and outside of the execution chamber, do not seriously question the sincerity of the inmate's religious belief.[120] However, Judge Owen in the Fifth Circuit expressed concerns that Ramirez is simply "delay[ing] his execution."[121] But Judge Dennis disagreed and did not question the sincerity of Ramirez's religious beliefs at all.[122] As there is no reason to question the sincerity of Ramirez's belief and it has not been a focus of previous cases, this should not be much of a hurdle for the case.

Additionally, a religious advisor praying over and blessing an inmate is clearly a religious practice and RLUIPA does not require the burdened religious practice to be central to a religious system or belief.[123] The Court has previously found the presence of religious advisors in the execution chamber to be a religious practice,[124] as well as growing a half-inch beard,[125] and having access to religious texts and religious gatherings.[126] Also, the defendant in *Dunn v. Smith* wished his spiritual advisor to bless him in the execution chamber and such a request was considered a religious practice. Thus, requesting a religious advisor to pray and bless an inmate through physical touch is a religious practice. This is another issue on which the courts do not generally focus when evaluating RLUIPA claims.

RLUIPA only applies to state practices which substantially limit inmates' religious activities.[127] In *Dunn v. Smith*, the Court found that restricting the presence of all religious advisors in the execution chamber was substantially restrictive.[128] In *Murphy*, the Court found that not having

118. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).
119. *Dunn v. Smith*, 141 S. Ct. 725 (2021) (Kagan, J., concurring).
120. *See id.*; *Murphy v. Collier*, 139 S. Ct. 1475, 1484 (2019); *Holt v. Hobbs*, 574 U.S. 352, 361 (2015).
121. *Ramirez v. Collier*, 10 F.4th 561, 562 (5th Cir. 2021) (Owen, J., concurring), *cert. granted*, 142 S. Ct. 50 (2021).
122. *Id.*
123. 42 U.S.C. § 2000cc-5.
124. *See Dunn*, 141 S. Ct. at 725; *Murphy*, 139 S. Ct. at 1475.
125. *See Holt*, 574 U.S. at 352.
126. *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).
127. 42 U.S.C. § 2000cc-5.
128. *See Dunn*, 141 S. Ct. at 725.

access to the kind of religious advisor requested by the inmate substantially limited the inmate's religious practice as well.[129] Additionally, the Court has found requiring an inmate to completely shave his beard, which was maintained for religious purposes, was substantially limiting.[130] Thus, restricting a religious advisor's touch and speech should be considered a substantial burden on an inmate's religious practice. Allowing the religious advisor to be present, but not to administer or perform any rites or prayers, essentially reduces the pastor to only a witness, which is too limiting for religious exercise freedoms. If the role of the religious advisor could be limited to that of a witness and still satisfying RLUIPA, the Court would not have determined that religious advisors must be permitted to be present in the execution chamber at all.[131] They would have found it sufficient if the religious advisors were allowed in the witness room only. However, the Court found this unsatisfactory in *Dunn v. Smith*, where all religious advisors were required to stay in the viewing room.[132] Thus, it is not sufficient for an inmate to simply view their religious advisor at the time of execution. The religious advisor is meant to lend support to the inmate and usher them into the afterlife. This cannot be done simply by the religious advisor standing in a corner and watching the inmate be executed. The advisor needs to be able to provide spiritual rituals and guidance and blessings if such religious practices are required by the inmate. Thus, Texas's policy of allowing the religious advisor into the execution chamber but requiring them to be mute and not have any physical contact with the inmate substantially burdens the inmate's religious practice.

Next, under the *Cutter* test,[133] Texas's policy of requiring the religious advisor to remain silent and not touch the inmate[134] is not the least restrictive means possible of furthering the State's compelling interest. As established in *Murphy*[135] and *Dunn v. Smith*,[136] the State has a well-established compelling interest in controlling the execution chamber and maintaining

129. *See Murphy*, 139 S. Ct. at 1475 (where state policy only allowed inmates access to religious advisors employed by the state and the state only employed Christian and Muslim advisors).
130. *See Holt v. Hobbs*, 574 U.S. 352, 352-53 (2015).
131. *See Dunn*, 141 S. Ct. at 725 (staying an execution when the state policy prohibited any religious advisor from entering the execution chamber).
132. *Dunn v. Smith*, 141 S. Ct. 725 (2021).
133. Koch, *supra* note 12.
134. *Ramirez v. Collier*, 10 F.4th 561, 563 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 50 (2021).
135. *Murphy*, 139 S. Ct. at 1476.
136. *Dunn*, 141 S. Ct. at 725.

prison security. However, as the Court laid out in *Cutter*, this State's interest must be balanced with the inmate's interest in exercising their right to religious practices.[137] Thus, RLUIPA does not prohibit all state practices or policies which restrict inmates' religious exercises but only those which are not the least restrictive. This least restrictive standard strikes balance between the State's and inmate's interests. Courts commonly look to the practices of other institutions when determining if a practice is the least restrictive.[138] In her concurrence in *Ramirez v. Collier*, District Judge Owen highlighted that the State had claimed that the Federal Bureau of Prisons does not allow physical contact between religious advisors and inmates in the execution chamber and that Ramirez had not pointed to any jurisdiction which allowed such actions.[139] While Ramirez may not have highlighted other states which allow such action, there are states that have such policies.

In November of 2021, after the Court's decision in *Dunn*, Alabama changed its policy and allowed Smith's spiritual advisor to "anoint Smith's head with oil, pray with Smith, and hold his hand, as long as the pastor moved out of the way before the execution team performed its consciousness check."[140] Similarly, Oklahoma changed its policy in 2022 to allow touching and audible prayer.[141] In oral arguments for *Ramirez v. Collier*, Texas pointed to both Alabama and Oklahoma before they had changed their policies.[142] These states changing their polices severely undermines Texas's argument that it is proceeding with the least restrictive means possible. If one state is able to maintain security while allowing audible prayer and physical touch, why is Texas unable to? As other states are able to maintain safety and control in the execution chamber while allowing audible prayer and physical contact, Texas's policy is clearly not the least restrictive possible.

137. *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (stating there is "no cause to believe" that the RLUIPA would not be applied to state interest in prison security in a balanced way).

138. *Ramirez*, 10 F.4th at 562. "Courts, including the Supreme Court, often consider practices and policies implemented in state and federal prisons in conducting a least-restrictive-means analysis." *Id.*

139. *Id.* at 561-62 (Owen, J., concurring).

140. DEATH PENALTY INFORMATION CENTER, *supra* note 88.

141. Clay, *supra* note 111.

142. Jessica Gresko, *U.S. Supreme Court considers Texas case about religious rights during executions*, PBS NEWS HOUR (Nov. 9, 2021, 11:10 AM), https://www.pbs.org/newshour/nation/u-s-supreme-court-to-consider-texas-case-about-religious-rights-during-executions
[perma: https://perma.cc/ET63-YH7C].

Texas's argument is also undermined by the fact that the state previously allowed religious advisors to "rest a hand on a prisoners leg and pray quietly during an execution."[143] In oral arguments for *Ramirez v. Collier,* Justice Kagan and Justice Breyer questioned if there had been any instances where physical contact with a prisoner stopped or interfered with an execution.[144] The State's attorney could not name any.[145] Additionally, the Justices asked if Texas had a policy that restricted inmates from audibly praying within the execution chamber or at the time of the execution.[146] The State's attorney responded that there was no such policy in place.[147] Thus, the State's argument that audible prayer is not permissible from a religious advisor as it would keep prison guards from being able to hear the machines used during execution[148] holds no water. While concerns regarding maintaining safety or control within the execution chamber and guards being able to hear the machines supposedly drive Texas's policy, such concerns are either fabricated or inflated in an attempt to justify the restrictive policy.

In addition to Texas's policy not surviving the *Cutter* test, the policy is also against the spirit of RLUIPA. "Congress passed RLUIPA in 2000 to prevent state and local governments from frivolously imposing substantial burdens on institutionalized persons' right to freely exercise their religions."[149] The timing of Congress passing the RLUIPA also signaled Congress's desire to ensure protections for prisoners; RLUIPA was passed just after RFRA was limited by the Court. Congress going to such lengths to ensure religious protections signals that such protections are of high importance and warrant great consideration.

The Texas policy restricting religious advisors from praying audibly or making physical contact with the inmate while in the execution chamber fails the *Cutter* test because it is not the least restrictive means for furthering

143. Jolie McCullough, *U.S. Supreme Court justices appear reluctant to loosen restrictions on religious advisors during Texas executions*, TEX. TRIB. (Nov. 9, 2021, 4:00 PM), https://www.texastribune.org/2021/11/09/texas-executions-religion-supreme-court/ [perma: https://perma.cc/4R78-BU65].

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Koch, *supra* note 12, at 142.*; see also* 42 U.S.C.§ 2000cc-1(a); *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (highlighting that Congress enacted the RLUIPA to provide broad protections).

the State's compelling interest and the policy is against the spirit of RLUIPA. Therefore, Ramirez's execution should be stayed.

CONCLUSION

Policies restricting religious advisors from audibly praying and making physical contact with inmates in the execution chamber violate RLUIPA and cannot be upheld. When RLUIPA was enacted in 2000, and deemed constitutional in *Cutter v. Wilkinson* in 2005, it was unclear to what degree it would serve to protect prisoners' exercise of religion. The Court's ruling in *Holt v. Hobbs* in 2015 clarified that, when possible, prisons must accommodate prisoners' religious exercises while in custody, but *Ray v. Dunn* in 2019 muddied the waters by creating uncertainty about just how much religion must be allowed to be exercised in the execution chamber. In *Murphy v. Collier* in 2019, Justice Kavanaugh seemed to suggest states could avoid religious exercise challenges by either allowing all religious advisors access to the execution chamber or barring all religious advisors. However, these prison policies were still challenged.

In 2021, the Supreme Court clarified in *Dunn v. Smith* that the State must allow inmates to have their religious advisors present in the execution chamber. As a result, many states changed their polices. Texas changed its policy to allow all religious advisors into the execution chamber but restricted them from praying or making contact with the inmate, claiming that such conduct would undermine the State's interest in maintaining security and control in the execution chamber. The Supreme Court is posed to rule on this restriction in 2022 in *Ramirez v. Collier*. The Supreme Court should stay Ramirez's execution as Texas's policy violates RLUIPA. The policy, while furthering a compelling state interest in maintaining security in prisons, is not the least restrictive means of doing so and is substantially burdening inmates' ability to practice sincerely held religious beliefs. While there are valid arguments about safety concerns in the execution chamber, the fact that other states do not need such restrictive polices undermines these concerns and highlights that the Texas policy is not the least restrictive means of ensuring safety. Thus, the Supreme Court must stay Ramirez's execution until Texas amends its policy to be in compliance with RLUIPA.