No. 18A985
CAPITAL CASE

In the Supreme Court of the United States

PATRICK HENRY MURPHY,

Petitioner,

v.

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

Respondents.

ON APPLICATION FOR STAY PENDING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON 8 ½ BY 11-INCH PAPER, AND BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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MOTION OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPLICATION

The Becket Fund for Religious Liberty respectfully moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief as *amicus curiae* in support of Petitioner's application. All parties have consented to the filing of the *amicus* brief.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions, and has represented—among others—agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, in lawsuits across the country and around the world.

Relevantly to this application, Becket has often defended—both as counsel and as *amicus curiae*—prisoners' free exercise of religion. See, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (as counsel, obtained religious beard accommodation for observant Muslim prisoner in Arkansas); *Rich* v. *Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013) (obtained kosher diet for observant Jewish prisoner); *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781, 784 (5th Cir. 2012) (obtained kosher diet for observant Jewish prisoner incarcerated by TDCJ); *Benning* v. *Georgia*, 391 F.3d 1299, 1302 (11th Cir. 2004) (obtained kosher diet for observant Jewish prisoner).

Becket seeks leave to submit this brief in order to clarify the law of religious liberty in this fraught area of law, and out of concern that the time-compressed nature of this appeal and others like it may obscure the important religious liberty issues at stake.

Respectfully submitted,

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MOTION OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY FOR LEAVE TO FILE BRIEF ON 8 ½ BY 11 INCH PAPER

In light of the emergency nature of the briefing, The Becket Fund for Religious Liberty respectfully moves for leave to file its *amicus curiae* brief in support of Petitioner's Emergency Motion and Application to Stay Execution on 8 ½ by 11-inch paper rather than in booklet form.

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QUESTION PRESENTED

Do the First Amendment and the Religious Land Use and Institutionalized Persons Act require a prison system to provide a condemned prisoner with access to clergy in the execution chamber?

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

In particular, Becket has often defended—both as counsel and as *amicus curiae*—prisoners' free exercise of religion. See *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (obtained religious beard accommodation for observant Muslim prisoner in Arkansas); *Rich* v. *Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013) (obtained kosher diet for observant Jewish prisoner); *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781, 784 (5th Cir. 2012) (obtained kosher diet for observant Jewish prisoner incarcerated by TDCJ); *Benning* v. *Georgia*, 391 F.3d 1299, 1302 (11th Cir. 2004) (obtained kosher diet for observant Jewish prisoner); *Baranowski* v. *Hart*, 486 F.3d 112 (5th Cir. 2007) (TDCJ kosher accommodation case); *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2013) (filed amicus brief in Native American RLUIPA case).

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[1] No counsel for a party authored any portion of this brief. No one other than *amicus curiae* or its members made any monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.

As an organization focused solely on religious liberty, Becket takes no position on the administration of the death penalty in general or Murphy's crimes in particular. Becket instead submits this brief in order to clarify the law of religious liberty in this societally and constitutionally fraught area, and out of concern that the time-compressed nature of this appeal and others like it may obscure the important religious liberty issues at stake.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case, like *Dunn* v. *Ray* before it, lies at the intersection of two major fields of litigation concerning deeply contentious and important issues—the death penalty and religious liberty. In this Court, much death penalty litigation follows a quick timeframe; religious liberty litigation often follows a more measured pace. There is thus a temptation to allow the urgency of death penalty litigation—and the remedy requested, a stay of execution—to harry the Court towards a fast decision that does not fully account for the broader societal interests at stake, which range far beyond the specific parties before the Court.

But it would be a mistake to treat this appeal as primarily a capital punishment case. On its own terms this appeal concerns not *whether* Murphy is executed, but *what happens before* Murphy is executed: will Rev. Hui-Yong Shih, his TDCJ-approved spiritual advisor, be allowed to minister to him in the execution chamber? That means that this is first and foremost a case about

prison conditions, not the death penalty. The problem is that the nature of the death penalty is such that completion of the sentence of death immediately moots the claim for protection of religious exercise. Yet this immediate mooting is not so different from other kinds of prison conditions claims, as the Prison Litigation Reform Act dramatically limits the ability of a former prisoner to sue a prison system after his or her sentence is completed.

The practical problem the Court confronts is therefore how to address an important religious liberty issue when the lawyers for the parties are locked into traditional litigating positions (and tactics) that make it close to impossible for the courts to reach the fundamental questions at hand. Given that dynamic, the Court can expect to continue seeing this issue until it provides clear guidance to state governments and lower courts.

And the religious liberty questions are indeed fundamental. They go to whether the Free Exercise Clause of the First Amendment protects a condemned man's religious exercise in seeking comfort of clergy in the execution chamber. The right of a condemned person to the comfort of clergy—and the rights of clergy to comfort the condemned—are among the longest-standing and most well-recognized forms of religious exercise known to civilization. For example, from ancient times a priest would typically be present at an execution to hear the condemned man's confession and administer last rites. See, *e.g.*, Catechism of the Catholic Church §§ 1524-1525 (concerning *viaticum* adminis-

tered to those facing death). In England and her colonies, this practice continued until the time of the Founding.[2] The modern practice of offering the presence of a chaplain in the execution chamber is rooted in these centuries-old religious practices.[3] Cf. *Giles* v. *California*, 554 U.S. 353, 362 (2008) (English dying-declarations doctrine relied on belief that one "soon to answer before her Maker" views her final conduct as religiously significant (citation omitted)).

Preventing or prohibiting this fundamental religious exercise flies in the face of the Free Exercise Clause and reflects an impoverished view of that Clause's scope and its historical meaning. The Founders would not have recognized a Free Exercise Clause that did not ensure a man's last moments included the opportunity to make peace with his faith. Several justices have recognized that current Free Exercise jurisprudence has too cramped a view of the Free Exercise protection. This case is a pressing and recurring example of that problem.

The questions presented by this appeal also go to whether the civil rights protections of the Religious Land Use and Institutionalized Persons Act (RLUIPA)—addressed by the Court only four years ago in *Holt* v. *Hobbs*—apply to this case. For the same reasons that the Free Exercise Clause obtains,

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[2] Stuart Banner, *The Death Penalty: An American History* 18-19 (2002).

[3] See W. Cole Durham and Robert Smith, *Other Forms of Government Chaplaincy*, 4 Religious Organizations and the Law § 36:7 (2017).

denying access to clergy constitutes a substantial burden under RLUIPA, one that Texas cannot hope to justify when it is able to accommodate so many other faiths.

Finally, the specific factual subject matter here is circumscribed. Only 25 prisoners were executed nationwide in 2018, 13 of them by Texas.[4] And only 13 states have executed a prisoner in the last 5 years, meaning that a large majority of executions are carried out by just a handful of states.[5] And the number of condemned prisoners who belong to minority faiths without prison-approved chaplains are a fraction of those executed. Ensuring that a condemned prisoner—particularly one of a minority faith—has access to clergy of his or her religious background would thus require only a few state governments to take action, in only a few instances, to accommodate religious exercise as the First Amendment demands. And because of the peculiarity of the factual scenario presented—in particular that Rev. Shih has been approved by TDCJ as a spiritual advisor to work inside the prison for over six years—offering relief here will not give rise to a host of additional claims regarding the sentence of death.

* * *

[4] See Death Penalty Information Center, Execution List 2018, https://deathpenaltyinfo.org/execution-list-2018/.

[5] See John Gramlich, *California is one of 11 states that have the death penalty but haven't used it in more than a decade*, Pew Research Center (March 14, 2019), https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/.

On application for a stay of execution, this Court sits in equity. *See Hill* v. *McDonough*, 547 U.S. 573, 584 (2006). It is therefore fully within the power of the Court to reform the remedy requested from a stay of execution to an injunction based on the Free Exercise Clause that requires Texas to allow Murphy brief access to Buddhist clergy in the execution chamber.[6] Texas is no doubt capable of making this accommodation if required to do so.[7] The problem is that the perverse logic of death penalty litigation prevents Texas from doing the right thing. The Court should order Texas to provide the religious accommodation that the First Amendment requires.

ARGUMENT

I. The Court should consider the procedural posture of this appeal separately from the underlying First Amendment and RLUIPA issues.

The Court has not chosen the emergency posture in which this appeal comes to it, but it should not allow the extremely time-compressed nature of Murphy's predicament to obscure the important religious liberty questions this appeal presents.

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[6] See *Columbus Bd. of Ed.* v. *Penick*, 443 U.S. 449, 465 (1979) ("the remedy imposed by a court of equity should be commensurate with the violation ascertained").

[7] For example, when *amicus* litigated the multiyear *Moussazadeh* kosher food litigation, TDCJ suddenly announced the creation of a new kosher food program on the morning of a district court status conference. Cf. *Ray* v. *Comm'r, Alabama Dep't of Corr.*, 915 F.3d 689, 694 (11th Cir. 2019) (in order to shore up its defense, Alabama deviated from written prison procedures requiring presence of Christian chaplain in execution chamber); *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525 (11th Cir. 2013) (Florida announced new kosher program shortly before Eleventh Circuit oral argument against *amicus*).

A. This is a prison conditions appeal, not a capital punishment appeal.

This particular appeal does not present a challenge to the constitutionality of the death penalty, nor is it a challenge to Texas' execution of Murphy. This is instead a challenge to the *conditions of Murphy's confinement* immediately prior to his execution. As this Court has previously explained, Section 1983 permits prisoners to challenge the legality of their "conditions of confinement," even though it does not authorize "a challenge to the validity of [a] death sentence." *Nelson* v. *Campbell*, 541 U.S. 637, 647-648 (2004); *Hill* v. *McDonough*, 547 U.S. 573, 580 (2006) (petitioner's claim did "not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin respondents from executing [him] in the matter they currently intend.").

Murphy argues that he "will be executed under conditions that violate" his constitutional and statutory rights. Dist. Ct. Compl. 1. Specifically, Murphy challenges the denial of access to a religious minister who conforms to his professed Buddhist faith while he is confined in the death chamber immediately prior to his execution. This appeal therefore questions not *whether* he may be executed, nor *when*, nor even *how*, but merely the way in which will be *treated* immediately prior to his execution. Such a claim is appropriately categorized as a challenge to his conditions of confinement and should be analyzed as such.

B. The proper remedy for violating the First Amendment or RLUIPA in this context is an injunction remedying the violation, not a stay of execution.

An injunction is the appropriate remedy when the government imposes unconstitutional restrictions on the conditions of a prisoner's confinement. See, *e.g.*, *Helling* v. *McKinney*, 509 U.S. 25, 28 (1993) ("Respondent sought injunctive relief [from the State for] subjecting him to cruel and unusual punishment."). Moreover, while the terms of such an injunction should be narrowly tailored to remedy the harm at issue, this Court need not limit itself to the relief sought by Murphy. *Nelson*, 541 U.S. at 648 (Injunctive relief "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.") (citing 18 U.S.C. 3626(a)(2)). This Court instead enjoys broad discretion to craft appropriate equitable relief in this case. *Holland* v. *Florida*, 560 U.S. 631, 650 (2010) ("The flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices.").

Here, an injunction against Texas's unconstitutional treatment of Murphy is preferable to a stay of execution because it correctly aligns the incentives of the litigants. Enjoining the execution without a Buddhist minister present allows prison officials to proceed with a timely execution—even an execution today—without requiring further filings before this Court. It also avoids the

danger that future petitioners might abuse religious liberty claims to seek a "stay by any means." Finally, such an injunction would give Murphy exactly the relief he sought and is due under the Constitution and federal law.

In denying Murphy's requested relief, the Fifth Circuit and the district court relied in part on past filings by Murphy's *counsel* in other capital cases that they believed to be dilatory, not on a pattern of dilatory filings by *Murphy* in this matter. CA5 Op. 4-5; Dist. Ct. Op. 9 n.9. If Murphy's counsel had engaged in "conduct unbecoming a member of the Bar," this Court could of course order "appropriate disciplinary action." S. Ct. R. 8.2; see, *e.g.*, *Ballard* v. *Pennsylvania*, 573 U.S. 980 (2014) (referring capital defense counsel to the Pennsylvania Supreme Court's Disciplinary Board); *In re Discipline of Shipley*, 135 S. Ct. 779 (2014) (issuing order to show cause why attorney should not be sanctioned). But it would be unjust to abridge Murphy's religious freedom as punishment for the unrelated past sins of his lawyer.

It would also be unjust for courts to act on hinted-at suspicions that a plaintiff is insincere without addressing the question of sincerity head-on. Sincerity is a necessary element of any free exercise claim. See *Thomas* v. *Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). One reading of the decisions below is that the lower courts may believe that Murphy—or his attorney—is insincerely claiming that he needs a Buddhist spiritual advisor present in the execution chamber. But if the lower courts have that suspicion, they should

address it directly. When courts fail to address their concerns about sincerity in a direct way, they will often deform free exercise doctrine in order not to "reward" a plaintiff they suspect is insincere. Here, because Texas has proceeded on the assumption that Murphy is sincere, the courts should be careful not to give any weight to vague suspicions that he is not.

II. Under both the First Amendment and RLUIPA, prisoners should presumptively be allowed access to their clergy in the execution chamber.

Both the First Amendment and RLUIPA presumptively require access to clergy in the execution chamber.

A. The Free Exercise Clause presumptively requires access to clergy in the execution chamber.

1. The Court should apply the *Trinity Lutheran/Masterpiece* standard to Murphy's Free Exercise claim.

The Court's recent decisions in *Trinity Lutheran* and *Masterpiece* mark a significant turning point in Free Exercise jurisprudence. Under these decisions, the Court has clarified that "difference in treatment" gives rise to a Free Exercise claim, and indeed an inference of hostility towards the worse-treated set of beliefs. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). That is true whether, as in *Masterpiece*, a specific set of conscientious beliefs is treated differently and worse than other conscientious beliefs, *id.* at 1730, or if the disparity in treatment disadvantages religious groups generally, as in *Trinity Lutheran*. See *Trinity Lutheran Church of*

Columbia, Inc. v. *Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" (citation omitted)). Indeed, as Justice Kavanaugh recently pointed out, this "principle of religious equality" means that "governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Free Exercise Clause and the Equal Protection Clause." *Morris Cty. Bd. of Chosen Freeholders* v. *Freedom From Religion Foundation*, 139 S. Ct. 909-910 (2019) (Kavanaugh, J. statement respecting denial of certiorari).

Here of course the differential treatment could not be starker. Were Murphy a Christian or a Muslim, he would have access to clergy within the execution chamber. But he has been denied access to his clergy of choice solely because he is a Buddhist. That violates the *Trinity Lutheran*/*Masterpiece* nondiscrimination principle.[8]

Yet there is a deeper level to the Free Exercise protection: even without proving up unequal treatment Murphy should be entitled to protection under

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[8] Although *Larson* v. *Valente*, 456 U.S. 228, 244 (1982), located this principle solely in the Establishment Clause, that approach was anomalous, not least because *Larson* is the only kind of Establishment Clause claim that gives rise to a strict scrutiny affirmative defense. The unequal treatment principle clarified in *Trinity Lutheran* and *Masterpiece* goes a long way towards removing the anomaly and acknowledging the role of the Free Exercise Clause in requiring nondiscrimination.

the Free Exercise Clause. Several justices recently raised the prospect of revisiting some of the Court's leading cases concerning free exercise rights:

> In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U.S. 872 (1990), the Court drastically cut back on the protection provided by the Free Exercise Clause, and in *Trans World Airlines, Inc.* v. *Hardison,* 432 U.S. 63 (1977), the Court opined that Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden. In this case, however, we have not been asked to revisit those decisions.

Kennedy v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J. statement respecting denial of certiorari). *Smith* should indeed be revisited, because it simply does not accord with the historical meaning of the Free Exercise Clause, resulting in an impoverished set of constitutional protections.[9]

As Professor Michael McConnell has pointed out, *Smith* studiously ignored the history behind the Free Exercise Clause. See Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne *v.* Flores, 39 Wm. & Mary L. Rev. 819, 822 (1998) (citing Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1116-19 (1990). And in fact *Smith* runs directly counter to the historic roots of the Free Exercise Clause, which indicated that far from providing a blanket blessing for neutral

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[9] Indeed, many of the religion-related decisions of this era were especially stingy in their attitude towards religious believers. In addition to *Smith* and *Hardison*, *Turner*/*O'Lone* (see *infra* Section II.B) and *Goldman* v. *Weinberger*, 475 U.S. 503 (1986) (denying yarmulke to Jewish Air Force officer) all stem from this era.

and generally applicable laws, the Free Exercise Clause was specifically designed by the Founders to provide exemptions and accommodations to, above all, religious minorities like Murphy. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1516 (1990).

"History plays an especially important role in constitutional interpretation when, as here, formal doctrine seems to have strayed from the fundamental values of the constitutional provision." Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 827 (2012). To paraphrase Professor McConnell, "[i]f current constructions of free exercise and nonestablishment do not provide a clear basis for upholding [a prisoner's right to access clergy at the time of execution], it is time to look back and seek guidance from history." *Id.* at 827-828. And if history were brought to bear again in Free Exercise jurisprudence, then it could not be clearer that Murphy would be entitled to an order allowing him clergy in the execution chamber.

2. Even under the pre-*Trinity Lutheran/Masterpiece* standard, Murphy's request for access to Buddhist clergy in the execution chamber should be accommodated.

Murphy should prevail even under the parsimonious standard applied to prisoners' First Amendment claims under *Turner* v. *Safley*, 482 U.S. 78, 90 (1987) and *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348-350 (1987). As a threshold matter this Court has "found it important to inquire whether prison

regulations restricting inmates' First Amendment rights operated in a *neutral* fashion, without regard to the content of the expression." *Turner*, 482 U.S. at 90 (emphasis added). In addition, this Court considers four factors:

(1) whether the challenged restrictions bear a "valid, rational connection" to a "legitimate governmental interest";

(2) whether alternative means are open to inmates to exercise the asserted right;

(3) what impact an accommodation of the right would have on guards and inmates and prison resources; and

(4) whether there are "ready alternatives" to the regulation.

Overton v. *Bazzetta*, 539 U.S. 126, 132 (2003) (citing *Turner*, 482 U.S. at 89-91) (internal quotations omitted).

Neutrality/legitimate governmental interest. Murphy alleges that TDCJ provides a Christian chaplain to accompany other inmates at the time of their execution, but will not allow his TDCJ-approved spiritual advisor, Rev. Hui-Yong Shih, to accompany him. Dist. Ct. Op. 2-3. This policy is not neutral; Christian inmates are accommodated with a chaplain at the moment of their death while members of minority faiths must forego the presence of their own spiritual advisor. There is no legitimate governmental interest in accommodating the same religious practice (spiritual accompaniment at the time of death) when carried out by some religious believers but not by others. Cf. *Ben-Levi* v.

Brown, 136 S. Ct. 930, 935-936 (2016) (Alito, J. dissenting from denial of cert) ("The State has no apparent reason for discriminating against Jewish inmates [by denying them permission to meet in groups while allowing other religious inmates to do so]. * * * [T]he Court's indifference to this discriminatory infringement of religious liberty is disappointing.").

Alternative means. Murphy believes that he can be reborn in the Pure Land and work towards enlightenment only if he succeeds in remaining focused on Buddha while dying. Murphy C.A. Br. 5. The close, personal presence of his spiritual advisor or another Buddhist spiritual advisor is particularly important to Murphy, because they will engage in chants intended to help Murphy focus on Buddha at the moment of his death. *Id.* TDCJ's alternative suggestion that Murphy's spiritual advisor observe from another room is thus inadequate. There is no meaningful alternative to the presence of a Buddhist spiritual advisor at the time of Murphy's death.

Impact on prison resources. Unlike many inmate First Amendment claims, allowing Murphy to have his spiritual advisor accompany him will have a *de minimis* impact on the larger prison population. Cf. *Shabazz*, 482 U.S. at 350 (allowing inmates on work release to return during the day to attend religious services would impact the entire prison by causing "congestion and delays at the main gate"). Murphy's spiritual advisor Rev. Hui-Yong Shih has been approved by TDCJ for the past six years and is presumably very familiar with the

prison environment, including the unique environment of prisoners awaiting execution. At the most, TDCJ may decide to deploy a single additional guard to accompany Murphy's TDCJ-approved spiritual advisor for the brief time he will be present. Accommodating Murphy in this way will simply not have the prison-wide or systemic impact that this Court has considered significant in cases like *Shabazz*. 482 U.S. at 350.

Ready alternatives. Murphy has proposed two alternatives: first, that Rev. Hui-Yong Shih, the spiritual advisor TDCJ has already approved for the past six years, be allowed to accompany him; and second, that a Buddhist priest from TDCJ's own staff accompany him instead. At the time of the district court's order, it appeared that TDCJ had not yet informed Murphy whether it has a Buddhist priest on staff. Dist. Ct. Op. 4. At a minimum, however, Murphy appears willing to accept a spiritual advisor chosen by TDCJ so long as the advisor is equipped to help him with his religious exercise at the time of his death. This, then, is a ready alternative to TDCJ's current position.

For all these reasons, and in the unique circumstances of this case, Murphy is entitled to relief even under *Turner's* deferential standard.

B. RLUIPA presumptively requires access to clergy in the execution chamber.

RLUIPA also requires Murphy to be given access to Buddhist clergy in the execution chamber. RLUIPA provide that "[n]o government shall impose a sub-

stantial burden on the religious exercise of a person residing in or confined to an institution" unless "the government demonstrates that imposition of the burden on that person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc-1(a). In short, RLUPIA "allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA [the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq*.]," that is, "the strict scrutiny test." *Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 430, 436 (2006). Further, RLUIPA provides that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. 2000cc-3(g).

Respondents have not seriously disputed that where the state is prohibiting a prisoner from accessing clergy of his own faith in the moments before his death, a substantial burden on religious exercise has been shown. RLUIPA therefore presumptively requires access to clergy of one's own faith, unless the State can meet the "exceptionally demanding" standard of demonstrating its prohibition on same is the least restrictive means of furthering a compelling government interest. See *Holt* v. *Hobbs*, 135 S. Ct. 853, 864 (2015) (quoting *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)).

1. Denial of clergy at the time of execution imposes a substantial burden on the religious exercise of prisoners like Murphy.

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). Here, Murphy has stated his desire to have Buddhist clergy present derives from his belief that it will help him attain a favorable afterlife. *See* Dist. Ct. Mot. Stay 4-5 (clergy will help Murphy "focus on the Buddha at the time of his death * * * by reciting an appropriate chant" so as to be "reborn in the Pure Land," per the teachings of his branch of Buddhism). Respondents have not contested his sincerity of belief.

If Murphy is indeed sincere, then flatly prohibiting Murphy from being guided at the time of death by Buddhist clergy is an explicit, and substantial, burden on religious exercise. See, *e.g.*, *Holt*, 135 S. Ct. at 862 (where prisoner shows exercise of religion "grounded in a sincerely held religious belief," enforced prohibition "substantially burdens his religious exercise"); *Yellowbear* v. *Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.) ("flatly prohibiting Mr. Yellowbear from participating in an activity motivated by a sincerely held religious belief" imposes substantial burden).

Respondents' briefing before the District Court and Fifth Circuit proceeds by "[a]ssuming that Murphy has met his initial burden under RLUIPA[.]" Defs' C.A. Br. 28; *see* Defs' Dist. Ct. Opp. Stay 18. Respondents' only passing objection is a general statement that Murphy "has provided no evidence supporting

his claims." Defs' C.A. Br. 28. But as noted, Murphy's briefing does articulate why his Pure Land Buddhist beliefs, if sincere, require him to have a spiritual advisor present.

2. Texas cannot satisfy strict scrutiny.

As this Court has explained in the context of prison regulations, the strict scrutiny required by RLUIPA is an "exceptionally demanding" standard, and it is the government's burden "not merely to explain why it denied [an] exemption, but to prove that" the standard is met. *Holt*, 135 S. Ct. at 864 (citation omitted).

Respondents state that TDCJ "is using the least restrictive means" of serving its compelling interest of "the safety and security of the execution process." Defs' C.A. Br. 28. While there is "no doubt that prison security is" a compelling interest, strict scrutiny requires a "show[ing] that [Texas's] wholesale prohibition on outside spiritual advisers," and refusal to alternatively provide an adviser of its own of the same religion, "is necessary to achieve that goal." *Dunn* v. *Ray*, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting from denial of certiorari).

Even prior to *Holt*, several circuits held that a prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Shakur* v. *Schriro*, 514 F.3d 878, 890 (9th Cir. 2008)

(quoting *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)); *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007) (same); *Couch* v. *Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (government must "acknowledge and give some consideration to less restrictive alternatives"); *Washington* v. *Klem*, 497 F.3d 272, 284 (3d Cir. 2007) ("Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means."). Further, to satisfy strict scrutiny, this consideration must be "serious" and in "good faith." *Fisher* v. *Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013) (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003)).

Respondents argue that only a person with "years of devoted service" to TDCJ and execution-specific training can be trusted to neither cause harm nor divulge employees' identities. Defs' C.A. Br. 21-22. But Respondents make no particular argument explaining why a Buddhist priest who has already served inmates within TDCJ facilities for six years could not quickly earn the department's trust with timely execution-specific training, as the TDCJ has trained chaplains for both Christians and Muslims.

Further, courts regularly conclude that a prison's ability to satisfy strict scrutiny is undermined when it is "substantially underinclusive" with regard to conduct "pos[ing] similar risks." *Holt*, 135 S. Ct. at 865 (inconsistent grooming policy); see, *e.g.*, *Yellowbear*, 741 F.3d at 60 (prison lacked a compelling interest in refusing lock downs for religious needs when it used lock downs for medical

needs); *Spratt*, 482 F.3d at 42 (prison lacked a compelling interest in stopping inmates from preaching on grounds that "leaders in prison" are dangerous, where inmates could "become leaders under other circumstances"); *Washington*, 497 F.3d at 285 (prison had no compelling interest in a ten-book limit when it allowed substantial additional reading material of other types). Here, respondents' evidence does not make clear the extent of the added risk over the status quo of allowing the Buddhist priest to "observe Murphy's execution in the appropriate witness room," Defs' C.A. Br. 28, particularly if accompanied by an added marginal safety measure like one additional guard accompanying the priest to prevent disruption. The State's only example of an observer disrupting an execution occurred when the prisoner's "son, a friend and a daughter-in-law"—not a religious minister—began to behave violently in a separate observers' room. Defs' C.A. Br. 21. And even assuming an individual who "may observe Murphy's execution in the appropriate witness room" would not be able to observe the execution team—a fact that respondents did not clarify below—respondents do not explain why a Buddhist priest serving TDCJ for six years (or perhaps a visiting Buddhist chaplain from another prison) could not be trusted with this information. In short, TDCJ's consideration of alternatives is too shallow to meet its strict scrutiny burden under RLUIPA.

*   *   *

Bishop Myriel famously establishes his virtue to the reader by volunteering to replace a sick chaplain in "mount[ing] the scaffold" alongside a condemned prisoner and guiding his prayer "at the moment when the knife was about to fall." Victor Hugo, 1 *Les Misérables* ch. 4. The guidance of the soul at the moment of execution—the moment at which the knife falls—has for centuries been well recognized as a crucial moment of religious exercise calling for a minister's guidance. This Court should recognize that our Constitution and civil rights laws support a right to that guidance.

CONCLUSION

The Court should order Texas to provide Murphy with access to a Buddhist spiritual advisor within the execution chamber.

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Respectfully submitted,

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