

OCTOBER TERM 2019

No. 19-8695

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IN THE SUPREME COURT OF THE UNITED STATES

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RUBEN GUTIERREZ,  
Petitioner,

v.

BRYAN COLLIER, Executive Director, Texas Department of Criminal Justice;  
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional  
Institutions Division; BILLY LEWIS, Warden, Texas Department of Criminal Justice,  
Huntsville Unit,  
Respondents.

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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--- CAPITAL CASE ---

EXECUTION SCHEDULED FOR AFTER 7:00 PM EASTERN TIME, TUESDAY,  
JUNE 16, 2020

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
I. Defendants’ Exhaustion Argument is Unpreserved and Without Merit. ....	1
II. This Court Should Grant a Stay and Certiorari on the RLUIPA Claim.....	3
A. TDCJ Has Imposed a Substantial Burden on Mr. Gutierrez’s Religious Exercise. ....	3
B. Defendants’ Claimed Security Concerns Are Speculative and Are Not Supported by the Record in this Case. ....	6
CONCLUSION.....	8

**TABLE OF AUTHORITIES**

**Federal Cases**

*Fox v. Washington*, 949 F.3d 270 (6th Cir. 2020) ..... 4, 5

*Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014) ..... 5

*Murphy v. Collier*, 139 S. Ct. 1475 (2019) ..... 5, 6, 7

*Murphy v. Collier*, 942 F.3d 704 (5th Cir. 2019) ..... 2, 3, 4

Petitioner Ruben Gutierrez files this Reply in support of his Petition for a Writ of Certiorari in this capital case. This Court should grant the writ to resolve the important questions presented.

## ARGUMENT

### I. Defendants' Exhaustion Argument is Unpreserved and Without Merit.

Defendants flatly state that the execution chamber claims are unexhausted. Br. in Opp. 14–17. Defendants distort the record. They studiously ignore the facts that (1) the district court emphatically rejected their exhaustion argument—on the basis of precedent from this Court and the Fifth Circuit rejecting a similar argument, DCO at 20–21; (2) Defendants relegated it to a footnote in their Fifth Circuit brief, *see* Mot. to Vacate 28 n.12; and (3) the Fifth Circuit never even mentioned it. Defendants' argument is without merit.

Defendants did not make a meaningful argument on these grounds in the courts below. While the district court was considering Defendants' motions to dismiss the complaint and then the amended complaint, Defendants raised one exhaustion argument—that filing a “Step 1” grievance is insufficient for exhaustion. *See* ROA.207–09, 653–58. Mr. Gutierrez answered that argument, and the district court rejected it. DCO at 20–21.

After the district court had already ruled on the motion to dismiss, Defendants raised in a footnote the argument they make now—that TDCJ could not find a copy of the “Step 1” grievance in its files. ROA.948 n.20. They did not, however, ask the district court to reconsider its denial of the motion to dismiss on that basis. Mr.

Gutierrez challenged the factual basis for Defendants’ new argument. ROA.985. The district court did not address it.

In the Fifth Circuit, Defendants jettisoned their original exhaustion argument and again relegated their new exhaustion argument to a footnote. Mot. to Vacate 28 n.12. The Fifth Circuit did not address it. Given that the argument was raised only belatedly in the district court and barely raised at all in the Fifth Circuit, it was not properly preserved below. Even if preserved, however, the argument is meritless.

First, the assertion that TDCJ cannot locate the Step 1 grievance in its files does not mean that Mr. Gutierrez did not submit it. At most Defendants raise an issue of fact about whether Mr. Gutierrez submitted the grievance. Mr. Gutierrez disputes that fact. Indeed, what conceivable point would there be in filling out, signing and providing to counsel a copy of the grievance—as Mr. Gutierrez clearly did, *see* ROA.67–68—but failing to submit it? Proceedings in the district court, including discovery, will likely reveal that the grievance was submitted but has been mislaid in some fashion by TDCJ.

Second, the grounds on which the district court denied Defendants’ original exhaustion argument, which Defendants have not challenged in the Fifth Circuit or in this Court, are equally applicable to Defendants’ current argument.

This Court “implicitly rejected” a similar argument last year in *Murphy*. *See Murphy v. Collier*, 942 F.3d 704, 709 (5th Cir. 2019) (noting that the State raised exhaustion throughout the March 2019 proceedings in *Murphy*, so this Court “could not have permitted Murphy’s case to proceed if it accepted the . . . exhaustion

argument”).<sup>1</sup> Given the decisions by this Court and the Fifth Circuit, the district court denied the motion to dismiss because a “factual question exists about whether relief—which in this case presumably means a change to, or accommodation from, TDCJ policy—is actually available through the prison grievance process to death row inmates requesting the presence of a spiritual advisor in the execution chamber.” DCO at 20.

Defendants made no attempt in the Fifth Circuit, and make none here, to show that the district court ruling in that regard was erroneous. They can attempt to do so on remand, but they cannot properly do so here. Their rejected and meritless exhaustion argument does not support their opposition to the certiorari petition and motion for stay of execution.

## **II. This Court Should Grant a Stay and Certiorari on the RLUIPA Claim.**

### **A. TDCJ Has Imposed a Substantial Burden on Mr. Gutierrez’s Religious Exercise.**

Mr. Gutierrez challenges Texas’s revised execution protocol on narrow, specific grounds: it deprives him of the religious consolation that a State-employed Christian chaplain could provide him in the execution chamber. This is the same consolation Texas has provided to hundreds of inmates for decades past, and the same consolation

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<sup>1</sup> Defendants acknowledge this directly contrary decision with a “*but see*” citation and the assertion that the only thing at issue in *Murphy* was a stay. Br. in Opp. 16. As this Court implicitly recognized and the Fifth Circuit explicitly held, a stay would not have been granted if the claim was unexhausted. *Murphy*, 942 F.3d at 709. Defendants’ argument is foreclosed by *Murphy*.

members of the clergy have provided to the condemned in the hour of death for centuries past.

Defendants respond to this challenge by attempting to reframe it. Defendants contend that Mr. Gutierrez seeks “last rites,” Br. in Opp. 10, 18, 19, 20, 21, 22 n.7, 29, 30, 31, or “viaticum,” *id.* at 10, 19, or some formal “religious rite,” *id.* at 28, 34, during his execution. Defendants then insist that meeting with clergy elsewhere at other times will satisfy the reframed request just as well. But Mr. Gutierrez has not asked for what Defendants say he has. Although he is a Catholic, he does not demand a Roman Catholic priest, nor a specific “preferred spiritual advisor,” to administer those sacraments. *See id.* at 24. It is therefore irrelevant whether a priest, if present, could practicably administer the sacraments at earlier times and outside the execution chamber. *See id.* at 10, 19, 20, 22, 28, 33, 34.

All Mr. Gutierrez seeks is the presence and religious support of a State-employed chaplain inside the chamber. TDCJ will bar him from having that presence and support. Under the RLUIPA, that is a substantial burden. “When determining the substantiality of a burden, we cannot look to ‘whether the RLUIPA claimant is able to engage in other forms of religious exercise.’” *Fox v. Washington*, 949 F.3d 270, 280 (6th Cir. 2020) (quoting *Holt v. Hobbs*, 574 U.S. 352, 362 (2015)).

In a variation of their argument, Defendants contend that there is no substantial burden unless the prison’s policy “*completely* prevent[s] the [prisoner] from exercising an act *dictated* by his faith,” Br. in Opp. 20 (emphasis added), and then suggesting that its proffered substitutes do not prevent Mr. Gutierrez from

exercising his faith. *Id.* This argument misstates the law of RLUIPA. When a prison policy “effectively bars” inmates from a religious practice and forces them to “modify [their] behavior,” it imposes a substantial burden. *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014). TDCJ’s policy effectively bars Mr. Gutierrez from having a chaplain with him in the chamber, and it forces him to modify his religious practice. It therefore imposes a substantial burden.

In any event, Mr. Gutierrez is being prevented from exercising his religious practice—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. *See* ROA.67-68. The State has precluded Mr. Gutierrez from exercising this sincerely held belief and practice. As already shown, *see* Pet. 18–20, this is a substantial burden.

The crux of Defendants’ argument is that Mr. Gutierrez is not prevented from exercising his religious beliefs because he will be allowed to meet with a chaplain a few hours prior to the execution (for no more than an hour, time shared with his lawyers). Defendants assert that this amounts to permitting Mr. Gutierrez “to exercise the religious practice he wishes to.” Br. in Opp. 21.

This argument simply seeks to negate the importance to Mr. Gutierrez of the chaplain’s presence inside the execution room at the time of the execution. *See* *Murphy v. Collier*, 139 S. Ct. 1475, 1483 & n.4 (2019) (Alito, J., dissenting from grant of application for stay) (recognizing that excluding all clerics from the execution room may give rise to claims under RLUIPA and the Free Exercise clause). Both the Petition and the amicus brief describe the religious importance of the chaplain’s



presence at the time of death. Pet. 2–6; Br. Amicus Curiae 5–6. As amicus explained, “[i]mportant is an understatement.” Br. Amicus Curiae 6. A few minutes with a chaplain a few hours before execution through a thick wire mesh screen is no substitute for the presence of a chaplain in the room at the time of execution.

**B. Defendants’ Claimed Security Concerns Are Speculative and Are Not Supported by the Record in this Case.**

Defendants characterize TDCJ’s security concerns as “manifold,” Br. in Opp. 26, but they identify only two—and neither is implicated by Mr. Gutierrez’s request. First, Defendants argue that TDCJ has an interest in “ensuring that individuals who attend an execution in the execution room are able to conduct themselves in a stressful situation with control, professionalism and good judgment,” and this interest precludes them from approving “a person who is not a TDCJ employee.” *Id.* (quotation marks omitted). Second, Defendants argue in a footnote that TDCJ has an interest in “maintaining the anonymity of the execution team, which could be jeopardized by the presence of an outsider during the execution process.” *Id.* at 26 n.11.

Notably, these concerns do not relate to Mr. Gutierrez’s request for a State-employed chaplain in the execution room. Rather, they relate to a hypothetical situation in which all condemned inmates could request a spiritual adviser of their individual faith. Indeed, Defendants rely on documents filed by them in the *Murphy* litigation, concerning Mr. Murphy’s request for the presence of a Buddhist spiritual adviser. *Id.* at 26 & n.11. None of these avowed security concerns were relied on by the Fifth Circuit in this case, and they were rejected at this stage of the litigation as

“speculative” by the district court. DCO at 23, 27. At best, Defendants raise “unresolved factual issues.” *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting from grant of application for stay).

This Court need not decide the legitimacy of these concerns—let alone whether they pass strict scrutiny—because neither is implicated by Mr. Gutierrez’s request, which does not require the TDCJ to approve “a person who is not a TDCJ employee” or an “outsider.” Mr. Gutierrez seeks only the aid and comfort of a TDCJ-employed chaplain, whose presence in the execution chamber would have been allowed as a matter of policy prior to April 2019. As the TDCJ itself has previously explained, its State-employed chaplains’ “years of devoted service” have ensured they are “truly dedicated to TDCJ’s interests” and can be trusted to conduct themselves appropriately in the execution chamber. *Murphy v. Collier*, No. 18A985, Br. in Opp. 22 (U.S. filed Mar. 28, 2019).

## CONCLUSION

For all of the reasons set forth above and in Mr. Gutierrez's other submissions to this Court, this Court should grant the writ of certiorari and stay Mr. Gutierrez's execution.

Respectfully submitted,

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