No. 19-70020

In the United States Court of Appeals for the Fifth Circuit

PATRICK HENRY MURPHY,

Plaintiff-Appellee,

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; BILLY LEWIS, WARDEN,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of Texas, Houston Division (No. 4:19-cv-01106)

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLEE AND AFFIRMANCE

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RULE 28.2.1 CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[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 world.

Becket has often defended prisoners' religious exercise. *See, e.g., Holt v. Hobbs*, 135 S. Ct. 853 (2015) (Muslim beard); *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012) (kosher diet); *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (amicus brief).

Becket submits this brief to clarify the law of religious liberty in this societally and constitutionally fraught area, and to ensure that the time-compressed nature of this appeal does not obscure the important religious liberty issues at stake.

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[1] All parties have consented to the filing of this brief. Undersigned counsel certifies that this brief was not authored in whole or part by counsel for any party; no party or party's counsel contributed money for the brief; and no one other than *amicus* and its counsel has contributed money for this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about a liberty interest older than the Nation: the right of a condemned man to the comfort of clergy leading up to, and at the moment of, his death. The Free Exercise Clause presumptively protects this right, as does RLUIPA. The standard for defeating this fundamental right is appropriately high, and Texas cannot meet it here. Texas has allowed this comfort to the condemned in the past and has not shown why it cannot afford the same to Murphy. This Court should therefore either affirm the stay below or modify the stay to require the presence of a Buddhist minister in the death chamber during Murphy's execution.

Furthermore, the Court should expressly reject the notion entertained by the district court that the appropriate remedy might be equality of deprivation. Where fundamental religious liberty interests are at stake, eliminating all accommodations in the name of equality is repugnant to the Constitution.

ARGUMENT

I. Both the Free Exercise Clause and RLUIPA require Texas to provide Murphy access to a Buddhist minister in the death chamber.

The right of a condemned person to the comfort of clergy is among the longest-standing and most well-recognized forms of religious exercise.

From ancient times, priests have been present at executions to hear confessions and administer last rites. *See*, *e.g.*, Catechism of the Catholic Church §§ 1524-1525 (concerning *viaticum* administered to those facing death). The early American colonies continued the practice long before the Founding.[2] The modern practice of offering a chaplain in the execution chamber is rooted in these centuries-old religious practices.[3]

Here, both the Free Exercise Clause and RLUIPA require Texas to afford Murphy comfort of clergy at the hour of his death.

A. Under the Free Exercise Clause, Texas must provide Murphy access to clergy in the death chamber.

1. Where, as here, a government policy specifically targets a particular known religious practice, strict scrutiny is triggered under the Free Exercise Clause.

Under *Employment Division v. Smith*, if a government policy is either not "neutral" or not "generally applicable," then it triggers strict scrutiny. 494 U.S. 872, 877-80 (1990). There is currently a circuit split over the standard for neutrality under *Smith*.

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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).

Most Circuits consider the history of a government policy to determine whether it is neutral. For example, in *Central Rabbinical Congress v. New York City Department of Health & Mental Hygiene*, a New York regulation banned an Orthodox Jewish religious practice known as *metzitzah b'peh*. 763 F.3d 183, 195 (2d Cir. 2014). Because the government admitted that the regulation was "prompted" by this specific religious practice, the Second Circuit remanded for the lower court to apply strict scrutiny. 763 F.3d at 186. Similarly, in *Ward v. Polite*, the Sixth Circuit held strict scrutiny applied where "[a]mple evidence support[ed] the theory that no such policy [of denying referrals] existed—until [Plaintiff] asked for a referral on faith-based grounds." 667 F.3d 727, 739 (6th Cir. 2012).

Other Circuits take the same approach. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) ("[W]e must look at available evidence that sheds light on the law's object" including "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act's] legislative or administrative history.") (quotation omitted); *CHILD, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000); *Shrum*

v. City of Coweta, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (McConnell, J.).[4]

Here, Texas's new policy of excluding all clergy (including chaplains) was prompted by Murphy's specific request to have access to a spiritual counselor, and indeed by the Supreme Court's order in this case. *See Central Rabbinical*, 763 F.3d at 195. That is enough to trigger strict scrutiny under the legal standard used in most Circuits.

2. Texas cannot prevail on its strict scrutiny affirmative defense.

Texas cannot satisfy strict scrutiny on the record before the court below, and indeed could not given its past practice. Although Texas has *invoked* compelling interests, it has not shown that applying its policy to Murphy furthers those interests. 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 v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.) (no

[4] The circuit split is described in a pending petition for certiorari. *See Fulton v. City of Philadelphia*, No. 19-123 (pet. docketed July 25, 2019).

compelling interest in refusing lockdowns for religious needs when it used lockdowns for medical needs).

Here, Murphy has continued to offer, as one option, the Rev. Hui-Yong Shih, who has visited Murphy in TDCJ facilities since 2013. Dkt. 57 at 1. As an outside spiritual advisor, Shih has been vetted by Texas, like all other outside spiritual advisors. Dkt. 39-7 at 3, 5 (Administrative Directive on Religious Programming). Texas makes no persuasive argument explaining why a Buddhist priest who has already served inmates within TDCJ facilities for six years would enjoy less trust than a just-hired TDCJ chaplain. TDCJ employment is a factual distinction, just one unconnected to TDCJ's stated security interests.

Moreover, Texas's consideration of alternatives must be "serious" and in "good faith." *Fisher v. University of Texas*, 570 U.S. 297, 312 (2013). Because Texas fails to clarify the added risk over past practices, and fails to even consider added marginal safety measures—like the presence of one additional accompanying guard—it has not met its burden of serious consideration of less religion-restrictive alternatives.

3. Even under the *Turner*/*O'Lone* standard, Murphy's request for access to Buddhist clergy in the execution chamber should be accommodated.

Murphy should prevail even under the narrower standard of *Turner v. Safley*, 482 U.S. 78, 89-90 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-50 (1987). This Court considers four factors under *Turner*/*O'Lone*:

> (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.

Brown v. Collier, 929 F.3d 218, 232 (5th Cir. 2019) (citing *Turner*, 482 U.S. at 89-90) (internal quotations omitted).

Neutrality/legitimate governmental interest. Murphy alleges that TDCJ allows its chaplains complete access to an inmate "until the minute he enters the execution chamber." But Murphy's TDCJ-approved spiritual advisor, Rev. Hui-Yong Shih, may only visit with him for one hour, and call him until 5 p.m., on the day of execution. Dkt. 57 at 1, 4. This policy is not neutral. Christian inmates may access a chaplain of

their faith up until the moment they enter the death chamber, while members of other faiths must forgo the presence of their own spiritual advisor. There is no legitimate governmental interest in accommodating the same religious practice (spiritual accompaniment) when carried out by some religious believers but not by others.

Alternative means. By definition, there are no alternative means to obtain comfort of clergy in the last moments of life.

Impact on prison resources. Allowing Murphy to have his spiritual advisor accompany him will have a *de minimis* impact on TDCJ's ample resources. *Id.* Accommodating Murphy will simply not have the prison-wide or systemic impact that the Court has considered significant in cases like *Shabazz*. 482 U.S. at 350.

Ready alternatives. Murphy has proposed two alternatives: either Shih or a TDCJ-approved Buddhist minister could accompany him.

Murphy is therefore entitled to relief even under *Turner's* deferential standard.

B. Texas's policy also violates RLUIPA.

RLUIPA also requires Murphy receive access to Buddhist clergy on the day of his death, including in the execution chamber.

As articulated above, receiving comfort of clergy is well-recognized as quintessential "religious exercise" across many faiths, satisfying RLUIPA's expansive definition. 42 U.S.C. § 2000cc-5(7)(A). Murphy has also stated a belief that the presence of clergy in the time leading up to death will help him attain a favorable afterlife. Dkt. 57 at 8.

"[F]latly prohibiting" Murphy from access to clergy at the time of his is a textbook substantial burden under RLUIPA. *Yellowbear*, 741 F.3d at 56; *see also 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").

With the obvious substantial burden on religious exercise, Texas must prove its strict scrutiny affirmative defense. But for the same reasons as those articulated above regarding Free Exercise, at this juncture Texas cannot make out a strict scrutiny affirmative defense under RLUIPA.[5]

[5] Texas does not argue that it can satisfy strict scrutiny, only that Murphy made too "cursory" a reference to RLUIPA. Mot. Vacate 15 n.3.

II. The remedy for the deprivation of Murphy's religious liberty interest is a narrow injunction, not "equality" created by eliminating religious exercise for all the condemned.

The district court's order staying the execution is the correct temporary remedy, but the district court's statements on how Texas might avoid a stay are wrong. This Court should resolve both this appeal and the broader issue of the comfort of clergy for condemned prisoners by focusing not on equality but on the liberty interests involved, and tailoring injunctive relief to those interests.

A. "Equality" achieved by uniformly depriving the condemned of comfort of clergy contravenes the Free Exercise Clause.

The district court expressed concern with what it calls "denominational discrimination," and suggests it could be "diffused" *either* "by (1) ending all contact with all clergy at the same hour for all inmates or (2) allowing all inmates equal access to their chosen spiritual advisors." Dkt. 57 at 12. The order also suggests that replacing chaplains with other nonreligious "trained professionals" could reduce First Amendment violations. *Id.*

The district court's approach to deciding religious liberty questions gets things backward—it is liberty, not equality, that is at stake. A hypothetical illustrates the point. Texas's briefing does not suggest *any*

interest in denying a condemned Christian access to a TDCJ-employed Christian chaplain prior to entering the chamber, or any risk in granting such access. Given no state interest, a condemned Christian could argue—under the First Amendment or RLUIPA—that Texas could not deny him clergy even if it wished to do so. That argument should prevail no matter how inmates with different beliefs are treated. Likewise, Murphy's rights do not rely on a disparate-treatment claim. While Texas's history of granting Christian or Muslim chaplains greater access than Murphy's minister is relevant, it is primarily relevant as evidence that Texas's asserted interests are not that strong.

This Court should reject the district court's dismissive treatment of the chaplain's role. As Murphy's claim illustrates, chaplains serve specific prayer and spiritual needs above and beyond a secular calming function. The Supreme Court has always permitted government practices that recognize and facilitate unique spiritual needs, *e.g.*, by allowing "prisoners to assemble for worship, but not for political rallies." *Cutter v. Wilkinson*, 544 U.S. 709, 724-25 (2005).

Adopting a least-common-denominator approach to religious accommodations would also create a host of problems elsewhere. The

Free Exercise Clause would mean precious little if religious exercise could be constrained for one person so long as it was equally constrained for everyone else.

It would be implausible to take this approach to military chaplains, for instance. Military chaplains are not only permissible, but necessary, under the Religion Clauses. *Katcoff v. Marsh*, 755 F.2d 223, 228, 234 (2d Cir. 1985). Yet at the same time, the "sheer size and pluralistic nature of the Army," makes it impossible for every soldier to have access at all times to a chaplain of his or her religious persuasion. *Id.* at 228. Plainly, pursuing absolute equality by 'leveling down' would create more, not fewer, Free Exercise violations.

This "leveling down" approach would also eliminate common religious accommodations like religious diets for prisoners. Equality in this context would thus disfavor those with different religious beliefs and restrictions.

Indeed, most religious accommodations do not apply equally to all faiths because faiths are different from one another. Catholic prisoners do not need kosher food, and Baptist prisoners do not need access to extreme unction. It would be anthropologically illiterate to treat all religions identically in the name of treating all religions equally.

B. The appropriate remedy for the deprivation of religious liberty is equitable relief allowing Texas to conduct the execution while affording Murphy comfort of clergy.

The district court's stay is not the only equitable remedy available. The Court could modify the terms of the stay to allow Texas to proceed with the execution if it allows a Buddhist minister to be present within the death chamber at the time of Murphy's execution.

This Court enjoys broad discretion to craft appropriate equitable relief in this case. *See Holland v. Florida*, 560 U.S. 631, 650 (2010). And the Court need not limit itself to the relief granted by the district court.

Here, an injunction against Texas's unconstitutional treatment of Murphy would align with the stated interests of the litigants. And it avoids concerns that future litigants might abuse religious liberty claims to seek a "stay by any means."

CONCLUSION

The Court should affirm the district court's issuance of a stay, or in the alternative, reform the injunctive relief ordered by the district court to require Texas to provide Murphy with access to Buddhist clergy at the hour of his death.

Date: November 9, 2019

Respectfully submitted,

/s/ Eric C. Rassbach

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CERTIFICATE OF SERVICE

I certify that on November 9, 2019, the foregoing brief was (1) served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users; and (2) transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Date: November 9, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a) and Fed. R. App. P. 27(d)(2) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 2,481 words. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point, proportionally spaced typeface (Century Schoolbook) using Microsoft Word 2016.

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