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What We Pretend To Be: Codifying a Right to a Religious Advisor in the Execution Chamber

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WHAT WE PRETEND TO BE: CODIFYING A RIGHT TO A RELIGIOUS ADVISOR IN THE EXECUTION CHAMBER

> *Property may be diminished, and afterwards increased. Liberty may be taken away for a time, and subsequently restored. The wound which is inflicted may be healed, and the wrong we have suffered may be atoned for; but there is no Promethean heat that can rekindle the lamp of life, if once extinguished.*[1]

Over the last fifty years, the Supreme Court has moved the pendulum both toward religious accommodation and away from it. After a decade of oscillating Court decisions, multiple attempts at corrective action by Congress, and widespread social activism, the Religious Land Use and Institutionalized Person's Act, or RLUIPA, was passed in 2000. RLUIPA was designed to fortify the rights of incarcerated persons and provide clarification to the Religious Freedom Restoration Act. As of 2024, the Supreme Court has granted certiorari in only a few RLUIPA cases—and has decided even less about the application of the law to death row inmates. The swinging pendulum of accommodation rights has been detrimental to the religious rights of people on death row who seek final spiritual comfort during their execution and death. In 2022, the Supreme Court addressed the issue most notably in *Ramirez v. Collier*, although the decision was surrounded by a litany of other cases, many of which were on the "shadow docket." These decisions precipitated a variety of ill effects which left lower courts confused. State legislatures were also pulled into the ambit of chaos—they were left to their own devices to strike a proper balance between an inmate's rights under RLUIPA and their interest in maintaining prison safety during executions. Since then, people throughout the United States are left to wonder whether the American culture of spirituality and religious pluralism extends to the isolation of the execution chamber. Most importantly, people on death row seeking spiritual guidance and comfort during their execution are left at the secular mercy of prison administrators rather than the sacred and holy principles and deities that are central to their faith. In this Note, I argue that the exclusion of spiritual advisors from the execution chamber is wholly inconsistent with the First Amendment value of religious freedom, and that any proffered state interests are not compelling enough to circumvent this right or have already been satisfied through alternative mechanisms.

1. CHARLES SPEAR, *Sacredness of Human Life*, *in* ESSAYS ON THE PUNISHMENT OF DEATH 15, 22 (3d ed. 1844) (emphasis added).

Finally, I will argue RLUIPA should be amended to explicitly apply to death row inmates, thus providing a specific protection against government interference with final religious advisements.

INTRODUCTION

In the United States, the Free Exercise Clause of the First Amendment is revered as a sacred cornerstone of a democratic

society.[2] Despite this protection being heralded as a foundational American value for hundreds of years,[3] the scope of people that have this right is, in some ways, limited.[4] Incarcerated people on death row are among those excluded from protection, as they continue to face uncertainty regarding the religious protections they are granted in the final moments of their life.[5]

Throughout the last decade, the Supreme Court has heard only a handful of cases pertaining to the religious accommodation rights of death row inmates.[6] This area of the law is new and evolving, as common death penalty scholarship relates to the ethics of the practice,[7] as well as the pervasive impact of race on both sentencing and application.[8] The study of the death penalty's external connection to religion is not new either, as many have questioned the impact of including or excluding potential jurors who identify as religious in

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2. U.S. CONST. amend. I; Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*

3. In 1785, James Madison published his protest of a proposed tax on Virginians intended to directly support "teachers of the Christian religion," as well as his support for legislation that created a clear partition between Church and State. "Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late revolution." *Memorial and Remonstrance against Religious Assessments*, [ca. 20 June] 1785, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163 [https://perma.cc/5UMB-MU8X] [Original source: *The Papers of James Madison*, vol. 8, *10 March 1784–28 March 1786*, ed. Robert A. Rutland & William M. E. Rachal. Chicago: The University of Chicago Press, 1973, pp. 295–306] (cited article contains an editorial note with background information as well as the historical document).

4. *See* Bradley J. Lingo & Michael G. Schietzelt, *A Second Class First Amendment Right? Text, Structure, History, and Free Exercise After* Fulton, 57 WAKE FOREST L. REV. 711, 718 (2022) (describing constitutional challenges that exposed the "instability" and lack of predictability in religious accommodations protections over the years).

5. *See* Ramirez v. Collier, 142 S. Ct. 1264, 1272 (2022); Dunn v. Smith, 141 S. Ct. 725, 725 (2021); Sean Murphy, *Oklahoma Prison Officials: Pastor Can't Be in Death Chamber*, ASSOCIATED PRESS (Jan. 9, 2023), https://apnews.com/article/us-supreme-court-crime-legal-proceedings-oklahoma-city-texas-0c87b44aa4291fd839a0d041b0a68120 [https://perma.cc/HU34-B5VC].

6. *See Ramirez*, 142 S. Ct. at 1272; Dunn v. Smith, 141 S. Ct. at 725; Gutierrez v. Saenz, 141 S. Ct. 127, 128 (2020).

7. *See, e.g.*, *Percentage of Americans Who View the Death Penalty as Morally Acceptable Remains Near Record Low*, DEATH PENALTY INFO. CTR. (June 16, 2022), https://deathpenaltyinfo.org/news/percentage-of-americans-who-view-the-death-penalty-as-morally-acceptable-remains-near-record-low [https://perma.cc/NU59-S2CV].

8. *See, e.g.*, *On Anniversary of Furman v. Georgia, DPIC Census of U.S. Death Sentences Details 50 Years of Arbitrariness, Bias, and Error*, DEATH PENALTY INFO. CTR. (June 29, 2022), https://deathpenaltyinfo.org/news/on-anniversary-of-furman-v-georgia-dpic-census-of-u-s-death-sentences-details-50-years-of-arbitrariness-bias-and-error [https://perma.cc/E79U-APUV].

death-eligible cases.[9] The issue of RLUIPA and its application to death penalty inmates is to some degree novel and evolving,[10] likely because the amount of people on death row is considerably lower than the general population of incarcerated persons[11] and presumably because RLUIPA relates to the religious accommodations people need in order to *live* in a prison.[12]

On March 24, 2022, the Supreme Court issued an opinion on a stay of execution request in *Ramirez v. Collier*.[13] In *Ramirez*, John Ramirez was scheduled to be executed on September 9, 2020, after several years of unsuccessful procedural appeals.[14] He asked the prison to allow his pastor, Dana Moore, to accompany him into the execution chamber.[15] This request was denied, as Texas law barred any religious advisors from entering the chamber.[16] Although the protocol previously allowed employed prison chaplains to accompany inmates into the execution chamber, Texas changed their law to exclude all advisors from the chamber as a result of the Supreme Court's decision in *Murphy v. Collier*.[17]

Ramirez filed suit against the state of Texas on First Amendment grounds, and eventually his death warrant was withdrawn.[18] His execution was rescheduled for September 8, 2021, and he filed an additional request which was subsequently denied.[19] In 2021, Texas changed their execution protocol to allow an inmate's spiritual

9. *See* Gary J. Simpson & Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 CORNELL L. REV. 1090, 1093 (2021) (discussing the implication of both including and excluding jurors who are staunchly against the death penalty for religious reasons).

10. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc -1.

11. *Compare Death Row USA*, DEATH PENALTY INFO. CTR. (Apr. 1, 2022), https://deathpenaltyinfo.org/death-row/overview/death-row-usa [https://perma.cc/VD7K-Y3NG] (finding 2,331 prisoners on death row as of January 2023), *with* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html#:~:text=Together%2C%20these%20systems%20hold%20almost,centers%2C%20state%20psychiatric%20hospitals%2C%20and [https://perma.cc/L569-3JLH] (citing the number of people in U.S. prisons as nearly two million).

12. *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 361–62 (2015); Amy Howe, *A Unanimous Supreme Court Endorses Religious Liberties in Prison: In Plain English*, SCOTUSBLOG (Jan. 20, 2015, 2:39 PM), https://www.scotusblog.com/2015/01/a-unanimous-supreme-court-endorses-religious-liberties-in-prison-in-plain-english [https://perma.cc/9FRA-27KT].

13. *See* Ramirez v. Collier, 142 S. Ct. 1264, 1274–75 (2022).

14. *Id.* at 1273–74.

15. *Id.* at 1273.

16. *Id.*

17. *Id.*; Murphy v. Collier, 139 S. Ct. 1475, 1476 (2019) (staying an execution until the prison provided a Buddhist inmate with his requested spiritual advisor).

18. *See Ramirez*, 142 S. Ct. at 1272–73.

19. *Id.* at 1273.

advisor to accompany them to the execution chamber in only certain circumstances.[20]

Once his request was approved, Ramirez filed an additional grievance requesting that his pastor be allowed to "'lay hands' on him and 'pray over' him while the execution was taking place."[21] This request was grounded in a common practice of his faith: in the Second Baptist Church of Corpus Christi, spiritual leaders lay hands on, and pray over, individuals who are "'sick or dying.'"[22] This request was promptly denied, stating that spiritual advisors were not permitted to touch inmates during the actual execution.[23] However, this issue was not addressed in the Texas protocol.[24] Ramirez appealed within the prison system and to various courts, and was finally granted a stay of execution from the Supreme Court, as well as a grant of certiorari on the question of whether Texas's decisions violated RLUIPA.[25]

Ultimately, the Court agreed with Ramirez, holding that the Texas policy violated RLUIPA.[26] The policy was placed under strict scrutiny, and failed on both the interest and means prongs.[27] *Ramirez* was significant in two ways. First, the case reignited controversy over the application of religious accommodation to incarcerated people in general and incarcerated people on death row specifically.[28] Second, it addressed the validity of common claims that the government advances to deny requests for religious advisors in the execution chamber.[29]

In summation, this Note seeks to address the challenges that individuals on death row face in seeking accommodations with an inquiry into potentially disparate outcomes on requests for religious accommodations by people of minority religions. I argue that the major interests proffered by the government to deny accommodations fall short of meeting the "compelling interest" burden, and thus, that Congress should codify a right to a spiritual advisor during executions as an amendment to RLUIPA. In the first part of this Note, I

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20. *Id.* at 1273–74.
21. *Id.* at 1274.
22. *Id.* at 1273–74.
23. *Id.* at 1274.
24. *Ramirez*, 142 S. Ct. at 1274.
25. *Id.* at 1274–75.
26. *Id.* at 1284.
27. *Id.* at 1277–80.
28. Michael C. Dorf, *Religious Freedom in Prison and the Military*, VERDICT: LEGAL ANALYSIS & COMMENT. FROM JUSTIA (Apr. 13, 2022), https://verdict.justia.com/2022/04/13/religious-freedom-in-prisons-and-the-military [https://perma.cc/5TFK-5J62].
29. *See Ramirez*, 142 S. Ct. at 1280–81.

discuss the controversy that has surrounded how to analyze issues of religious accommodation. In Part II, I detail precisely why the issue of denying spiritual advisors is not consistent with contemporary American religious practices and the status of the death penalty in America. In Part III, I examine the litany of problems that arise without an explicit protection for spiritual rights upon death. Finally, in Part IV, I propose a solution which would amend RLUIPA to allow spiritual advisors in the execution chamber.

I. RLUIPA AND THE PENDULUM OF RELIGIOUS ACCOMMODATION

For decades, the Supreme Court and Congress have battled over how to analyze religious accommodation claims.[30] A religious accommodation is any instance in which an individual or organization is given an exemption from the civil or criminal penalties that apply to other people, or, when a person or group of people is not required to follow a government order or policy.[31] In other words, it creates an individualized protection to ensure that a person or entity can practice their faith.[32]

The baseline standard for a religious belief requires only that it is sincerely held.[33] This standard is a relatively low bar, largely because exacting any form of scrutiny on a belief or belief system essentially permits the government to entangle itself with religion.[34] However, the passage of RLUIPA and its subsequent application to execution-based RLUIPA claims has, in practice, created a higher

30. *Understanding Religious Accommodations and the Hobby Lobby Decision*, STAN. LAW., Spring 2015, https://law.stanford.edu/stanford-lawyer/articles/understanding-religious-accommodations-and-the-hobby-lobby-decision [https://perma.cc/3ZXK-3TUT] (describing accommodations pertaining to blood transfusions, grooming, and dress laws in prisons, wearing religious garments in the military, and even social security identification cards); *The* Smith *Decision: The Court Returns to the Belief-Action Distinction—Fact Sheet*, PEW RSCH. CTR. (Oct. 24, 2007), https://www.pewresearch.org/religion/2007/10/24/a-delicate-balance6 [https://perma.cc/2A39-2S3S].

31. *See What You Should Know: Workplace Religious Accommodation*, EEOC (Mar. 6, 2014), https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation [https://perma.cc/2AGH-5CYM] (defining, at a general level, religious accommodation as a worker being exempt from certain policies or practices of their employer because of a recognized religious belief).

32. *See id.*

33. Frazee v. Ill. Dep't Emp. Sec., 489 U.S. 829, 834 (1989).

34. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (mandating how religious accommodations should be analyzed for incarcerated persons and issues of land use); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695–96 (2014) (determining that RLUIPA amended RFRA's definition of the "exercise of religion" to explicitly include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.*).

standard for sincerity with space for the subjective beliefs of prison wardens and other officials.[35]

A. The Religious Land Use and Institutionalized Persons Act

The Religious Land Use and Institutionalized Persons Act, or RLUIPA, is a civil rights law designed to protect individuals and groups from experiencing government-created substantial burdens during the exercise of their religious beliefs.[36] RLUIPA was passed unanimously by Congress and signed into law by President Bill Clinton on September 22, 2000.[37] The law was passed in the wake of the Supreme Court's invalidation of the Religious Freedom Restoration Act, or RFRA, in *City of Boerne v. Flores*.[38]

RLUIPA has two primary provisions. The first is the Land Use provision, which "protects individuals and religious assemblies and institutions from discriminatory and unduly burdensome land use regulations,"[39] largely related to zoning law ordinances.[40] The second provision, and the subject of this Note, is the Institutionalized Persons provision, which "protects the religious freedom of persons confined to prisons, jails, and certain other institutions in which the government exerts a degree of control far greater than that which is found in civilian society."[41] Specifically, RLUIPA prevents the government from imposing substantial burdens on the religious exercise of incarcerated persons—except where the government can overcome the burden of demonstrating that the law passes constitutional muster under strict scrutiny.[42] However, the protections created by RLUIPA, which would at first glance appear to be prudent in a society dedicated to religious pluralism, only came to fruition after a multi-decade-long battle between Congress and the Supreme Court.[43]

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35. *See, e.g.*, *Hobby Lobby Stores, Inc.*, 573 U.S. at 693.

36. DOJ, Statement on the Land Use Provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (2018) at 1 [hereinafter DOJ Statement on Land Use], https://file:///Users/clairejenkins/Downloads/rluipa_qas_pub_version_508.pdf [https://perma.cc/MYW2-LPS6].

37. *Id.*

38. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997); City of Boerne v. Flores, 521 U.S. 507, 532–33, 536 (1997).

39. DOJ Statement on Land Use, *supra* note 36, at 1.

40. *Id.*

41. DOJ, Statement of the Department of Justice on the Institutionalized Persons Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (2017) at 1, https://www.justice.gov/crt/page/file/974661/dl?inline [https://perma.cc/FQ65-NPQL].

42. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1.

43. Jason Z. Pesick, Note, *RLUIPA: What's the Use*, 17 MICH. J. RACE & L. 359, 363–64 (2012).

B. The Controversy Surrounding Religious Accommodations Law

The foundational history of religious accommodations law began with *Sherbert v. Verner* in 1963 and *Wisconsin v. Yoder* in 1972.[44] In both cases, the Supreme Court's decisions were rights-protective.[45] In *Wisconsin v. Yoder*, the Court granted the accommodation, which exempted Amish families from a Wisconsin law requiring compulsory education until age sixteen.[46] In *Sherbert v. Verner*, the Court agreed that a woman's religious rights were being burdened when she was forced to choose between exercising her religion's day of Sabbath and receiving state unemployment benefits.[47]

In *Sherbert v. Verner*, the Court created the *Sherbert* Test, which first asks whether a person's religious exercise has been substantially burdened.[48] If there is a substantial burden, the burden shifts to the government, who must show that there is a compelling interest in having the burdening law or policy, and that it is the least restrictive means available to achieve that interest.[49] In practice, these decisions indicate that the Court was largely in favor of granting accommodations.[50]

However, this changed with *Employment Division v. Smith*, which swung the pendulum away from protecting accommodations.[51] There, the Court determined that if a law is (1) generally applicable and (2) neutral on its face, meaning it does not target a specific religion, then it is a permissible burden and does not violate the Free Exercise Clause.[52] The *Smith* decision was widely unpopular and brought together groups that are typically opposed to each other, including both conservative religious groups and progressive political organizations alike.[53] This is because the rule of general

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44. *See* Sherbert v. Verner, 374 U.S. 398, 398, 402 (1963); Wisconsin v. Yoder, 406 U.S. 205, 205 (1972).

45. *See Sherbert*, 374 U.S. at 409; *Yoder*, 406 U.S. at 221–22.

46. *Yoder*, 406 U.S. at 207, 234.

47. *Sherbert*, 374 U.S. at 404.

48. *Id.* at 403.

49. *Id.* at 406–07.

50. *See id.* at 404; *Yoder*, 406 U.S. at 207, 234.

51. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 485 U.S. 660, 671 (1988); *The* Smith *Decision: The Court Returns to the Belief-Action Distinction—Fact Sheet*, PEW RSCH. CTR. (Oct. 24, 2007), https://www.pewresearch.org/religion/2007/10/24/a-delicate-balance6 [https://perma.cc/T7ZX-HWMX].

52. *Smith*, 485 U.S. at 673–74.

53. MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 146 (Aspen Publishing, 5th ed. 2022) (discussing that in the aftermath of *Smith*, groups including the ACLU, Americans United, the Christian Legal Society, American Jewish Congress, and the National Association of Evangelicals worked with Republicans and Democrats alike to reverse its ill effects).

applicability proved to be harmful to religious exercise.[54] In response to the failure of *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA),[55] which reimposed the compelling interest test and substantial burden analysis developed in *Sherbert* and *Yoder*.[56]

Although Congress believed that RFRA had finally secured access to accommodations, *City of Boerne v. Flores* undermined that belief when the Court held that Congress exceeded its Section 5 power by passing RFRA.[57] They reasoned that it was not directly related to an existing constitutional right.[58] However, RFRA was not wholly unconstitutional.[59] RFRA only applied to federal laws, meaning that Congress alone was barred from imposing restrictions or tests on state and local governments.[60] After much debate, negotiation, and political upheaval, including a RFRA redux, Congress passed the Religious Land Use and Institutionalized Persons Act, or RLUIPA, which is a very narrow alteration of RFRA.[61] One of the most significant changes brought about by RLUIPA is that it mandates the *Yoder/Sherbert* compelling interest test and substantial burden analysis, in local and state governments, specifically for issues of religious land use or religious accommodations for incarcerated people.[62]

C. The Strict Scrutiny Standard

The most notable change arising from RLUIPA's passage is that it returned the test for religious accommodations back to the strict scrutiny standard under the original *Yoder*/*Sherbert* Test.[63] For the strict scrutiny test to be triggered, a plaintiff must first successfully show that a prison or government policy "implicates his religious exercise," meaning that the accommodation is *sincerely* based on an inmate's religious belief and that the burden on his religious exercise

54. *See Smith*, 485 U.S. at 671.

55. MCCONNELL ET AL., *supra* note 53, at 146–47; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(2) (1993).

56. Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); MCCONNELL ET AL., *supra* note 53, at 147.

57. City of Boerne v. Flores, 521 U.S. 507, 532 (1997); U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

58. *Id.* at 532.

59. MCCONNELL ET AL., *supra* note 53, at 147.

60. *Id.* at 148.

61. *Id.* at 149.

62. *Id.*

63. Religious Land Use and Institutionalized Persons Act 42 U.S.C. § 2000cc-1(a)(1) (2000); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

is *substantial*.[64] In diametric opposition (and likely backlash) to the *Smith* test, RLUIPA explicitly barred the imposition of a substantial burden on religious exercise even if a rule is generally applicable.[65]

If a plaintiff can prove that they have experienced a substantial burden to their religious exercise, strict scrutiny is triggered.[66] Under the applicable test, the government must prove that the burdening policy "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest" in order for the policy to pass constitutional muster.[67] Inevitably, this creates several factors that need definition, including "sincerity," "substantial burden," and "compelling government interest."[68]

1. Sincerity

Implicit in RLUIPA's definition of religious exercise, which "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief" is that the belief is sincere.[69] Although the government is not invited to make their own judgments about the merits of a person's faith, the reality is that decentralized system of evaluating RLUIPA requests for accommodation has led to some disparity among religions, whether intentional or not.[70]

Some scholars have begun to examine the specific treatment of inmates who identify as a member of a religious minority through variable success in obtaining RLUIPA-based accommodations.[71] In one

64. Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022) (quoting Holt v. Hobbs, 574 U.S. 352, 360).

65. Religious Land Use and Institutionalized Persons Act 42 U.S.C. §§ 2000cc-1(a)(2) (2000).

66. *Id.* § 2000cc-1(a).

67. *Id.*

68. Holt v. Hobbs, 574 U.S. 352, 361 (2015) (using the term "sincerity"); Religious Land Use and Institutionalized Persons Act 42 U.S.C. § 2000cc-1(a) (using the terms "substantial burden" and "compelling government interest").

69. Religious Land Use and Institutionalized Persons Act 42 U.S.C. § 2000cc-5(7)(A); *Hobbs*, 574 U.S. at 360.

70. *See* Ian Millhiser, *The Supreme Court Just Backed Away from One of Its Cruelest Death Penalty Decisions*, VOX (Feb. 21, 2021), https://www.vox.com/22279878/supreme-court-death-penalty-religious-liberty-dunn-ray-smith-elena-kagan-amy-coney-barrett [https://perma.cc/H6FB-9ADK] (contrasting the decision of *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019), which denied an inmate's request for a Muslim imam spiritual advisor and *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021), a decision that permitted a similar injunction for the presence of a Christian pastor).

71. *See, e.g.*, Adeel Mohamadi, Note, *Sincerity, Religious Questions, and the Accommodations Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1836 (2020); Daniel T. Judge, Note, *A Different Kind of Prisoner's Dilemma: The Right to the Free Exercise of*

examination of RLUIPA claims, the author determined that Muslim-identifying inmates are generally *less likely* to make successful claims under RLUIPA (or alternatively to be granted accommodations) than Christian-identifying inmates.[72] One proffered hypothesis is that this disparity stems from a stringent application of the "sincerity" element of RLUIPA claims, which attempts to weed out superfluous claims by determining whether a person genuinely, or sincerely, adheres to the faith upon which they seek an accommodation.[73] This poses a problem for any inmate seeking an exception to a rule that prohibits their free exercise—particularly when they identify with a minority religion—and is particularly harmful for death row inmates.[74]

In most cases, death row inmates must specifically request the presence of a religious advisor under RLUIPA, because most prison policies are incredibly restrictive about the procedural aspects of an execution.[75] Any gaps in the policy or exceptions to long-standing procedure must typically be approved by a prison administrator.[76] In Alabama, for example, death row inmates may elect to have a spiritual advisor, but are limited by time restrictions and a prison warden's consideration of security risks:

> [A]ny spiritual advisor and alternate spiritual advisor identified will be required to submit a written plan to the Warden setting forth how the individual intends to assist the condemned inmate in the exercise of his/her religious beliefs . . . . The condemned inmate shall be further advised that this written plan must be submitted to the Warden for approval within fourteen days.[77]

Though more recently the Supreme Court has started to require a showing of specific security interests from prison officials, the opposite has been true for a longer period of time and a less restrictive "reasonableness" test was employed to "afford appropriate deference to prison officials."[78] Thus, without any codified and articulated rule

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Religion for Incarcerated Persons, 95 NOTRE DAME L. REV. 2119, 2126 (2020); Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 329–30 (2022).

72. *See* Mohamadi, *supra* note 71, at 1842, 1850.

73. *See id.* at 1883.

74. *See id.* at 1839.

75. *See, e.g.*, Ala. Dep't of Corr., Execution Procedures § IV(C) (2023) [hereinafter Execution Procedures], https://dpic-cdn.org/production/documents/Al_Lethal_Gas_Execution_Protocol_2023_08.pdf?dm=1693938490 [https://perma.cc/Q2ZF-Q4NS].

76. *See, e.g.*, *id.* § IV(C)(iv).

77. *Id.*

78. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

requiring that death row inmates at least be presented with the option to have a spiritual advisor, they will continue to be left to the subjectivity of prison officials, who carry their own set of biases and beliefs.[79]

2. Substantial Burdens

For many years, a struggle ensued over how to define what a "substantial burden" on religion is.[80] However, two cases have been instructive on this matter: *Burwell v. Hobby Lobby Stores, Inc.* and *Holt v. Hobbs*.[81] In these cases, the Supreme Court found that a substantial burden exists when a person must choose between exercising a religious belief or facing a state-imposed consequence.[82] Under RLUIPA, the religious belief does not have to be central to the religion, nor does it have to be practiced by all members—it need only be sincere.[83]

In *Hobbs* for example, an incarcerated person was forced to choose between shaving his beard, which violated a practice of his faith, or being subject to prison conduct violations.[84] This was enough for the Court to find a substantial burden.[85] The Court also noted that the concept of substantial burden evolves when related to incarcerated persons—the question is not whether there was an alternative means for the individual to practice their religion, but rather whether the practice they chose to engage in was burdened in some substantial way.[86] In summary, the definition of substantial burden is context-specific, but is largely dependent on practitioners of a faith being forced into a choice between practicing their religion and government-imposed penalties.[87]

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79. Alexis Ahlzadeh, *Prisoner's Religious Exercise Rights (Or Lack Thereof) Under RLUIPA: The Search for a Workable Standard*, CTR. FOR STUDY L. & RELIGION, Feb. 2021 at 17.

80. Lisa Matthews, Hobby Lobby *and* Hobbs *to the Rescue: Clarifying RLUIPA's Confusing Substantial Burden Test for Land-Use Cases*, 24 GEO. MASON L. REV. 1025, 1042.

81. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); Holt v. Hobbs, 574 U.S. 353, 361 (2015).

82. *Hobby Lobby Stores, Inc.*, 573 U.S. at 691; *Hobbs*, 574 U.S. at 361.

83. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc -5(7)(A); *see* Thomas v. Rev. Bd. of the Ind. Employ. Sec. Div., 450 U.S. 707, 715–16 (1981) (determining that not all members of a faith must practice a particular exercise for it to be afforded First Amendment protections).

84. *Hobbs*, 574 U.S. at 361.

85. *Id.* at 362.

86. *Id.* at 369.

87. *Id.*

3. Compelling Interests and the Tailoring Requirement

Defining a compelling interest under RLUIPA has been another area of controversy because the Act necessarily overturned the *Smith* test by reviving subjective interest-balancing.[88] RLUIPA states that a government cannot substantially burden a prisoner's Free Exercise rights "unless the government demonstrates that imposition of the burden on that person, assembly or institution—(A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling governmental interest."[89]

Throughout the RLUIPA-based death penalty cases that have reached the Supreme Court in the last decade, a variety of interests have been proffered by the government.[90] These interests are the greatest challenges that people on death row face in obtaining religious accommodation, because they often implicate issues of prison security—which is certainly not an inconsequential problem.[91] As a result, the Supreme Court has been deferential to prison officials.[92] In *Cutter v. Wilkinson*, one of the first RLUIPA cases to reach the Supreme Court, Justice Ginsburg noted that if the request by incarcerated persons "become[s] excessive, impose[s] unjustified burdens on other institutionalized persons, or jeopardize[s] the effective functioning of an institution, the facility would be free to resist the imposition."[93] In general, the Court has valued prison security in an inconsistent manner.

The pre-RLUIPA case of *O'Lone v. Estate of Shabazz* provides an early representation of how the Supreme Court evaluated the significance of prison security.[94] There, the Supreme Court held that two prison policies, which caused several plaintiffs to miss the Jumu'ah prayer,[95] did not offend the First Amendment's Free Exercise Clause because the State proved that the regulations served the penological interest of security.[96] The Court found a legitimate interest in security because the prison had new concerns related to order and security after a recent, significant increase in the state's

88. *See* PEW RSCH. CTR., *supra* note 30.

89. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc -1(a).

90. *See infra* Sections I.C.1–3 (detailing the interests proffered in *Dunn v. Ray*, 139 S. Ct. 661 (2019)).

91. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348–49 (1987).

92. *See* Cutter v. Wilkinson, 544 U.S. 709, 726 (2005).

93. *Id.*

94. *See O'Lone*, 482 U.S. at 346–48.

95. *Id.* at 347. Jumu'ah is the Friday Prayer in the Islamic faith.

96. *O'Lone*, 482 U.S. at 353.

prison population, which also drained their financial resources.[97] The State of New Jersey also demonstrated that there was no alternative method for the inmate to practice his faith while also protecting the security interests of the prison.[98] In these earlier cases, the level of deference given to prison officials was so significant that obtaining a religious accommodation would require inmates to overcome a nearly insurmountable hurdle.[99]

In the more recent case of *Ramirez v. Collier*, the State offered different interests that may be unique to the death penalty.[100] After Ramirez demonstrated a substantial burden on his sincere religious belief,[101] the government raised compelling interests for denying both his request for audible prayer and for the pastor to physically touch him during the execution.[102]

The government raised the following two interests in response to the request for audible prayer: (1) a need for silence in the execution chamber to monitor the medical condition of the incarcerated person and (2) a fear that a religious advisor may "exploit" the opportunity to talk to people in the viewing area, which could, in theory, retraumatize the family members of victims.[103] They also raised three interests in regards to physical touch: "[1] security in the execution chamber, [2] preventing unnecessary suffering [to the incarcerated person], and [3] avoiding further emotional trauma to the victim's family members."[104] Aside from the Court noting that there were a variety of procedural safeguards in place to prevent chaos or disruption in the execution chamber, they also determined that there were still less restrictive means available, such as placing the pastor away from IV lines, which was consistent with the prison's typical protocol.[105]

However, while the Court recognized that the prison's proffered interests were important, they did not sufficiently outweigh Ramirez's religious rights as to prevent the injunction.[106] The Court noted that there is a "rich history" of vocal prayer both in Texas and nationally, and that any belief that the pastor would be disruptive was "conjecture."[107] Similarly, there were less restrictive means of

97. *See id.* at 350–51.
98. *Id.* at 350.
99. *Id.* at 348–49.
100. *See* Ramirez v. Collier, 142 S. Ct. 1264, 1278–80 (2022).
101. *Id.* at 1278.
102. *Id.* at 1278–81.
103. *Id.* at 1279–80.
104. *Id.* at 1280.
105. *Id.* at 1280–81.
106. *Ramirez*, 142 S. Ct. at 1283–84.
107. *Id.* at 1278–80.

accomplishing the state's interests in security and preventing further grief to families, such as asking pastors to sign a pledge to follow the prison's guidelines and protocol.[108] The Court primarily focused on the state's failure to use alternatives that were not heavily rights-restrictive.[109] In short, these cases demonstrate that the interest-balancing performed by the Court does not provide consistent results, thus ensuring that the rights of condemned inmates are left swaying in the balance.

II. THE HISTORICAL RECORD OF SPIRITUAL ADVISEMENT AND THE DEATH PENALTY SUPPORTS CODIFICATION OF THE PROTECTION

In American society, people place value on both the place of religion and punitive action.[110] The concurrent presence of these values is unsurprising as religion has consistently been used to define immoral behavior and moral behavior,[111] and "crime was . . . a symptom of a culture that encouraged immoral behavior."[112] These values inherently conflict as they relate to the death penalty, as evidenced by the inconsistency with which execution-based RLUIPA claims are granted and denied.[113] However, the "rich history" of protecting spiritual rights even for the condemned,[114] the culture surrounding the death penalty and religion in America,[115] and the modern inconsistency of Supreme Court decisions demonstrate the need to codify the explicit right to a spiritual advisor during execution.[116]

A. The Historical Use of Government-Mandated Spiritual Advisement

In *Ramirez*, the Supreme Court summarized the history of providing spiritual advisement before and during executions in the United States,[117] largely relying on an amicus brief submitted by the

108. *Id.* at 1280.
109. *Id.*
110. *See Americans Have Positive Views About Religion's Role in Society, but Want It Out of Politics*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/religion/2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics [https://perma.cc/J9HE-NZUH]; DANIEL LACHANCE, EXECUTING FREEDOM: THE CULTURAL LIFE OF CAPITAL PUNISHMENT IN THE UNITED STATES 4 (2016).
111. LACHANCE, *supra* note 110, at 158–59.
112. *Id.* at 158.
113. *See infra* Sections I.C.1–3.
114. *See Ramirez*, 142 S. Ct. at 1278–79.
115. *Infra* note Section II.B.3.b.
116. *See* Millhiser, *supra* note 70.
117. *Ramirez*, 142 S. Ct. at 1278–80.

Becket Fund for Religious Liberty ("The Becket Fund").[118] The Becket Fund submitted an amicus brief to demonstrate the "pounds of history on offer" of the "ancient religious practice" of having a religious advisor in the execution chamber who may audibly pray over—and touch—an inmate during their execution.[119] Their history purports to range from "the executions of deserters during the Revolutionary War, to the 'execution sermons' of Cotton Mather, to the Army executions of Nazi war criminals after the Nuremberg Trials, and the practice of many states (including Texas) until the present day."[120]

Though the history of clergy prayer during executions predates the American Revolution, then-General George Washington permitted enemy prisoners who were sentenced to death to "be attended with such Chaplains, as they choose" prior to being executed.[121] The first known federal use of the death penalty, which was the execution of Thomas Bird in 1790, included the accompaniment of a spiritual advisor.[122] The presence of spiritual advisors at the gallows was widely included in newspaper reports during the Antebellum period, and continued to be commonplace into World War II, where providing spiritual advisement was a requirement mandated by the Procedure for Military Executions, a document of protocols utilized by the U.S. army.[123] Even after the war, Nazi war criminals sentenced to death were provided spiritual advisors who accompanied them to their execution "not because of who the war criminals were, but because of who Americans are."[124] Thus, the historical record supports the protection of religion and spiritual advisement before and during state-sanctioned executions.

B. Death and Religion in American Culture

1. Modern Use of the Death Penalty

Although the number of people being executed each year is decreasing, the death penalty is still actively used throughout the United

118. Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioner at 5–19, Ramirez v. Collier 142 S. Ct. 1264 (2022) (No. 21-5592), 2021 WL 4670584.

119. *Id.* at 1–2.

120. *Id.* at 2.

121. *Id.* at 6–8.

122. Brief of Spiritual Advisors and Former Corrections Officials as Amicus Curiae Supporting Petitioner at 11–13, Ramirez v. Collier 142 S. Ct. 1264 (2022) (No. 21-5592) 2021 WL 4670366.

123. Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioner, *supra* note 118, at 8–11.

124. *Id.* at 12.

States.[125] Some have suggested that the issues surrounding the death penalty are now becoming obsolete,[126] however, the rise in Orwellian death penalty innovations shows that the opposite is true.[127]

Despite this notion, as of 2023, the death penalty is legal in twenty-seven states, although six states currently have gubernatorial-imposed moratoria.[128] The federal government has, at least temporarily, halted executions.[129] As of January 1, 2023, there are 2,331 people on death row in the United States.[130] Throughout 2023, twenty-four executions were carried out through Missouri, Texas, Florida, Alabama, and Oklahoma.[131] As of April, there have been five executions in 2024, one of which involved the controversial use of nitrogen hypoxia on Kenneth Eugene Smith, and in the case of Brian Dorsey, raised questions about whether the preparation for particular execution methods may be so painful as to impede a "meaningful interaction with [a condemned inmate's] spiritual adviser."[132] Regardless, even if only one execution in total was carried out this year, the issues surrounding the death penalty would still be relevant, because it is a microcosm of how far the government is willing to extend protections designed for those who society has deemed unworthy of a shield.

2. A Religious Tradition

Necessarily, the death penalty is inherently tied to both morals and religion.[133] In fact, its use largely originates from the connection

125. *State-by-State: 2023*, DEATH PENALTY INFO. CTR. (database updated Feb. 23, 2024, 12:00 PM), https://deathpenaltyinfo.org/states-landing [https://perma.cc/8LPT-NB28].

126. *See* Isaac Green, Note, *A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution*, 16 HARV. L. & POL'Y REV. 623, 650 (2022).

127. *See* Nicholas Bogel-Burroughs & Abbie VanSickle, *Alabama Carries out First U.S. Execution by Nitrogen*, N.Y. TIMES (Jan. 25, 2024), https://www.nytimes.com/2024/01/25/us/alabama-nitrogen-execution-kenneth-smith.html [https://perma.cc/PG97-YEEE] (explaining that Alabama recently executed an inmate through an untested method known as nitrogen hypoxia, which causes a form of asphyxiation).

128. *State-by-State: 2023*, *supra* note 125.

129. *Id.*

130. *Death Row*, DEATH PENALTY INFO. CTR. (database updated Jan. 1, 2023), https://deathpenaltyinfo.org/death-row/overview [https://perma.cc/83W4-FD5F].

131. *Execution Database*, DEATH PENALTY INFO. CTR. (database updated Apr. 17, 2024, at 12:00 PM), https://deathpenaltyinfo.org/database/executions?year=2023 [https://perma.cc/B4DC-55LG].

132. Bogel-Burroughs & VanSickle, *supra* note 127; Jim Salter, *Missouri Man Executed for Killing His Cousin and Her Husband in 2006*, ASSOCIATED PRESS (Apr. 9, 2024), https://apnews.com/article/missouri-execution-brian-dorsey-1a7801bb6fc42e666d95daa68a2b2ce1 [https://perma.cc/XQ25-LGF9].

133. Michael C. Westmoreland-White & Glen H. Stasen, *Biblical Perspectives on the Death Penalty*, *in* RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 123, 123–24, 128 (Erik C. Owens, John D. Carlson & Eric P. Elshtain eds., 2004).

between religion and the law, as a major justification for the death penalty's use has been the concept of *lex talionis*, or "an eye for an eye."[134] This phrase dates to Hammurabi's law code from around 1792 to 1750 BCE,[135] but is central to a multitude of faiths and continues to exist in varying formats.[136] For example, in Christianity, the dominant religion in the United States,[137] this can be found in *Leviticus* 24: 19–22: "Anyone who maims another shall suffer the same injury in return: fracture for fracture, eye for eye, tooth for tooth; the injury inflicted is the injury to be suffered."[138] However, some scholars have considered the third and final mention of this "eye for an eye" concept in *Deuteronomy* 19:19–21 to mean that punishment should be "appropriate and proportional to the crime, and is not meant as literal repetition of the crime."[139] This interpretation makes sense when considering "[t]here is no command to lie to a liar, rape a rapist, or steal from a thief."[140]

Additionally, religious texts inform the way that people view the death penalty—that it is the "righting" of a great wrong through a manifestation of divine will.[141] Though this should give pause to people who justify the death penalty because of religion, it also means if the death penalty must continue, that it must be devoid of humanity.[142] Accordingly, providing a spiritual advisor to condemned persons does not contradict the magnitude of the punishment.

Religion plays a monumental role in the culture surrounding death.[143] In many religions, the administering of last rites and

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134. *Id.* at 128.

135. Eds. of Encyc. Britannica, *Code of Hammurabi: Babylonian Laws*, BRITANNICA (Aug. 31, 2022), https://www.britannica.com/topic/Code-of-Hammurabi [https://perma.cc/7UAR-VAYL].

136. Westmoreland-White & Stasen, *supra* note 133, at 128.

137. *Religious Landscape Study*, PEW RSCH. CTR., https://www.pewresearch.org/religion/religious-landscape-study [https://perma.cc/KK3Q-8A7J] (last visited June 12, 2024) (finding that 70.6% of Americans identify as Christian).

138. Westmoreland-White & Stasen, *supra* note 133, at 129; *Leviticus* 24:19–22.

139. Westmoreland-White & Stasen, *supra* note 133, at 129; *Deuteronomy* 19:19–21.

140. Westmoreland-White & Stasen, *supra* note 133, at 129.

141. John D. Carson, *Human Nature, Limited Justice, and the Irony of Capital Punishment*, *in* RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING, at 158, 165 (Erik C. Owens, John D. Carlson & Eric P. Elshtain eds., 2004)

> It is one thing to justify the death penalty based upon standards of conduct or principles of justice . . . gleaned [from] worldly political conditions . . . . It is something quite different when human justice seeks to mirror divine retribution and becomes an explicit agent of divine atonement, thus collapsing the moral space between infinite and finite.

Id.

142. *See id.* at 165.

143. Jonathan Evans, Kelsey Jo Starr, Manolo Corichi & William Miner, *Buddhism, Islam and Religious Pluralism in South and Southeast Asia: 5. Funeral Practices and Beliefs About the Afterlife*, PEW RSCH. CTR. (Sept. 12, 2023), https://www.pewresearch.org

prayers before and during death are required to attain salvation.[144] In fact, the importance of this prayer is so significant that it has transcended deep, political divides—including when Catholic prisoners of Britain were permitted to have spiritual advisors during executions before the nation became tolerant of the Catholic faith.[145]

In order to determine whether bias is informing the decisions of prison officials to grant or deny execution based RLUIPA requests, it is helpful to consider both the religious censuses of the United States more generally, and an active death penalty state, like Texas, more specifically.[146]

First, the dominant religion in the United States is Protestantism.[147] Protestantism generally refers to people of Baptist, Methodist, Pentecostal, Lutheran, or a non-denominational Christian Faith.[148] Two polls performed by Pew Research Center in 2007 and 2014 are insightful, indicating that the majority of Americans identify with protestant religions.[149] Alternatively, non-Christian/Protestant Faiths (referred to here are Islam, Judaism, Buddhism, Hinduism, and "other faiths") represent only 5.9% of the population.[150] 22.8% of people identified as having no religious affiliation.[151] These polls indicate what is common knowledge: that many Americans are religious.[152] These statistics provide a backdrop for an analysis into whether the bias of religion plays a role when prison officials grant or deny execution-based RLUIPA requests.

Considering that Texas has sat at the epicenter of death penalty litigation in recent years,[153] statistics on religion in that state may be a helpful indication of why religious discrimination can occur in

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/religion/2023/09/12/funeral-practices-and-beliefs-about-the-afterlife [https://perma.cc/4ZMU-GGLN].

144. Petition for Writ of Certiorari at 2–3, Ramirez v. Collier, 10 F.4th 561 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 1264 (2022) (No. 21-5592), at 2–3; Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioner, *supra* note 118, at 8, 10.

145. *See* Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioner, *supra* note 118, at 8.

146. *See Religious Landscape Study*, *supra* note 137; *Adults in Texas: Religious Landscape Study*, PEW RSCH. CTR., https://www.pewresearch.org/religion/religious-landscape-study/state/texas [https://perma.cc/68ZP-JABP].

147. *Religious Landscape Study*, *supra* note 137.

148. *Appendix B: Classification of Protestant Denominations: America's Changing Religious Landscape*, PEW RSCH. CTR. (May 12, 2015), https://www.pewresearch.org/religion/2015/05/12/appendix-b-classification-of-protestant-denominations [https://perma.cc/738J-8ZLT].

149. *Religious Landscape Study*, *supra* note 137.

150. *Id.*

151. *Id.*

152. *Id.*

153. *See, e.g.*, Ramirez v. Collier, 142 S. Ct. 1264, 1273; Dunn v. Smith, 141 S. Ct. 725 (2021).

state governments and individual prisons. In a Pew Research Center Landscape Study, it was found that 77% of Texans identify as Protestant/Christian, 4% identify as non-Christian, and 18% identify as unaffiliated with any religion.[154] This indicates the role that the religious landscape plays in states that actively sentence people to death and carry out executions. These statistics show that there is a vast disparity among people who adhere to different faiths in the American population, and most importantly, that people of non-Christian Faiths are clearly in the spiritual minority.

3. Modern Cases

Throughout the last four years, the Supreme Court considered execution stay requests on both its primary docket and shadow docket.[155] In 2019, the Supreme Court decided *Dunn v. Ray*,[156] which set off a chain reaction of legislative and lower court confusion, societal criticism, and further inconsistent Supreme Court decisions.[157] The Supreme Court's inconsistency—and the punitive reaction of some legislatures—demonstrates why the right to a spiritual advisor must be explicitly protected.[158]

a. Dunn v. Ray

In *Dunn v. Ray*, the Supreme Court granted a request to vacate the stay which temporarily halted Domenique Hakim Marcelle Ray's execution.[159] Mr. Ray had originally requested that his execution be halted until he was provided an imam, which is the spiritual advisor in the Muslim faith.[160] The Supreme Court vacated his stay of execution in just a few sentences—finding that he was time barred from seeking relief.[161] This decision was largely scrutinized, being referred to as "the kind of Supreme Court decision a comic book supervillain might write."[162]

154. *Adults in Texas*, *supra* note 146.
155. Green, *supra* note 126, at 640–41.
156. Ian Millhiser, *The Supreme Court Must Decide if It Loves Religious Liberty More than the Death Penalty*, VOX (Nov. 7, 2021), https://www.vox.com/22763939/supreme-court-death-penalty-religious-liberty-ramirez-collier-execution-pastor [https://perma.cc/4QV3-JX79].
157. *Id.*
158. *See id.*
159. Dunn v. Ray, 139 S. Ct. 661, 661 (2019).
160. *Id.*
161. *Id.*
162. Millhiser, *supra* note 156.

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, wrote a dissent outlining a substantive due process argument against vacating the judgment.[163] Justice Kagan argued that the state of Alabama's statute, which only permitted a Christian chaplain into the execution chamber, was a profound violation of the Establishment Clause because it gave preferential treatment to *some* religions.[164] Further, she addressed the compelling interests forwarded by the state of Alabama and reaffirmed that prison security is a compelling interest.[165] However, she argued that the policy failed on in its tailoring, because there were less restrictive alternatives than a "wholesale prohibition on outside spiritual advisers" which could be used to meet the goal of prison security.[166] She offered alternatives, which included providing the execution protocol training to the imam or requiring the imam to sign a document stating he would not interfere with the execution under oath.[167] The decision in *Ray*, and its dissent, undoubtedly started a chain reaction.[168]

b. Murphy v. Collier

In *Murphy v. Collier*, Patrick Murphy filed a stay of execution through a similar RLUIPA claim—that he be provided a spiritual advisor of Buddhist faith.[169] His request was originally denied under Texas law, which at the time only allowed Christian chaplains and Muslim imams to enter the execution chamber.[170] Under the policy, Christian chaplains and Muslim imams had the opportunity to either enter the actual execution chamber or the viewing room; religious advisors from other denominations were, at most, allowed to sit in the viewing room.[171] The Supreme Court ultimately granted the stay of execution so that Texas could review the issues caused by their current policy.[172]

Justice Kavanaugh's concurrence is also worth noting; he discusses potential remedies for statutes that do not provide equal treatment in these cases.[173] Though he acknowledges it will be case

163. *Ray*, 139 S. Ct. at 661–62 (Kagan, J., dissenting).
164. *Id.*
165. *Id.* at 662.
166. *Id.*
167. *Id.*
168. Millhiser, *supra* note 156.
169. Murphy v. Collier, 139 S. Ct. 1475, 1475–76 (2019).
170. *Id.* at 1475, 1480.
171. *Id.* at 1475, 1477.
172. *Id.* at 1475.
173. *Id.* at 1475–76 (Kavanaugh, J., concurring).

and statute specific, he provides two potential remedies.[174] His first suggestion is that the State should put no restrictions on which kind of religious advisor may enter the execution chamber.[175] Oppositely, his second suggestion is to allow all religious advisors to enter only the viewing room instead of the execution chamber, specifically including the prison chaplain.[176] He contends that the second remedy is appropriate if a state truly is attempting to carry out an interest in safety and security, recognizing that the unique nature of executions means that things can quickly go awry.[177]

Justice Kavanaugh later wrote a separate statement following the decisions of Texas after the Supreme Court handed down its opinion, later published together.[178] He commends the choice that Texas made to allow all religious advisors to attend the execution, but only from the public viewing room.[179] However, this resolution is also a startling departure from the American culture surrounding religion and death.[180] That procedure does nothing to protect the right to have a spiritual advisor present at execution, and instead actively circumvents it by giving states the tacit approval to deny the protection.[181] Murphy again requested a stay of execution under the new policy, which was granted because the lower court believed that the new policy still created significant concerns about religious discrimination.[182] In a practice as intimate and often religiously enveloped as death, barring religious advisors continues to present more issues than it solves.

c. Dunn v. Smith

After the decisions in *Dunn v. Ray* and *Murphy v. Collier*, states were left confused by inconsistent decisions and confusion about which scrutiny test to employ; some states, including Texas and Alabama, made changes to religious accommodations available for death row inmates by barring all spiritual advisors from accompanying the

174. *See Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring).
175. *Id.* at 1475.
176. *Id.*
177. *Id.* at 1475–76.
178. *Id.* at 1476–77.
179. *Id.* at 1476.
180. *See infra* Section II.A.
181. Ahlzadeh, *supra* note 79.
182. *U.S. Supreme Court Stays Texas Execution, Agrees to Review Contours of the Right to Religious Exercise in the Execution Chamber*, DEATH PENALTY INFO. CTR. (Sept. 9, 2021) [hereinafter *Supreme Court Stays Texas Execution*], 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/GGX4-HX9S].

inmate to the execution chamber.[183] The harshest among these changes were spiritual advisors of all faiths being banned from the execution chamber in Alabama.[184]

In Alabama, Smith requested a stay of execution so that a Christian minister could pray with him before his execution and then accompany him to the execution chamber, rather than just being in the viewing room according to policy.[185] Smith argued that having a religious advisor present is "essential to [his] search for redemption" and an integral part of the practice of his faith.[186] Ultimately, the Supreme Court granted a stay of execution for Smith so that this religious exercise could be observed.[187] Although this decision provided little analysis regarding the Court's decision, it did suggest that they were beginning to change their perspective on religious rights in the execution chamber.[188] It also provided alternative options to prison wardens that were concerned that outside advisors would pose a security risk: "[t]he 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."[189] The only specific guideline laid out is that a warden is not entitled to exclude people based on who they feel is "untrustworthy," an argument that was made in the brief for petitioner.[190] Justice Kavanaugh's concurrence in *Smith* begins to address one of the core issues with not having an explicit protection for the right spiritual advisement—the decision will be left in the hands of prison officials.[191]

III. THE PROBLEMS OF PROCEDURE, OPACITY, AND DEFERENCE TO PRISONS SURROUNDING RLUIPA CLAIMS SUPPORTS CODIFICATION OF THE RIGHT

In addition to the historical tradition of prayer at executions and inconsistent decisions by the Supreme Court over the last five years, there are several problems that further demonstrate the need to codify the right to a religious advisor. These problems can be divided into four generalized groups: procedural problems, decreased

183. *Id.*; Ramirez v. Collier, 142 S. Ct. 1264, 1279 (2022).
184. *See Ramirez*, 142 S. Ct. at 1278; *Supreme Court Stays Texas Execution*, *supra* note 182.
185. Dunn v. Smith, 141 S. Ct. 725, 725–26 (2021).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. Dunn v. Smith, 141 S. Ct. at 725, 726 (Kavanaugh, J., concurring).

transparency, reporting errors, and the subjectivity and deference to prison officials.

A. Procedural Problems

1. Injunctive Relief

Even if a death row inmate is successful on their RLUIPA claim, they must overcome an additional hurdle—showing that an injunction is an appropriate remedy in the case.[192] A petitioner must show that they will suffer irreparable harm without the requested injunctive relief, "that the balance of equities tips in his favor, and that an injunction is in the public interest."[193] In *Ramirez*, the Supreme Court found that absence of the relief would cause irreparable harm, namely because it would forever—and without recourse—deprive him of religious exercise at the end of his life.[194] The Court also determined that Ramirez met the other aspects of the balancing standard, where he did not "seek an open-ended stay of execution," and had requested relief that was "narrowly drawn, extend[ed] no further than necessary to correct the harm the court finds requires preliminary relief, and [was] the least intrusive means necessary to correct that harm."[195]

The irreparable harm suffered by death row inmates denied relief is obvious,[196] however, it is an unnecessary procedural step that could be avoided by providing inmates with an option, in *all* cases, to select an advisor of their choosing. Both people who advocate for the death penalty and those who advocate against it often cite the length of the appeals process as a substantial problem in the penalty's application.[197] This is a fair criticism, as one 2007 nationwide study showed that the median amount of time to complete direct appeal in capital cases is 966 days.[198] If RLUIPA explicitly required prisons to provide spiritual advisors of the individual's choosing, it would likely cut down on time delays caused by having to appeal a prison's decision and build a record for obtaining injunctive relief.

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192. *See* Ramirez v. Collier, 142 S. Ct. 1264, 1283 (2022).
193. *Id.* at 1275.
194. *Id.*
195. *Id.* at 1282.
196. *See id.*
197. *See* BARRY LATZER & JAMES N.G. CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTI-STATE STUDY PREPARED FOR THE DEPARTMENT OF JUSTICE 2 (2007), https://www.ojp.gov/pdffiles1/nij/grants/217555.pdf [https://perma.cc/6R3E-EG5H].
198. *Id.* at 28.

2. Time Restrictions

Time restrictions are also often a procedural bar to being provided the ability to have a spiritual advisor during execution.[199] Prisons often have different policy and protocol surrounding the timeline for submitting these requests prior to execution if they allow them at all.[200]

In *Dunn v. Ray*, Justice Kagan expressed severe disappointment at the Court's refusal to take up an issue of irreparable religious discrimination because it did not meet the filing deadlines.[201] This was not the only time that death row inmates were denied religious protection because of time restraints: Carl Wayne Buntion applied for a commutation of his death sentence, or alternatively a ninety-day reprieve to be granted the presence of a religious advisor during his execution.[202] His request for a spiritual advisor was denied one week before the *Ramirez* decision was published, and his attorneys were left scrambling to understand whether the request may be reconsidered only three weeks prior to the execution.[203] Similarly to the procedural problems discussed, this issue can be eliminated by affirmatively providing the right to an advisor up until a reasonable time before executions.

B. The Shadow Docket's Opacity

The emergency docket, often referred to as the "shadow docket" is the set of Supreme Court decisions that are made quickly and without full briefing.[204] It was intended to serve emergency requests, such as stays of execution.[205] As a result, these decisions are largely made outside of public view and often escape criticism.[206]

Shadow docket decisions frequently lack the detailed analysis of other decisions and are sometimes less than a page long, which in turn provide no guidance to lower courts.[207] The shadow docket is largely known for its short death penalty decisions, including its decision in *Dunn v. Ray*:

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199. *See* Execution Procedures, *supra* note 75.

200. *See, e.g.*, *id.* (requiring a fourteen-day notice to request a spiritual advisor during execution).

201. Dunn v. Ray, 139 S. Ct. at 661, 662 (2019) (Kagan, J., dissenting).

202. Application for Commutation of Death Sentence to a Lesser Penalty or, in the Alternative, a 90-Day Reprieve at 1, *In re* Buntion, TDCJ #993 (Tex. Bd. of Pardons & Paroles Mar. 30, 2022).

203. *Id.* at 10–11.

204. *See* Green, *supra* note 126, at 650.

205. *See id.*

206. *See id.*

207. *See id.* at 654.

> The application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on February 6, 2019, presented to Justice THOMAS and by him referred to the Court, is granted.
> On November 6, 2018, the State scheduled Domineque Ray's execution date for February 7, 2019. Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh Circuit.[208]

It also occurred in *Dunn v. Smith*, where Mr. Smith petitioned the Court for a religious advisor exemption so that they could "ease '[his] transition between the worlds of the living and the dead.'"[209] Despite Mr. Smith's impassioned plea for solace in his final moments, the decision on his petition read only: "The application to vacate the injunction presented to JUSTICE THOMAS and by him referred to the Court is denied. JUSTICE THOMAS would grant the application."[210]

Although the shadow docket is a necessity for last-minute stays of execution based on claims of procedural error, innocence, or method of execution, it can be problematic. Some of the primary issues with the shadow docket are that it typically does not include analysis or reasoning, it can create legal precedent without complete briefings, and it allows for an anonymous voting process by the justices that omits the vote count.[211] This reflects poorly on due process and has the potential to exacerbate religious discrimination, especially because opinions often provide no information about the application of the law to the case.[212] Justice Kagan noticed this concern in *Dunn v. Ray*, where the other justices utilized a time restriction technicality without taking up the substantive issues in the case.[213]

There has also been an uptick in cases being heard on the shadow docket, indicating that the justices may feel that it is a safer mechanism for deciding cases they know are controversial, like choosing to leave in place Senate Bill 8, a Texas bill which banned abortion after detection of a heartbeat.[214] One further implication of

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208. Dunn v. Ray, 139 S. Ct. at 661, 661 (2021) (footnotes omitted).

209. *See* Dunn v. Smith, 141 S. Ct. 725, 725 (2021); Def.'s Emergency Mot. For Prelim. Inj. at 2 (Dec. 14, 2020), Dunn 141 S. Ct. 725 (2021).

210. Dunn v. Smith, 141 S. Ct. at 725.

211. *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 6–9 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. of Tex. Sch. of L.).

212. *See Dunn v. Smith*, 141 S. Ct. at 725.

213. *See* Dunn v. Ray, 139 S. Ct. 661, 661–62 (2019) (Kagan, J., dissenting).

214. *See* Alexis Denny, *Clarity in Light: Rejecting the Opacity of the Supreme Court's Shadow Docket*, 90 UMKC L. REV. 675, 690–91 (2022); S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

this is that by hiding the process of the death penalty from the public, it prevents Americans from having a complete understanding of the death penalty process and politics at play.[215] This would be problematic if citizens were asked to vote on issues related to the death penalty, which in turn would reflect public opinion and inform society's "evolving standard of decency."[216]

C. Deference to Prison Officials

1. Subjective Decision-Making and Security Interests

When inmates are required to request an RLUIPA accommodation for the execution chamber, it must typically be approved by a prison warden or official.[217] In some cases, even if a spiritual advisor is permitted to join inmates in the execution chamber, it must be approved by the prison.[218] The significant deference given to prison officials, and the level of subjective judgment they may use, creates unnecessary burdens on both the prison administration and the inmate requesting spiritual advisement.[219]

For the safety and security of a prison and its staff, there necessarily must be certain protocols in place, and wardens need some ability to make judgments.[220] Prison officials often forward important interests, like those addressed in *Cutter v. Wilkinson*, where the Supreme Court elucidated that prison officials still maintain wide authority in RLUIPA claims.[221] In fact, RLUIPA was created with this in mind.[222] In *Cutter*, the Court ultimately determined that RLUIPA accommodations were not superior to needs of the prison, such as safety and security.[223] However, when inmates have to request a spiritual advisor and seek the subjective approval of a warden, it creates several problems: even incidentally, it may allow for religious

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215. *See* Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, DEATH PENALTY INFO. CTR. (Nov. 20, 2018), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/behind-the-curtain-secrecy-and-the-death-penalty-in-the-united-states [https://perma.cc/9MWP-Z49F].

216. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (elucidating that the use of the death penalty should be reconsidered according to "evolving standards of decency" over time). Though this Case has since been overturned, it is evidence that the Supreme Court has considered public opinion in the past and may do so in the future. *See id.*

217. *See* Execution Procedures, *supra* note 75.

218. *See id.*

219. *See* Cutter v. Wilkinson, 544 U.S. 709, 725–26 (2005).

220. *See id.*

221. *Id.*

222. *Id.* at 723.

223. *See id.* at 722–23.

discrimination based on whose requests are accommodated,[224] and it also puts a high level of stress on spiritual advisors, which in practice can hinder their ability or desire to provide the right to individuals during execution at all.[225]

2. Possible Religious Discrimination

First, RLUIPA states that a belief does not have to be central to a faith to be deserving of protection.[226] Cases like *Hobby Lobby* have bolstered this idea by elucidating that it is not a court's place to determine whether a belief is central to a system of faith—instead, the court must only decide "whether the line drawn represents an 'honest conviction.'"[227] However, when a prison official evaluates an accommodation request, they will engage in some level of sincerity analysis, because it is implied that the belief must be sincere.[228] When prison officials are asked to consider accommodations for religions they are not as familiar with, it creates the potential for disparate evaluations of claims. This is unsurprising, as the Institutional Persons provision of RLUIPA was designed to combat the "egregious and unnecessary" restrictions that were "frivolously or arbitrarily" imposed on the religious liberty of people in state institutions.[229]

As a part of an attempt to ensure that civil rights were being protected, the Department of Justice has published a report on efforts to enforce RLUIPA every ten years since its creation.[230] This report and inquiry were tasked to the Civil Rights Division of the Department of Justice.[231] The Civil Rights Division reported that in twenty years' time, the Department of Justice has "conducted 68 formal or informal investigations, initiated three lawsuits, and filed eight statements of interest and 13 *amicus* briefs involving RLUIPA and institutionalized persons."[232] There were a total of 553 investigations including land use, zoning, and inmate claims.[233]

224. *Infra* Section III.C.2.
225. *Infra* Section III.C.3.
226. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1.
227. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014).
228. *See* Holt v. Hobbs, 574 U.S. 352, 360 (2015).
229. DEP'T OF JUST., REPORT ON THE TWENTIETH ANNIVERSARY OF RLUIPA 4–5 (Sept. 22, 2020) [hereinafter REPORT ON RLUIPA], https://www.justice.gov/crt/case-document/file/1319186/dl [https://perma.cc/JV2D-WQMN].
230. *Id.* at 1–2.
231. *Id.* at 1.
232. *Id.* at 25.
233. *Id.* at 11.

The majority (about 56%) of investigations have involved Christian groups, while Muslim and Jewish groups combined represent about 33% of total complaints.[234] The statistic about people of Islam and Judaism is particularly troubling, as this represents about ten times as many Jewish and Muslim people than live in the United States.[235] Further, in 2008, the independent, bipartisan U.S. Commission on Civil Rights was tasked with reviewing the civil rights violations in prisons under RLUIPA and reporting that information to Congress and the President.[236] The report outlines the fact that religious grievances make up a very small portion of grievances made by incarcerated persons and that most people incarcerated are of "minority faiths."[237]

This information suggests that, based on reported RLUIPA filings, the number of minority faith-identifying persons could be severely under reported.[238] This is possibly the result of prisons and inmates not being aware that RLUIPA protection exists[239] or inmates of minority faiths fearing retaliation for reporting the prison through either the legal system or the media.[240] It could also include a lack of access: some prisons attempt to block access to journalists[241] and "jailhouse lawyers."[242] There are also financial obstacles, including paying court filing fees or attorneys if litigation is pursued.[243] If they cannot afford the fees, they have to have enough legal knowledge to petition to proceed in *forma pauperis*;[244] if they wish to proceed *pro se*, it would require a sufficient legal knowledge surrounding RLUIPA to raise the claim, let alone be successful.[245] When facing

234. *Id.* at 12.

235. REPORT ON RLUIPA, *supra* note 229, at 12.

236. U.S. COMM'N ON CIV. RTS., ENFORCING RELIGIOUS FREEDOM IN PRISON i–iv (2008).

237. *Id.* at xiii.

238. *See id.* If people believe that they are less likely to obtain an accommodation because they do not begin at the same starting line as others, they may choose to go without these accommodation requests.

239. *See* REPORT ON RLUIPA, *supra* note 229, at 29.

240. *See* Dana Liebelson & Raillan Brooks, *This Is Why Americans Have No Idea What Really Happens in Prisons*, HUFFPOST (July 1, 2015), https://www.huffpost.com/entry/prison-secrecy_n_7706404 [https://perma.cc/H7UK-K3F8]; Christopher Zoukis, *If They Lock Me Up, Call My Attorney: The Culture of Retaliation in the Federal Bureau of Prisons*, HUFFPOST (Aug. 20, 2014), https://www.huffpost.com/entry/if-they-lock-me-up-call-prison_b_5688317 [https://perma.cc/B7FZ-VB4J].

241. *Id.*

242. Jessica Schulberg, *How Oregon's Prison System Retaliated Against Its Most Effective Jailhouse Lawyer*, HUFFPOST (Apr. 15, 2022), https://www.huffpost.com/entry/oregon-prison-system-legal-assistant_n_62604225e4b08393e1bfdd7f [https://perma.cc/LCQ6-XLSX].

243. *See* Williams v. Dankert, No. 06-C-1133, 2007 WL 1101983, at *1–2 (E.D. Wis. Apr. 11, 2007).

244. *Id.*

245. REPORT ON RLUIPA, *supra* note 229, at 28.

significant hurdles in any direction, inmates who are facing death may also feel that reporting is a fruitless endeavor.[246]

If an inmate is a member of a minority religion, they may feel singled out by prison officials, who are more likely to be of a dominant religion.[247] People, even unintentionally, experience bias.[248] This is most likely to occur when prison officials consider the sincerity of a religion.[249] Consider *Lindell v. McCallum*, where prison officials refused to recognize a nature-based religion or allow Wotanism because they learned that some versions of the faith taught racial superiority—they then prohibited the inmate from possessing any books on the religion or practicing his dietary restrictions.[250] In another case, a prison refused to provide its Muslim inmates with an imam or even a copy of the Qur'an, then required that both Shi'ite and Sunni Muslims participate in Ramadan activities together.[251] In short, despite the fact that statistics indicate possible religious discrimination, the amount of hurdles facing inmates of minority religions who seek accommodations indicates why there may be under-reporting.

3. The Pressure Placed on Spiritual Advisors

The wide latitude provided to prison officials also affords them the opportunity to use illusory reasoning, based on security or sincerity, to deny RLUIPA claims, and escape claims of disparate treatment based on religion.[252] It also provides prisons the ability to put great pressure on the spiritual advisors who volunteer to assist with executions.[253]

In 2023, Scott Eizember requested that his pastor, Reverend Jeff Hood, accompany him to the execution chamber for final spiritual advisement.[254] The prison denied his request based on security

246. Zoukis, *supra* note 240.

247. *See supra* Section II.B.2.

248. *See supra* Section II.B.2.

249. *See supra* Section II.B.2.

250. Lindell v. McCallum, 352 F.3d 1107, 1108–09 (7th Cir. 2003). Although this particular example includes a religion with some invidious beliefs, it demonstrates the level of deference that prison officials have, and that ultimately can be used against other religions.

251. Salahuddin v. Goord, 467 F.3d 263, 269–70 (2d Cir. 2006). The prison provided inmates with only a Christian chaplain and copies of the Christian Bible. *Id.*

252. REPORT ON RLUIPA, *supra* note 229, at 8.

253. *See* Jonathan Edwards, *Before He Dies, Death Row Inmate Fights to Have His Priest at Execution*, WASH. POST (Jan. 11, 2023), https://www.washingtonpost.com/nation/2023/01/11/oklahoma-death-row-priest [https://perma.cc/R89S-ZNVY].

254. Complaint Under 42 U.S.C. § 1983 at 3, Eizember v. Harpe, 5:23CV00025 (W.D. Okla. 2023) (CIV-23-25-PRW); Edwards, *supra* note 253.

interests.[255] The prison reasoned that Reverend Hood could speak with him in the days leading up to the execution, but that because Hood had been an outspoken anti-death penalty activist, there was a concern that he would cause disruption, as he had already "demonstrate[ed] a blatant disregard for the experience of victims' families and the solemnity of the process."[256] Mr. Hood had already underwent extensive background checks from the prison, as he had regularly met with other inmates, and counseled with Mr. Eizember multiple times in the year before his execution.[257] In this case, the prison used a veil of security, which was really the political and religious views of the pastor, to deny someone religious protection.[258] This has both Free Speech and Free Exercise implications.[259] As long as RLUIPA does not explicitly include death row inmates, prisons are empowered to make decisions of significant magnitude for insufficient and arbitrary reasons.

This process has also put profound pressure on spiritual advisors.[260] In January 2024, Reverend Hood was asked to advise Kenneth Eugene Smith in his final moments, after Smith had already experienced a botched execution in 2022.[261] Alabama was also testing out a new method of execution known as nitrogen hypoxia, a method "novel and untested."[262] As a result, they required Reverend Hood to sign a waiver acknowledging the associated risks and to stay at least three feet away from the mask used, which would prevent him from touching Mr. Smith—hindering his ability to fully perform the religious exercise.[263] Reverend Hood discussed the way in which spiritual advisors are left feeling vulnerable in circumstances like this, describing it as "walking into a house of horrors," and explaining that "[i]t needs to be perfectly clear to the world that this is terrifying."[264] Whether it is intentional or not, this practice puts pressure on spiritual advisors to stop ministering to the people on death

255. Edwards, *supra* note 253.
256. *Id.*
257. Complaint Under 42 U.S.C. § 1983, *supra* note 254, at 6, 12.
258. *Id.* at 12.
259. U.S. CONST. amend. I.
260. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 132–33 (1992).
261. Bevan Hurley, *'Walking into a House of Horrors': Kenneth Smith's Spiritual Advisor 'Terrified' of Nitrogen Gas Execution*, INDEPENDENT (Jan. 25, 2024), https://www.independent.co.uk/news/world/americas/kenneth-smith-nitrogen-execution-advisor-b2484841.html [https://perma.cc/U6CJ-KNBB].
262. Chiara Eisner, *Alabama's Upcoming Gas Execution Could Harm Witnesses and Violate Religious Liberty*, NPR (Dec. 12, 2023), https://www.npr.org/2023/12/12/1218591962/alabamas-upcoming-gas-execution-could-harm-witnesses-and-violate-religious-liber [https://perma.cc/CR5V-WG94].
263. *Id.* (providing a downloadable version of the waiver Mr. Hood was required to sign).
264. Hurley, *supra* note 261.

row.[265] Thus, although the right to religious exercise in the execution chamber has received validation in some cases, in practice states may be unintentionally forcing the spiritual advisors out of the death chamber by asking them to perform incomplete and less meaningful rituals in high-risk situations.

Despite enduring a variety of problems when ministering in the execution chamber and prisons more broadly, spiritual advisors do not want to stop providing faith-based support to condemned inmates.[266] For example, in July 2019, a group of over 200 leaders from various faiths made a statement criticizing the Texas Department of Corrections decision to exclude spiritual advisors from the execution chamber.[267] Instead, states should provide support and assurance to advisors while eliminating the administrative obstacles designed to keep them out.

The support provided by spiritual advisors is appreciable.[268] Spiritual advisors claim to be the only persons who can preside over certain death rituals and furnish spiritual comfort to condemned persons, viewing it as a "small but vital form of human compassion."[269] However, their job involves so much more—they often spend an inmate's last day with them, preparing them for what lies ahead—both physically, mentally, and spiritually.[270] This includes helping them call family members,[271] filling out paperwork,[272] advocating for them,[273] and even explaining the execution procedure to them.[274] In other cases, they help counsel the family of both the victim and the inmate, and may deliver belongings after the execution.[275] In other words, if states claim to support religious freedom and likewise choose to continue sentencing people to death, allowing inmates to automatically be provided the option of a spiritual advisor is of paramount importance. One death row chaplain described the experience he shares with executed inmates through the language of Dante's

265. Eisner, *supra* note 262.

266. *Id.*

267. Interfaith Statement in Response to the Tex. Dep't of Crim. Just.'s Decision to Remove Chaplains from the Execution Chamber (July 2019), https://drive.google.com/file/d/1v06HlnenFjWSuGaACFnJZbSTopYEaULk/view [https://perma.cc/Q7GJ-2DQF].

268. *See id.*

269. *Id.*

270. CARROLL PICKETT & CARLTON STOWERS, WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN 228 (1st ed. 2002).

271. *Id.* at 228–31.

272. *Id.*

273. RUSS FORD, CHARLES PEPPERS & TODD C. PEPPERS, CROSSING THE RIVER STYX: MEMOIRS OF A DEATH ROW CHAPLAIN 49–51 (2023).

274. *Id.*

275. PICKETT & STOWERS, *supra* note 270, at 233.

Inferno: "descend[ing] into the depths of hell before struggling to ascend toward a heavenly vision."[276]

IV. CODIFYING A RIGHT TO A SPIRITUAL ADVISOR IN THE EXECUTION CHAMBER

The simplest solution is to abolish the death penalty. However, the reality is that executions continue to occur—thus, all allowable protections must be provided to inmates facing death. As a result, I propose amending RLUIPA to explicitly (1) apply to death row inmates and (2) to automatically grant condemned inmates a right to a spiritual advisor of their choosing.

To provide an additional protection to inmates, an amendment to RLUIPA is the most favorable method. In *Cutter v. Wilkinson*, the Court recognized that religious rights could be shielded through a legislative form of accommodation.[277] Instead of requiring multiple levels of request and appeal, which is time consuming and can invite unnecessary subjectivity, the accommodation could be carved out in RLUIPA. If amended, it would require that prisons carrying out executions explicitly ask inmates on death row if they would like a spiritual advisor and give them a reasonable time to identify one of their choosing. The presumption would be that an inmate is provided a spiritual advisor, and the prison warden would have the burden of showing that the request was untenable only in extenuating circumstances. It would be most akin to First Amendment precedent that requires objective and neutral tests when regulating the context of speech.[278]

There are several obstacles that may make amendment difficult. First, imposing the law may require prisons to find additional funding to train one-time spiritual advisors or change existing time restraints on execution protocol.[279] However, many states that impose the death penalty have already developed and administered trainings for religious advisors to the extent necessary to satisfy safety requirements.[280] Prisons could simply require new spiritual advisors to undergo the same training. There are also a declining number of executions, meaning that monetary resources needed will likely continue to decrease.[281]

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276. FORD ET AL., *supra* note 273, at 213.

277. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005).

278. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 132–33 (1992).

279. *See* Execution Procedures, *supra* note 75.

280. *See* Dunn v. Ray, 139 S. Ct. 661, 661–62 (2019).

281. INFO. CTR., THE DEATH PENALTY IN 2023: YEAR END REPORT, DEATH PENALTY 17 (2023), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report [https://perma.cc/5HUH-WXH2].

Additionally, *Hobby Lobby* already provided an answer to this issue: sometimes the government will have to take on a cost or burden of their own to further a religious liberty.[282] It would also underscore the importance that the Supreme Court places on First Amendment's protections.[283]

This would also address the concerns elucidated by Justice Kagan in *Dunn*, because it ensures that this type of religious exercise protection is not denied by procedural technicalities such as time bars or appeals.[284] Furthermore, by having to explicitly ask inmates if they would like a spiritual advisor, it would inform them that this right exists in the first place.[285] It would also likely pull more cases from the shadow docket if they did not need to be litigated at all.[286] The issue of inaccessibility to litigating claims under RLUIPA (whether through money or knowledge), at least for death row inmates, would become largely moot.[287]

Second, legislatures and prisons alike may be concerned that safety and security interests cannot be accomplished if a spiritual advisor is provided in every case in which it is requested.[288] However, the Supreme Court has repeatedly identified mechanisms in which safety concerns can be met.[289] In *Dunn v. Ray*, Justice Kagan suggested that prisons provide advisors with the training received by other death row chaplains or to require them to sign a pledge stating they would not interfere with the execution.[290] She also suggested that there were less restrictive means than barring every spiritual advisor from entering the execution chamber.[291] Oppositely, in *Murphy v. Collier*, Justice Kavanaugh suggested that equal treatment issues could be solved by either allowing or barring all spiritual advisors into the execution chamber.[292] In short, the Supreme Court has attempted to devise a solution to this problem themselves, meaning that it should not be an impossible feat for legislatures. Codifying a right to a spiritual advisor for death row inmates addresses the fact that nearly all security interests can be met while also providing the right to a spiritual advisor to inmates on death row. It would take the power of religious choice away from government

282. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).
283. *See id.*
284. Dunn v. Ray, 139 S. Ct. at 661–62 (Kagan, J., dissenting).
285. *Id.*
286. Green, *supra* note 126, at 650.
287. *Id.*
288. *See, e.g.*, Ramirez v. Collier, 142 S. Ct. 1264, 1279–81 (2022).
289. *See, e.g.*, *id.*
290. Dunn v. Ray, 139 S. Ct. 661, 661 (2019) (Kagan, J., dissenting).
291. *Id.*
292. *See* Murphy v. Collier, 139 S. Ct. 1475, 1475–77 (2019) (Kavanaugh, J., concurring).

and give it to those who need the protection most. More than that, these objectives would allow America to come closer to being the place of religious diversity and toleration that is *who it pretends to be*.[293]

CONCLUSION

Providing death row inmates with spiritual advisors during execution should not be a privilege, but a right. There is a long history in the United States of providing everyone—even those that society liked the least—with a right to hear prayer and feel touch from a spiritual advisor during their execution. There has also been a plethora of procedural problems, Supreme Court opinions that are shrouded in secrecy, and a level of prison deference that can perpetuate religious discrimination and placing a tremendous level of pressure and risk on spiritual advisors. Furthermore, the force of inconsistent Supreme Court decisions and state legislative action is so strong that it has created a pendulum, which perpetually swings between religious accommodation and the restriction of religious liberties. It may only be restored to equilibrium by protecting the right to a spiritual advisor.

The solution to this problem is not complex. If states do not eliminate the use of the death penalty, then they must offer spiritual advisement to those they plan to execute. This modest provision is one that society should be more willing to accept, because it is rooted in a pervasive tradition present throughout the history of government-sanctioned executions—*and simply because death is different*. The Supreme Court cannot overrule death, and a state may not legislate around it. However, the government has nothing to lose in providing a moment of humanity and comfort in an act that is unthinkably barbaric.

CLAIRE R. JENKINS*

293. *See id.*; Wisconsin v. Yoder 406 U.S. 205, 214–15 (1972); Ramirez v. Collier, 142 S. Ct. 1264, 1278–79 (2022); David Masci, *Many Americans See Religious Discrimination in U.S.—Especially Against Muslims*, PEW RSCH. CTR. (May 17, 2019), https://www.pewresearch.org/short-reads/2019/05/17/many-americans-see-religious-discrimination-in-u-s-especially-against-muslims [https://perma.cc/G629-FSFF]; U.S. CONST. amend I.

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