No.____

In the Supreme Court of the United States

STEPHEN DALE BARBEE,
Petitioner.
v.
BRYAN COLLIER, BOBBY LUMPKIN, DENNIS CROWLEY
Texas Department of Criminal Justice,
Respondents

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

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

Mr. Barbee is scheduled to be executed on November 16, 2022

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QUESTIONS PRESENTED

In 2021, Petitioner Stephen Barbee filed this lawsuit against the relevant directors of the Texas Department of Criminal Justice ("TDCJ"). He has alleged that TDCJ refused to allow his spiritual advisor to audibly pray and hold his hand while in the execution chamber, in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and the First Amendment's Free Exercise Clause. The district court stayed an earlier execution and stayed the case pending this Court's resolution of *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

On March 24, 2022, this Court decided *Ramirez*, ordering TDCJ to allow the inmate's spiritual advisor to be allowed to pray and lay hands on him during the execution. Recognizing that case-by-case dispositions of religious rights claims may result in continued "last-minute litigation." the Court provided the following guidance:

> [T]imely resolution of such claims could be facilitated if State were to adopt policies anticipating and addressing issues likely to arise. Doing so would assist both prison officials responsible for carrying out executions and prisoners preparing to confront the end of life according to their religious beliefs...If States adopt clear rules in advance, it should be the rare case that requires last-minute resort to the federal courts. If such cases do arise, and a court determines that relief is appropriate under the RLUIPA, the proper remedy is an injunction ordering the accommodation, not a stay of execution. This approach balances the State's interest in carrying out capital sentences without delay and the prisoner's interest in religious exercise.
> (*Id*. at 1283).

In Petitioner's case, on May 22, 2022, Director Lumpkin signed an affidavit promising Barbee that he could have his spiritual advisor audibly pray and touch him on a lower extremity. On August 17, 2022, Lumpkin signed another affidavit, this one promising Barbee that his spiritual advisor could hold his hand in the execution chamber. The district court, in reviewing the history of this type of litigation across several cases, found that Texas has not adopted a policy after Ramirez

and observed that "TDCJ has apparently left the question of what a spiritual advisor may do to the discretion of prison officials, including the TDCJ Director." (App.014). In light of these findings, the district court granted Barbee a preliminary injunction stating that TDCJ can proceed with Barbee's execution on November 16, 2022 "only after it publishes a clear policy" addressing how it will protect the religious rights of prisoners in the execution chamber. (App.018).

The Fifth Circuit Court of Appeals vacated the injunction as overbroad because an order requiring a change in TDCJ policy would benefit not only Barbee but also other death row inmates. This gives rise to the following questions:

1. Whether the Fifth Circuit erred in vacating as an abuse of discretion the injunction requiring TDCJ to publish a clear policy where the district court found that, despite this Court's guidance in *Ramirez*, TDCJ "has not responded by enacting any formal policy guaranteeing religious expression in the execution chamber." (App.014).

2. Whether the Fifth Circuit erred in vacating the injunction granted below on the ground that "it is improper under the PLRA [Prison Litigation Reform Act]...to go beyond relief for Barbee himself (App.006) although the district court had determined the injunction's scope was necessary to give Barbee the relief to which he was entitled?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Petitioner Stephen Dale Barbee, a death-sentenced Texas inmate, was the appellee in the United States Court of Appeals for the Fifth Circuit. Respondents, Bryan Collier, Executive Director of the Texas Department of Criminal Justice ("TDCJ"), Bobby Lumpkin, Director of TDCJ's Correctional Institutions Division, and Dennis Crowley, Warden of TDCJ's Huntsville Unit, were

the appellants in that court.

Mr. Barbee asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen Dale Barbee respectfully prays that a writ of certiorari issue to review the decision of the U.S. Court of Appeals for the Fifth Circuit vacating the preliminary injunction entered by the U.S. District Court for the Southern District of Texas based on Respondents' refusal to conform their policies to this Court's decision in *Ramirez v. Collier*, 142 S. Ct. 1264 (2022). (App.001-007). Petitioner also requests that this Court stay the mandate of the Fifth Circuit, issued on November 11, 2022. *Barbee v. Collier*, No.22-70011. (App.008-009).

INTRODUCTION

Plaintiff Stephen Barbee was indicted, tried and convicted of capital murder in February 2006 for the deaths of Lisa and Jayden Underwood in Tarrant County, Texas. Mr. Barbee is scheduled to be executed on November 16, 2022, under the authority of the Respondents (hereafter, "TDCJ"). On September 21, 2021, Barbee filed a lawsuit under 42 U.S.C. § 1983 to protect his religious rights under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. (ROA.7-63).[1] On November 3, 2022, the United States District Court for the Southern District of Texas, Houston Division, issued a "Memorandum and Order" (hereafter, "Order") denying without prejudice TDCJ's motion to dismiss Barbee's lawsuit. (App.009-015). The same day, the district court also issued a "Preliminary Injunction" (hereafter, "Injunction") stating that TDCJ

> may proceed with the execution of Stephen Barbee on November 16, 2022, only after it publishes a clear policy that has been approved by its governing policy body that (1) protects an inmate's religious rights in the execution chamber and (2) sets out any exceptions to that policy, further describing with precision what those exceptions might be. (App.018).

[1] "ROA" refers to the Electronic Record on Appeal filed in the 5th Circuit.

Despite the fact that litigation is still ongoing in the religious rights lawsuit in the district court and there has been no final determination on the merits, TDCJ filed an interlocutory appeal in the form of a motion to vacate the injunction and another identical document styled as their brief in the Fifth Circuit Court of Appeals. *Barbee v. Collier*, No. 22-70011. They did not appeal the district court's order. On November 11, 2022 the Fifth Circuit vacated the district court's preliminary injunction and remanded the case to the federal district court "for further proceedings consistent with this opinion." (App.007).

The district court's injunction rightly enjoined Mr. Barbee's execution until TDCJ approves and "adopt[s] clear rules in advance," exactly what this Court called for in *Ramirez v. Collier*, 142 S. Ct. 1264, 1283 (2022).

LOWER COURT OPINIONS AND ORDERS

The Fifth Circuit opinion vacating the preliminary injunction, *Barbee v. Collier*, No. 22-70011 (5th Cir. Nov. 11, 2022) and that Court's judgment, issued as the mandate, is attached as Appendix A. The District Court's memorandum opinion granting the preliminary injunction and the injunction, *Barbee v. Collier*, 2022 WL 16710723 (S.D. Tex. Nov. 3, 2022), are attached as Appendix B.

JURISDICTION

The Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The opinion of the Fifth Circuit and the judgment, issued as the mandate, were entered on November 11, 2022. (App.001-009). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof ….

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ….

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803, 42 U.S.C. § 2000cc-1(a) provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution … even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

The Prison Litigation Reform Act of 1995 ("PLRA"), 104 Stat. 134, 18 U.S.C. §3626 *et seq*., provides in relevant part:

> In any civil action with respect to prison conditions...the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.

STATEMENT OF THE CASE

A. The Factual Background.

Stephen Barbee is a devout Christian and has been throughout his life. He has been active in the Pentecostal church since childhood, including teaching Sunday School classes. He seeks to exercise his faith when Texas carries out his execution, currently scheduled for November 16, 2022. Specifically, Barbee requests that his spiritual advisor—Barry Brown of the Salvation Army—be permitted to hold his hand and pray audibly over him during the execution. The laying on of

hands—a symbolic act in which religious leaders place their hands on a person in order to confer a spiritual blessing—is an integral part of Mr. Barbee's Pentecostal faith.

TDCJ's written policies permit the presence of the minister but do not authorize audible prayer or touch. Until April 2019, TDCJ allowed TDCJ-approved chaplains in the execution chamber to guide persons being executed into the afterlife according to their religious beliefs. Between 1982 and March 2019, Texas conducted 560 executions pursuant to this policy.

In March 2019, TDCJ refused inmate Patrick Murphy's request that his Buddhist spiritual advisor accompany him in the chamber during the scheduled execution. *See Murphy v. Collier*, 139 S. Ct. 1475 (2019). Patrick Murphy had sought access for his Buddhist priest in the chamber so that the priest could "chant[] while a lethal injection is administered" to assist him in "remaining focused on Buddha while dying." *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting). After TDCJ refused Murphy's request, he filed a request for a stay of execution in this Court and sought to challenge TDCJ's decision on equal protection and First Amendment grounds. *See id*.

On March 28, 2018, this Court granted a stay of execution and issued an order prohibiting TDCJ from carrying out the execution "pending the timely filing and disposition of a petition for a writ of certiorari unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution." *Murphy*, 139 S. Ct. at 1475. Justice Kavanaugh wrote a concurring opinion, in which he expressed his view that "the Constitution prohibits [the] denominational discrimination" of the then-existing TDCJ policy. *Id*. at 1475-76. Justice Kavanaugh observed that a potential remedy for this denominational discrimination would be to ban *all* spiritual advisors of *any* denomination from the chamber. *Id*. On April 2, 2019, TDCJ revised its Execution Procedure to provide that "TDCJ Chaplains and Ministers/Spiritual Advisors designated by the offender may observe the execution

only from the witness rooms. Tex. Dep't Crim. Just., Execution Procedure at 8 (Apr. 2019).

Following the setting of his execution for June 16, 2020, Ruben Gutierrez, a condemned inmate, brought a § 1983 complaint under the First Amendment and the RLUIPA, challenging TDCJ's prohibition on the presence of any spiritual advisor in the chamber and noting that "communal prayer [is] a longstanding religious tradition worthy of First Amendment protection" and that "Texas has long recognized that a condemned prisoner's prayer with a chaplain is integral in executions." Pet. For Writ of Certiorari at 24, *Gutierrez v. Saenz*, No. 19-8594 (S. Ct.), cert. granted, 141 S. Ct. 1260 (2021). A panel of the Fifth Circuit Court of Appeals had vacated the district court's grant of a stay of execution based on the challenge to TDCJ's spiritual advisor policy, but this Court granted a stay. This Court remanded the case to the district court to make factual findings regarding "whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution." *Gutierrez*, 141 S. Ct. at 127. After the district court made findings that no security problem would result, this Court granted certiorari, vacated the Fifth Circuit's panel decision, and remanded the case for consideration on the merits. *Gutierrez*, 141 S. Ct. 1260, 1261 (2021).

On April 21, 2021, TDCJ again revised its Execution Procedure, presumably in response to the litigation in *Gutierrez v. Saenz*. This time, the protocol provided that a prisoner may be accompanied in the execution chamber by their personal religious advisor, who may be escorted into the execution chamber to observe the execution, if requested by the prisoner and approved by the TDCJ. The 2021 protocol also specifies that if the spiritual advisor engages in behavior that a CID [Correctional Institutions Division] director or representative deems "disruptive to the execution procedure," the spiritual advisor shall be removed from the execution chamber." 2021 TDCJ

Protocol at 10 (ROA.42). Under the new policy, TDCJ allows spiritual advisors in the execution chamber to "observe" the execution, provided they be verified and pass a background check. 2021 TDCJ Protocol at 8 (ROA.40).

On August 10, 2021, John Henry Ramirez brought a complaint under 42 U.S.C. § 1983 alleging that TDCJ had informed Mr. Ramirez and his counsel that TDCJ policy forbids Mr. Ramirez's spiritual advisor from laying hands upon him at the time of his death, "a long-held and practiced tradition in Christianity in general and in the Protestant belief system Mr. Ramirez adheres to." Mr. Ramirez's complaint alleged that TDCJ's "No Contact" policy violated his rights under the Free Exercise Clause of the First Amendment and RLUIPA, 42 U.S.C. § 2000cc *et seq*. *Ramirez v. Collier et. al.*, No 4:21-CV-02609, ECF No. 1.

In his complaint, Mr. Ramirez alleged that his spiritual advisor "needs to lay his hands on Mr. Ramirez" at the time of his death "in accordance with [the spiritual advisor's] and Mr. Ramirez's faith tradition." *Id*. at 5, ¶17. Mr. Ramirez further alleged that "the laying on of hands is a symbolic act in which religious leaders place their hands on a person in order to confer a spiritual blessing." *Id.* at ¶18.

Mr. Ramirez attached as an exhibit to his Amended Complaint an Offender Form I-127 complaining that the Director of Chaplaincy at TDCJ had told him that his spiritual advisor was not going to be allowed to have physical contact with him in the execution chamber. In response, on July 2, 2021, a representative of the TDCJ typed, "A spiritual advisor is not allowed to touch an inmate while in the execution chamber." *Ramirez*, No. 4:21-cv-022609, ECF No. 5 at 38-39.

On August 22, 2021, Mr. Ramirez filed a second amended complaint in which he alleged that, in addition to being prohibited from touching Mr. Ramirez during the execution to administer a final blessing, the spiritual advisor would be prohibited from praying aloud while in the chamber.

Mr. Ramirez attached as an exhibit to his second amended complaint a letter dated August 19, 2021, from TDCJ's general counsel to Ramirez's counsel, in which TDCJ's counsel informed Ramirez's counsel that, "At this time, TDCJ does not allow the spiritual advisor to pray out loud once inside the execution chamber." Letter from General Counsel Worman to Eric Allen, counsel for Ramirez, dated August 19, 2021. The August 19 letter also reiterated that the spiritual advisor would *not* be allowed physical contact with Mr. Ramirez once inside the execution chamber. *Ibid*.

On September 7, 2021, Mr. Ramirez sought a stay of execution from the United States District Court for the Southern District of Texas, based on the likelihood that he would prevail on his § 1983 challenge to TDCJ's "No Speaking" and "No Contact" policies. When the district court denied his motion for a stay of execution, Mr. Ramirez appealed to the United States Court of Appeals for the Fifth Circuit, and when the Fifth Circuit affirmed the district court's denial of a stay, Mr. Ramirez filed a motion for a stay of execution in this Court, along with a petition for writ of certiorari. *Ramirez v. Collier, et. al.*, No. 21-5592; 21A33.

On September 8, 2021, this Court stayed Mr. Ramirez's execution and granted a writ of certiorari to answer the questions presented in Mr. Ramirez's petition about TDCJ's "No Contact" and "No Speaking" policies forbidding spiritual advisors who are present in the execution chamber from vocal prayer and from having physical contact with condemned persons as they are about to be executed. *Ramirez v. Collier, et. al*, No. 21-5592.

On September 7, 2021, Mr. Barry Brown informed Mr. Barbee that "TDCJ would not allow him [Mr. Brown] to touch me or speak to me while I was in the death chamber, during my execution." Step 1 Grievance Offender Form submitted by Stephen Barbee on September 15, 2021. (ROA.56). Mr. Barbee complained that "I am being deprived of my religious rights because I believe my spiritual advisor should touch me and say the appropriate words while I'm in the death

chamber." *Id.*

On September 16, 2021, this grievance was denied: "At this time the spiritual advisor is not allowed to touch the inmate or speak out loud once inside the execution chamber. No further action is warranted at this time." (ROA.57).

B. The RLUIPA Litigation in The Courts Below.

The current appeal relates to an ongoing complaint under 42 U.S.C. § 1983, filed on September 21, 2021 in the United States District Court for the Southern District of Texas, alleging the violation of Barbee's rights under RLUIPA. *Barbee v. Collier*, No. 4:21-cv-3077 (S.D. Tex.). (ROA.7-63). On September 28, 2021, Barbee filed a motion for a stay of execution (ROA.79-99); and on October 4, 2021, TDCJ filed an opposition to the stay motion. (ROA.132-185). On October 7, 2021, the district court issued a 19-page "Order Staying Execution." (ROA.315-332). On November 29, 2021, the district court stayed and administratively closed the case. (ROA.370-371).

On March 24, 2022, this Court decided *Ramirez v. Collier*, and on April 5, 2022, the district court ordered the case reopened and directed the parties to file a proposed joint briefing schedule by April 15, 2022. (ROA.376). Due to Barbee's counsel being hospitalized for emergency triple-bypass heart surgery for almost one month, the district court authorized an extension of time to file the proposed joint briefing schedule. (ROA.382).

However, on May 5, 2022, instead of filing a proposed briefing schedule as ordered by the district court, TDCJ moved for an accelerated briefing schedule despite their knowledge of Barbee's counsel's illness and impairment during recovery. (ROA.383-387). On May 6, 2022, Barbee filed his proposed briefing schedule, which was opposed by TDCJ. (ROA.388-391).

Despite the fact that the district court had yet to set a briefing schedule, on May 27, 2022 TDCJ then filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1), following their own

proposed, but not adopted, schedule. (ROA.393-405). On June 13, 2022, the district court accepted the filing of TDCJ's motion to dismiss and ordered Barbee to file a response to that pleading by July 27, 2022. (ROA.410-411).

TDCJ attached to the motion to dismiss an affidavit, dated May 26, 2022, by Bobby Lumpkin, Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, one of the named defendants in this lawsuit, stating that he had "reevaluated the requests made by Stephen Barbee that his spiritual advisor be permitted to lay hands on him when he is in the execution chamber and to audibly pray during the execution process" and that "Barbee's spiritual advisor will be permitted to lay hands on Barbee on a lower extremity after Barbee is secured to the gurney in the execution chamber and the IV lines are in place." Affidavit of Bobby Lumpkin, Director of the Texas Dept. of Criminal Justice, Correctional Institutions Division, Ex. A to Defendants' Motion. (ROA.403). Thus, Mr. Barbee's explicit request that his religious advisor be permitted to hold his hand in the chamber (ROA.348) was not granted. A subsequent and contradictory "reevaluation" of this policy by Mr. Lumpkin allowed the previously-denied hand-holding.(ROA.449).[2] The current TDCJ execution protocol, which was adopted on April 21, 2021 and remains in effect, does not appear to permit even these partial concessions. (ROA.33-44).

Despite the district court's stay of execution, on July 15, 2022, the State, through the Tarrant

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[2] This was a 2-step "reevaluation." Last year, TDCJ opposed both audible prayer and all touching by Mr. Barbee's spiritual advisor. (ROA.157, 171-172). The first reevaluation was in TDCJ's motion to dismiss, filed on May 27, 2022, where Defendant Lumpkin for the first time conceded that audible prayer was now allowed and "Barbee's spiritual advisor will be permitted to lay hands on Barbee on a lower extremity after Barbee is secured to the gurney..." (ROA.403, Affidavit of Bobby Lumpkin dated May 26, 2022). Their second reevaluation was on August 17, 2022. In TDCJ's reply to Barbee's response to the motion to dismiss, Defendant Lumpkin again changed his position and stated that "I have nevertheless approved Barbee's request for handholding." (ROA.449).

County District Attorney's Office, moved for the trial court to set an execution date for Mr. Barbee in late October. *State v. Barbee*, No. 1004856R, 213th Judicial District Court, Tarrant County, "State's Third Motion For Court To Enter Order Setting Execution Date." (ROA.546-553). That Motion was filed with the State's full knowledge of the ongoing district court proceedings.

In the ongoing RLUIPA litigation in the federal district court, on September 15, 2022, that Court ordered the parties to "provide briefing in ten (10) days which discusses whether issuing an injunction in this case, as requested by Barbee in his complaint, would be appropriate." (ROA.471). On September 26, 2022, the parties submitted their briefs. (ROA.472-483 (TDCJ); ROA.484-494 (Barbee)). On November 3, 2022, the district court denied TDCJ's motion to dismiss and issued the preliminary injunction that is the subject of this petition. (App.011-018).

TDCJ appealed the grant of the injunction to the Fifth Circuit Court of Appeals and on November 11, 2022, that Court vacated the district court's preliminary injunction and remanded the matter to the district court for "further proceedings consistent with this opinion." (App.001-007). The Court's judgment, issued as the mandate, was also issued that day. (App.008-009).

REASONS FOR GRANTING CERTIORARI

As this Court predicted in *Ramirez v. Collier*, a RLUIPA case has arrived shortly before the State of Texas is scheduled to execute the Plaintiff. Though more than seven months have passed since *Ramirez* was decided, TDCJ has not adopted a policy "anticipating and addressing issues likely to arise" in the spiritual advisor context. 142 S .Ct. at 1283. Recognizing the guidance provided in *Ramirez*, the district court granted a preliminary injunction requiring TDCJ to publish a policy. (App.018) Without one, TDCJ has "left the question of what a spiritual advisor may do to the discretion of prison officials." (App.014). The district court did not defer to that discretion

because its "unwritten practice escapes court scrutiny" and the "record does not suggest or support the conclusion that an accommodation of an inmate's requested religious practice is automatic or absolute. . . . "(App.015).

By vacating the preliminary injunction, the Fifth Circuit's holding will perpetuate the sort of chaos that this Court sought to avoid with its opinion in *Ramirez*. *See id*. (providing guidance to help limit "last-minute resort to the federal courts"); *id*. at 1285 (Sotomayor, J., concurring) ("Timely notice of policies is essential to ensure the ability to timely raise, or seek informal resolution of, any claims related to those policies.").

The TDCJ's policy—or, more accurately, the lack of one—was the source of the harm the district court identified in Mr. Barbee's case. The piecemeal manner in which TDCJ made concessions to his request for his advisor to pray audibly and hold his hand, the agency's shifting interpretations of the 2021 protocol, and the defendants' efforts to "moot" the litigation without a binding court order informed the district court's decision to deny TDCJ's motion to dismiss and grant Barbee's request for a preliminary injunction. In short, the district court determined that the prospective irreparable harm to Barbee's religious rights required the remedy of a new TDCJ policy. (App.015-018).

The Fifth Circuit determined that the injunction was "overbroad" because it interpreted the PLRA to prohibit any remedy that could inure to the benefit of any individual not named in the suit. (App.005-006). This narrow view of the statute and the judicial power strips Barbee of the relief to which the district court found he was entitled. The district court here did not abuse its discretion by ordering TDCJ to publish a policy. After all, it had determined that a policy was needed to ensure Barbee's religious rights are not violated. (App.014-017).

This Court should intervene because the Fifth Circuit has decided an important question of

federal law in a manner that conflicts with *Ramirez*. The failure to intervene would ensure that the courts and future litigants will remain entangled in last-minute litigation about the religious rights of death row inmates. This Court should also grant certiorari so Mr. Barbee does not endure "spiritual [harm]" that could never be rectified. *Ramirez*, 142 S. Ct. at 1282.

ARGUMENT

1. This Court Should Intervene Because the Fifth Circuit Has Decided An Important Question of Federal Law in a Manner That Conflicts With *Ramirez*.

a. The District Court did not abuse its discretion issuing the injunction because it correctly determined that the current protocol conflicts with *Ramirez*.

The district court was correct to issue the injunction (App.018), because the change to TDCJ's execution protocol was necessary to afford Mr. Barbee the protection of his religious rights that this Court determined he was entitled to in *Ramirez*. The 2021 protocol was in place *before* this Court decided *Ramirez*, and it has not been modified in response to *Ramirez*, and it is silent as to what a spiritual advisor may do—if anything—inside the execution chamber. *See Ramirez*, 142 S. Ct. at 1274 ("The protocol says nothing about whether a spiritual advisor may pray aloud or touch an inmate for comfort.")

Until recently, TDCJ interpreted the protocol to prohibit physical touch or audible prayer in the execution chamber. This was at least a fair reading of the protocol. *See* Protocol at 10 (ROA.42) ("If requested by the inmate and previously approved by the TDCJ, a TDCJ Chaplain or the inmate's approved spiritual advisor will be escorted into the execution chamber by an agency representative to *observe* the inmate's execution" (emphasis added), and "NOTE: Any behavior by the spiritual advisor or witnesses deemed by the CID [Correctional Institutions

Division] Director or designee to be disruptive to the execution procedure shall be cause for immediate removal from the Huntsville Unit.") It is reasonable to read these two provisions together in such a way that would prohibit audible prayer and physical touch; yet, now, TDCJ has reversed course and represented to the courts that the same provisions may be read to allow physical contact and audible prayer.

Similarly, while TDCJ once took the position, that "accommodations granted in advance of the execution can potentially be modified at the discretion of Director Lumpkin and the Warden in the moments immediately prior to the commencement of the execution." *Gonzales v. Collier*, 2022 WL 4100852, at *2 (S.D. TX. 2022); it now claims that "approved accommodations will not be withdrawn." These shifts in position led the district court to conclude:

> TDCJ is now operating under an unwritten policy where prison officials may unilaterally decide whether to allow an inmate's requested accommodation. This practice constitutes an arbitrary method for interpreting its own policy; hence, the accommodation may be withdrawn at the will or caprice of any prison official at the last moment thereby avoiding judicial review.
> Memorandum and Order (App.017).

The Fifth Circuit did not dispute this conclusion; it merely chastised the district court for fashioning a remedy that would resolve the contradiction between Texas' protocol and this Court's decision in *Ramirez*. Where the protocol conflicted with *Ramirez*, the district court's injunction would require TDCJ to correct it, to bring it into harmony with *Ramirez*. The district court found that Mr. Barbee was entitled to this protection. (App.016-017) Just because it follows that other Texas death-row prisoners are entitled to—and might receive—the same protection under a modified policy does not render the remedy over-broad, as the Fifth Circuit determined. To read it that way would deprive the district court of any discretion to protect Mr.

Barbee's religious rights by eliminating the likelihood that a last-minute exercise of the CID Director's discretion would result in a deprivation of his religious rights. The district court correctly discerned that such a remedy was necessary to prevent grave spiritual harm for which Barbee would have no recourse. This Court in *Ramirez* clearly contemplated that courts adjudicating the "rare" 'disputes that would arise after *Ramirez* would have discretion to prevent exactly such spiritual harms.

b. Failure to intervene in Mr. Barbee's case will insure that courts and future litigants remain entangled in last-minute litigation about the religious rights of prisoners facing execution.

The district court was right to interpret TDCJ's policy as presenting a constitutionally unacceptable risk of a RLUIPA violation, and, the Fifth Circuit did not dispute the district court's interpretation of the protocol. The Fifth Circuit violated both the spirit and the letter of *Ramirez* when it vacated the injunction because it required a written change to Texas' execution protocol. Such a change would protect other prisoners' religious rights, in addition to safeguarding Barbee's.

The Fifth Circuit misappropriated the language in *Ramirez* to the effect that the "proper remedy" for a faulty protocol under RLUIPA "is an injunction ordering the accommodation." (App.007). Given that the "proper remedy" was articulated in the context of a jurisdiction having "adopted clear rules" about spiritual advisors in the chamber—something the State of Texas refuses to do—it cannot be read to foreclose the injunctive relief the district court afforded Mr. Barbee. Further, the language that the "proper remedy" under RLUIPA "is an injunction ordering the accommodation" was a conditional statement about appropriate remedies referring to the particular and hypothetical context of a State having already "adopt[ed] clear rules in advance"—not, as the Fifth Circuit read it, a prohibition on a particular type of injunctive relief.

In vacating the injunction, the Fifth Circuit assumed that this Court in *Ramirez* articulated a right to spiritual accompaniment in the execution chamber, including audible prayer and physical touch for comfort, while contemplating that courts would be powerless to enforce such a right, in the event that a State chose to ignore it. In assuming that the Court merely issued a "recommendation" (App.006) that States revise their protocols to allow for the religious accommodations that *Ramirez* required and that Barbee requests, the Fifth Circuit misinterpreted the fundamental holding of *Ramirez* and reduced it to a mere "suggestion."

The district court found, and the Fifth Circuit did not dispute, that "TDCJ is now operating under an unwritten policy where prison officials may unilaterally decide whether to allow an inmate's requested accommodation . . . [and] the accommodation may be withdrawn at the will or caprice of any prison official at the last moment." (App.017). It defies reason to assume that this is the situation this Court in *Ramirez* anticipated when it articulated a right to spiritual advisors' audible prayer and physical touch for comfort in the execution chamber. It makes no sense that if a State's execution protocol blatantly runs afoul of *Ramirez* by, for example, explicitly prohibiting audible prayer in the execution chamber, each individual prisoner facing execution such a religious accommodation would have to sue individually to obtain an injunction ordering such an accommodation, tailored specifically to that particular execution. Yet, that is the result of the Fifth Circuit's interpretation of *Ramirez*. This Court in *Ramirez* explicitly considered the risk that States with faulty protocols (which the district court here found Texas' protocol to be) would produce a steady stream of litigation of the type that *Ramirez* initiated and Barbee has pursued. Certainly the Court did not intend to render district courts powerless to fashion remedies sufficient to stem the tide.

It is significant that the protocol at issue in *Ramirez* was Texas' current 2021 protocol – that fact adds weight to the argument that the Court in *Ramirez* was assuming a change in protocol, in making the determination that the appropriate remedy, in the rare event of a lawsuit, would be a narrowly-tailored accommodation. This Court should grant certiorari because the Fifth Circuit's narrow view of the statute and the judicial power deprives Barbee of the relief to which the district court found he was entitled, and the district court here did not abuse its discretion by ordering TDCJ to publish a policy.

2. The Injunction Was Not Overbroad Under the PLRA Because It was Necessary to Provide Mr. Barbee the Relief to Which He Is Entitled

The Fifth Circuit held that the injunction was "improper under the PLRA because it goes beyond relief for Barbee himself." (App.006, quoting *Ball v. LeBlanc*, 792 F.3d 584 at 598-99 (5th Cir. 2015)). The Fifth Circuit's logic dictates that courts cannot fashion injunctions that provide any protection to individuals who are not parties in the lawsuit at issue. This approach—perhaps informed by an emerging concern with judicial use of "nationwide" or "universal" injunctions—goes too far in limiting judicial authority. While both the PLRA and the rules for preliminary injunctions urge judicial caution about the scope of the remedy, they do not preclude the injunction granted in this case because it was necessary to confer upon Mr. Barbee the relief to which he is entitled.

The Fifth Circuit's ruling emphasizes the PLRA's requirement that relief be provided only to the plaintiffs in the case. (*See* App.005; *Ball*, 792 F.3d at 599; 18 U.S.C. § 3626(a)(1)(A)). However, as this Court has made clear, this requirement "means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court." *Brown v. Plata*, 563 U.S. 493, 531 (2011). As this

Court in *Plata* emphasized, "the [PLRA] precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects. Nor does anything in the text of the PLRA require that result." *Id.* A court should focus on whether the injunction as drawn up is needed to address the identified harm to the plaintiff. It should not exclusively evaluate whether the injunction may happen to benefit someone else. But, the Fifth Circuit requires the opposite mode of analysis here: scrapping an otherwise indispensable injunction merely because it happens to protect non-parties.

Mr. Barbee's RLUIPA lawsuit has survived a motion to dismiss under Fed. R. Civ. P 12(b)(6), meaning that the district court determined that it contained at least sufficient factual allegations to make it plausible. (App.015-017). In denying TDCJ's motion to dismiss as moot, the district court also found that the piece-meal *ad hoc,* and sometimes contradictory concessions by the Director of the Correctional Institutions Division of TDCJ, Bobby Lumpkin, were inadequate, and that published, clearly articulated measures were necessary to protect the religious rights of Mr. Barbee. (App.014-017). This went no further than required under the PLRA, whose "narrow tailoring" requirement only "requires a 'fit' between the [remedy's] ends and the means chosen to accomplish those ends.'" *Plata*, 563 U.S. at 531, citing *Board of Trustees of State Univ. Of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Federal courts can order prospective relief "in any civil action with respect to prison conditions," provided the relief "extend[s] no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a). The district court went no further than that here.

The PLRA does not require the result the Fifth Circuit reached. The standards governing injunctive relief prove the point. *See, e.g.*, *Plata*, 563 U.S. at 571 (Alito, J., dissenting) ("These statutory restrictions [in the PLRA] largely reflect general standards for injunctive relief aimed

at remedying constitutional violations by state and local governments."). "An injunction [ ] is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Prof'l Ass'n of Coll. Educators, TSTA/NEA v. El Paso Cty. Cmty. Coll. Dist.*, 730 F.2d 258, 273-74 (5th Cir. 1984). So long as the injunction is appropriately tailored, some impact on non-parties does not doom it. *See Plata*, 563 U.S. at 531.

Here, the district court—in view of all developments that occurred between the filing of the complaint in September of 2021 and the denial of TDCJ's motion to dismiss earlier this month—issued an injunction Mr. Barbee needed to ensure his religious rights in the execution chamber would be protected. TDCJ's discretion creates the likelihood of irreparable harm. (App.018). That discretion, etched in the existing protocol, can only be curbed by a new policy. And, consistent with the standards governing injunctive relief, that is what the district court required. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (describing "the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs").

A careful reading of the Fifth Circuit's precedent reveals that its ruling over-enforced the PLRA. The case on which it primarily relied, *Ball*, observed that "any relief must apply only to them, *if possible*." 792 F.3d at 599 (emphasis added). What the Fifth Circuit missed is that it was *not possible* in Mr. Barbee's case. The district court correctly determined that TDCJ had to revisit its policy to ensure that its discretion was appropriately delineated. Otherwise, all that remains will be these last-minute, individual actions which this Court strongly disfavored in *Ramirez*. Because the injunction represented the relief to which Mr. Barbee was entitled, its

spillover benefits to other inmates do not negate its validity. *Cf. Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733 (5th Cir. 1977) (observing in a corporate context that a "companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the [law]").

CONCLUSION

For the forgoing reasons, the Court should stay the mandate of the Fifth Circuit Court of Appeals and grant the petition for writ of certiorari to consider the important questions presented by this petition.

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Respectfully submitted,

s/s A. Richard Ellis

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