No. 21-5592

IN THE

Supreme Court of the United States

JOHN RAMIREZ,

Petitioner,

v.

BRYAN COLLIER, Executive Director, Texas Department of Criminal Justice; BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division; DENNIS CROWLEY, Warden, TDCJ, Huntsville, TX,

Respondents.

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

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, AMERICAN ATHEISTS, AND AMERICAN HUMANIST ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTERESTS OF AMICI CURIAE[1]

The Freedom From Religion Foundation ("FFRF")—a national educational nonprofit organization based in Madison, Wisconsin—is the largest association of freethinkers in the United States, representing more than 35,000 atheists, agnostics, and other nonreligious Americans. Along with its current dues-paying membership, FFRF represents the interests of the largest single group by religious identification — the "nones." More Americans identify as having no religion than those who identify as Roman Catholic, Southern Baptist or any other particular religious denomination. Today nearly one in four U.S. adults identifies as religiously unaffiliated.[2] Founded nationally in 1978, FFRF has members in every state, the District of Columbia, and Puerto Rico. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional principle of separation between state and church.

FFRF's interest in this case arises from its position that capital punishment is an unconstitutional, inhumane imposition of a religiously based punishment. In modern times, freethinkers have been the first to

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[1] Counsel of record for the parties have given consent for amicus briefs. Pursuant to Supreme Court Rule 37.6, counsel of record for amici curiae discloses that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Moreover, no person or entity, other than amici curiae, its members, or its counsel, made a monetary contribution intended to fund this brief's preparation or submission.

[2] Robert P. Jones & Daniel Cox, *America's Changing Religious Identity*, PUBLIC RELIGION RESEARCH INSTITUTE (Sept. 6, 2017) available at http://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf.

speak out for the abolition of the death penalty. FFRF regularly denounces the imposition of the death penalty for crimes, particularly blasphemy, around the world. FFRF also has called for the United States to end the biblically based death penalty. Nearly 70 percent of FFRF's membership opposes the death penalty. FFRF is headquartered in Wisconsin, which was the first state to abolish the death penalty permanently for all crimes in 1853.

American Atheists, Inc. is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to foster an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, advocacy, and community-building and work to end the stigma associated with being an atheist in America. American Atheists, Inc. is a 501(c)(3) nonprofit corporation with members nationwide. American Atheists and its members believe that death is permanent and final. The fact that no afterlife awaits us when we die makes each of our lives that much more valuable. Death forecloses any possibility for a person to grow or contribute further to humanity. No one, including the state, has the right to deprive another person of that possibility.

The American Humanist Association ("AHA") is a national nonprofit membership organization based in Washington, D.C. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. The AHA has tens of thousands of members and over

242 local chapters and affiliates across the country. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity.

The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. To that end, the AHA has litigated dozens of First Amendment cases nationwide, including in the U.S. Supreme Court.

SUMMARY OF ARGUMENT

The Court correctly concluded that the death penalty was unconstitutional in 1972, and regrettably reversed course only four years later. In the western world, the death penalty is a barbaric relic that often has been justified by religious scripture, and it has no place in modern society. A state-sponsored execution violates the Eighth Amendment because it permanently destroys a person's human dignity, and is thus cruel and unusual. Further, the Damocles sword hanging over a person on death row is torturous, and death row tenure is so long that a death sentence in practice amounts to more than a decade of torture, which is itself cruel and unusual punishment in violation of the Eighth Amendment.

Furthermore, the Court's recent, unprecedented expansion of the religious liberty protections under the Free Exercise Clause necessitates the conclusion that a state-sponsored execution substantially burdens the decedent's religious liberty rights. When applying the Court's current test for whether an execution policy that burdens free exercise rights is permissible, the Court must conclude that the execution

itself is a violation of the Free Exercise Clause. It would be absurd to continue reviewing increasingly granulated end-of-life details for any hint of an encroachment on religious liberty, knowing that a far greater burden, without any rational justification, will immediately follow.

If the Court declines to reexamine the constitutionality of the death penalty, it should fashion a rule that protects the rights of all persons on death row equally, not just those who are religious. The Establishment Clause prohibits prison policies that favor one religion over another, or religion over nonreligion. Allowing end-of-life accommodations only to the religious, such as a support person and physical contact in the execution chamber, would impermissibly favor religious persons on death row over their nonreligious counterparts and would have a strong coercive proselytizing effect because no one, religious or not, wants to die alone.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT CAPITAL PUNISHMENT IS UNCONSTITUTIONAL.

The Constitution forbids the "inflic[tion] of cruel and unusual punishments." U.S. Const. amend. VIII. In the 1970s, this Court declared that the death penalty was unconstitutional under the Eighth Amendment. *Furman v. Georgia,* 408 U.S. 238 (1972). This resulted in a nationwide halt in executions. This Court unfortunately reversed course only four years later in *Gregg v. Georgia*, holding that capital punishment could be constitutional so long as the sentencing body is able to consider aggravating and mitigating factors and there is appellate review of the

sentence. 438 U.S. 153 (1976). *Gregg* also highlighted the significance of proportionality in punishment: "We must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed." *Id.* at 187. Even though the death penalty was reinstated in 1976, the Court has continually narrowed its scope ever since. *See Kennedy v. Louisiana,* 554 U.S. 407 (2008) (barring death penalty for the rape of a child which did not result in death); *Roper v. Simmons,* 543 U.S. 551 (2005) (unconstitutional for juvenile offenders whose crime was committed before 18 years of age); *Atkins v. Virginia,* 536 U.S. 304 (2002) (an execution of an intellectually disabled individual violates the Eighth Amendment); *Ford v. Wainwright,* 477 U.S. 399 (1986) (death penalty imposed on person suffering severe mental illness violates the Eighth Amendment); *Eberheart v. Georgia*, 433 U.S. 917 (1977) (per curiam) (holding that the death penalty is unconstitutional for non-homicidal kidnapping); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty unconstitutional in cases of non-homicidal rape of an adult). The Court's struggle with the death penalty and the continual narrowing of its scope evidence the flaws in its application as a form of punishment.

The current application of the death penalty as a punishment in America is fraught with peril from its unreliability to its arbitrariness to its cruelty. Amici oppose this archaic punishment because it abases human dignity and violates the Constitution. Amici believe that the "deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Furman*, 408 at 291. It is a punishment that is cruel, immoral, and racist, and a product of a bygone era. This Court should join the majority of Americans in turning against the death penalty.

A. The biblically based death penalty should be rejected once and for all.

While the root source of capital punishment may not be *solely* biblical, in the western world that has been the sourcebook for the death penalty. The Christian Church in particular "has played a significant role in validating the state's use of capital punishment . . . " Davison M. Douglas, God and the Executioner: The Influence of Western Religion on the Use of the Death Penalty, 9 Wm. & Mary Bill Rts. J. 137, 139 (2000).

There are many biblical references that Christians have used to justify capital punishment. Genesis, for example, states: "[w]hoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image." Genesis 9:6 (Revised Standard Version). In the New Testament, Paul wrote to the Romans that they should respect civil authority because the state "does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer." Romans 13:4 (Revised Standard Version). Many Christians have relied on these biblical passages to support the view that God sanctions the state as an executioner.

These biblical justifications were also used by the colonists in the Americas. The Puritans based their penal system from Mosaic law listing capital crimes that derived from the Torah "almost verbatim." Douglas, *supra*, at 155. Justice Marshall likewise noted in his concurring opinion in *Furman* that

> ""The Capitall Lawes of New-England,' dating from 1636, were drawn by the Massachusetts Bay Colony and are the first written expression of capital offenses known to exist in this

> country. These laws make the following crimes capital offenses: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion. Each crime is accompanied by a reference to the Old Testament to indicate its source." *Furman,* 408 U.S. at 335 (Marshall J., concurring)

The Founding era saw a rise in opposition to capital punishment. Many Enlightenment thinkers "sharply criticized the harsh penal systems of most Western nations." Douglas, *supra*, at 156–57. Eighteenth Century death penalty opponent Benjamin Rush found these punishments to be the "natural offspring of monarchical government." *Id*. at 157. Thomas Jefferson, influenced by Cesare Beccaria, who advocated for the principle of proportionality in punishment and believed the death penalty was not an effective deterrent, proposed the abolition of all capital crimes except murder and treason in 1779. The proposal was rejected, but the trend of limiting the punishment to certain crimes began.

In the 1960s and 1970s, the trend toward abolition again began to grow. In 1968, the National Council of Churches of Christ (for 103 church bodies) called for the end of capital punishment. When *Furman v. Georgia* was argued, thirteen religious organizations asked this Court to abolish the death penalty. Notably, it was in the 1970s, after Vatican II, that the Roman Catholic Church reversed its position on the death penalty. Today almost all mainstream churches have formal opposition to this barbaric form of punishment.

According to the Death Penalty Information Center, public support for the capital punishment is at a near

half-century low, while opposition is at its highest level since the 1960s. Death Penalty Information Center, The Death Penalty in 2020: Year End Report (Dec. 16, 2020). DPIC's 2020 year-end report also found that twenty-two states have abolished the death penalty, and twelve have not carried out an execution in at least ten years. *Id.*

The United States' use of punishment by death is a global embarrassment. While more than seventy percent of the world's countries have abolished the death penalty, the United States ranks as one of the top countries in executions, among countries like China, Iran, Saudi Arabia, Iraq, Egypt, Somalia, South Sudan, and North Korea. Amnesty Int'l, Global Report: Death Sentences and Executions 2020 (Apr. 21, 2021).

As our society moves toward an acknowledgment that punishment by death is no longer acceptable, this Court should give effect to "the evolving standards of decency that mark the progress of a maturing society" and end capital punishment once and for all. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

B. The Eighth Amendment forbids death penalty because it is inherently cruel and unusual.

1. The preservation of human dignity lies at the heart of the Eighth Amendment.

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (quoting *Trop v. Dulles*, 356 U.S. at 100). The constitutional prohibition against cruel and unusual punishments is "our insulation from our baser selves." *Furman*, 408 U.S. at 345 (Marshall, J., concurring). "The Eighth

Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Trop*, 356 U.S. at 100.

Justice Brennan rightly found that "[a] punishment is 'cruel and unusual,' [] if it does not comport with human dignity." *Furman,* 408 U.S. at 270. He correctly concluded, "the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Id.* at 291.

There simply is no way for the death penalty to be administered in a way that is respectful to human dignity. It is a fallacy to suggest it can. The intentional killing of an individual by the state is the highest violation of an individual's dignity. Capital punishment is inherently cruel and unusual.

2. Excessive delays add to the cruelty of the punishment.

Justice Brennan wrote in *Furman*, "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." *Furman*, 408 U.S. at 287. He continued, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." *Id*. (quoting *People v. Anderson*, 6 Cal.3d 628 (1972)). Recently, Justice Breyer wrote that modern administration of capital punishment still results in constitutional defects that, to him, make it "likely" to be "legally prohibited" cruel and unusual punishment. *Glossip v. Gross*, 576 U.S. 863, 909 (2015). He pointed to three constitutional defects that render the punishment illegal: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays

that undermine the death penalty's penological purpose." *Id.* It is the third that amici believe renders the punishment in this case unconstitutional as well reasons set forth in Section II.

Excessive delays in administering the death penalty cause additional emotional turmoil for the condemned, thus adding to the cruelty of the punishment. Justice Breyer agrees, pointing out in his dissent in *Glossip* that "a lengthy delay in and of itself is especially cruel because it 'subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement." *Glossip*, 576 U.S. at 925 (quoting *Johnson v. Bredesen*, 558 U.S. 1067, 1069 (2009)).

The system sets up a paradox where the condemned must fight for his life, while also enduring the torture of waiting for his constitutional options to be exhausted. These delays – figuring out what rights are held by the condemned *moments before* those rights are irrevocably and forever taken away – add to the absurdity of it all. Justice Breyer illustrated this paradox perfectly, "Those who face 'that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.' At the same time, the Constitution insists that 'every safeguard' be 'observed' when "a defendant's life is at stake.'" *Glossip*, 576 U.S. at 924 (internal citations omitted). It cannot be denied that "[a] death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment . . ." *Id.* 938.

The paradox illustrates the irreconcilable conflict between the death penalty and our Constitution. The uncertainty, physical hardship, and mental anguish caused by prolonged delays greatly compound the cruelty of the punishment. Yet delays are an inadvertent

but inevitable consequence of administering a system of capital punishment under a constitutional order that demands fairness, due process, and equal protection under the law. Justice Breyer again summed it up best, "It may be that there is no way to execute a prisoner quickly while affording him the protections that our Constitutional guarantees to those who have been singled out for our law's most severe sanction." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1145, 203 L. Ed 2d 521 (2019) (Breyer, J., dissenting). The answer then is to end capital punishment.

II. STATE-SPONSORED EXECUTIONS PROFOUNDLY VIOLATE RELIGIOUS FREE EXERCISE RIGHTS.

A. The death penalty is a far greater burden on religious exercise than Texas's challenged policy.

Of all the ways a state could impermissibly interfere with someone's free exercise of religion, killing them is certainly the most direct and effective. This simple fact highlights an absurdity in the petition before the Court: Ramirez asks the Court to recognize that Texas's policy requiring him to die without physical contact violates his ability to freely exercise his religion, but even if the Court vindicates Ramirez's asserted right to religious freedom, it simultaneously allows that same right to be permanently obliterated by allowing his execution to go forward.

The Court should recognize that if religious freedom means anything, it must include a protection against state-sponsored slayings. Instead of nuanced line-drawing to apply the Free Exercise Clause and

RLUIPA[3] to end-of-life accommodations, the simple solution is to conclude that wherever those lines may be, literally killing the person is unquestionably more offensive to their ability to freely exercise their religion and should be categorically banned.

Consider, for example, an inmate who attends a weekly religious study. Prohibiting his attendance would be a clear burden on the inmate's free exercise rights. Killing him, to state the obvious, also prevents him from attending his religious study and thus must be at least as burdensome on his free exercise rights.

In recent years, the Court has heavily scrutinized even minor burdens on free exercise rights. For example, the Court has held that the government burdens a plaintiff's free exercise of religion by requiring them to provide employee health insurance coverage that includes contraceptives and reproductive healthcare. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014). If being required to provide comprehensive health coverage is too heavy a burden on the ability to freely exercise one's religion, it is inconceivable that being put to death would fall short of that same line.

Death penalty advocates might respond by pointing out that circumstances were different in *Hobby Lobby*, because in that case the government was trying to force plaintiffs to take an affirmative action that

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[3] RLUIPA is undoubtedly unconstitutional as a violation of the separation of church and state in many applications. *See, e.g.,* Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 189 (2001). If the Court chooses to nevertheless apply RLUIPA, the death penalty is certainly a burden on religious exercise and triggers strict scrutiny under RLUIPA.

they believed to be hostile to their religious beliefs, however small or implausible that may have been. By contrast, the argument would go, executing someone does not force them to take any affirmative action.

However, this framing falls apart when applied to the Court's other recent death penalty cases. In *Murphy v. Collier*, the Court held that Patrick Henry Murphy, a Buddhist man, was entitled to a stay of execution because a Buddhist priest was only allowed to be present in the viewing room, not the adjacent execution chamber. 139 S. Ct. 1475, 1476 (2019). This was not a matter of the government forcing Mr. Murphy to do something, but rather was an acknowledgement that Mr. Murphy had some right to have a spiritual adviser present, at least so long as other denominations were given this option, and that the government impermissibly violated his Free Exercise rights by denying him this source of support.

In concurrence, Justice Kavanaugh suggested that *Murphy* was only a matter of denominational discrimination, rather than a general right to have a spiritual adviser present. *Id.* at 1475–76. But subsequent events showed this not to be the case. In response to the *Murphy* decision, Texas initially barred all spiritual advisers from the execution chamber, indisputably ending any discriminatory treatment. Rather than allowing executions to proceed, though, the Court stayed the execution of Ruben Gutierrez, a Catholic man, when he challenged the practice. *See Gutierrez v. Saenz*, 141 S. Ct. 127, L. Ed. 2d 1075 (2020).

B. Applying the Court's test in recent cases to the death penalty itself, the practice indefensibly violates the Free Exercise Clause.

In *Gutierrez v. Saenz*, the Court ordered fact-finding on "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." *Id.* This shows that even in the absence of discrimination, the Court is concerned about the government infringing on people's ability to freely exercise their religion—down to the not inconsequential detail of which side of the glass a spiritual adviser may stand—unless the state's policy is necessary to avoid "serious security problems."

The Court has thus recognized a substantive, affirmative religious liberty right to have a spiritual adviser present *inside* the execution chamber—not next to it—which can only be overcome by the government showing that this would be dangerous. The Court confirmed this earlier this year in *Dunn v. Smith*, 141 S. Ct. 725, 209 L.Ed. 2d 30 (2021). Now, the Court is considering the further nuance of whether this visitor may have physical contact with the person being executed.

But if the Court comes up for air and surveys the new legal landscape, it will realize it has somehow drifted off course. By erecting a tall barrier for the government to overcome when it treads on relatively minor burdens on religious free exercise, the Court has failed to reexamine the entire practice at issue under the same light.

Whatever substantive right a person has to practice their religious beliefs, killing the person substantially burdens that right. Justice Brennan eloquently highlighted the threat the death penalty presents to fundamental rights:

> Although death, like expatriation, destroys the individual's "political existence" and his "status in organized society," it does more, for unlike expatriation, death also destroys "(h)is very existence." There is, too, at least the possibility that the expatriate will in the future regain "the right to have rights." Death forecloses even that possibility. *Furman v. Georgia*, 408 U.S 238, 289–90 (1972) (Brennan, J., concurring).

Instead of asking Texas whether a "no touching" rule is necessary for security purposes, the Court should ask Texas whether the execution itself, a far greater burden on free exercise, is necessary. The answer must be no, since abolishing the death penalty would save many millions of dollars each year—*See, e.g.,* California Comm'n on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California* at 10 (June 30, 2008) (estimating that imposing a maximum penalty of lifetime incarceration instead of the death penalty would save the state of California alone more than $100 million per year)—a fraction of which could be used to offset any increased security risk created by a small number of additional life-sentence inmates.

If this Court is serious about protecting the religious liberty rights of persons on death row, it should take them off death row unless the state can show that the slaying is necessary to achieve a compelling

state interest, which it cannot hope to do. As the Court continues to recklessly expand the protections of the Free Exercise Clause, it is nonsensical to hold that those protections do not extend to banning state-sponsored killings.

III. IF EXECUTIONS ARE ALLOWED TO TAKE PLACE, END-OF-LIFE ACCOMMODATIONS MUST BE EQUALLY AVAILABLE.

A long string of unbroken precedent holds that the government may not officially favor one religion over another, nor may it favor religion over nonreligion. If the Court chooses to allow state-sponsored killings to continue, it must ensure that end-of-life accommodations are made equally available to those of all religions and those with no religion at all. Anything less would violate the Equal Protection Clause of the Fourteenth Amendment and would coerce those on death row to convert to the government's preferred religious sects, in violation of the Establishment Clause of the First Amendment.

As Justice Kavanaugh noted recently, "[t]he government may not discriminate against religion generally or against particular religious denominations." *Murphy v. Collier*, 139 S.Ct. 1475 (2019); *see also Larson v. Valente*, 456 U.S. 228, 224 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Justice Jackson famously explained: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

A necessary corollary of this basic rule is that the government may not favor religion over nonreligion. As Justice Black wrote in 1947, the Establishment Clause "means at least" that "[n]either a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." *Everson v. Bd. of Educ. of Ewing Twsp.*, 330 U.S. 1 (1947), 15–16; *see also Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding that a state's religious test for public office "unconstitutionally invades the [atheist's] freedom of belief and religion.").

This Court has consistently reaffirmed this basic rule that the government may not take a stance on matters of religion. Justice Kennedy wrote for the Court: "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Justice O'Connor described the same idea in terms of religious endorsement: "government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community." *Cty. Of Allegheny v. ACLU*, 492 U.S. 573, 627 (1983) (O'Connor, J., concurring).

The Court has applied accommodations for religious belief to nonreligious people with comparable beliefs. In *U.S. v. Seeger*, this Court held that a religious exemption from military service, statutorily limited to "an individual's belief in a relation to a Supreme Being," must apply to each of three petitioners

who had been denied an exemption because their beliefs were not religious: (1) Mr. Seeger, who cited "Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense,'" (2) Mr. Jakobson, who "defined religion as the 'sum and essence of one's basic attitudes to the fundamental problems of human existence,'" and (3) Mr. Peter, who "stated that he was not a member of a religious sect or organization, . . . felt it a violation of his moral code to take human life," and attributed this conviction to "reading and meditation 'in our democratic American culture, with its values derived from the western religious and philosophical tradition.'" 380 U.S. 163, 166–69 (1965). The Court found that all three conscientious objectors qualified for the exemption based on the test of "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." *Id.* at 166.

Courts have consistently applied this rule to incarcerated persons, holding that while jails and prisons may *accommodate* incarcerated person's religious beliefs, they may not, in policy or practice, condition any benefit or penalty on an inmate's particular religious beliefs *or lack thereof*. *See, e.g., Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014); *Inouye v. Kemna*, 504 F.3d 705, 714 n.9 (9th Cir. 2007); *Warner v. Orange Cty. Dep't of Probation*, 115 F.3d 1068, 1077 (2d Cir. 1997); *Kerr v. Ferrey*, 95 F.3d 472, 480 (7th Cir. 1996); *Arnold v. Tenn. Bd. Of Paroles*, 956 S.W.2d 478, 484 (Tenn. 1997); *Griffin v. Coughlin*, 673 N.E.2d 98, 108 (N.Y. 1996). Allowing a source of comfort to be present in the execution chamber is an unequivocal benefit that cannot be conditioned on an incarcerated

person's religious belief. Nonreligious inmates may very well have a desire for an end-of-life support person, and that accommodation cannot be denied simply because the request is based solely on a universal human desire to not die alone without an accompanying religious explanation.

This result is required by the Court's prohibition against religious coercion in *Lee,* 505 U.S. at 587. Denying end-of-life comfort support to nonbelievers coerces persons on death row to "find religion" far more strongly than the high school graduation prayer at issue in *Lee*. The discomfort of sitting through a state-sponsored prayer pales in comparison to the discomfort of being forced to die alone by the state's hand.

Denying end-of-life accommodations to inmates simply because they are nonreligious would be deeply unjust. But the greatest injustice is that the death penalty continues to exist in American society at all. Allowing it is a blight on the government and an affront to our secular Constitution.

CONCLUSION

For the reasons stated above, the Court need not decide whether Texas's policy of disallowing spoken prayer and physical contact inside the execution chamber is permissible, because it should conclude that the death penalty is unconstitutional and should remand the case with instructions to permanently enjoin Ramirez's execution. Alternatively, the Court should hold that any rule must apply equally to persons of any minority religion or no religion at all.

Respectfully submitted,

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