*In The*

# United States Court of Appeals

*for the*

# Eleventh Circuit

Case No. 19-10405-P

DOMINEQUE HAKIM MARCELLE RAY,

*Plaintiff-Appellant,*

v.

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

*Defendant-Appellee.*

*On Appeal from the United States District Court for the Middle District of Alabama*

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT**

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February 4, 2019

**MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

Pursuant to Fed. R. App. P. 29(a), The Rutherford Institute respectfully moves for leave to file the accompanying amicus curiae brief in support of Plaintiff-Appellant. In support of this Motion, The Rutherford Institute states as follows:

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues.

The Rutherford Institute requests the opportunity to present an amicus curiae brief in this case because the Institute is keenly interested in the protection of individuals' religious freedoms. The issue presented in this case—whether a State prison may prohibit an imam from accompanying a Muslim inmate into the death chamber during his execution, despite routinely allowing similarly situated Christian inmates the spiritual comfort of Christian chaplains—implicates significant statutory and constitutional religious protections. The Rutherford Institute brings a particularized analysis to the issues presented in this case, and its experience in these matters will assist the Court in reaching a just resolution to the question presented.

Leave to file a brief as amicus curiae should be granted when "the amici have stated an 'interest in the case,' and it appears that their brief is 'relevant' and 'desirable,'" such as when "it alerts the merits panel to possible implications of the appeal." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (quoting Fed. R. App. P. 29(a)(3)); *see also id.* at 132 ("The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent.").

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an amicus curiae brief be granted.

February 4, 2019

Respectfully submitted,

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## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and Eleventh Circuit Rule 26.1, The Rutherford Institute states that, in addition to those interested person's identified in Plaintiff-Appellant's Supplement to Appellant's Amended Emergency Motion for Stay of Execution, the following persons or entities are known to The Rutherford Institute as having an interest in the outcome of this appeal:

- The Rutherford Institute, amicus curiae

Pursuant to Fed. R. App. P. 26.1, amicus curiae The Rutherford Institute, a Virginia nonprofit corporation, hereby make the following disclosures:

1. There are no parent corporations of The Rutherford Institute; and
2. No public corporation owns 10% or more stock in The Rutherford Institute.

Pursuant to Fed. R. App. P. 29(c)(5), The Rutherford Institute states that no party's counsel authored this amicus curiae brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than The Rutherford Institute, its members, or its counsel contributed money to fund the preparation or submission of this brief.

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Rutherford Institute is an international nonprofit civil liberties organization that for more than thirty years has provided legal services at no charge to individuals whose constitutional and human rights have been threatened or violated. The Rutherford Institute is interested in this case because it is concerned about and seeks to defend the rights of inmates whose religious rights have been restricted by state prisons, such as the facially discriminatory denial of spiritual comfort in the death chamber that is at issue in this case. A more detailed statement of interest is contained in the accompanying motion seeking the Court's leave to file this amicus brief.

## SUMMARY OF ARGUMENT

The Alabama Department of Corrections ("ADOC" or the "State") employs and provides death row inmates a Christian chaplain at the time of their execution. Yet it denies a similar benefit to inmates of other faiths, a violation of both the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Establishment Clause of the U.S. Constitution. Given that Muslim inmates account for nearly 10% of the state prison population,[1] this overt discrimination is all the more egregious.

Plaintiff-Appellant Domineque Ray, a devout Muslim, requested that a Muslim imam take the place of a Christian chaplain at his execution on February 7, 2019. Doc. 12 at 1. The prison warden denied this request, Doc. 12 at 6, and the District Court refused Mr. Ray's petition for a stay, Doc. 21 at 18. Mr. Ray now faces the prospect of execution without the presence of a spiritual advisor during the final moments of his life.

The District Court disregarded Supreme Court and Eleventh Circuit precedent and erred on two essential points. First, the District Court improperly determined that Mr. Ray was not likely to prevail on the merits of his claim under RLUIPA. It abused its discretion by misapplying the burden of proof with respect

[1] According to a Pew Research Center survey, Muslims make up an estimated 9.4% of the state prison population. *See* Pew Research Ctr.: The Pew Forum in Religion & Public Life, Religion in Prisons: A 50-State Survey of Prison Chaplains 48 (Mar. 22, 2012), *available at* http://www.pewforum.org/2012/03/22/prison-chaplains-exec/ (the "Pew Prison Survey").

to the "compelling interest" and "least restrictive means" tests. Second, the District Court failed to recognize that the State's disparate treatment of inmates of different religious faiths constitutes an Establishment Clause violation.

## ARGUMENT

### I. Mr. Ray Would Be Substantially Likely to Prevail on the Merits with Respect to the Substantial Burden Test under RLUIPA

A claimant bringing a RLUIPA claim bears the burden of demonstrating that his religious beliefs are sincere[2] and that the government's actions have substantially burdened his religious exercise. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). In applying the substantial burden test, the Eleventh Circuit "look[s] to 'whether the [government's rule] imposes a substantial burden on the ability of the objecting part[y] to conduct [himself] in accordance with [his] religious beliefs." *Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015). Courts do not attempt to gauge the reasonableness of the claimant's religious practices, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981), nor do they consider "whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Holt*, 135 S. Ct. at 862 (2015). They look only to see whether the claimant "actually holds the beliefs he claims to hold." *Davila*, 777 F.3d at 1204.

[2] There is no dispute in the record or the District Court's Order as to the sincerity of Mr. Ray's religious belief regarding his need for the presence of a Muslim imam.

In *Wilkinson v. Secretary, Florida Dept. of Corrections*, 622 F. App'x 805, 813 (11th Cir. 2015), an inmate filed a RLUIPA claim after the prison chaplain denied a request that he be allowed to celebrate Santeria holy days with his fellow inmates, when the chaplain allowed prisoners of other faiths to celebrate their holy days. The Eleventh Circuit reversed summary judgment against the inmate, finding a substantial burden because the denial "significantly hampered his . . . religious practice." *Id.* at 215. The claimant "has drawn a line between what comports with his religious beliefs (a celebration with the SBCF Santeria community) and what does not (inability to celebrate with this community), and 'it is not for us to say that the line he drew was an unreasonable one.'" *Id.* at 815 (quoting *Thomas*, 450 U.S. at 716).

Similarly, in *Davila v. Gladden*, an inmate alleged a RLUIPA violation because prison officials had prohibited him from receiving a unique set of beads and shells that he believed to be infused with spiritual force. 777 F.3d at 1202. The Eleventh Circuit again reversed summary judgement, observing that the claimant had shown that his religious beliefs required him to wear the beads and shells and "that the Defendants substantially burdened his religious exercise by flatly preventing him from having [them]." *Id.* at 1205.

Here, Mr. Ray has asserted a sincere belief that his faith requires his imam's presence at his execution, yet the State has refused to allow the imam to

accompany Mr. Ray into the execution chamber. Doc. 11 at 6. This outright rejection of the request on its face hampers Mr. Ray's religious practice. *See Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007).

The context for the State's refusal—the deprivation of spiritual comfort in the final moments of life—makes the substantial burden all the clearer. As the District Court itself observed, the State's power to perform an execution is "extraordinary, simultaneously touching the philosophical underpinnings of corporate power over individuals and the metaphysical consequences of its exercise." Doc. 21 at 12. The State has a "moral obligation to carry out executions with the degree of seriousness and respect that the state-administered termination of human life demands." *Id.* (citation omitted). Yet the State is prohibiting Mr. Ray from accessing the company and counsel of a Muslim imam in the moment he most needs that support.

By hiring a chaplain to pray with inmates in the execution chamber, the State recognizes the importance of spiritual counsel at the time of death. In fact, according to the State, the current chaplain has been present and available to pray with inmates at "nearly every execution conducted in the state of Alabama." Doc. 11 at 5. But the State's solution falls far short of what is required in today's pluralistic society. Indeed, for a Muslim such as Mr. Ray, providing a Christian chaplain is like providing a rabbi for a Christian inmate or a Hindu priest for one of

Jewish faith; it is of no comfort at all. This rejection of Mr. Ray's request could not be more burdensome, and the District Court erred in concluding that Mr. Ray would not have been substantially likely to prevail on the substantial burden element of his RLUIPA claim.

## II. Mr. Ray Would Be Substantially Likely to Prevail on the Merits with Respect to the Compelling Interest and Least Restrictive Means Tests under RLUIPA

### A. The District Court applied the incorrect burden of proof

Once a RLUIPA claimant demonstrates a sincere belief and a substantial burden on his religious exercise, the burden shifts to the government to establish that the infringing policy is the least restrictive means of furthering a compelling governmental interest. *Holt*, 135 S. Ct. at 862–64. Thus, when the record lacks evidence as to the compelling interest or least restrictive means, the government cannot justify a substantial burden on a claimant's religious practices. The District Court erred by misapplying this burden of proof.

The District Court observed that "Ray has not shown that it is substantially likely that the State *lacks* a compelling interest or that the State *could* use a less-restrictive means of furthering its interest." Doc. 21 at 12 (emphasis added). It concluded that "Ray has not shown that it is substantially likely that the State *could* further its interest while allowing untrained, 'free world' spiritual advisors be in the death chamber." Doc. 21 at 13 (emphasis added). But the Court had it exactly

backwards. Mr. Ray needed to show only a substantial likelihood that the State *could not prove*—using only the evidence in the record—that accommodating Mr. Ray would seriously compromise its interests. In other words, the absence of evidence with respect to the compelling interest and least restrictive means tests should have favored Mr. Ray.

### B. The District Court wrongly held that the State's policy was the least restrictive means of furthering a compelling state interest

Because the State bears the burden of proving that a challenged policy is the least restrictive mean of furthering a compelling governmental interest, RLUIPA requires it to demonstrate that accommodating the claimant will seriously compromise that interest. *Id.* at 863. As the Supreme Court has explained, "RLUIPA requires us to scrutinize the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context." *Holt*, 135 S. Ct. at 862–64 (alterations omitted).

In *Holt*, the Supreme Court held that a prison's rule prohibiting inmates from growing beards, enacted to preserve "security and safety," would not be compromised by an exception for a Muslim inmate. Although the Court found compelling rationales for the policy—preventing prisoners from disguising themselves and staunching the flow of contraband—it explained that exempting a Muslim inmate from the policy would not "seriously compromise" those interests.

It noted that the prison had failed to establish that it could not satisfy its security concerns through other measures.

In *Wilkinson*, the Eleventh Circuit adopted the *Holt* rationale. There, the Court reversed the district court's holding that prohibiting the claimant from celebrating his holy days was the least restrictive means of furthering the prison's security interests. Likewise, in *Davila*, the Court explained that "Defendants' generalized statement of interests, unsupported by specific and reliable evidence, is not sufficient to show that [a] prison restriction furthered a compelling governmental interest." 777 F.3d at 1206. "[P]rison officials cannot simply utter the magic words 'security and costs' and as a result receive unlimited deference from those of us charged with resolving these disputes." *Id.*

In this case, Mr. Ray has shown it substantially unlikely that the State can prove that denying his requested accommodation is the least restrictive means of furthering the safety concerns purported to accompany execution. The State has produced scant evidence that it cannot maintain its security protocol and also allow Mr. Ray's imam to be with him at the time of his death. It has simply cited its policy of allowing only ADOC employees in the execution chamber, and concluded that non-employees do not have the "requisite experience or security clearances." Doc. 11 at 9. Such conclusory statements are insufficient. *See Holt*, 135 S. Ct. at 866 ("[T]he courts below deferred to these prison officials' mere say-

so that they could not accommodate petitioner's request. RLUIPA, however, demands much more."). The State must show *why* it cannot address its concerns without substantially burdening Mr. Ray's religious exercise. It must *provide evidence* that allowing a non-employee in the execution chamber would "seriously compromise" security. This it has not done.[3]

Moreover, the evidence casts serious doubt on the credibility of the State's position. The State has already demonstrated its ability to train a religious advisor in the execution protocol. By employing a Christian chaplain to pray with inmates in the execution chamber, the State has acknowledged less restrictive means exist than banning religious advisors from the room. In other words, the State has shown it possesses the means necessary to maintain its security without infringing on the religious rights of inmates. Without evidence that a Muslim imam is less capable of adhering to the State's security requirements than a Christian chaplain, the State's arguments necessarily fail.

## III. The State's Provision of a Paid Christian Chaplain, Coupled with its Denial of Mr. Ray's Request for the Presence of His Imam, Violates the Establishment Clause

The State's actions also constitute a plain violation of the Establishment Clause, which "requires that government be neutral in its relations between various

[3] Nor did the District Court cite evidence as to why Mr. Ray's imam could not be trained in how to react if something were to go wrong or suggest why the imam could not be made to swear to obey orders or face disciplinary action. The District Court failed to explain how the presence of Mr. Ray's imam would compromise Mr. Ray's safety *at his own execution*.

religions and between non-believers and believers." *Jaffree v. Wallace*, 705 F.2d 1526, 1533 (11th Cir. 1983) (quoting *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947)).[4] A government action accordingly violates the Establishment Clause if it discriminates among religious denominations. *See, e.g.*, *Glassroth v. Moore*, 335 F.3d 1282, 1299 (11th Cir. 2003) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.") (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

In *Town of Greece, N.Y. v. Galloway*, the Supreme Court held that a town could allow Christian ministers to lead a prayer at its board meetings only because the town "represented that it would welcome a prayer by *any minister or layman* who wished to give one." 572 U.S. 565, 585 (2014) (emphasis added). "*So long as the town maintains a policy of nondiscrimination*," the Court reasoned, "the Constitution does not require it to search beyond its borders for non-Christian prayer givers." *Id.* at 585–86 (emphasis added).

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[4] Mr. Ray's counsel raised the Establishment Clause issue in the motion hearing. *See* Hearing on Mot. for Stay at 20:2-9 ("If Mr. Ray were a standard, everyday Protestant Lutheran Christian, he would have a spiritual advisor there who could touch his hand and pray with him in his final moments. But because he happens to be a Muslim -- and who knows if the next person is going to be Catholic or Jewish or a Buddhist -- they don't get that benefit. And that is an Establishment Clause violation of the first order, Your Honor."). Regardless, this Court can consider the issue on appeal under the "plain error" standard. Under that test, a court may reverse if it finds there was (1) error, (2) that is plain, and (3) that affects substantial rights. If these conditions are met, the court may exercise its discretion to notice a forfeited error if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Heath*, 419 F.3d 1312 (11th Cir.2005) (quoting *United States v. Cotton*, 535 U.S. 625, 631 (2002)).

The State's rule in this case violates the Establishment Clause for the precise reason the prayer in *Town of Greece* did not; namely, it welcomes the spiritual counsel of only one religion in its execution chamber. It allows only a *Christian* chaplain to take an inmate by the hand and pray with him until he dies. *See* Hearing on Motion for Stay at 18:1-3 (counsel for Mr. Ray recalling an execution "where Chaplain Summers approached, put his hand on the left hand of [the inmate], and prayed with him until he passed").

Although Muslim inmates make up some 9.4% of the prison population,[5] ADOC continues to overtly favor Christian prisoners in the final moments of their lives. Nor does it employ or provide any other religious figures in that capacity, Doc. 11 at 5, even though other prisons throughout the country have Muslim chaplains,[6] and even though the prison itself allows for the presence of volunteer chaplains.[7] Moreover, it *bars* inmates like Mr. Ray from bringing figures of other denominations into the execution chamber. Inmates who are not Christian may either forgo their religious exercise in the last minutes of their lives, or conform to the State-endorsed *Christian* prayer ADOC offers. This is precisely the discrimination the Establishment Clause forbids.

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5 *See supra* p.2 n.1 and accompanying text.

6 The Pew Prison Survey 34.

7 *See* Alabama Department of Corrections, Admin. Reg. No. 460, *available at* http://www.doc.state.al.us/docs/AdminRegs/AR460.pdf.

## CONCLUSION

For the foregoing reasons, Amici request that this Court reverse the District Court's denial of Mr. Ray's motion to stay execution.

February 4, 2019

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit requirements of Fed. R. App. P. 29(a)(5) in that it consists of 2,594 words, as calculated by a word processing program.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

**/s/ Murad Hussain**
MURAD HUSSAIN

## CERTIFICATE OF SERVICE

I certify that, on February 4, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to the following:

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