DEAD WRONG: TEXAS TESTS THE FREE EXERCISE CLAUSE AND THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT BY BANNING SPIRITUAL ADVISORS FROM EXECUTION CHAMBERS

CAROLINE KOCH*

Freedom of religion was considered one of the most fundamental rights during the founding of the United States. Recently, states have expanded this freedom in numerous areas, but Texas is limiting this paramount freedom among its condemned inmates. Originally, Texas permitted only Christian and Muslim inmates to be accompanied into the execution chambers by their spiritual advisors. However, when Patrick Murphy, a Buddhist inmate, challenged Texas's policy a few weeks before his execution date in March, the Supreme Court stayed his execution because the policy of accommodating inmates of just two religions violated the Establishment Clause. In response, the Texas Department of Criminal Justice altered its policy to prohibit all spiritual advisors from accompanying inmates into the execution chambers. This new policy violates the Free Exercise Clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act. Consequently, Texas should revise its policy again to permit spiritual advisors to accompany all religious inmates into the chambers during their executions.

---

* Junior Staff, *American University Law Review*, Volume 69; J.D. Candidate, May 2021, *American University Washington College of Law*; B.A. Law and Society, 2018, *American University*. I would like to thank the entire *Law Review* staff for their valuable assistance in preparing this piece for publication. I would also like to thank Sister Ann Regan and Professor Robert Johnson, who were instrumental in exposing me to the injustices on death row and teaching me the importance of advocating for the rights, and more importantly, the human dignity of every person. Finally, I would like to thank my family and Nicholas. Only because of their steadfast support and unconditional love have I had the opportunity to learn and advocate.

TABLE OF CONTENTS

INTRODUCTION

On Christmas Eve in 2000, a gang of seven escaped convicts in Texas brutally murdered Officer Aubrey Hawkins.[1] About a month later, when authorities attempted to apprehend the gang, one of the suspects committed suicide while officers successfully detained the other six men.[2] Texas eventually tried, convicted, and sentenced all six men to death for murdering Hawkins.[3] Since then, the Texas Department of Criminal Justice ("the Department" or TDCJ) has executed four of the gang members while two remain on death row.[4] The Department planned to execute one of the remaining death row detainees, Patrick Henry Murphy Jr., on March 28, 2019.[5] However, the Supreme Court stayed Murphy's execution the night it was scheduled to occur because the Department refused to allow Murphy's Buddhist spiritual advisor into the execution chambers to accompany him during the lethal injection.[6] Leading up to Murphy's execution, the

---

1. *"Texas 7" Member Executed for Murder of Cop Near Dallas*, CBS NEWS (Feb. 4, 2015), https://www.cbsnews.com/news/texas-7-member-executed-for-murder-of-dallas-cop [https://perma.cc/Y3D7-6KK9]. The seven men, dubbed the "Texas 7," escaped from the Connally Unit of the Texas Department of Criminal Justice eleven days prior. *Id.* In their pursuit of robbing a sporting goods store, the men shot twenty-nine-year-old Officer Hawkins eleven times then ran him over with a stolen vehicle. *Id.*

2. Juan A. Lozano & Michael Graczyk, *Member of 'Texas 7' Gang Executed for Officer's Killing*, AP NEWS (Dec. 4, 2018), https://www.apnews.com/bb6d19c8b85f4c70be7c7c10df7b8a3f [https://perma.cc/HDH9-W8LC].

3. *Id.*

4. *Id.*

5. Murphy v. Collier, 139 S. Ct. 1475, 1478 (2019) (Alito, J., dissenting); *see also* Jolie McCullough, *In Last-Minute Ruling, U.S. Supreme Court Stops Execution of "Texas Seven" Prisoner*, TEX. TRIB. (Mar. 28, 2019, 8:00 PM), https://www.texastribune.org/2019/03/28/texas-seven-patrick-murphy-execution-law-of-parties [https://perma.cc/WLD7-RB5P] (reporting that Murphy alleged that he did not participate in Officer Hawkins' killing and that he is only eligible for the death penalty because of a Texas law that treats accomplices and the murderer equally culpable as long as the alleged accomplice "at least anticipated the death").

6. *Murphy*, 139 S. Ct. at 1475 (majority opinion); Murphy v. Collier, 376 F. Supp. 3d 734, 736 (S.D. Tex. 2019) ("We do not permit a non-[Texas Department of Criminal Justice] employee be present in the execution chamber during the execution, which precludes Mr. Murphy's spiritual advisor from being present."). Further, it is not uncommon that condemned inmates in Texas commonly turn to religion as a means of coping with their death sentence. *See* Brendan D. Kelly & Sharon R. Foley, *Love, Spirituality, and Regret: Thematic Analysis of Last Statements from Death Row, Texas (2006–2011)*, 41 J. AM. ACAD. & PSYCHIATRY L. 540, 548 (2013) ("For some individuals, time spent on death row [in Texas] involves intense psychological change, which may, for example, result in an altered pattern of religious practice and spiritual

Department had a strict spiritual advisor policy that only allowed Christian or Muslim clerics employed by the state to accompany inmates during their executions.[7] This issue has reignited a popular debate forcing Americans to grapple with an uncomfortable question: what rights, if any, should condemned murderers maintain throughout their incarceration and up until their last breath?

Consequently, Murphy's case has forced prison administrations across the United States to debate the necessity of allowing spiritual advisors into execution chambers, and more importantly, whether there are constitutional liberties that protect condemned inmates' access to spiritual advisors during their executions.[8] For instance, less than a week after the Supreme Court stayed Murphy's execution because it decided Texas's policy violated the Establishment Clause,[9] the Texas Department of Criminal Justice announced a new execution policy banning all spiritual advisors from accompanying condemned inmates in the execution chambers during their executions.[10]

---

awareness."). Additionally, themes of spirituality and love are common in last statements on Texas's death row. *Id.*

7. McCullough, *supra* note 5.

8. *Compare* Dunn v. Ray, 139 S. Ct. 661, 661 (2019) (vacating the stay of a Muslim death row inmate's execution in Alabama because the inmate waited too long to seek relief once notified that Alabama's Department of Corrections only permitted Christian spiritual advisors to accompany condemned inmates and would not permit his imam to enter the execution chambers during his execution), *with Murphy*, 139 S. Ct. at 1475 (staying a Buddhist inmate's execution because the Texas Department of Criminal Justice refused to provide Murphy with a Buddhist spiritual advisor but offered Christian or Muslim inmates access to chaplains and imams during their executions); *see also* Nina Totenberg, *Supreme Court's Conservatives Defend Their Handling of Death Penalty Cases*, NPR (May 14, 2019), https://www.npr.org/2019/05/14/722868203/supreme-courts-conservatives-defend-their-handling-of-death-penalty-cases [https://perma.cc/ZSX2-LX32] (explaining the significance of the unusual release of explanatory statements from conservative members of the Court attempting to justify the contradictory spiritual advisor opinions in *Ray* and *Murphy*).

9. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

10. Keri Blakinger, *Texas Prison System Bans Spiritual Advisers from Death Chamber*, CHRON. (Apr. 3, 2019), https://www.chron.com/news/houston-texas/article/Texas-prison-system-bans-spiritual-advisers-from-13739060.php [https://perma.cc/VB3H-BBL2]; *see also* Execution Procedure, Tex. Dep't Crim. Just. Correctional Institutions Division (Apr. 2019) (on file with author). The Texas Department of Criminal Justice announced its new policy orally through spokesperson Jeremy Desel. Blackinger, *supra* note 10. However, it has not updated its Administrative Code detailing the execution protocol since 2017. *See* 37 Tex. Admin. Code § 152.51(c) (2017) (defining Texas's most recently published execution policy). In fact, the current published policy does

Although Justice Kavanaugh's one-man concurrence in *Murphy v. Collier*[11] seemed to endorse Texas's new all or nothing approach,[12] the majority opinion held that Texas may not carry out Murphy's execution "unless [Texas] 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."[13] In addition to challenging the Supreme Court's majority opinion, the Department's new policy also directly conflicts with the Free Exercise Clause of the United States Constitution[14] and the Religious Land Use and Institutionalized Persons Act[15] (RLUIPA) of 2000.[16]

This Comment argues that Texas's policy banning spiritual advisors from accompanying condemned inmates in the execution chambers is unconstitutional because it violates the First Amendment and RLUIPA. First, Texas's policy violates the Free Exercise Clause under the test articulated in *Turner v. Safley*[17] because it is not reasonably related to a legitimate penological objective, and the Department could easily implement other procedural safeguards to ensure sufficient security during executions.[18] Second, Texas's new policy similarly violates RLUIPA under the test articulated in *Cutter v. Wilkinson*[19] because it imposes a substantial burden on the religious exercise of a person confined to an institution but does not further a compelling governmental interest by the least restrictive means.[20] Part I provides a factual background on the Department's new policy, the *Turner* test, and the *Cutter* test, laying the foundation for the analysis under which the Supreme Court examines alleged constitutional and statutory

---

not specify from which rooms the spiritual advisors may view the executions; it simply says the spiritual advisors may be a witness if the condemned inmate gives the warden their name fourteen days prior to the execution. *Id.*

11. 139 S. Ct. 1475 (2019).

12. *See id.* at 1475 (Kavanaugh, J., concurring) ("For this kind of claim, there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, *only* in the viewing room, not the execution room.") (emphasis added).

13. *Id.* (majority opinion) (emphasis added).

14. U.S. CONST. amend. I.

15. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

16. *See infra* Parts I–II.

17. 482 U.S. 78, 89 (1987).

18. *See infra* Section I.C.1.

19. 544 U.S. 709, 710 (2005).

20. *See infra* Section I.D.1.

violations. Part II applies Texas's new policy to the *Turner* test and the *Cutter* test to analyze the constitutional and statutory violations that the policy presents. Finally, Part III concludes that Texas's new policy banning spiritual advisors from accompanying condemned inmates during their executions fails the Supreme Court's *Turner* and *Cutter* tests and therefore violates the Free Exercise Clause of the First Amendment and RLUIPA. Part III also suggests alternative procedural safeguards and less restrictive means of executing religious inmates to further illustrate that Texas's new policy is unconstitutional. Accordingly, the Texas Department of Criminal Justice must revise its policy to permit religious inmates facing the death penalty to be accompanied by a spiritual advisor from their genuinely practiced religion during their executions.

I. BACKGROUND

Upholding inmates' constitutional rights within correctional facilities has long been an issue for correctional officers in the United States.[21] Because of this history of constitutional violations within correctional facilities, the Supreme Court previously fashioned tests to evaluate whether a correctional institution policy violates the Constitution or other federal statutes.[22] In *Turner*, the Supreme Court established a test to evaluate whether a Missouri correctional facility violated inmates' First Amendment rights.[23] Later, the Supreme Court developed the *Cutter* test to analyze whether an Ohio correctional facility violated inmates' rights under RLUIPA.[24] Understanding these tests will later help demonstrate that Texas's new policy banning spiritual advisors from

21. *See* Beard v. Banks, 548 U.S. 521, 525 (2006) (plurality opinion) (examining whether the prohibition of access to newspapers, magazines, and even personal photographs for Pennsylvania inmates housed in the most restrictive level violated their constitutional rights); *see also* Overton v. Bazzetta, 539 U.S. 126, 128 (2003) (analyzing whether limiting prison visitation by minor children and banning inmates with substance-abuse violations from visitation wrongly infringed on Michigan inmates' constitutional rights); Shaw v. Murphy, 532 U.S. 223, 225 (2001) (determining whether punishing a Montana inmate for statements the inmate made in a legal advice letter to a fellow inmate violated his constitutional rights); Procunier v. Martinez, 416 U.S. 396, 398 (1974), *overruled* by Thornburgh v. Abbott, 490 U.S. 401 (1989) (evaluating whether censoring or withholding delivery of inmate mail wrongly oppressed California inmates' constitutional rights).

22. *Cutter*, 544 U.S. at 712–13; *Turner*, 482 U.S. at 81.

23. *Turner*, 482 U.S. at 81.

24. *Cutter*, 544 U.S. at 712–13.

accompanying condemned inmates during their executions violates their constitutional rights under the First Amendment and RLUIPA.[25]

A. The Supreme Court Granted Murphy's Petition for a Stay of Execution

The difficulty of balancing correctional facility security with constitutional liberties recently resurfaced when the TDCJ to execute Patrick Murphy, a Buddhist inmate, without the presence of his Buddhist spiritual advisor.[26] Murphy originally argued that he needed a Buddhist spiritual advisor in the execution chambers during the execution to help him "focus his thoughts on Buddha at the time of his death so [Murphy] could be reborn in the Pure Land."[27] Lower state and federal courts denied Murphy's Establishment Clause argument and rejected Murphy's appeal on the basis that he filed his petition for a stay of execution too late.[28] However, the Supreme Court ultimately granted Murphy's petition for a stay of execution.[29] The majority merely provided a two-sentence opinion granting his stay of execution and instructing the Department not to execute him without a Buddhist spiritual advisor accompanying him *in* the execution chambers.[30]

---

25. This Comment applies the *Turner* test as opposed to the test articulated in *Employment Division v. Smith*. *Employment Division* also deals with Free Exercise issues but is not relevant to the analysis in this Comment because the *Employment Division* test only applies to policies that are "neutral laws of general applicability." Emp't Div. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring).

In *Employment Division*, a private drug rehabilitation organization fired Native American Church members for ingesting peyote during religious ceremonies, and the employees were subsequently denied unemployment benefits as a result. The Supreme Court held that states may refuse to carve out exceptions from laws of general applicability but that the right of Free Exercise does not excuse religious people from complying with a neutral policy. *Employment Division* does not apply to Texas's policy because the policy directly targets religion by banning spiritual advisors from accompanying condemned inmates during their executions. Instead, *Turner* applies to Texas's policy.

26. *See* Blakinger, *supra* note 10 (detailing Texas's new execution policy banning all spiritual advisors from accompanying condemned inmates).

27. *Id.*

28. McCullough, *supra* note 5. Murphy requested the Texas Department of Criminal Justice allow his Buddhist spiritual advisor to accompany him during his execution approximately one month before his execution date, but the Department denied his request. *Id.* Murphy then requested that any Buddhist spiritual advisor accompany him during his execution, and the Texas Department of Criminal Justice failed to respond. *Id.* As a result, Murphy did not file his Establishment Clause suit until two days before his scheduled execution. *Id.*

29. Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019).

30. *See id.* ("The application for a stay of execution of sentence of death presented to Justice Alito and by him referred to the Court is granted. The State may not carry

However, Justice Kavanaugh authored a one-man concurring opinion suggesting that Texas could rectify its procedure by allowing spiritual advisors of all religions into the execution chambers or only permitting spiritual advisors in the viewing room.[31] Justice Kavanaugh also took the opportunity to emphasize the "operational and security issues associated with an execution by lethal injection."[32]

A Texas Department of Criminal Justice spokesperson responded to the ruling by saying the prison's legal teams would review the Supreme Court's decision then decide what impact it could have on Texas policy.[33] Texas did not hesitate in responding to the ruling or Justice Kavanaugh's suggestion.[34]

B. Texas's Response to the Supreme Court Granting Murphy's Petition for Stay of Execution

Just five days after the Supreme Court granted Murphy a stay of execution, Texas released a new spiritual advisor policy.[35] Texas, attempting to address the previous Establishment Clause issue, now prohibits all spiritual advisors from accompanying condemned inmates into the execution chambers during their executions.[36] Justice Kavanaugh suggested that the new policy likely complies with RLUIPA because Texas has a compelling interest in securing its execution chambers.[37] However, Justice Kavanaugh failed to acknowledge whether the new policy would be a substantial burden on condemned inmates' right to Free Exercise or whether it would be the least restrictive means of ensuring there are no security breaches within the execution chambers.[38]

---

out Murphy's 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."). The majority did not analyze any case law or provide further insight on its decision. *See id.*

31. *Id.* at 1475 (Kavanaugh, J., concurring).

32. *Id.*

33. McCullough, *supra* note 5.

34. *See Murphy*, 139 S. Ct. at 1476 ("On April 2[, 2019], five days after the Court granted a stay, Texas changed its unconstitutional policy, and it did so effective immediately."); Execution Procedure, Tex. Dep't Crim. Just. Correctional Institutions Division (Apr. 2019) (on file with author).

35. Execution Procedure, Tex. Dep't Crim. Just. Correctional Institutions Division (Apr. 2019) (on file with author).

36. *Id.*

37. *See Murphy*, 139 S. Ct. at 1476.

38. *See id.* (refraining from conducting further analysis).

In response to Texas's new spiritual advisor policy, Murphy's attorney, David Dow, said he found it especially surprising that Texas state officials were exhibiting such "hostility" toward religion "even if those religious people happen to be on death row."[39] The updated policy permits spiritual advisors to meet with the condemned inmate leading up to their execution, but only allows them to observe the execution from a witness viewing room.[40] Dow alleged that the new TDCJ policy does not actually comply with Justice Kavanaugh's concurrence.[41] Dow maintained that Texas ignored Justice Kavanaugh's concerns about targeting religion generally, and focused only on treating Buddhist inmates the same as Christian and Muslim inmates, thus eliminating all spiritual advisors from execution chambers.[42] Dow even went so far as to call the new policy "arbitrary" and "unguided," and urged that it could lead to even more unequal treatment.[43] Meanwhile, the Department has failed to publish an updated execution policy since 2017.[44]

---

39. Blakinger, *supra* note 10. Ostensibly a state that strongly upholds religion in schools and professional settings should also advocate for its inmates to freely exercise their religions too. *See, e.g.*, Christine Bolaños, *Texas 'Religious Freedom' Bill Opens Door to LGBT Discrimination, Opponents Say*, GUARDIAN (Apr. 8, 2019, 5:15 PM), https://www.theguardian.com/us-news/2019/apr/05/texas-sb17-lgbt-discrimination-religious-freedom [https://perma.cc/YJC7-XA7G] ("The Texas state senate passed Senate Bill 17 earlier this week, which would protect the right of state-licensed workers such as doctors, teachers and counselors to refuse to provide their services based on '*a sincerely held religious belief* . . . ." (emphasis added)).

40. Blakinger, *supra* note 10; *see also* Execution Procedure, Tex. Dep't Crim. Just. Correctional Institutions Division (Apr. 2019) (on file with author).

41. Blakinger, *supra* note 10.

42. *Id.*

43. *Id.*

44. *See* 37 Tex. Admin. Code § 152.51 (2017) (showing Texas's most recently publicly published execution policy). The author obtained the 2019 policy through the Texas Public Information Act. While Texas may have orally updated its execution procedures, its failure to publish the newest policy also creates a notice issue for condemned inmates. This is especially concerning if inmates are not aware that they are prohibited from accessing a spiritual advisor during their execution, then are penalized by the Supreme Court for filing their request for accommodations too late. *See* Dunn v. Ray, 139 S. Ct. 661, 661 (2019) (vacating the stay of a Muslim death row inmate's execution in Alabama because the inmate waited too long to seek relief once he was notified that Alabama's Department of Corrections only permitted Christian spiritual advisors in the execution chambers during its executions). Further, a court may "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Gomez v. U.S. Dist. Ct. for N.D. of Cal., 503 U.S. 653, 654 (1992) (per curiam). Most last-minute petitions are viewed as an attempt to thwart state-

C. The Free Exercise Clause

The Free Exercise Clause protects religious freedom by prohibiting laws that "unduly suppress" citizens' right to freely exercise their religion.[45] Originally, the Clause only applied to the federal government.[46] However, in 1940, the Supreme Court held that it is also enforceable against state and local governments under the auspices of the Fourteenth Amendment.[47] As a result, state-owned prisons are bound by the Free Exercise Clause and are therefore constitutionally required not to inhibit inmates from freely exercising their religion.[48] Nonetheless, state and federal prisons have continuously limited inmates' First Amendment rights to freely exercise their religion.[49] Historically, courts have permitted these limitations so long as they were linked to maintaining security within the correctional facilities.[50] While prisons obviously have a compelling interest to ensure proper security within their facilities, courts frequently use the *Turner* test to protect inmates from alleged First Amendment violations that result from security-based policies.[51]

---

sanctioned punishments. *See* Price v. Dunn, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring) ("Petitioner's strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless."). This presumption fatally alters the sincere consideration that genuine last-minute petitions are entitled to.

45. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

46. U.S. CONST. amend. I ("*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." (emphasis added)).

47. *Cantwell*, 310 U.S. at 303, 311.

48. *See id.* at 303 (incorporating the First Amendment via the Fourteenth Amendment); *see also* Procunier v. Martinez, 416 U.S. 396, 405–06 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

49. *See, e.g.*, Sasnett v. Litscher, 197 F.3d 290, 293 (7th Cir. 1999) (holding that, absent a reason, a Wisconsin prison that forbade Protestant inmates from possessing crosses on their persons violated the First Amendment's Free Exercise Clause), *abrogated on other grounds by* Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

50. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 344, 353 (1987) (upholding a New Jersey prison policy preventing Muslim inmates from attending weekly congregation because officials enacted the policy to limit foot traffic in the facility to enhance prison security and thus did not violate the Free Exercise Clause).

51. *See id.* at 351–52 (using *Turner* to analyze whether a New Jersey prison policy preventing Muslim inmates from attending religious services because of security concerns was an exception to First Amendment liberties); *see also* Spies v. Voinovich, 173 F.3d 398, 403–04 (6th Cir. 1999) (utilizing *Turner* to evaluate an Ohio prison policy prohibiting a Buddhist inmate from practicing his religion in group worship services).

1. Turner*'s reasonableness test*

Turner arose when inmates filed a class action suit against Missouri Division of Corrections after it implemented new regulations at the Renz Correctional Institution ("Renz") in Cedar City, Missouri.[52] Two inmates in the class, Leonard Safley and P.J. Watson, sought an injunction and damages that they claimed resulted from the regulations.[53] The two met at Renz, which housed both male and female inmates.[54] Safley and Watson later became romantically involved.[55] Then, because of an incident stemming from the relationship, the Missouri Division of Corrections transferred Safley to Ozark Correctional Center.[56] Around the time of his transfer, the Missouri Division of Corrections implemented its new regulations.[57]

The first regulation sought to limit inmate-to-inmate correspondence between different institutions unless the inmates were immediate family members or they were writing about related legal matters.[58] Therefore, this regulation effectively prohibited Safley and Watson from communicating with each other from their separate facilities.[59] Safley and Watson even tried to communicate through family members and friends, but any of the letters addressed to Watson that mentioned Safley were returned to the senders.[60] The second regulation forbade inmates from marrying unless they obtained their prison superintendent's permission, which was based on "compelling reasons."[61] The Missouri Division of Corrections did not define "compelling" when implementing its regulation, but Renz prison officials testified that usually only pregnancy or the birth of a child out of wedlock was thought to be a

52. Turner v. Safley, 482 U.S. 78, 81 (1987).

53. *Turner*, 482 U.S. at 81; Safley v. Turner, 586 F. Supp. 589, 593–94 (W.D. Mo. 1984), *rev. in part*, 482 U.S. 78 (1987).

54. *Safley*, 586 F. Supp. at 590, 593.

55. *Id.*

56. *Id.* Safley and Watson did know that there was an "unwritten policy" at Renz where one of the two inmates in a close or physical relationship would be sent to another facility. *Id.* Additionally, it was not until after a "noisy 'lovers' quarrel'" that Renz correctional officers transferred Safley. *Id.*

57. *See Turner*, 482 U.S. at 81 (permitting correspondence between inmates at different institutions who are immediate family members).

58. *Id.*

59. *See Safley*, 586 F. Supp. at 593 (finding no family relationship between the inmates).

60. *See id.* at 593–94.

61. *Turner*, 482 U.S. at 82.

compelling reason.[62] As a result, Renz inmates were often denied the right to marry other inmates or outside citizens.[63]

The district court found that the Renz employees had threatened inmates who attempted to continue to exercise their right to marry or correspond with the loss of parole or parole privileges.[64] It also found that correctional officers threatened inmates with loss of child custody if they attempted to marry.[65] The court even found instances of correctional officers harassing or threatening inmates if the inmates pursued grievances after they were unable to express their right to marry or correspond.[66] Lastly, inmates in general worried that testifying about these issues would subject them to retaliation or harassment by Renz employees.[67] This prohibition on marriage further prevented inmates at separate facilities from corresponding because inmates were only allowed to correspond with other inmates if they were family.[68]

After both the district court and the Eighth Circuit decided that the two regulations were unconstitutional under a strict scrutiny standard, appellant Superintendent Turner appealed to the Supreme Court.[69] Noting "prison walls do not form a barrier separating prison inmates from the protections of the Constitution," the Supreme Court granted certiorari to address the regulations directly.[70] In analyzing Renz's regulations, the Court created a new test to determine whether "a prison regulation that burden[ed] fundamental rights [was] 'reasonably related' to legitimate penological objectives, or whether it represent[ed] an 'exaggerated response' to those concerns."[71] The Court presented several factors to evaluate the reasonableness of a prison regulation: (1) whether there is a valid, rational connection between the regulation and the governmental interest; (2) whether the

62. *Id.*
63. *See Safley*, 586 F. Supp. at 593.
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *See* Turner v. Safley, 482 U.S. 78, 81 (1987) (describing the inmate-to-inmate correspondence regulation).
69. *See id.* at 83. There was a third regulation that did not permit former inmates to visit current inmates until six months elapsed. *See Safley*, 586 F. Supp. at 592. The district court upheld this regulation and it was not challenged on appeal. *See id.* at 589.
70. *Turner*, 482 U.S. at 84. The Court also emphasized that the judiciary should try to defer to prison authorities regarding strict regulations when possible because they are best suited to understand the needs of the institution and to plan accordingly. *See id.* at 85.
71. *Id.* at 87.

governmental objective is legitimate and neutral; (3) the potential impact of a possible accommodation; and (4) the absence of ready alternatives.[72] Both in *Turner* and in subsequent cases, the Supreme Court applied these four prongs to attempt to balance inmates' constitutional rights with legitimate penological interests.[73]

a. Valid, rational connection

The Court in *Turner* explained that a prison regulation must have a valid and rational connection to a legitimate governmental objective.[74] This means that a court should only authorize a regulation that limits a constitutional right if the connection between the regulation and the asserted goal is not "so remote as to render the policy arbitrary or irrational."[75] For example, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[76] the Supreme Court decided that prohibiting the group activities of a prison union, which included inmate solicitation and group meetings, was "rationally related to the reasonable, indeed to the central, objectives of prison administration."[77] In *Jones*, the Court found that the governmental objective, maintaining control of the facility, was justified by the administrations' belief that the existence of a union constituted a "threat of essential discipline and control" because inmates could use the unions to cause work slowdowns or stoppages.[78] Therefore, the Court held that the governmental objective outweighed the inmates' First Amendment rights.[79]

The Supreme Court also found a rational connection between a regulation and a penological interest in *Bell v. Wolfish*.[80] In *Bell*, the Court ruled that inmates could only purchase or receive hardback books that were mailed directly from publishers, book clubs, or bookstores.[81] The Court upheld the *Bell* prison regulation because it had a rational and valid

72. *Id.* at 89–90.

73. *Infra* Section I.C.1; *see also* Overton v. Bazzetta, 539 U.S. 126, 132–35 (2003) (applying the four prongs of the *Turner* test and finding that the Michigan Department of Corrections had a legitimate penological interest in limiting minor visitations over inmates' claims of constitutional violations).

74. *See Turner*, 482 U.S. at 89.

75. *Id.* at 89–90.

76. 433 U.S. 119 (1977).

77. *Id.* at 129.

78. *Id.* at 123 (citing North Carolina Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 941 (E.D.N.C. 1976)).

79. *See id.* at 136.

80. *See* 441 U.S. 520, 550 (1979).

81. *Id.*

connection to a serious security problem: inmates' outside associates hiding contraband in used books, then mailing the books to the inmates so they could smuggle contraband into the facility.[82] Since the prison was able to show that inmates were indeed using the books to smuggle in and conceal contraband, "there [was] simply no evidence . . . that MCC officials [had] exaggerated their response to [the] security problem."[83]

In *Turner*, the Court decided that restricting communication between inmates at different facilities was not arbitrary or irrational because prison officials testified that inter-institution communications would allow inmates to create escape plans or to arrange assaults, which threatened the prison's security.[84] In attempting to justify the marriage restriction, Renz officials alleged that the regulation would enhance security by preventing inmate "love triangles" and would promote its efforts to rehabilitate female inmates.[85] The Supreme Court suggested that love triangles might still form regardless of formal marriage ceremonies, implying that Renz's marriage regulation was an exaggerated response to a penal issue.[86]

b. Governmental objective

When analyzing *Turner*, the Supreme Court further explained that a prison regulation must also have a legitimate and neutral governmental objective.[87] In the face of First Amendment challenges, the Court must analyze issues "in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law."[88] The Court further defined "neutral" as disregarding the content of the expression the regulation seeks to suppress.[89]

The Court also examined neutral governmental objectives in *Pell v. Procunier*.[90] In *Pell*, four California inmates and three professional journalists brought suit in response to a California Department of Corrections policy, which prohibited inmates from attending in-

82. *Id.* at 550–51.
83. *Id.* at 551.
84. Turner v. Safley, 482 U.S. 78, 91 (1987).
85. *Id.* at 97.
86. *Id.* at 98.
87. *See id.* at 90.
88. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).
89. *Turner*, 482 U.S. at 90.
90. 417 U.S. 817 (1974).

person interviews with the press.[91] The petitioners claimed that the regulation violated free speech and freedom of press, both of which were guaranteed by the First and Fourteenth Amendments.[92] In response, the Supreme Court laid out several "legitimate policies and goals of the corrections system."[93] The Court acknowledged that legitimate penal objectives include deterring people from committing the crime in question by isolating past offenders, rehabilitating inmates who will eventually return to society, and maintaining internal security of correctional facilities.[94] In *Pell*, the Supreme Court ultimately found that the California Department of Corrections' policy was constitutional because it lessened the overall amount of visitors without restricting inmates' access to persons aiding in their rehabilitation; thus, the regulation conformed to the neutral government objectives of maintaining security and promoting rehabilitation.[95] California's emphasis on rehabilitation and security persuaded the Court to weigh the *Turner* test in its favor.[96]

Pertaining to the correspondence regulation in *Turner*, the Court emphasized that Renz's objective was to enforce safety and security within its facility.[97] At the time Renz implemented the new regulations, the Missouri Division of Corrections had a growing gang problem.[98] Renz had previously attempted to combat the gang problem by transferring gang-affiliated inmates to other institutions in order to restrict gang members' communications.[99] Therefore, the Court held that the communication regulation was based on a neutral penological objective.[100] However, when looking at the marriage regulation, the Supreme Court decided that safety was not a legitimate penological interest insofar as to prevent inmates from marrying because there was no proof that permitting inmate marriages was more dangerous than forbidding it.[101] The Court also decided that restricting marriage to rehabilitate inmates was "suspect" and, therefore, illegitimate because

91. *See id.* at 819.
92. *See id.* at 821.
93. *Id.* at 822.
94. *See id.* at 822–23.
95. *See id.* at 827.
96. *See id.*
97. *See* Turner v. Safley, 482 U.S. 78, 91 (1987).
98. *Id.*
99. *See id.*
100. *See id.*
101. *See id.* at 97–98.

promoting independence among female inmates was not a legitimate issue that needed addressing within the facility.[102]

c. Impact of the accommodation

The Court in *Turner* explained that it must also evaluate a prison regulation based on the potential impact that accommodating an inmate's asserted constitutional right would have on the entire facility.[103] The Court emphasized the importance of deferring to corrections officials when evaluating whether the accommodation was likely to have a "ripple effect" on the prison population.[104]

In *Beard v. Banks*,[105] the Supreme Court discussed the impact of accommodating segregated inmates' request to access newspapers, magazines, and personal photographs.[106] The inmates were segregated into the most restrictive housing unit because of serious behavioral issues.[107] The Court reasoned that since the purpose of the restrictive policy was to promote better behavior by problematic inmates, removing the policy and, thus accommodating the inmates' requests, would produce worse behavior.[108] Accordingly, the Court ultimately upheld the policy because accommodating the inmates' requests would have a negative impact on the institution.[109]

When analyzing the "ripple effect" of accommodating Renz's prisoners' requests to correspond with inmates in other facilities in *Turner*, the Court decided that the "ripple effect" would be broad because the proposed exception would reach other facilities and, therefore, would impact those facilities as well.[110] Thus, the Court upheld the correspondence regulation based on the overreaching impact that otherwise accommodating the inmates' requests to correspond would have.[111] In evaluating the "ripple effect" of the marriage regulation, the Court held that the impact of allowing inmates

---

102. *Id.* at 99 ("Of the several female inmates whose marriage requests were discussed by prison officials at trial, only one was refused on the basis of fostering excessive dependency.").
103. *See id.* at 90.
104. *Id.*
105. 548 U.S. 521 (1987) (plurality opinion).
106. *Id.* at 524.
107. *See id.* at 525.
108. *See id.* at 532.
109. *See id.* at 525, 532.
110. Turner v. Safley, 482 U.S. 78, 92 (1987).
111. *See id.*

to marry would be rather small, especially if the inmate was marrying a civilian.[112] Since the marriage regulation only impacted Renz, unless the inmate was seeking to marry an inmate at a different institution, the Court emphasized the rather small impact an accommodation would have, and thus struck down the marriage prohibition.[113]

d. Absence of ready alternatives

The Court in *Turner* explained that it must also evaluate whether a regulation is reasonable based on the absence of ready alternatives.[114] For example, obvious and easy alternatives that are available at the facility are evidence that the regulation is not reasonable but rather an exaggerated response to a facility's concerns.[115] The Supreme Court evaluates whether alternatives are easy or obvious by calculating the de minimis cost to the institution in terms of the burden on staff resources and risks that could arise.[116] In *Turner*, the burden on staff resources was the amount of time it would have taken correctional officers to read and then censor each inmate-to-inmate communication.[117] The inherent risk was that the staff could potentially miss a dangerous communication, fail to censor it, and thus allow gang-related plans to come to fruition.[118] The Court further explained that "the unavailability of 'ready alternatives' is typically . . . one of the underlying rationales for the adoption of inmate privilege deprivation policies."[119]

When evaluating *Turner's* correspondence regulation, the Court acknowledged that there were no obvious or easy alternatives to Renz's current regulation, especially because other facilities employed similar measures to maintain security.[120] Therefore, the Court upheld the correspondence regulation.[121] However, when analyzing the marriage regulation, the Court stated that there were obvious and easy

112. *Id.* at 98.
113. *See id.*
114. *Id.* at 90; *see also* Block v. Rutherford 468 U.S. 576, 579 (1984) (exemplifying a ready alternative).
115. *Turner*, 482 U.S. at 90. The Court emphasized that the test promulgated was not a "least restrictive alternative test," meaning the correction officials do not have to brainstorm alternatives. *Id.* Rather, if the inmate can suggest plausible alternatives, those alternatives can be evidence that the regulation fails the reasonableness test. *See id.* at 90–91.
116. *Id.* at 91.
117. *See id.* at 93.
118. *See id.*
119. Beard v. Banks, 548 U.S. 521, 541–42 (2006) (Thomas, J., concurring).
120. *See Turner*, 482 U.S. at 93.
121. *See id.*

alternatives to the restrictive regulation that would still allow prisoners to marry.[122] For example, an easy alternative is to generally permit marriages unless the marriage poses a known threat to institutional security.[123] The Court, finding that there were easy alternatives to prohibition, struck down the marriage prohibition.[124]

D. The Religious Land Use and Institutionalized Persons Act

Congress passed RLUIPA in 2000 to prevent state and local governments from frivolously imposing substantial burdens on institutionalized persons' right to freely exercise their religions.[125] Section three of RLUIPA specifically protects prisoners' right to freely exercise their religions.[126] In enacting RLUIPA, Congress carved out a strict scrutiny test composed of two requirements for institutions restricting religious activities: the burden on free exercise must be (1) "in furtherance of a compelling governmental interest; and (2) [the least] restrictive means of furthering that compelling governmental interest."[127] Nonetheless, local and state prisons have continued to limit inmates' right to freely exercise their religions without having compelling governmental interests or utilizing the least restrictive

122. *See id.* at 98.

123. *See id.* The Supreme Court referenced a Bureau of Prisons Regulation generally allowing inmates to marry. *See id.*; *see also* 28 C.F.R. § 551.10 (1986) (detailing that "[t]he Warden shall approve an inmate's request to marry except" when there is "a threat to the security of the institution").

124. *See Turner*, 482 U.S. at 98.

125. *See* 42 U.S.C. § 2000cc-1(a) (2012); *see also* Holt v. Hobbs, 574 U.S. 352, 356 (2015) (stating that Congress enacted RLUIPA to provide "very broad protection for religious liberty") (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014)).

126. *See* § 2000cc-1(a) ("No government shall impose a substantial burden on the religious exercise of a person residing in or *confined to an institution* . . . ." (emphasis added)); *see also* Cutter v. Wilkinson, 544 U.S. 709, 720–21 (2005) (explaining that section three of RLUIPA applies to state-run institutions such as "mental hospitals, prisons, and the like . . . in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise").

127. 42 U.S.C. § 2000cc-1(a)(1)–(2).

means of that interest.[128] Courts frequently use the *Cutter* test to analyze these alleged violations.[129]

1. Cutter's substantial burden test

Cutter arose out of an Ohio class action where inmates alleged that the Ohio Department of Rehabilitation and Corrections discriminated against them because of their nontraditional faiths.[130] The inmates also claimed that the Ohio Department of Rehabilitation and Corrections failed to accommodate their right to freely exercise their religion.[131] The class of inmates identified as adherents of "nonmainstream" religions such as Satanist, Wiccan, and the Church of Jesus Christ Christian.[132] The Ohio Department of Rehabilitation and Corrections responded to the suit with a facial challenge to RLUIPA, arguing that RLUIPA violated the Establishment Clause of the First Amendment by improperly advancing religion.[133] The district court denied Ohio's motion to dismiss.[134] On appeal, the Sixth Circuit reversed the district court's decision and held that the institutionalized persons section of RLUIPA violated the Establishment Clause.[135] The Supreme Court granted certiorari to reconcile RLUIPA with the First Amendment, ultimately proving that the two can coexist.[136] By unanimously upholding RLUIPA, the Supreme

---

128. *See, e.g.*, Chance v. Tex. Dep't of Criminal Justice, 730 F.3d 404, 410, 419 (5th Cir. 2013) (finding that a genuine issue of fact remained in determining whether the Texas Department of Criminal Justice's policy of preventing religious Native American inmates from possessing a lock of a deceased relative's hair was unconstitutional because less restrictive alternatives were possible such as restricting the size of the lock of hair, inspecting it, washing it, or even only allowing the lock within the inmate's cell).

129. *See, e.g.*, Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 36 (1st Cir. 2007) (relying on the Court's analysis of RLUIPA in *Cutter* to evaluate whether Rhode Island Department of Corrections' ban on inmates preaching to other inmates appropriately addressed a compelling prison interest and was the least restrictive means of protecting that compelling prison interest).

130. *See Cutter*, 544 U.S. at 712–13.

131. *Id.* at 712. The inmates further asserted that the Ohio Department of Rehabilitation and Corrections retaliated against them for their religious beliefs, but that issue is not relevant for the purposes of this analysis. *Id.* at 713.

132. *Id.* at 712. The prison officials stipulated that inmates were members of recognized religions and sincerely believed in those religions. *Id.* at 713.

133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.* at 713, 718 (emphasizing that the government can "accommodate religion beyond free exercise requirements, without offense to the Establishment Clause").

Court reversed the Sixth Circuit's decision and remanded *Cutter* to be evaluated based on whether the (1) substantial burden was (2) in furtherance of a compelling governmental interest and was (3) the least restrictive means of achieving that compelling governmental interest.[137]

a. Substantial burden

After upholding RLUIPA, the Supreme Court cemented the test for evaluating RLUIPA violations.[138] The first prong of the *Cutter* test requires courts to decide whether there is a substantial burden on the petitioner's religious exercise.[139] RLUIPA defines religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[140] A substantial burden is not a mere inconvenience; rather it is a considerable pressure to modify one's behavior and thus violate one's own beliefs.[141] Substantial burdens usually involve direct or indirect coercion by a government entity.[142]

b. Compelling governmental interest

Cutter's second prong discusses what qualifies as a compelling governmental interest, and therefore would allow institutions to enact a regulation sought to protect that interest.[143] By default, prison security is always a compelling governmental interest.[144] However, "security concerns must be 'grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations.'"[145] Therefore, courts must still evaluate

137. *Id.* at 726.

138. *See, e.g.*, Scott v. Erdogan, No. 3:CV-12-2041, 2015 U.S. Dist. LEXIS 38739, at *36–37 (M.D. Pa. Mar. 25, 2015) (relying on the Court's analysis in *Cutter* of the RLUIPA a decade after Supreme Court established the *Cutter* test).

139. *Cutter*, 544 U.S. at 714.

140. 42 U.S.C. § 2000cc-5(7)(A) (2000).

141. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); *see also* Holt v. Hobbs, 574 U.S. 352, 361 (2015) (explaining that Arkansas's policy forbidding inmates from growing a beard substantially burdened inmates' right to freely exercise because they needed to choose between following their religion or facing serious disciplinary action); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (explaining that a substantial burden is present when one must "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other").

142. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

143. *Cutter*, 544 U.S. at 715.

144. *Id.* at 725 n.13.

145. Fowler v. Crawford, 534 F.3d 931, 939 (8th Cir. 2008) (quoting S. REP. NO. 103–111, at 10 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1900).

penological regulations, even when they are based on security concerns, to ensure there are legitimate concerns triggering the regulations.[146]

c. Least restrictive means

Cutter's third prong requires courts to ensure that prison regulations are the least restrictive means to achieve the intended compelling governmental interest.[147] The least restrictive means standard is "exceptionally demanding" because it requires the government to prove that it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties."[148] Further, when less restrictive means are available to achieve the government's compelling interest, the government must use them.[149] *Holt v. Hobbs* is an example of the Supreme Court instructing prison officials to use less restrictive means to ensure the security of their facilities, rather than infringe on a prisoner's right to freely exercise his religion.[150]

In *Holt*, Arkansas inmate Gregory Holt was a practicing Salafi Muslim.[151] The Arkansas Department of Correction had a strict grooming policy that prohibited its inmates from growing facial hair.[152] Holt argued that, as a Muslim, growing facial hair was a necessary part of his religious practice and that, therefore, Arkansas's policy impeded his ability to practice his religion.[153] It is important to note that Arkansas carved out an exception to its grooming policy for inmates with diagnosed skin conditions, which allowed them to grow one-fourth inch beards.[154] Accordingly, Holt argued that he should also be granted an exemption to the policy based on his religious beliefs, and he requested to grow a one-half inch beard.[155] At trial, Arkansas Department of Correction employees testified that allowing Muslim inmates to grow beards would cause safety concerns such as giving

146. *See id.* at 939 (acknowledging due deference to prison officials but still evaluating the restricted practices for legitimate security concerns).
147. *Cutter*, 544 U.S. at 715.
148. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).
149. United States v. Playboy Entm't Grp. Inc., 529 U.S. 803, 815 (2000).
150. 574 U.S. 352, 355 (2015).
151. *Id.*; Holt v. Hobbs, OYEZ, https://www.oyez.org/cases/2014/13-6827 [https://perma.cc/G7ZA-7W73].
152. *Holt*, 574 U.S. at 356–57.
153. *Id.* at 359–61.
154. *Id.* at 358.
155. *Id.* at 359.

inmates the opportunity to conceal contraband in their beards or disguise their identity.[156] Arkansas officials also voiced a concern that preferential treatment towards one inmate or a group of inmates can incite violence within a facility.[157] After granting certiorari, the Supreme Court decided that instead of forbidding Muslim men from growing half-inch beards for security purposes, the Arkansas Department of Correction had less restrictive alternatives available to it, like searching the beards or having the inmates run combs through their beards.[158] The prison officials also argued that allowing inmates to grow beards could prevent guards from making quick identifications of inmates if the inmates were permitted to have a beard then shaved it, and that this could also create security concerns if inmates tried to use this tactic to enter restricted areas.[159] However, the Court again proposed less restrictive means such as photographing the inmates before and after they grow their beards.[160] This ruling illustrates that less restrictive alternatives to stringent policies can be simple substitutes that still allow inmates to freely exercise their religion.[161]

II. ANALYSIS

Applying *Turner* and *Cutter* to Texas's new policy proves that the policy is unconstitutional.[162] Analyzing the policy through *Turner*'s lens confirms that Texas's policy is not reasonably related to a legitimate penological objective.[163] Examining the policy through the *Cutter* test illustrates that condemned Texas inmates' constitutional rights are substantially burdened although less restrictive alternatives exist.[164] Therefore, Texas's new policy violates both the Free Exercise Clause of the First Amendment and RLUIPA.[165]

---

156. *Id.* at 363–65.

157. *Holt v. Hobbs,* No. 5:11-cv-00164, 2012 U.S. Dist. LEXIS 40942, at *8–9 (E.D. Ark. Jan. 27, 2012).

158. *Holt*, 574 U.S. at 364–65.

159. *Id.* at 366.

160. *Id.*

161. *See id.* at 365–66 (suggesting multiple replacements for the correctional facility's strict grooming policy to accommodate the inmates' First Amendment right to Free Exercise).

162. *See infra* Sections II.A–B.

163. *See infra* Section II.A.

164. *See infra* Section II.B.

165. *See infra* Sections II.A–B.

A. Texas's New Spiritual Advisor Policy Clearly Violates the Free Exercise Clause

Texas's policy banning spiritual advisors from accompanying condemned inmates during executions clearly violates the Free Exercise Clause of the First Amendment.[166] Texas's law intentionally targets religious inmates to prohibit them from worshipping with their spiritual advisors at the time of their death.[167] Evaluating Texas's spiritual advisor policy under the four prongs of the *Turner* test confirms the policy is unconstitutional.[168]

1. Texas's new policy blatantly lacks a rational connection to security

Texas's policy banning spiritual advisors from accompanying condemned inmates during their executions fails to present a valid, rational connection to the Texas Department of Criminal Justice's internal security during executions.[169] In fact, Jeremy Desel, the designated spokesperson who announced the change in Texas's execution policy, "declined to elaborate on the reasoning behind the policy change."[170] Without a justification, Texas has failed to present a valid, rational connection between the new policy and any penological interest, let alone security initiatives. However, since Texas now only allows security personnel within its execution chambers, this Comment will assume the policy changed because of security concerns.[171]

Prison regulations limiting First Amendment rights are only constitutional if the connection between the regulation and the institution's goal is not arbitrary or irrational.[172] In *Turner*, prison officials alleged that Renz's regulations, which limited communication between inmates at different facilities, were rational because they prevented inmates from organizing interfacility plans to escape or coordinate violence.[173] Here, Texas's policy does not have a similar connection to

---

166. *See* U.S. CONST. amend. I.

167. Blakinger, *supra* note 10.

168. *Infra* Sections II.A.1–4.

169. *See* Blakinger, *supra* note 10. ("Only TDCJ security personnel shall be permitted in the execution chamber[.]").

170. Jake Bleiberg, *Texas Bans All Clergy from Executions After Supreme Court Ruling*, PBS (Apr. 4, 2019, 10:05 AM), https://www.pbs.org/newshour/nation/texas-bans-all-clergy-from-executions-after-supreme-court-ruling [https://perma.cc/9YHQ-NGPS].

171. *See* Blakinger, *supra* note 10 (implying executions are more secure when only prison staff is in attendance).

172. Turner v. Safley, 482 U.S. 78, 89–90 (1987).

173. *Id.* at 91.

ensuring safety or security because the Department has not alleged that any security breaches have resulted or will result from allowing spiritual advisors to accompany condemned inmates into the execution chambers during their executions.[174] Rather, Texas's new policy is more similar to the regulation prohibiting Renz's inmates to marry, which the Supreme Court struck down because it had no effect on inmate conduct.[175] Further, allowing spiritual advisors to accompany inmates into execution chambers, much like allowing them to marry, provides them with invaluable benefits such as prayers and company during their last moments.[176]

Texas's policy also fails to withstand the Supreme Court's analysis in *Jones*.[177] In *Jones*, the Supreme Court held that prohibiting union members from holding group meetings and soliciting new members was rationally related to neutral penological objectives.[178] Conversely, Texas revising its policy to allow various spiritual advisors would not allow inmates to meet in groups or solicit other inmates; it would merely allow a spiritual advisor, who has likely already had contact visits with inmates,[179] to stand with them during their execution. In *Jones*, the North Carolina institution feared that inmates unionizing would create an easier opportunity for them to revolt in the workplace,[180] but Texas revising its policy to allow any spiritual advisors into the execution chambers would not present the same concerns about giving inmates the opportunity to collaborate or gain power. The TDCJ would merely be permitting one spiritual advisor, surrounded by prison officials, to stand with one inmate while the inmate is executed, which would not give the inmate any additional power.

---

174. Bleiberg, *supra* note 170 (stating that the spokesperson declined to comment about why Texas changed its policy); *see also* Execution Procedure, Tex. Dep't Crim. Just. Correctional Institutions Division (Apr. 2019) (on file with author) (stating that spiritual advisors are to observe executions from outside of the chambers but not explaining the exclusion of spiritual advisors from the execution chambers).

175. *See Turner*, 482 U.S. at 95–98 (explaining that love triangles would happen regardless of whether the facility permitted marriages, and marriage's additional benefits such a support systems and tax breaks outweigh the facilities' concern).

176. *See* Blakinger, *supra* note 10 (illustrating that Murphy requested his spiritual advisor with good intentions and for the purpose of allowing him to "focus his thoughts on Buddha at the time of his death so that he could be reborn in the Pure Land").

177. *See supra* notes 76–79 and accompanying text.

178. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977).

179. *See* Murphy v. Collier, 376 F. Supp. 3d 734, 735 (S.D. Tex. 2019) (explaining that Murphy has already met with his Buddhist spiritual advisor for six years).

180. *Jones*, 433 U.S. at 123.

The Supreme Court also found a rational connection to security in *Bell*.[181] In *Bell*, the Court permitted the prison facility to prohibit books not mailed directly from publishers because the facility showed that inmates used secondhand books to smuggle in, then collect and conceal contraband.[182] However, Texas has not proven that spiritual advisors of various religions are a threat to the security of its executions.[183] Texas implemented its policy without offering any explanation or reasoning.[184] Therefore, because Texas has failed to provide a logical foundation for its new policy that bans spiritual advisors from its execution chambers or any evidence that it is safer to prohibit spiritual advisors, the policy falls on the irrational side of the analytical spectrum and does not have a valid connection to maintaining prison security.

2. Texas clearly embellished the governmental objective of its new policy

Texas's new policy banning spiritual advisors does not communicate a legitimate and neutral governmental objective.[185] Based on the timing, Texas likely changed its policy in response to the Supreme Court ruling in *Murphy*.[186] But, it likely chose to prohibit any spiritual advisor rather than allow all spiritual advisors because of the security concerns it previously claimed prevented it from allowing Murphy's Buddhist spiritual advisor into the execution chambers.[187] Security is a compelling governmental objective;[188] therefore, prohibiting all spiritual advisors, instead of those from select religions, is a neutral response to the Supreme Court's holding in *Murphy*.[189] However, in this instance, the governmental objective is illegitimate because there

181. Bell v. Wolfish, 441 U.S. 520, 550 (1979).

182. *Id.* at 550–51.

183. Bleiberg, *supra* note 170.

184. *Id.*

185. *See* Execution Procedure, Tex. Dep't Crim. Just. Correctional Institutions Division (Apr. 2019) (on file with author) (stating that spiritual advisors are to observe executions from outside of the chambers but not providing an explanation for excluding spiritual advisors from the execution chambers); Bleiberg, *supra* note 170 (noting the Texas Department of Criminal Justice's failure to articulate why it changed its policy).

186. *See* Murphy v. Collier, 139 S. Ct. 1475, 1476 (2019) (mem.) (Kavanaugh, J., concurring) ("On April 2[, 2019], five days after the Court granted a stay, Texas changed its unconstitutional policy[.]").

187. *See* Blakinger, *supra* note 10 (explaining that the Texas Department of Criminal Justice's policy only allowed department employees and did not allow Murphy's Buddhist spiritual advisor into the execution chambers during his execution).

188. *See* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

189. *See* Turner v. Safley, 482 U.S. 78, 90 (1987) (defining neutral policies as ones that disregard the content of the expression the policy seeks to suppress).

is no evidence that banning spiritual advisors from accompanying condemned inmates during their executions is less dangerous than allowing them into the chambers.[190]

Further, in *Pell*, the Supreme Court allowed the California Department of Corrections to prohibit the press from attending contact visits with inmates to maintain institutional security.[191] Moving forward, inmates may only receive visitors for rehabilitative purposes. While the decision in *Pell* may seem to support Texas's new policy, it actually supports the assertion that the policy is unconstitutional. In *Pell*, the facilities' goals were to rehabilitate inmates and maintain security.[192] Texas cannot claim that it is seeking to rehabilitate inmates because Texas is executing these inmates.[193] Under *Pell*, Texas does have a claim that allowing fewer people to have contact with visitors helps maintain security;[194] however, in this case, Murphy has already had contact visits with his spiritual advisor for six years.[195] Thus, Texas cannot now, after no reported incidents, claim that it needs to cut down on Murphy's spiritual advisor visitations. Therefore, Texas's ban on spiritual advisors is not promoting a governmental objective because it is not preventing additional people from entering the facility in order to maintain security; rather, the ban merely restricts people from entering one room within the facility.[196] Therefore, Texas's policy is baseless.[197]

---

190. *See id.* at 98 (holding that the security objective of banning inmate marriages was illegitimate because there was no proof that allowing inmate marriages was more dangerous than forbidding them). Arguably, it is less dangerous to provide inmates a spiritual advisor to accompany them during their execution because they would be more comfortable and less likely to lash out and not cooperate.

191. Pell v. Procunier, 417 U.S. 817, 827 (1974).

192. *Id.*

193. *See id.* at 822–23 (stating that the three legitimate penological objectives intend to deter people from committing the crime in question by isolating past offenders, rehabilitating inmates who will eventually return to society, and maintaining internal security of correctional facilities).

194. *See id.* at 827 (holding that a policy that limits the number of contact visits withstands the *Turner* test and, thus, seeks to achieve the legitimate governmental objective of promoting security).

195. Murphy v. Collier, 376 F. Supp. 3d 734, 735 (S.D. Tex. 2019), *aff'd and stay denied*, 919 F.3d 913 (5th Cir. 2019), *stay granted*, 139 S. Ct. 1475 (2019).

196. *See id.* at 736 (stating that Murphy's spiritual advisor may observe the execution from the witness room).

197. *See* Turner v. Safley, 482 U.S. 78, 91 (1987) (explaining that the Missouri facility's limit to speech to inhibit gang members' ability to communicate was a legitimate governmental objective). However, since Texas failed to articulate why spiritual advisors were banned, it did not prove it was attempting to achieve a

3. There is no potential impact on Texas's correctional facilities if Texas chooses to accommodate spiritual advisors within its execution chambers

Accommodating condemned inmates' requests to have their spiritual advisors accompany them during their executions will not have any effect on the rest of the facility or the TDCJ.[198] The effects of changing the policy to allow spiritual advisors into the execution chambers are narrow and limited to only one facility because the Huntsville Unit is the only facility in Texas that performs executions.[199] Allowing inmates to have their spiritual advisors accompany them into the execution chambers would only have a small ripple effect, if any, because the regulation would only impact one condemned inmate,[200] who is already isolated from the rest of the prison population, at a time.[201] Additionally, approving inmates' spiritual advisor requests will not produce bad inmate behavior; Texas did not even implement its policy to encourage good behavior.[202] Therefore, Texas could allow spiritual advisors into the execution chambers without disrupting any aspect of prison life or

---

legitimate governmental objective. *See id.* at 90 (illustrating that the agency must articulate a clear and neutral governmental objective to withstand the *Turner* test).

198. *See* Blakinger, *supra* note 10 (detailing Texas's previous policy of permitting Christian and Muslim spiritual advisors, who were Department employees, into the execution chambers). Additionally, the Department's argument that it only allows employees into the execution chambers is moot because the Department has allowed Murphy's Buddhist spiritual advisor to meet with him on death row for the last six years. *Collier*, 376 F. Supp. 3d at 735. Texas would have a difficult time proving that Murphy's spiritual advisor is a security threat in the execution chambers surrounded by trained guards but not in a one-on-one setting when the spiritual advisor was previously alone with Murphy.

199. *See Turner*, 482 U.S. at 92 (deciding that allowing inter-facility communications would have a broad ripple effect because it would impact multiple facilities); *State and Federal Info: Texas*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas [https://perma.cc/NF34-YS2T].

200. On average, Texas executes a small number of condemned inmates per month. *See Death Row Information: Scheduled Executions*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_scheduled_executions.html [https://perma.cc/L5VE-Q8SR]. Therefore, accommodating condemned inmates' requests for spiritual advisors would impact no more than five inmates per month. *See id.*

201. *See Turner*, 482 U.S. at 98 (holding that allowing inmates to marry civilians is a personal decision with a negligible ripple effect among the prison population or other correctional facilities); *Death Row Information: Death Row Facts*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_facts.html [https://perma.cc/ K3D6-PTY3].

202. *See* Beard v. Banks, 548 U.S. 521, 532 (1987) (plurality opinion) (explaining that since the strict regulation was implemented to encourage good behavior and that removing it would produce bad behavior).

providing special treatment to a particular inmate, especially since Texas previously allowed select spiritual advisors into its execution chambers.[203]

4. There are ready alternatives to Texas's restrictive policy

There are ready alternatives to Texas's policy banning spiritual advisors from accompanying condemned inmates into its execution chambers.[204] The Supreme Court previously defined ready alternatives as having low cost, which includes monetary value and necessary manpower, and, in terms of safety and security, low risk for correctional facilities.[205] Justice Kavanaugh already proposed that Texas could allow all inmates to have a spiritual advisor in the execution chambers with them during their executions.[206] Justice Kavanaugh's suggestion is evidence that Texas's strict regulation infringing on condemned inmates' constitutional right to freely exercise their religious beliefs is not reasonable, but rather an "exaggerated response" to the Supreme Court's ruling in *Murphy*.[207] While the correctional facility does not have the burden to suggest less restrictive regulations, any plausible alternatives an inmate proposes are evidence that the regulation fails the reasonableness test because ready alternatives exist.[208] Therefore, Justice Kavanaugh's suggestion to allow all spiritual advisors into the execution chambers and any of the inmates' proposed alternatives suggest that Texas's policy banning spiritual advisors is an exaggerated response, which violates the Supreme Court's reasonableness test.[209]

---

203. Blakinger, *supra* note 10.

204. *See* Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring) (suggesting that Texas could allow all spiritual advisors into execution chambers to correct its former unconstitutional policy of allowing only Christian and Muslim spiritual advisors).

205. *Turner*, 482 U.S. at 80, 91.

206. *Murphy*, 139 S. Ct. at 1475.

207. *See Turner*, 482 U.S. at 90 (explaining the significance of obvious and easy alternatives).

208. *Id.* at 90–91. Reasonable alternatives are available in Murphy's case and for other condemned inmates in Texas. For example, if prison officials are concerned the spiritual advisors may interfere with the execution, prison officials could restrain the spiritual advisors while they are in the execution chambers. Alternatively, if prison officials are completely unwilling to allow spiritual advisors in the room, perhaps prison officials could play a closed-circuit stream of the spiritual advisors for the inmates during their executions so the inmates could at least see and hear their spiritual advisors during their executions. These are examples of low-cost, low-risk alternatives for the correctional facility in accordance with the *Turner* test. *See id.* at 80, 91 (explaining de minimis cost in regard to ready alternatives).

209. *See generally id.* at 87 (explaining exaggerated responses).

Further, the Supreme Court explained that "the unavailability of 'ready alternatives' is typically . . . one of the underlying rationales for the adoption of inmate privilege deprivation policies."[210] Since Justice Kavanaugh proved that there was more than one option to remedy Texas's Establishment Clause violation before Texas implemented its new policy, the unavailability of ready alternatives could not be Texas's underlying rationale.[211] While the proposed alternatives may require additional resources, such as having to train new death row spiritual advisors,[212] they would not violate inmates' constitutional right to freely exercise their religion.

B. Texas's Policy Blatantly Violates the Religious Land Use and Institutionalized Persons Act

Texas's policy banning spiritual advisors from accompanying condemned inmates during their executions clearly violates RLUIPA.[213] Texas intentionally imposed a burden on inmates' right to freely exercise their religion during their last moments alive.[214] Evaluating Texas's new policy using the *Cutter* test proves that banning spiritual advisors from the execution chambers violates RLUIPA.[215]

1. Banning spiritual advisors from the execution chambers substantially burdens condemned inmates

By enacting its new policy, Texas clearly places a substantial burden on its condemned inmates' right to freely exercise their religion during their executions.[216] Murphy argued that he needed his spiritual advisor present *in* the chambers during his execution to allow him to keep his thoughts focused on Buddha, so Murphy could be reborn in the Pure Land.[217] Since RLUIPA defines religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a

---

210. Beard v. Banks, 548 U.S. 521, 541–42 (2006) (Thomas, J., concurring).

211. *See Murphy*, 139 S. Ct. at 1475 (suggesting two possible remedies).

212. *See* Dunn v. Ray, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting) (questioning why training Domineque Ray's imam in "execution protocol" or merely compelling "the imam to pledge, under penalty of contempt, that [the imam would] not interfere" with Ray's execution was insufficient to allow the imam to accompany Ray in the execution chambers).

213. *See* 42 U.S.C. § 2000cc-1(a)(1)–(2) (2012).

214. Blakinger, *supra* note 10.

215. *Infra* Sections II.B.1–3.

216. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (explaining that a substantial burden to free exercise exists when one must abandon one of the facets of one's religion).

217. Blakinger, *supra* note 10.

system of religious belief,"[218] Murphy's religious request may qualify for RLUIPA protection even if his religion does not require the desired expression.[219] For example, growing a beard was not a central pillar of Holt's religion, but he wanted to grow a beard as a way to express his Muslim faith.[220] Since RLUIPA only requires that the expression be related to the inmate's religion, the Supreme Court struck down the beard prohibition for substantially burdening Holt's freedom of expression.[221] Like the beard ban, prohibiting Murphy's access to a Buddhist spiritual advisor during his execution substantially burdens his ability to freely exercise Buddhism because his spiritual advisor cannot help focus his thoughts on Buddha from a separate room.[222] While Buddhism does not require a spiritual advisor to accompany believers during death, prohibiting the spiritual advisor from joining Murphy in the execution chambers during his execution still substantially burdens his right to freely exercise his Buddhist faith.[223]

2. At best, Texas embellishes the compelling purpose of its new policy

By default, security is always a compelling governmental interest.[224] However, Texas fails to justify its new policy or even provide any purpose for which it was set to achieve.[225] Even if Texas enacted its new policy to enhance its security measures, any security concern was likely grounded on mere speculation or exaggerated fears because the Department failed to justify the new policy or explain any security concerns.[226] For example, in *Holt*, the Arkansas Department of Corrections clearly based its grooming policy on security.[227] However,

---

218. 42 U.S.C. § 2000cc-5(7)(A).

219. *See id.* (implying that RLUIPA's definition of "religious exercise" is sufficiently broad to encompass Murphy's spiritual advisor joining Murphy in the execution room).

220. *See* Holt v. Hobbs, 574 U.S. 352, 355–56 (2015) (explaining that Holt argued that growing a beard was a necessary part of his religion).

221. *See id.* at 365 (describing the substantial burden to Holt's right to free exercise of religion).

222. *See* 42 U.S.C. § 2000cc-5(7)(A) (defining religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"); *see also* Blakinger, *supra* note 10 (illustrating that preventing Murphy from having his spiritual advisor during his execution will impede the practice of his religion).

223. *See* Blakinger, *supra* note 10 (reasoning why Murphy having his spiritual advisor with him during his execution was important to his Buddhist faith).

224. Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005).

225. Bleiberg, *supra* note 170.

226. *See id.* (stating that the Texas Department of Criminal Justice spokesperson failed to elaborate on the reasoning behind the new policy).

227. Holt v. Hobbs, 574 U.S. 352, 359 (2015).

in this case, the TDCJ did not articulate any legitimate security concerns that triggered the new regulation.[228] Therefore, Texas's policy lacks support and, thus, should not infringe on its inmates' right to express their religion.

3. Less restrictive means to Texas's overbearing policy exist

Texas's new policy banning spiritual advisors from accompanying condemned inmates during their executions is not the least restrictive means to secure its executions.[229] Texas fails to prove that it lacks "other means of achieving its desired goal."[230] Texas surely could enact less restrictive means to ensure the safety of its executions, even if it requires more resources. For example, the Supreme Court held in *Holt* that instead of forcing Muslim men to shave their beards, which conflicted with their religious beliefs, prison officials could simply search their beards with combs and photograph inmates with and without beards to maintain prison security.[231] While these alternatives required more resources, the Court's analysis weighed in Holt's favor because the Court acknowledged Holt's significant interest in expressing his religion.[232]

If Texas is concerned with security, it could hire and train multiple spiritual advisors who, together, represent every religion genuinely practiced on its death row. Although it would require more resources, like in *Holt*, it would also ensure that the spiritual advisors are authorized to be present during executions. While courts routinely defer to prison officials' experience when evaluating prison policies,[233] Texas prison officials have not alleged that having spiritual advisors in the execution chambers presents legitimate threats to prison security.[234]

An example of a less restrictive alternative is making spiritual advisors of any religion available during executions. This alternative

---

228. *See* Fowler v. Crawford, 534 F.3d 931, 939 (8th Cir. 2008) (describing what qualifies as legitimate security concerns).

229. *See* Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring) (suggesting that Texas has multiple options in how it chooses to respond to *Murphy*).

230. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014) (explaining the demanding nature of the least restrictive means standard).

231. *See Holt*, 574 U.S. 352 at 365–66 (suggesting alternatives to the Arkansas Department of Corrections' ban on beards longer than a quarter of an inch to show that it could not constitute the least restrictive means of promoting prison safety and security).

232. *Id.* at 369.

233. Cutter v. Wilkinson, 544 U.S. 709, 715 (2005).

234. *See* Bleiberg, *supra* note 170 (showing that the Texas Department of Criminal Justice spokesperson failed to elaborate on why Texas implemented its new policy banning spiritual advisors from accompanying condemned inmates during their executions).

could require more resources,[235] but because Texas executes a limited number of inmates per year,[236] the TDCJ could adequately process background checks and provide trainings without draining its resources. Moreover, Murphy's spiritual advisor has already cleared the TDCJ's security protocol and attended contact visits with Murphy in the weeks leading up to this execution.[237]

CONCLUSION

In light of the foregoing reasons, Texas's new policy banning spiritual advisors from accompanying condemned inmates during their executions is unconstitutional. Because Texas failed to prove that its new policy is reasonably related to a legitimate penological objective, the policy fails under the *Turner* test and thus violates the Free Exercise Clause of the First Amendment.[238] Additionally, because Texas's policy presents a substantial burden to a condemned inmate's right to free exercise without serving a compelling governmental purpose by the least restrictive means, the policy also fails the *Cutter* test and therefore violates the Religious Land Use and Institutionalized Persons Act.[239]

Justice Kavanaugh has already suggested one alternative that would allow inmates to freely exercise their religion upon death: allowing a spiritual advisor of any religion to accompany condemned inmates in the execution chambers during their executions.[240] As shown by

---

235. Allotting additional resources should be evaluated under *Turner*'s ready alternatives. *See supra* Section II.A.4. One must consider the financial-, labor-, and risk-costs associated with investigating additional spiritual advisors and clearing them to enter execution chambers. However, the Texas Department of Criminal Justice could be more proactive in these situations. For example, the Department could ask inmates whether they plan to request a spiritual advisor to accompany them during their execution at sentencing or when the Department sets the execution date. Implementing this procedure would give the Department time to adequately investigate spiritual advisors to ensure they would not pose any unforeseen risks during the executions they attend.

236. *Death Row Information: Scheduled Executions*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_scheduled_executions.html [https://perma.cc/L5VE-Q8SR].

237. Murphy v. Collier, 376 F. Supp. 3d 734, 735 (S.D. Tex. 2019) ("Rev. Hui-Yong Shih, also known as Gerald Sharrock, has been Murphy's TDCJ-approved spiritual advisor for six years."), *aff'd and stay denied*, 919 F.3d 913 (5th Cir. 2019), *stay granted*, 139 S. Ct. 1475 (2019).

238. *Supra* Sections 0.1–4.

239. *Supra* Sections 0.1–3.

240. *See* Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring) (outlining the relevant equal-protection remedies, which include allowing all spiritual

Murphy visiting with his spiritual advisor for the last six years,[241] Texas clearly has the resources to adequately investigate and clear its death row visitors. When condemned Texas inmates petition the Supreme Court for a writ of certiorari because they want their spiritual advisor to accompany them during their executions, the Court should grant certiorari, follow its majority opinion in *Murphy*,[242] and mandate that Texas use its resources to allow condemned inmates to exercise their constitutional right to freely express their religion during their death.

advisors into the execution room or confining them to the viewing room, regardless of their religion or employment status).

241. *Collier*, 376 F. Supp. 3d at 735.

242. *Murphy*, 139 S. Ct. at 1475.