Religious Land Use and Institutionalized Persons Act — Religious Liberty — Death Penalty — Ramirez v. Collier

Incarcerated people depend on the state for access to their most basic needs, including the ability to practice religion. Over time, Congress has added protections for their religious exercise, first with the Religious Freedom Restoration Act of 1993[1] (RFRA) and then with the Religious Land Use and Institutionalized Persons Act of 2000[2] (RLUIPA). Recently, condemned persons began litigating under RLUIPA to have spiritual advisors with them in the execution chamber.[3] Last Term, in *Ramirez v. Collier*,[4] the Supreme Court held that Texas's policy preventing a death row inmate's pastor from praying with and touching him during his execution likely violated RLUIPA.[5] But the Court's use of history in its strict scrutiny analysis incorporated an atextual inquiry that both diverges from RLUIPA jurisprudence and threatens to skew RLUIPA toward mainstream religions, undermining its neutrality. While the outcome expands religious exercise for condemned persons, the Court's overreliance on history could result in asymmetric outcomes for litigants.

In 2008, Texas sentenced John Henry Ramirez to die for the 2004 stabbing of Pablo Castro, during which Ramirez allegedly took $1.25 from the dying man.[6] Ramirez challenged his conviction, arguing that he had not committed the robbery and so should not have been convicted of murder in the course of committing or attempting to commit a robbery, a capital offense in Texas.[7] Over the following ten years, Ramirez filed multiple habeas petitions, all of which were denied.[8] Texas set Ramirez's first execution date for February 2017, at which point he moved to stay, arguing that he had received constitutionally ineffective assistance from his trial counsel.[9] As a result, Texas moved his execution date back to September 2020.[10]

In the meantime, Texas changed its execution protocol. Before 2019, Texas had allowed Christian and Muslim chaplains to enter execution

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[1] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated as applied to state and local laws by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[2] 42 U.S.C. §§ 2000cc to 2000cc-5. RLUIPA established strict scrutiny for state laws that burden religious land uses or practices of institutionalized persons. *Id.*

[3] *See, e.g.*, Dunn v. Smith, 141 S. Ct. 725 (2021) (Kagan, J., concurring in denial of application to vacate injunction); Murphy v. Collier, 139 S. Ct. 1475 (2019).

[4] 142 S. Ct. 1264 (2022).

[5] *Id.* at 1284.

[6] *Id.* at 1272–73.

[7] *See id.* (citing TEX. PENAL CODE ANN. § 19.03(a)(2) (West 2019)).

[8] *See Ex parte* Ramirez, No. WR-72,735-03, 2012 WL 4834115, at *1 (Tex. Crim. App. Oct. 10, 2012) (per curiam); Ramirez v. Stephens, No. 12-CV-410, 2015 WL 3629639, at *1 (S.D. Tex. June 10, 2015), *aff'd*, 641 F. App'x. 312 (5th Cir. 2016); Ramirez v. Davis, 780 F. App'x. 110, 114 (5th Cir. 2019).

[9] *Ramirez*, 142 S. Ct. at 1273.

[10] *Id.*

chambers.[11] But when Patrick Henry Murphy, a practicing Buddhist, sought to have his spiritual advisor enter the execution chamber, Texas refused.[12] In *Murphy v. Collier*,[13] the Court stayed Murphy's execution.[14] Texas, in turn, barred all religious advisors from the execution chamber.[15] In 2020, Ramirez challenged Texas's new protocol, arguing that it violated his First Amendment rights and RLUIPA.[16] Ramirez sought to have Pastor Dana Moore, his religious advisor, pray with him during his execution but disavowed the need for Moore to lay hands on him.[17] The litigation was dismissed without prejudice after Texas withdrew the death warrant.[18]

In February 2021, Texas set Ramirez's new execution date for September 8, 2021.[19] Following the requirements of the Prison Litigation Reform Act of 1995[20] (PLRA), Ramirez filed a Step 1 grievance again requesting Moore's presence in the execution chamber.[21] Texas initially denied the request but later amended its protocol to allow the presence of spiritual advisors.[22] On June 11, 2021, Ramirez filed a new grievance, requesting that Moore be able to lay hands on and pray over him during the execution.[23] Texas denied the grievance on July 2, and Ramirez appealed within the prison system on July 8.[24] On August 10, when Ramirez filed suit seeking a stay of execution in the Southern District of Texas, Texas still had not responded to his appeal.[25]

The district court denied the motion for a stay.[26] Applying the four-factor test from *Nken v. Holder*,[27] Judge Hittner held that Ramirez had not met his burden of demonstrating his likelihood of success on the merits for either his RLUIPA or First Amendment claims.[28] Judge Hittner found that Texas's policy changes allowed Ramirez to meet his

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[11] Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., concurring).

[12] *Id.*

[13] 139 S. Ct. 1475.

[14] *Id.* at 1475.

[15] *Ramirez*, 142 S. Ct. at 1273.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended at scattered sections of the U.S. Code).

[21] *Ramirez*, 142 S. Ct. at 1273.

[22] *Id.*

[23] *See id.* at 1274 (quoting Joint Appendix at 52–53, *Ramirez* (No. 21-5592)).

[24] *Id.*

[25] *See id.* Ramirez brought a claim under 42 U.S.C. § 1983, alleging that Texas's policy violated his rights under the First Amendment and RLUIPA. *See* Ramirez v. Collier, 558 F. Supp. 3d 437, 439–40 (S.D. Tex. 2021).

[26] *Ramirez*, 558 F. Supp. 3d at 439.

[27] 556 U.S. 418 (2009). Courts applying *Nken* consider the movant's likelihood of success on the merits, irreparable injury to the moving party absent the stay, substantial harm to other parties resulting from the stay, and the public interest. *See id.* at 425–26.

[28] *See Ramirez*, 558 F. Supp. 3d at 440–42.

religious needs and served the compelling government interest of carrying out executions in a low-risk, orderly fashion.[29] The other three *Nken* factors also weighed in Texas's favor.[30]

The Fifth Circuit affirmed in a brief per curiam order, to which each member of the panel filed a separate opinion.[31] Chief Judge Owen and Judge Dennis both agreed with the district court's finding that Ramirez had failed to establish his likelihood of success on the merits for his First Amendment claims.[32] Chief Judge Owen and Judge Higginbotham held that Ramirez had not demonstrated a likelihood of success on the merits of his RLUIPA claim.[33] Concurring, Chief Judge Owen found that Texas's interest was compelling and emphasized the similarity of the Federal Bureau of Prisons' policies.[34] She also noted that the current complaint, unlike the 2020 one, had asked for Moore to lay hands on Ramirez, suggesting that his litigation was designed to delay execution.[35] Judge Higginbotham also concurred, highlighting the complexity of execution by lethal injection and the risks posed by nonmedical contact during execution procedures.[36] He also found no alternative means for the state to achieve its compelling interest.[37] Judge Dennis dissented.[38] In his view, the Court's spiritual-advisor cases indicated that Texas's policy substantially burdened Ramirez's religious exercise, and Texas had not met its burden under RLUIPA.[39]

The Supreme Court reversed and remanded.[40] Writing for the Court, Chief Justice Roberts[41] held that Texas's policy was likely inconsistent with RLUIPA and that the other *Nken* factors merited a stay of execution.[42] He began with the PLRA's exhaustion requirement.[43] Chief Justice Roberts held that Ramirez had complied with that require-

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[29] *See id.*

[30] *See id.* at 442. Judge Hittner found that Ramirez had not shown "a possibility of irreparable injury" because he failed to demonstrate likelihood of success on the merits, and that the balance of the equities and public interest favored the state's interest in timely executing Ramirez. *Id.*

[31] Ramirez v. Collier, 10 F.4th 561 (5th Cir. 2021) (per curiam). Chief Judge Owen and Judge Higginbotham each filed concurrences. *Id.* at 561–62. Judge Dennis dissented. *Id.* at 563.

[32] *See id.* at 561 (Owen, C.J., concurring); *id.* at 565 (Dennis, J., dissenting).

[33] *See id.* at 561 (Owen, C.J., concurring); *id.* at 562–63 (Higginbotham, J., concurring).

[34] *See id.* at 561–62 (Owen, C.J., concurring).

[35] *See id.* at 562.

[36] *See id.* at 562–63 (Higginbotham, J., concurring).

[37] *See id.* at 563.

[38] *Id.* (Dennis, J., dissenting).

[39] *Id.* at 565–68 (citing Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.); Gutierrez v. Saenz, 141 S. Ct. 127 (2020) (mem.)).

[40] *Ramirez*, 142 S. Ct. at 1284.

[41] Chief Justice Roberts was joined by Justices Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett.

[42] *Ramirez*, 142 S. Ct. at 1284.

[43] *Id.* at 1275. Under the PLRA, incarcerated persons must exhaust administrative remedies within the prison system before filing suit in federal court, even in death penalty cases. *Id.*

ment by seeking informal resolution before filing his Step 1 and 2 grievances, despite Texas's claims that Ramirez had filed his grievances both too soon and too late.[44]

Chief Justice Roberts then turned to RLUIPA. He began by clarifying the burdens: A plaintiff must first show that "a prison policy 'implicates [their] religious exercise.'"[45] Once the plaintiff does, the burden shifts to the state to "'demonstrate[] that imposition of the burden on that person' is the least restrictive means of furthering a compelling governmental interest."[46] The Court held that Ramirez was likely to succeed in this showing: Texas, relying on Ramirez's 2020 complaint,[47] had argued only that Ramirez's beliefs were insincere, not that its policy failed to substantially burden them.[48] But in the Court's view, the complaint was not dispositive: the litigation had been dismissed without prejudice, Ramirez stated he would have amended the complaint, and any inconsistency was outweighed by "ample evidence" of the sincerity of his beliefs.[49]

Since Ramirez had shown that his religious practice had likely been substantially burdened, Chief Justice Roberts evaluated whether Texas had met its burden.[50] He began with audible prayer, emphasizing the "rich history of clerical prayer at the time of a prisoner's execution, dating back well before the founding of our Nation."[51] He also briefly noted that the federal government had allowed audible prayer at several recent executions.[52] Texas had set forth two compelling governmental interests: (1) the need for absolute silence to be able to monitor the administration of the lethal injection and (2) reducing the risk that the spiritual advisor would use the opportunity for prayer to make statements to observers.[53] But Texas's explanation was only "conclusory" as to the first issue, as it had not shown it was infeasible to allow audible prayer, and less restrictive options, like volume limits on audible prayer, existed.[54] As to the second, the Court found no reason to believe that Moore would cause disruptions.[55]

Chief Justice Roberts also rejected Texas's attempt to show the total ban on religious touch was the least restrictive means of furthering three

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[44] *See id.* at 1275–76, 1282–83.

[45] *Id.* at 1277 (quoting Holt v. Hobbs, 574 U.S. 352, 360 (2015)).

[46] *Id.* (alteration in original) (quoting 42 U.S.C. § 2000cc-1(a)) (citing *Holt*, 574 U.S. at 362).

[47] Brief for Respondents at 35, *Ramirez* (No. 21-5592).

[48] *Ramirez*, 142 S. Ct. at 1277–78.

[49] *Id.* at 1278.

[50] *Id.*

[51] *Id.* (citing Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Petitioner at 3–15, *Ramirez* (No. 21-5592)).

[52] *Id.* at 1279 (citing Brief for the United States as Amicus Curiae Supporting Neither Party at 24–25, *Ramirez* (No. 21-5592)).

[53] *See id.* at 1279–80 (quoting Brief for Respondents, *supra* note 47, at 46).

[54] *Id.* at 1279; *see id.* at 1280.

[55] *Id.* at 1280.

asserted interests: "security in the execution chamber, preventing unnecessary suffering, and avoiding further emotional trauma to the victim's family members."[56] Texas had erred in two respects: first, it could have achieved these interests through narrower means, like allowing touch away from sensitive IV lines; and second, it misunderstood the allocation of the burdens.[57] Texas had argued that it was Ramirez's burden to identify less restrictive means and so identified none — but this "gets things backward."[58] Finally, Chief Justice Roberts found that the other *Nken* factors also favored an injunction.[59] He also rejected Texas's argument that Ramirez had engaged in inequitable conduct and urged states to "adopt clear rules in advance" to enable "timely resolution" of RLUIPA claims.[60]

Justice Sotomayor concurred.[61] She emphasized "the interaction between prison officials' obligations to set [clear] rules" governing the presence of spiritual advisors at executions and the PLRA's exhaustion requirement.[62] For remedies to be available, procedures must "facilitate addressing execution-related claims within the timeframe of a scheduled execution."[63] This imposes a "twofold responsibility" on prison officials: First, rules must "clearly and timely" inform those facing execution of capital sentences in order to enable them to raise concerns in a timely manner.[64] Second, the administrative process ought to "proceed[] swiftly enough to permit exhaustion with sufficient time . . . to seek judicial review . . . prior to a scheduled execution."[65] In this case, the judicial record indicated Texas's failure to comply with these responsibilities, and Justice Sotomayor emphasized that the PLRA burden falls on incarcerated persons *and* prison officials to "achieve . . . timely resolution of disputes."[66]

Justice Kavanaugh also concurred.[67] First, he recounted the "recent history of litigation involving religious advisors in execution rooms."[68] Second, he addressed the difficulties of evaluating compelling interests

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[56] *Id.*

[57] *Id.* at 1280–81.

[58] *Id.* at 1281.

[59] *Id.* at 1282. Chief Justice Roberts found that Ramirez would be irreparably harmed by the denial of the ability to engage in his protected spiritual practices and that damages paid to his estate would not remedy the harm involved. *Id.* He also found that the balance of the equities and the public interest both favored Ramirez, since he sought a "tailored injunction" and RLUIPA represented Congress's expression of the public interest in not substantially burdening the religious exercise of incarcerated persons. *Id.*

[60] *Id.* at 1283.

[61] *Id.* at 1284 (Sotomayor, J., concurring).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1285.

[67] *Id.* at 1285 (Kavanaugh, J., concurring).

[68] *Id.*

in RLUIPA execution cases, arguing that the determination is inherently complex given the weighty interests in avoiding disruptions because of the "catastrophic" risks involved.[69] He praised the Court's use of history and recent experience to assess Texas's arguments in *Ramirez*.[70] Finally, he encouraged "a dose of caution" for states going forward, given the "extraordinary micromanagement of the execution room that RLUIPA has ushered in."[71]

Justice Thomas dissented.[72] He suggested that Ramirez had behaved inequitably by changing positions on the issue of religious touch and claimed this was part of a larger pattern by death penalty litigants.[73] Justice Thomas would have held that the victims' and state's interest in the timely enforcement of Ramirez's capital sentence outweighed Ramirez's interests.[74] Justice Thomas warned that the majority's test would create delays, uncertainty, and more chances for appeal.[75] Next, he suggested that Ramirez's claims were of dubious sincerity since only the grievance, which had been amended, supported his claims of faith.[76] Finally, Justice Thomas would have held that Ramirez had not complied with the PLRA's exhaustion requirement.[77]

Chief Justice Roberts's majority opinion and Justice Kavanaugh's concurrence both drew attention to the importance of history in the compelling interest analysis. America's long history of religious prayer formed the core of the majority's inquiry into whether the state's interest in preventing audible prayer at executions is compelling.[78] While *Ramirez*'s outcome is correct, given Congress's command of strict scrutiny, the Court overemphasized history while masking its underlying policy determinations. Historical practice, though useful, is out of step with RLUIPA jurisprudence and skews the law toward accommodations for religions with longer histories of acceptance in the United States, like Christianity. While the outcome is rights expansive for incarcerated persons on death row, the Court's focus on history to evaluate the compelling interests and narrow tailoring of policy choices could result in asymmetric outcomes for incarcerated persons.

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[69] *Id.* at 1287; *see also id.* at 1287–88.

[70] *See id.* at 1288.

[71] *Id.* at 1289.

[72] *Id.* (Thomas, J., dissenting).

[73] *See id.* at 1292–93. *But see* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1570–73 (2003) (discrediting the narrative that prisoners file frivolous lawsuits); U.S. COMM'N ON C.R., ENFORCING RELIGIOUS FREEDOM IN PRISON 38–39 (2008).

[74] *See Ramirez*, 142 S. Ct. at 1295 (Thomas, J., dissenting).

[75] *See id.* at 1297.

[76] *See id.* at 1297–98.

[77] *See id.* at 1299.

[78] *See id.* at 1279 (majority opinion). Recounting the history of audible prayer comprised about half of the analysis in this part of the Chief Justice's opinion; it also played an important role in the evaluation of whether Texas had narrowly tailored its policy. *See id.* at 1279–80. Because Texas had historically allowed audible prayer, the Court was unwilling to defer to the state's policy determination. *Id.*

The historical analysis the majority used in *Ramirez* is an outlier in the Court's RLUIPA jurisprudence. First, it diverged from the commonsense approach[79] used in nondeath RLUIPA cases. In *Holt v. Hobbs*,[80] one of the Court's most significant RLUIPA cases, a unanimous Court compared Arkansas's beard-length policy to its other grooming policies and considered its asserted justifications for why its policy was the least restrictive means of achieving the security interests at stake.[81] It also compared Arkansas's policy to other grooming policies.[82] But nowhere did the Court consider issues like the history of grooming regulations in prisons since the founding, nor did any Justice suggest that it would have been appropriate to do so.[83] Second, the majority opinion's analysis differed from the approach the Court has taken in RLUIPA cases involving the religious practice of condemned persons. These cases are relatively recent[84] and, until *Ramirez*, had all been resolved on the shadow docket.[85] None of the opinions used or mentioned history.[86] Rather, they all followed the commonsense approach exemplified in *Hobbs*.[87]

While elevating history may not have been the Court's intent,[88] its decision in *Ramirez* creates the risk that lower courts will take the issue of historical practice as a core inquiry, rather than as a helpful one. RLUIPA inquiries are, as the Court noted in *Ramirez*, fact specific.[89] The Court's past guidance in religious-advisor cases has been unclear, particularly since the Court decided every such case until *Ramirez* on the shadow docket without a controlling opinion.[90] And the case-by-

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[79] *See* Holt v. Hobbs, 574 U.S. 352, 355–56, 363–64 (2015).

[80] 574 U.S. 352.

[81] *See id.* at 363–67.

[82] *See id.* at 368 (quoting Procunier v. Martinez, 416 U.S. 396, 414 n.14 (1974)).

[83] In similar contexts, courts have taken the commonsense approach, rather than resorting to history. *See, e.g.*, O'Lone v. Shabazz, 482 U.S. 342, 349 (1987) (pre-RLUIPA); Williams v. Annucci, 895 F.3d 180, 191–94 (2d Cir. 2018) (post-RLUIPA).

[84] *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 557–68 (2005).

[85] *See, e.g.*, Murphy v. Collier, 139 S. Ct. 1475 (2019); *see also Ramirez*, 142 S. Ct. at 1285–86 (Kavanaugh, J., concurring) (describing cases).

[86] *See* Dunn v. Ray, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting); *Murphy*, 139. S. Ct. 1475; Gutierrez v. Saenz, 141 S. Ct. 127 (2020) (mem.); Dunn v. Smith, 141 S. Ct. 725 (2021) (Kagan, J., concurring in denial of application to vacate injunction).

[87] *See Gutierrez*, 141 S. Ct at 128; *Smith*, 141 S. Ct. at 725–26 (Kagan, J., concurring); *id.* at 726–27 (Kavanaugh, J., dissenting); *Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring); *id.* at 1483 (Alito, J., dissenting); *Ray*, 139 S. Ct. at 661–62 (Kagan, J., dissenting).

[88] That said, Justice Kavanaugh has long criticized the tiers of scrutiny as being too indeterminate and advocated replacing them with a history-and-tradition test. *See, e.g.*, Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1914–16, 1919 (2017); Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). This Term, the Court rejected tiers of scrutiny for history and tradition in Second Amendment claims. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

[89] *See Ramirez*, 142 S. Ct. at 1280, 1283.

[90] *See* cases cited *supra* note 85.

case analysis of the lower courts has often been confused.[91] The courts, already deferential to prison administrators,[92] may see the Court's emphasis on history as an additional path to rule for the state, with the burden falling on incarcerated persons who practice less historically tolerated religions.

Such overreliance on history contravenes the text and purpose of RLUIPA. Because America's history of religious tolerance is mixed at best, looking to the past to define the scope of religious freedom results in a corresponding narrowing of those rights.[93] In prisons, perhaps unsurprisingly given their history as sites of intended religious and moral reform, there has been little acceptance of practices that deviate from the mainstream.[94] States have largely been left to their own devices in regulating life in prison,[95] and "when Congress or the courts have remembered prisoners, it has been to further circumscribe their right to access the courts."[96]

As a result, the Court's use of history is regressive and limits the rights of incarcerated persons. The Court's opinion only briefly acknowledged changes in execution methods and did not mention the chasm between practices in prisons at the founding and under mass incarceration today.[97] It also did not consider the addition of laws like RFRA and RLUIPA, which have helped expand the religious rights of incarcerated persons.[98] To use the past practices of American prisons as the baseline restricts the progress that incarcerated persons can make

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[91] *See* Barrick Bollman, Note, *Deference and Prisoner Accommodations Post-*Holt*: Moving RLUIPA Toward "Strict in Theory, Strict in Fact,"* 112 NW. U. L. REV. 839, 845–48 (2018).

[92] *See* Enrique Armijo, *Belief Behind Bars: Religious Freedom in Prison, RLUIPA, and the Establishment Clause*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 297, 323 (2005).

[93] *See* Barbara A. McGraw & James T. Richardson, *Tolerance and Intolerance in the History of Religious Liberty Jurisprudence in the United States and the Implementation of RFRA and RLUIPA*, *in* SECULARIZATION, DESECULARIZATION, AND TOLERATION 233, 233–34 (Vyacheslav Karpov & Manfred Svensson eds., 2020).

[94] *See Developments in the Law — The Law of Prisons*, 115 HARV. L. REV. 1838, 1892–93 (2002).

[95] This is due in no small part to the highly deferential "legitimate penological interests" standard the Court established in *Turner v. Safley*, 482 U.S. 78 (1987). *Id.* at 89. It is both structured and applied such that reviewing courts almost always uphold the challenged regulation. *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 535–41 (2021); James E. Robertson, *The Rehnquist Court and the "*Turner*ization" of Prisoners' Rights*, 10 N.Y.C. L. REV. 97, 115 (2006).

[96] Gaubatz, *supra* note 84, at 504.

[97] *See Ramirez*, 142 S. Ct. at 1279; *id.* at 1288 (Kavanaugh, J., concurring). For a discussion of some of the means of punishment common in the pre-founding period, see generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975). For a discussion of the racist origins of the American prison system, see generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

[98] *See Developments in the Law — The Law of Prisons*, *supra* note 94, at 1894–95; U.S. COMM'N ON C.R., *supra* note 73, at 3–4, 7; Brief of Religious-Liberty Scholars Douglas Laycock et al. as Amici Curiae in Support of Petitioner at 14, *Ramirez* (No. 21-5592) [hereinafter Brief of Religious-Liberty Scholars].

using RLUIPA, and the Court offered little justification for why this ought to be the case.

The Court's use of history makes even less sense given the text and purpose of RLUIPA. First, Congress made strict scrutiny the standard for RLUIPA claims.[99] Second, the text Congress enacted intentionally went beyond the protections that courts had given incarcerated persons under RFRA.[100] Finally, Congress made clear its intent to enact broad protections for religious exercise in its "Rules of Construction," prescribing that RLUIPA "shall be construed in favor of a broad protection of religious exercise."[101] RLUIPA's text repeatedly commands broad, robust protections for the religious exercise of incarcerated persons.

By contrast, the Court's inquiry into history disfavors incarcerated persons and skews RLUIPA in favor of protecting more common American religions. The Court's analysis places the burden on plaintiffs, incarcerated persons on death row with far fewer resources and far less institutional power, to show that their religious practice has a history of accommodation. Yet RLUIPA's text places the burden on the *state* to demonstrate that its policy satisfies the strict scrutiny standard that Congress enacted — no matter the religion involved.[102] The Court's approach in *Ramirez* also skews RLUIPA against adherents of religions that arrived in the United States more recently or that have historically been discriminated against here. Where accommodations for religious practice *have* existed prior to RLUIPA, the default rules have tended to protect more common American religions. For example, prior to *Murphy*, Texas allowed Christian and Muslim religious advisors to accompany incarcerated persons to the execution chamber.[103] This suggests that religious practices with clear analogs to, say, Christian practices, would fare well under the Court's approach in *Ramirez*. While a court looking backward would likely find, as they did in *Ramirez*, a history that includes prayer at executions, that history might not include evidence of a practice like facing one's deathbed toward Mecca.[104]

The Court's recent Establishment Clause cases reveal the dangers of making history a central inquiry in RLUIPA cases. Here, history has played a central, if not outcome-determinative, role.[105] The Court has asked whether the religious activity or display in question has a long

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[99] 42 U.S.C. § 2000cc-1(a). This reaffirmed RFRA's break with the "legitimate penological interests" standard of the *Turner* regime. *Turner*, 482 U.S. at 88.

[100] *See* Brief of Religious-Liberty Scholars, *supra* note 98, at 14; U.S. COMM'N ON C.R., *supra* note 73, at 7.

[101] 42 U.S.C. § 2000cc-3(g); *see also* Brief of Religious-Liberty Scholars, *supra* note 98, at 12.

[102] *See* Gaubatz, *supra* note 84, at 544–45.

[103] *See Ramirez*, 142 S. Ct. at 1273.

[104] *See* Nabeel Sarhill et al., *The Terminally Ill Muslim: Death and Dying from the Muslim Perspective*, 18 AM. J. HOSPICE & PALLIATIVE CARE 251, 252 (2001).

[105] *See* Steven K. Green, *The Supreme Court's Ahistorical Religion Clause Historicism*, 73 BAYLOR L. REV. 505, 506–07 (2021) (citing Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 493).

history such that the state cannot be understood to have engaged in the establishment of religion.[106] While history insulates the state's practice in the Establishment Clause context, it can support an incarcerated person's rights claim in RLUIPA cases. But in both contexts, the Court's historical inquiries favor longer-accepted religions. *Ramirez* may encourage litigants to try to analogize their practices to Christian ones to gain RLUIPA's protections.[107] But not all incarcerated persons will be able to find such a close historical analog to use this strategy. Thus, while *Ramirez* represents a step forward for the protection of incarcerated persons, the Court's focus on history limits its impact.

While the decision allowed Ramirez his sought-after outcome[108] and marked a rare win for death row litigants at the Court, the Court has made it more likely that future RLUIPA cases will rely on history in evaluating the state's compelling interest. The decision risks skewing outcomes in favor of more common American religions, like Christianity, and against religions that arrived in the United States more recently or have historically been discriminated against in this country. The approach is both inconsistent with RLUIPA's commands and with the Court's precedent. And it threatens to undermine the progress that incarcerated persons who practice minority religions have been able to make under RLUIPA in the gravest of circumstances.

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[106] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987 (2022); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Town of Greece v. Galloway, 572 U.S. 565 (2014).

[107] For a pre-*Ramirez* example, see First Amended Complaint Filed Pursuant to 42 U.S.C. § 1983 at 6 & n.1, Murphy v. Collier, 423 F. Supp. 3d 355 (S.D. Tex. 2019) (No. 19-cv-01106). Other decisions this Term, like *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, may reinforce the perception that history occupies a preferred analytical position, particularly when it comes to religion.

[108] On October 5, 2022, the State of Texas executed John Henry Ramirez. María Luisa Paúl, *Texas Executes John Henry Ramirez, Who Won Religious Rights Supreme Court Case*, WASH. POST (Oct. 6, 2022, 4:36 AM), https://www.washingtonpost.com/nation/2022/10/06/john-henry-ramirez-executed-texas [https://perma.cc/62G3-KFLB]. Pastor Dana Moore placed hands on and prayed with Ramirez during the execution. *Id.*