AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Punishments: The Death Penalty

Chaplains at Executions:

**Dunn v. Ray** and **Murphy v. Collier** (2019)

*Domineque Ray was scheduled to be executed on February 7, 2019 for a rape, robbery and murder committed in 1995. Ten days before his execution, he filed a petition in the Eleventh Circuit claiming that Alabama was violating his constitutional rights by refusing to let a Muslim imam accompany him in the execution chamber. Alabama permitted death-sentenced persons to have a minister of their faith be with them in the hours leading up to the execution and then view the execution from another room, but only the chaplain employed by the prison, who had always been Christian, could be in the execution chamber. On January 23, 2019 Alabama refused Ray’s request to have the minister of his choice in the chamber. Ray filed a petition asking for relief five days later. The Court of Appeals for the Eleventh Circuit granted a stay of execution to determine whether Alabama practice violated the establishment clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. Alabama immediately asked the Supreme Court to reverse that decision and, in legal terms, “vacate” the stay.*

 *Patrick Murphy was scheduled to be executed on March 28, 2019 for the murder of a police officer in 2000. On March 20, 2019, Murphy filed a lawsuit against Bryan Collier, the executor director of the Texas, Department of Justice, claiming a constitutional right to have a Buddhist priest accompany him in the execution chamber. Texas law (as in Alabama) permitted only clerics employed by the Department of Corrections to accompany the condemned person in the execution chamber. At the time, the Department of Corrections employed only Christian and Muslim clerics. Texas on March 5, 2019 informed Murphy and his counsel of the state policy, but the state did not respond when counsel asked whether the state employed any Buddhist clerics. Both the Texas Court of Criminal Appeals and the lower federal courts refused to issue a stay. Murphy appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote vacated the stay of execution in* Dunn v. Ray*, but by a 6-3 vote in* Murphy v. Collier *granted a stay of execution. The Dunn majority consisted of the five more conservative justices, Chief Justice Roberts, Justice Kavanaugh, Justice Alito, Justice Thomas and Justice Gorsuch. They simply announced the stay was being vacated without issuing an opinion. Justice Kagan wrote a short dissent signed by the other liberals on the bench, Justices Ginsburg, Sotomayor and Breyer. The Murphy majority consisted of the four liberals, plus Roberts and Kavanaugh. Kavanaugh wrote a short opinion for the majority and a somewhat longer opinion joined by Roberts, explaining what they perceived to be the differences between Ray and Murphy. Justice Alito wrote a dissent signed by Gorsuch and Thomas. Why did Kavanaugh support the stay in* Murphy*, but not in* Dunn? *Is his argument persuasive? Should stays have been granted in both cases? Neither? Does Murphy have a “slam-dunk” religious freedom claim or is Justice Alito convincing that the argument is far more complex. What accounts for the last minute nature of these appeals? Were the death penalty lawyers gaming the system, desperate, or is it simply the case that death concentrates the legal mind wonderfully, so that the review of the case before execution is far more thorough than at any other time in the process.*

Dunn v. Ray, \_\_\_ U.S. \_\_\_ (2019)

The application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on February 6, 2019, presented to Justice THOMAS and by him referred to the Court, is granted.

On November 6, 2018, the State scheduled Domineque Ray's execution date for February 7, 2019. Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh Circuit.

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Iaa5ade682ba911e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=Iaa5ade682ba911e99a6efc60af1b5d9c), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Iaa5ade682ba911e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=Iaa5ade682ba911e99a6efc60af1b5d9c), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Iaa5ade682ba911e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=Iaa5ade682ba911e99a6efc60af1b5d9c), and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Iaa5ade682ba911e99a6efc60af1b5d9c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=Iaa5ade682ba911e99a6efc60af1b5d9c) join, dissenting from grant of application to vacate stay.

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“The clearest command of the Establishment Clause,” this Court has held, “is that one religious denomination cannot be officially preferred over another.” But the State's policy does just that. Under that policy, a Christian prisoner may have a minister of his own faith accompany him into the execution chamber to say his last rites. But if an inmate practices a different religion—whether Islam, Judaism, or any other—he may not die with a minister of his own faith by his side. That treatment goes against the Establishment Clause's core principle of denominational neutrality.

To justify such religious discrimination, the State must show that its policy is narrowly tailored to a compelling interest. I have no doubt that prison security is an interest of that kind. But the State has offered no evidence to show that its wholesale prohibition on outside spiritual advisers is necessary to achieve that goal. . . . The only evidence the State has offered is a conclusory affidavit stating that its policy “is the least restrictive means of furthering” its interest in safety and security. That is not enough to support a denominational preference.

I also see no reason to reject the Eleventh Circuit's finding that Ray brought his claim in a timely manner. The warden denied Ray's request to have his imam by his side on January 23, 2019. And Ray filed his complaint five days later, on January 28. The State contends that Ray should have known to bring his claim earlier, when his execution date was set on November 6. But the relevant statute would not have placed Ray on notice that the prison would deny his request. To the contrary, that statute provides that both the chaplain of the prison and the inmate's spiritual adviser of choice “may be present at an execution.” It makes no distinction between persons who may be present within the execution chamber and those who may enter only the viewing room. And the prison refused to give Ray a copy of its own practices and procedures (which would have made that distinction clear). So there is no reason Ray should have known, prior to January 23, that his imam would be granted less access than the Christian chaplain to the execution chamber.

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Murphy v. Collier, \_\_\_ U.S. \_\_\_ (2019)

The application for a stay of execution of sentence of death presented to Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I343dda575f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I343dda575f8811e9adfea82903531a62) and by him referred to the Court is granted. The State may not carry 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.

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I343dda575f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I343dda575f8811e9adfea82903531a62), concurring in grant of application for stay.

As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Constitution. The government may not discriminate against religion generally or against particular religious denominations. In this case, the relevant Texas policy allows a Christian or Muslim inmate to have a state-employed Christian or Muslim religious adviser present either in the execution room *or* in the adjacent viewing room. But inmates of other religious denominations—for example, Buddhist inmates such as Murphy—who want their religious adviser to be present can have the religious adviser present *only* in the viewing room and *not* in the execution room itself for their executions. In my view, the Constitution prohibits such denominational discrimination.



Statement of Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I343dda575f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I343dda575f8811e9adfea82903531a62), with whom THE CHIEF JUSTICE joins, respecting grant of application for stay.

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On April 2, five days after the Court granted a stay, Texas changed its unconstitutional policy, and it did so effective immediately. Texas now allows all religious ministers only in the viewing room and not in the execution room. The new policy solves the equal-treatment constitutional issue. And because States have a compelling interest in controlling access to the execution room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

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. . . [U]nlike Murphy, Ray did not raise an equal-treatment claim. Ray raised an Establishment Clause claim to have the State’s Christian chaplain removed from the execution room. The State of Alabama then agreed to remove the Christian chaplain, thereby mooting that . claim. . . . Ray also raised a RLUIPA claim to have his Muslim religious minister in the execution room and not just in the viewing ****room. As noted above, however, the State has a compelling interest in controlling access to the execution room, which means that an inmate likely cannot prevail on a RLUIPA or free exercise claim to have a religious minister in the execution room, as opposed to the viewing room.

To be sure, in granting Ray a stay, the Eleventh Circuit relied on an equal-treatment theory, on the idea that the State’s policy discriminated against non-Christian inmates. But Ray did not raise an equal-treatment argument in the District Court or the Eleventh Circuit. The Eleventh Circuit came up with the equal-treatment argument on its own, as the State correctly pointed out when the case later came to this Court. Given that Ray did not raise an equal-treatment argument, the Eleventh Circuit’s stay of Ray’s execution on that basis was incorrect.

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[I]n response to the Eleventh Circuit’s stay in Ray’s case, Alabama indicated to this Court that an equal-treatment problem, if there were one, would typically be remedied by removing ministers of all religions from the execution room (as Texas has now done).. That remedy would of course have done nothing for Ray, who wanted his religious minister *in the execution room*. That presumably explains why Ray raised a RLUIPA claim, but did not raise an equal-treatment claim. And that further explains why it was incorrect for the Eleventh Circuit to stay Ray’s execution on the basis of an argument (the equal-treatment theory) that was not raised by Ray and that, even if successful, would not have afforded Ray the relief he sought of having his religious minister in the execution room.

[U]nlike Ray, Murphy made his request to the State of Texas a full month before his scheduled execution. Yet the State never responded to Murphy’s request to have any Buddhist minister in the execution room. The timing of Murphy’s request, when combined with the State’s foot-dragging in response and the ease with which the State could have promptly responded and addressed this discrete issue, was relevant to the assessment of the equities for purposes of the stay. . . .

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I343dda575f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I343dda575f8811e9adfea82903531a62), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I343dda575f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I343dda575f8811e9adfea82903531a62) and Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I343dda575f8811e9adfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I343dda575f8811e9adfea82903531a62) join, dissenting from grant of application for stay.

Patrick H. Murphy, who was convicted and sentenced to death in 2003, was scheduled to be executed at 7 p.m. on March 28. Murphy’s attorneys waited until March 26 before filing this suit in Federal District Court. The complaint they filed challenges a feature of the Texas execution protocol that has been in place and on the public record since 2012. . . .

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. . . . In 2012, Texas made publicly available its policy regarding the presence of a member of the clergy in the room where ****an execution by lethal injection is carried out. Under that policy, any of the prison system’s chaplains, but no other cleric, may enter this room. Texas has more than 100 chaplains, who are either employees of or under contract with the prison system. These chaplains include Christians, Muslims, Jews, and practitioners of a Native American religion, but no Buddhist priest. . . .

On February 28, 2019, about three months after Murphy’s execution date was set, his attorneys wrote to the general counsel of the Texas Department of Criminal Justice and inquired whether Rev. Shih would be permitted to enter the execution room with their client, and on March 5, the department responded that only a chaplain is permitted in the room. Two days later, Murphy’s attorney responded and said that he believed Murphy would be satisfied with a Buddhist chaplain but that he assumed none of Texas’s chaplains were Buddhists. Texas did not respond and Murphy’s attorneys never renewed their inquiry.

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 “[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” An applicant for a stay of execution must satisfy all the traditional stay factors and therefore must show that there is “a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari,” that there is “a fair prospect that a majority of the Court will vote to reverse the judgment below,” and, in a close case, that the equities favor the granting of relief. A court must also apply “a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.”

Thus, in granting a stay in this case, the Court must have concluded that there is a reasonable probability that we will grant review of the question whether the District Court abused its discretion in finding that Murphy’s delay in raising his religious liberty claims disentitled him to the equitable remedy of a stay. We do not generally grant review of such factbound questions. But in death penalty matters, it appears, ordinary procedural rules do not apply. . . .

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By granting a stay in this case, the Court disregards the “strong equitable presumption” against the grant of such relief when the applicant unreasonably delayed in raising the underlying claims. This presumption deserves greater respect because it serves many important interests.

****First, it honors a State’s strong interest in the timely enforcement of valid judgments of its courts. . . .

Second, eleventh-hour stay requests can impair valid interests of the federal courts. When courts do not have adequate time to consider a claim, the decisionmaking process may be compromised. And last-minute applications may disrupt other important work.

Third, the hasty decisionmaking resulting from late applications may harm the interests of applicants with potentially meritorious claims. Attorneys do not serve such clients well by unduly delaying the filing of claims that hold a real prospect of relief.

Finally, the cancellation of a scheduled execution only hours before (or even after) it is scheduled to take place may inflict further emotional trauma on the family and friends of the murder victim and the affected community.

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As of at least 2013, Murphy and his attorneys knew or had reason to know everything necessary to assert the claim that the First Amendment and RLUIPA entitled him to have Rev. Shih at his side during his execution. By that date, Murphy had converted to Pure Land Buddhism, had begun to see Rev. Shih, and should have been aware of the Texas policy now at issue. Had Murphy begun to pursue his claims at that time, they could have been properly adjudicated long ago.

Even if Murphy is not held responsible for failing to act in 2013 or shortly thereafter, he and his attorneys certainly should have been spurred to action when, in November of last year, his execution date was set. Instead, his lawyers waited three months before writing to the Texas Department of Criminal Justice. How can that be justified?

Then, after receiving word on March 5 that Texas would adhere to its long-established policy, the attorneys waited three more weeks before filing suit. While they blame Texas’s failure to respond to their second e-mail for their delay, that is simply untenable. If they could not act without further communication from Texas, why did they fail to follow up with the State? . . . . This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent. By countenancing the dilatory litigation in this case, the Court, I fear, will encourage this damaging practice.

While I strongly disagree with the decision to grant a stay in this case, I recognize that Murphy, like Ray, raises serious questions under both the First Amendment and RLUIPA. Murphy argues, among other things, that Texas’s policy of admitting only authorized chaplains illegally discriminates on the basis of religion. . . .

. . . [T]there is no question that, if Murphy were not in prison, Texas could not tell him that the only cleric he could have at his side in the moments before death is one who is approved by the State. But this Court’s precedents hold that imprisonment necessarily imposes limitations on a prisoner’s constitutional rights. Under those cases, it is not enough for a prisoner to assert a claim that would succeed in the outside world. Instead, we must consider the following four factors: (1) whether a prison rule bears a “valid, rational connection to a legitimate governmental interest”; (2) “whether alternative means are open to inmates to exercise the asserted right”; (3) “what impact an accommodation of the right would have on guards, inmates, and prison resources”; and (4) “whether there are ready alternatives to the regulation.” . . .

. . . . Here, Texas argues that it must be able to regulate the members of the clergy who are allowed in the execution room in order to ensure that these individuals do not intentionally or unintentionally engage in any conduct that might interfere with an execution. Murphy responds that Texas has failed to show that this is a real concern in his case because Rev. Shih has visited him in prison without incident and because Texas had sufficient time to do whatever additional vetting and training it thinks is needed. But on the present record, we cannot tell whether this is true. Visiting a living prisoner is not the same as watching from a short distance and chanting while a lethal injection is administered. And Texas may have an interest that goes beyond interference with Murphy’s execution, namely, that allowing members of the clergy and spiritual advisers other than official chaplains to enter the execution room would set an unworkable precedent. Specifically, Texas may be concerned that if it admits any cleric other than an official chaplain, every prisoner will insist on the presence of whichever outside cleric he prefers.

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In permitting Murphy’s execution to go forward provided that *some* Buddhist priest was allowed in the execution room, the Court may perhaps be understood to have concluded that a prison need not afford a prisoner facing execution the same array of choices that he would enjoy in the outside world. But if that is the Court’s reasoning, what it shows is that the prison setting justifies important adjustments in the rules that apply outside prison walls. Determining just how far those adjustments may go is a sensitive question requiring an understanding of many factual questions that cannot be adequately decided on the thin record before us.[4](https://1.next.westlaw.com/Document/I343dda575f8811e9adfea82903531a62/View/FullText.html?navigationPath=%2FFoldering%2Fv3%2Fmgraber%3D40law.umaryland.edu%2Fhistory%2Fitems%2FdocumentNavigation%2F08b9894b-586d-403f-9cfa-c81f25b7209f%2FM5KLLuf6rNlvTlWA4SvRwdJ2Ky%606hX8ps7%60tuQha3QH7VncuQBVUuluyNOQ%60CrCRlugtrCtT59uU4AW4nRd%7Cut%7CufF3hJWPq&listSource=Foldering&list=historyDocuments&rank=3&sessionScopeId=b40f8fd5ba7b1658538527a5094bea15cce0f7702829437ac0d8f4e01a5211d2&originationContext=MyResearchHistoryDocuments&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0#co_footnote_B00052048247966)

****So far, I have discussed the prospects of Murphy’s Establishment Clause claim, but even if that claim cannot succeed, he might still prevail under RLUIPA, which was enacted by Congress to provide greater protection for religious liberty than do this Court’s First Amendment precedents. To prevail under RLUIPA, Murphy would have to show at the outset that excluding Rev. Shih would impose a substantial burden on his exercise of religion.

We have not addressed whether, under RLUIPA or its cousin, the Religious Freedom Restoration Act of 1993 (RFRA), there is a difference between a State’s interference with a religious practice that is compelled and a religious practice that is merely preferred. . . . [I]t may be that RLUIPA and RFRA do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect “any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief.”

. . . .

I will assume for present purposes that a policy like Texas’s imposes a substantial burden on *any* prisoner who seeks the presence of a cleric other than one of the official chaplains, but that does not necessarily mean that the prisoner’s RLUIPA claim would prevail. The State claims that its policy furthers its compelling interest in security and that the policy is narrowly tailored to serve that interest and in deciding whether its policy can be sustained on that basis, we would face unresolved factual questions that are similar to those discussed above. . . .

The claims raised by Murphy and Ray are important and may ultimately be held ****to have merit. But they are not simple, and they require a careful consideration of the legitimate interests of both prisoners and prisons. Prisoners should bring such claims well before their scheduled executions so that the courts can adjudicate them in the way that the claims require and deserve and so that States are afforded sufficient time to make any necessary modifications to their execution protocols.

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