

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOHN H. RAMIREZ,)
)
) Petitioner,)
)
) v.) No. 21-5592
)
BRYAN COLLIER, EXECUTIVE DIRECTOR,)
)
) TEXAS DEPARTMENT OF CRIMINAL)
)
) JUSTICE, ET AL.,)
)
) Respondents.)

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JOHN H. RAMIREZ,)

Petitioner,)

v.) No. 21-5592

BRYAN COLLIER, EXECUTIVE DIRECTOR,)

TEXAS DEPARTMENT OF CRIMINAL)

JUSTICE, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Tuesday, November 9, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 a.m.

1 APPEARANCES:

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3 the Petitioner.

4 ERIC J. FEIGIN, Deputy Solicitor General,
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6 United States, as amicus curiae, in support of
7 neither party.

8 JUDD E. STONE, II, Solicitor General, Austin, Texas;
9 on behalf of the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SETH KRETZER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	ERIC J. FEIGIN, ESQ.	
7	For the United States, as amicus	
8	curiae, in support of neither party	45
9	ORAL ARGUMENT OF:	
10	JUDD E. STONE, II, ESQ.	
11	On behalf of the Respondents	76
12	REBUTTAL ARGUMENT OF:	
13	SETH KRETZER, ESQ.	
14	On behalf of the Petitioner	103
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:17 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next today in Case 21-5592, Ramirez
5 versus Collier.

6 Mr. Kretzer.

7 ORAL ARGUMENT OF SETH KRETZER

8 ON BEHALF OF THE PETITIONER

9 MR. KRETZER: Mr. Chief Justice, and
10 may it please the Court:

11 Across Texas's 572 executions spanning
12 four decades, the State's policy was to allow a
13 spiritual advisor to be present in the execution
14 chamber to lay hands on a condemned inmate and
15 to audibly pray.

16 In 2019, that long-standing practice
17 changed suddenly when the State chose to forbid
18 any religious advisor from the execution
19 chamber. Ramirez and other inmates fought to
20 preserve their religious exercise rights to
21 spiritual advisor presence, and while these
22 challenges proceeded, the State withdrew
23 Ramirez's 2020 execution date in exchange for
24 withdrawal of his Section 1983 petition.

25 Six months later, the State reset

1 Ramirez's execution, followed two months after
2 that by a reversion to allowing in chambers
3 spiritual advisor presence. The State then
4 waited to reveal -- months more to reveal first
5 a ban on touch; only later, it banned the writ
6 -- spoken word.

7 Either the State merely delayed
8 revealing these new restrictions or, worse,
9 added them piecemeal while Ramirez sought
10 redress through the grievance system. Either
11 way, the State's actions rendered that system
12 unavailable under the PLRA. The State now
13 argues that Ramirez's resort to litigation came
14 somehow far too late but also six days too
15 early.

16 TDCJ's own history and practices, as
17 well as the current approaches of the federal
18 government and states like Alabama, prove that
19 Texas's restrictions on touch and prayer are not
20 the least restrictive means of furthering its
21 proffered execution interest.

22 Mr. Ramirez should prevail as a matter
23 of law under RLUIPA. If the Court determines,
24 however, that the State should be allowed
25 another chance to attempt to meet its burden,

1 this Court should remand for an evidentiary
2 hearing in which both sides may develop the
3 record.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Counsel, has Mr.
6 Ramirez always requested that hands be laid on
7 him?

8 MR. KRETZER: The answer to your
9 question, Justice Thomas, is that is Mr.
10 Ramirez's religious belief. There is a sentence
11 in the petition I filed in the year 2020 which
12 turned out, in light of facts ultimately learned
13 by me, to have been incorrect. That was only on
14 file for two days before the State asked me to
15 dismiss it without prejudice.

16 When the matter was refiled, and I had
17 an affidavit from Pastor Moore, it was reflected
18 appropriately. It would have been amended at
19 the time.

20 JUSTICE THOMAS: Well, I mean, that's
21 an affidavit from Pastor Moore.

22 MR. KRETZER: Yes.

23 JUSTICE THOMAS: We're talking about
24 Mr. Ramirez now.

25 If we think that Mr. Ramirez has

1 changed his request a number of times and has
2 filed last-minute complaints that, as -- and
3 that is -- and -- and -- and if we assume that
4 that's some indication of gaming the system,
5 what should we do with that with respect to
6 assessing the sincerity of his beliefs?

7 MR. KRETZER: I think, Justice Thomas,
8 you can assess the sincerity of Mr. Ramirez's
9 belief by looking at the best evidence that
10 there is in the record, which is a seriatim, one
11 handwritten, signed grievance after another
12 repeatedly requesting the same thing --

13 JUSTICE THOMAS: Yeah, but I'm --

14 MR. KRETZER: -- the ministrations of
15 Pastor Moore.

16 JUSTICE THOMAS: -- but you have
17 people filing grievances --

18 MR. KRETZER: Yes.

19 JUSTICE THOMAS: -- in non-religious
20 contexts, and that's not evidence of their
21 religious beliefs. It's evidence that,
22 obviously, they don't -- obviously don't want to
23 be executed. And they -- and in some instances,
24 they're gaming the system.

25 I guess my question is, can one's

1 repeated filing of complaints, particularly at
2 the last minute, not only be seen as evidence of
3 gaming of the system but also of the sincerity
4 of religious beliefs?

5 MR. KRETZER: Well, Justice Thomas, I
6 can certainly see how a hypothetical inmate
7 perhaps filing a last-minute such request might
8 so be construed. I can only speak as Mr.
9 Ramirez's attorney, and I do not play games.
10 There's no dilatory tactics in this case.

11 When the State set the execution date
12 in the year 2020, I filed the 1983 lawsuit, and
13 the State asked me to dismiss it without
14 prejudice. When the State filed again -- got a
15 new death warrant in the year 2020, it was only
16 -- Mr. Ramirez immediately filed grievances.
17 There was no waiting there. And the State
18 responded by handing him a copy of this new
19 policy they promulgated on April 21, 2021.

20 Mr. Ramirez has always, Justice
21 Thomas, filed these grievances within days of
22 learning -- in that case, he learned from the
23 director of chaplaincy that there would be this
24 no touch requirement that was suddenly imposed
25 in the year 2021.

1 And yet, it was the State that
2 delays -- there is, I think, a very alarming
3 intention you see in the Riley affidavit the
4 State lodged in their materials where she said
5 that as the execution date gets quicker, the
6 State regards these grievances and tries to
7 process them all the faster.

8 That's not at all what happened here,
9 Justice Thomas. Mr. Ramirez filed his request
10 in -- Level 2 grievance in July of 2021. The
11 State sat on this for six weeks, until we were
12 right on the cusp of the execution.

13 I would contend, if there's any delay
14 here, Justice Thomas, it's on the part of the
15 State. There's no insincerity as to Mr.
16 Ramirez's consistently stated beliefs, and Mr.
17 Ramirez has repeatedly asked as quickly as
18 possible for the least -- relief, as he is
19 required to, from the prison system.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Counsel, what
22 is your client's position on -- is it touch
23 anywhere on his body that will satisfy his
24 religious needs?

25 MR. KRETZER: Yes, that's correct.

1 Pastor Moore, when he lays his hands on the --
2 his congregants, can touch anywhere on the body.
3 So, for example, Pastor Moore can touch Mr.
4 Ramirez's foot, an extremity on the complete far
5 end of the body from the point at which the IV
6 line will be inserted into his arm. So, yes,
7 that would satisfy the religious exercise.

8 CHIEF JUSTICE ROBERTS: How would you
9 analyze the case -- is it -- would it be any
10 different than how you're analyzing it, in your
11 case, if the religious conviction were somewhat
12 different and the hand had to be on the
13 forehead, on the heart, something like that?

14 MR. KRETZER: I can certainly see how
15 it might be a little closer, and yet, in such a
16 religious exercise, if that was, in fact, what
17 the religious exercise generally was, such as we
18 have with Pastor Moore and his congregants, then
19 touching on the other side of the body I still
20 don't think would present a problem because
21 there's no touch anywhere near the IV.

22 For example, if the prison -- the IV
23 is in one arm and the prison doctor's ultimately
24 to touch the other arm to monitor pulse, there
25 would be no problem with Pastor Moore touching

1 that other arm. Similarly, with the head -- as
2 the heart. These are still places pretty far
3 removed, not as far away as the foot that I
4 mentioned, but still pretty far removed from the
5 point at which that IV will be injected.

6 CHIEF JUSTICE ROBERTS: Well, I don't
7 think either the hand or the heart is very far
8 removed from the IV injection site.

9 MR. KRETZER: They're obviously closer
10 to the IV injection site than the foot is. And
11 yet, I think the important point, Chief, Mr.
12 Chief Justice, is that under RLUIPA, the courts
13 are not allowed to rewrite the religious
14 exercise for the inmate so as to accommodate
15 their religious exercise, as that term is
16 narrowly defined under RLUIPA, is that as the
17 inmate and his religious precepts dictate.

18 Mr. Ramirez does not need any place
19 other on the body even closer to the IV site to
20 be touched, just the same as Mr. Ramirez's
21 religious exercise is not satisfied by what the
22 State proposes.

23 CHIEF JUSTICE ROBERTS: Right. I'm --
24 I'm trying to get a sense of your stand -- the
25 standard of review as applied in this situation

1 and how, I mean, would -- what would the
2 analysis be if, for example, his religious
3 beliefs required three -- three people to be
4 present?

5 MR. KRETZER: Yes. The -- just -- Mr.
6 Chief Justice, RLUIPA is specifically designed
7 to take these matters of religious exercise up
8 on an inmate-by-inmate basis.

9 This Court has said in several cases
10 the classic rejoinder of bureaucrats throughout
11 history, if I make an exception for you, I have
12 to make it for everyone. So no exceptions.

13 CHIEF JUSTICE ROBERTS: It's very
14 eloquent.

15 (Laughter.)

16 MR. KRETZER: It was not my words.
17 The -- the -- the logic being that this does
18 have to be taken up on an inmate-by-inmate
19 basis. If some inmate had a genuinely held,
20 sincere religious observance and it was to be
21 established that this needed to be done at a
22 particular point in the body, I guess that might
23 be a different case.

24 But, to answer your question directly,
25 the standard is exactly that from the statute,

1 to take it up on an inmate-inmate --

2 JUSTICE KAVANAUGH: That'll --

3 MR. KRETZER: -- basis instead
4 of categorically.

5 JUSTICE KAVANAUGH: -- that'll be the
6 next case, and then there will be the next case
7 after that and the next case after that where
8 people are moving the goalposts on their claims
9 in order to delay executions. At least that's
10 the State's concern.

11 And kind of four issues you need to
12 run through. Sincerity, Justice Thomas's
13 questions get at that. Substantial burden. It
14 can't just be a burden. It has to be a
15 substantial burden. And then too I want to ask
16 about compelling interest, the State's
17 compelling interest and least restrictive means.

18 So let me just focus on the compelling
19 interest because I think the State's compelling
20 interest here is challenging for us to analyze
21 because I think it is in reducing risk, risk of
22 something going wrong in the execution chamber.

23 And I think the State is saying, we
24 want the risk to be zero of a problem. That's
25 when they were excluding everyone following our

1 equal treatment principle that we enshrined in
2 -- in Murphy or enforced.

3 MR. KRETZER: Okay.

4 JUSTICE KAVANAUGH: So we want the
5 risk to be zero.

6 Now that it looks like, okay, well,
7 there has to be someone allowed in the execution
8 room, a religious minister, we want the risk to
9 be as close to zero as possible of something
10 going wrong.

11 Why isn't that a compelling interest
12 when the State says we want the risk to be as
13 close to zero as possible, and, if we allow
14 touching and -- and the like, the risk
15 increases?

16 And you might say: Ah, there's really
17 still not too much of a risk, it's okay. But
18 the State is saying: No, we want the risk to be
19 low.

20 How do we as a Court say, no,
21 actually, State, your compelling interest in
22 reducing the risk to close to zero, it's not
23 good enough, it's not compelling? How do we do
24 that?

25 MR. KRETZER: Yes, Justice Kavanaugh.

1 My answer is somewhat different than as you
2 phrased it at the end of the question.

3 I do not dispute at all the State's
4 palpable interest in having a secure
5 environment. Prisons are all about risk
6 management.

7 JUSTICE KAVANAUGH: It's about risk.

8 MR. KRETZER: Yes, I understand.

9 JUSTICE KAVANAUGH: It's about degree
10 of risk.

11 MR. KRETZER: Yes.

12 JUSTICE KAVANAUGH: And we all agree
13 in the security, and I appreciate your answer on
14 that, but the State is saying we want the risk
15 to be really close to zero of a problem.

16 And you're saying you can do this and
17 without a problem, and the State's saying that
18 increases the risk of a problem. And I don't
19 think you can dispute that. It does increase
20 the risk of a problem some. But you can -- you
21 might want to respond to that.

22 MR. KRETZER: My answer, Justice
23 Kavanaugh, would be this: I mean, risk, as a
24 statistical matter, is based in empirical data.
25 We have a vast empirical dataset of hundreds of

1 executions --

2 JUSTICE KAVANAUGH: That --

3 MR. KRETZER: -- spanning four
4 decades.

5 JUSTICE KAVANAUGH: I'm sorry, that
6 doesn't -- that doesn't move me at all because
7 those were state chaplains who were officials of
8 the state, which was the whole point, right?
9 That's what created the equal treatment problem
10 to begin with. Those were largely Christian,
11 right?

12 MR. KRETZER: Yes.

13 JUSTICE KAVANAUGH: And that created
14 the equal treatment problem. So that doesn't
15 work.

16 What they're worried about is someone
17 from the outside coming in, and you never know.
18 And it's a very fraught -- Judge Higginbotham's
19 concurrence is a very fraught situation with a
20 lot of potential for issues. At least the State
21 thinks so.

22 And I don't know how we, sitting here
23 -- we haven't -- we're not in the execution
24 room, we don't know -- how we can question the
25 State's interest in keeping the risk of a

1 problem close to zero.

2 I think you're saying, ah, the risk
3 isn't that much. But how do we analyze that?

4 MR. KRETZER: Well, the answer,
5 Justice Kavanaugh, is that while I certainly
6 understand the State's logic, we hire the
7 prison-employed chaplains, ergo, we could fire
8 them or not renew their contract, there are
9 substantial laws on the books in every state
10 criminalizing interference with a law
11 enforcement officer in the disposition of his
12 duties.

13 There is not a single example in
14 history where any spiritual advisor -- and the
15 state allowed these, you know, as a matter of
16 course -- has ever interrupted a proceeding.

17 What the State can do, to answer your
18 question directly, Justice Kavanaugh, is exactly
19 that which Pastor Moore did. He went and drove
20 hundreds of miles to visit with these folks at a
21 particular location. He signed a penalty-backed
22 pledge.

23 We know the State believes that Pastor
24 Moore was safe to be in the execution chamber.
25 On September 8, the execution leading up to when

1 this Court granted the stay, he sat there all
2 day. We know the State --

3 JUSTICE KAVANAUGH: Can I -- that's
4 about the facts of this case, and I understand
5 it, but I was asking a case -- we're going to --
6 you know, if we rule in your favor here, this is
7 going to be a heavy part of our docket for years
8 to come, would be my sense given the history of
9 death penalty litigation, which we'll -- we'll
10 deal with as it comes.

11 But, on least restrictive
12 alternatives, I want to ask about that. Your
13 basic point on that is, if another state does
14 it, that helps show that there's a less
15 restrictive alternative.

16 And I guess what if a state allows, to
17 the -- use the Chief Justice's example, multiple
18 people in the room? Does that mean every state
19 has to do it?

20 MR. KRETZER: No.

21 JUSTICE KAVANAUGH: If the -- your
22 answer is no to that?

23 MR. KRETZER: Okay. Yes, my answer to
24 that would be no. Under RLUIPA --

25 JUSTICE KAVANAUGH: Okay. And how

1 about if another state allows bread and wine in
2 the execution room right before the execution?
3 Does every state have to do that because it's a
4 less restrictive alternative?

5 MR. KRETZER: No, there is not a, I
6 don't know -- greatest common denominator or
7 least common denominator.

8 JUSTICE KAVANAUGH: And if -- and if
9 another state allows the minister to kind of hug
10 the inmate, does every other state have to do
11 that?

12 MR. KRETZER: No. One state doing a
13 first mover does not calibrate a national
14 standard ipso facto.

15 JUSTICE KAVANAUGH: And why -- how
16 could we as a Court say actually two people no,
17 one person yes? Like, what neutral principle
18 are we relying on there when other states do it
19 and we say, well, other states do it, but that's
20 not the least restrictive alternative?

21 MR. KRETZER: Justice Kavanaugh, I
22 don't think there will be a micromanagement
23 problem. No one is asking federal courts to
24 micromanage.

25 I think the issue will remain that you

1 will still have most recent national standards
2 as demonstrated -- maybe not national
3 standard -- empirical basis, what we see the
4 federal government did just last year, and the
5 State of Alabama has changed its rules just in
6 the last six months and carried out such an
7 execution only two weeks ago.

8 And I -- perhaps I could point out the
9 State of Alabama actually affords more religious
10 exercise in that execution of Willie Smith --

11 JUSTICE KAVANAUGH: That's --

12 MR. KRETZER: -- than Mr. Ramirez's
13 question.

14 JUSTICE KAVANAUGH: -- you're making
15 the argument that I'm -- that I'm a bit
16 concerned about. And you -- you make strong
17 arguments, so I'm not -- I'm just testing them
18 here.

19 The argument I'm concerned about is,
20 once you get one state doing this, every other
21 state has to follow. And then, when you get the
22 two -- you know, I've already -- already said
23 it. And you citing Alabama from two weeks ago,
24 that's going to happen over and over over the
25 next few years, I would imagine -- maybe not --

1 where states are being sued by inmates in the
2 last days before an execution saying: Another
3 state does it different. I want this.

4 Now how do we deal with that?

5 MR. KRETZER: Sure. Under RLUIPA, a
6 state certainly can get to some point where they
7 have inhibitions greater than perhaps their
8 sister states. But, if a state wants to do
9 that, they would have to show evidence in the
10 record when the burden shift. After the
11 plaintiff satisfied his first prong under
12 RLUIPA, they would have to show that we studied
13 this issue or we come to a conclusion, an
14 informed conclusion, that we need to reach a
15 different result.

16 In the Ramirez case, there was no
17 evidence of risk put into the record. If a
18 state like Texas and if this Court --

19 JUSTICE KAVANAUGH: Well, the risk is
20 inherent in having another person in the room, I
21 think, but you're not saying we can -- if we
22 rule for you in this case, the concern about
23 future litigation would go away if you're saying
24 there's kind of a bright line because there's a
25 historical practice of audible prayer and

1 touching, but we're not looking for anything
2 else in the execution room.

3 But you can't say that, can you?

4 MR. KRETZER: I don't know that I --
5 that I would agree with that, Justice Kavanaugh,
6 respectfully, because I think perhaps what the
7 State has done here is recreated, they've come
8 full circle, back to the same issue which
9 impelled the opinion in Murphy, by which I mean,
10 if TDCJ chaplains, those employees, are able to
11 touch and pray, and now there's a new rule the
12 State has so told us in -- in a seriatim fashion
13 last summer that the outside non-TDCJ employees
14 are not allowed to touch and pray, now you have
15 a new form of denominational discrimination.

16 JUSTICE ALITO: But out -- over the
17 last couple of years, we have had a whole series
18 of stay applications that present issues that
19 are related to the one that is presented here,
20 and each one has been different. Like virtually
21 every application for a stay of execution, they
22 come to us at the last minute, the day before,
23 sometimes the day of. And what you have said so
24 far suggests to me that we can look forward to
25 an unending stream of variations.

1 So you would be satisfied -- you have
2 told us you would be satisfied if Pastor Moore
3 touches Mr. Ramirez's foot. But what's going to
4 happen when the next prisoner says that I have a
5 religious belief that he should touch my knee?
6 He should hold my hand? He should put his hand
7 over my heart? He should be able to put his
8 hand on my head? We're going to have to go
9 through the whole human anatomy with a series of
10 -- of cases.

11 And you haven't said anything about
12 what you want exactly with respect to audible
13 prayer. What type of prayer? When? How loud?
14 What exactly do you want to start out with?

15 MR. KRETZER: Yes, let me touch --
16 Justice Alito, start with audible prayer. Yes,
17 prayer, as we can -- should be non-disruptive,
18 audible prayer in the ordinary style of how
19 people pray.

20 When, to answer your question
21 directly, Justice Alito, is after the in -- the
22 -- the pastor and the warden come in together
23 after the drug team has already inserted the IV
24 line. So --

25 JUSTICE ALITO: And you want it

1 throughout the execution? You want it up to the
2 point where the prisoner loses consciousness or
3 dies?

4 MR. KRETZER: Yes. The pastor can
5 step away. What they agreed to do in Alabama is
6 before -- after the prisoner passes, when the
7 conscious -- the pastor steps away when the
8 consciousness assessment is performed and then
9 remains when the drapes are closed and removal
10 and so forth.

11 So the prayer, to answer your
12 question, Justice Alito, yes, would be after the
13 -- the lethal injection begins and then until --

14 JUSTICE ALITO: Okay. Well, that's --

15 MR. KRETZER: -- the point in time he
16 passes in a non-disruptive way.

17 JUSTICE ALITO: -- that's helpful.

18 So can you -- can you say anything to
19 us to relieve us of the fear that we are going
20 to get an unending stream of variations about
21 both of these things, about touching different
22 parts of the body, about the type of prayer, the
23 -- the singing, chanting, number of people in
24 the room? Are we just -- is this just what's
25 going to happen?

1 The lower courts are going to have to
2 deal with this on the eve of every execution,
3 and we're going to get these at the very last
4 minute and have to decide them. The difference
5 between the -- the factual information presented
6 to us in these briefs and what we received in
7 all of the previous stay applications is like
8 night and day.

9 MR. KRETZER: Well, Justice Alito, I
10 could talk about timing, and then I'll switch in
11 just a second.

12 With regard to timing, in Mr.
13 Ramirez's case, the 1983 petition was filed a
14 month in advance of the execution date, and the
15 district judge entered a scheduling order when
16 the motion for stay would be filed, the
17 response/reply. So all those proceeded very
18 much apace, and the Fifth Circuit ruled within a
19 few days. So everything proceeded here on a
20 listed schedule.

21 When we go --

22 JUSTICE ALITO: Well, how far in
23 advance of the execution did it come here?

24 MR. KRETZER: The Fifth Circuit, I
25 believe their opinion issued on Labor Day. The

1 Court was obviously -- early that morning. I
2 wrote the stay application the following day.
3 The next day, the State responded, and I filed
4 the reply that same day. So it all --

5 JUSTICE ALITO: And when was the --
6 how far in advance of the execution date was
7 that?

8 MR. KRETZER: I believe the execution
9 date's a Tuesday, was -- the 8th was a Tuesday
10 -- I don't have a calendar in front of me -- but
11 I believe that was correct. So I filed -- no,
12 it was the 7th. So I -- the Fifth Circuit
13 opinion issued on the 6th, the stay application
14 was filed on the 7th, the State responded in the
15 middle of the day of the 8th, and the reply was
16 filed later that same day.

17 JUSTICE ALITO: Well, we get these at
18 the very last minute, and we're going to
19 continue to get them at the very last minute.

20 MR. KRETZER: Well, I don't know that
21 -- Justice Alito, that you necessarily -- I -- I
22 don't know that you necessarily will get them at
23 the last minute. I think it has to be
24 remembered that Mr. Ramirez, starting back when
25 his execution was first scheduled, started to

1 file Step 1, Step 2 grievances. Then the State
2 changed their policy. The State then proceeded
3 to list these restrictions in seriatim in this
4 piecemeal fashion that came from a letter from
5 the general counsel and so forth.

6 If the State is so worried about these
7 things coming up in the last minute, all they
8 have to do is actually tell us what the rules
9 are. In other words, there's not a single thing
10 in the prison manual that anyone can see or in
11 the form that Pastor Moore was told to sign that
12 says what he could or could not do. If the
13 State would simply tell us what they want
14 instead of having -- make us try to figure out
15 by guessing, these would not --

16 JUSTICE ALITO: All right. Well, we
17 can --

18 MR. KRETZER: -- present so late.

19 JUSTICE ALITO: -- you know, you and
20 -- and -- and Texas can argue about who did what
21 when and all of that, and it's relevant to some
22 of the issues.

23 But, to get back to my point about the
24 unending stream of variations, I -- I take it
25 what you said is, well, each one of these is

1 different, factually different; prisoners have
2 different religious beliefs; each one has to be
3 analyzed separately.

4 MR. KRETZER: Well --

5 JUSTICE ALITO: Different states,
6 different execution chambers, different sizes,
7 different religious beliefs, each one will
8 present its own unique question.

9 MR. KRETZER: Justice Alito, I'm sorry
10 --

11 JUSTICE ALITO: Maybe that's the way
12 it has to be.

13 MR. KRETZER: Justice Alito, I mean,
14 I'm certainly no expert on religion. I don't
15 know all the religions in the world, but I think
16 similar concerns voiced in this Court in the
17 early Religious Freedom Restoration Act cases,
18 in the Church of Lukumi and so forth, no -- even
19 in the Holt v. Hobbs case, the question was
20 specifically asked: Are these issues going to
21 bubble up one half-an-inch beard at a time?

22 They're not going to present in that
23 order. I don't think any religion has striated
24 that there must be a touch on this particular
25 piece of the body. What we're talking about

1 here is a laying-on-of-hands doctrine that the
2 minister does with all of his congregants as
3 they're nearing the point in time that they die.

4 If some other inmate has a
5 well-established, sincerely held belief and that
6 can be -- bear their burden under RLUIPA on the
7 first prong, then perhaps that will be or it
8 will not be their --

9 JUSTICE ALITO: Well, do you think in
10 -- in RLUIPA a court can say you are whatever,
11 you are a -- a Catholic, and so I am going to
12 see what the teaching of the Catholic Church is
13 on this question? Is that the way this is --
14 this is resolved? Or --

15 MR. KRETZER: No.

16 JUSTICE ALITO: -- can the prisoner
17 say, well, yes, I'm a Catholic, but I have my
18 own personal beliefs about this? Would we not
19 have to honor that person's own sincere,
20 individual, perhaps unique religious beliefs?
21 Isn't that the way RLUIPA works?

22 MR. KRETZER: To answer your question,
23 the first part of your question, Justice Alito,
24 no, the -- what you said is exactly opposite to
25 RLUIPA. No, you cannot inquire as to the

1 centrality or ultimate correctness theologically
2 of a --

3 JUSTICE ALITO: Right.

4 MR. KRETZER: -- sincerely held
5 religious belief. I think the point was made in
6 the Tenth Circuit in Yellowbear that the
7 question for federal district courts in that
8 first prong of RLUIPA is really just, is the
9 inmate trying to perpetrate a fraud on the
10 court? Are they lying to try to get some
11 benefit they would otherwise not be entitled to
12 in the secular context?

13 Once they do that, the burden shifts
14 to the state. RLUIPA is written this way. And
15 all the equities, the victims and so forth, were
16 all taken into account and cognized by Congress
17 in the statute passed nearly unanimously over 20
18 years ago.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: No, Chief.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer?

25 Justice Alito? No?

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: Counsel, under the
3 Turner standard, a generalized security interest
4 would have been enough to defeat a claim.
5 RLUIPA changed that, and whether we like it or
6 not, it requires the state to address each
7 individual person's need. And a risk analysis
8 that talks generally about a compelling need is
9 not -- not the standard that RLUIPA sets. The
10 standard is, is something that you're proposing
11 going to interfere with this execution?

12 Now I looked at the pictures that I
13 was provided, and the other side gave a bunch of
14 reasons. They said it'll block the view. But I
15 saw the picture of the prison, and the window at
16 least by the foot doesn't block the view. So
17 where you want to stand is not going to block
18 the view.

19 They have fears that a unknown pastor
20 could -- and this goes to Justice Kavanaugh's
21 concern -- that an unknown pastor could go to
22 the IV line, could go to the manacles, et
23 cetera. But the manacles are nowhere near
24 there. The minister has a person standing with
25 him.

1 I'm assuming that your argument is
2 that every security risk they present is just
3 not presented by these facts, correct?

4 MR. KRETZER: Correct, yes.

5 JUSTICE SOTOMAYOR: And going back to
6 the response that Justice Kavanaugh and Justice
7 Alito have expressed, it's not us that have to
8 worry about the individualized treatment.
9 Congress has told us that that's what
10 petitioners are entitled to, correct?

11 MR. KRETZER: Yes.

12 JUSTICE SOTOMAYOR: And prisons have
13 to work in good faith to accommodate those
14 needs?

15 MR. KRETZER: They're supposed to,
16 yes.

17 JUSTICE SOTOMAYOR: They waited a
18 month to tell you -- six weeks to tell you they
19 wouldn't permit the touching or praying. That's
20 not working in good faith is what you're saying?

21 MR. KRETZER: I never heard, Justice
22 Sotomayor, a word about no prayer until I got
23 that letter on August 19th.

24 JUSTICE SOTOMAYOR: All right. So
25 they can say what it is early and tell people,

1 if you have an objection, come in and tell us
2 what you need within a certain amount of time,
3 correct?

4 MR. KRETZER: Yes.

5 JUSTICE SOTOMAYOR: That's what you've
6 said?

7 MR. KRETZER: Yes.

8 JUSTICE SOTOMAYOR: So they can avoid
9 last-minute requests by simply setting
10 reasonable guidelines, correct?

11 MR. KRETZER: They could, yes.

12 JUSTICE SOTOMAYOR: And acting
13 expeditiously?

14 MR. KRETZER: Yes.

15 JUSTICE SOTOMAYOR: They're the ones
16 who waited close to the execution date, correct?

17 MR. KRETZER: Yes, Justice --

18 JUSTICE SOTOMAYOR: That's your point?

19 MR. KRETZER: Yes.

20 JUSTICE SOTOMAYOR: All right. Thank
21 you, counsel.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?
23 Justice Gorsuch, anything further?
24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: I do have several

1 questions. Judge Higginbotham said in his
2 concurring opinion: "While lethal injection may
3 seem straightforward, the actual administration
4 of the drugs and pronouncement of death is both
5 delicate and fraught with difficulties, as
6 evidenced by the responses of regulatory bodies
7 and the experience of this Court with mishaps in
8 execution by lethal injection.

9 "In short, the complexities attending
10 the administration of drugs in the execution
11 procedure and its failures expose the risks of
12 non-medical hands on the body of a person
13 undergoing the procedure."

14 Why do you think Judge Higginbotham's
15 wrong?

16 MR. KRETZER: Well, it's not that I
17 think he's wrong, Justice Kavanaugh. These --
18 Pastor Moore is definitionally not a doctor.
19 His hands would be on the body. So, in that
20 sense, his -- you know, it would be non-medical
21 hands on the body.

22 The way Judge Higginbotham construed
23 it, though, was no hands means no hands. It's a
24 direct quote, I believe, from his opinion. And
25 yet, we know that that would not be true under

1 the State's own logic with a TDCJ chaplain who
2 has touched the -- I believe there's testimony
3 that he touched the leg, the calf, so forth, for
4 years.

5 JUSTICE KAVANAUGH: And that goes to
6 the risk question that I talked about earlier
7 because that person has been an employee.

8 But second question. On sincerity, to
9 follow up on Justice Alito's questions, this is
10 a potential huge area of future litigation
11 across a lot of areas, sincerity of religious
12 claims, and how do we -- how do we question
13 those?

14 Some things that people have talked
15 about are the incentives someone might have to
16 be insincere, behavioral inconsistencies --
17 Justice Thomas's questions got at that with the
18 complaint -- the religious tradition of the
19 practice.

20 Are those -- what do we look at to
21 check sincerity? Because that's a very awkward
22 thing for a judge to do to say: I want to look
23 into the sincerity of your claim, but our case
24 law says we must do that.

25 MR. KRETZER: Well, Justice --

1 JUSTICE KAVANAUGH: How do we do that?

2 MR. KRETZER: Yes, Justice Kavanaugh.

3 I would argue, yes, while federal judges, as --
4 you know, obviously would be very worried to
5 look at the religiosity, the correctness of the
6 religious aspects of the claim, federal district
7 courts judge sincerity, in a manner of speaking,
8 all the time. Credibility determinations are
9 made by district judges in every motion to
10 suppress.

11 JUSTICE KAVANAUGH: It's a -- it's a
12 little more awkward, I think you would admit,
13 for a judge to tell someone you're claiming that
14 you believe this is a matter of religion, but I
15 think you're lying. That's -- that's hard to
16 do. Do you agree with that?

17 MR. KRETZER: Well, I don't know that
18 I do, Justice Kavanaugh. I mean, district
19 judges have to, unfortunately, say they believe
20 in a suppression hearing, for example, a case
21 agent or any other manner of law enforcement
22 witness is not telling the truth.

23 Many experts testify in white collar
24 cases on causality. Experts -- people have to
25 testify about things all the time in a district

1 court on a Daubert challenge, for example, has
2 to decide whether or not it's sincere.

3 Maybe not sincere as to religious
4 beliefs to be sure. It might be a somewhat more
5 rare circumstance. But those sort of
6 credibility determinations are made on a daily
7 basis in federal courts in this country.

8 JUSTICE KAVANAUGH: Okay. Two more.
9 Sorry, I'll try to be succinct.

10 Justice Sotomayor is quite right in
11 saying that Congress put this standard in place,
12 the strict scrutiny standard. I think the
13 difficulty of applying it's one of the reasons
14 some of us in -- in *Fulton* had concerns about
15 what might replace *Smith*.

16 And this case is a good illustration,
17 I think, of the problems that can arise trying
18 to apply a strict scrutiny standard. But just
19 on the relationship of compelling interests
20 versus least restrictive alternative, and when
21 it goes to risk, I mean, I'm still having
22 problems with they're saying we should keep the
23 risk to zero, and you're saying, no, you should
24 tolerate a little more risk because Alabama does
25 it.

1 MR. KRETZER: No, just --

2 JUSTICE KAVANAUGH: And -- and -- or
3 because other states do it. And I just, as a
4 judge, don't know. You might be right. They
5 might be right. I don't know of a neutral
6 principle, how to -- how to resolve that where
7 they're saying we want the risk lower, we want
8 the risk to be lower than our next-door -- or
9 the state -- state -- another state.

10 MR. KRETZER: Justice Kavanaugh, I
11 think I'd have to very respectfully disagree
12 with the premise of that last part of the
13 question, which is that a non-TDCJ-employed
14 chaplain necessarily carries with him some
15 appreciable additional level of risk.

16 I can say I attach --

17 JUSTICE KAVANAUGH: Okay. Can I stop
18 you right there? I don't see how you can say
19 that.

20 MR. KRETZER: Okay.

21 JUSTICE KAVANAUGH: There's another
22 human being, to go back to Judge Higginbotham,
23 in the execution room in about the most fraught
24 situation anyone can imagine, especially if the
25 person is, by definition, close to the inmate,

1 spiritually, friends, and they're about to die
2 and be put to death.

3 And the idea that we can predict how
4 another human being will react in that situation
5 and be sure, as you're saying, that the person's
6 not going to react in a way that they would
7 never react in any other situation, I just don't
8 -- I don't know. You might be right, and -- and
9 we'll see, I guess, if -- if you prevail here,
10 how -- how this plays out.

11 But I'm -- as a -- it's not my
12 decision, and as a judge, I don't know how I
13 prioritize your assessment of that over the
14 State's.

15 MR. KRETZER: Well, the way I can say
16 that, to answer your question, Justice
17 Kavanaugh, you asked me how I can say that.

18 The way I can say that is that it is
19 incredibly well documented, every single time
20 anyone, a minister, a reporter, or anybody else
21 goes to see a prisoner, Pastor Moore has been
22 going to see, for example, Mr. Ramirez for five
23 years, longer than I've been his lawyer --

24 JUSTICE KAVANAUGH: I'm not
25 questioning --

1 MR. KRETZER: -- there's never been an
2 incident.

3 JUSTICE KAVANAUGH: I'm sorry to
4 interrupt. I'm not questioning the current
5 pastor at all involved in this case, so I don't
6 mean to do that.

7 And the last question, I'll finish
8 with this, is just the victims. I mean, we
9 haven't mentioned -- we've gone a long time and
10 we haven't mentioned the victim's family, who
11 filed a brief here, and they've had to go
12 through now four-and-a-half years of postponed
13 executions.

14 And their brief says: "In Maria's
15 eyes, Ramirez gets all this publicity like he
16 just won a gold medal, while she and her family
17 are going through all this pain and suffering
18 each time they're told Ramirez will be executed,
19 only to have the courts put a hold on it."

20 You know, we -- we have to think about
21 the -- the victim's family members too with
22 this, oh, it's going to be a stay here and a
23 stay there and a stay there and each time
24 they're -- they're -- they're brought to the
25 execution room decades after the -- the crime,

1 where their father was, you know, beaten to
2 death and stabbed to death in a parking lot.

3 I mean, I just think we -- that's all
4 by way of saying that as a legal point to it, if
5 we're going to rule for you, I think we need
6 some clear lines so, as Justice Alito says,
7 we're not putting future victims' families in
8 the same position of time after time having
9 these delays.

10 MR. KRETZER: Justice Kavanaugh, I
11 have nothing but the greatest sympathy for the
12 family of Pablo Castro. I grieve for them. I
13 feel horribly for their loss.

14 Victims certainly do have an interest
15 in -- public interest in the proceedings and
16 finality of executions of judgment and so forth.
17 All those victims' interests were specifically
18 taken into account by Congress when it passed
19 the RLUIPA.

20 And that was not even a newfangled
21 concept 20 years ago some now when the RLUIPA
22 was passed. The brief the amicus of the Becket
23 Fund filed where they showed the historical
24 examples of where pastoral spiritual guidance
25 has been given throughout history to people as

1 risible as the Nazis, and the point was made it
2 was not a luxury afforded for who those people
3 were but something that religion affords in
4 larger society because of who the society is.

5 And Congress accounted for all of that
6 when it passed the statute, and that's how the
7 equities are to be balanced out.

8 JUSTICE KAVANAUGH: Thank you. I
9 appreciate your good answers. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: I just have one
13 question. So Justice Kavanaugh has been asking
14 you about how strict scrutiny would apply here,
15 and Justice Kavanaugh said that the compelling
16 interest that the State has is in the reduction
17 of risk because, understandably, the State wants
18 that risk to be zero because the consequences of
19 a botched execution are quite high.

20 I think how we define the compelling
21 interest matters a lot for how the strict
22 scrutiny analysis pays out. So I'm just
23 wondering how you would characterize the State's
24 interests. Would you characterize it the way
25 that Justice Kavanaugh does, or do you have a

1 different articulation of how you think the
2 compelling interest should be described?

3 MR. KRETZER: I think I would
4 characterize it, respectfully, slightly
5 differently than Justice Kavanaugh did, Justice
6 Barrett, and that is that the compelling
7 interest is in a execution that is done in the
8 humane way, in the safe way, for all the
9 circumstances that have been discussed here and
10 further in the briefs.

11 If the State, though, is going to --
12 the compelling interest, to answer your question
13 directly, is directed towards how they have
14 chose to frame the execution, the -- for
15 instance, the size of the execution chamber.
16 The prison chose the size of that execution
17 chamber. Under RLUIPA, a prison entity can be
18 required to spend --

19 JUSTICE BARRETT: Well, that's not --

20 MR. KRETZER: -- some money to
21 alleviate --

22 JUSTICE BARRETT: -- the compelling
23 interest, right? That -- that -- that goes to
24 how the State is structuring the execution and
25 how it chooses to carry it out.

1 I mean, the compelling interest may be
2 prison security or, you know, as you say, the
3 humanity -- carrying -- carrying out the
4 execution in a humane and -- and safe way. But
5 the size of the execution chamber, I don't
6 think, is the compelling interest, right?

7 MR. KRETZER: No, I would agree. The
8 compelling interest is in the safety of -- I
9 mean, that's what prisons do. They're risk
10 management operations.

11 I guess one could construct a
12 perfectly safe operation where no one --
13 lawyers, reporters, anybody -- was ever allowed
14 to see an inmate. Prisons are tasked with
15 managing risk. One has to show the ID and a
16 background check and paperwork and so forth,
17 which the State is free to and did and is doing,
18 of any pastor who wants to come in for these
19 circumstances.

20 So, yes, the State absolutely has a
21 compelling interest. I embrace it completely.
22 And yet, that compelling interest, if they're
23 going to then go to the next step, the State,
24 it's not that they could not necessarily do
25 something different than other states or the

1 federal government is doing, but --

2 JUSTICE BARRETT: But you're talking
3 about least restrictive alternatives.

4 MR. KRETZER: Okay.

5 JUSTICE BARRETT: I just wanted to
6 know --

7 MR. KRETZER: Okay, yes.

8 JUSTICE BARRETT: -- about compelling
9 interests. You answered the question. Thank
10 you very much.

11 MR. KRETZER: Yes.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Feigin.

15 ORAL ARGUMENT OF ERIC J. FEIGIN FOR
16 THE UNITED STATES, AS AMICUS CURIAE

17 MR. FEIGIN: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 As the submissions to this Court,
20 including today, reflect, there are continuing
21 factual disputes on many issues that we think
22 ultimately warrant a remand. And we'd like to
23 think that better explaining the federal
24 experience may be helpful for further review.

25 We agree that Texas can vindicate its

1 compelling interests by substantially limiting
2 physical contact with the inmate and
3 vocalization by a spiritual advisor in the
4 highly choreographed and sensitive execution
5 procedure.

6 But our recent experiences suggest
7 that a categorical ban, like Texas appears to
8 have, isn't the least restrictive means for
9 doing so. To justify such a ban, Texas would
10 have to offer -- its experts would have to offer
11 state-specific reasons why it's necessary.

12 I -- I'm happy to take the Court's
13 questions, but one way in which I might be a
14 little helpful is just to tease apart the word
15 "execution," which I think is just used as an
16 overarching term in both some of the briefing
17 and in -- especially in media reports.

18 There are really two relevant phases
19 that occur when both the inmate and his
20 spiritual advisor are in the execution chamber
21 together, separated by before the drugs are
22 administered and during the administration of
23 the drugs. And, obviously, the second part,
24 which, in our experience, takes about five to
25 eight minutes, is the more sensitive portion of

1 the procedure.

2 So we do think it's helpful to think
3 about this case in terms of maybe a little bit
4 like a box. He's making two claims, one for
5 physical contact, one for vocalization. And
6 there are two parts, as relevant here, of the
7 procedure, one before the drug and one during
8 the drug.

9 We think Texas has a very strong
10 argument to resist physical contact during the
11 administration of the drug, and we have not
12 allowed that.

13 We think, conversely, that Petitioner
14 has a fairly strong argument that -- for
15 vocalization before the administration of the
16 drug. In fact, if you look at page 16a,
17 paragraph 11 of the Lumpkin declaration, I don't
18 think they even really address why they couldn't
19 accommodate that.

20 And then the other two boxes,
21 vocalization during the administration of the
22 drug -- and I can talk a little bit more about
23 that later -- and physical contact before
24 administration of the drug are a little bit more
25 indeterminate and could benefit from some

1 further factual findings.

2 I apologize, Justice Thomas. You
3 appeared to want to ask a question.

4 JUSTICE THOMAS: Well, I think you're
5 -- you've come close to answering it because I'm
6 interested in what would be precisely in this
7 context the State of Texas -- I know you've
8 generically talked about it -- what would be the
9 least restrictive means in this case?

10 MR. FEIGIN: Well, Your Honor, I can't
11 answer that question definitively, in part
12 because I -- I really do think it depends on
13 some factual circumstances that I don't know and
14 certainly aren't in the record.

15 I can share what the federal
16 experience has revealed. We have -- although it
17 isn't the way we would have necessarily ideally
18 set up the procedure, we've allowed vocalization
19 essentially throughout. Obviously, someone
20 can't interrupt the marshal while they're
21 announcing the judgment or when something --
22 someone else is speaking. But we've allowed
23 vocalization essentially throughout, through
24 both phases of the execution. And we've allowed
25 physical contact one time briefly before the

1 execution -- before the administration of the
2 drugs began.

3 In every instance where we've had a
4 spiritual advisor in the chamber, the spiritual
5 advisor has been well away from the inmate as
6 the drugs are actually administered.

7 JUSTICE THOMAS: So do you -- and the
8 next claim would be, you know, obviously, a
9 little more contact. But I want to ask you
10 something that's different, okay?

11 So we have RFRA and we have RLUIPA,
12 and the -- we normally, in RFRA -- under RFRA,
13 would rarely discuss the sincerity of beliefs.

14 Is that analysis different under
15 RLUIPA, considering the opportunities for gaming
16 the system?

17 MR. FEIGIN: I -- I think sincerity is
18 quite relevant under, frankly, both statutes,
19 Justice Thomas, but I think you're quite right
20 that in the RLUIPA context, there may be
21 particularized incentives for someone to falsely
22 claim a religious belief.

23 And some of those concerns are
24 manifest here and would need to be developed a
25 little bit further. Obviously, it raises one

1 red flag that something different was claimed in
2 the 2020 litigation, and now we have the State's
3 lodging -- and that's what I was also citing
4 earlier, the State's lodging -- and at page 25a
5 of the redacted declaration, you can see the
6 representation is made that on the day he
7 thought he was going to be executed, the only
8 reason he wanted to meet with Pastor Moore was,
9 he represented, because of the pending
10 litigation, which raises further sincerity
11 concerns.

12 We took sincerity as a given here
13 because the lower courts did. They, as we
14 understand it, essentially just considered the
15 narrow tailoring analysis and almost nothing
16 else past that.

17 JUSTICE THOMAS: Thank you.

18 MR. FEIGIN: But we do think that's a
19 -- an issue here.

20 JUSTICE THOMAS: Thank you.

21 JUSTICE SOTOMAYOR: Mr. Feigin, what
22 is insincere about -- there's steps to this.
23 There's a certain amount of time in which an
24 inmate is given with his family, correct, and,
25 presumably, with a pastor if he wants it before

1 the execution, correct?

2 MR. FEIGIN: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: And, here, he
4 decided not to have the pastor there, correct?

5 MR. FEIGIN: I -- I believe his -- if
6 I'm understanding the declaration correctly,
7 Your Honor, I believe his pastor was there, but
8 he chose not to meet with him.

9 JUSTICE SOTOMAYOR: He wanted to meet
10 with his family. How does that take away from
11 his desire to have the pastor at -- in the
12 execution chamber when he's dying? Because the
13 whole purpose of the religious belief is that
14 you should have a pastor to help guide you to
15 the other place.

16 MR. FEIGIN: So, Your Honor, I am not
17 suggesting how a court should come out if it
18 considered these facts. I am simply suggesting
19 that given the combination of facts -- and, in
20 fact, Petitioner, in the reply brief, said he
21 would welcome a hearing at which he can have a
22 chance to explain or maybe even --

23 JUSTICE SOTOMAYOR: Do you have any --

24 MR. FEIGIN: -- cross-examine these --
25 these facts.

1 JUSTICE SOTOMAYOR: -- do you have any
2 reason why we shouldn't order -- enter an order
3 like we did in Murphy, which is send it back,
4 let these issues be thrashed out, but let Texas
5 decide whether it wants to execute him in the
6 meantime? Because it does seem as though
7 sending it back would cause delay, but it's
8 within Texas's freedom to choose to accommodate
9 him and go ahead, correct?

10 MR. FEIGIN: Well, Your Honor, I
11 think, essentially, we -- we don't disagree that
12 the Court should simply remand. I'd add that
13 there's been no dispute with the representation
14 in our brief, so I take it to be correct under
15 Texas law, though I'm no expert in it, that --
16 pages 32 and 33 of our brief, that under Texas
17 law, there'd have to be a 90-day waiting period
18 between a court setting a new execution date and
19 the actual execution, which means there would be
20 at least 90 days to develop a further record on
21 some of these issues.

22 And also, regardless of whether there
23 was proper exhaustion here or whether the
24 absence of exhaustion could be excused as
25 unavailable, I do think there are some

1 continuing factual matters that the parties
2 might be able to work out between themselves as
3 far as the -- exactly what Petitioner is
4 requesting and exactly what he would be
5 satisfied with and how far the State can go to
6 accommodate that.

7 That's exactly why exhaustion is so
8 important, because it not only allows for some
9 consensual resolution but might really
10 crystallize the dispute into a dispute of a much
11 smaller nature; either we're just talking about
12 one of the boxes I mentioned earlier or maybe
13 even just a --

14 JUSTICE SOTOMAYOR: That seems --

15 MR. FEIGIN: -- subcomponent of one.

16 JUSTICE SOTOMAYOR: -- useless here
17 because they didn't give a response for six
18 weeks.

19 MR. FEIGIN: Well, Your Honor --

20 JUSTICE SOTOMAYOR: They never
21 attempted to engage in accommodation.

22 MR. FEIGIN: Well, Your Honor, I think
23 that goes to whether the grievance process was
24 properly exhausted and whether they were on
25 notice that there was specific request for

1 vocalization and at what point Petitioner was
2 aware that that would be limited, which are also
3 factual issues that could be explored.

4 But -- and perhaps I am being overly
5 optimistic about the degree of accommodation
6 that could be reached between the parties, but I
7 do think that further development during at
8 least that 90-day period and possibly longer --
9 as you noted, it's obviously under Texas's
10 control when it decides to set the execution
11 date and carry out the execution -- some further
12 degree of development in the lower courts would
13 be tremendously helpful, not only so the courts
14 can properly resolve this but also for purposes
15 of the parties themselves.

16 JUSTICE KAGAN: Mr. Feigin, could --

17 CHIEF JUSTICE ROBERTS: Mr. Feigin --
18 go ahead.

19 I don't understand how the prison
20 officials and the judges are supposed to assess
21 sincerity. I mean, it is certainly
22 understandable that as death approaches, inmates
23 may have, you know, different religious views
24 than they did before and -- and want to take
25 those into account.

1 I mean, let's say a week before a
2 prisoner comes in and -- and says: I want to
3 become a member of a particular church because I
4 think I -- you know, I need that to be saved.

5 And the period, the -- the training,
6 the whatever, the initiation is three months,
7 and it's very sincere.

8 What -- what happens then?

9 MR. FEIGIN: Well, Your Honor, if a
10 court believes it's very sincere, I'm not --

11 CHIEF JUSTICE ROBERTS: We have -- I
12 mean to say we have no reason to doubt the
13 sincerity.

14 MR. FEIGIN: Well, I -- I think that's
15 somewhat how the lower courts took this case. I
16 think it is difficult to determine sincerity.
17 It's nevertheless a requirement that the statute
18 --

19 CHIEF JUSTICE ROBERTS: Even if --

20 MR. FEIGIN: -- imposes --

21 CHIEF JUSTICE ROBERTS: -- he says,
22 you know, the process for me to reach the point
23 under which I feel that I can -- you know, the
24 religion would benefit me is three months?

25 MR. FEIGIN: Well, Your Honor, I think

1 there are -- if I could take this out a little
2 bit and just talk about the universe of
3 religious claims for a second, this is a
4 particularly, for reasons you just mentioned,
5 difficult subset of that.

6 But, just generally, I think it is a
7 very robust requirement that courts have been
8 able to use to eliminate certain frivolous
9 claims, like my religion requires me to be a
10 marijuana distributor or something to that
11 effect.

12 I think it gets somewhat more
13 difficult, Your Honor, in -- in this context,
14 and I -- it might well require something like an
15 evidentiary hearing here.

16 And I think what makes -- I think
17 there will be cases in which sincerity has
18 certain red flags on it, and I think this case
19 may or may not be one of those, but in a case
20 where it does appear that the inmate has a
21 sincere religious belief, the court would have
22 to proceed to the further steps.

23 Now there --

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Kagan?

1 JUSTICE KAGAN: May I ask more about
2 the BOP experience? I mean, as I understand it,
3 there were 13 recent executions. In 11, there
4 were spiritual advisors there. You said that
5 all of them, you allowed vocalization throughout
6 the process, but in only one was there touching
7 and that before the drugs were administered.

8 Is that basically -- did I get that
9 right?

10 MR. FEIGIN: Yes, Your Honor, with --
11 with two very small caveats. It's a little bit
12 unclear, just because no one was focusing on
13 this when they made their records, it's a little
14 bit unclear whether all the vocalization
15 included vocalization during the administration
16 of the drugs. It may have; it may not have.

17 And, also, I think, in one case, it
18 was just conversation before and not actual
19 prayer.

20 JUSTICE KAGAN: Here's what I'd like
21 to know. I guess I'd like to get a little bit
22 more texture about how the process played out.

23 In other words, you know, when you got
24 these requests, what -- what -- you being the
25 BOP, what did -- what did the BOP do? Were

1 there discussions? Were there requests that
2 were rejected? Were -- were -- how does this
3 all get managed in -- in -- in the experience of
4 the BOP?

5 As I understand it, none of these ever
6 came to a court. Is that -- is that right? I
7 mean --

8 MR. FEIGIN: That's --

9 JUSTICE KAGAN: -- they all came to a
10 court, but not with respect to the religious
11 claims.

12 MR. FEIGIN: That's correct, Your
13 Honor. There were some RFRA claims with the
14 recent executions, but they didn't relate to
15 this specific issue.

16 JUSTICE KAGAN: So how does this all
17 get done?

18 MR. FEIGIN: Essentially, Your Honor,
19 we resolve them informally. We have discussions
20 with the inmates and/or their spiritual advisor
21 about what it was that they were proposing and
22 internal discussions about what could be
23 accommodated. I don't think we accommodated
24 every single request --

25 JUSTICE KAGAN: What kind of --

1 MR. FEIGIN: -- that was made.

2 JUSTICE KAGAN: -- requests did you
3 reject?

4 MR. FEIGIN: Your Honor, I -- I'm not
5 aware of any specific requests that we rejected,
6 but my general understanding is there may have
7 been requests that we did not -- I -- I don't
8 want to rep -- my -- my concern is representing
9 to the Court that we accommodated everything
10 that was requested of us. I'm not certain I
11 could make that representation. But everyone
12 was clearly satisfied enough that we avoided
13 last-minute litigation.

14 JUSTICE KAVANAUGH: But there was no
15 -- no touching, right?

16 MR. FEIGIN: There was no touching
17 during --

18 JUSTICE KAVANAUGH: So, if someone had
19 requested touching, like Petitioner --

20 JUSTICE KAGAN: But there was touching
21 in one, is that -- is that correct?

22 MR. FEIGIN: There was -- may I, Your
23 Honor?

24 JUSTICE KAGAN: It was -- wasn't there
25 communion given in one and the -- and use of

1 holy oils?

2 MR. FEIGIN: Well, Your Honor, our --
3 our recollection of that one is a little bit
4 different from -- from Father O'Keefe's
5 recollection of it, but there was -- our
6 recollection is there was at least some
7 touching, but that was during the period before
8 the administration of the drugs.

9 And we don't think it was communion in
10 the sense of -- of giving someone a wafer on the
11 tongue or anything to that effect.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 JUSTICE THOMAS: No.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer?

18 Justice Alito?

19 JUSTICE ALITO: Yeah, Mr. Feigin, I do
20 have a number of questions. RLUIPA, like RFRA,
21 like the pre-Smith free exercise jurisprudence
22 of this Court, requires an individualized
23 determination. That's been the law for a long
24 time. RFRA's been the law on the books for a
25 long time. It's a completely workable standard.

1 It's regrettable it wasn't extended to the Free
2 Exercise Clause, but it is individualized.

3 And what would be most helpful here, I
4 think, is if we could at least identify sort of
5 a gold standard, not to preclude individualized
6 variations but a -- a -- something that will
7 generally be sufficient to take into account
8 religious demands regarding the two things that
9 are at issue here, touching and vocalization,
10 and accommodation of the State's interests.

11 And we could look to the BOP, doesn't
12 get to specify what the First Amendment requires
13 or what RLUIPA requires, but it's a starting
14 point. And so, if you -- you -- you've said
15 what has happened in the past. If there are
16 federal executions in the future, what will the
17 BOP do?

18 Will it -- will its policy be
19 generally -- will its policy be no touching
20 during the execution, vocalization allowed
21 throughout the -- the -- the execution so long
22 as it doesn't interfere with other
23 communications that have to take place?

24 MR. FEIGIN: Your Honor, I -- I don't
25 think -- I can't quite represent accurately

1 under any circumstances exactly what BOP --

2 JUSTICE ALITO: All right. Let me --
3 that --

4 MR. FEIGIN: -- would do in a specific
5 case.

6 JUSTICE ALITO: -- that's unfair, an
7 unfair question, so let me -- let me look back.

8 That was what BOP apparently thought
9 was appropriate during the executions that took
10 place last year?

11 MR. FEIGIN: Well, Your Honor, I want
12 to be a little bit more nuanced about that. I
13 think what the BOP was doing was making
14 individualized judgments about each particular
15 case and then were kind of mapping out a -- how
16 that shaped out if you look at the entire
17 universe of the 13.

18 JUSTICE ALITO: Well, I wonder if you
19 could be a little more helpful. What does the
20 BOP regard as sufficient to satisfy its
21 interests in security and in having executions
22 carried out without any interference?

23 MR. FEIGIN: Well, Your Honor, if we
24 wanted to have the risk be absolutely zero,
25 there would be no spiritual advisor in the

1 chamber whatsoever.

2 However, BOP was able to carry out 11
3 executions with a spiritual advisor in the
4 chamber. It had a security person next to the
5 spiritual advisor at all times. Everything was
6 -- the position of the spiritual advisor varied
7 with the phase of the execution, as I've
8 described earlier.

9 The BOP -- I -- does do some auditory
10 monitoring during the administration of the
11 drugs, in particular, listening for any drip
12 from the IV lines. And it is also listening for
13 a particular snoring sound from the prisoner
14 that would indicate the pentobarbital is working
15 as it is supposed to, and it -- the chanting and
16 praying sometimes could interfere with that.

17 The BOP may do with visual and EKG
18 monitoring, and nothing went wrong when they --
19 when they did that, fortunately.

20 The BOP, I think, did not get a
21 request to physically touch the inmate during
22 the administration of the drugs. I think they
23 would have very, very substantial concerns about
24 that because of the risk of either advertent or
25 inadvertent disruption of the IV lines.

1 That risk may be low, but the harm, as
2 Justice Barrett was mentioning earlier, would be
3 extremely high. Also, unlike an -- an actual
4 prison employee, like a state or federal
5 chaplain, the outside spiritual advisor would
6 need to be removed if the medical team had to
7 come in, and that in itself could cause delay or
8 -- or problems.

9 And, frankly, Your Honor, I -- I also
10 think blocking the witnesses' views, which, you
11 know, now you're requiring two people, the
12 outside spiritual advisor and the security
13 person, is a legitimate concern here because one
14 of the purposes of capital punishment is to
15 provide some closure to the victims. And, of
16 course, we believe the inmate's family should be
17 able to witness this as well. And blocking
18 either of them from fully viewing the inmate at
19 the time of the execution is an important
20 factor.

21 JUSTICE ALITO: All that is helpful.

22 Now, to follow up a little bit, we
23 have a picture of the execution room that Texas
24 uses. I don't know whether the execution room
25 that the federal government has is a matter of

1 public record, anything about it, but can you
2 tell us whether there's anything that is
3 materially different about the -- what the
4 federal -- about the room that the federal
5 government uses or the procedures that would
6 suggest that the considerations in Texas should
7 be different from the considerations in Terre
8 Haute?

9 MR. FEIGIN: As to the chamber, Your
10 Honor, ours has about twice the square footage
11 of what I understand Texas's is, which is what
12 enables us to have the spiritual advisor about
13 nine feet away during the administration of the
14 drugs.

15 Before the administration of the
16 drugs, the spiritual advisor was advised to
17 stand at a line that's taped on the floor that's
18 about 28 inches away from the gurney. I don't
19 know that the precise procedures we've used
20 there would be feasible for Texas with its
21 smaller chamber.

22 I'm also not entirely clear on what
23 Texas's monitoring equipment exactly looks like
24 or the positioning of its windows. We have
25 separate galleries for the victim and inmate

1 witnesses, as well as the federal official
2 witnesses, and then another one for the medical
3 team, and they all need to be able to see in for
4 one reason or another.

5 And then there's auditory monitoring
6 equipment and medical monitoring equipment that
7 may differ there as well that may raise some
8 concerns too.

9 JUSTICE ALITO: I'm sorry to take up
10 so much time. If I could just ask one more
11 question. It relates to something that, to my
12 mind, is related to this, although it's a
13 different subject, and -- and that is I'm
14 interested in BOP practice regarding religious
15 services during a typical weekend.

16 So, on a Friday, Saturday, Sunday, in
17 a federal prison, what religious services, if
18 any, are prisoners allowed to attend? Do you
19 know the answer to that?

20 MR. FEIGIN: Your Honor, not -- not as
21 I stand here today, no.

22 JUSTICE ALITO: All right. Thank you
23 very much.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor, anything further?

1 Justice Kagan?

2 JUSTICE KAVANAUGH: I have a few
3 follow-ups. I share Justice Alito's desire to
4 have a -- what I would call bright-line rule or
5 -- or something, some guidelines, if -- if
6 Petitioner's position were to prevail here, and
7 it's helpful, your explanation, of what happened
8 in the federal executions. But I want to make
9 sure, following up on Justice Kagan's questions,
10 I understand what happened.

11 There was no touching except in one,
12 is that correct?

13 MR. FEIGIN: That is our recollection,
14 Your Honor, yes.

15 JUSTICE KAVANAUGH: There was someone
16 present in 11 of the 13?

17 MR. FEIGIN: Yes.

18 JUSTICE KAVANAUGH: Okay. And they
19 spoke aloud in all 11 of those?

20 MR. FEIGIN: In one of them, there
21 appears to have just been conversation before
22 the administration --

23 JUSTICE KAVANAUGH: Okay.

24 MR. FEIGIN: -- of the drugs.

25 JUSTICE KAVANAUGH: And I --

1 MR. FEIGIN: In --

2 JUSTICE KAVANAUGH: Sorry, keep going.

3 MR. FEIGIN: I'm sorry. In the rest
4 of them, there was at least some prayer. And,
5 again, because of the somewhat underdetermined
6 word "execution," it's not entirely clear
7 whether the prayer was during the entire period
8 or just during the portion as the witnesses were
9 coming in and the spiritual advisor and the
10 inmate were alone with the federal officials.

11 JUSTICE KAVANAUGH: And if I'm
12 interpreting you correctly, but correct --
13 correct me if I'm wrong, you have much more
14 concern -- you're okay with someone being in the
15 room or at least BOP was, during these, okay
16 with audible? It doesn't seem like you're okay
17 as you stand here today with someone touching
18 during the execution, putting to the side the --
19 or maybe you don't want to put it to the side --
20 the question of what the execution is.

21 MR. FEIGIN: Well, Your Honor, just to
22 be clear, I mean, I'm not quite sure I'd
23 represent that we were okay with it. It was
24 just BOP was able to accommodate it.

25 JUSTICE KAVANAUGH: Okay.

1 MR. FEIGIN: And I think BOP would
2 have a vastly greater degree of concern for the
3 reasons I mentioned earlier about accommodating
4 a request to have the spiritual advisor in
5 physical contact with the inmate.

6 I mean, if I could just emphasize one
7 thing that I think really came out in the
8 Gutierrez litigation after this Court remanded,
9 is that Texas, you know, points out, and I think
10 they point it out here but not to the same
11 degree, even -- it's not just a matter of not
12 trusting a spiritual advisor. It's a very
13 fraught circumstance.

14 You don't know how someone's going to
15 react in that circumstance. I mean, I -- I -- I
16 realize this probably wouldn't happen to most
17 people, but someone could faint, someone could
18 stumble, and it -- you could jostle the lines.
19 That might or might not disrupt them.

20 But, if that were to happen in the
21 middle of the pentobarbital, all of the problems
22 in, for example, the Lockett execution in
23 Oklahoma were because the IV was going into the
24 tissue as opposed to into the vein, and anything
25 going wrong here would be catastrophic.

1 JUSTICE KAVANAUGH: And then, to
2 follow up on Justice Barrett's question and my
3 earlier questions about the risk, the State's
4 compelling interest in reducing the risk to zero
5 or as close to zero as possible given what we've
6 mandated under RLUIPA, you said, I think, at the
7 beginning, the State would need state-specific
8 reasons to justify that.

9 And I'm wondering how a state could
10 say: We have a state-specific reason for
11 wanting to reduce the risk to as close to zero
12 as possible.

13 MR. FEIGIN: Well, I think this is
14 where Holt's and Cutter's emphasis on
15 substantial deference to prison administrators'
16 expertise comes in. We certainly do not think
17 that courts should be micromanaging prison
18 procedures. But I -- I think Holt identifies
19 the practices of other jurisdictions as at least
20 another least restrictive means that the state
21 needs to, in Holt's words, give persuasive
22 reasons why it can't follow.

23 So, if a number of other
24 jurisdictions, and, here, the federal government
25 and Alabama, have been able to allow outside

1 spiritual advisors, I think what Texas would
2 need to do but hasn't done yet and may or may
3 not be able to do is to say things that are of
4 the nature of what I was discussing earlier with
5 Justice Alito: We have different monitoring
6 equipment. We -- our chamber is not the same
7 size as the federal government's. We rely more
8 heavily on certain types of monitoring than the
9 federal government does.

10 And I also think they could
11 legitimately decide to tolerate a lower degree
12 of risk than the federal government was willing
13 to accommodate. I think --

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett, anything further?

16 MR. FEIGIN: I'm sorry.

17 JUSTICE BARRETT: Yes, Mr. Feigin, I
18 just have two quick questions. One is to follow
19 up. I think Justice Kavanaugh was asking a very
20 important question about how do we define the
21 state interest. And I -- I feel like you gave
22 him a lot of examples of least restrictive
23 alternatives but maybe not the compelling
24 interest.

25 MR. FEIGIN: Sure.

1 JUSTICE BARRETT: I'm just wondering
2 if it's legitimate to define it as trying to get
3 to zero percent risk, because, you know, Justice
4 Alito asked you about services on the weekends.
5 I -- I think -- it's my understanding, I might
6 be wrong -- that BOP and -- and state prisons
7 too do allow some religious services, perhaps
8 because of RLUIPA. If they said, we want the
9 risk of prison rioting or fighting to be
10 zero percent, that would permit the prison,
11 right, to say there can never be any kind of
12 prayer service or gathering?

13 But, if the compelling interest were
14 defined differently, like, for example, to say
15 maintaining prison security, then that wouldn't
16 rule out those kinds of gatherings.

17 And so, here, if -- if the prison
18 defines the compelling interest in saying, like,
19 well, we in Alabama want a zero percent risk or
20 we in Texas want only a 2 percent risk, that
21 permits them to -- to altogether bar the
22 spiritual advisor from the chamber, right,
23 because there's not going to be any, you know,
24 lesser restrictive alternative that's going to
25 get you there. It always -- it's -- inherently

1 carries a risk.

2 So how would the federal government
3 articulate what the acceptable state compelling
4 interest is?

5 MR. FEIGIN: Well, I think RLUIPA kind
6 of presupposes that you can't ever get to
7 zero percent risk on anything for the reasons
8 that you just mentioned, Justice Barrett.

9 I -- I do think courts are interfering
10 a little bit too much under the Holt standard if
11 they're kind of micromanaging between, like -- I
12 mean, not that anyone could ever get precise
13 empirical numbers, but, like, 10 and 5 percent
14 risk.

15 But I -- I -- I think the -- just to
16 answer your question directly, the question you
17 asked my friend directly, we think the
18 compelling interest here in this particular
19 context is in carrying out the execution
20 procedure effectively and -- which both means
21 making sure it goes correctly for the prisoner
22 and also making sure the purposes of the
23 judgment are satisfied.

24 And, obviously, even having a
25 spiritual advisor in the chamber does create

1 some degree of risk even if they're nine feet
2 away, but I -- I think courts could probably set
3 a minimum bar on risk tolerance. And one place
4 to look is the experience of other
5 jurisdictions.

6 I think courts should be very hesitant
7 outside of that to start suggesting that these
8 kinds of things need to be allowed. But, if you
9 see that other jurisdictions are permitting
10 them, it places under Holt at least somewhat of
11 a modest burden on the state to give some
12 reasons, which would themselves get deference
13 for their administrators, as to why they
14 couldn't similarly accommodate it. And they may
15 well have such reasons here.

16 JUSTICE BARRETT: One other just brief
17 question. Justice Kagan was asking you about
18 how BOP carries out these executions and
19 determines its standards, and you said it was an
20 individualized process with respect to each of
21 the inmates.

22 Presumably, though, BOP had to make
23 some decisions about standards that would apply
24 to each one. Like you mentioned, there was tape
25 on the floor and the spiritual advisor had to

1 stand on the tape or that there would be a
2 security officer present.

3 Was there any kind of discussion or
4 consultation with prison administrators or
5 experts before the 11 executions were carried
6 out to decide, well, these are -- you know, this
7 is the minimum, they can't get any closer than
8 this tape on the floor?

9 MR. FEIGIN: Your Honor, I'm not
10 precisely sure why they decided on that specific
11 distance. I think they wanted them close for --
12 wanted to allow them to be close for that
13 portion of it but not too close.

14 The concern there was simply making
15 sure that the security official would still be
16 in position to try to stop the advisor from
17 doing something that might interfere with the
18 execution.

19 I -- I don't know the precise content
20 of the discussions that BOP had ahead of time,
21 but there was clearly a great deal of thinking.
22 Even during periods where federal executions are
23 in a moratorium, they rehearse this essentially
24 semi-annually, what the procedures are going to
25 look like. It's a very choreographed procedure

1 with a lot of thought into it.

2 JUSTICE BARRETT: Thank you.

3 MR. FEIGIN: Sorry, Mr. Chief Justice.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 General Stone.

8 ORAL ARGUMENT OF JUDD E. STONE, II,
9 ON BEHALF OF THE RESPONDENTS

10 MR. STONE: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Petitioner has twice received the
13 extremely exceptional remedy of having his
14 execution halted at the last minute. Each time
15 he litigates around an execution date, he
16 receives another lengthy reprieve.

17 This Court should not countenance the
18 delay of a fourth execution date.

19 Ramirez claims that he has
20 consistently sought the same relief, namely, his
21 pastor's touch and audible prayer, throughout
22 his piecemeal litigation.

23 There are two problems with that
24 assertion. First, it's false. Ramirez
25 disclaimed in 2020 that he wanted pastoral

1 touch. And in April 2021, Texas gave Ramirez
2 all that he had been looking for at that time,
3 his pastor's presence in the execution chamber.

4 Second, Ramirez's assertion makes his
5 litigation conduct inexplicable. If Ramirez was
6 aware the entire time that he wanted pastoral
7 touch and audible prayer, then he has no excuse
8 for failing to timely raise and grieve those
9 requests.

10 Ramirez tries to excuse both his
11 failures to -- both his delays and his failures
12 to exhaust by claiming he only learned he
13 wouldn't be permitted touch or audible prayer in
14 June and August of this year, respectively.

15 Again, false. The -- the State's
16 execution procedures publicly available as of
17 this April state that a pastor may "observe the
18 inmate's execution." An observer's role is
19 passive, not interactive.

20 Ramirez knew his pastor's observation
21 and his pastor's participation were distinct
22 because he himself distinguished them. Ramirez
23 stated in August that he assumed his pastor
24 could not audibly pray, and he distinguished
25 touch from presence in his 2020 suit.

1 Ramirez has delayed in seeking
2 accommodations, reversed his litigation
3 positions, and raised his claims seriatim, all
4 for the purposes of delay. This Court should
5 put an end to these tactics once and for all.

6 I welcome the Court's questions.

7 CHIEF JUSTICE ROBERTS: Counsel, how
8 would you deal with the hypothetical I was
9 raising earlier, which is, you know, a few days
10 before execution the prisoner says, I've decided
11 I need to convert to a particular faith and the
12 process takes three months, and there's a --
13 there's a religion in which that is true, that
14 it takes three months.

15 What -- what -- would you -- what
16 would you do?

17 MR. STONE: Certainly, Your Honor.
18 So, for purposes of -- and I assume that this
19 prisoner is raising a RLUIPA claim and asking
20 for a preliminary injunction against his
21 execution?

22 CHIEF JUSTICE ROBERTS: Yeah, because
23 it takes three months, and that's what his --
24 the faith that he wants to pursue takes.

25 MR. STONE: Well, Your Honor, first, I

1 think the -- the court would have to determine
2 whether or not that was a sincere conversion.

3 CHIEF JUSTICE ROBERTS: Well, right.
4 That's --

5 MR. STONE: Right.

6 CHIEF JUSTICE ROBERTS: -- what I'm
7 asking you.

8 MR. STONE: That's right.

9 CHIEF JUSTICE ROBERTS: How would you
10 -- what would you do to make sure you've
11 accommodated that concern?

12 MR. STONE: The court would go -- go
13 into a pretext inquiry as discussed in the RFRA
14 context in Footnote 28 of Hobby Lobby. It would
15 look into factors like, for example, how is this
16 individual -- how has this individual behaved in
17 the past? Have they made any similar --

18 CHIEF JUSTICE ROBERTS: Well, he had a
19 conversion experience. I suspect impending
20 death focuses people's concerns on religion in a
21 way they may not have been before. And with
22 death imminent, he decided he needed this --
23 needed to pursue this route to salvation.

24 MR. STONE: On just those facts alone,
25 Your Honor, it would sound to me that, with

1 nothing else, that -- that the individual might
2 be seeking delay of his execution because
3 several days beforehand he's requesting a
4 multi-month process. But I think that would be
5 a -- a credibility determination and -- and that
6 would be --

7 CHIEF JUSTICE ROBERTS: Well, but --
8 yeah, I understand that. But how would you do
9 that? I mean, it is a factually plausible
10 thing. I mean, people convert and particularly
11 in times of stress. There is a church that
12 requires three months. Maybe he's not sincere,
13 but how do you tell?

14 MR. STONE: You look at other
15 collateral circumstances, such as whether or not
16 there had been previous contact with a pastor
17 that, you know, sort of engendered a spiritual
18 relationship beforehand, whether or not the
19 person had raised similar claims beforehand and,
20 if so, when relative to previous execution
21 dates.

22 Whether or not this is, in fact, the
23 kind of -- whether or not this individual has
24 brought other basically pretextual or baseless
25 lawsuits, I think these would all be the kinds

1 of facts and circumstances that would help a
2 district court make the familiar inquiry as to
3 whether or not basically they're being lied to,
4 the same pretext inquiry that occurs in
5 virtually every area of law.

6 Undoubtedly, because this is a very
7 sensitive area of law and a very sensitive area
8 of human experience, it's going to require --
9 it's going to require an examination of a lot of
10 facts and circumstances around the individual.

11 And it may be the case that district
12 judges making this factual determination for the
13 first time are going to tend to give some
14 deference to an individual on the surface of
15 things.

16 But Congress has placed that initial
17 burden on the individual trying to show
18 sincerity. So, at a minimum, that person has to
19 start by adducing some proof that they have a
20 sincere need.

21 JUSTICE BARRETT: General Stone, can I
22 ask you -- you just said that the April 2020
23 policy said that the -- that the prisoner could
24 have a spiritual advisor observe in the room.

25 Could you direct me to where it says

1 that? Because I'm looking at the policy and it
2 talks about the spiritual advisor being present
3 in the room, and I think that's a significant
4 difference.

5 So does it say "observe"?

6 MR. STONE: It's the April 2021
7 policy, Justice Barrett. Let me get you that
8 page.

9 JUSTICE BARRETT: I'm -- I'm sorry.
10 I'm looking at the April 2021 policy. Maybe you
11 could get that for me.

12 MR. STONE: Of course. It's on page
13 149 of the Joint Appendix, of the Joint
14 Appendix. In Part D, Part 1, it says, to read
15 the relevant quote: "If requested by the
16 inmate" -- towards the bottom, it says, "will be
17 escorted into the execution chamber by an agency
18 representative to observe the inmate's
19 execution."

20 JUSTICE BARRETT: Okay. Thank you
21 very much.

22 JUSTICE BREYER: Well, I mean, I've
23 gone through -- or we have in my chambers the
24 dates, and there's an argument about this. I
25 mean, they say, look, in -- you used to allow

1 spiritual advisors in. No problem. Then you
2 decided in 2019, no, they can't come in.

3 So, in 2020, after we got through with
4 it, he says, please, let them in, okay? And he
5 doesn't say anything about laying on of hands
6 because, you know, letting them in is better
7 than nothing. You say, no, they can't come in.

8 Then we get to 2022, and he says, come
9 on, let him in. And you say, okay, we'll let
10 him in.

11 And at that point, they say: Huh,
12 pretty good, fine, and we want the hands and the
13 audible prayer too. That's what you used to do.

14 And you say: Ha, you didn't ask for
15 that before. Of course, they didn't. They
16 thought they couldn't come in at all. And --
17 and so now you're asking for it. All right.
18 The answer is no.

19 All right. So here we are. And --
20 and -- and as I go through this, I think that
21 they have a point. Maybe you have a point.
22 What are we supposed to do? Send it back for
23 that?

24 MR. STONE: Two points, Your Honor.

25 I think there are at least two clear

1 places where Mr. Ramirez certainly should have
2 had notice that he needed to look into this.
3 The first one is in 2019, when TDCJ first
4 changed its policies --

5 JUSTICE BREYER: Yes.

6 MR. STONE: -- partially in response
7 to this Court's decision in Murphy. At that
8 point, TDCJ's policy was no pastors in the
9 chamber at all.

10 JUSTICE BREYER: Yeah.

11 MR. STONE: Because what he wanted was
12 not only a pastor in the chamber but other
13 things that are sort of logically subsequent to
14 that, by being told you may not have a pastor in
15 the chamber, he's being told you may not have
16 any of those other things too.

17 JUSTICE BREYER: Well, I mean, it's
18 very technical and it's excellent lawyering,
19 but, you know, you sit there and you read it,
20 and you used to let them in, and now he reads it
21 and says no, they can't come in. And we have
22 the case still, and, finally, it gets out of
23 here, and you go back and, no, they can't come
24 in.

25 So, obviously, he says, please let him

1 in. And then, finally, when you change and let
2 them in, he says, by the way, we would like
3 hands plus -- I'm just repeating myself -- hands
4 plus audible prayer. That's what you used to
5 do.

6 Now -- now, as I say it like that, you
7 know, it sounds as if they had been fairly
8 reasonable. But, as you say, well, you say, but
9 they didn't really ask for it. I say, okay, you
10 have a point. And -- and so my question was,
11 what do we do about that? And I have a question
12 on the merits too, but go ahead with that.

13 MR. STONE: Sure. Well, Your Honor,
14 this Court's rule, as articulated in Hill and in
15 Bucklew, places the obligation on the capital
16 inmate who's going to raise claims to do so in a
17 diligent manner so as to not require the
18 equitable relief staying his execution. He's
19 under that burden and an obligation -- a burden
20 of bringing claims diligently includes a burden
21 to investigate.

22 JUSTICE BREYER: Okay. Okay. I got
23 your point --

24 MR. STONE: Right.

25 JUSTICE BREYER: Now, on the merits,

1 I'd like to know this: Do you have any idea how
2 many executions have there been -- let's go back
3 a hundred years, okay -- where they did let
4 spiritual advisors in somewhere? I don't care,
5 United States, do it as you want, what --
6 depending on what you know. They let the
7 spiritual advisors in, there was physical
8 touching, and there was audible prayer.

9 Was the answer zero? Was the answer
10 --

11 MR. STONE: Certainly not.

12 JUSTICE BREYER: No? Certainly not?

13 MR. STONE: Certainly not zero.

14 JUSTICE BREYER: What -- what -- what
15 was the answer about? Can you guess?

16 MR. STONE: It was a commonplace in
17 executions --

18 JUSTICE BREYER: Okay.

19 MR. STONE: -- in Texas between 1982
20 and 2019.

21 JUSTICE BREYER: Okay. So someplace
22 it's commonplace. In how many of those did the
23 audibility and the physical touching create the
24 execution going astray? Are you aware of any?

25 MR. STONE: No, Your Honor --

1 JUSTICE BREYER: Okay.

2 MR. STONE: -- though I would point
3 out --

4 JUSTICE BREYER: So we have experience
5 and there's never been a problem. All right.
6 That's -- that's what you think. I mean, I
7 don't know if you think it, but, I mean, at
8 least that's the best you can answer.

9 MR. STONE: I -- I would also add an
10 important -- an important distinction, Your
11 Honor, is that for every one of those
12 circumstances, the individual is a TDCJ
13 employee. And it turns out TDCJ is a
14 correctional institution dealing with the
15 extraordinarily charged and choreographed area
16 of -- of a death chamber.

17 There is a very significant difference
18 between having an outsider with no relationship
19 whatsoever --

20 JUSTICE KAGAN: Are you aware in any
21 other states of an execution going astray
22 because of an outside spiritual advisor?

23 MR. STONE: No, Justice Kagan, though
24 I do -- we reached out to other states, and
25 because this is very new in the handful of

1 jurisdictions that allow it, I'm not surprised
2 that we have none of them. This is the sort of
3 thing we would anticipate to be a very low
4 likelihood of occurring. It just has a
5 catastrophic potential of potential damage if it
6 did.

7 JUSTICE BARRETT: Given that
8 catastrophic risk, the question that I asked Mr.
9 Feigin and your friend on the other side about
10 what the definition of the State's compelling
11 interest is, could you give us yours?

12 MR. STONE: Of course, Your Honor. I
13 think Justice Kavanaugh accurately or almost
14 accurately summarizes that we're attempting to
15 minimize risk almost all the way to zero, as --
16 as much as we reasonably can.

17 I -- I take the point that you have
18 that if that's the State's compelling interest
19 going forward in all sorts of contexts, that
20 that sounds an awful lot like a license for the
21 State to just reject religious claims.

22 I think the Court's -- the Court's
23 articulated deference in *Holt v. Hobbs* and other
24 similar cases and the sort of span of that
25 deference is what does a lot of work in this

1 case. So, for example, this Court rejected
2 deference to these sorts of claims of minimizing
3 risk in Holt precisely because the policy was
4 under-inclusive, it seemed incredibly hard to
5 believe that the contraband could be held in a
6 half-inch beard, situations like that.

7 To the extent that you have a -- a
8 correctional institution saying that we have to
9 ban -- we have to ban all church services
10 because there's too high of a chance of a riot,
11 there's -- it sounds in that hypothetical it's
12 just a very bad ends/means fit between the thing
13 that was ultimately chosen and the -- and the
14 pursuit of the sort of minimization of risk or
15 at least a policy that appears to be sacrificing
16 a whole lot of potential RFRA rights.

17 And in that case, I think that the
18 Court's deference to the stated security
19 concerns of -- of the administrative -- of the
20 -- of the agency should be a lot lower, if only
21 because, like I said, you've got this very
22 over-inclusive sort of policy. And these
23 over-inclusion and under-inclusion analyses are
24 very typical of when this Court says, well, we
25 defer to prison administrators as experts, but

1 we're not sure about this particular policy.

2 I think that would take care of at
3 least a lot of the concerns that you have.

4 JUSTICE KAVANAUGH: You have to think
5 about the risk together with the harm, correct?

6 MR. STONE: That's exactly right. So
7 --

8 JUSTICE KAVANAUGH: So the risk is
9 low, but the potential harm, as you used the
10 word, and I think Mr. Feigin agreed with this,
11 catastrophic or some adjective similar to that,
12 so those two things need to be thought about
13 together?

14 MR. STONE: That's exactly right, Your
15 Honor. Texas being unwilling to tolerate a very
16 small amount of risk in the death chamber, where
17 a tiny amount of risk can lead to a situation
18 that would be -- that would create intolerable
19 pain for an inmate or an intolerable amount of
20 reliving of suffering for a victim -- for the
21 victims' families or any of these very high --

22 JUSTICE KAVANAUGH: What -- what about
23 --

24 MR. STONE: -- sort of very high
25 negative value problems.

1 JUSTICE KAVANAUGH: -- what about Mr.
2 Feigin's description of the experience and then
3 our effort to balance the competing interests
4 here under a test, the strict scrutiny test,
5 that is difficult to apply here, as I think
6 everyone would acknowledge? The advisor's
7 allowed in the room. There can be audible
8 prayer before the drugs are administered. No
9 touching. Is that something Texas could live
10 with?

11 MR. STONE: Well, Your Honor, one of
12 the major problems is -- was alluded to in the
13 -- in the logistics of the federal execution
14 room is that it's just much, much larger than
15 Texas's. I might point out that's one major
16 difference because, in Texas, we can
17 functionally only have about three people. It's
18 about a 9-by-12 room. Most of one wall is taken
19 up by windows for the inmate -- for -- rather,
20 for witnesses on behalf of the inmates'
21 families. The other is witnesses of the
22 victim's. On the other side, we have a large
23 window for the medical team to view and IV lines
24 coming in. So the much smaller space makes it
25 much more difficult to navigate.

1 In terms of the sort of -- in terms of
2 your sort of general point that I think you're
3 getting at as to whether or not Texas might be
4 able to accommodate something that was
5 significantly less intrusive of a request, Texas
6 is obligated under -- under RFRA and RLUIPA to
7 take these prison requests one at a time.

8 In the event that someone said, I want
9 a five-second blessing and then my pastor can
10 step outside, that would be obviously something
11 that would be much less intrusive, that would --
12 that would bear much less of a risk and that
13 Texas would have to have an awfully good reason
14 to refuse.

15 The reason why that doesn't work here
16 is because Mr. Ramirez is insistent that he's
17 wanted the same thing the whole time. He's
18 wanted touch and prayer the entire duration of
19 the -- of the execution from beginning all the
20 way to end.

21 JUSTICE KAVANAUGH: Well, that goes --

22 JUSTICE KAGAN: The size of the room
23 did not prevent many, many chaplains in Texas's
24 history from providing both touch and prayer, is
25 that right?

1 MR. STONE: No, Justice Kagan, but it
2 did indirectly in that when we had chaplains in
3 the room, we didn't need to have another
4 security officer in the room. And so the fact
5 that we have a volunteer coming into the room,
6 the chaplain has to now be -- now has to be
7 accompanied by a security officer, which
8 required us to take out the warden.

9 So it did change -- it did change how
10 we had to run the room, but the chaplain himself
11 did not add to the risk, no.

12 JUSTICE KAVANAUGH: That was, again,
13 the state official, right? The state --

14 MR. STONE: Yes, Your Honor, it was.

15 JUSTICE KAVANAUGH: -- official
16 chaplain.

17 MR. STONE: That's right.

18 JUSTICE KAVANAUGH: That's different
19 -- at least to me, that's a somewhat different
20 situation. It may not be to others.

21 You were switching, though, to
22 sincerity in this case, and I get you have a
23 whole argument about sincerity in this case, but
24 we may also have to opine on compelling interest
25 and least restrictive alternatives.

1 Just on the -- looking to other
2 states, how do we do that? You know, Alabama
3 does it. Why can't Texas? That's the argument
4 -- I -- I'm simplifying, but that's kind of the
5 argument on the other side as to some of this.

6 Your response?

7 MR. STONE: Sure, Your Honor. In
8 particular with Alabama, I think the Court,
9 however it's going to set down rules, needs to
10 make sure it's really engaging in an
11 apples-to-apples comparison.

12 The request in Alabama was much
13 briefer. I understand that it was a brief touch
14 with holy oils to essentially administer the
15 last rights, and that's something significantly
16 less intrusive risk-wise than what's being
17 presented in Texas.

18 All else equal, if someone in Texas
19 were to -- if someone in Texas were to present
20 that same request as in Alabama, the fact
21 Alabama was able to provide it would be a piece
22 of evidence, not necessarily dispositive, but at
23 least something to the extent that Alabama has a
24 similar execution protocol and a similar
25 execution room.

1 JUSTICE KAGAN: General, why isn't the
2 inquiry really exactly how Holt laid out the
3 inquiry? In other words, you know, in Holt,
4 prison officials came in and said men can put
5 contraband in their beards and we have a
6 security interest in preventing that.

7 And what the Court said was, you know
8 what, I mean, that might be, but we're going to
9 look around at other states, see what other
10 practices are. To the extent most other states
11 or many other states can deal with the security
12 interests in a way that also respects religious
13 interests of the inmate, then we're going,
14 essentially, to, you know, say to the state why
15 not you too?

16 And in all of that, there is an
17 appropriate level of deference given to prison
18 officials, but there's also an appropriate level
19 of respect given to the inmate with religious
20 convictions, as commanded by Congress.

21 MR. STONE: I don't think we're very
22 far apart, Justice Kagan. I think that to the
23 extent that we're dealing with many states that
24 are similarly situated as in having the same
25 kind of execution protocol and similarly

1 substantial execution rooms, that if many states
2 had that same experience that, in fact, there
3 wasn't a risk or the -- the risk didn't manifest
4 after a long period of time, that would be
5 powerful evidence that a given state, for
6 example, Texas in this case, couldn't
7 legitimately say we can't do this without
8 unacceptably adding to our risk.

9 I was speaking more specifically that
10 to the extent that this Court's going to look at
11 other states as like examples for purposes of --
12 of engaging exactly that kind of state
13 comparison that you bring up, Justice Kagan,
14 that the Court's making sure it's getting like
15 things like.

16 And the kind of fact that might fall
17 by the wayside for purposes of comparison is the
18 federal government has just a much larger
19 chamber, and that's an important fact. Whether
20 or not it should be sufficient to justify a
21 policy -- a policy difference in one or many
22 cases, that's obviously going to be
23 case-specific and up to this Court.

24 But that's sort of what I was
25 exhorting, was that you can't take one

1 particular institution or one particular
2 execution as dispositive for that analysis.

3 JUSTICE SOTOMAYOR: Counsel --

4 JUSTICE ALITO: If Mr. -- if Mr.
5 Ramirez is going to be executed, would a new
6 execution date have to be set?

7 MR. STONE: Yes, Justice Alito.

8 JUSTICE ALITO: And that would -- that
9 would have to be at least 90 days from when?

10 MR. STONE: As a practical matter,
11 Your Honor, first of all, a date has to be -- a
12 state court has to be petitioned to set another
13 date. No state court in Texas is going to do
14 that while this Court has a case on the merits
15 pending regarding given execution.

16 After that occurs, it would be at
17 least 91 days from when the trial judge is --
18 grants the motion. As a practical matter, it
19 tends to be about four to seven months, as this
20 Court could see regarding Mr. Ramirez's dates.

21 JUSTICE ALITO: And would there be any
22 reason why Mr. Ramirez could not exhaust any
23 grievances he has about the way the execution
24 will be carried out during that period?

25 MR. STONE: Well, Your Honor, I

1 believe he actually -- so he hasn't exhausted
2 either of the two as of right now. The
3 exhaustion came after he'd filed loss -- the --
4 his lawsuit regarding physical touch.

5 So I believe, if that were dismissed
6 for exhaustion, that would be without prejudice
7 or at least with leave to refile based on the
8 district court's analysis of that.

9 The other audible claim -- audible
10 prayer one, he's had notice of that for more
11 than 15 days. This Court in Woodford has noted
12 that a prisoner has to engage in exhaustion
13 proper, not just exhaustion simpliciter. And
14 because TDCJ's consistent policy is that you
15 have to raise a first step grievance within 15
16 days of the arising of the problem, his refusal
17 to do so would mean he couldn't exhaust that
18 one.

19 JUSTICE SOTOMAYOR: Counsel, I
20 understand that prisoners -- you don't have any
21 rules that say prisoners can't pray out loud
22 during the execution, correct?

23 MR. STONE: No, Your Honor. And, in
24 fact --

25 JUSTICE SOTOMAYOR: All right. So you

1 tolerate their noise.

2 Number two, you were talking about the
3 fact that you didn't understand his request in
4 -- in June to "touch and pray over me," that it
5 would be verbal.

6 How was he supposed to understand from
7 the word "observe" in your April -- in your
8 April 21 change of execution policy that
9 "observe" meant no touching and no praying?
10 Observing, it had happened before.

11 So all I'm suggesting to you is you
12 can defend your position. He's defended his.
13 To me, prayer -- silent prayer, you don't have
14 to ask permission for.

15 I suspect that many of your people in
16 that room, even though they're DOJ employees,
17 also pray silently, and no one would question
18 that their prayer would be in their head.

19 So all I'm suggesting is lack of
20 clarity exists on both sides, but you can fix
21 yours by making your rules clearer. He tried to
22 fix his by filing a grievance less than a month,
23 weeks after you announced your policy on May 4.

24 You returned his grievance saying your
25 spiritual advisor can come. Weeks later,

1 Petitioner's counsel e-mails you and asks you if
2 touching will be allowed. June 11, three days
3 later, Petitioner files his grievance and says
4 "allow Moore to touch and pray over me."

5 You deny that almost a month later,
6 July 2. And on July 8, he files a grievance,
7 but you don't respond to that over a month
8 later. What were you doing six weeks later?

9 MR. STONE: Your Honor, if I recall
10 correctly, we responded in 36 days. TDCJ's
11 manual state that these grievances can take up
12 to 40 days to respond. We try to be faster.
13 TDCJ receives quite a few --

14 JUSTICE SOTOMAYOR: What was so slow
15 -- why were you so slow here? The execution's
16 going to be in September. If you don't want
17 there to be delay, what took you so long?

18 MR. STONE: Well, Your Honor, TDCJ
19 still responded within the amount of time that
20 the manual says --

21 JUSTICE SOTOMAYOR: Yeah, but at some
22 point, that becomes ineffective as a remedy --

23 MR. STONE: Well --

24 JUSTICE SOTOMAYOR: -- if you're going
25 to butt up against the execution date purposely.

1 MR. STONE: -- respectfully, Your
2 Honor, I think that means that Ramirez was under
3 an obligation to bring his grievance earlier.

4 At a very minimum, passing by the
5 public announcement of the changed protocols,
6 passing by the fact he had notice of everything
7 he would have needed to bring his RLUIPA
8 lawsuits in 2019, he received actual notice in
9 the form of his returned grievance saying you
10 may have your pastor --

11 JUSTICE SOTOMAYOR: On May -- in May.

12 MR. STONE: May 4, I believe, that's
13 right.

14 JUSTICE SOTOMAYOR: And within weeks,
15 he filed his grievance --

16 MR. STONE: He's in May --

17 JUSTICE SOTOMAYOR: -- in the same
18 amount of time that you took to deny it.

19 MR. STONE: He's in May 2021, Your
20 Honor, and he has a September execution date.
21 He waits to file his first grievance not May
22 6th, 7th, 8th, 9th. He waits until the middle
23 of June. So he takes a third of the time he has
24 left for purposes of figuring out whether or not
25 he's entitled to the extremely exceptional stay

1 of an -- of an execution at the last minute.
2 Spends it not grieving. Then he gets a
3 grievance in. Then TDCJ takes much less than
4 the 40 days back.

5 JUSTICE SOTOMAYOR: Thirty-six, four
6 days less. Thirty-six days.

7 MR. STONE: In the first return -- in
8 the return of the June grievance, I believe we
9 -- we received it on the -- on the 14th. We
10 returned it on July 5 for that first step
11 grievance, so far faster than 40 days. We
12 returned it certainly diligently.

13 Then he files a Step 2 on the 8th, and
14 then we end up filing 36 days -- we end up
15 returning it to him 36 days later, and he's
16 already sued.

17 At a bare minimum, if -- if Mr.
18 Ramirez thought that the grievance process was
19 unavailable, which he'd be incorrect about
20 legally and descriptively, at a minimum, then he
21 shouldn't have waited until the very end to
22 bring his lawsuit.

23 If he was going to go and file a
24 lawsuit regardless of whether or not he'd
25 received a second step grievance response, then

1 he should have done everyone a favor and sued in
2 May.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: No questions.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer?

9 Justice Alito?

10 Justice Gorsuch?

11 Justice Barrett? No?

12 Thank you very much, counsel.

13 Rebuttal, Mr. Kretzer.

14 REBUTTAL ARGUMENT OF SETH KRETZER

15 ON BEHALF OF THE PETITIONER

16 MR. KRETZER: Yes, Mr. Chief Justice.

17 I think perhaps one of the most
18 alarming things that my friend General Stone
19 said in his argument was that the TDCJ now has
20 the affirmative power under their logic to
21 front-run, impede, cut off, whatever you want to
22 call it, the ability to file a 1983 case by
23 their delay of the Level 2 exhaustion.

24 The three most catalytic pages of this
25 entire record and the lodged materials, 11, 12,

1 and 13, it's also at page 53 of the Joint
2 Appendix, and this is where Mr. Ramirez filed --
3 this was in June that he said the "and pray over
4 me" language, it was denied in boilerplate on
5 July 2.

6 The August 19 -- 16 denial -- this is
7 on page 13 -- has the exact same language.
8 Someone literally just took the same typewriter
9 and put the exact same thing and stamped there
10 on August 16. It sat there for six weeks.

11 This page 13 appears in the lodged
12 grievance file. It's not in the Joint Appendix
13 because it was never received by the attorney.
14 In other words, TDCJ, Mr. Stone said they can
15 take up -- we returned it in 36 days. We have
16 40.

17 Under their own internal protocols,
18 they could give themselves another 40 days to
19 respond to it, in which case they would have
20 returned the Level 2 grievance after Mr. Ramirez
21 was already executed.

22 That is the implication of how they
23 are trying to construe exhaustion in this case.
24 And there were several questions to me in my
25 opening about what would the larger implications

1 be for other cases.

2 If this Court adopts Mr. Stone's
3 logic, I predict you will see the word go out to
4 prisons across the country that they now have
5 this wonderful tool to insulate their policies,
6 whatever they may be, from federal review under
7 1983 because they can put off the Level 2
8 grievance as long as they care to.

9 I would point out -- Justice
10 Kavanaugh, you asked me in my opening about the
11 risk of, as you perceived, the non-TDCJ employee
12 chaplains being greater than TDCJ employee
13 chaplains. I would just point out that the drug
14 team members are not TDCJ employees. And the
15 botched executions you've heard about from both
16 sides, most famously Mr. Lockett in Oklahoma,
17 those botched executions were apparently caused
18 by these individuals who were not TDCJ
19 employees.

20 If the real concern is the compelling
21 interest, the safety of -- the security
22 protocols of the execution, I would submit
23 history has shown that it's these non-TDCJ
24 employees -- non-prison employees, in these
25 other cases, that have caused these executions,

1 not anything caused by any chaplain.

2 There simply exists -- as far as
3 everyone has looked for a hundred years, Justice
4 Breyer, or longer, there is not a single
5 instance of any chaplain ever causing any such
6 disturbance.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:54 p.m., the case
10 was submitted.)

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Official

<p>1</p> <p>1 [2] 27:1 82:14 10 [1] 73:13 103 [1] 3:14 11 [8] 47:17 57:3 63:2 67:16,19 75:5 100:2 103:25 11:17 [2] 1:17 4:2 12 [1] 103:25 12:54 [1] 106:9 13 [6] 57:3 62:17 67:16 104:1,7,11 149 [1] 82:13 14th [1] 102:9 15 [2] 98:11,15 16 [2] 104:6,10 16a [1] 47:16 19 [1] 104:6 1982 [1] 86:19 1983 [5] 4:24 8:12 25:13 103:22 105:7 19th [1] 32:23</p>	<p>8 [2] 17:25 100:6 8th [4] 26:9,15 101:22 102:13</p> <p>9</p> <p>9 [1] 1:13 9-by-12 [1] 91:18 90 [2] 52:20 97:9 90-day [2] 52:17 54:8 91 [1] 97:17 9th [1] 101:22</p>	<p>75:4 89:25 administrators' [1] 70:15 admit [1] 36:12 adopts [1] 105:2 advance [3] 25:14,23 26:6 advertent [1] 63:24 advised [1] 65:16 advisor [29] 4:13,18,21 5:3 17:14 46:3,20 49:4,5 58:20 62:25 63:3,5,6 64:5,12 65:12,16 68:9 69:4,12 72:22 73:25 74:25 75:16 81:24 82:2 87:22 99:25 advisor's [1] 91:6 advisors [5] 57:4 71:1 83:1 86:4,7 affidavit [3] 6:17,21 9:3 affirmative [1] 103:20 afforded [1] 42:2 affords [2] 20:9 42:3 agency [2] 82:17 89:20 agent [1] 36:21 ago [4] 20:7,23 30:18 41:21 agree [5] 15:12 22:5 36:16 44:7 45:25 agreed [2] 24:5 90:10 Ah [2] 14:16 17:2 ahead [4] 52:9 54:18 75:20 85:12 AL [1] 1:8 Alabama [14] 5:18 20:5,9,23 24:5 37:24 70:25 72:19 94:2,8,12,20,21,23 alarming [2] 9:2 103:18 ALITO [40] 22:16 23:16,21,25 24:12,14,17 25:9,22 26:5,17,21 27:16,19 28:5,9,11,13 29:9,16,23 30:3,25 32:7 41:6 60:18,19 62:2,6,18 64:21 66:9,22 71:5 72:4 97:4,7,8,21 103:9 Alito's [2] 35:9 67:3 alleviate [1] 43:21 allow [8] 4:12 14:13 70:25 72:7 75:12 82:25 88:1 100:4 allowed [16] 5:24 11:13 14:7 17:15 22:14 44:13 47:12 48:18,22,24 57:5 61:20 66:18 74:8 91:7 100:2 allowing [1] 5:2 allows [4] 18:16 19:1,9 53:8 alluded [1] 91:12 almost [4] 50:15 88:13,15 100:5 alone [2] 68:10 79:24 aloud [1] 67:19 already [5] 20:22,22 23:23 102:16 104:21 alternative [5] 18:15 19:4,20 37:20 72:24 alternatives [4] 18:12 45:3 71:23 93:25</p>	<p>although [2] 48:16 66:12 altogether [1] 72:21 amended [1] 6:18 Amendment [1] 61:12 amicus [4] 2:6 3:7 41:22 45:16 amount [7] 33:2 50:23 90:16,17,19 100:19 101:18 analyses [1] 89:23 analysis [7] 12:2 31:7 42:22 49:14 50:15 97:2 98:8 analyze [3] 10:9 13:20 17:3 analyzed [1] 28:3 analyzing [1] 10:10 anatomy [1] 23:9 and/or [1] 58:20 announced [1] 99:23 announcement [1] 101:5 announcing [1] 48:21 another [17] 5:25 7:11 18:13 19:1,9 21:2,20 38:9,21 39:4 66:2,4 70:20 76:16 93:3 97:12 104:18 answer [22] 6:8 12:24 15:1,13,22 17:4,17 18:22,23 23:20 24:11 29:22 39:16 43:12 48:11 66:19 73:16 83:18 86:9,9,15 87:8 answered [1] 45:9 answering [1] 48:5 answers [1] 42:9 anticipate [1] 88:3 anybody [2] 39:20 44:13 apace [1] 25:18 apart [2] 46:14 95:22 apologize [1] 48:2 apparently [2] 62:8 105:17 appear [1] 56:20 APPEARANCES [1] 2:1 appeared [1] 48:3 appears [4] 46:7 67:21 89:15 104:11 Appendix [4] 82:13,14 104:2,12 apples-to-apples [1] 94:11 application [3] 22:21 26:2,13 applications [2] 22:18 25:7 applied [1] 11:25 apply [4] 37:18 42:14 74:23 91:5 applying [1] 37:13 appreciable [1] 38:15 appreciate [2] 15:13 42:9 approaches [2] 5:17 54:22 appropriate [3] 62:9 95:17,18 appropriately [1] 6:18 April [8] 8:19 77:1,17 81:22 82:6,10 99:7,8</p>	<p>area [5] 35:10 81:5,7,7 87:15 areas [1] 35:11 aren't [1] 48:14 argue [2] 27:20 36:3 argues [1] 5:13 argument [20] 1:16 3:2,5,9,12 4:4,7 20:15,19 32:1 45:15 47:10,14 76:8 82:24 93:23 94:3,5 103:14,19 arguments [1] 20:17 arise [1] 37:17 arising [1] 98:16 arm [4] 10:6,23,24 11:1 around [3] 76:15 81:10 95:9 articulate [1] 73:3 articulated [2] 85:14 88:23 articulation [1] 43:1 asks [1] 100:1 aspects [1] 36:6 assertion [2] 76:24 77:4 assess [2] 7:8 54:20 assessing [1] 7:6 assessment [2] 24:8 39:13 assume [2] 7:3 78:18 assumed [1] 77:23 assuming [1] 32:1 astray [2] 86:24 87:21 attach [1] 38:16 attempt [1] 5:25 attempted [1] 53:21 attempting [1] 88:14 attend [1] 66:18 attending [1] 34:9 attorney [2] 8:9 104:13 audibility [1] 86:23 audible [14] 21:25 23:12,16,18 68:16 76:21 77:7,13 83:13 85:4 86:8 91:7 98:9,9 audibly [2] 4:15 77:24 auditory [2] 63:9 66:5 August [5] 32:23 77:14,23 104:6,10 Austin [1] 2:8 available [1] 77:16 avoid [1] 33:8 avoided [1] 59:12 aware [5] 54:2 59:5 77:6 86:24 87:20 away [9] 11:3 21:23 24:5,7 49:5 51:10 65:13,18 74:2 awful [1] 88:20 awfully [1] 92:13 awkward [2] 35:21 36:12</p> <p>B</p> <p>back [12] 22:8 26:24 27:23 32:5 38:22 52:3,7 62:7 83:22 84:23 86:2 102:4 background [1] 44:16 bad [1] 89:12</p>
<p>2</p> <p>2 [9] 9:10 27:1 72:20 100:6 102:13 103:23 104:5,20 105:7 20 [2] 30:17 41:21 2019 [5] 4:16 83:2 84:3 86:20 101:8 2020 [9] 4:23 6:11 8:12,15 50:2 76:25 77:25 81:22 83:3 2021 [8] 1:13 8:19,25 9:10 77:1 82:6,10 101:19 2022 [1] 83:8 21 [2] 8:19 99:8 21-5592 [1] 4:4 25a [1] 50:4 28 [2] 65:18 79:14</p>	<p>A</p> <p>a.m [2] 1:17 4:2 ability [1] 103:22 able [12] 22:10 23:7 53:2 56:8 63:2 64:17 66:3 68:24 70:25 71:3 92:4 94:21 above-entitled [1] 1:15 absence [1] 52:24 absolutely [2] 44:20 62:24 acceptable [1] 73:3 accommodate [9] 11:14 32:13 47:19 52:8 53:6 68:24 71:13 74:14 92:4 accommodated [4] 58:23,23 59:9 79:11 accommodating [1] 69:3 accommodation [3] 53:21 54:5 61:10 accommodations [1] 78:2 accompanied [1] 93:7 account [4] 30:16 41:18 54:25 61:7 accounted [1] 42:5 accurately [3] 61:25 88:13,14 acknowledge [1] 91:6 Across [3] 4:11 35:11 105:4 Act [1] 28:17 acting [1] 33:12 actions [1] 5:11 actual [5] 34:3 52:19 57:18 64:3 101:8 actually [6] 14:21 19:16 20:9 27:8 49:6 98:1 add [3] 52:12 87:9 93:11 added [1] 5:9 adding [1] 96:8 additional [1] 38:15 address [2] 31:6 47:18 adducing [1] 81:19 adjective [1] 90:11 administer [1] 94:14 administered [4] 46:22 49:6 57:7 91:8 administration [15] 34:3,10 46:22 47:11,15,21,24 49:1 57:15 60:8 63:10,22 65:13,15 67:22 administrative [1] 89:19 administrators [3] 74:13</p>	<p>75:4 89:25 administrators' [1] 70:15 admit [1] 36:12 adopts [1] 105:2 advance [3] 25:14,23 26:6 advertent [1] 63:24 advised [1] 65:16 advisor [29] 4:13,18,21 5:3 17:14 46:3,20 49:4,5 58:20 62:25 63:3,5,6 64:5,12 65:12,16 68:9 69:4,12 72:22 73:25 74:25 75:16 81:24 82:2 87:22 99:25 advisor's [1] 91:6 advisors [5] 57:4 71:1 83:1 86:4,7 affidavit [3] 6:17,21 9:3 affirmative [1] 103:20 afforded [1] 42:2 affords [2] 20:9 42:3 agency [2] 82:17 89:20 agent [1] 36:21 ago [4] 20:7,23 30:18 41:21 agree [5] 15:12 22:5 36:16 44:7 45:25 agreed [2] 24:5 90:10 Ah [2] 14:16 17:2 ahead [4] 52:9 54:18 75:20 85:12 AL [1] 1:8 Alabama [14] 5:18 20:5,9,23 24:5 37:24 70:25 72:19 94:2,8,12,20,21,23 alarming [2] 9:2 103:18 ALITO [40] 22:16 23:16,21,25 24:12,14,17 25:9,22 26:5,17,21 27:16,19 28:5,9,11,13 29:9,16,23 30:3,25 32:7 41:6 60:18,19 62:2,6,18 64:21 66:9,22 71:5 72:4 97:4,7,8,21 103:9 Alito's [2] 35:9 67:3 alleviate [1] 43:21 allow [8] 4:12 14:13 70:25 72:7 75:12 82:25 88:1 100:4 allowed [16] 5:24 11:13 14:7 17:15 22:14 44:13 47:12 48:18,22,24 57:5 61:20 66:18 74:8 91:7 100:2 allowing [1] 5:2 allows [4] 18:16 19:1,9 53:8 alluded [1] 91:12 almost [4] 50:15 88:13,15 100:5 alone [2] 68:10 79:24 aloud [1] 67:19 already [5] 20:22,22 23:23 102:16 104:21 alternative [5] 18:15 19:4,20 37:20 72:24 alternatives [4] 18:12 45:3 71:23 93:25</p>	<p>although [2] 48:16 66:12 altogether [1] 72:21 amended [1] 6:18 Amendment [1] 61:12 amicus [4] 2:6 3:7 41:22 45:16 amount [7] 33:2 50:23 90:16,17,19 100:19 101:18 analyses [1] 89:23 analysis [7] 12:2 31:7 42:22 49:14 50:15 97:2 98:8 analyze [3] 10:9 13:20 17:3 analyzed [1] 28:3 analyzing [1] 10:10 anatomy [1] 23:9 and/or [1] 58:20 announced [1] 99:23 announcement [1] 101:5 announcing [1] 48:21 another [17] 5:25 7:11 18:13 19:1,9 21:2,20 38:9,21 39:4 66:2,4 70:20 76:16 93:3 97:12 104:18 answer [22] 6:8 12:24 15:1,13,22 17:4,17 18:22,23 23:20 24:11 29:22 39:16 43:12 48:11 66:19 73:16 83:18 86:9,9,15 87:8 answered [1] 45:9 answering [1] 48:5 answers [1] 42:9 anticipate [1] 88:3 anybody [2] 39:20 44:13 apace [1] 25:18 apart [2] 46:14 95:22 apologize [1] 48:2 apparently [2] 62:8 105:17 appear [1] 56:20 APPEARANCES [1] 2:1 appeared [1] 48:3 appears [4] 46:7 67:21 89:15 104:11 Appendix [4] 82:13,14 104:2,12 apples-to-apples [1] 94:11 application [3] 22:21 26:2,13 applications [2] 22:18 25:7 applied [1] 11:25 apply [4] 37:18 42:14 74:23 91:5 applying [1] 37:13 appreciable [1] 38:15 appreciate [2] 15:13 42:9 approaches [2] 5:17 54:22 appropriate [3] 62:9 95:17,18 appropriately [1] 6:18 April [8] 8:19 77:1,17 81:22 82:6,10 99:7,8</p>	<p>area [5] 35:10 81:5,7,7 87:15 areas [1] 35:11 aren't [1] 48:14 argue [2] 27:20 36:3 argues [1] 5:13 argument [20] 1:16 3:2,5,9,12 4:4,7 20:15,19 32:1 45:15 47:10,14 76:8 82:24 93:23 94:3,5 103:14,19 arguments [1] 20:17 arise [1] 37:17 arising [1] 98:16 arm [4] 10:6,23,24 11:1 around [3] 76:15 81:10 95:9 articulate [1] 73:3 articulated [2] 85:14 88:23 articulation [1] 43:1 asks [1] 100:1 aspects [1] 36:6 assertion [2] 76:24 77:4 assess [2] 7:8 54:20 assessing [1] 7:6 assessment [2] 24:8 39:13 assume [2] 7:3 78:18 assumed [1] 77:23 assuming [1] 32:1 astray [2] 86:24 87:21 attach [1] 38:16 attempt [1] 5:25 attempted [1] 53:21 attempting [1] 88:14 attend [1] 66:18 attending [1] 34:9 attorney [2] 8:9 104:13 audibility [1] 86:23 audible [14] 21:25 23:12,16,18 68:16 76:21 77:7,13 83:13 85:4 86:8 91:7 98:9,9 audibly [2] 4:15 77:24 auditory [2] 63:9 66:5 August [5] 32:23 77:14,23 104:6,10 Austin [1] 2:8 available [1] 77:16 avoid [1] 33:8 avoided [1] 59:12 aware [5] 54:2 59:5 77:6 86:24 87:20 away [9] 11:3 21:23 24:5,7 49:5 51:10 65:13,18 74:2 awful [1] 88:20 awfully [1] 92:13 awkward [2] 35:21 36:12</p>
<p>3</p> <p>32 [1] 52:16 33 [1] 52:16 36 [4] 100:10 102:14,15 104:15</p> <p>4</p> <p>4 [3] 3:4 99:23 101:12 40 [5] 100:12 102:4,11 104:16,18 45 [1] 3:8</p>	<p>Act [1] 28:17 acting [1] 33:12 actions [1] 5:11 actual [5] 34:3 52:19 57:18 64:3 101:8 actually [6] 14:21 19:16 20:9 27:8 49:6 98:1 add [3] 52:12 87:9 93:11 added [1] 5:9 adding [1] 96:8 additional [1] 38:15 address [2] 31:6 47:18 adducing [1] 81:19 adjective [1] 90:11 administer [1] 94:14 administered [4] 46:22 49:6 57:7 91:8 administration [15] 34:3,10 46:22 47:11,15,21,24 49:1 57:15 60:8 63:10,22 65:13,15 67:22 administrative [1] 89:19 administrators [3] 74:13</p>	<p>75:4 89:25 administrators' [1] 70:15 admit [1] 36:12 adopts [1] 105:2 advance [3] 25:14,23 26:6 advertent [1] 63:24 advised [1] 65:16 advisor [29] 4:13,18,21 5:3 17:14 46:3,20 49:4,5 58:20 62:25 63:3,5,6 64:5,12 65:12,16 68:9 69:4,12 72:22 73:25 74:25 75:16 81:24 82:2 87:22 99:25 advisor's [1] 91:6 advisors [5] 57:4 71:1 83:1 86:4,7 affidavit [3] 6:17,21 9:3 affirmative [1] 103:20 afforded [1] 42:2 affords [2] 20:9 42:3 agency [2] 82:17 89:20 agent [1] 36:21 ago [4] 20:7,23 30:18 41:21 agree [5] 15:12 22:5 36:16 44:7 45:25 agreed [2] 24:5 90:10 Ah [2] 14:16 17:2 ahead [4] 52:9 54:18 75:20 85:12 AL [1] 1:8 Alabama [14] 5:18 20:5,9,23 24:5 37:24 70:25 72:19 94:2,8,12,20,21,23 alarming [2] 9:2 103:18 ALITO [40] 22:16 23:16,21,25 24:12,14,17 25:9,22 26:5,17,21 27:16,19 28:5,9,11,13 29:9,16,23 30:3,25 32:7 41:6 60:18,19 62:2,6,18 64:21 66:9,22 71:5 72:4 97:4,7,8,21 103:9 Alito's [2] 35:9 67:3 alleviate [1] 43:21 allow [8] 4:12 14:13 70:25 72:7 75:12 82:25 88:1 100:4 allowed [16] 5:24 11:13 14:7 17:15 22:14 44:13 47:12 48:18,22,24 57:5 61:20 66:18 74:8 91:7 100:2 allowing [1] 5:2 allows [4] 18:16 19:1,9 53:8 alluded [1] 91:12 almost [4] 50:15 88:13,15 100:5 alone [2] 68:10 79:24 aloud [1] 67:19 already [5] 20:22,22 23:23 102:16 104:21 alternative [5] 18:15 19:4,20 37:20 72:24 alternatives [4] 18:12 45:3 71:23 93:25</p>	<p>although [2] 48:16 66:12 altogether [1] 72:21 amended [1] 6:18 Amendment [1] 61:12 amicus [4] 2:6 3:7 41:22 45:16 amount [7] 33:2 50:23 90:16,17,19 100:19 101:18 analyses [1] 89:23 analysis [7] 12:2 31:7 42:22 49:14 50:15 97:2 98:8 analyze [3] 10:9 13:20 17:3 analyzed [1] 28:3 analyzing [1] 10:10 anatomy [1] 23:9 and/or [1] 58:20 announced</p>	

Official

<p>balance ^[1] 91:3 balanced ^[1] 42:7 ban ^[5] 5:5 46:7,9 89:9,9 banned ^[1] 5:5 bar ^[2] 72:21 74:3 bare ^[1] 102:17 Barrett ^[21] 42:11,12 43:6,19,22 45:2,5,8 64:2 71:15,17 72:1 73:8 74:16 76:2 81:21 82:7,9,20 88:7 103:11 Barrett's ^[1] 70:2 based ^[2] 15:24 98:7 baseless ^[1] 80:24 basic ^[1] 18:13 basically ^[3] 57:8 80:24 81:3 basis ^[5] 12:8,19 13:3 20:3 37:7 bear ^[2] 29:6 92:12 beard ^[2] 28:21 89:6 beards ^[1] 95:5 beaten ^[1] 41:1 Becket ^[1] 41:22 become ^[1] 55:3 becomes ^[1] 100:22 beforehand ^[3] 80:3,18,19 began ^[1] 49:2 begin ^[1] 16:10 beginning ^[2] 70:7 92:19 begins ^[1] 24:13 behalf ^[9] 2:2,9 3:4,11,14 4:8 76:9 91:20 103:15 behaved ^[1] 79:16 behavioral ^[1] 35:16 belief ^[8] 6:10 7:9 23:5 29:5 30:5 49:22 51:13 56:21 beliefs ^[11] 7:6,21 8:4 9:16 12:3 28:2,7 29:18,20 37:4 49:13 believe ^[15] 25:25 26:8,11 34:24 35:2 36:14,19 51:5,7 64:16 89:5 98:1,5 101:12 102:8 believes ^[2] 17:23 55:10 benefit ^[3] 30:11 47:25 55:24 best ^[2] 7:9 87:8 better ^[2] 45:23 83:6 between ^[8] 25:5 52:18 53:2 54:6 73:11 86:19 87:18 89:12 bit ^[13] 20:15 47:3,22,24 49:25 56:2 57:11,14,21 60:3 62:12 64:22 73:10 blessing ^[1] 92:9 block ^[3] 31:14,16,17 blocking ^[2] 64:10,17 bodies ^[1] 34:6 body ^[11] 9:23 10:2,5,19 11:19 12:22 24:22 28:25 34:12,19,21 boilerplate ^[1] 104:4 books ^[2] 17:9 60:24</p>	<p>BOP ^[22] 57:2,25,25 58:4 61:11,17 62:1,8,13,20 63:2,9,17,20 66:14 68:15,24 69:1 72:6 74:18,22 75:20 botched ^[3] 42:19 105:15,17 both ^[13] 6:2 24:21 34:4 46:16,19 48:24 49:18 73:20 77:10,11 92:24 99:20 105:15 bottom ^[1] 82:16 box ^[1] 47:4 boxes ^[2] 47:20 53:12 bread ^[1] 19:1 Breyer ^[16] 30:24 60:17 82:22 84:5,10,17 85:22,25 86:12,14,18,21 87:1,4 103:8 106:4 brief ^[8] 40:11,14 41:22 51:20 52:14,16 74:16 94:13 briefe ^[1] 94:13 briefing ^[1] 46:16 briefly ^[1] 48:25 briefs ^[2] 25:6 43:10 bright ^[1] 21:24 bright-line ^[1] 67:4 bring ^[4] 96:13 101:3,7 102:22 bringing ^[1] 85:20 brought ^[2] 40:24 80:24 BRYAN ^[1] 1:6 bubble ^[1] 28:21 Bucklew ^[1] 85:15 bunch ^[1] 31:13 burden ^[12] 5:25 13:13,14,15 21:10 29:6 30:13 74:11 81:17 85:19,19,20 bureaucrats ^[1] 12:10 butt ^[1] 100:25</p> <p style="text-align: center;">C</p> <p>calendar ^[1] 26:10 calf ^[1] 35:3 calibrate ^[1] 19:13 call ^[2] 67:4 103:22 came ^[8] 1:15 5:13 27:4 58:6,9 69:7 95:4 98:3 cannot ^[1] 29:25 capital ^[2] 64:14 85:15 care ^[3] 86:4 90:2 105:8 carried ^[4] 20:6 62:22 75:5 97:24 carries ^[3] 38:14 73:1 74:18 carry ^[3] 43:25 54:11 63:2 carrying ^[3] 44:3,3 73:19 Case ^[40] 4:4 8:10,22 10:9,11 12:23 13:6,6,7 18:4,5 21:16,22 25:13 28:19 35:23 36:20 37:16 40:5 47:3 48:9 55:15 56:18,19 57:17 62:5,15 81:11 84:22 89:1,17 93:22,23 96:6 97:14 103:22 104:19,23 106:8,9</p>	<p>case-specific ^[1] 96:23 cases ^[9] 12:9 23:10 28:17 36:24 56:17 88:24 96:22 105:1,25 Castro ^[1] 41:12 catalytic ^[1] 103:24 catastrophic ^[4] 69:25 88:5,8 90:11 categorical ^[1] 46:7 categorically ^[1] 13:4 Catholic ^[3] 29:11,12,17 causality ^[1] 36:24 cause ^[2] 52:7 64:7 caused ^[3] 105:17,25 106:1 causing ^[1] 106:5 caveats ^[1] 57:11 centrality ^[1] 30:1 certain ^[6] 33:2 50:23 56:8,18 59:10 71:8 certainly ^[15] 8:6 10:14 17:5 21:6 28:14 41:14 48:14 54:21 70:16 78:17 84:1 86:11,12,13 102:12 cetera ^[1] 31:23 challenge ^[1] 37:1 challenges ^[1] 4:22 challenging ^[1] 13:20 chamber ^[25] 4:14,19 13:22 17:24 43:15,17 44:5 46:20 49:4 51:12 63:1,4 65:9,21 71:6 72:22 73:25 77:3 82:17 84:9,12,15 87:16 90:16 96:19 chambers ^[3] 5:2 28:6 82:23 chance ^[3] 5:25 51:22 89:10 change ^[4] 85:1 93:9,9 99:8 changed ^[7] 4:17 7:1 20:5 27:2 31:5 84:4 101:5 chanting ^[2] 24:23 63:15 chaplain ^[8] 35:1 38:14 64:5 93:6,10,16 106:1,5 chaplaincy ^[1] 8:23 chaplains ^[7] 16:7 17:7 22:10 92:23 93:2 105:12,13 characterize ^[3] 42:23,24 43:4 charged ^[1] 87:15 check ^[2] 35:21 44:16 CHIEF ^[41] 4:3,9 9:21 10:8 11:6,11,12,23 12:6,13 18:17 30:19,22,23 33:22 42:10 45:12,17 54:17 55:11,19,21 56:24 60:12,16 66:24 71:14 76:3,5,10 78:7,22 79:3,6,9,18 80:7 103:3,7,16 106:7 choose ^[1] 52:8 chooses ^[1] 43:25 choreographed ^[3] 46:4 75:25 87:15</p>	<p>chose ^[4] 4:17 43:14,16 51:8 chosen ^[1] 89:13 Christian ^[1] 16:10 Church ^[5] 28:18 29:12 55:3 80:11 89:9 circle ^[1] 22:8 Circuit ^[4] 25:18,24 26:12 30:6 circumstance ^[3] 37:5 69:13,15 circumstances ^[8] 43:9 44:19 48:13 62:1 80:15 81:1,10 87:12 citing ^[2] 20:23 50:3 claim ^[7] 31:4 35:23 36:6 49:8,22 78:19 98:9 claimed ^[1] 50:1 claiming ^[2] 36:13 77:12 claims ^[14] 13:8 35:12 47:4 56:3,9 58:11,13 76:19 78:3 80:19 85:16,20 88:21 89:2 clarity ^[1] 99:20 classic ^[1] 12:10 Clause ^[1] 61:2 clear ^[5] 41:6 65:22 68:6,22 83:25 clearer ^[1] 99:21 clearly ^[2] 59:12 75:21 client's ^[1] 9:22 close ^[13] 14:9,13,22 15:15 17:1 33:16 38:25 48:5 70:5,11 75:11,12,13 closed ^[1] 24:9 closer ^[4] 10:15 11:9,19 75:7 closure ^[1] 64:15 cognized ^[1] 30:16 collar ^[1] 36:23 collateral ^[1] 80:15 COLLIER ^[2] 1:6 4:5 combination ^[1] 51:19 come ^[18] 18:8 21:13 22:7,22 23:22 25:23 33:1 44:18 48:5 51:17 64:7 83:2,7,8,16 84:21,23 99:25 comes ^[3] 18:10 55:2 70:16 coming ^[5] 16:17 27:7 68:9 91:24 93:5 commanded ^[1] 95:20 common ^[2] 19:6,7 commonplace ^[2] 86:16,22 communications ^[1] 61:23 communion ^[2] 59:25 60:9 comparison ^[3] 94:11 96:13,17 compelling ^[32] 13:16,17,18,19 14:11,21,23 31:8 37:19 42:15,20 43:2,6,12,22</p>	<p>44:1,6,8,21,22 45:8 46:1 70:4 71:23 72:13,18 73:3,18 88:10,18 93:24 105:20 competing ^[1] 91:3 complaint ^[1] 35:18 complaints ^[2] 7:2 8:1 complete ^[1] 10:4 completely ^[2] 44:21 60:25 complexities ^[1] 34:9 concept ^[1] 41:21 concern ^[10] 13:10 21:22 31:21 59:8 64:13 68:14 69:2 75:14 79:11 105:20 concerned ^[2] 20:16,19 concerns ^[9] 28:16 37:14 49:23 50:11 63:23 66:8 79:20 89:19 90:3 conclusion ^[2] 21:13,14 concurrence ^[1] 16:19 concurring ^[1] 34:2 condemned ^[1] 4:14 conduct ^[1] 77:5 congregants ^[3] 10:2,18 29:2 Congress ^[7] 30:16 32:9 37:11 41:18 42:5 81:16 95:20 conscious ^[1] 24:7 consciousness ^[2] 24:2,8 consensual ^[1] 53:9 consequences ^[1] 42:18 considerations ^[2] 65:6,7 considered ^[2] 50:14 51:18 considering ^[1] 49:15 consistent ^[1] 98:14 consistently ^[2] 9:16 76:20 construct ^[1] 44:11 construe ^[1] 104:23 construed ^[2] 8:8 34:22 consultation ^[1] 75:4 contact ^[8] 46:2 47:5,10,23 48:25 49:9 69:5 80:16 contend ^[1] 9:13 content ^[1] 75:19 context ^[6] 30:12 48:7 49:20 56:13 73:19 79:14 contexts ^[2] 7:20 88:19 continue ^[1] 26:19 continuing ^[2] 45:20 53:1 contraband ^[2] 89:5 95:5 contract ^[1] 17:8 control ^[1] 54:10 conversation ^[2] 57:18 67:21 conversely ^[1] 47:13 conversion ^[2] 79:2,19 convert ^[2] 78:11 80:10 conviction ^[1] 10:11 convictions ^[1] 95:20 copy ^[1] 8:18 correct ^[20] 9:25 26:11 32:</p>
--	---	--	---	---

Official

3,4,10 33:3,10,16 50:24 51:1,4 52:9,14 58:12 59:21 67:12 68:12,13 90:5 98:22 correctional [2] 87:14 89:8 correctly [4] 51:6 68:12 73:21 100:10 correctness [2] 30:1 36:5 couldn't [5] 47:18 74:14 83:16 96:6 98:17 Counsel [16] 6:5 9:21 27:5 30:20 31:2 33:21 45:13 60:13 76:6 78:7 97:3 98:19 100:1 103:4,12 106:8 countenance [1] 76:17 country [2] 37:7 105:4 couple [1] 22:17 course [5] 17:16 64:16 82:12 83:15 88:12 COURT [45] 1:1,16 4:10 5:23 6:1 12:9 14:20 18:1 19:16 21:18 26:1 28:16 29:10 30:10 34:7 37:1 45:18,19 51:17 52:12,18 55:10 56:21 58:6,10 59:9 60:22 69:8 76:11,17 78:4 79:1,12 81:2 89:1,24 94:8 95:7 96:23 97:12,13,14,20 98:11 105:2 Court's [11] 6:4 46:12 78:6 84:7 85:14 88:22,22 89:18 96:10,14 98:8 courts [16] 11:12 19:23 25:1 30:7 36:7 37:7 40:19 50:13 54:12,13 55:15 56:7 70:17 73:9 74:2,6 create [3] 73:25 86:23 90:18 created [2] 16:9,13 Credibility [3] 36:8 37:6 80:5 crime [1] 40:25 CRIMINAL [1] 1:7 criminalizing [1] 17:10 cross-examine [1] 51:24 crystallize [1] 53:10 curiae [3] 2:6 3:8 45:16 current [2] 5:17 40:4 cuspid [1] 9:12 cut [1] 103:21 Cutter's [1] 70:14	20 Daubert [1] 37:1 day [11] 18:2 22:22,23 25:8,25 26:2,3,4,15,16 50:6 days [23] 5:14 6:14 8:21 21:2 25:19 52:20 78:9 80:3 97:9,17 98:11,16 100:2,10,12 102:4,6,6,11,14,15 104:15,18 deal [6] 18:10 21:4 25:2 75:21 78:8 95:11 dealing [2] 87:14 95:23 death [11] 8:15 18:9 34:4 39:2 41:2,2 54:22 79:20,22 87:16 90:16 decades [3] 4:12 16:4 40:25 decide [5] 25:4 37:2 52:5 71:11 75:6 decided [5] 51:4 75:10 78:10 79:22 83:2 decides [1] 54:10 decision [2] 39:12 84:7 decisions [1] 74:23 declaration [3] 47:17 50:5 51:6 defeat [1] 31:4 defend [1] 99:12 defended [1] 99:12 defer [1] 89:25 deference [8] 70:15 74:12 81:14 88:23,25 89:2,18 95:17 define [3] 42:20 71:20 72:2 defined [2] 11:16 72:14 defines [1] 72:18 definition [2] 38:25 88:10 definitionally [1] 34:18 definitively [1] 48:11 degree [7] 15:9 54:5,12 69:2,11 71:11 74:1 delay [9] 9:13 13:9 52:7 64:7 76:18 78:4 80:2 100:17 103:23 delayed [2] 5:7 78:1 delays [3] 9:2 41:9 77:11 delicate [1] 34:5 demands [1] 61:8 demonstrated [1] 20:2 denial [1] 104:6 denied [1] 104:4 denominational [1] 22:15 denominator [2] 19:6,7 deny [2] 100:5 101:18 DEPARTMENT [2] 1:7 2:5 depending [1] 86:6 depends [1] 48:12 Deputy [1] 2:4 described [2] 43:2 63:8 description [1] 91:2 descriptively [1] 102:20 designed [1] 12:6 desire [2] 51:11 67:3 determination [3] 60:23	80:5 81:12 determinations [2] 36:8 37:6 determine [2] 55:16 79:1 determines [2] 5:23 74:19 develop [2] 6:2 52:20 developed [1] 49:24 development [2] 54:7,12 dictate [1] 11:17 die [2] 29:3 39:1 dies [1] 24:3 differ [1] 66:7 difference [5] 25:4 82:4 87:17 91:16 96:21 different [28] 10:10,12 12:23 15:1 21:3,15 22:20 24:21 28:1,1,2,5,6,6,7 43:1 44:25 49:10,14 50:1 54:23 60:4 65:3,7 66:13 71:5 93:18,19 differently [2] 43:5 72:14 difficult [5] 55:16 56:5,13 91:5,25 difficulties [1] 34:5 difficulty [1] 37:13 dilatory [1] 8:10 diligent [1] 85:17 diligently [2] 85:20 102:12 direct [2] 34:24 81:25 directed [1] 43:13 directly [6] 12:24 17:18 23:21 43:13 73:16,17 DIRECTOR [1] 1:6 8:23 disagree [2] 38:11 52:11 disclaimed [1] 76:25 discrimination [1] 22:15 discuss [1] 49:13 discussed [2] 43:9 79:13 discussing [1] 71:4 discussion [1] 75:3 discussions [4] 58:1,19,22 75:20 dismiss [2] 6:15 8:13 dismissed [1] 98:5 disposition [1] 17:11 dispositive [2] 94:22 97:2 dispute [5] 15:3,19 52:13 53:10,10 disputes [1] 45:21 disrupt [1] 69:19 disruption [1] 63:25 distance [1] 75:11 distinct [1] 77:21 distinction [1] 87:10 distinguished [2] 77:22,24 distributor [1] 56:10 district [9] 25:15 30:7 36:6,9,18,25 81:2,11 98:8 disturbance [1] 106:6 docket [1] 18:7 doctor [1] 34:18 doctor's [1] 10:23 doctrine [1] 29:1	documented [1] 39:19 doing [8] 19:12 20:20 44:17 45:1 46:9 62:13 75:17 100:8 DOJ [1] 99:16 done [6] 12:21 22:7 43:7 58:17 71:2 103:1 doubt [1] 55:12 down [1] 94:9 drapes [1] 24:9 drip [1] 63:11 drove [1] 17:19 drug [8] 23:23 47:7,8,11,16,22,24 105:13 drugs [15] 34:4,10 46:21,23 49:2,6 57:7,16 60:8 63:11,22 65:14,16 67:24 91:8 duration [1] 92:18 during [21] 46:22 47:7,10,21 54:7 57:15 59:17 60:7 61:20 62:9 63:10,21 65:13 66:15 68:7,8,15,18 75:22 97:24 98:22 duties [1] 17:12 dying [1] 51:12	enough [3] 14:23 31:4 59:12 enshrined [1] 14:1 enter [1] 52:2 entered [1] 25:15 entire [5] 62:16 68:7 77:6 92:18 103:25 entirely [2] 65:22 68:6 entitled [3] 30:11 32:10 101:25 entity [1] 43:17 environment [1] 15:5 equal [4] 14:1 16:9,14 94:18 equipment [4] 65:23 66:6,6 71:6 equitable [1] 85:18 equities [2] 30:15 42:7 ergo [1] 17:7 ERIC [3] 2:4 3:6 45:15 escorted [1] 82:17 especially [2] 38:24 46:17 ESQ [4] 3:3,6,10,13 ESQUIRE [1] 2:2 essentially [8] 48:19,23 50:14 52:11 58:18 75:23 94:14 95:14 established [1] 12:21 ET [2] 1:8 31:22 eve [1] 25:2 even [12] 11:19 28:18 41:20 47:18 51:22 53:13 55:19 69:11 73:24 74:1 75:22 99:16 event [1] 92:8 everyone [6] 12:12 13:25 59:11 91:6 103:1 106:3 everything [4] 25:19 59:9 63:5 101:6 evidence [8] 7:9,20,21 8:2 21:9,17 94:22 96:5 evidenced [1] 34:6 evidentiary [2] 6:1 56:15 exact [2] 104:7,9 exactly [14] 12:25 17:18 23:12,14 29:24 53:3,4,7 62:1 65:23 90:6,14 95:2 96:12 examination [1] 81:9 example [13] 10:3,22 12:2 17:13 18:17 36:20 37:1 39:22 69:22 72:14 79:15 89:1 96:6 examples [3] 41:24 71:22 96:11 excellent [1] 84:18 except [1] 67:11 exception [1] 12:11 exceptional [2] 76:13 101:25 exceptions [1] 12:12 exchange [1] 4:23 excluding [1] 13:25 excuse [2] 77:7,10 excused [1] 52:24
--	--	--	--	---

E

e-mails [1] 100:1
each [11] 22:20 27:25 28:2,7 31:6 40:18,23 62:14 74:20,24 76:14
earlier [10] 35:6 50:4 53:12 63:8 64:2 69:3 70:3 71:4 78:9 101:3
early [4] 5:15 26:1 28:17 32:25
effect [2] 56:11 60:11
effectively [1] 73:20
effort [1] 91:3
eight [1] 46:25
Either [7] 5:7,10 11:7 53:11 63:24 64:18 98:2
EKG [1] 63:17
eliminate [1] 56:8
eloquent [1] 12:14
embrace [1] 44:21
emphasis [1] 70:14
emphasize [1] 69:6
empirical [4] 15:24,25 20:3 73:13
employee [5] 35:7 64:4 87:13 105:11,12
employees [7] 22:10,13 99:16 105:14,19,24,24
enables [1] 65:12
end [7] 10:5 15:2 78:5 92:20 102:14,14,21
ends/means [1] 89:12
enforced [1] 14:2
enforcement [2] 17:11 36:21
engage [2] 53:21 98:12
engaging [2] 94:10 96:12
engendered [1] 80:17

Official

<p>execute ^[1] 52:5 executed ^[5] 7:23 40:18 50:7 97:5 104:21 execution ^[96] 4:13,18,23 5:1,21 8:11 9:5,12 13:22 14:7 16:23 17:24,25 19:2, 2 20:7,10 21:2 22:2,21 24: 1 25:2,14,23 26:6,8,25 28: 6 31:11 33:16 34:8,10 38: 23 40:25 42:19 43:7,14,15, 16,24 44:4,5 46:4,15,20 48: 24 49:1 51:1,12 52:18,19 54:10,11 61:20,21 63:7 64: 19,23,24 68:6,18,20 69:22 73:19 75:18 76:14,15,18 77:3,16,18 78:10,21 80:2, 20 82:17,19 85:18 86:24 87:21 91:13 92:19 94:24, 25 95:25 96:1 97:2,6,15,23 98:22 99:8 100:25 101:20 102:1 105:22 execution's ^[1] 100:15 executions ^[20] 4:11 13:9 16:1 40:13 41:16 57:3 58: 14 61:16 62:9,21 63:3 67: 8 74:18 75:5,22 86:2,17 105:15,17,25 EXECUTIVE ^[1] 1:6 exercise ^[11] 4:20 10:7,16, 17 11:14,15,21 12:7 20:10 60:21 61:2 exhaust ^[3] 77:12 97:22 98: 17 exhausted ^[2] 53:24 98:1 exhaustion ^[9] 52:23,24 53:7 98:3,6,12,13 103:23 104:23 exhorting ^[1] 96:25 exists ^[2] 99:20 106:2 expeditiously ^[1] 33:13 experience ^[12] 34:7 45: 24 46:24 48:16 57:2 58:3 74:4 79:19 81:8 87:4 91:2 96:2 experiences ^[1] 46:6 expert ^[2] 28:14 52:15 expertise ^[1] 70:16 experts ^[5] 36:23,24 46:10 75:5 89:25 explain ^[1] 51:22 explaining ^[1] 45:23 explanation ^[1] 67:7 explored ^[1] 54:3 expose ^[1] 34:11 expressed ^[1] 32:7 extended ^[1] 61:1 extent ^[5] 89:7 94:23 95:10, 23 96:10 extraordinarily ^[1] 87:15 extremely ^[3] 64:3 76:13 101:25 extremity ^[1] 10:4 eyes ^[1] 40:15</p>	<p style="text-align: center;">F</p> <p>fact ^[12] 10:16 47:16 51:20 80:22 93:4 94:20 96:2,16, 19 98:24 99:3 101:6 facto ^[1] 19:14 factor ^[1] 64:20 factors ^[1] 79:15 facts ^[9] 6:12 18:4 32:3 51: 18,19,25 79:24 81:1,10 factual ^[7] 25:5 45:21 48:1, 13 53:1 54:3 81:12 factually ^[2] 28:1 80:9 failing ^[1] 77:8 failures ^[3] 34:11 77:11,11 faint ^[1] 69:17 fairly ^[2] 47:14 85:7 faith ^[4] 32:13,20 78:11,24 fall ^[1] 96:16 false ^[2] 76:24 77:15 falsely ^[1] 49:21 familiar ^[1] 81:2 families ^[3] 41:7 90:21 91: 21 family ^[7] 40:10,16,21 41: 12 50:24 51:10 64:16 famously ^[1] 105:16 far ^[14] 5:14 10:4 11:2,3,4,7 22:24 25:22 26:6 53:3,5 95:22 102:11 106:2 fashion ^[2] 22:12 27:4 faster ^[3] 9:7 100:12 102: 11 father ^[2] 41:1 60:4 favor ^[2] 18:6 103:1 fear ^[1] 24:19 fears ^[1] 31:19 feasible ^[1] 65:20 federal ^[28] 5:17 19:23 20: 4 30:7 36:3,6 37:7 45:1,23 48:15 61:16 64:4,25 65:4, 4 66:1,17 67:8 68:10 70: 24 71:7,9,12 73:2 75:22 91:13 96:18 105:6 feel ^[3] 41:13 55:23 71:21 feet ^[2] 65:13 74:1 FEIGIN ^[56] 2:4 3:6 45:14, 15,17 48:10 49:17 50:18, 21 51:2,5,16,24 52:10 53: 15,19,22 54:16,17 55:9,14, 20,25 57:10 58:8,12,18 59: 1,4,16,22 60:2,19 61:24 62: 4,11,23 65:9 66:20 67:13, 17,20,24 68:1,3,21 69:1 70: 13 71:16,17,25 73:5 75:9 76:3 88:9 90:10 Feigin's ^[1] 91:2 few ^[5] 20:25 25:19 67:2 78: 9 100:13 Fifth ^[3] 25:18,24 26:12 fighting ^[1] 72:9 figure ^[1] 27:14 figuring ^[1] 101:24 file ^[6] 6:14 27:1 101:21</p>	<p>102:23 103:22 104:12 filed ^[18] 6:11 7:2 8:12,14, 16,21 9:9 25:13,16 26:3,11, 14,16 40:11 41:23 98:3 101:15 104:2 files ^[3] 100:3,6 102:13 filing ^[5] 7:17 8:1,7 99:22 102:14 finality ^[1] 41:16 finally ^[2] 84:22 85:1 findings ^[1] 48:1 fine ^[1] 83:12 finish ^[1] 40:7 fire ^[1] 17:7 first ^[18] 5:4 19:13 21:11 26: 25 29:7,23 30:8 61:12 76: 24 78:25 81:13 84:3,3 97: 11 98:15 101:21 102:7,10 fit ^[1] 89:12 five ^[2] 39:22 46:24 five-second ^[1] 92:9 fix ^[2] 99:20,22 flag ^[1] 50:1 flags ^[1] 56:18 floor ^[3] 65:17 74:25 75:8 focus ^[1] 13:18 focuses ^[1] 79:20 focusing ^[1] 57:12 folks ^[1] 17:20 follow ^[6] 20:21 35:9 64:22 70:2,22 71:18 follow-ups ^[1] 67:3 followed ^[1] 5:1 following ^[3] 13:25 26:2 67:9 foot ^[5] 10:4 11:3,10 23:3 31:16 footage ^[1] 65:10 Footnote ^[1] 79:14 forbid ^[1] 4:17 forehead ^[1] 10:13 form ^[3] 22:15 27:11 101:9 forth ^[7] 24:10 27:5 28:18 30:15 35:3 41:16 44:16 fortunately ^[1] 63:19 forward ^[2] 22:24 88:19 fought ^[1] 4:19 four ^[5] 4:12 13:11 16:3 97: 19 102:5 four-and-a-half ^[1] 40:12 fourth ^[1] 76:18 frame ^[1] 43:14 frankly ^[2] 49:18 64:9 fraud ^[1] 30:9 fraught ^[5] 16:18,19 34:5 38:23 69:13 free ^[3] 44:17 60:21 61:1 Freedom ^[2] 28:17 52:8 Friday ^[1] 66:16 friend ^[3] 73:17 88:9 103: 18 friends ^[1] 39:1 frivolous ^[1] 56:8 front ^[1] 26:10</p>	<p>front-run ^[1] 103:21 full ^[1] 22:8 fully ^[1] 64:18 Fulton ^[1] 37:14 functionally ^[1] 91:17 Fund ^[1] 41:23 further ^[14] 30:21 33:23 43: 10 45:24 48:1 49:25 50:10 52:20 54:7,11 56:22 66:25 71:15 103:5 furthering ^[1] 5:20 future ^[4] 21:23 35:10 41:7 61:16</p> <p style="text-align: center;">G</p> <p>galleries ^[1] 65:25 games ^[1] 8:9 gaming ^[4] 7:4,24 8:3 49: 15 gathering ^[1] 72:12 gatherings ^[1] 72:16 gave ^[3] 31:13 71:21 77:1 General ^[9] 2:4,8 27:5 59:6 76:7 81:21 92:2 95:1 103: 18 generalized ^[1] 31:3 generally ^[5] 10:17 31:8 56:6 61:7,19 generically ^[1] 48:8 genuinely ^[1] 12:19 gets ^[5] 9:5 40:15 56:12 84: 22 102:2 getting ^[2] 92:3 96:14 give ^[6] 53:17 70:21 74:11 81:13 88:11 104:18 given ^[12] 18:8 41:25 50:12, 24 51:19 59:25 70:5 88:7 95:17,19 96:5 97:15 giving ^[1] 60:10 goalposts ^[1] 13:8 gold ^[2] 40:16 61:5 Gorsuch ^[2] 33:23 103:10 got ^[7] 8:14 32:22 35:17 57: 23 83:3 85:22 89:21 government ^[10] 5:18 20:4 45:1 64:25 65:5 70:24 71: 9,12 73:2 96:18 government's ^[1] 71:7 granted ^[1] 18:1 grants ^[1] 97:18 great ^[1] 75:21 greater ^[3] 21:7 69:2 105: 12 greatest ^[2] 19:6 41:11 grievance ^[21] 5:10 7:11 9: 10 53:23 98:15 99:22,24 100:3,6 101:3,9,15,21 102: 3,8,11,18,25 104:12,20 105:8 grievances ^[7] 7:17 8:16, 21 9:6 27:1 97:23 100:11 grieve ^[2] 41:12 77:8 grieving ^[1] 102:2 guess ^[7] 7:25 12:22 18:16</p>	<p>39:9 44:11 57:21 86:15 guessing ^[1] 27:15 guidance ^[1] 41:24 guide ^[1] 51:14 guidelines ^[2] 33:10 67:5 gurney ^[1] 65:18 Gutierrez ^[1] 69:8</p> <p style="text-align: center;">H</p> <p>Ha ^[1] 83:14 half-an-inch ^[1] 28:21 half-inch ^[1] 89:6 halted ^[1] 76:14 hand ^[5] 10:12 11:7 23:6,6, 8 handful ^[1] 87:25 handing ^[1] 8:18 hands ^[12] 4:14 6:6 10:1 34:12,19,21,23,23 83:5,12 85:3,3 handwritten ^[1] 7:11 happen ^[5] 20:24 23:4 24: 25 69:16,20 happened ^[5] 9:8 61:15 67: 7,10 99:10 happens ^[1] 55:8 happy ^[1] 46:12 hard ^[2] 36:15 89:4 harm ^[3] 64:1 90:5,9 haute ^[1] 65:8 Haute ^[3] 11:1 23:8 99:18 hear ^[1] 4:3 heard ^[2] 32:21 105:15 hearing ^[4] 6:2 36:20 51: 21 56:15 heart ^[4] 10:13 11:2,7 23:7 heavily ^[1] 71:8 heavy ^[1] 18:7 held ^[4] 12:19 29:5 30:4 89: 5 help ^[2] 51:14 81:1 helpful ^[9] 24:17 45:24 46: 14 47:2 54:13 61:3 62:19 64:21 67:7 helps ^[1] 18:14 hesitant ^[1] 74:6 Higginbotham ^[3] 34:1,22 38:22 Higginbotham's ^[2] 16:18 34:14 high ^[5] 42:19 64:3 89:10 90:21,24 highly ^[1] 46:4 Hill ^[1] 85:14 himself ^[2] 77:22 93:10 hire ^[1] 17:6 historical ^[2] 21:25 41:23 history ^[7] 5:16 12:11 17: 14 18:8 41:25 92:24 105: 23 Hobbs ^[2] 28:19 88:23 Hobby ^[1] 79:14 hold ^[2] 23:6 40:19 Holt ^[8] 28:19 70:18 73:10</p>
---	---	---	---	--

Official

<p>74:10 88:23 89:3 95:2,3 Holt's [2] 70:14,21 holy [2] 60:1 94:14 honor [45] 29:19 48:10 51:2,7,16 52:10 53:19,22 55:9,25 56:13 57:10 58:13,18 59:4,23 60:2 61:24 62:11,23 64:9 65:10 66:20 67:14 68:21 75:9 78:17,25 79:25 83:24 85:13 86:25 87:11 88:12 90:15 91:11 93:14 94:7 97:11,25 98:23 100:9,18 101:2,20 horribly [1] 41:13 Houston [1] 2:2 however [3] 5:24 63:2 94:9 hug [1] 19:9 huge [1] 35:10 human [4] 23:9 38:22 39:4 81:8 humane [2] 43:8 44:4 humanity [1] 44:3 hundred [2] 86:3 106:3 hundreds [2] 15:25 17:20 hypothetical [3] 8:6 78:8 89:11</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ID [1] 44:15 idea [2] 39:3 86:1 ideally [1] 48:17 identifies [1] 70:18 identify [1] 61:4 II [3] 2:8 3:10 76:8 illustration [1] 37:16 imagine [2] 20:25 38:24 immediately [1] 8:16 imminent [1] 79:22 impede [1] 103:21 impelled [1] 22:9 impending [1] 79:19 implication [1] 104:22 implications [1] 104:25 important [7] 11:11 53:8 64:19 71:20 87:10,10 96:19 imposed [1] 8:24 imposes [1] 55:20 inadvertent [1] 63:25 incentives [2] 35:15 49:21 inches [1] 65:18 incident [1] 40:2 included [1] 57:15 includes [1] 85:20 including [1] 45:20 inconsistencies [1] 35:16 incorrect [2] 6:13 102:19 increase [1] 15:19 increases [2] 14:15 15:18 incredibly [2] 39:19 89:4 indeterminate [1] 47:25 indicate [1] 63:14 indication [1] 7:4</p>	<p>indirectly [1] 93:2 individual [10] 29:20 31:7 79:16,16 80:1,23 81:10,14,17 87:12 individualized [6] 32:8 60:22 61:2,5 62:14 74:20 individuals [1] 105:18 ineffective [1] 100:22 inexplicable [1] 77:5 informally [1] 58:19 information [1] 25:5 informed [1] 21:14 inherent [1] 21:20 inherently [1] 72:25 inhibitions [1] 21:7 initial [1] 81:16 initiation [1] 55:6 injected [1] 11:5 injection [5] 11:8,10 24:13 34:2,8 injunction [1] 78:20 inmate [26] 4:14 8:6 11:14,17 12:19 19:10 29:4 30:9 38:25 44:14 46:2,19 49:5 50:24 56:20 63:21 64:18 65:25 68:10 69:5 82:16 85:16 90:19 91:19 95:13,19 inmate's [3] 64:16 77:18 82:18 inmate-by-inmate [2] 12:8,18 inmate-inmate [1] 13:1 inmates [5] 4:19 21:1 54:22 58:20 74:21 inmates' [1] 91:20 inquire [1] 29:25 inquiry [5] 79:13 81:2,4 95:2,3 inserted [2] 10:6 23:23 insincere [2] 35:16 50:22 insincerity [1] 9:15 insistent [1] 92:16 instance [3] 43:15 49:3 106:5 instances [1] 7:23 instead [2] 13:3 27:14 institution [3] 87:14 89:8 97:1 insulate [1] 105:5 intention [1] 9:3 interactive [1] 77:19 interest [35] 5:21 13:16,17,19,20 14:11,21 15:4 16:25 31:3 41:14,15 42:16,21 43:2,7,12,23 44:1,6,8,21,22 70:4 71:21,24 72:13,18 73:4,18 88:11,18 93:24 95:6 105:21 interested [2] 48:6 66:14 interests [10] 37:19 41:17 42:24 45:9 46:1 61:10 62:21 91:3 95:12,13 interfere [4] 31:11 61:22 63:16 75:17</p>	<p>interference [2] 17:10 62:22 interfering [1] 73:9 internal [2] 58:22 104:17 interpreting [1] 68:12 interrupt [2] 40:4 48:20 interrupted [1] 17:16 intolerable [2] 90:18,19 intrusive [3] 92:5,11 94:16 investigate [1] 85:21 involved [1] 40:5 ipso [1] 19:14 isn't [6] 14:11 17:3 29:21 46:8 48:17 95:1 issue [6] 19:25 21:13 22:8 50:19 58:15 61:9 issued [2] 25:25 26:13 issues [9] 13:11 16:20 22:18 27:22 28:20 45:21 52:4,21 54:3 it'll [1] 31:14 itself [1] 64:7 IV [13] 10:5,21,22 11:5,8,10,19 23:23 31:22 63:12,25 69:23 91:23</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JOHN [1] 1:3 Joint [4] 82:13,13 104:1,12 jostle [1] 69:18 JUDE [3] 2:8 3:10 76:8 Judge [12] 16:18 25:15 34:1,14,22 35:22 36:7,13 38:4,22 39:12 97:17 judges [5] 36:3,9,19 54:20 81:12 judgment [3] 41:16 48:21 73:23 judgments [1] 62:14 July [5] 9:10 100:6,6 102:10 104:5 June [6] 77:14 99:4 100:2 101:23 102:8 104:3 jurisdictions [5] 70:19,24 74:5,9 88:1 jurisprudence [1] 60:21 JUSTICE [274] 1:8 2:5 4:3,9 6:5,9,20,23 7:7,13,16,19 8:5,20 9:9,14,20,21 10:8 11:6,12,23 12:6,13 13:2,5,12 14:4,25 15:7,9,12,22 16:2,5,13 17:5,18 18:3,21,25 19:8,15,21 20:11,14 21:19 22:5,16 23:16,21,25 24:12,14 17 25:9,22 26:5,17,21 27:16,19 28:5,9,11,13 29:9,16,23 30:3,19,21,22,23,23,25 31:1,2,20 32:5,6,6,12,17,21,24 33:5,8,12,15,17,18,20,22,22,23,24,25 34:17 35:5,9,17,25 36:1,2,11,18 37:8,10 38:2,10,17,21 39:16,24 40:3 41:6,10 42:8,10,10,12,13,15,25 43:5,5,</p>	<p>19,22 45:2,5,8,12,18 48:2,4 49:7,19 50:17,20,21 51:3,9,23 52:1 53:14,16,20 54:16,17 55:11,19,21 56:24,25 57:1,20 58:9,16,25 59:2,14,18,20,24 60:12,14,15,16,16,18,19 62:2,6,18 64:2,21 66:9,22,24,24 67:1,2,3,9,15,18,23,25 68:2,11,25 70:1,2 71:5,14,14,17,19 72:1,3 73:8 74:16,17 76:2,3,5,11 78:7,22 79:3,6,9,18 80:7 81:21 82:7,9,20,22 84:5,10,17 85:22,25 86:12,14,18,21 87:1,4,20,23 88:7,13 90:4,8,22 91:1 92:21,22 93:1,12,15,18 95:1,22 96:13 97:3,4,7,8,21 98:19,25 100:14,21,24 101:11,14,17 102:5 103:3,5,6,7,9,10,11,16 105:9 106:3,7 Justice's [1] 18:17 justify [3] 46:9 70:8 96:20</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan [20] 33:22 54:16 56:25 57:1,20 58:9,16,25 59:2,20,24 67:1 74:17 87:20,23 92:22 93:1 95:1,22 96:13 Kagan's [1] 67:9 KAVANAUGH [68] 13:2,5 14:4,25 15:7,9,12,23 16:2,5,13 17:5,18 18:3,21,25 19:8,15,21 20:11,14 21:19 22:5 32:6 33:24,25 34:17 35:5 36:1,2,11,18 37:8 38:2,10,17,21 39:17,24 40:3 41:10 42:8,13,15,25 43:5 59:14,18 67:2,15,18,23,25 68:2,11,25 70:1 71:19 88:13 90:4,8,22 91:1 92:21 93:12,15,18 105:10 Kavanaugh's [1] 31:20 keep [2] 37:22 68:2 keeping [1] 16:25 kind [14] 13:11 19:9 21:24 58:25 62:15 72:11 73:5,11 75:3 80:23 94:4 95:25 96:12,16 kinds [3] 72:16 74:8 80:25 knee [1] 23:5 KRETZER [77] 2:2 3:3,13 4:6,7,9 6:8,22 7:7,14,18 8:5 9:25 10:14 11:9 12:5,16 13:3 14:3,25 15:8,11,22 16:3,12 17:4 18:20,23 19:5,12,21 20:12 21:5 22:4 23:15 24:4,15 25:9,24 26:8,20 27:18 28:4,9,13 29:15,22 30:4 32:4,11,15,21 33:4,7,11,14,17,19 34:16 35:25 36:2,17 38:1,10,20 39:15 40:1 41:10 43:3,20 44:7 45:4,7,11 103:13,14,16</p>	<p style="text-align: center;">L</p> <hr/> <p>Labor [1] 25:25 lack [1] 99:19 laid [2] 6:6 95:2 language [2] 104:4,7 large [1] 91:22 largely [1] 16:10 larger [4] 42:4 91:14 96:18 104:25 last [18] 8:2 20:4,6 21:2 22:13,17,22 25:3 26:18,19,23 27:7 38:12 40:7 62:10 76:14 94:15 102:1 last-minute [4] 7:2 8:7 33:9 59:13 late [2] 5:14 27:18 later [10] 4:25 5:5 26:16 47:23 99:25 100:3,5,8,8 102:15 Laughter [1] 12:15 law [10] 5:23 17:10 35:24 36:21 52:15,17 60:23,24 81:5,7 laws [1] 17:9 lawsuit [4] 8:12 98:4 102:22,24 lawsuits [2] 80:25 101:8 lawyer [1] 39:23 lawyers [1] 84:18 lawyering [1] 44:13 lay [1] 4:14 laying [1] 83:5 laying-on-of-hands [1] 29:1 lays [1] 10:1 lead [1] 90:17 leading [1] 17:25 learned [3] 6:12 8:22 77:12 learning [1] 8:22 least [33] 5:20 9:18 13:9,17 16:20 18:11 19:7,20 31:16 37:20 45:3 46:8 48:9 52:20 54:8 60:6 61:4 68:4,15 70:19,20 71:22 74:10 83:25 87:8 89:15 90:3 93:19,25 94:23 97:9,17 98:7 leave [1] 98:7 left [1] 101:24 leg [1] 35:3 legal [1] 41:4 legally [1] 102:20 legitimate [2] 64:13 72:2 legitimately [2] 71:11 96:7 lengthy [1] 76:16 less [9] 18:14 19:4 92:5,11,12 94:16 99:22 102:3,6 lesser [1] 72:24 lethal [3] 24:13 34:2,8 letter [2] 27:4 32:23 letting [1] 83:6 Level [7] 9:10 38:15 95:17,18 103:23 104:20 105:7 license [1] 88:20</p>
--	---	---	--	--

Official

<p>lied ^[1] 81:3 light ^[1] 6:12 likelihood ^[1] 88:4 limited ^[1] 54:2 limiting ^[1] 46:1 line ^[5] 10:6 21:24 23:24 31:22 65:17 lines ^[5] 41:6 63:12,25 69:18 91:23 list ^[1] 27:3 listed ^[1] 25:20 listening ^[2] 63:11,12 literally ^[1] 104:8 litigates ^[1] 76:15 litigation ^[11] 5:13 18:9 21:23 35:10 50:2,10 59:13 69:8 76:22 77:5 78:2 little ^[18] 10:15 36:12 37:24 46:14 47:3,22,24 49:9,25 56:1 57:11,13,21 60:3 62:12,19 64:22 73:10 live ^[1] 91:9 Lobby ^[1] 79:14 location ^[1] 17:21 Lockett ^[2] 69:22 105:16 lodged ^[9] 9:4 103:25 104:11 lodging ^[2] 50:3,4 logic ^[5] 12:17 17:6 35:1 103:20 105:3 logically ^[1] 84:13 logistics ^[1] 91:13 long ^[7] 40:9 60:23,25 61:21 96:4 100:17 105:8 long-standing ^[1] 4:16 longer ^[3] 39:23 54:8 106:4 look ^[16] 22:24 35:20,22 36:5 47:16 61:11 62:7,16 74:4 75:25 79:15 80:14 82:25 84:2 95:9 96:10 looked ^[2] 31:12 106:3 looking ^[8] 7:9 22:1 77:2 82:1,10 94:1 looks ^[2] 14:6 65:23 loses ^[1] 24:2 loss ^[2] 41:13 98:3 lot ^[12] 16:20 35:11 41:2 42:21 71:22 76:1 81:9 88:20,25 89:16,20 90:3 loud ^[2] 23:13 98:21 low ^[4] 14:19 64:1 88:3 90:9 lower ^[8] 25:1 38:7,8 50:13 54:12 55:15 71:11 89:20 Lukumi ^[1] 28:18 Lumpkin ^[1] 47:17 luxury ^[1] 42:2 lying ^[2] 30:10 36:15</p> <hr/> <p style="text-align: center;">M</p> <p>made ^[8] 30:5 36:9 37:6 42:1 50:6 57:13 59:1 79:17 maintaining ^[1] 72:15 major ^[2] 91:12,15</p>	<p>manacles ^[2] 31:22,23 managed ^[1] 58:3 management ^[2] 15:6 44:10 managing ^[1] 44:15 mandated ^[1] 70:6 manifest ^[2] 49:24 96:3 manner ^[3] 36:7,21 85:17 manual ^[3] 27:10 100:11,20 Many ^[11] 36:23 45:21 86:2,22 92:23,23 95:11,23 96:1,21 99:15 mapping ^[1] 62:15 Maria's ^[1] 40:14 marijuana ^[1] 56:10 marshal ^[1] 48:20 materially ^[1] 65:3 materials ^[2] 9:4 103:25 matter ^[10] 1:15 5:22 6:16 15:24 17:15 36:14 64:25 69:11 97:10,18 matters ^[3] 12:7 42:21 53:1 mean ^[31] 6:20 12:1 15:23 18:18 22:9 28:13 36:18 37:21 40:6,8 41:3 44:1,9 54:21 55:1,12 57:2 58:7 68:22 69:6,15 73:12 80:9,10 82:22,25 84:17 87:6,7 95:8 98:17 means ^[9] 5:20 13:17 34:23 46:8 48:9 52:19 70:20 73:20 101:2 meant ^[1] 99:9 meantime ^[1] 52:6 medal ^[1] 40:16 media ^[1] 46:17 medical ^[4] 64:6 66:2,6 91:23 meet ^[4] 5:25 50:8 51:8,9 member ^[1] 55:3 members ^[2] 40:21 105:14 men ^[1] 95:4 mentioned ^[8] 11:4 40:9,10 53:12 56:4 69:3 73:8 74:24 mentioning ^[1] 64:2 merely ^[1] 5:7 merits ^[3] 85:12,25 97:14 micromanage ^[1] 19:24 micromanagement ^[1] 19:22 micromanaging ^[2] 70:17 73:11 middle ^[3] 26:15 69:21 101:22 might ^[24] 8:7 10:15 12:22 14:16 15:21 35:15 37:4,15 38:4,5 39:8 46:13 53:2,9 56:14 69:19,19 72:5 75:17 80:1 91:15 92:3 95:8 96:16 miles ^[1] 17:20</p>	<p>mind ^[1] 66:12 minimization ^[1] 89:14 minimize ^[1] 88:15 minimizing ^[1] 89:2 minimum ^[6] 74:3 75:7 81:18 101:4 102:17,20 minister ^[5] 14:8 19:9 29:2 31:24 39:20 ministrations ^[1] 7:14 minute ^[9] 8:2 22:22 25:4 26:18,19,23 27:7 76:14 102:1 minutes ^[1] 46:25 mishaps ^[1] 34:7 modest ^[1] 74:11 money ^[1] 43:20 monitor ^[1] 10:24 monitoring ^[7] 63:10,18 65:23 66:5,6 71:5,8 month ^[5] 25:14 32:18 99:22 100:5,7 months ^[11] 4:25 5:1,4 20:6 55:6,24 78:12,14,23 80:12 97:19 Moore ^[15] 6:17,21 7:15 10:1,3,18,25 17:19,24 23:2 27:11 34:18 39:21 50:8 100:4 moratorium ^[1] 75:23 morning ^[1] 26:1 most ^[9] 20:1 38:23 61:3 69:16 91:18 95:10 103:17,24 105:16 motion ^[3] 25:16 36:9 97:18 move ^[1] 16:6 mover ^[1] 19:13 moving ^[1] 13:8 much ^[2] 14:17 17:3 25:18 45:10 53:10 66:10,23 68:13 73:10 82:21 88:16 91:12 96:18 102:3 103:12 multi-month ^[1] 80:4 multiple ^[1] 18:17 Murphy ^[4] 14:2 22:9 52:3 84:7 must ^[2] 28:24 35:24 myself ^[1] 85:3</p> <hr/> <p style="text-align: center;">N</p> <p>namely ^[1] 76:20 narrow ^[1] 50:15 narrowly ^[1] 11:16 national ^[3] 19:13 20:1,2 nature ^[2] 53:11 71:4 navigate ^[1] 91:25 Nazis ^[1] 42:1 near ^[2] 10:21 31:23 nearing ^[1] 29:3 nearly ^[1] 30:17 necessarily ^[6] 26:21,22 38:14 44:24 48:17 94:22 necessary ^[1] 46:11 need ^[18] 11:18 13:11 21:</p>	<p>14 31:7,8 33:2 41:5 49:24 55:4 64:6 66:3 70:7 71:2 74:8 78:11 81:20 90:12 93:3 needed ^[5] 12:21 79:22,23 84:2 101:7 needs ^[4] 9:24 32:14 70:21 94:9 negative ^[1] 90:25 neither ^[2] 2:7 3:8 neutral ^[2] 19:17 38:5 never ^[8] 16:17 32:21 39:7 40:1 53:20 72:11 87:5 104:13 nevertheless ^[1] 55:17 new ^[8] 5:8 8:15,18 22:11,15 52:18 87:25 97:5 newfangled ^[1] 41:20 next ^[10] 4:4 13:6,6,7 20:25 23:4 26:3 44:23 49:8 63:4 next-door ^[1] 38:8 night ^[1] 25:8 nine ^[2] 65:13 74:1 noise ^[1] 99:1 non-disruptive ^[2] 23:17 24:16 non-medical ^[2] 34:12,20 non-prison ^[1] 105:24 non-religious ^[1] 7:19 non-TDCJ ^[3] 22:13 105:11,23 non-TDCJ-employed ^[1] 38:13 none ^[2] 58:5 88:2 normally ^[1] 49:12 noted ^[2] 54:9 98:11 nothing ^[5] 41:11 50:15 63:18 80:1 83:7 notice ^[5] 53:25 84:2 98:10 101:6,8 November ^[1] 1:13 nowhere ^[1] 31:23 nuanced ^[1] 62:12 number ^[5] 7:1 24:23 60:20 70:23 99:2 numbers ^[1] 73:13</p> <hr/> <p style="text-align: center;">O</p> <p>O'Keefe's ^[1] 60:4 objection ^[1] 33:1 obligated ^[1] 92:6 obligation ^[3] 85:15,19 101:3 observance ^[1] 12:20 observation ^[1] 77:20 observe ^[6] 77:17 81:24 82:5,18 99:7,9 observer's ^[1] 77:18 Observing ^[1] 99:10 obviously ^[14] 7:22,22 11:9 26:1 36:4 46:23 48:19 49:8,25 54:9 73:24 84:25 92:10 96:22 occur ^[1] 46:19</p>	<p>occurring ^[1] 88:4 occurs ^[2] 81:4 97:16 offer ^[2] 46:10,10 officer ^[4] 17:11 75:2 93:4,7 official ^[4] 66:1 75:15 93:13,15 officials ^[5] 16:7 54:20 68:10 95:4,18 oils ^[2] 60:1 94:14 Okay ^[29] 14:3,6,17 18:23,25 24:14 37:8 38:17,20 45:4,7 49:10 67:18,23 68:14,15,16,23,25 82:20 83:4,9 85:9,22,22 86:3,18,21 87:1 Oklahoma ^[2] 69:23 105:16 once ^[3] 20:20 30:13 78:5 one ^[57] 7:10 10:23 19:12,17,23 20:20 22:19,20 27:25 28:2,7,21 37:13 42:12 44:11,12,15 46:13 47:4,5,7,7 48:25 49:25 53:12,15 56:19 57:6,12,17 59:21,25 60:3 64:13 66:2,4,10 67:11,20 69:6 71:18 74:3,16,24 84:3 87:11 91:11,15,18 92:7 96:21,25 97:1 98:10,18 99:17 103:17 one's ^[1] 7:25 ones ^[1] 33:15 only ^[16] 5:5 6:13 8:2,8,15 20:7 40:19 50:7 53:8 54:13 57:6 72:20 77:12 84:12 89:20 91:17 opening ^[2] 104:25 105:10 operation ^[1] 44:12 operations ^[1] 44:10 opine ^[1] 93:24 opinion ^[5] 22:9 25:25 26:13 34:2,24 opportunities ^[1] 49:15 opposed ^[1] 69:24 opposite ^[1] 29:24 optimistic ^[1] 54:5 oral ^[7] 1:16 3:2,5,9 4:7 45:15 76:8 order ^[5] 13:9 25:15 28:23 52:2,2 ordinary ^[1] 23:18 other ^[47] 4:19 10:19,24 11:1,19 19:10,18,19 20:20 27:9 29:4 31:13 36:21 38:3 39:7 44:25 47:20 51:15 57:23 61:22 70:19,23 74:4,9,16 80:14,24 84:12,16 87:21,24 88:9,23 91:21,22 94:1,5 95:3,9,10,11 96:11 98:9 104:14 105:1,25 others ^[1] 93:20 otherwise ^[1] 30:11 out ^[41] 6:12 20:6,8 22:16 23:14 27:14 39:10 42:7,22 43:25 44:3 51:17 52:4 53:</p>
---	---	--	---	---

Official

<p>2 54:11 56:1 57:22 62:15, 16,22 63:2 69:7,9,10 72:16 73:19 74:18 75:6 84:22 87:3,13,24 91:15 93:8 95:2 97:24 98:21 101:24 105:3, 9,13</p> <p>outside [8] 16:17 22:13 64:5,12 70:25 74:7 87:22 92:10</p> <p>outsider [1] 87:18</p> <p>over [11] 20:24,24,24 22:16 23:7 30:17 39:13 99:4 100:4,7 104:3</p> <p>over-inclusion [1] 89:23</p> <p>over-inclusive [1] 89:22</p> <p>overarching [1] 46:16</p> <p>overly [1] 54:4</p> <p>own [6] 5:16 28:8 29:18,19 35:1 104:17</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m [1] 106:9</p> <p>Pablo [1] 41:12</p> <p>PAGE [8] 3:2 47:16 50:4 82:8,12 104:1,7,11</p> <p>pages [2] 52:16 103:24</p> <p>pain [2] 40:17 90:19</p> <p>palpable [1] 15:4</p> <p>paperwork [1] 44:16</p> <p>paragraph [1] 47:17</p> <p>parking [1] 41:2</p> <p>part [8] 9:14 18:7 29:23 38:12 46:23 48:11 82:14,14</p> <p>partially [1] 84:6</p> <p>participation [1] 77:21</p> <p>particular [13] 12:22 17:21 28:24 55:3 62:14 63:11,13 73:18 78:11 90:1 94:8 97:1,1</p> <p>particularized [1] 49:21</p> <p>particularly [3] 8:1 56:4 80:10</p> <p>parties [3] 53:1 54:6,15</p> <p>parts [2] 24:22 47:6</p> <p>party [2] 2:7 3:8</p> <p>passed [4] 30:17 41:18,22 42:6</p> <p>passes [2] 24:6,16</p> <p>passing [2] 101:4,6</p> <p>passive [1] 77:19</p> <p>past [3] 50:16 61:15 79:17</p> <p>Pastor [33] 6:17,21 7:15 10:1,3,18,25 17:19,23 23:2,22 24:4,7 27:11 31:19,21 34:18 39:21 40:5 44:18 50:8, 25 51:4,7,11,14 77:17,23 80:16 84:12,14 92:9 101:10</p> <p>pastor's [4] 76:21 77:3,20, 21</p> <p>pastoral [3] 41:24 76:25 77:6</p> <p>pastors [1] 84:8</p> <p>pays [1] 42:22</p>	<p>penalty [1] 18:9</p> <p>penalty-backed [1] 17:21</p> <p>pending [2] 50:9 97:15</p> <p>pentobarbital [2] 63:14 69:21</p> <p>people [17] 7:17 12:3 13:8 18:18 19:16 23:19 24:23 32:25 35:14 36:24 41:25 42:2 64:11 69:17 80:10 91:17 99:15</p> <p>people's [1] 79:20</p> <p>perceived [1] 105:11</p> <p>percent [6] 72:3,10,19,20 73:7,13</p> <p>perfectly [1] 44:12</p> <p>performed [1] 24:8</p> <p>perhaps [9] 8:7 20:8 21:7 22:6 29:7,20 54:4 72:7 103:17</p> <p>period [7] 52:17 54:8 55:5 60:7 68:7 96:4 97:24</p> <p>periods [1] 75:22</p> <p>permission [1] 99:14</p> <p>permit [2] 32:19 72:10</p> <p>permits [1] 72:21</p> <p>permitted [1] 77:13</p> <p>permitting [1] 74:9</p> <p>perpetrate [1] 30:9</p> <p>person [10] 19:17 21:20 31:24 34:12 35:7 38:25 63:4 64:13 80:19 81:18</p> <p>person's [3] 29:19 31:7 39:5</p> <p>personal [1] 29:18</p> <p>persuasive [1] 70:21</p> <p>petition [3] 4:24 6:11 25:13</p> <p>petitioned [1] 97:12</p> <p>Petitioner [13] 1:4 2:3 3:4, 14 4:8 47:13 51:20 53:3 54:1 59:19 76:12 100:3 103:15</p> <p>Petitioner's [2] 67:6 100:1</p> <p>petitioners [1] 32:10</p> <p>phase [1] 63:7</p> <p>phases [2] 46:18 48:24</p> <p>phrased [1] 15:2</p> <p>physical [9] 46:2 47:5,10, 23 48:25 69:5 86:7,23 98:4</p> <p>physically [1] 63:21</p> <p>picture [2] 31:15 64:23</p> <p>pictures [1] 31:12</p> <p>piece [2] 28:25 94:21</p> <p>piecemeal [3] 5:9 27:4 76:22</p> <p>place [6] 11:18 37:11 51:15 61:23 62:10 74:3</p> <p>placed [1] 81:16</p> <p>places [4] 11:2 74:10 84:1 85:15</p> <p>plaintiff [1] 21:11</p> <p>plausible [1] 80:9</p> <p>play [1] 8:9</p>	<p>played [1] 57:22</p> <p>plays [1] 39:10</p> <p>please [5] 4:10 45:18 76:11 83:4 84:25</p> <p>pledge [1] 17:22</p> <p>PLRA [1] 5:12</p> <p>plus [2] 85:3,4</p> <p>point [33] 10:5 11:5,11 12:22 16:8 18:13 20:8 21:6 24:2,15 27:23 29:3 30:5 33:18 41:4 42:1 54:1 55:22 61:14 69:10 83:11,21, 21 84:8 85:10,23 87:2 88:17 91:15 92:2 100:22 105:9,13</p> <p>points [2] 69:9 83:24</p> <p>policies [2] 84:4 105:5</p> <p>policy [19] 4:12 8:19 27:2 61:18,19 81:23 82:1,7,10 84:8 89:3,15,22 90:1 96:21,21 98:14 99:8,23</p> <p>portion [3] 46:25 68:8 75:13</p> <p>position [6] 9:22 41:8 63:6 67:6 75:16 99:12</p> <p>positioning [1] 65:24</p> <p>positions [1] 78:3</p> <p>possible [5] 9:18 14:9,13 70:5,12</p> <p>possibly [1] 54:8</p> <p>postponed [1] 40:12</p> <p>potential [6] 16:20 35:10 88:5,5 89:16 90:9</p> <p>power [1] 103:20</p> <p>powerful [1] 96:5</p> <p>practical [2] 97:10,18</p> <p>practice [4] 4:16 21:25 35:19 66:14</p> <p>practices [3] 5:16 70:19 95:10</p> <p>pray [10] 4:15 22:11,14 23:19 77:24 98:21 99:4,17 100:4 104:3</p> <p>prayer [27] 5:19 21:25 23:13,13,16,17,18 24:11,22 32:22 57:19 68:4,7 72:12 76:21 77:7,13 83:13 85:4 86:8 91:8 92:18,24 98:10 99:13,13,18</p> <p>praying [3] 32:19 63:16 99:9</p> <p>pre-Smith [1] 60:21</p> <p>precepts [1] 11:17</p> <p>precise [3] 65:19 73:12 75:19</p> <p>precisely [3] 48:6 75:10 89:3</p> <p>preclude [1] 61:5</p> <p>predict [2] 39:3 105:3</p> <p>prejudice [3] 6:15 8:14 98:6</p> <p>preliminary [1] 78:20</p> <p>premise [1] 38:12</p> <p>presence [4] 4:21 5:3 77:3,</p>	<p>25</p> <p>present [12] 4:13 10:20 12:4 22:18 27:18 28:8,22 32:2 67:16 75:2 82:2 94:19</p> <p>presented [4] 22:19 25:5 32:3 94:17</p> <p>preserve [1] 4:20</p> <p>presumably [2] 50:25 74:22</p> <p>presupposes [1] 73:6</p> <p>pretext [2] 79:13 81:4</p> <p>pretextual [1] 80:24</p> <p>pretty [3] 11:2,4 83:12</p> <p>prevail [3] 5:22 39:9 67:6</p> <p>prevent [1] 92:23</p> <p>preventing [1] 95:6</p> <p>previous [3] 25:7 80:16,20</p> <p>principle [3] 14:1 19:17 38:6</p> <p>prioritize [1] 39:13</p> <p>prison [22] 9:19 10:22,23 27:10 31:15 43:16,17 44:2 54:19 64:4 66:17 70:15,17 72:9,10,15,17 75:4 89:25 92:7 95:4,17</p> <p>prison-employed [1] 17:7</p> <p>prisoner [12] 23:4 24:2,6 29:16 39:21 55:2 63:13 73:21 78:10,19 81:23 98:12</p> <p>prisoners [4] 28:1 66:18 98:20,21</p> <p>Prisons [6] 15:5 32:12 44:9,14 72:6 105:4</p> <p>probably [2] 69:16 74:2</p> <p>problem [14] 10:20,25 13:24 15:15,17,18,20 16:9,14 17:1 19:23 83:1 87:5 98:16</p> <p>problems [7] 37:17,22 64:8 69:21 76:23 90:25 91:12</p> <p>procedure [8] 34:11,13 46:5 47:1,7 48:18 73:20 75:25</p> <p>procedures [5] 65:5,19 70:18 75:24 77:16</p> <p>proceed [1] 56:22</p> <p>proceeded [4] 4:22 25:17, 19 27:2</p> <p>proceeding [1] 17:16</p> <p>proceedings [1] 41:15</p> <p>process [9] 9:7 53:23 55:22 57:6,22 74:20 78:12 80:4 102:18</p> <p>proffered [1] 5:21</p> <p>promulgated [1] 8:19</p> <p>prong [3] 21:11 29:7 30:8</p> <p>pronouncement [1] 34:4</p> <p>proof [1] 81:19</p> <p>proper [2] 52:23 98:13</p> <p>properly [2] 53:24 54:14</p> <p>proposes [1] 11:22</p> <p>proposing [2] 31:10 58:21</p> <p>protocol [2] 94:24 95:25</p> <p>protocols [3] 101:5 104:17</p>	<p>105:22</p> <p>prove [1] 5:18</p> <p>provide [2] 64:15 94:21</p> <p>provided [1] 31:13</p> <p>providing [1] 92:24</p> <p>public [3] 41:15 65:1 101:5</p> <p>publicity [1] 40:15</p> <p>publicly [1] 77:16</p> <p>pulse [1] 10:24</p> <p>punishment [1] 64:14</p> <p>purpose [1] 51:13</p> <p>purposely [1] 100:25</p> <p>purposes [8] 54:14 64:14 73:22 78:4,18 96:11,17 101:24</p> <p>pursue [2] 78:24 79:23</p> <p>pursuit [1] 89:14</p> <p>put [11] 21:17 23:6,7 37:11 39:2 40:19 68:19 78:5 95:4 104:9 105:7</p> <p>putting [2] 41:7 68:18</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question [38] 6:9 7:25 12:24 15:2 16:24 17:18 20:13 23:20 24:12 28:8,19 29:13, 22,23 30:7 35:6,8,12 38:13 39:16 40:7 42:13 43:12 45:9 48:3,11 62:7 66:11 68:20 70:2 71:20 73:16,16 74:17 85:10,11 88:8 99:17</p> <p>questioning [2] 39:25 40:4</p> <p>questions [13] 6:4 13:13 34:1 35:9,17 46:13 60:20 67:9 70:3 71:18 78:6 103:6 104:24</p> <p>quick [1] 71:18</p> <p>quicker [1] 9:5</p> <p>quickly [1] 9:17</p> <p>quite [7] 37:10 42:19 49:18, 19 61:25 68:22 100:13</p> <p>quote [2] 34:24 82:15</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise [4] 66:7 77:8 85:16 98:15</p> <p>raised [2] 78:3 80:19</p> <p>raises [2] 49:25 50:10</p> <p>raising [2] 78:9,19</p> <p>RAMIREZ [34] 1:3 4:4,19 5:9,22 6:6,24,25 8:16,20 9:9, 17 11:18 21:16 26:24 39:22 40:15,18 76:19,24 77:1, 5,10,20,22 78:1 84:1 92:16 97:5,22 101:2 102:18 104:2,20</p> <p>Ramirez's [14] 4:23 5:1,13 6:10 7:8 8:9 9:16 10:4 11:20 20:12 23:3 25:13 77:4 90:20</p> <p>rare [1] 37:5</p> <p>rarely [1] 49:13</p> <p>rather [1] 91:19</p>
--	--	--	---	---

Official

<p>reach [2] 21:14 55:22 reached [2] 54:6 87:24 react [4] 39:4,6,7 69:15 read [2] 82:14 84:19 reads [1] 84:20 real [1] 105:20 realize [1] 69:16 really [1] 14:16 15:15 30:8 46:18 47:18 48:12 53:9 69:7 7 85:9 94:10 95:2 reason [8] 50:8 52:2 55:12 66:4 70:10 92:13,15 97:22 reasonable [2] 33:10 85:8 reasonably [1] 88:16 reasons [10] 31:14 37:13 46:11 56:4 69:3 70:8,22 73:7 74:12,15 REBUTTAL [3] 3:12 103:13,14 recall [1] 100:9 received [6] 25:6 76:12 101:8 102:9,25 104:13 receives [2] 76:16 100:13 recent [4] 20:1 46:6 57:3 58:14 recollection [4] 60:3,5,6 67:13 record [8] 6:3 7:10 21:10, 17 48:14 52:20 65:1 103:25 records [1] 57:13 recreated [1] 22:7 red [2] 50:1 56:18 redacted [1] 50:5 redress [1] 5:10 reduce [1] 70:11 reducing [3] 13:21 14:22 70:4 reduction [1] 42:16 refile [1] 98:7 refiled [1] 6:16 reflect [1] 45:20 reflected [1] 6:17 refusal [1] 98:16 refuse [1] 92:14 regard [2] 25:12 62:20 regarding [5] 61:8 66:14 97:15,20 98:4 regardless [2] 52:22 102:24 regards [1] 9:6 regrettable [1] 61:1 regulatory [1] 34:6 rehearse [1] 75:23 reject [2] 59:3 88:21 rejected [3] 58:2 59:5 89:1 rejoinder [1] 12:10 relate [1] 58:14 related [2] 22:19 66:12 relates [1] 66:11 relationship [3] 37:19 80:18 87:18 relative [1] 80:20 relevant [5] 27:21 46:18</p>	<p>47:6 49:18 82:15 relief [3] 9:18 76:20 85:18 relieve [1] 24:19 religion [8] 28:14,23 36:14 42:3 55:24 56:9 78:13 79:20 religions [1] 28:15 religiosity [1] 36:5 religious [42] 4:18,20 6:10 7:21 8:4 9:24 10:7,11,16, 17 11:13,15,17,21 12:2,7, 20 14:8 20:9 23:5 28:2,7, 17 29:20 30:5 35:11,18 36:6 37:3 49:22 51:13 54:23 56:3,21 58:10 61:8 66:14, 17 72:7 88:21 95:12,19 reliving [1] 90:20 rely [1] 71:7 relying [1] 19:18 remain [1] 19:25 remains [1] 24:9 remand [3] 6:1 45:22 52:12 remanded [1] 69:8 remedy [2] 76:13 100:22 remembered [1] 26:24 removal [1] 24:9 removed [4] 11:3,4,8 64:6 rendered [1] 5:11 renew [1] 17:8 rep [1] 59:8 repeated [1] 8:1 repeatedly [2] 7:12 9:17 repeating [1] 85:3 replace [1] 37:15 reply [3] 26:4,15 51:20 reporter [1] 39:20 reporters [1] 44:13 reports [1] 46:17 represent [2] 61:25 68:23 representation [3] 50:6 52:13 59:11 representative [1] 82:18 represented [1] 50:9 representing [1] 59:8 reprieve [1] 76:16 request [1] 7:1 8:7 9:9 53:25 58:24 63:21 69:4 92:5 94:12,20 99:3 requested [4] 6:6 59:10,19 82:15 requesting [3] 7:12 53:4 80:3 requests [8] 33:9 57:24 58:1 59:2,5,7 77:9 92:7 require [4] 56:14 81:8,9 85:17 required [4] 9:19 12:3 43:18 93:8 requirement [3] 8:24 55:17 56:7 requires [6] 31:6 56:9 60:22 61:12,13 80:12 requiring [1] 64:11</p>	<p>reset [1] 4:25 resist [1] 47:10 resolution [1] 53:9 resolve [3] 38:6 54:14 58:19 resolved [1] 29:14 resort [1] 5:13 respect [5] 7:5 23:12 58:10 74:20 95:19 respectfully [4] 22:6 38:11 43:4 101:1 respectively [1] 77:14 respects [1] 95:12 respond [4] 15:21 100:7, 12 104:19 responded [5] 8:18 26:3, 14 100:10,19 Respondents [4] 1:9 2:9 3:11 76:9 response [5] 32:6 53:17 84:6 94:6 102:25 response/reply [1] 25:17 responses [1] 34:6 rest [1] 68:3 Restoration [1] 28:17 restrictions [3] 5:8,19 27:3 restrictive [14] 5:20 13:17 18:11,15 19:4,20 37:20 45:3 46:8 48:9 70:20 71:22 72:24 93:25 result [1] 21:15 return [2] 102:7,8 returned [6] 99:24 101:9 102:10,12 104:15,20 returning [1] 102:15 reveal [2] 5:4,4 revealed [1] 48:16 revealing [1] 5:8 reversed [1] 78:2 reversion [1] 5:2 review [3] 11:25 45:24 105:6 rewrite [1] 11:13 RFRA [8] 49:11,12,12 58:13 60:20 79:13 89:16 92:6 RFRA's [1] 60:24 rights [3] 4:20 89:16 94:15 Riley [1] 9:3 rioted [1] 89:10 rioting [1] 72:9 risible [1] 42:1 risk [64] 13:21,21,24 14:5,8, 12,14,17,18,22 15:5,7,10, 14,18,20,23 16:25 17:2 21:17, 19 31:7 32:2 35:6 37:21, 23,24 38:7,8,15 42:17, 18 44:9,15 62:24 63:24 64:1 70:3,4,11 71:12 72:3,9, 19,20 73:1,7,14 74:1,3 88:8, 15 89:3,14 90:5,8,16,17 92:12 93:11 96:3,3,8 105:11 risk-wise [1] 94:16</p>	<p>risks [1] 34:11 RLUIPA [29] 5:23 11:12,16 12:6 18:24 21:5,12 29:6, 10,21,25 30:8,14 31:5,9 41:19, 21 43:17 49:11,15,20 60:20 61:13 70:6 72:8 73:5 78:19 92:6 101:7 ROBERTS [31] 4:3 9:21 10:8 11:6,23 12:13 30:19,23 33:22 42:10 45:12 54:17 55:11,19,21 56:24 60:12, 16 66:24 71:14 76:5 78:7, 22 79:3,6,9,18 80:7 103:3, 7 106:7 robust [1] 56:7 role [1] 77:18 room [25] 14:8 16:24 18:18 19:2 21:20 22:2 24:24 38:23 40:25 64:23,24 65:4 68:15 81:24 82:3 91:7,14,18 92:22 93:3,4,5,10 94:25 99:16 rooms [1] 96:1 route [1] 79:23 rule [7] 18:6 21:22 22:11 41:5 67:4 72:16 85:14 ruled [1] 25:18 rules [5] 20:5 27:8 94:9 98:21 99:21 run [2] 13:12 93:10</p> <p style="text-align: center;">S</p> <p>sacrificing [1] 89:15 safe [4] 17:24 43:8 44:4,12 safety [2] 44:8 105:21 salvation [1] 79:23 same [18] 7:12 11:20 22:8 26:4,16 41:8 69:10 71:6 76:20 81:4 92:17 94:20 95:24 96:2 101:17 104:7,8,9 sat [3] 9:11 18:1 104:10 satisfied [7] 11:21 21:11 23:1,2 53:5 59:12 73:23 satisfy [3] 9:23 10:7 62:20 Saturday [1] 66:16 saved [1] 55:4 saw [1] 31:15 saying [20] 13:23 14:18 15:14, 16,17 17:2 21:2,21,23 32:20 37:11,22,23 38:7 39:5 41:4 72:18 89:8 99:24 101:9 says [20] 14:12 23:4 27:12 35:24 40:14 41:6 55:2,21 78:10 81:25 82:14,16 83:4, 8 84:21,25 85:2 89:24 100:3,20 schedule [1] 25:20 scheduled [1] 26:25 scheduling [1] 25:15 scrutiny [5] 37:12,18 42:14, 22 91:4 second [6] 25:11 35:8 46:23 56:3 77:4 102:25</p>	<p>Section [1] 4:24 secular [1] 30:12 secure [1] 15:4 security [16] 15:13 31:3 32:2 44:2 62:21 63:4 64:12 72:15 75:2,15 89:18 93:4, 7 95:6,11 105:21 see [17] 8:6 9:3 10:14 20:3 27:10 29:12 38:18 39:9,21, 22 44:14 50:5 66:3 74:9 95:9 97:20 105:3 seeking [2] 78:1 80:2 seem [3] 34:3 52:6 68:16 seemed [1] 89:4 seems [1] 53:14 seen [1] 8:2 semi-annually [1] 75:24 send [2] 52:3 83:22 sending [1] 52:7 sense [4] 11:24 18:8 34:20 60:10 sensitive [4] 46:4,25 81:7, 7 sentence [1] 6:10 separate [1] 65:25 separated [1] 46:21 separately [1] 28:3 September [3] 17:25 100:16 101:20 seriatim [4] 7:10 22:12 27:3 78:3 series [2] 22:17 23:9 service [1] 72:12 services [5] 66:15,17 72:4, 7 89:9 set [7] 8:11 48:18 54:10 74:2 94:9 97:6,12 SETH [5] 2:2 3:3,13 4:7 103:14 sets [1] 31:9 setting [2] 33:9 52:18 seven [1] 97:19 several [4] 12:9 33:25 80:3 104:24 shaped [1] 62:16 share [2] 48:15 67:3 shift [1] 21:10 shifts [1] 30:13 short [1] 34:9 shouldn't [2] 52:2 102:21 show [5] 18:14 21:9,12 44:15 81:17 showed [1] 41:23 shown [1] 105:23 side [7] 10:19 31:13 68:18, 19 88:9 91:22 94:5 sides [3] 6:2 99:20 105:16 sign [1] 27:11 signed [2] 7:11 17:21 significant [2] 82:3 87:17 significantly [2] 92:5 94:15 silent [1] 99:13 silently [1] 99:17</p>
---	---	---	---	--

Official

<p>similar [7] 28:16 79:17 80:19 88:24 90:11 94:24,24</p> <p>Similarly [4] 11:1 74:14 95:24,25</p> <p>simpliciter [1] 98:13</p> <p>simplifying [1] 94:4</p> <p>simply [6] 27:13 33:9 51:18 52:12 75:14 106:2</p> <p>sincere [10] 12:20 29:19 37:2,3 55:7,10 56:21 79:2 80:12 81:20</p> <p>sincerely [2] 29:5 30:4</p> <p>sincerity [20] 7:6,8 8:3 13:12 35:8,11,21,23 36:7 49:13,17 50:10,12 54:21 55:13,16 56:17 81:18 93:22,23</p> <p>singing [1] 24:23</p> <p>single [5] 17:13 27:9 39:19 58:24 106:4</p> <p>sister [1] 21:8</p> <p>sit [1] 84:19</p> <p>site [3] 11:8,10,19</p> <p>sitting [1] 16:22</p> <p>situated [1] 95:24</p> <p>situation [7] 11:25 16:19 38:24 39:4,7 90:17 93:20</p> <p>situations [1] 89:6</p> <p>Six [8] 4:25 5:14 9:11 20:6 32:18 53:17 100:8 104:10</p> <p>size [5] 43:15,16 44:5 71:7 92:22</p> <p>sizes [1] 28:6</p> <p>slightly [1] 43:4</p> <p>slow [2] 100:14,15</p> <p>small [2] 57:11 90:16</p> <p>smaller [3] 53:11 65:21 91:24</p> <p>Smith [2] 20:10 37:15</p> <p>snoring [1] 63:13</p> <p>society [2] 42:4,4</p> <p>Solicitor [2] 2:4,8</p> <p>somehow [1] 5:14</p> <p>someone [18] 14:7 16:16 35:15 36:13 48:19,22 49:21 59:18 60:10 67:15 68:14,17 69:17,17 92:8 94:18,19 104:8</p> <p>someone's [1] 69:14</p> <p>somewhere [1] 86:21</p> <p>sometimes [2] 22:23 63:16</p> <p>somewhat [8] 10:11 15:1 37:4 55:15 56:12 68:5 74:10 93:19</p> <p>somewhere [1] 86:4</p> <p>sorry [10] 16:5 28:9 37:9 40:3 66:9 68:2,3 71:16 76:3 82:9</p> <p>sort [12] 37:5 61:4 80:17 84:13 88:2,24 89:14,22 90:24 92:1,2 96:24</p> <p>sorts [2] 88:19 89:2</p> <p>Sotomayor [33] 31:1,2 32:</p>	<p>5,12,17,22,24 33:5,8,12,15,18,20 37:10 50:21 51:3,9,23 52:1 53:14,16,20 66:25 97:3 98:19,25 100:14,21,24 101:11,14,17 102:5</p> <p>sought [2] 5:9 76:20</p> <p>sound [2] 63:13 79:25</p> <p>sounds [3] 85:7 88:20 89:11</p> <p>space [1] 91:24</p> <p>span [1] 88:24</p> <p>spanning [2] 4:11 16:3</p> <p>speaking [3] 36:7 48:22 96:9</p> <p>specific [5] 53:25 58:15 59:5 62:4 75:10</p> <p>specifically [4] 12:6 28:20 41:17 96:9</p> <p>specify [1] 61:12</p> <p>spend [1] 43:18</p> <p>Spends [1] 102:2</p> <p>spiritual [34] 4:13,21 5:3 17:14 41:24 46:3,20 49:4,4 57:4 58:20 62:25 63:3,5,6 64:5,12 65:12,16 68:9 69:4,12 71:1 72:22 73:25 74:25 80:17 81:24 82:2 83:1 86:4,7 87:22 99:25</p> <p>spiritually [1] 39:1</p> <p>spoke [1] 67:19</p> <p>spoken [1] 5:6</p> <p>square [1] 65:10</p> <p>stabbed [1] 41:2</p> <p>stamped [1] 104:9</p> <p>stand [6] 11:24 31:17 65:17 66:21 68:17 75:1</p> <p>standard [13] 11:25 12:25 19:14 20:3 31:3,9,10 37:11,12,18 60:25 61:5 73:10</p> <p>standards [3] 20:1 74:19,23</p> <p>standing [1] 31:24</p> <p>start [4] 23:14,16 74:7 81:19</p> <p>started [1] 26:25</p> <p>starting [2] 26:24 61:13</p> <p>State [87] 4:17,22,25 5:3,7,12,24 6:14 8:11,13,14,17 9:1,4,6,11,15 11:22 13:23 14:12,18,21 15:14 16:7,8,20 17:9,15,17,23 18:2,13,16,18 19:1,3,9,10,12 20:5,9,20,21 21:3,6,8,18 22:7,12 26:3,14 27:1,2,6,13 30:14 31:6 38:9,9,9 42:16,17 43:11,24 44:17,20,23 48:7 53:5 64:4 70:7,9,20 71:21 72:6 73:3 74:11 77:17 88:21 93:13,13 95:14 96:5,12 97:12,13 100:11</p> <p>State's [19] 4:12 5:11 13:10,16,19 15:3,17 16:25 17:6 35:1 39:14 42:23 50:2,4 61:10 70:3 77:15 88:10,18</p>	<p>state-specific [3] 46:11 70:7,10</p> <p>stated [3] 9:16 77:23 89:18</p> <p>STATES [23] 1:1,17 2:6 3:7 5:18 19:18,19 21:1,8 28:5 38:3 44:25 45:16 86:5 87:21,24 94:2 95:9,10,11,23 96:1,11</p> <p>statistical [1] 15:24</p> <p>statute [4] 12:25 30:17 42:6 55:17</p> <p>statutes [1] 49:18</p> <p>stay [11] 18:1 22:18,21 25:7,16 26:2,13 40:22,23,23 101:25</p> <p>staying [1] 85:18</p> <p>step [9] 24:5 27:1,1 44:23 92:10 98:15 102:10,13,25</p> <p>steps [3] 24:7 50:22 56:22</p> <p>still [9] 10:19 11:2,4 14:17 20:1 37:21 75:15 84:22 100:19</p> <p>STONE [52] 2:8 3:10 76:7,8,10 78:17,25 79:5,8,12,24 80:14 81:21 82:6,12 83:24 84:6,11 85:13,24 86:11,13,16,19,25 87:2,9,23 88:12 90:6,14,24 91:11 93:1,14,17 94:7 95:21 97:7,10,25 98:23 100:9,18,23 101:1,12,16,19 102:7 103:18 104:14</p> <p>Stone's [1] 105:2</p> <p>stop [2] 38:17 75:16</p> <p>straightforward [1] 34:3</p> <p>stream [3] 22:25 24:20 27:24</p> <p>stress [1] 80:11</p> <p>striated [1] 28:23</p> <p>strict [5] 37:12,18 42:14,21 91:4</p> <p>strong [3] 20:16 47:9,14</p> <p>structuring [1] 43:24</p> <p>studied [1] 21:12</p> <p>stumble [1] 69:18</p> <p>style [1] 23:18</p> <p>subcomponent [1] 53:15</p> <p>subject [1] 66:13</p> <p>submissions [1] 45:19</p> <p>submit [1] 105:22</p> <p>submitted [2] 106:8,10</p> <p>subsequent [1] 84:13</p> <p>subset [1] 56:5</p> <p>Substantial [6] 13:13,15 17:9 63:23 70:15 96:1</p> <p>substantially [1] 46:1</p> <p>succinct [1] 37:9</p> <p>suddenly [2] 4:17 8:24</p> <p>sued [3] 21:1 102:16 103:1</p> <p>suffering [2] 40:17 90:20</p> <p>sufficient [3] 61:7 62:20 96:20</p> <p>suggest [2] 46:6 65:6</p> <p>suggesting [5] 51:17,18</p>	<p>74:7 99:11,19</p> <p>suggests [1] 22:24</p> <p>suit [1] 77:25</p> <p>summarizes [1] 88:14</p> <p>summer [1] 22:13</p> <p>Sunday [1] 66:16</p> <p>support [2] 2:6 3:8</p> <p>supposed [5] 32:15 54:20 63:15 83:22 99:6</p> <p>suppress [1] 36:10</p> <p>suppression [1] 36:20</p> <p>SUPREME [2] 1:1,16</p> <p>surface [1] 81:14</p> <p>surprised [1] 88:1</p> <p>suspect [2] 79:19 99:15</p> <p>switch [1] 25:10</p> <p>switching [1] 93:21</p> <p>sympathy [1] 41:11</p> <p>system [7] 5:10,11 7:4,24 8:3 9:19 49:16</p>	<p>there'd [1] 52:17</p> <p>There's [26] 8:10 9:13,15 10:21 14:16 18:14 21:24,24 22:11 27:9 35:2 38:21 40:1 50:22,23 52:13 65:2 66:5 72:23 78:12,13 82:24 87:5 89:10,11 95:18</p> <p>they've [2] 22:7 40:11</p> <p>thinking [1] 75:20</p> <p>thinks [1] 16:21</p> <p>third [1] 101:23</p> <p>Thirty-six [2] 102:5,6</p> <p>THOMAS [25] 6:5,9,20,23 7:7,13,16,19 8:5,21 9:9,14,20 30:21,22 48:2,4 49:7,19 50:17,20 60:14,15 103:5,6</p> <p>Thomas's [2] 13:12 35:17</p> <p>though [9] 34:23 43:11 52:6,15 74:22 87:2,23 93:21 99:16</p> <p>thrashed [1] 52:4</p> <p>three [11] 12:3,3 55:6,24 78:12,14,23 80:12 91:17 100:2 103:24</p> <p>throughout [8] 12:10 24:1 41:25 48:19,23 57:5 61:21 76:21</p> <p>timely [1] 77:8</p> <p>timing [2] 25:10,12</p> <p>tiny [1] 90:17</p> <p>tissue [1] 69:24</p> <p>today [4] 4:4 45:20 66:21 68:17</p> <p>together [4] 23:22 46:21 90:5,13</p> <p>tolerance [1] 74:3</p> <p>tolerate [4] 37:24 71:11 90:15 99:1</p> <p>tongue [1] 60:11</p> <p>took [6] 50:12 55:15 62:9 100:17 101:18 104:8</p> <p>tool [1] 105:5</p> <p>touch [25] 5:5,19 8:24 9:22 10:2,3,21,24 22:11,14 23:5,15 28:24 63:21 76:21 77:1,7,13,25 92:18,24 94:13 98:4 99:4 100:4</p> <p>touched [3] 11:20 35:2,3</p> <p>touches [1] 23:3</p> <p>touching [21] 10:19,25 14:14 22:1 24:21 32:19 57:6 59:15,16,19,20 60:7 61:9,19 67:11 68:17 86:8,23 91:9 99:9 100:2</p> <p>towards [2] 43:13 82:16</p> <p>tradition [1] 35:18</p> <p>training [1] 55:5</p> <p>treatment [4] 14:1 16:9,14 32:8</p> <p>tremendously [1] 54:13</p> <p>trial [1] 97:17</p> <p>tried [1] 99:21</p> <p>tries [2] 9:6 77:10</p> <p>true [2] 34:25 78:13</p>
---	---	---	---	--

T

tactics [2] 8:10 78:5

tailoring [1] 50:15

talked [3] 35:6,14 48:8

talks [2] 31:8 82:2

tape [3] 74:24 75:1,8

taped [1] 65:17

tasked [1] 44:14

TDCJ [13] 22:10 35:1 84:3 87:12,13 100:13,18 102:3 103:19 104:14 105:12,14,18

TDCJ's [4] 5:16 84:8 98:14 100:10

teaching [1] 29:12

team [5] 23:23 64:6 66:3 91:23 105:14

tease [1] 46:14

technical [1] 84:18

tend [1] 81:13

tends [1] 97:19

Tenth [1] 30:6

term [2] 11:15 46:16

terms [3] 47:3 92:1,1

Terre [1] 65:7

test [2] 91:4,4

testify [2] 36:23,25

testimony [1] 35:2

testing [1] 20:17

TEXAS [33] 1:7 2:2,8 21:18 27:20 45:25 46:7,9 47:9 48:7 52:4,15,16 64:23 65:6,20 69:9 71:1 72:20 77:1 86:19 90:15 91:9,16 92:3,5,13 94:3,17,18,19 96:6 97:13

Texas's [8] 4:11 5:19 52:8 54:9 65:11,23 91:15 92:23

texture [1] 57:22

That'll [2] 13:2,5

themselves [4] 53:2 54:15 74:12 104:18

theologically [1] 30:1

Official

<p>trusting ^[1] 69:12 truth ^[1] 36:22 try ^[5] 27:14 30:10 37:9 75:16 100:12 trying ^[6] 11:24 30:9 37:17 72:2 81:17 104:23 Tuesday ^[3] 1:13 26:9,9 turned ^[1] 6:12 Turner ^[1] 31:3 turns ^[1] 87:13 twice ^[2] 65:10 76:12 two ^[2] 5:1 6:14 19:16 20:7,22,23 37:8 46:18 47:4,6,20 57:11 61:8 64:11 71:18 76:23 83:24,25 90:12 98:2 99:2 type ^[2] 23:13 24:22 types ^[1] 71:8 typewriter ^[1] 104:8 typical ^[2] 66:15 89:24</p> <hr/> <p style="text-align: center;">U</p> <p>ultimate ^[1] 30:1 ultimately ^[4] 6:12 10:23 45:22 89:13 unacceptably ^[1] 96:8 unanimously ^[1] 30:17 unavailable ^[3] 5:12 52:25 102:19 unclear ^[2] 57:12,14 under ^[30] 5:12,23 11:12,16 18:24 21:5,11 29:6 31:2 34:25 43:17 49:12,14,18 52:14,16 54:9 55:23 62:1 70:6 73:10 74:10 85:19 91:4 92:6,6 101:2 103:20 104:17 105:6 under-inclusion ^[1] 89:23 under-inclusive ^[1] 89:4 underdetermined ^[1] 68:5 undergoing ^[1] 34:13 understand ^[14] 15:8 17:6 18:4 50:14 54:19 57:2 58:5 65:11 67:10 80:8 94:13 98:20 99:3,6 understandable ^[1] 54:22 understandably ^[1] 42:17 understanding ^[3] 51:6 59:6 72:5 Undoubtedly ^[1] 81:6 unending ^[3] 22:25 24:20 27:24 unfair ^[2] 62:6,7 unfortunately ^[1] 36:19 unique ^[2] 28:8 29:20 UNITED ^[6] 1:1,17 2:6 3:7 45:16 86:5 universe ^[2] 56:2 62:17 unknown ^[2] 31:19,21 unlike ^[1] 64:3 until ^[5] 9:11 24:13 32:22 101:22 102:21 unwilling ^[1] 90:15</p>	<p>up ^[22] 12:7,18 13:1 17:25 24:1 27:7 28:21 35:9 48:18 64:22 66:9 67:9 70:2 71:19 91:19 96:13,23 100:11,25 102:14,14 104:15 useless ^[1] 53:16 uses ^[2] 64:24 65:5</p> <hr/> <p style="text-align: center;">V</p> <p>value ^[1] 90:25 variations ^[4] 22:25 24:20 27:24 61:6 varied ^[1] 63:6 vast ^[1] 15:25 vastly ^[1] 69:2 vein ^[1] 69:24 verbal ^[1] 99:5 versus ^[2] 4:5 37:20 victim ^[2] 65:25 90:20 victim's ^[3] 40:10,21 91:22 victims ^[4] 30:15 40:8 41:14 64:15 victims' ^[3] 41:7,17 90:21 view ^[4] 31:14,16,18 91:23 viewing ^[1] 64:18 views ^[2] 54:23 64:10 vindicate ^[1] 45:25 virtually ^[2] 22:20 81:5 visit ^[1] 17:20 visual ^[1] 63:17 vocalization ^[12] 46:3 47:5,15,21 48:18,23 54:1 57:5,14,15 61:9,20 voiced ^[1] 28:16 volunteer ^[1] 93:5</p> <hr/> <p style="text-align: center;">W</p> <p>wafer ^[1] 60:10 waited ^[4] 5:4 32:17 33:16 102:21 waiting ^[2] 8:17 52:17 waits ^[2] 101:21,22 wall ^[1] 91:18 wanted ^[11] 45:5 50:8 51:9 62:24 75:11,12 76:25 77:6 84:11 92:17,18 wanting ^[1] 70:11 wants ^[6] 21:8 42:17 44:18 50:25 52:5 78:24 warden ^[2] 23:22 93:8 warrant ^[2] 8:15 45:22 Washington ^[2] 1:12 2:5 way ^[23] 5:11 24:16 28:11 29:13,21 30:14 34:22 39:6,15,18 41:4 42:24 43:8,8 44:4 46:13 48:17 79:21 85:2 88:15 92:20 95:12 97:23 wayside ^[1] 96:17 week ^[1] 55:1 weekend ^[1] 66:15 weekends ^[1] 72:4 weeks ^[10] 9:11 20:7,23 32:18 53:18 99:23,25 100:8 101:14 104:10</p>	<p>welcome ^[3] 6:4 51:21 78:6 well-established ^[1] 29:5 whatever ^[4] 29:10 55:6 103:21 105:6 whatsoever ^[2] 63:1 87:19 Whereupon ^[1] 106:9 whether ^[2] 31:5 37:2 52:5,22,23 53:23,24 57:14 64:24 65:2 68:7 79:2 80:15,18,22,23 81:3 92:3 96:19 101:24 102:24 white ^[1] 36:23 who's ^[1] 85:16 whole ^[7] 16:8 22:17 23:9 51:13 89:16 92:17 93:23 will ^[23] 9:23 10:6 11:5 13:6 19:22,25 20:1 26:22 28:7 29:7,8 39:4 40:18 56:17 61:6,16,18,18,19 82:16 97:24 100:2 105:3 Willie ^[1] 20:10 willing ^[1] 71:12 window ^[2] 31:15 91:23 windows ^[2] 65:24 91:19 wine ^[1] 19:1 withdrawal ^[1] 4:24 withdrew ^[1] 4:22 within ^[7] 8:21 25:18 33:2 52:8 98:15 100:19 101:14 without ^[6] 6:15 8:13 15:17 62:22 96:7 98:6 witness ^[2] 36:22 64:17 witnesses ^[5] 66:1,2 68:8 91:20,21 witnesses' ^[1] 64:10 won ^[1] 40:16 wonder ^[1] 62:18 wonderful ^[1] 105:5 wondering ^[3] 42:23 70:9 72:1 Woodford ^[1] 98:11 word ^[7] 5:6 32:22 46:14 68:6 90:10 99:7 105:3 words ^[6] 12:16 27:9 57:23 70:21 95:3 104:14 work ^[5] 16:15 32:13 53:2 88:25 92:15 workable ^[1] 60:25 working ^[2] 32:20 63:14 works ^[1] 29:21 world ^[1] 28:15 worried ^[3] 16:16 27:6 36:4 worry ^[1] 32:8 worse ^[1] 5:8 writ ^[1] 5:5 written ^[1] 30:14 wrote ^[1] 26:2</p> <hr/> <p style="text-align: center;">Y</p> <p>year ^[7] 6:11 8:12,15,25 20:4 62:10 77:14 years ^[10] 18:7 20:25 22:17</p>	<p>30:18 35:4 39:23 40:12 41:21 86:3 106:3 Yellowbear ^[1] 30:6</p> <hr/> <p style="text-align: center;">Z</p> <p>zero ^[20] 13:24 14:5,9,13,22 15:15 17:1 37:23 42:18 62:24 70:4,5,11 72:3,10,19 73:7 86:9,13 88:15</p>
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