No. 07-137

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS H. BARANOWSKI
Petitioner,
v.
LARRY HART, et al.,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Baranowski continues to have standing when during this litigation he has voluntarily changed his designated religious preference away from Judaism to now be "none."

2. Whether the court of appeals was correct to affirm a summary judgment granted against Baranowski on his claim under the Religious Land Use and Institutionalized Persons Act for failure to show a "substantial burden."

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In this petition for certiorari review, Baranowksi argues that the Fifth Circuit's application of the RLUIPA "substantial burden" standard is inconsistent with the approach of other circuits and conflicts with Supreme Court doctrine. However, Baranowksi failed to preserve any issue for review and this Court now lacks jurisdiction to consider those claims. Alternatively, his claims are wholly without merit, and this writ of certiorari should be denied.

STATEMENT OF THE CASE

The petition omits the facts relevant to the Court's consideration of whether Baranowski has standing to assert a Religious Land Use and Institutionalized Persons Act (RLUIPA) claim in regard to these religious services.

In 1998, on a form provided by the prison system to facilitate the accommodation of prisoners' beliefs, Baranowski changed his designated religious preference from "none" to "Judaism-Hebrew." (App. A at 3).

In 2003, Baranowski filed the claim at issue in this petition, contending that the RLUIPA was violated when he was unable to attend Friday night services on four specified dates on which a rabbi was unavailable to participate. (Pet. App. B at 32).

The district court eventually granted summary judgment to the defendants on all claims. On the single claim relevant to this petition for certiorari, the court held that Baranowski failed to survive summary judgment on his claim that his rights were substantially burdened within the meaning of RLUIPA when he was unable to attend religious services on four occasions when a volunteer religious officiant chose not to come to his unit. (Pet. App. B at 32). Baranowski appealed.

During the pendency of his appeal, Baranowski elected to change his designated religious preference to "none." (Pet. App. B). To the best of defendants' knowledge, that is Baranowski's most recent designation.

After the Fifth Circuit affirmed that judgment on May 4, 2007, two interest groups (the Aleph Institute and Jewish Prisoner Services International) moved to intervene and moved for panel rehearing. Those groups noted that Baranowski had changed his official religious affiliation from "Jewish" to "none," arguing that this deprived him of standing to pursue his claims. (App. B). The state officials filed a response representing that they had previously been unaware that Baranowksi had changed his designated religious preference.[1] The Fifth Circuit denied the proposed intervenors' motions on

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1 The state defendants responded to this motion by arguing that this case could be saved from the mootness doctrine by the 'capable of reptition yet evading review' exception. Standing, however, present a different set of prudential concerns. And this Court – if it grants review and hears argument – may well reach the conclusion that the case must be dismissed for want of standing.

June 8, 2007.

REASONS FOR DENYING THE PETITION

I. There Are Serious Questions Whether Baranowski Now Has Standing To Pursue This Prospective Relief Given His Changing Religious Designation.

This case makes a remarkably poor vehicle to address the meaning of this statute because there are serious questions about Baranowski's standing, as he no longer claims to be Jewish. Baranowski has changed his faith from "Jewish" to "none." (App. B at 23, 29). This Court should not grant review.

To have Article III standing, Baranowski must allege that his "particular freedoms are infringed" *Sch. Distr. Of Abington v. Schempp,* 374. U.S. 203, 224 n.9 (1963). Because Baranowski sought prospective relief as a Jewish inmate, a position he has voluntarily relinquished, he is not suffering an "actual or imminent" injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Baranowski lacks standing to maintain this action. *Craig v. Boren,* 429 U.S. 190, 192 (1976).

At worst, Baranowski lacks standing because he no longer is the proper plaintiff to be pursuing prospective relief about the availability of religious services for Jewish inmates. At best, Baranowski's claim would involve complex questions regarding whether there exists an alleged circuit split. Those are questions not briefed or addressed by the courts below, and that are better dealt

with in a case involving a plaintiff who presents them straightforwardly.

II. There Is No Meaningful Split Warranting This Court's Intervention.

In framing a circuit split, the petition:

1) overstates the absoluteness of the Fifth Circuit's rule, creating the false impression that the circuit's controlling precedent does not permit analysis of a plaintiff's particular circumstances — which it does;

2) treats other circuits' *land-use cases* as being equivalent to their prisoner cases — which subsequent cases from some of those circuits have made clear is not the complete picture; and

3) ignores the reality that the various circuits' view of this area is *converging* in the wake of recent decisions, suggesting that percolation of these fine-grained issues in the lower courts may yet resolve any remaining disagreements.

A. Contrary to the Petition's Characterization, the Fifth Circuit's Rule Expressly Permits Consideration of the Plaintiff's Individual Circumstances.

The petition seems aimed more at the Fifth Circuit's prior decision in *Adkins v. Kaspar,* 393 F.3d 559 (5th Cir. 2004), *cert. denied,* 545 U.S. 1104 (2005), than at the decision below. Indeed, it is the Fifth Circuit's formulation

of the rule in Adkins that is attacked rather than the application of that rule to the facts of this case.

The petition asserts that Adkins "refused to engage in an adherent-base analysis," Pet. 2, and that Adkins' rule ignored the "particular circumstances" of the case, Pet. 4. But the Fifth Circuit in Adkins — in language quoted by the court of appeals in this case — made clear that its rule does permit such an analysis:

> "The [*Adkins*] court cautioned, however, that 'our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent's religious exercise...."

See Pet. App. 19 (quoting *Adkins*, 393 F.3d at 571).

It is simply untrue that the Fifth Circuit has categorically rejected such a possibility. To the contrary, it has expressly left the door open for a plaintiff to offer such proof in summary judgment. Here, Baranowski failed to offer sufficient evidence to meet his summary judgment burden, and his complaint boils down to a disagreement over the assessment of those facts, not any bright-line legal rule that might warrant this Court's intervention.

B. The Cases Offered by Baranowski Merely Show a Distinction Between Prison Cases and Land-Use Cases, *Not* a Divergence Among the Circuits Regarding Prison Cases.

Baranowski tries to conjure up a circuit split by citing to a number of cases from other circuits that — although they deal with RLUIPA — deal with the context of land-use cases rather than institutionalized-person cases. As those circuits have themselves acknowledged in other decisions, that distinction makes a critical difference. Indeed, three of those circuits have expressly applied a test like the Fifth Circuit's test in regard to institutionalized-person cases. The so-called "split" is really a substantive distinction between different categories of cases and hardly warrants this Court's intervention.

The Ninth Circuit case is explained as a distinction between land-use cases and prison-policy cases. Baranowksi cites to a Ninth Circuit *land-use* case, *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir.2004), in which the court determined that "a substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *San Jose,* 360 F.3d at 1034. Subsequent to *San Jose*, however, the Ninth Circuit addressed the prison-policy context. In that case, it did not cite that language from *San Jose* but instead cited with approval to both *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707 (1981) and *Sherbert v. Verner,* 374 U.S. 398 (1963) to conclude that a prison grooming policy

substantially burdened an inmate's religious exercise. *Warsoldier v. Woodford,* 418 F.3d 989 (9th Cir. 2005). "Because the grooming policy intentionally puts significant pressure on inmates such as Warsoldier to abandon their religious beliefs by cutting their hair, CDC's grooming policy imposes a substantial burden on Warsoldier's religious practice." *Id.* (citations omitted)

Baranowksi contends that the Eleventh Circuit's decision in *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied,* 125 S. Ct. 1295 (2005), evidences a circuit split. However, *Midrash* was a land-use case and, since the filing of this petition, the Eleventh Circuit has issued an opinion in a prisoner case which more closely follows the holding in *Thomas.* In *Smith v. Allen,* No. 05-06010, 2007 WL 2826759 (11th Cir. Oct. 2, 2007), a prisoner who claimed to be an adherent of the Odinist faith filed suit after prison officials denied his request to have a quartz crystal. The court defined a "substantial burden" as being "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Smith,* 2007 WL 2826759 * 17 (citing *Midrash,* 366 F.3d at 1227). In order to constitute a "substantial burden" on religious practice, the government's action must be "more than ... incidental" and "must place more than an inconvenience on religious exercise." *Id.* (citation omitted). That is, to constitute a substantial burden under RLUIPA, the governmental action must significantly hamper one's religious practice. *Id.*

Similarly, in a case cited to by Petitioner, the Fourth Circuit cited to *Thomas* when it found that a substantial burden on religious exercise occurs when a state or local government, through act or omission, "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee,* 472 F.3d 174, 187 (4th Cir. 2006), (citing *Thomas,* 450 U.S. at 718).

Although Baranowksi argues that the First Circuit's definition conflicts with the Fifth Circuit, this assertion is incorrect because the First Circuit has not yet ruled on the merits of this issue. In *Spratt v. R.I. Dept. Of Corrs.,* 482 F.3d 33 (1st Cir. 2007), it noted that the district court "decided that a 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs. *Spratt,* 482 F.3d at 38 (citations omitted). The First Circuit never addressed the merits, but merely assumed "arguendo that *Thomas* applies." *Id.* Certainly, the First Circuit should be given the opportunity to reach that question squarely before it is deemed to be in such tension with the Fifth Circuit that certiorari would be warranted.

C. As Those More Recent Circuit Decisions Drive Home, the Circuits' View of This Area Is Converging as These Issues Percolate Below.

As the circuits have time to consider a wider variety of cases and this Court's recent guidance, their decisions will converge. What once appeared to be disagreements are being ironed out as circuits work through the different standards that might apply to totally different classes of

cases. Some of the decisions on which Baranowski relies are no longer even the authoritative statement on this subject within their own circuit. Indeed, since the filing of this petition, two new opinions have been issued. The Third Circuit recently concluded that a substantial burden exists where:

1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behaviour and to violate his beliefs. *Washington,* 497 F.3d at 280.[2] Also, as already noted, the Eleventh Circuit issued its opinion in *Smith* on October 2, 2007.

RLUIPA is a new statute, enacted in 2000. Courts delayed reaching the merits of these cases pending the outcome of the Establishment Clause challenge in *Cutter v. Wilkinson,* 544 U.S. 709 (2005). Only a few circuits have yet spoken to the question what constitutes a "substantial burden." Those circuits are becoming more consistent in their approach and have correctly defined the term "in light of the purposes Congress sought to serve," *Chapman,* 441 U.S. at 608, by interpreting cases in light

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[2] The Third Circuit opined that the Fifth Circuit has "enunciated the proper standard" because it incorporates the holdings of both *Sherbert* and *Thomas* while also requiring that the burden on religious exercise be substantial. *Washington,* 497 F.3d at 280 n 7.

of this Court's jurisprudence set out in *Sherbert* and/or *Thomas*. Because these issues need time to percolate, the petition should be denied.

III. In Any Event, the Fifth Circuit's Resolution of This Case Comports with the Statute and With Precedent.

Congress did not define the term "substantial burden" in RLUIPA. However, in a Joint Statement that appeared in the Congressional Record, the section on the definition of substantial burden states that "[t]he Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7774, 7776 (July 27, 2000).[3] Because the Fifth Circuit correctly complied with the intent of Congress and has followed Supreme Court jurisprudence, this petition should be denied.

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[3] *See also* Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S.Cal. L. Rev. 845, 853 (1992) ("A fairly common function of legislative history is explaining specialized meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly interested in the statute's enactment."); *Champman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) (As in all cases of statutory construction, the task is to interpret the words of the statute in light of the purpose Congress sought to serve.")

In *Sherbert*, a Sabbatarian was refused unemployment benefits when she could not find employment because she declined to work on Saturday. This Court found that a substantial burden exists when a follower is forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." This Court examined this issue again in *Thomas*. Thomas, a Jehovah Witness, was denied unemployment benefits after he quit his job because of his religious beliefs. Citing to *Sherbert,* this Court held that

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Finally, the Fifth Circuit reviewed the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), a case in which a Native American organization sought to block construction of a road the government wanted to build through an area of public

land used by several Native American tribes. This Court, in denying the plaintiffs' First Amendment claim, rejected their interpretation of *Thomas* and *Sherbert,* because that interpretation implied that "'incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.'" *Id.* at 450-51 (citing *Sherbert*).

The Fifth Circuit has formulated its definition based on the analyses set out in *Sherbert, Thomas* and *Lyng*:

> [A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. *See Sherbert* and *Thomas.* On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is

not otherwise generally available or acting in a way that is not otherwise generally allowed. *Adkins,* 393 F.3d at 569-70 (citing *Lyng*).

Because the Fifth Circuit has complied with Supreme Court precedent, the petition should be denied.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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