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

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOEL L. THOLLANDER
Counsel of Record
MCKOOL SMITH, P.C.
300 W. 6th Street, Suite 1700
Austin, Texas 78701
(512) 692-8700
(512) 692-8744 (FAX)

ANTHONY GARZA
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
(214) 978-4044 (FAX)

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

PETITIONER'S REPLY BRIEF

Nine circuits have applied RLUIPA's "substantial burden" standard, and have propounded varying definitions that lead to differing results under the same federal statute. In this case, the Fifth Circuit found that a regulation that forced Baranowski to forfeit his regular Sabbath worship did not impose a substantial burden on his religious exercise. In reaching that conclusion, the court considered neither the restrictive control inherent in prisons nor the particularized effect of the regulation on Baranowski's religious exercise. Other circuits have considered analogous cases, and reached differing conclusions. The Court should grant the petition to harmonize the inconsistent standards in this area.

I. There Is No Standing Problem.

Baranowski unquestionably has standing to pursue this appeal. Standing depends upon the existence of a sufficient personal interest at the *commencement* of the litigation. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Co.*, 528 U.S. 167, 189 (2000). There is no dispute that, at the commencement of this litigation in 2003, Baranowski had suffered a redressable injury that was traceable to the defendants' conduct. *See id.* at 180-81. Even if checking a single box on a form in September 2006 evidenced a wholesale abandonment of Baranowski's desire to engage in corporate worship – which it did

not – there is no question that Baranowski had standing to bring this suit in 2003.

Neither are Baranowski's claims under RLUIPA moot. Indeed, Respondents argued as much to the Fifth Circuit panel just a few months ago. B.I.O. at 2 n.1. In addition to the arguments made there, the claims here are not moot because Baranowski may seek nominal damages to redress his past injuries. *See Smith v. Allen*, No. 05-16010, 2007 U.S. App. LEXIS 23038, at *34-35 (11th Cir. Oct. 2, 2007); Pet. App. B at 25 (noting that Baranowski seeks "unspecified damages"). Furthermore, Baranowski's claim for injunctive relief is not moot. Baranowski presently contends that he desires to meet and worship regularly on the Sabbath, as required by his religion. *See* Pet. App. A at 19. An injunction will ensure that Baranowski's current desired religious exercise is accommodated.[1] Respondents' suggestion that a temporary lapse in faith renders any claim for injunctive relief moot is untenable – Baranowski has a present interest in the enforcement of his religious rights. *Cf. Smith v. Allen*, 2007 U.S. App. LEXIS

[1] Additionally, Respondents have not shown how any change in Baranowski's claimed religious status compels a finding of mootness. To find mootness, the Court must find that meeting and worshiping on the Sabbath is no longer sincere religious exercise to Baranowski. Courts are unfit to engage in such an analysis, and have refused to do so in analogous situations. *See Kay v. Bemis*, No. 07-4032, 2007 U.S. App. LEXIS 21811, at *10 (10th Cir. Sept. 11, 2007) (noting that adjudging sincerity is "almost exclusively" a credibility determination).

23038, at *22-23 (concluding that an injunctive relief claim under RLUIPA was not moot, even though the prisoner-plaintiff was released from prison for some time during the appeal).

II. There Is Conflict Among the Circuits Warranting This Court's Intervention.

A. The Fifth Circuit Has Not Engaged in Fact-Specific Analysis to Determine Whether the Regulation Imposes a Substantial Burden on Religious Exercise.

When determining whether a regulation imposes a "substantial burden" on religious exercise, other circuits have consistently considered the regulation's particularized effect on the affected adherent. *See Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004). The Fifth Circuit has not. *See* Pet. App. A at 19-20; *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004). Respondents attempt to minimize this conflict by suggesting that the Fifth Circuit has not "categorically rejected" the prospect of a "fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent's religious exercise." B.I.O. at 4.

The Fifth Circuit may not have "categorically rejected" that approach, but it certainly has not consistently employed it. The panel here based the

"substantial burden" holding at issue on two observations: 1) when Baranowski was precluded from participating in group worship, no "approved religious volunteer was available to lead the services"; and 2) the panel in *Adkins* had held, regarding a similar challenge, that the adherents "were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers." Pet. App. A at 19-20. Neither observation has anything to do with weighing the particularized impact of the outside-volunteer requirement on Baranowski's religious exercise. The first simply recognizes that the requirement was not satisfied, and the second reflects an illegitimate focus on the nature of the requirement – whether it imposes its burden directly or indirectly[2] – instead of the extent of the burden imposed.

The panel's reliance on *Adkins* is further troubling because, in that case, the panel considered the fact that the burden resulted from a rule that was a "uniform requirement for all religious assemblies" as evidence that the burden was not substantial. *See* 393 F.3d at 570; *see also id.* at 571 ("[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

[2] This is the direct/indirect distinction discussed in Baranowski's Petition. Pet. at 10-11. Respondents' Brief in Opposition does not address this additional error in the Fifth Circuit's "substantial burden" jurisprudence.

acting in a way that is not otherwise generally allowed."). Contrary to Respondents' argument, *see* B.I.O. at 6-8, this approach does not comport with the statute. RLUIPA is expressly designed to provide relief to inmates whose religious exercise is substantially burdened by "a rule of general applicability." *See* 42 U.S.C. § 2000cc-1(a). In suggesting that a regulation with uniform application is – for that reason – unlikely to impose substantial burdens on religious exercise, the Fifth Circuit seriously undermines the purposes of the statute. *See also*, *e.g.*, 42 U.S.C. § 2000cc-3(g) ("This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.").

B. The Distinction Between Prison Cases and Land-Use Cases Presents a Reason to Grant Certiorari, Not to Deny It.

Respondents argue that some of the conflicts in the circuits' "substantial burden" standards reflect a distinction between prison cases and land-use cases. B.I.O. at 4-5. As discussed further below, the conflicts are real, and it is reasonable to conclude that the burden that was found insubstantial in this case would have been found substantial in other circuits. *See* Section II(C)(5), *infra*. But it is also important to recognize that the distinction between prison cases and land-use cases highlighted by Respondents presents a reason to grant Certiorari, not to deny it.

As explained in Baranowski's petition, the Fifth Circuit's approach improperly ignores the distinction between burdens imposed on prisoners and those imposed on free persons. Pet. at 12-14. As this Court has recognized, the prison context is unique because "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). Courts should thus be wary – as the Fifth Circuit was not – of blindly importing principles relevant to land-use cases into the analysis of RLUIPA claims brought by prisoners. *See* Pet. at 12-13.

Despite the onerous nature of control in prisons, it is *more difficult* to show a substantial burden under the Fifth Circuit's prison jurisprudence than under other circuits' land-use jurisprudence. In a recent Second Circuit land-use decision, for example, the court reasoned that a lack of "ready alternatives" can be "indicative of a substantial burden" under RLUIPA. *See Westchester Day Sch. v. Vill. of Mamaroneck*, No. 06-1464, 2007 U.S. App. LEXIS 24267, at *19-20 (2d Cir. Oct. 17, 2007). It is precisely such a lack of "ready alternatives" that typically distinguishes the prison context from all others. But the Fifth Circuit's approach, embodied in its analysis in this case and in *Adkins*, does not take this critical factor into consideration. *See* Pet. App. A at 19-20; *Adkins*, 393 F.3d at 571. Because the Fifth Circuit failed to consider or account for the extent of the government's control

over inmates, the Court should grant the petition, and correct that approach.

C. The Differences Between the Circuits' Interpretation of "Substantial Burden" Are Numerous and Substantive – and Waiting for Additional "Percolation" Would Not Be Fair to Inmates Such as Baranowski.

Respondents have not shown that the circuits' differing interpretations of "substantial burden" will converge. To the contrary, the following brief survey indicates that the conflicts on this issue are numerous and substantive. Unless the Supreme Court clarifies the standard, prisoners in different areas of the country will continue to receive differing protections under the same federal statute.

1. The Circuits Differ as to Whether Generally Applicable Burdens May Be "Substantial."

As noted in Baranowski's Petition, the Fifth Circuit has held that "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 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. In the same vein, the Second Circuit explicitly cautions against adjudging a burden "substantial"

based on effect alone, because "generally applicable burdens, neutrally imposed, are not 'substantial.'" *See Westchester*, 2007 U.S. App. LEXIS 24267, at *20. Both cases rely on pre-*Smith* free-exercise cases for support. *See Adkins*, 393 F.3d 570 (citing *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450-51 (1988)); *Westchester*, 2007 U.S. App. LEXIS 24267, at *20 (citing *Lyng*, 485 U.S. at 451; *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 389-91 (1990)).

In contrast, the First Circuit looks to the particularized effects of regulations to find a substantial burden, even if the regulation is generally-applicable and neutrally-imposed. *See Spratt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 38 (1st Cir. 2007) (finding a substantial burden when application of a prison policy did not allow the adherent to preach "anytime or anywhere"). The Third Circuit does likewise. *See Washington*, 497 F.3d at 272 (finding that a ten-book-per-week limitation imposed a substantial burden on the adherent's need to review four books per day); *cf. Parks-El v. Fleming*, 212 Fed. Appx. 245, 247-48 (4th Cir. Jan. 10, 2007) (unpublished) (holding that the adherent's contention that the prison prevented him from performing the congregational Eid-ul-Fitr prayer precluded summary dismissal on whether the prison "substantially burdened" his religious exercise).

The removal of "generally applicable" burdens from RLUIPA's ambit would dramatically reduce prisoners' religious freedoms. The statute would not

apply to prison regulations, like those found in *Spratt*, *Washington*, and *Adkins*, and would only affect individualized actions, like the suspension at issue in *Parks-El*. The plain meaning of the word "burden" does not support this distinction, and this interpretation vitiates a key purpose of the statute, as recognized by this Court. *See Cutter*, 544 U.S. at 720-21 (citing generally-applicable prison regulations as examples of how the government "exerts a degree of control [that is] severely disabling to private religious exercise").

2. The Circuits Differ as to Whether Indirect Burdens May Be "Substantial."

The Fifth and Seventh Circuits consider whether the regulation directly burdens religious exercise in determining whether the burden imposed is substantial. *See Adkins*, 393 F.3d at 571; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (holding that a burden is "substantial" if it "necessarily bears *direct*, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable") (emphasis added); *cf. Vill. of Bensenville v. FAA*, 457 F.3d 52, 63 n.3 (D.C. Cir. 2006) (holding that the government is not responsible for restraints imposed by third parties regulated by the government) (interpreting RFRA). The Ninth Circuit, in contrast, recognizes that indirect burdens to religious exercise may constitute substantial burdens. *See Warsoldier v. Woodford*, 418

F.3d 989, 996 (9th Cir. 2005) (rejecting the prison's contention that any actions on the part of the prison did not constitute a "substantial burden" because the adherent was not "physically forced" to restrain from religious exercise) (citing *Sherbert* and *Thomas*).

As explained in the petition, *see* Pet. at 10-11, the indirect/direct distinction is neither legitimate nor helpful, and conflicts with analogous precedent from this Court. As a result, the Court should grant Certiorari to correct this approach.

3. Some Circuits Allow Inquiry into the Centrality of the Religious Exercise.

The Eighth Circuit held that inquiry into the centrality of the burdened religious exercise is relevant in determining whether a burden is substantial. *See Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). More recently, the Fourth and Eleventh Circuits have suggested that the "necessity" of the exercise is still relevant in determining whether a burden is substantial. *See Smith v. Allen*, 2007 U.S. App. LEXIS 23038, at *55-56, 62 (considering that the adherent had "presented no evidence that a small quartz crystal was *fundamental* to his practice of Odinism," and that third party sources did not indicate that "a small quartz crystal is *necessary* to observe the rites of Odinism" or "the *necessity* of a pine fire" in determining that the burden on religious exercise was incidental, not substantial) (emphasis added); *Parks-El*, 212 Fed. Appx. at 247 ("[T]he fact

that a particular practice is . . . mandated is 'surely relevant' in determining whether the burden is substantial.").

The Fifth Circuit, however, has noted that RLUIPA bars inquiry into the centrality of the religious exercise. *See Adkins*, 393 F.3d at 570 ("We emphasize that no test for the presence of a 'substantial burden' . . . may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system."). Thus, even though religious exercise under RLUIPA is defined as "any exercise of religion, whether compelled by, or central to, a system of religious belief," the circuits still conflict as to whether a centrality inquiry is relevant or proper in finding a "substantial burden" under RLUIPA. 42 U.S.C. § 2000cc-8(7)(a).

4. Circuits Differ as to When a Burden Becomes "Substantial."

The Ninth and Eleventh Circuits have recognized that the Seventh Circuit's test for a substantial burden is more onerous than their own. *See Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (rejecting Defendant's view that the Ninth Circuit had adopted the "narrower" definition of the Seventh Circuit) (quoting *Civil Liberties of Urban Believers*, 342 F.3d at 761 ("[A] land-use regulation . . . imposes a substantial burden on religious exercise [if it renders] religious exercise . . . effectively impracticable")); *Midrash Sephardi*, 366 F.3d at 1227

(declining to adopt the Seventh's Circuit definition). The Seventh Circuit's requirement that religious exercise be rendered "effectively impracticable" unreasonably limits the ambit of the statute. The Eleventh and Ninth Circuits' refusal to adopt the Seventh Circuit's standard indicates that, contrary to Respondents' assertion, the definition of substantial burden is not converging.

5. The Differences in Interpretation Have Led, and Will Lead, to Differences in Result.

The differences adverted to above have led to differing results in comparable cases. In *Orafan v. Rashid*, the district court granted summary judgment because the prison's refusal to provide a congregate Jumah service led by a Shiite prayer leader, instead of the then-provided unified-Muslim service led by a Sunni prayer leader, did not constitute a "substantial burden" under RLUIPA. 411 F. Supp. 2d 153, 156, 159 (N.D.N.Y. 2006). A Second Circuit panel reversed, noting "unresolved issues of material fact relevant to . . . the burden that the denial of a Friday congregate prayer service placed on plaintiffs' religious exercise." *Orafan v. Rashid*, No. 06-2951, 2007 U.S. App. LEXIS 22902, at *2-3 (2d Cir. Sept. 28, 2007) (unpublished). In *Washington v. Klem*, as a matter of policy, the prison limited each prisoner to possessing ten books at a time. The Third Circuit found that this policy imposed a substantial burden on the adherent's religious requirement to read four Afro-centric books

each day. *See* 497 F.3d at 275, 282. Finally, in *Parks-El*, the Fourth Circuit reversed the district court's finding that the adherent had not adequately pleaded a cause of action under RLUIPA, noting that (1) the adherent identified a specific religious practice – a particular form of congregational worship – and (2) he asserted that the prison's actions forced him to refrain from that practice, in violation of his faith. *See* 212 Fed. Appx. at 247-48.

In *Orafan*, *Washington*, and *Parks-El*, the courts looked to the particularized effect of the prison's actions to determine whether the adherent showed a substantial burden on his religious exercise.[3] The Fifth Circuit did not do so here, and thereby did not afford Baranowski the same religious protections provided by the Second, Third, and Fourth Circuits. The contrast of *Baranowski* with *Orafan* and *Parks-El* is particularly striking, because the adherent in each case sought various forms of group worship, yet the panels came to opposite conclusions. The Court should not permit these issues to percolate while inmates subject to the Fifth Circuit's jurisprudence are denied the "broad protection of religious exercise" that RLUIPA was designed to afford them. *See* 42 U.S.C. § 2000cc-3(g).

[3] As explained in the petition, the same analysis applies to *Spratt* and *Lovelace*. *See* Pet. at 8.

CONCLUSION

For all of the reasons above, Baranowski requests that the Court grant his petition.

Respectfully submitted,

JOEL L. THOLLANDER
Counsel of Record
MCKOOL SMITH, P.C.
300 W. 6th Street, Suite 1700
Austin, Texas 78701
(512) 692-8700
(512) 692-8744 (FAX)

ANTHONY GARZA
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
(214) 978-4044 (FAX)

Counsel for Petitioner