Supreme Court, U.S.
FILED
JUL 31 2007
OFFICE OF THE CLERK

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

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

QUESTION PRESENTED

Whether a regulation that forces an inmate to forfeit his regular Sabbath group worship if he cannot secure the presence of a Rabbi or prison-approved outside volunteer constitutes a "substantial burden" under the Religious Land Use and Institutionalized Persons Act.

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is Thomas H. Baranowski.

The respondents are Larry Hart, Unit Chaplain, Huntsville Unit, Texas Department of Criminal Justice; Bill Pierce, Director of Chaplaincy Department, Texas Department of Criminal Justice; Lawrence Hodges, Warden, Huntsville Unit, Texas Department of Criminal Justice; and Douglas Dretke, Director of the Correctional Institutions Division, Texas Department of Criminal Justice.

TABLE OF CONTENTS

	Page
Brief for Petitioner	1
Opinions Below	1
Jurisdiction	1
Applicable Statutory Provision	1
Statement	2
Reasons for Granting the Writ	5
A. The Fifth Circuit's Application of the RLUIPA "Substantial Burden" Standard Is Inconsistent With the Approach of Other Circuits	5
B. The Decision in the Court Below Conflicts With Supreme Court Doctrine	10
C. The Decision Ignores Distinctions Between Prisoner and Land-Use Cases	12
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004)........*passim*

Agrawal v. Briley, No. 02-CV-6807, 2004 U.S. Dist. LEXIS 16997 (N.D. Ill. Aug. 25, 2004) 10, 11, 13, 14

Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007)....*passim*

Baranowski v. Hart, No. 4:03-CV-03893, 2005 U.S. Dist. LEXIS 36231 (S.D. Tex. July 15, 2005) 1

Charles v. Verhagen, 220 F. Supp. 2d 937 (W.D. Wis. 2002)... 9, 14

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003)...................... 3, 11

Coronel v. Paul, 316 F. Supp. 2d 868 (D. Ariz. 2004)....... 14

Cutter v. Wilkinson, 544 U.S. 709 (2005) 12

Episcopal Student Foundation v. Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004)...........................11, 12

Farrow v. Stanley, No. 02-CV-567-B, 2004 U.S. Dist. LEXIS 1518 (D.N.H. Feb. 5, 2004)..............9, 10, 14

Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001)....... 12

Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006)..............2, 6, 8

Lyng v. N.W. Indian Cemetery Protective Assoc., 485 U.S. 439 (1988).. 12

Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996)................. 14

Marria v. Broaddus, No. 97-CV-8297-NRB, 2003 U.S. Dist. LEXIS 13329 (S.D.N.Y. July 31, 2003)...10, 14

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) 3, 6, 9, 12

TABLE OF AUTHORITIES – Continued

Page

Murphy v. Mo. Dep't of Corrs., 372 F.3d 979 (8th Cir. 2004) 6

San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) 6, 9, 12

Shakur v. Selsky, 391 F.3d 106 (2d Cir. 2004) 9

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 10, 11

Spratt v. R.I. Dep't of Corrs., 482 F.3d 33 (1st Cir. 2007) 3, 6, 8

Thomas v. Review Board, 450 U.S. 707 (1981) 3, 6, 10, 11

Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) 11

Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995) 14

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000cc-1 (Religious Land Use and Institutionalized Persons Act) 1, 2

OTHER AUTHORITY

Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501 (2005) 14, 15

Blank Page

BRIEF FOR PETITIONER

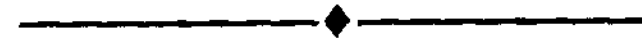
Petitioner inmate respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 486 F.3d 112 (5th Cir. 2007), and is reproduced in the Appendix at App. A. The opinion of the district court is reported at 2005 U.S. Dist. LEXIS 36231 (S.D. Tex. July 15, 2005), and is reproduced in the Appendix at App. B.

JURISDICTION

The court of appeals entered its judgment on May 4, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).



APPLICABLE STATUTORY PROVISION

The portion of the Religious Land Use and Institutionalized Persons Act relevant to this petition is 42 U.S.C. § 2000cc-1(a):

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

STATEMENT

Petitioner Thomas H. Baranowski seeks review of the Fifth Circuit's interpretation of the term "substantial burden" as used in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a). The panel held, incorrectly, that the Texas Department of Criminal Justice ("TDCJ") regulation which forced Baranowski to forfeit his regular Sabbath group worship did not constitute a "substantial burden" on Baranowski's religious exercise.

In reaching its holding, the panel did not examine the particularized effect of the TDCJ regulation on Baranowski's religious exercise. Instead, the panel relied on a prior Fifth Circuit case, *Adkins v. Kaspar*, which also refused to engage in an adherent-based analysis in determining whether the burden placed on a prisoner's religious exercise by the TDCJ regulation at issue was substantial. 393 F.3d 559, 570 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).[1] This approach differs from that of other circuits, and circumvents the wording and intent of the statute. *See Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir.

[1] The panel noted that the facts in *Baranowski* are not materially different from those in *Adkins*. *See Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) ("We reach the same result in the instant case . . . on facts that are not materially different from *Adkins*.").

2006); *Spratt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 38 (1st Cir. 2007); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004).

The court of appeals buttressed its conclusion by suggesting that any burden to Baranowski's religious exercise was caused most directly by a "dearth of clergy and authorized volunteers," and only indirectly by the prison regulation which required the presence of such volunteers. Although this "direct/indirect" analysis arguably comports with that of another circuit, it conflicts with this Court's doctrine. *Compare Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004); *with Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981).

Petitioner Thomas H. Baranowski is a practicing Jewish prisoner confined by the TDCJ. App. B at 24. Baranowski, like other observant followers of Judaism, is obligated to attend congregational services every Friday evening. TDCJ prison regulations require the presence and direct supervision of either the unit Chaplain or an "approved religious volunteer" for any meetings of a religious nature, including these Sabbath congregational services. App. B at 32. On September 5 and 12, 2003, as well as October 3 and 10, 2003, Baranowski's unit did not sponsor any Jewish Sabbath services because a Rabbi or qualified volunteer was not available. App. B at 32. Baranowski claims, *inter alia*, that his inability to assemble on every Sabbath and every Jewish holy day "substantially burdens" the practice of his religion, in violation of RLUIPA.

On July 15, 2005, the United States District Court for the Southern District of Texas held that the Defendants had not substantially burdened Baranowski's religious exercise, noting that "on the days [Baranowski] claims no Friday evening services were provided, no rabbi or approved religious volunteer was available to lead the services. [Baranowski] does not submit any summary judgment evidence that defendants turned away an available rabbi or approved religious volunteer for those services." App. B at 38. The district court cited *Adkins* for support, noting that government action does not create a substantial burden on religious expression 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." App. B at 38 (citing *Adkins*, 393 F.3d at 570).

The Fifth Circuit affirmed the district court, and found that the TDCJ regulation that precluded Baranowski from engaging in group worship on the Sabbath did not place a substantial burden on his religious exercise. Like the district court, the Fifth Circuit panel relied on *Adkins* for support. *Baranowski*, 486 F.3d at 124-25. The Fifth Circuit has now twice held that the requirement of an outside volunteer for all religious assemblies does not place a substantial burden on the religious exercise of inmates, whether or not that requirement effectively results, under the particular circumstances at issue, in a complete ban on group worship.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Application of the RLUIPA "Substantial Burden" Standard Is Inconsistent With the Approach of Other Circuits.

The Fifth Circuit's application of the "substantial burden" standard in *Baranowski* and *Adkins* is inconsistent with the approach taken in other circuits – in both Fifth Circuit cases, the analysis did not turn on the actual, particularized effect of the government regulation on the adherent. In *Adkins*, the court conceded that Adkins was prevented from congregating on many holy days. 393 F.3d at 571. The panel nevertheless concluded that the prerequisite mandated by the prison – the attendance of an outside volunteer – did not place a substantial burden on Adkins's religious exercise. *Id.* Significantly, it reached this conclusion without considering whether Adkins could actually find an outside volunteer for every holy day or Sabbath. *Id.* The court considered the same TDCJ regulation in *Baranowski*, and again, without considering whether Baranowski could find an outside volunteer for each Sabbath and holy day, found no substantial burden on his religious exercise. 486 F.3d at 124-25.

A close review of *Adkins* explains the results in both cases. On the surface, the legal test enunciated in *Adkins*, and quoted in *Baranowski*, is not worlds away from the tests used in some other circuits – "a government action or regulation creates a 'substantial burden' if it truly pressures the adherent to significantly modify his religious

behavior and significantly violates his religious beliefs." 393 F.3d at 570.[2] However, the *Adkins* panel continued:

> 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. **On the opposite end of the spectrum, however, a government action or regulation**

[2] It is significant, however, that the six circuits to address the issue have propounded differing definitions for "substantial burden" under RLUIPA. In *Midrash Sephardi*, the Eleventh Circuit held that "an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." 366 F.3d at 1227. The Ninth Circuit, in *San Jose Christian College*, held that a substantial burden results from the imposition of a "significantly great restriction or onus on any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). In *Murphy*, the Eighth Circuit defined substantial burden to include regulations that "significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs," "meaningfully curtail a person's ability to express adherence to his or her faith," or "deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). In *Lovelace*, the Fourth Circuit held that a substantial burden "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.'" 472 F.3d at 187 (quoting *Thomas*, 450 U.S. at 718). The First Circuit, in *Spratt*, adopted the *Lovelace* test. *Spratt*, 482 F.3d at 38. These varying definitions further demonstrate the need for this Court's guidance and clarification on the correct standard for determining whether a burden is "substantial" under RLUIPA.

> **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.**

Id. (emphasis added).[3] The panel in *Adkins* focused on the equal application of the regulation, rather than the particularized effect of the regulation on the adherent, in determining that no substantial burden existed.[4] Thus, because unsupervised group worship was not "generally available," the restriction of such worship did not constitute a "substantial burden" under RLUIPA. *Id.* at 571.

The *Baranowski* panel also held that the regulation at issue did not constitute a substantial burden without determining the particularized effect of requiring an outside volunteer on Baranowski's ability to participate in group Sabbath worship. 486 F.3d at 124-25. For example, the panel did not analyze the burden of foregoing group Sabbath worship in light of Baranowski's individualized religious beliefs, nor did it recognize the particular difficulty of finding willing outside volunteers – which may be

[3] As noted earlier, the *Baranowski* district court relied on this section of *Adkins* in determining that Baranowski had not shown a substantial burden. *See* App. B at 38.

[4] *See id.* at 571 ("With the exception of Muslims who are subject to a special court order, every religious group at [the prison] is required to have a qualified outside volunteer on such occasions. . . . The requirement of an outside volunteer . . . is a uniform requirement for all religious assemblies at [the prison] with the exception of Muslims. . . . We admit some lingering concern about the prison authorities' refusal to [allow a certain couple to act as volunteers] . . . which in turn prevents YEA members from congregating on the same basis as other similarly situated groups.").

significant, considering that such volunteers who are practicing Orthodox Jews cannot travel from sundown Friday to sundown Saturday, and thus must stay in the prison (or within walking distance) to participate in Sabbath worship. Instead, the panel noted that it considered a similar regulation in *Adkins*, and applied its holding, without considering any particularized differences in Baranowski's and Adkins's situations. Under the *Baranowski* and *Adkins* analysis, then, the nature of the regulation is the deciding factor, not the effect of the regulation on the adherent's religious exercise.

In contrast, other circuits consider the actual, particularized effects on the adherent in determining whether a prison regulation creates a substantial burden on the adherent's religious exercise. For example, in *Lovelace*, the Fourth Circuit first considered the particular religious beliefs of the affected inmate, and then determined that the prison policy at issue actually restricted his religious exercise, as it prevented him from fasting during daylight hours or participating in organized religious services. *See* 472 F.3d at 187 ("[The dissent] overlooks the fact that the policy works to restrict the religious exercise of any [Nation of Islam] inmate who cannot or does not fast, but who still wishes to participate in group services or prayers.") In *Spratt*, an inmate desired to preach to his fellow inmates. 482 F.3d at 35, 38. The First Circuit recognized a substantial burden when, due to a generally-applicable prison regulation, he was not allowed to preach "anytime or anywhere." *Id.* Similarly, in deciding whether the relocation of a synagogue imposed a substantial burden, the Eleventh Circuit recognized the actual, particularized effect on observant Jews who may not drive on the Sabbath – they would have to walk farther to travel to the

synagogue. *Midrash Sephardi*, 366 F.3d at 1227-28. The circuit court found the burden "of walking a few extra blocks" to the synagogue insubstantial, *id.*, but it is unlikely that it would also have found the burden insubstantial if it meant an outright forfeiture of the right to congregate on the Sabbath.

In its application of *Adkins*, the court of appeals fundamentally misapplied RLUIPA by ignoring the ordinary or natural meaning of "burden" – "something that is oppressive." *See Midrash Sephardi*, 366 F.3d at 1226 ("Because RLUIPA does not define 'substantial burden,' we give the term its ordinary or natural meaning."); *San Jose Christian College*, 360 F.3d at 1034 (9th Cir. 2004) (quoting Black's Law Dictionary to define "burden"). The *Adkins* panel did not determine whether a regulation was oppressive to the adherent. Rather, the analysis in that case turned on whether the regulation prevented the adherent from participating in religious exercise that is not "generally allowed." This is in substantial conflict with the many cases recognizing a prison regulation as oppressive to religious exercise despite the fact that the exercise in question would not be "generally allowed." *See Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004);[5] *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946 (W.D. Wis. 2002);[6] *Farrow v. Stanley*, No. 02-CV-567-B, 2004 U.S. Dist.

[5] Plaintiff requested permission to attend the Eid ul Fitr feast, a Muslim holiday. *Id.* at 108.

[6] Plaintiff requested two communal meals: one to celebrate the end of Ramadan and one to celebrate the end of the Hajj. *Id.* Prison regulations limited religious feasts to one each year. *Id.*

LEXIS 1518, at *29-30 (D.N.H. Feb. 5, 2004);[7] *Marria v. Broaddus*, No. 97-CV-8297-NRB, 2003 U.S. Dist. LEXIS 13329, at *48 (S.D.N.Y. July 31, 2003);[8] *Agrawal v. Briley*, No. 02-CV-6807, 2004 U.S. Dist. LEXIS 16997, at *22 (N.D. Ill. Aug. 25, 2004).[9] *Baranowski* shows that *Adkins* was not a one-off situation; the circuit continues to ignore the fundamental nature of burdens by applying *Adkins* to RLUIPA challenges, and by failing to consider the challenged regulation's actual particularized effect on the adherent's religious exercise. This interpretation and application of the RLUIPA standard demands correction.

B. The Decision in the Court Below Conflicts With Supreme Court Doctrine.

In past cases, this Court has not shown special protection for government action that "indirectly" burdens religion. In *Sherbert v. Verner*, this Court held that an indirect burden may be constitutionally suspect. 374 U.S. 398, 404 (1963); *see also id.* (noting further that the "placing of conditions upon a benefit or privilege" can infringe religious liberty). In *Thomas*, the Court held that indirect compulsion may substantially impinge free exercise rights. 450 U.S. at 718-19; *accord*

---

[7] Plaintiff requested access to a "sweat lodge," a place of healing used to cleanse the body and renew the spirit integral to Native religions. *Id.* at *5.

[8] Plaintiff requested access to the Supreme Mathematics and the Supreme Alphabet – both numerology devices associated with the Nation of Gods and Earths. *Id.* at *9.

[9] Plaintiff requested a nutritious diet free of meat and eggs as required by the Vaishnava Hindu religion. *Id.* at *2.

Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005) (applying *Thomas* to an RLUIPA claim).

Despite this, the court of appeals justified its decision, at least in part, by reference to the "indirect" nature of the religious burden. *See Baranowski*, 486 F.3d at 125. ("We explained [in *Adkins*] that the plaintiff and other YEA members were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers."); *Adkins*, 393 F.3d at 571; *cf. Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable."). Under this interpretation, indirect burdens are somehow less "substantial" than direct burdens.

The direct/indirect distinction is neither legitimate nor helpful. Indirect regulations can substantially burden religion. *See Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *20-22 (finding that a regulation that conditioned a religious diet on written verification by a clergy member was a substantial burden under RLUIPA). Direct regulations may not substantially burden religion. *See Episcopal Student Found. v. Ann Arbor*, 341 F. Supp. 2d 691, 703-07 (E.D. Mich. 2004) (finding a denial of an application to demolish its existing church did not constitute a substantial burden). Because the Fifth Circuit relies on a distinction that this Court has already ruled inapposite in analogous religion cases, this petition should be granted, and that approach be corrected. *See Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 718-19.

C. The Decision Ignores Distinctions Between Prisoner and Land-Use Cases.

The Fifth Circuit's approach also improperly imports principles relevant to land-use cases into its analysis of RLUIPA claims brought by prisoners such as Baranowski. In land-use cases, the adherent usually has an element of control. *See, e.g., Episcopal Student Found.*, 341 F. Supp. 2d at 704 (finding no "substantial burden" when "the solution to a majority of Plaintiff's myriad constraints appears to lie within Plaintiff's control"). If a church is denied a specific land use permit, for instance, the church may be able to find another suitable site. *See San Jose Christian College*, 360 F.3d at 1035. If alternative locations or opportunities for comparable religious exercise are available, the regulation may only inconvenience the adherent, and may not constitute a substantial burden. *See Midrash Sephardi*, 366 F.3d at 1227.[10]

In *Adkins*, the Fifth Circuit cited *Lyng v. N.W. Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), one of this Court's land-use cases, to support its assertion that "merely preventing the adherent from either enjoying some benefit that is not generally available or acting in a way that is not generally allowed" is not a "substantial burden" upon an adherent. *Adkins*, 393 F.3d at 570. Prisoners, however, frequently rely wholly on prison management to provide opportunities for religious exercise. *See Cutter v. Wilkinson*,

[10] In the same vein, if the burdened exercise is one of many means to the same end, the court may not find any single burden substantial. *See Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (finding that a restriction on selling t-shirts on the national mall was not a substantial burden on plaintiff's belief in the need to spread the gospel) (applying RFRA).

544 U.S. 709 (2005) ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion"). If the government constrains a prisoner's religious exercise, therefore, the prisoner often lacks the power – unlike those outside the prison walls – to seek alternative opportunities to participate in comparable forms of worship. In a prison setting, then, it is more likely that any restriction on religious practice will create a substantial burden on that practice. *See id.* at 720-21.

The Fifth Circuit panel did not take Baranowski's limited freedoms into account in deciding his appeal. Although the panel recognized that no rabbi or approved religious volunteer was available, the Court did not consider whether Baranowski had a reasonable opportunity to recruit sufficient free-world volunteers to satisfy the prison's group-worship regulation – especially considering the Sabbath travel restrictions for certain Jewish volunteers. *See Baranowski*, 486 F.3d at 124-25; *cf. Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *21-23 (finding a prison's requirement that he receive documentation from a clergy member to receive a non-traditional diet a substantial burden because, among other reasons, defendants did not prove that a clergy member was available, willing, and able to confirm the adherent's religious requirements). The Court did not consider whether Baranowski could effectively recruit additional free-world volunteers for each Sabbath from behind prison walls, and thus could not determine whether the prison regulation effectively forces him to refrain from Sabbath group worship, resulting in a complete abandonment of that religious exercise.

Indeed, under the *Adkins* standard, courts need not determine whether or not an adherent was forced to refrain from religious exercise due to a lack of alternative opportunities for comparable forms of worship. Under that standard, burdens that force an adherent to refrain from important religious exercise could still be classified as insubstantial if the religious exercise is not "generally allowed." This defies common sense, along with multiple courts' interpretations. *See Mack v. O'Leary*, 80 F.3d 1175, 1180 (7th Cir. 1996) (interpreting RFRA); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (interpreting RFRA); *Charles*, 220 F. Supp. 2d at 946; *Farrow*, 2004 WL 224602, at *9; *Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *21-23. In fact, some courts have recognized that, in a prison setting, restrictions that force adherents to refrain from group worship substantially burden religious exercise. *Marria*, 2003 U.S. Dist. LEXIS 13329, at *48-51; *Coronel v. Paul*, 316 F. Supp. 2d 868, 881-82 (D. Ariz. 2004), *reversed on other grounds by* 2007 U.S. App. LEXIS 6928 (9th Cir. Mar. 12, 2007). Because the Fifth Circuit standard does not consider the degree of control the prisoner has over alternative means of exercise, the Court should grant certiorari.

CONCLUSION

Prisoners have filed a significant number of claims under RLUIPA since its inception. *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 570 (2005) (recognizing sixty discrete prisoner cases that have ruled on either the merits of the claim or the constitutionality of RLUIPA). Prisoners will

continue to use RLUIPA to vindicate their statutory religious rights. Because the Fifth Circuit's application of RLUIPA differs from its sister circuits, a prisoner's right to religious exercise depends on where he is incarcerated – an anomalous result, considering that Congress sought to enact a single nationwide standard through Federal legislation. This Court should grant certiorari in this case to harmonize the application of the "substantial burden" standard. *Cf. id.* at 516 n.65 (collecting cases with inconsistent "substantial burden" standards).

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