No. 20-14

IN THE

Supreme Court of the United States

CONGREGATION RABBINICAL COLLEGE OF TARTIKOV, INC., *et al.*,

Petitioners,

v.

VILLAGE OF POMONA, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that Petitioners failed to establish a concrete, non-speculative injury sufficient for constitutional standing under Article III for RLUIPA and related claims concerning local zoning laws, which were not based on allegations of religious discrimination.

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The opinion of the court of appeals (Pet. App. 1a-91a) is reported at 945 F.3d 83. The decision and orders of the district court (Pet. App. 92a-232a, 233a-407a, 408a-535a) are reported at 280 F. Supp. 3d 426, 138 F. Supp. 3d 352 and 915 F. Supp. 2d 574.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2019. A petition for rehearing was denied on February 6, 2020. On March 19, 2020, this Court entered an order extending the time within which to file a petition for certiorari to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition was filed on July 6, 2020. The jurisdiction of this Court is invoked under 29 U.S.C. § 1254(1).

STATEMENT

The Village of Pomona was incorporated in 1967. Pet. App. 14a. From its inception, the Village focused on maintaining a rural, family home character. The entire Village has one-acre single-family zoning. *Id.*

In December 1999, Yeshiva Spring Valley, an Orthodox Jewish organization, informally approached the Village planning board about building a primary and pre-school. Pet. App. 15a. Yeshiva Spring Valley had purchased a 100-acre parcel that had previously been used for a summer camp by Jewish organizations. *Id.* Yeshiva Spring Valley sought to expand the religious school it operated in a nearby town. In response to inquiries by members

of the Village planning board, Yeshiva Spring Valley's representative, Rabbi Fromowitz, assured that it had no intention to have dormitories, because "[p]rimary school children should be living at home." Pet. App. 17a.

Following Rabbi Fromowitz's presentation, the Village's outside planning consultant commented that he had looked at the zoning for schools and considered it inadequate. He recommended that the Village consider updating its laws so the zoning "wouldn't restrict [Yeshiva Spring Valley] from doing what they want to do but would assure the Village" that any future development on the property would be controlled. Pet. App. 18a.

The consultant prepared amendments to the Village zoning laws, requiring schools to meet particular zoning restrictions and apply for a special permit. Schools and Educational Institutions would be limited to kindergarten, primary and secondary grades, be accredited by the State of New York, and not have dormitories. Pet. App. 20a-21a. In January 2001, the Village Board adopted Local Law No. 1 of 2001 (the "2001 Law"), which incorporated the consultant's recommendations. Pet. App. at 22a. *See also* 2d Cir. Trial Exhibits, p. TE 1482-1485 (hereinafter "TE ____"). Under the 2001 Law, Yeshiva Spring Valley could still build its planned primary school. Pet App. at 62a.

In 2003, a new Village Attorney was hired. She conducted a review of the Village's laws and proposed a modernization, which led to the enactment of 22 new laws. TE 1890. As part of this process, in September 2004, the Village enacted Local Law 5 of 2004 (the "2004 Law"). TE 1488-1491. It "liberalized several features of the then existing zoning laws," principally the 2001 Law. Pet. App.

69a. The 2004 Law allowed traditional dormitories (but not single-family, two-family or multi-family dwelling units), permitted accreditation by other recognized accrediting agencies, and added colleges, graduate and post-graduate institutions. *Id.* These amendments "added no new restrictions" and "would not have prevented [Yeshiva Spring Valley] from developing the Subject Property." *Id.*; *see also id.* at 27a.

When the Village adopted the 2004 Law, it was unaware that, less than a month earlier, Yeshiva Spring Valley had sold the property to Congregation Rabbinical College of Tartikov, Inc. ("Tartikov") for $13 million. Pet. App. 24a. The parties stipulated that the Village did not learn of the sale until November 2004. *Id.* at 24a-25a.

In late 2006, the Village Attorney drafted two zoning amendments, which would restrict the size of dormitories and impose limits on construction near wetlands. Pet. App. 33a-34a. A public hearing to discuss amendments in December 2006 was continued until January 2007, at Tartikov's request. *Id.* at 35a. Before that hearing was held, a report surfaced in a local newspaper that Tartikov intended to build a rabbinical college with housing for 1,000 families, which would more than double the Village's population. *Id.* at 36a-37a. At the January 2007 hearing, even though Tartikov had not submitted a formal proposal, local residents focused on the newspaper's revelations rather than the proposed zoning amendments. *Id.* at 38a-39a. Following the hearing, the Village Board adopted Local Law 1 of 2007 (the Dormitory Law) (*id.* at 43a), and in April Local Law 5 of 2007 (the Wetlands Law) (together, the "2007 Laws"). *Id.* at 48a.

Tartikov never sought a special permit to build its rabbinical college (*id.* at 48a), nor did it submit a formal building proposal, seek a variance, or take any steps to assess or alter the effects of the Village zoning. *Id.* at 55a. In July 2007, Tartikov, along with certain prospective teachers and students (the Petitioners), filed the present action in district court bringing both facial and as-applied challenges to the 2001, 2004 and two 2007 local laws. Petitioners' complaint raised claims under the federal and state constitutions, as well as RLUIPA and other statutes. Pet. App. 48a.

The district court dismissed Petitioners' as-applied challenges. *Id.* After a 10-day bench trial in May 2017, the district court ruled that all four challenged laws were unconstitutional as enacted with intent to discriminate against the Orthodox/Hasidic Jewish community. Pet. App. 49a; 119a. In addition to striking down the four laws, the district court issued an injunction exempting Tartikov from the special permit requirement while establishing specific measures and timelines for the Village's processing of any future application by Tartikov, including the environmental review required by state law. 2d Cir. Special Appendix, pp. SPA1-SPA5.

The court of appeals reversed the district court in large measure. It first considered Petitioners' standing, dividing the claims into two categories, those based on unequal treatment of a religious group and those concerning other restrictions on Tartikov's use of the property. Applying this Court's three-part test from *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the court of appeals held that Petitioners had standing to pursue the first group of constitutional and RLUIPA

claims based on intent to discriminate on the basis of religion but not the second group, which merely alleged that the challenged laws prevented Tartikov from building its rabbinical college. Pet. App. 53a-55a. In the absence of a formal proposal, permit application, or "any other conduct that would implicate or invoke the operation of the challenged zoning laws," the court concluded that any injury as to the second category of claims was only conjectural. *Id.* at 55a.

The court of appeals then considered each of the four challenged laws in turn to decide if the district court's ruling on discriminatory purpose was clearly erroneous. The court of appeals determined that the evidence was "insufficient to support an inference that the 2001 Law was enacted to discriminate against [Yeshiva Spring Valley] in particular or Hasidic Jews in general." Pet. App. 59a. Central to this determination was the fact, repeatedly stated, that the 2001 Law would not have prohibited Yeshiva Spring Valley from building the school it proposed. *See id.* at 60a; 62a; 64a. The court of appeals concluded that the 2001 Law would not "thwart or exclude [Yeshiva Spring Valley] from the Village." *Id.* at 67a.

Similarly, the court of appeals held that the 2004 Law liberalized parts of the 2001 Law, easing the zoning requirements for Yeshiva Spring Valley (which the Village believed still owned the property), and would have allowed construction of its school. *Id.* at 69a. "These measures would not have impeded [Yeshiva Spring Valley's] planned project." *Id.* As there was not enough evidence "that the Village acted with discriminatory intent in adopting the 2001 and 2004 local laws," the court of appeals reversed the district court's finding of those laws' unconstitutionality.

Id. at 75a; 91a. Petitioners do not seek review of this holding.

As to the 2007 Laws, the court of appeals reached a different conclusion. The court held there was no clear error regarding the district court's finding of discriminatory purpose and discriminatory effect in the 2007 Laws. Pet. App. 83a; 86a.

The court of appeals vacated the affirmative injunctive relief that the district court had imposed because it went "much further than is needed to remedy the injuries that Tartikov actually suffered…." Pet. App. 88a. The court limited relief to enjoining the Village from enforcing the 2007 Laws. *Id.* Petitioners do not seek review of the court of appeals' ruling as to the proper remedy.

ARGUMENT

The court of appeals applied the correct tripartite test from *Lujan*, which Petitioners agree controls. Pet. 14. Petitioners' dispute with the court of appeals' fact-bound conclusion as to the result of the application of that test is not a proper basis for review. The court of appeals' decision does not conflict with that of any other court of appeals. Petitioners' alleged conflict concerns separate concepts of ripeness that the court of appeals did not consider or discuss. This case is also an unsuitable vehicle for review both because the question presented by Petitioners would not change the result below and because an alternate ground for affirmance exists.

I. The Court Of Appeals Properly Applied This Court's Precedents To Decide That Petitioners Lacked Article III Standing

The court of appeals concluded that it lacked jurisdiction because Petitioners did not have standing to pursue the claims that were not based upon allegations of discrimination. The court of appeals relied only upon the constitutional requirements of Article III, as set forth in this Court's decisions. It did not consider any prudential factors. Petitioners' dispute with the court of appeals' conclusion is a fact-bound issue regarding the application of settled law, which is not appropriate for certiorari review.

This Court has long recognized that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases and controversies." *Clapper v Amnesty Int'l*, 568 U.S. 398, 408 (2013) quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997). As an element of the case-or-controversy requirement, plaintiffs "must establish they have standing to sue." *Id.*

As the court of appeals recognized, to have Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Pet. App. 53a, quoting *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016). *See also Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615, 1618 (2020).

Petitioners do not argue that the court of appeals applied the wrong standard to determine Article III

standing. Nor could they: the court of appeals faithfully applied the *Lujan* test explaining that an injury in fact must be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'" in order to establish Article III standing. Pet. App. 53a.

Instead, Petitioners primarily contend that the court incorrectly applied the *Lujan* test. Pet. 13-14. That is merely a request for error correction that is unworthy of review. *See* Sup.Ct. R. 10; *see also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.) quoting *U.S. v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In any event, the court of appeals' fact-bound decision was correct in light of Tartikov's failure to offer a concrete proposal or to apply for any relief from the pre-existing zoning.[1]

II. The Court Of Appeals Decision Does Not Conflict With That Of Any Other Court

Petitioners contend that the decision below is at odds with certain other circuit courts of appeals on the question of "*ripeness*." Pet. 11 (emphasis in original). Petitioners claim "a well-developed split among eight of the Circuit Courts of Appeals regarding the applicable 'ripeness' test for RLUIPA claims …" *Id.* This argument is based upon

1. Petitioners incorrectly contend the court of appeals created a prerequisite to standing that a party must seek a legislative change in the law. Pet. 16. *See also id.* at 15 n.10; 16 n.11; 23-4. The court of appeals decision neither expressly nor implicitly imposed such a requirement.

a misunderstanding of the decision below. Petitioners have misinterpreted the court of appeals decision based on standing as one predicated on ripeness.

The court of appeals did not consider ripeness, or any prudential factors, in determining that Petitioners lacked standing. It relied solely on Article III constitutional requirements. *See* Pet. App. 54a ("Whether Tartikov has standing to pursue each group of claims turns on whether the alleged injury is an injury in fact for Article III purposes"). The court of appeals did not mention ripeness in its discussion of standing or anywhere else in its opinion.[2]

Petitioners' misunderstanding is apparent in a footnote, which asserts that "[w]hile the Second Circuit used the term 'standing,' it specifically applied the concept of ripeness." Pet. 13 n.9. The actual language of the court of appeals decision, and its reliance on this Court's test for Article III standing from *Lujan*, demonstrate this is incorrect. Petitioners' footnote (*id.)* cites language from a different decision by the court of appeals, *National Organization for Marriage v. Walsh*, 714 F.3d 682 (2d Cir. 2013). The decision in the present case did not cite that opinion. Nor did the court of appeals refer to any other decisions regarding ripeness. Ripeness was simply not part of the court of appeals' analysis.

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2. Even in ruling against Petitioners' cross-appeal of the district court's dismissal of their as-applied challenges as unripe (*see* Pet. App. 48a), the court of appeals did not rely upon ripeness principles, but rather the insufficient evidence of discriminatory animus. *Id.* at 89a-90a.

Petitioners also argue that the court of appeals "stretch[ed] this Court's decision in *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), far beyond its original context …" Pet. 16. The court of appeals did not rely upon any aspect of *Williamson County* in ruling on standing, nor did it cite that case in its opinion. This argument also is based on a misunderstanding of the court of appeals' decision.

Petitioners lengthy argument that courts of appeals are divided over the test for ripeness and the applicability of *Williamson County* (*see* Pet. 16-32) is irrelevant to whether or not certiorari should be granted in this case. Regardless of whether such a split exists (which the Village questions), none of the asserted issues concerning ripeness are implicated by the court of appeals' decision, which limited its standing determination to Article III constitutional requirements. As that determination does not conflict with any decision of this Court, or another court of appeals, it does not warrant review by this Court.[3]

III. The Review Sought By Petitioners Will Not Change The Result Below

Even if this case did present the conflict that Petitioners assert – and it does not – this present case would be an unsuitable vehicle for this Court's review.

Petitioners specifically limited their request for review to the 2004 Law. Their petition states "[t]he 2001

3. Petitioners concede that all of the courts of appeals require a RLUIPA claimant to initially meet Article III standards for standing. *See* Pet. 10.

Law is not at issue in this Petition." Pet. 4 n.5. Petitioners contend that the 2004 Law "completely prohibit[s] the rabbinical college from existing within Pomona." Pet. 5. They state that the 2004 Law, while permitting traditional dormitories, "expressly forbade family dwelling units as dormitories and dormitory rooms with separate cooking, dining or housekeeping facilities." Pet. 6; *see* Pet. 14. Further, Petitioners contend "[t]he 2004 Law also prohibited non-accredited Educational Institutions, which also excludes the rabbinical college," because Tartikov could not be accredited. Pet. 6; *see* Pet. 14. In Petitioners' view, these provisions alone, or in combination, preclude construction of its rabbinical college.

The 2001 Law, however, contains similar, and more restrictive, provisions. It prohibits dormitories of any kind, defining schools as "not including any institution with a dormitory." TE-1482. Both the court of appeals and the district court recognized that dormitories "had not been permitted under the 2001 Law." Pet. App. 69a. *See also id.* at 106a. Further, the 2001 Law created the accreditation requirement, as all educational institutions had to be "duly licensed by the State of New York." TE 1482.[4] The 2001 Law limited educational institutions to "kindergartens, primary and secondary schools" (TE 1482), which did not allow colleges, graduate or post-graduate schools. *See* Pet. App. 26a; 69a.

The 2004 Law "liberalized certain provisions of the Village law related to educational institutions – including provisions of the 2001 Law." Pet. 26a. The 2004 Law

4. The district court even referred to the 2001 Law as the "Accreditation Law." Pet. App. 127a.

allowed dormitories for the first time, loosened the accreditation requirements to allow other accrediting agencies besides the State of New York, and permitted college, graduate and post-graduate institutions. Pet. App. 69a. *See also id.* at 26a; TE 1488. To the extent the 2004 Law would not allow Tartikov to build a rabbinical college, the 2001 Law also would not allow it.

The court of appeals' ruling that Petitioners had no standing to challenge claims not based on discrimination applied equally to the 2001 Law. As their petition specifically does not seek review of that holding, even if the petition was granted and the 2004 Law invalidated, the more restrictive barriers of the 2001 Law would remain.

In addition, as the court of appeals pointed out (*see* Pet. App. 90a n.289), Tartikov purchased the property from Yeshiva Spring Valley three years after enactment of the 2001 Law. Tartikov's representative conceded that Tartikov did no due diligence concerning the existing zoning. 2d Cir. Appendix, pp. A919-A923. Had Tartikov done so, it would have discovered that the existing zoning would not have allowed construction of its rabbinical college.

In these circumstances, the court of appeals pointed out, "buying into an injury in fact does not suffice for Article III standing." Pet. 90a n.289. The court of appeals recognized the same problem extended to the 2004 Law that "is effectively a more permissive version of the 2001 Law." *Id.* Although the court of appeals did not rest its decision on this basis (*id.*), it forms an alternative ground for affirmance. Both Petitioners' election not to seek review of the 2001 Law and Tartikov's purchase of

property already subject to zoning restrictions, make this case an unsuitable vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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