No. 20-7028

IN THE
SUPREME COURT OF THE UNITED STATES

Amos Mast, Menno Mast, Sam Miller, and Ammon Swartzentruber,

Petitioners,

vs.

County of Fillmore and Minnesota Pollution Control Agency,

Respondents.

PETITION FOR WRIT OF CERTIORARI

BRIEF IN OPPOSITION FOR RESPONDENT MINNESOTA POLLUTION CONTROL AGENCY

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QUESTIONS PRESENTED

1. Does credible evidence regarding the Petitioners' water use habits, topography and soil conditions surrounding plaintiffs' residences, and the bacterial and viral composition of gray water, coupled with plaintiffs' admission that the government has a compelling interest in protecting human health and the environment, satisfy RLUIPA's requirement that the government demonstrate a compelling interest as applied to Petitioners?

2. Does a government satisfy RLUIPA's "least restrictive means" test if it, in addition to providing scientific support for its own regulation, provides credible evidence demonstrating why a water-treatment system permitted in a minority of states is not suitable for use within its own state?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL REGULATIONS

STATE REGULATIONS

FEDERAL COURT RULES

INTRODUCTION

The right to practice one's religion, free from unconstitutional government interference, is a right that is fiercely protected by Minnesota Courts. Indeed, the Minnesota Constitution provides greater protections for religious freedom than those provided by the United States Constitution. Whether a government regulation violates the Minnesota's Freedom of Conscience Clause turns on a nearly identical test to that under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Minn. Const. art. 1, § 16; 42 U.S.C. § 2000cc *et seq*. The State may not enact regulations that burden or interfere with a person's sincerely held religious belief unless the regulation is the least restrictive means of achieving a compelling government interest. *Hill-Murray Fed'n of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 864-65 (Minn. 1992). This is a clear standard that has been applied by Minnesota courts for over thirty years.

Petitioners in this case seek review of a nonprecedential Minnesota Court of Appeals decision that has limited application to future religious freedom cases in the state. This nonprecedential decision affirmed a district court order, after a seven-day court trial, that found the Minnesota Pollution Control Agency (MPCA) and Fillmore County (collectively the "government") presented sufficient evidence to prove their subsurface sewage treatment system (SSTS) regulations were the least restrictive means of protecting Minnesotans from the untreated or improperly treated

gray water discharged from Petitioners' homes under both RLUIPA and the Minnesota Constitution.

Despite Petitioners' assertions, this is an attempt to retry the underlying case for a third time. The Petition for Writ of Certiorari recites the clear standards set forth in RLUIPA and this Court's relevant jurisprudence, then devotes the majority of its analysis to Petitioners' objections to the district court's factual findings and weighing of the evidence presented during trial. In state appellate cases, review by this Court is generally limited to cases where state appellate courts misapply federal law in a way that conflicts with other Supreme Court decisions and/or where a question of federal law remains undecided. Sup. Ct. R. 10. Neither of these situations are present here. Setting aside that Petitioners did not properly preserve their issues on appeal, review by this Court will not change the outcome nor provide any additional guidance on the burden placed on the government when enacting regulations that interfere with a person's right to religious freedom. No compelling reasons exist that support granting Petitioners' request for review. The writ for certiorari should be denied.

STATEMENT OF THE CASE

I. Minnesota's SSTS Regulatory Background and System Requirements

Minnesota's Water Pollution Control Act charges MPCA with preventing and controlling water pollution. Minn. Stat. § 115.03, subd. 1(e) (2016). In the early

1990s, as part of this duty, the legislature directed MPCA to adopt rules "containing *minimum* standards and criteria for the design, location, installation, use, and maintenance of [SSTS]." Minn. Stat. § 115.55, subd. 3(a) (1994) (emphasis added).

In response, in 1996, MPCA adopted its first design criteria for SSTS. *See* Minn. R. ch. 7080 (1996). Under these rules, all dwellings that discharge "sewage" must install a SSTS that meets Minnesota's minimum requirements. Minn. R. 7080.1500, subp. 1 (2016). Sewage is defined as "waste produced by toilets, bathing, laundry, or culinary operations or the floor drains associated with these sources." Minn. R. 7080.1100, subp. 73 (2016).

A Minnesota-approved SSTS includes a septic tank and PVC pipes that lead to a drain field. Pet. App. 2. Wastewater flows from the house to the septic tank. *Id*. The tank settles out heavy solids, as well as oils, grease, and soap scum, before the wastewater is discharged to the drain field. *Id*. The drain field uses perforated pipes and a distribution media, such as rocks or gravel, to evenly distribute the wastewater over the soil treatment area. *Id*.; Minn. R. 7080.2150, subp. 3 (2016). Adequate soil treatment of wastewater requires it to pass through three feet of unsaturated soil. Pet. App. 2-3. Each component (i.e. tank, piping, distribution media, etc.) must be approved by MPCA by passing the agency's registration process. *See* Minn. R. ch. 7083 (2016) (setting forth testing, result reporting, and product performance standards for registration). Finally, the SSTS must be installed

no deeper than seven feet below the ground surface and have at least six inches of top soil between the surface and the drain field. *Id*.; Minn. R. 7080.2150, subp. 3(I).

Prior to installation, MPCA's SSTS rules require a design process that includes site evaluation and a soil test. MPCA App. 3. The site evaluation determines possible uses for the property, the most appropriate location for the SSTS, and likely flow rates of sewage from the building. *Id*. The soil test uses soil borings to determine the appropriate sizes of the absorption area and drain field, as well as the depth of saturated versus unsaturated soil. *Id*.

Because not all Minnesota residents use indoor toilets, MPCA's SSTS rules allow for the installation of a reduced-size SSTS that treats only discharged gray water, which is "sewage that does not contain toilet wastes." Minn. R. 7080.1100, subp. 37. Toilet wastes, or "black water," may not be discharged into a gray water SSTS. Minn. R. 7080.2240, subp. 2 (2016). Discharging toilet wastes into a gray water SSTS would cause the system to fail. MPCA App. 4.[1] Despite the lack of toilet wastes, MPCA still requires gray water be treated with a SSTS because it may contain pathogens, viruses, bacteria, and other materials harmful to human health and the environment. *Id*. at 5-8.

[1] From this point forward, MPCA will refer to gray water SSTS as simply "SSTS."

II. Plaintiffs and their Objection to MPCA's SSTS Regulations[2]

The Swartzentruber Amish are one of the most conservative Amish sects in America. Pet. App. 40. Petitioners are members of the Swartzentruber Amish community in Fillmore County, Minnesota. *Id*. at 40-41. This community is comprised of six churches. *Id*. at 41. One of these churches, Original Canton (also known as Canton Middle), objects to the installation of a SSTS. *Id*. at 41; 45-46. Three of the four Petitioners belong to this church. *Id*. at 41.

All Petitioners own homes in Fillmore County and reside with their respective wives and children. MPCA App. 9-16. At the time of the district court trial, some Petitioners had between 10 and 16 people living in their homes. *Id*. at 16-17.

Three of the four Petitioners have plumbing systems that bring water from a well into their homes. *See*, *e.g.*, *id*. at 18. The water is used for bathing, laundry, and kitchen activities. *Id*. at 19. These activities generate sewage and include, for example, cooking, washing dirty diapers, and rinsing off chicken carcasses after they are defeathered. *Id*. at 16, 20-24. The wastewater generated from these activities then goes down a drain and into Petitioners' respective mulch systems or SSTS. *See*, *e.g.*, *id*. at 25.

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[2] Because the government did not appeal whether Petitioners have a sincerely held religious belief that is substantially burdened by the state's SSTS regulations, MPCA omits a substantive discussion of the Amish faith and its interplay with septic systems.

III. Procedural History

In response to MPCA issuing administrative penalty orders (APO) to members of the Swartzentruber communities in Fillmore County, Petitioners initiated a declaratory judgment action in district court.[3] Petitioners asserted MPCA's SSTS regulations and Fillmore County's SSTS ordinance violated their right to religious freedom under the U.S. Constitution, the Minnesota Constitution, and RLUIPA. Appellants subsequently withdrew their claim under the U.S. Constitution. Pet. App. 15.

At the beginning of the seven-day court trial, Petitioners partially stipulated to the third prong under both the Minnesota Constitution and RLUIPA analysis—whether the government has a compelling interest in enforcing the challenged regulation. Specifically, Petitioners stipulated that the government had a compelling

[3] Petitioners severely misrepresent the focus of MPCA's enforcement actions. *See* Pet. for Writ of Cert. at 10. In 2015, the year MPCA issued twenty-three APOs to members of the Swartzentruber community, MPCA issued approximately 1,062 enforcement actions statewide. Therefore, the APOs issued to the community comprised approximately 2.1% of enforcement actions in 2015. The following year, when the community members continued to refuse to install compliant systems, MPCA used specific statutory authority to docket final APOs and field citations with the district court for enforcement. *See* Minn. Stat. §§ 116.072, subd. 9(b) and 116.073, subd. 4 (2016). The proportion cited by Petitioners – 62% of all cases filed in district court in 2016 – is misleading because jurisdiction over the majority of MPCA's enforcement actions lies elsewhere—with the Office of Administrative Hearings and the Minnesota Court of Appeals. *See* Minn. Stat. ch. 14 (2016) (Minnesota Administrative Procedures Act) and Minn. Stat. ch. 606 (2016) (governing writs of certiorari for quasi-judicial agency actions).

interest in protecting human health and the environment. Pet. App. 7. They did not, however, stipulate that gray water itself presented a threat. *Id*. Therefore, the court addressed two issues regarding the government's compelling interest. First, whether gray water itself required proper treatment. *Id*. at 53-54. Second, whether the gray water discharged from Petitioners' home, left untreated or improperly treated, posed a threat to other Minnesotans. *Id*. at 54, 66, 67.

After reviewing the parties' post-trial submissions, the district court found that while the challenged regulations substantially burdened Petitioners' sincerely held religious beliefs, the government's SSTS regulations were the least restrictive means of achieving its compelling interest in protecting human health and the environment from untreated or improperly treated gray water discharged from Petitioners' homes. *Id*. at 14-16. Specifically, the district court found:

> The gray water septic system required by the Government reliably and effectively treats household gray water over the long term with minimal maintenance, ensuring that contaminants and disease pathogens do not come into contact with people or enter the surface or ground waters untreated; and that problematic nutrients are not released untreated into the environment. The evidence convinces me that the mulch basin gray water system does *not* provide that same protection.
>
> Minnesota prohibits use of biodegradable substances such as woodchips as distribution media in waste water treatment systems because of the problems the decomposition of these materials creates. The evidence convinces me that that prohibition makes sense. I am persuaded by the Government's evidence that woodchip mulch is not suitable for this purpose.

> [Petitioners' expert] thinks that the risk posed by gray water to human health is overstated by inexperienced people like Dr. Heger; and that in the thirty states that do *not* permit mulch basin systems, gray water treatment is misguidedly over-regulated, over-engineered and overpriced. I am not convinced by these views and find the Government's evidence more persuasive on all of these points.
>
> Had [Petitioners'] own experimental mulch basin systems proved successful, they might have been strong evidence of a practical, less religiously intrusive alternative. But they did not work, and instead illustrate the Government's objections to mulch basin systems.

Id. at 66, 68, 73-74. Petitioners appealed.

On June 8, 2020, the court of appeals, in an unpublished opinion, affirmed the district court's order. Specifically, the court of appeals found the district court applied the appropriate analyses under the Minnesota Constitution and RLUIPA and that the district court's findings of fact were supported by the evidentiary record. *Id*. at 5-6, 12.

Petitioners filed a petition for further review with the Minnesota Supreme Court challenging whether the government had met its burden under both the Minnesota Constitution and RLUIPA's "least restrictive means" test. MPCA App. 41. On August 25, 2020, the Minnesota Supreme Court denied Petitioners' request. The Petition for a Writ of Certiorari to this Court followed.

REASONS FOR DENYING THE PETITION

Petitioners have not identified any compelling reasons to grant certiorari and the petition should be denied for three reasons. *See* Sup. Ct. R. 10 ("A petition for

a writ of certiorari will be granted only for compelling reasons."). First, Petitioners' waived their right to appeal the issue of whether the lower courts properly applied RLUIPA's compelling interest test as they did not appeal this issue to the Minnesota Supreme Court. Further, while Petitioners have generally asserted that Respondents failed to meet their burden of demonstrating a compelling interest, they argue for the first time in this petition that the lower courts did not apply the appropriate "as to the person" analysis.

Second, despite Petitioners' failure to preserve the issue for appeal and previously misstating the test, the lower courts' orders properly apply the rigorous RLUIPA analysis required by this Court. *Cf.* Sup. Ct. R. 10(c) (Court grants certiorari when a state court "decide[s] an important federal question in a way that conflicts with relevant decisions of this Court.").

Third, this Court's jurisprudence clearly outlines a government's heavy burden when enacting regulations that infringe on First Amendment rights. Additional review will not alter the demanding standard applied in RLUIPA cases nor change the outcome of this case. *Cf. Id.* (Court grants certiorari when the case involves an important question of federal law that "has *not* been, but should be, settled by this Court") (emphasis added).

Finally, as the Court will see throughout the sections below, Petitioners' challenge lies not with the applicable legal analysis under RLUIPA, but with the

lower courts' findings of fact. Challenges to findings of fact or misapplications of properly stated law rarely support issuance of a writ. Sup. Ct. R. 10. The petition should be denied.

I. Petitioners Failed to Preserve the "Compelling Interest" Issue on Appeal.

Petitioners bear the burden of demonstrating that issues raised on appeal were "properly presented to the [state] appellate courts[.]" *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998). It is only in "very rare exceptions" that this Court will review a federal claim "unless it was either addressed by or properly presented to the state court that rendered the decision [it has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). If a federal issue was not presented to the state appellate courts, this Court "ha[s] no power to consider it." *Street v. New York*, 394 U.S. 576, 582 (1969).

In their petition for review to the Minnesota Supreme Court, Petitioners suggested only that the government had not met its burden of proof to show there was no less restrictive alternative. They framed the single issue as—"[d]id Respondents carry their burden under [the Minnesota Constitution] and under RLUIPA to prove that there is no alternative means for adequately disposing of household gray water that is less restrictive on Petitioners' freedom to exercise their religious beliefs?" MPCA App. 41. That stands in stark contrast to the first question presented by Petitioners to this Court, which focuses on the test for determining

whether the government interest is compelling. Failure to provide Minnesota's highest court with an opportunity to address an issue on appeal bars Petitioners from raising it here. *Conn. Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 544 (1948).

Further, not only did Petitioners fail to appeal this issue to the Minnesota Supreme Court, they did not properly present it to either the district court or the court of appeals. The assertion that the government's compelling interest must be analyzed "as to the person" is raised for the first time in the petition for a writ of certiorari.

While Petitioners now argue that RLUIPA's compelling interest test is more restrictive than that under the Minnesota Constitution, they had argued the opposite in the lower courts. Before the district court, Petitioners argued that the Minnesota Constitution's "compelling interest" test "is somewhat different than the third element in RLUIPA because Minnesota protects religious liberty at a *higher* level than RLUIPA." MPCA Add. 61 (emphasis added). In their opening brief to the court of appeals, Petitioners stated that "[t]he compelling government interest test required under RLUIPA mirrors the 'compelling or overriding interest' test required for analysis under the Minnesota Constitution." MPCA Add. 110. Now, in an about face, Petitioners argue that RLUIPA's "compelling interest" test does not mirror that of the Minnesota Constitution and is, in fact, more stringent. Pet. for Writ of Cert. 5. Petitioners' failure to properly appeal and articulate RLUIPA's "compelling

interest" test deprived Minnesota state courts of the ability to fully address this issue. As such, it should not be heard for the first time here. *See Webb v. Webb*, 451. U.S. 493, 499 (1981) ("powerful policy considerations" dictate that federal questions must first be properly raised in state courts).

II. The Lower Courts Appropriately Applied RLUIPA's "Compelling Interest" Test.

Even if Petitioners had properly preserved the "compelling interest" issue on appeal, Petitioners fail to show any conflict between the decision below and decisions of this court. The lower court's application of RLUIPA's compelling interest test comports with federal law.

Petitioners argue the lower courts erred two ways. First, by failing to analyze the government's compelling interest in protecting human health and the environment by imposing its SSTS regulations *on Petitioners*. Second, by holding the government had a compelling interest in the proper treatment of gray water when it regulates other forms of wastewater and toilet wastes under different standards. Both arguments fail. The lower courts thoroughly analyzed the government's compelling interest in regulating the gray water discharged from Petitioners' homes and made factual findings to support its conclusion that the government had met its burden to establish a compelling interest. Further, the "analogous" conduct that the government purportedly fails to regulate are actually not analogous at all but concern different wastes and treatment processes that serve different purposes than the

government's SSTS. As demonstrated below, additional review would result in the same outcome.

A. The Lower Courts Analyzed the Imposition of the Government's SSTS Regulations on Petitioners.

When courts review whether the government has a compelling interest in enforcing a regulation, they must go beyond "broadly formulated interests" and determine whether the government has a compelling interest in applying the challenged regulation "to the person" whose sincere religious belief "is being substantially burdened. 42 U.S.C. § 2000cc(a)(1); *see also Holt v. Hobbs*, 574 U.S. 352, 363 (2015). That is precisely what the district court did in this case, when it made these findings specific to the government's compelling interest in treating gray water in Fillmore County:

> I find that untreated or inadequately treated gray water presents substantial and serious danger to public health and risk to the environment, and that the Government has a compelling interest in protecting against those dangers.
>
> I also find that proper wastewater treatment is of particular urgency in Fillmore County due to its karst topography. That topography -- characterized by fissures, fractures, and sinkholes in the slowly dissolving limestone bedrock -- permits much more rapid travel of wastewater to both ground and surface waters than would be the case elsewhere. It is possible, in a karst area, for household wastewater to reach a drinking water source in a time measured not in years or decades (as may be the case in non-karst areas) but in days.

Pet. App. 54.

The district court found that gray water posed a threat to human health and the environment due to its composition. On average, one tenth of a liter of gray water produced by a home contains 10 million coliform bacteria. *Id*. at 53-54. As noted by the district court, "to put this number in perspective, it is considered unsafe to swim in water with more than 200 coliform bacteria per [one tenth of a liter]." *Id*. In other words, gray water contains 50,000 times the permissible limit of coliform bacteria considered safe for human contact. Gray water's bacterial load comes from fecal traces on clothing, anything washed off the skin during bathing, and the kitchen sink, which contains "some of the dirtiest water in our home . . . after the toilet." MPCA App. 6.

In addition to its concerns regarding the presence of karst topography, the district court also found the soil conditions on Petitioners' farms concerning. Pet. App. 67. The government's experts provided credible testimony that it would be "questionable whether one could even find sites on the [Petitioners'] farms in Fillmore County that would provide three feet of separation from the perched water table and bedrock." *Id*. The district court also found that the poor soil conditions on Petitioners' farms required the use of the government's SSTS to ensure proper treatment of the gray water discharged from Petitioners' homes, "regardless of their willingness to otherwise comply with the government's requirements." *Id*.

Although the lower courts did not articulate the "to the person" standard, because no party suggested they needed to, they fully analyzed the government's interest in ensuring the proper treatment of gray water from Amish homes in Fillmore County. The lower courts found, based on the evidentiary record, that the government had a compelling interest in protecting human health and the environment from *Petitioners'* discharge of untreated or improperly treated gray water. *Id*. at 8-9, 54, 67. RLUIPA's "to the person" requirement was fully satisfied. These decisions by Minnesota courts are entirely consistent with the decisions of this Court.

B. Petitioners Fail to Identify Unregulated "Analogous" Conduct.

In *Gonzales v. O'Centro Espírita Beneficente Uniõ de Vegetal*, this Court found that the government failed to demonstrate a compelling government interest when it could not explain why one religious group and not another should receive an exemption from the Controlled Substances Act for hallucinogens used during religious ceremonies. 546 U.S. 418, 433 (2006). This failure to regulate "analogous" conduct was fatal to the government's regulation under RLUIPA. *Id*. Petitioners attempt to create a conflict between the decision below and *Gonzales*, by pointing to other wastewater that the government does not regulate the same as gray water. Petitioners' cite three main examples—hand carried gray water, privies/outhouses, and land application of septage—that do not require the use of

SSTS. However, each of those situations is fundamentally different from gray water used in a household. Nothing in the record before the lower courts supports Petitioners' alleged regulatory malfeasance.

First, as explained during trial and during the appeals process, if individuals carry water into their homes or dwellings for use, they may dispose of the gray water generated inside the home or dwelling directly onto the ground. Minn. R. 7080.1500, subp. 2. This is known as the "hand carried gray water" exception. *Id*. This water may be disposed of on the ground if it is done in an area that meets certain safety requirements. *Id*.; *see also* MPCA App. 26-28. The government allows this because the time and effort it takes to carry water into a dwelling for use minimizes the amount of gray water that can be generated. *Id*. The campgrounds cited by Petitioners, as well as anyone else throughout Minnesota who hand carries water for use, may make use of this exception. If, however, water is brought into a home through a plumbing system, like those used in Petitioners' homes, the residents are able to generate gray water in such quantities that make disposal on the ground surface a health and safety hazard. *Id*. at 26-27.

Second, privies are wholly different systems than SSTS. They are governed by separate rules as they treat different types of waste. Privies treat solid wastes, while gray water systems treat liquid. *Compare* Minn. R. 7080.1100, subp. 37 (defining "gray water") *with* Minn. R. 7080.1100, subp. 62 (defining privy). Privies

may only receive urine, fecal matter, and toilet paper. Minn. R. 7080.2280 (2016). Users are specifically prohibited from include flushing water and other liquids. Minn. R. 7080.1100, subp. 62. If privies meet appropriate locational and soil requirements, the system may use unsaturated soil as a treatment method. Minn. R. 7080.2280. However, if soil conditions are not appropriate, privies must utilize watertight holding tanks or a toilet treatment device. *Id*. Gray water cannot be discharged into a privy and toilet wastes cannot be sent to a gray water SSTS. To do so would cause a failure of either system. MPCA App. 4.

Finally, the government permits licensed SSTS professionals and farmers to land apply septage from a SSTS as long as the person applying the septage complies with federal law. The law governing land application in Minnesota is colloquially referred as the "503s." 40 C.F.R. § 503 *et seq*. (2016). These regulations ensure that septage is properly treated with chemicals prior to surface application or properly incorporated or injected into the soil. *Id*. In addition to general safety requirements, the 503s contain pollutant limits; management practices; operational standards; and monitoring, recordkeeping, and reporting requirements. MPCA App.

29.[4] These requirements ensure that septage is land applied and/or incorporated in a manner that does not pose a threat to human health or the environment.[5]

In short, there is no conflict between the decisions below and *Gonzales* because Petitioners fail to identify "analogous" wastewater to the gray water generated by Petitioners' homes that the government fails to regulate. Solid wastes and septage either treated or incorporated into soil pursuant to crop-specific loading rates are dissimilar to liquid gray water and are treated accordingly. The lower courts' analyses of the government's compelling interest is consistent with federal precedent.

III. There is No Conflict Between the Decision Below and RLUIPA's "Least Restrictive Alternative" Analysis.

RLUIPA requires that the government utilize the "least restrictive alternative" when regulating its compelling interests. Courts have found that a government must demonstrate "it lacks other means of achieving its desired goal." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). It is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) *superseded by statute*, RLUIPA, 42 U.S.C. § 2000cc *et seq.*, *as recognized in Holt*, 574 U.S. at 357. Neither the lower courts nor the government dispute this is the

[4] *A Plain English Guide to the EPA Part 503 Biosolids Rule*, U.S. Env't Prot. Agency (Sept. 1994), https://www.epa.gov/sites/production/files/2018-12/documents/plain-english-guide-part503-biosolids-rule.pdf.
[5] *Id*.

correct legal standard to apply under RLUIPA. Rather, Petitioners once again take issue with the lower courts' analyses of the evidentiary record and attempt to create a legal issue where none exists. Specifically, Petitioners attempt to create a new constitutional standard that holds if a minority of jurisdictions permit a certain alternative, the alternative is *per se* the least restrictive alternative in all jurisdictions. Further, because the lower courts did not extensively analyze the other states permitting mulch systems, the record lacks evidentiary support for finding the government met its burden under RLUIPA. However, the lower courts did exactly what this Court's precedent requires by analyzing the evidence the government presented regarding why the mulch systems that were allowed in other states were not an acceptable alternative in the particular environment of Fillmore County, Minnesota.

In addition to the findings set forth earlier in this brief, the district court found that

> [the court] record contains no evidence of a single, properly working mulch basin system in Minnesota; or in any other northern tier state with polar vortex temperatures. I find that the only practical and proven means of accomplishing household gray water treatment on the farms of Fillmore County, including the Amish farms, is a septic system of the type required by Fillmore County and MPCA. The Government's evidence convinces me that the proposed mulch systems, even with the capacity expansion and siting improvements to which the Plaintiffs are agreeable, would not accomplish the Government's compelling public health and environmental safety purposes.

> In *Yoder*, [this] Court said: "A way of life that is odd or even erratic but *interferes with no rights or interests of others* is not to be condemned because it is different." *Yoder* at 223-24 (italics added). I would never characterize Amish beliefs and the way of life guided by those beliefs as either odd or erratic. But to the degree their way of life would introduce untreated gray water into the soil and waters of Fillmore County, it interferes with the rights and interests of others. This is a situation in which the Amish cannot, despite their most sincere efforts, be separate from the world. All water is connected, and all of us, Amish and English alike, drink from the same aquifers. Because I find the Government's public health and environmental safety interests cannot be accomplished by a less religiously intrusive alternative means, I deny [Petitioners] the relief they seek under the Minnesota Constitution and RLUIPA.

Pet. App. 74-75; *see also supra* at 8-9.

In arguing that those findings are somehow in tension with federal law, Petitioners cite two cases. First, *Holt v. Hobbs*, which addressed a state prison's denial of a religious exception to its facial hair ban. 574 U.S. at 356. Second, *McCullen v. Coakley*, which dealt with a ban on protests on public sidewalks outside of abortion clinics. 573 U.S. 464 (2014). In these two cases, this Court found the government failed to explain why it did not allow "less restrictive alternatives" permitted in other states. Petitioners assert these cases stand for the proposition that a government must provide a state-by-state comparison of all jurisdictions allowing the requested "least restrictive alternative."

Petitioners' reliance, however, is misplaced. Neither case requires such a comparison of a challenged "least restrictive alternative." *See*, *e.g.*, *Holt*, 574 U.S. at 368 ("While not necessarily controlling, the policies followed at other well-run

institutions would be relevant to a determination of the need for a particular type of restriction.") (internal citation omitted). In both of those cases, the Court's analysis boils down to the question, "if other states allow the less restrictive alternative requested by the petitioner, why can't you?" In *Holt*, the government could not explain why running a comb through a beard in Arkansas was any different than running a comb through a beard in another state. 574 U.S. at 368. In *McCullen*, the government couldn't explain how other states controlled protests by ordering crowds to disperse once they reach a certain size, but Massachusetts' only option was to ban protests in front of abortion clinics all together. 573 U.S. at 492-93. Here, in contrast, the government provided ample evidence why a mulch system may be permissible in other states, but not in Minnesota. First, by providing credible evidence regarding the efficacy of the government's SSTS. Second, by identifying the structural deficiencies in Petitioners' proposed mulch systems.

A. Minnesota's SSTS Constitute the Least Restrictive Alternative for Adequately Treating Gray Water within the State.

The evidence presented by the government overwhelmingly supports the lower courts' findings that the government met its burden to show it utilizes the least restrictive means of ensuring the proper treatment of gray water discharged from Petitioners' farms. First, the district court found no evidence of a single functioning mulch system in a state with polar vortex temperatures. Pet. App. 74. Second, the evidence before the district court showed that all of Petitioners' mulch systems

failed. *Id*. Further, the district court concluded that even with their proposed changes and alterations to their mulch systems, they would not provide proper treatment of gray water. *Id*.

Third, as Petitioners point out, a minority of states have adopted the portions of the Universal Plumbing Code (UPC) that permit the use of mulch systems. However, this means that a *majority* of states, including Minnesota, do not permit the use of mulch systems nor have codified the relevant portions of the UPC into law. As the lower courts noted, there are many reasons for this. For example, states have different definitions of gray water. California does not permit the inclusion of kitchen sink water and water used to wash linens soiled with urine or fecal matter in gray water. Pet. App. 61 n.25; Cal. Plumbing Code ch. 15. There, that water must go to a septic system. *Id*. Not so in Minnesota, which includes both types of wastewater in its definition of gray water. Minn. R. 7080.1100, subp. 37. Further, plumbing codes differ between states. In Minnesota, the plumbing code applies to the inside of a dwelling while SSTS regulations apply to the outside. MPCA App. 30-31. Minnesota rejected the UPC as it does not provide sufficiently prescriptive guidelines. *Id*. at 31. The government's SSTS regulations are thorough and provide greater guidance to SSTS professionals and protection for Minnesotans from inadequately treated wastewaters. *Id*. at 30-31.

Finally, and most importantly, the government provided credible witnesses that testified regarding why Minnesota requires the use of SSTS. First, requiring the use of a septic tank ensures that solids and other materials that would clog up a system are removed prior to the wastewater entering the soil treatment field. Pet. App. 10. This extends the longevity of the system and prevents system failures. *Id*. at 62, 66. Second, prohibiting the use of biodegradable materials, such as mulch, prevents system failures and ensures adequate oxygen for proper treatment. *Id*. at 66-67. Biodegradable materials that break down consume oxygen that is otherwise needed for proper soil treatment. The breakdown of materials also clogs the system and causes the soil to seal up. *Id*. Third, SSTS are designed to require little oversight and minimal maintenance. A properly installed SSTS requires minimal maintenance for approximately 25 years. *Id*. at 57. The government's regulations ensure that regardless of where a SSTS is installed, it is properly protecting Minnesotans from inadequately treated gray water. MPCA App. 32.

B. Petitioners' Proposed Mulch Systems Are Not Suitable For Use Within Minnesota.

In addition to evidence supporting the use of SSTS, the government's witnesses also addressed whether, assuming perfect soil and topography conditions, a mulch system could adequately treat gray water. Their answer was no. First, the systems would require 24/7 oversight. Pet. App. 68-69. Second, the lack of a septic tank would cause clogging in the system. *Id*. at 11. Third, the system would need

to be frequently relocated as the biodegradable materials would cause the soil to seal. *Id*. at 11, 67. Fourth, the systems lack the required six inches of top soil. Any failure could result in standing gray water, which constitutes an imminent public health threat. Minn. R. 7080.1500, subp. 4(A). Lastly, the constant oversight would require significant government involvement and inspections paid for by the Petitioners—both of which Petitioners object to. Pet. App. 69 n.30; MPCA App. 33, 33-35.

Finally, as persuasive as the government's evidence was in proving its SSTS constitutes the least restrictive alternative, the Petitioners' evidence was as equally unpersuasive. Petitioners did not provide any evidence of a functioning mulch system in Minnesota. Their expert also had no experience working with mulch systems in the State. MPCA App. 36. She incorrectly identified the location of Minnesota's groundwater and stated she was neither a soil nor groundwater expert and deferred to the government's expert witnesses. Pet. App. 71 n.32. The district court found her understanding of groundwater and soil conditions in Minnesota "rudimentary and flawed." *Id*. at 71. She also authored her expert report based on a mistaken definition of gray water and the types of water included in Petitioners' systems. *Id*. at 69 n.25. Petitioners did not provide a single piece of credible evidence that mulch systems adequately treat gray water and protect Minnesota's drinking water sources.

The lower courts properly analyzed the government's SSTS using RLUIPA's "least restrictive alternative" standard as required by this Court. As the district court stated, "[it] required that the state show that there is no less religiously intrusive alternative, proposed or not proposed" and that the state had met RLUIPA's "exceptionally demanding standard." MPCA App. 25-26. Nothing in the district court's order, nor the court of appeals' unpublished affirmance of the underlying decision, departs from this Court's jurisprudence or will cause confusion during future applications of RLUIPA to religious freedom challenges within Minnesota.

IV. The Court Should Not Stay A Decision on the Petition Pending the Outcome in the Cases Identified by Petitioners.

As discussed above, the lower courts properly applied the standards set forth in RLUIPA to the facts of this case. Whether the government met its burden turned not on the legal standard applied, but the scientific evidence presented to the district court and whether the evidence supported the district court's weighing of the government's burden under RLUIPA. The lower courts' decisions did not alter, misapply, or call into question the proper standards under RLUIPA. Additional clarification from cases pending before this court will not alter the outcome in this matter. As such, there is no reason why this Court should stay its decision pending the outcome in Petitioners' enumerated cases.

CONCLUSION

For all of these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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