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.

On Petition for a Writ of Certiorari to
the Minnesota Court of Appeals

REPLY BRIEF FOR PETITIONERS

LAW OFFICES OF SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.
Brian N. Lipford, ID #313856
Attorney for Petitioners
903 West Center Street, Suite 230
Rochester, MN 55902
507.292.0080
brian.lipford@smrls.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES AND RULES

OTHER

REPLY IN SUPPORT OF CERTIORARI

Rather than addressing arguments on the RLUIPA analysis, Minnesota Pollution Control (MPCA) merely summarizes the lower courts' decisions. And this summary confirms precisely what the Petitioners said in their petition: that the Minnesota Courts failed to apply RLUIPA under the standard that this Court mandates. The courts below did not require Respondents to prove that its interest was compelling as applied to the Swartzentruber Amish, nor did they give proper weight to the fact that twenty other states permit the less-restrictive alternative requested by Petitioners.

MPCA's argument can be summarized as this: Petitioners did not prove mulch systems can work in Minnesota. BIO 24. This argument, which the courts below found persuasive, illustrates the fundamental problem: it inverts the burden of proof and places the cart before the horse. "The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v. of Newsom*, 141 S. Ct. 716, 718 (2021). This was not done.

The Swartzentruber Amish have been using straight pipes for gray water disposal since establishing their Minnesota settlement in 1974.[1] Pet. App. 1-2. Until recently, Fillmore County considered the Swartzentruber Amish's traditional practices as being covered by Minnesota's hand-carried water exemption which

[1] Petitioners mistakenly said "1980s" instead of "1970s" in its Petition for Certiorari.

spared them from the septic system requirements.[2] Minn. R. 7080.1500 Pet. App. 143-144. Respondents admit there is no evidence of anyone ever getting sick from gray water contact. Pet. For Writ of Cert. at 15. Respondents admit that there was no evidence concerning any environmental harm. Pet. For Writ of Cert. at 16. The Amish's household water practices have not changed for centuries. The lower courts should have properly scrutinized Fillmore County's assertion that it needed to change their longstanding interpretation of this policy.

Nor did the lower courts consider this change could have been motivated by other reasons, such as animus. Discrimination against religious groups can lie beneath local government's land use decisions and RLUIPA strict scrutiny is an important protection against this pernicious problem. Jewish Coalition Amicus Br. 7-14. In this case, Fillmore County consistently challenged the sincerity of Petitioners' claim that their objections were based upon their religious beliefs.[3] Pet. App. 3-46. Additionally, Fillmore County used their access to Petitioners' properties to inspect their mulch systems (Pet. App. 127-130) as an opportunity to seek evidence of perceived inconsistencies in what technologies were permissible within their faith. Pet. App. 47-49. Despite this conduct, the lower courts never questioned Fillmore County's assertion that strict county regulation of the Amish's traditional practices

[2] Petitioners refer to the reduced size septic system which Respondents call a gray water system as simply a "septic system."

[3] MPCA did not challenge this claim by Petitioners.

was needed. The courts below should have tested the Respondents on this crucial question, especially given Fillmore County's position that Petitioners' religious based objections were nothing more than a sham.

This case is of enormous consequence for the Swartzentruber Amish community. MPCA mentions only the Original Canton church. BIO 5. But the impact extends beyond this one congregation. Other Amish churches have many members that object to the mandate and their parishioners are facing potential splits because of this policy. Pet. App. 50-55. This says nothing about the larger impact on religious liberty rights if Respondents can expel a religious community for refusing to change their time-honored way of life to meet Fillmore County's unnecessary new demands.

I. Minnesota's courts were adequately apprised of the substance of the federal claim presented.

Respondents urge this Court to deny review with an argument that Petitioners failed to present to the Minnesota appellate courts the claim that the Respondent's compelling interest did not justify the substantial burden on Petitioners' exercise of religion. BIO 11-12. Yet it is clear from Petitioners' brief to the Minnesota Court of Appeals that this is not true. MPCA App. 73 and 110. MPCA selectively quotes cases where this Court analyzes whether or not a state court was aware of a federal issue was raised because it was never discussed in the opinion. BIO 10-12. But Petitioners

are not attempting to resurrect a phantom federal question lurking in its pleadings, this claim was raised from the outset.[4] Pet. App 133, 139-140.

This Court need not ask if Minnesota state courts addressed a federal question. The district court analyzed Petitioners' RLUIPA claim including its compelling interest challenge. The Minnesota Court of Appeals analyzed Petitioners' appeal based on its RLUIPA violation claim and its opinion addressed the RLUIPA compelling interest test. Petitioners petitioned the Minnesota Supreme Court alleging the lower courts erred in finding the MPCA's policy did not violate RLUIPA. MPCA App. 41, 46-47. It is abundantly clear from the record that there is no question that the lower courts were adequately apprised of this federal claim. The Respondent's effort to obfuscate this clear history of the case is without merit.

Equally lacking is MPCA's claim that Petitioners' questions to this Court must mirror the language in their Petition for Review to the Minnesota Supreme Court. BIO 10. When petitioning this Court, Petitioners are not required to replicate the exact language that was used when petitioning the state supreme court. A Petitioner "generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below" and "can generally frame the question as broadly or as narrowly as he sees fit". *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

[4] This case was originally filed in Ramsey County District Court as 62-CV-17-2033 and was later transferred to Fillmore County.

Even if this Court is persuaded by the Respondent's claim that state courts were not provided the opportunity to review the federal question, this Court should not deny certiorari. Rather, because of the lower court's flawed application of the proper RLUIPA standard, which will be addressed next, the appropriate remedy would be to grant certiorari, vacate judgment, and remand this case in light of recent precedent.

II. Minnesota's courts did not apply RLUIPA's "to a person" standard for the "Compelling Interest" test nor properly scrutinize comparable conduct the government does not regulate.

MPCA claims that, although the lower courts did not discuss the proper "to a person" compelling interest standard, the court's analysis concerning coliform bacteria concentrations and karst are sufficient justifications for their desired outcome. BIO 15. However, relying on unsupported conclusions regarding theoretical bacteria concentrations and rock formations are a far cry from the standard required by this Court. Generic interests are not sufficient: to show a compelling interest under RLUIPA, a state must establish that it has a compelling interest in preventing a particular risk to a particular state interest posed by a particular plaintiff. Amicus Br. 14. The lower courts failed to hold the Respondents to its burden.

MPCA compares coliform bacteria levels in household gray water to levels in lakes considered unsafe for swimming to argue ergo "gray water contains 50,000 times the permissible limit of coliform bacteria". BIO 14. But Petitioners are not claiming gray water is safe for swimming, just that it can be safely used for

subsurface irrigation. Mulch basin systems discharge gray water underground, just like a septic system. The rural Fillmore County soil where gray water is being distributed is already abundant with bacteria; approximately 100 million to 1 billion bacteria can be found in a single teaspoon of active soil. See Elaine R. Ingram, *USDA Soil Bacteria* available at: https://tinyurl.com/2m2zdx43. The naturally occurring bacteria concentrations present in soil is much higher than found in gray water.[5]

Although Respondent's argument is dubious for a "generic" compelling interest, it is absurd under the proper "to a person" application made to the Swartzentruber Amish. Perhaps gray water irrigation could be a potential risk in dense urban areas, but not on the Swartzentruber Amish's remote farms. As will be addressed in more detail later, Respondents allow largely unregulated disposal- on agricultural land -of a modern home's septic tank contents, which is much more potentially dangerous. Pet. App. 56-62.

As tenuous as the Respondent's first argument was, the presence of karst in Fillmore County is even less persuasive. BIO 13-14. Karst is abundant in the United States, including the states which have adopted Petitioners' proposed alternative. Pet. App. 63-65. Respondents agree that disposal systems which rely on soil for treatment- whether by septic system, mulch basin system, or a privy/outhouse- require the exact same soil conditions. Pet. For Writ of Cert. at 19. Any of the systems

[5] Soil would have 2,000 times more bacteria than what is being claimed could be in gray water; 10 million per 100ml vs. 1 billion per 5ml (1 teaspoon = 4.93 ml).

can work with appropriate soil separation from karst formations. Petitioners do not object to soil testing which is already being done to determine appropriate locations for their outhouses/privies. Pet. App. 66-68.

III. The lower courts failed to consider analogous conduct that Respondents regulate less or not at all.

Minnesota is known for its abundance of recreational cabins. MPCA App. 26-28. See *Good Question: How Many Minnesotans Own Cabins?* CBS Minnesota, https://tinyurl.com/28hhtvnk (last visited April 26, 2021). The similarities between an Amish home and the cabins that modern Americans use to "get back to nature" cannot be denied: outhouses, fireplace heat, no electricity. Yet the difference in how Respondents treat these two dwellings is astounding. If you are Swartzentruber Amish living without these modern amenities and do not have a septic tank, you have to be worried about court fines, a possible jail sentence or 24-hour a week community service obligation, and being evicted from your home. Pet. App. 30, 51, 69-71. But if you own a recreational cabin and do not have a septic tank, the only thing you need to be afraid of is the mosquitos, not government sewage inspectors. Concerning enforcement, Fillmore County has enough resources to pursue legal actions against the Swartzentruber Amish community but not enough staffing to monitor its own commercial campgrounds. Pet. App. 72-75. This clear double standard raises questions regarding Respondent's true motive underlying the selective enforcement of its policy.

At a minimum, the lower courts should have compared the aggregate gray water disposal that is allowed at Fillmore County's Maple Springs Campground to a Swartzentruber Amish farm. Pet. App. 76-80, 147. But rather than give this proper consideration, the district court dismissed this entire subject matter as "a very peripheral point and really not something for us to get all head up about".[6] Pet. App. 79. However, as this Court has recently made abundantly clear, targeting religious groups for more onerous treatment for engaging in the same activity as non-religious actors cannot be ignored by lower courts. See e.g. *South Bay*.

MPCA claims that "anyone" in Minnesota can be exempted from the septic system mandate and it is the "plumbing system" which justifies differential treatment. BIO 16. But "anyone" in Fillmore County, needs the caveat "unless you are Amish". Petitioner Amos Mast and his wife Mattie do not have a plumbing system and Fillmore County still required them to install a septic system. Pet. App. 81-86. MPCA's rationalizes that keeping the hand-carried exemption for recreational cabins is justified because driving a car to a cabin is "sufficiently time consuming and difficult" is without merit when considering how this is applied in Fillmore County. MPCA App. 26-27. Any governmental policy that is applied in a manner where a state considers driving a car as "sufficiently difficult" but a county considers using a horse and wagon as "too easy" cannot pass strict scrutiny.

---

[6] Additionally, based on the context, Petitioners assert the Official Transcript should read "largely *irrelevant*" not "largely relevant". Pet. App. 80.

In *O Centro*, a unanimous Court rejected the government's compelling interest claim because it failed to regulate a similar hallucinogen. The analysis required for this case is much more straightforward. Septic tanks in modern homes store all the household's gray water. These tanks also store all the household's toilet waste including feces. This combined wastewater has substantially higher concentrations of all potentially dangerous materials than compared to gray water without toilet waste. Pet. App. 56-62. Respondents grant an exception for farmers to dispose of their septic tank contents on their own fields.[7] Minn. Admin. R. 7083.0700, D, Pet. App. 145-146. Fillmore County chooses not to further regulate this disposal. Pet. App. 87-88, See 40 C.F.R. § 503.5 at Pet. App. 142. This shows that the courts below did not apply the proper analysis that this Court's *O Centro* standard requires. Here Fillmore County chooses to not regulate this combined wastewater- gray water *with* toilet waste - but is claiming a compelling interest in regulating gray water *without* the toilet waste. Such an irrational approach cannot satisfy the demanding standard articulated by this Court.

[7] Respondents refer this Court to an EPA guidance document. BIO 18. But this guidance document governs land with a high potential for contact such as public parks and recommends a separate document for agricultural land. See page 9 or Pet. App. 148. See *Domestic Septage Regulatory Guidance: A Guide to the EPA 503 Rule*. See case summary of the requirements on agricultural land at page 34 or Pet. App. 149. Full document available at: https://tinyurl.com/rd9jv56a

Finally, Respondents make little effort to defend the position that a septic tank is not required for toilet waste but is required for gray water. If a simple privy/outhouse pit effectively protects against toilet waste then it is common sense that a mulch basin can protect against gray water. Rather than defend its position, Respondents simply cite to their existing rules. BIO 16-17. While this argument was sufficient for the lower courts, no government should be able to satisfy strict scrutiny analysis with the argument "because we said so."

IV. Respondents failed to prove that alternatives being used in other jurisdictions are incapable of working in Minnesota.

Even though there is no evidence of any harm caused by the Swartzentruber Amish's gray water practices, Petitioners are willing to start using a mulch basin, which is an alternative to a septic tank system that twenty other jurisdictions have determined adequately meets health and safety objectives. Pet. For Writ of Cert. at 4, 5, 10, 12, 14, 20, 22. If other jurisdictions are using alternative means, Respondents should be required to "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Hobbs* at 368-69. The government cannot "assume a plausible, less restrictive alternative would be ineffective," *Id.*, yet Respondents did just that. None of Fillmore County's expert witnesses had training or experience on the type of alternative system proposed. Pet. App. 89-93. Although MPCA is aware of these systems, they have never formally evaluated this proposed alternative for approval. Pet. App. 94-98. Instead of seeking guidance from other jurisdictions that allow mulch systems, Respondents simply assumed that the system

would be ineffective in Minnesota. In so doing, Respondents failed to properly consider a plausible alternative which they are required to do under this Court's precedent.

During the course of the trial, Petitioners built a mulch basin system as a "proof of concept" and to determine if it would be acceptable under their *Ordnung*. Pet. App. 106-109. While it is true that Petitioners' initial systems were undersized Pet. App. 123; these systems were attempted without following the designs of systems successfully used elsewhere. Pet. App. 99-105, 150-151. However, the tests did establish that the systems would be religiously acceptable technology and proved they could be used throughout the winter without freezing. Pet. App. 121-123. Petitioners' expert witness recommended an improved design based on her expertise on working with successfully implemented systems in similar jurisdictions. Pet. App. 110-120, 150-151. There is nothing in the record to suggest that the Amish are incapable of implementing the same practices that millions of Americans are currently using in other states. The MPCA's hyperbolic conjecture that these systems would require "24/7 oversight", suffer "clogging", "need to be frequently relocated" BIO 23-24 are ridiculous and, if true, the Uniform Plumbing Code would not allow them and these systems could not be used anywhere. Yet the trend is clear that more and more jurisdictions are allowing this practice. Despite its assertions otherwise, MPCA and the lower courts did precisely what this Court said a government cannot do: it assumed that a mulch system would not work.

MPCA claims that Petitioners are seeking to create a "new constitutional standard". BIO 19. Not so. If anything, denying review would stand for the premise that a government can survive strict scrutiny if it merely shows a slight majority of states do not already have the suggested alternative on the books. It would also stand for granting local government officials unquestioned deference.

As this Court very recently stated "[d]eference, though broad, has its limits." *South Bay* at 717 (2021). In 1632, the forefathers of those now collectively referred to as "the Amish" adopted deference to secular authorities as a cornerstone of their faith. *See* Dorchester Confession at Article XIII at: https://tinyurl.com/h8ypay8a. While they will give enormous deference to secular authorities, there are rare occasions where they will say the government requires too much than their beliefs will allow. The Swartzentruber Amish believe they cannot yield to Fillmore County's new demands for a septic system. Pet. App. 124-126. If forced, they will sacrifice their farms for their faith. But if RLUIPA's proper strict scrutiny test is applied, this is a choice that Fillmore County cannot demand them to make.

CONCLUSION

Amicus correctly points out that *Diocese of Brooklyn* provides significant new guidance regarding how to apply strict scrutiny to health and safety regulations. Jewish Coalition Amicus Br. at 22. The petition for a writ of certiorari should be granted. Additionally, the Court should vacate and remand the case for further consideration in light of recent precedent.

Dated: April 28, 2021

Respectfully submitted,

LAW OFFICES OF SOUTHERN MINNESOTA
REGIONAL LEGAL SERVICES, INC.

_____

Brian N. Lipford, ID #313856
Attorney for Petitioners
903 West Center Street, Suite 230
Rochester, MN 55902
507.292.0060
brian.lipford@smrls.org