

No. 17-914

IN THE
Supreme Court of the United States

LIVINGSTON CHRISTIAN SCHOOLS,
Petitioner,

v.

GENOA CHARTER TOWNSHIP,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

**AMICUS BRIEF OF RESTORING RELIGIOUS
FREEDOM PROJECT IN SUPPORT OF
PETITIONER'S WRIT OF CERTIORARI**

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INTERESTS OF *AMICUS CURIAE*¹

The Restoring Religious Freedom Project (“RRFP”) at Emory University School of Law is a program dedicated to providing students with hands-on experience while providing accessible, nonpartisan information and opening up new opportunities for dialogue regarding freedom of religion issues. The Project convenes scholars and students from around the world to share research in this growing field. RRFP engages in litigation regarding religious freedom rights, with substantial burden often being one of the central questions before the courts. RRFP is interested in better clarifying the distinction among the circuits over what a substantial burden is.

David Schoen has 30 years of extensive experience throughout the nation as lead counsel in trial and appellate level complex litigation cases. In addition to his law practice, he has taught as an adjunct professor in the fields of Criminal Procedure, Trial Skills, and the First Amendment. He has lectured in different continuing legal education programs in these fields, and in others including

¹ Pursuant to Rule 37.2, *amici* notified counsel of record for all parties of their intent to file an *amicus* brief at least ten days prior to the due date for the brief. Further, *amici* have obtained written consent of all parties to file this amicus brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and its counsel made a monetary contribution to its preparation or submission.

Legal Ethics, Civil Rights Litigation, Evidence, and litigation under the Anti-Terrorism Act.

Mark Goldfeder is Senior Lecturer at Emory Law School, Senior Fellow at the Center for the Study of Law and Religion, and the Director of the Restoring Religious Freedom Project at Emory Law. He both litigates and writes extensively on issues of law and religion.

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SUMMARY OF THE ARGUMENT

The federal courts across the country—particularly the Circuit courts—are unable to reach a consensus regarding the definition of “substantial burden” in the land use context under RLUIPA. The lack of guidance from the Supreme Court has left jurists to fend for themselves in a highly contentious area of the law. Even with the influx of religious freedom cases following RLUIPA and RFRA, the Supreme Court has yet to hear a single case regarding land use in a post-RLUIPA world while the case law on RLUIPA in the prison context continues to grow. This presents the Court with an opportunity to either unify the standard for burdens under RLUIPA, completely divide it, or otherwise address a growing split amongst the Circuits.

ARGUMENT

Substantial burden is one of the key prongs in analyzing a claim under either the Religious Freedom Restoration Act (RFRA) or the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. § 2000-bb (2017); 42 U.S.C. § 2000cc (2017). While the two statutes do cover different kinds of claimants, there is substantial overlap concerning the commonly shared elements. While there are four prongs—sincerely held religious belief, substantial burden, compelling government interest, and least restrictive means—cases have traditionally risen and fallen on the last two prongs. The first prong is difficult to argue over as it inherently means questioning the religious and personal beliefs of an individual, while the last two

prongs fall to the government in these cases to prove or disprove by a preponderance of the evidence. However, the jurisprudence regarding the second prong, substantial burden, particularly in relation to land use, has produced an inconsistency amongst the circuits. This case presents the clearest opportunity to the Court in years to address this split before it widens any further.

I. The Jurisprudence across Circuits is Unclear about What Amounts to a Substantial Burden

This Court should grant certiorari because the Sixth Circuit's decision, if followed by other courts, would be yet another in a series of perplexing decisions where a court has failed to clearly identify what is and is not a substantial burden. It is insufficient to rely simply on the term itself—substantial burden—as carrying all the necessary legal weight to answer a determinative question.

The lack of consistent jurisprudence regarding substantial burden has left courts at a loss, leading to a split amongst the circuits and inconsistent rulings on a crucial prong of many religious freedom tests. This is not a failure of the courts, but emblematic of religious freedom litigation in general. RLUIPA has been the target of harsh criticism and over-exaggerated concerns about what effect it might have otherwise neutral ordinances, leading to its underuse overall. Douglas Laycock & Luke w. Goodrich, *RLUIPA: Necessary, Modest, and Under-enforced*, 39 FORDHAM URB. L.J. 1021 (2011-2012). What cases there are have broadly confused the issue

and created inconsistencies. This case presents an opportunity for the Court to set the record straight.

It is inconsistent that the signing of a form in *Hobby Lobby* and *Little Sisters of the Poor* (RFRA) or the growing of a beard in *Holt v. Hobbs* (prison-context RLUIPA) are all considered to be substantial burdens when the totality of the circumstances and the effect on belief of the plaintiffs is considered, but an existential threat to a religious private school is not. *See generally* *Zubik v. Burwell*, 136 S.Ct. 1557 (2016); *Holt v. Hobbs*, 135 S.Ct. 853 (2015); *Burwell v. Hobby Lobby Stores Inc.* 134 S.Ct. 2751 (2014). It is entirely possible that there is a vast difference between these situations, but the Supreme Court has never had the opportunity to address them directly and reconcile these different conclusions. This case represents that opportunity.

A. The Lack of Jurisprudence Regarding Substantial Burden and Land Use is Becoming More Noticeable

Since its inception, RLUIPA litigation has been overwhelmingly focused on issues involving institutionalized persons and not land use. The result is that there has been widespread change in the last decade for prison litigants, but hardly any for religious organizations facing zoning issues. Further indicative of this lack of land use cases is that all of the previous cases on that subject within the 6th Circuit have gone unpublished, pointing to a relative dearth in this area of the law.

What limited jurisprudence there is on land use becomes all the more scant when looking specifically at the substantial burden prong in land use cases. The 6th Circuit recognized this exact issue. As they explained:

Nor has the Supreme Court had occasion to focus on the substantial-burden inquiry under RLUIPA in the land-use context, although it has done so in the institutionalized-persons context. Even in *Holt*, the Supreme Court did not articulate a definition of ‘substantial burden,’ but rather explained that the ability to engage in other religious practices did not prevent a prisoner from making a substantial-burden claim as to the rule against growing a half-inch beard. **We will therefore turn to case law from this court and other circuits regarding the substantial-burden inquiry.**

Livingston Christian Sch. v. Genoa Charter Twp., 858 F.3d 996, 1001—2 (6th Cir. 2017) (citing *Holt*, 135 S. Ct. at 862.) (emphasis added). This case presents the Court with an opportunity to reconcile the *Holt* line of RLUIPA cases and substantial burden with that of land use and establish one clear standard.

B. There Remain Inconsistencies within the Lower Courts Regarding Substantial Burden

In *Livingston*, the lower court deviated from its own prior cases in considering what would amount to a substantial burden on the Petitioners. As the 6th Circuit noted in *DiLaura v. Township of Ann Arbor*, 112 F. App'x 445 (6th Cir. 2004), a substantial burden existed when a zoning ordinance prevented the opening of an overnight religious retreat, as the serving of Communion wine and meals would have been violated. In *Living Water Church of God v. Charter Township of Meridian*, 258 F. App'x 729 (6th Cir. 2007), a special-use permit was granted to a church to build their new facility, but the restrictions on the size of the building—limiting it to 25,000 square feet overall and not the requested 35,000 square feet that they needed—were found to not be a substantial burden to their practice.

Rather than opting for either of these approaches, both of which would have arguably gone in favor of petitioners here, who were being denied their land use in its entirety, the 6th Circuit went in a wholly different direction. *Livingston School* is facing an existential threat to its operation, like in *DiLaura*, but did not obtain a special use permit like in *Living Water*. This results in a verdict that is inconsistent with either line of prior case law before the 6th Circuit. Again, while neither of these cases is a published opinion, and the 6th Circuit is free to change its own law as there is no binding precedent elsewhere, it still raises the unanswered question as to why the sudden inconsistency.

This inconsistent ruling is not just reserved to the 6th Circuit, but applies elsewhere as well. In the 7th Circuit, land use conditions are not a substantial burden when they are “neutral and traceable to municipal land planning goals.” *Vision Church v. Vill. Of Long Grove*, 468 F.3d 975, 998—9 (7th Cir. 2006). However, the 7th Circuit has previously held that the inconsistent application of policies without explanation can be a sign of a substantial burden. *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). Therefore, it seems that so long as a neutral and traceable planning goal is applied inconsistently, it would result in a substantial burden. These seem to be questions about the government motive, however, and not really about the burden, substantial or otherwise, on the plaintiffs. Further, there is no substantial burden in the 9th Circuit when the plaintiff is not precluded from using other sites in the city and where there is no evidence that the same requirements would not be imposed elsewhere. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004). This approach fails to take into account instances where the specific property is wanted for religious reasons or when a property anywhere else would be completely unfeasible, like in the case at bar, or in the case of an Orthodox synagogue whose members need to be in walking distance. As the 2nd Circuit pointed out, “[t]he same reasoning that precludes a religious organization from demonstrating substantial burden in the neutral application of legitimate land use restrictions may,

in fact, support a substantial burden claim where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully.” *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007). This ruling sounds like almost a conflation of the second and third prongs of RLUIPA, as the burden of proof should be on the state to show that their compelling state interest was not arbitrary, capricious, or unlawful. The lack of clarity is not just reserved for Christian private schools like LCS, but burdens houses of worship from all religious traditions. Lisa W. Foderaro, *The Mosque Next Door: City Law vs. Houses of Faith*, N.Y. TIMES, Dec. 20, 2016, at A22.

The lack of interpretation from the Supreme Court and/or guidance from Congress has left in place a hodge-podge of laws that has litigants fully at the whim of the judges in front of whom they happen to appear. It is unlikely that these inconsistent judgments are due to any kind of malice, but all would benefit from a clear Supreme Court ruling.

At least Texas tried to create *some* articulable standard. The 5th Circuit in *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009), was asked to consider whether a practitioner of Santeria was allowed to religiously sacrifice animals within his residential home. Though based on the Texas Religious Freedom Restoration Act (TRFRA), the court noted that federal law on RFRA and RLUIPA would still be relevant. *Id.* at 585. The Texas Supreme Court’s prior decision in *Barr v. City of Sinton*, 295 SW 3d 287 (2009), stated that while the substantial burden

is case and fact specific, a burden is substantial if it is “real vs. merely perceived, and significant vs. trivial,” then being cited in the *Merced* opinion. *Merced*, 577 F.3d at 585, (citing *Barr*). These words, while simple in appearance, provide some kind of clarification of the law, but have little precedential value outside of Texas.

What is clear is that what amounts to a substantial burden varies across the circuits, and the only consensus is on the lack of clear guidance. This ultimately leaves litigants open to far more personal interpretation from the bench than should ideally be allowed. We therefore respectfully urge the Court to clarify.

CONCLUSION

This Court should grant the petition for certiorari in order to examine and provide guidance on what constitutes a substantial burden in land use cases under RLUIPA. Litigants across circuits are facing questionable jurisprudence that will only continue to confuse an already complicated situation. Addressing the problem will spare litigants unneeded grief in the future, save judicial resources in the long run, and has the added benefit of being the right thing to do.

Respectfully submitted,

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