No. 21-__________

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) When applying strict scrutiny under RLUIPA, can lower courts rely upon an admission that an interest is compelling generally, or must they require the government to demonstrate that the interest is compelling as applied to the particular claimant, as this Court has previously held?

(2) When applying strict scrutiny under RLUIPA, is evidence that twenty other jurisdictions permit a particular less restrictive alternative sufficient to defeat a government's claim that it used the least restrictive alternative?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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JURISDICTION

The petitioners' case challenges the validity of Minnesota Statutes as applied to the Swartzentruber Amish on the basis of being repugnant to the laws of the United States. The Minnesota Court of Appeals issued an opinion on June 8, 2020. The Minnesota Supreme Court denied review on August 25, 2020. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

RELEVANT STATUTORY PROVISIONS

Section 2000cc of Title 42 of the United States Code states that "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution- (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest."

Section 2000cc-3(c) of Title 42 of the United States Code states that "this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."

Section 2000cc-3(g) of Title 42 of the United States Code states the "this chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."

INTRODUCTION

The Swartzentruber Amish community in Fillmore County live a traditional and simple way of life mandated by their deep religious commitments. They reject conveniences that most other Americans consider necessities, including indoor toilets and electricity in their homes. This rejection of modern technology is critical to their way of life; if they are forced to choose between their beliefs and the farms that provide their livelihood, they will choose their beliefs. That is the choice the government is forcing upon them.

In 2013, Fillmore County began mandating that the Swartzentruber Amish install a septic system to dispose of the water byproducts associated with laundry, bathing, and cooking, which is collectively referred to as "gray water".[1] In keeping with their religious convictions, the Swartzentruber Amish proposed a religiously compliant method which is based on the reuse of gray water for irrigation purposes and utilizes mulch basins. This type of system is favored by many across the country who wish to conserve natural resources or reduce their utility bills. Twenty different U.S. States and the Uniform Plumbing Code permit gray water reuse systems, but Fillmore County does not.

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[1] The Swartzentruber Amish use outhouses for toilets, a practice permitted by law which does not have a septic tank. This dispute relates solely to gray water and the petitioners do not challenge the government's regulations for combined wastewater, which includes toilet waste, and is called "black water".

Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) for situations like this one—modern land use laws which conflict with sincere religious practice. And this Court has applied RLUIPA and its companion statute, the Religious Freedom Restoration Act (RFRA), to place a heavy burden of proof on government actors who burden religious exercise. This is in keeping with the statute's requirement that it "shall be construed in favor of a broad protection of religious exercise." 42 U.S.C.A. § 2000cc-3(g). But the courts below failed to apply the standard that this Court mandates. The courts did not require the government to prove that its interest was compelling as applied to the regulation of the Swartzentruber Amish in their remote community, nor did it give proper weight to the fact that twenty other states permit the less-restrictive alternative requested by petitioners.

These incorrect legal standards have real consequences, consequences of national importance. Courts in Minnesota and across the country regularly apply RLUIPA, RFRA, and similar standards under the First Amendment. If the lower courts' distorted strict scrutiny analysis is allowed to stand, it may have serious consequences for litigants in a variety of contexts.

This is to say nothing of the existential question facing Fillmore County's remaining Swartzentruber Amish community. They and the petitioners face a stark choice: stay true to their faith and resist the government's demands, face imprisonment, community service mandates, and fines; or sell their family farms and flee.

This Court should grant the petition to clarify the meaning of RLUIPA's "to the person" standard and the proper application of the "least restrictive means" analysis in cases where numerous other jurisdictions have adopted a less restrictive means. In the alternative, the Court should hold this petition until it has decided three pending cases which involve the proper application of strict scrutiny, *Fulton v. Philadelphia*, No. 19-123; *Americans for Prosperity v. Becerra*, No. 19-251; and *Thomas More Law Center v. Becerra*, No.19-255.

STATEMENT OF THE CASE

I. The Fillmore County Swartzentruber Amish

A Swartzentruber Amish community established a settlement in Fillmore County, Minnesota in the 1980s and have maintained a continuous presence since that time. The community currently has six different churches, commonly referred to as church districts. A principal tenet of the Amish's religious beliefs is that its adherents remain separate and apart from the modern world. This concept of separation emanates from Christian Biblical directions to "be not conformed to this world," *see* Romans 12:2; and "Be ye not unequally yoked together with unbelievers," *see* II Corinthians 6:14.

Not all Amish are the same or follow the same religious rules, or *Ordnung*. Their *Ordnung* is decided by agreement among members of a church and may only be changed by unanimous consent. When the Amish are presented with questions that might seem simple to non-Amish, such as whether they may use a neighbor's telephone in an emergency, they must resolve those questions as a community. The Amish take changes or innovations in their way of life very seriously. If Amish communities cannot agree on these questions, they may split into smaller groups. Today, there are approximately 40 different affiliations within the Amish in the United States. The Swartzentruber Amish are the most conservative affiliation and have remained the most separate from the modern world.

In *Wisconsin v. Yoder*, this Court examined the Amish faith in a free exercise challenge to the compulsory school attendance laws. 406 U.S. 205 (1972). In *Yoder*, this Court described the traditional Amish way of life as one which has "not altered in fundamentals for centuries", stresses a church-oriented community closely tied to "nature and the soil" and rejects "the outside world and 'worldly influences,' and is mandated by deep religious conviction." Id. at 216–17. The Court stressed "the interrelationship of belief with [the Amish] mode of life." *Id*. at 235; see also *id*. at 216 (emphasizing that the "traditional way of life of the Amish is . . . shared by an organized group, and intimately related to daily living"); *id*. at 215 (focusing on "whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent"). The Amish faith "pervades and determines the entire mode of life of its adherents," regulating it "in great detail by the *Ordnung*, or rules, of the church community." *Id*. at 210. And the *Yoder* Court emphasized the Amish community's theological emphasis on remaining "separate and apart from the world and worldly influence." *Id*. The Amish way of life has not changed since this Court accurately described their way of life in 1972. The Swartzentruber Amish use horse and buggy for transportation, educate their children in one room schoolhouses, and make their own clothing.

They have no separate free-standing churches. Communal worship services are held in members' own homes on an alternating schedule. To alter an Amish home is also to alter the place in which they gather for worship. They live their lives in

close connection and harmony with the land in a manner and according to rules that have been passed down for centuries.

This case involves the regulation of gray water from Amish homes. Under their *Ordnung*, Fillmore County Swartzentruber Amish homes have an internal water source from a single line, either hand pumped or via gravity flow from an external cistern, and is then carried by hand to where it is needed inside the home. They do not have kitchen sinks with drains but instead use "dry sinks". Dishes are washed by hand in large bowls.

II. Dispute Background

On October 10, 2013, the Minnesota Pollution Control Agency passed sewage treatment rules mandating that all counties create local ordinances rather than simply adopting the state septic code by reference. On December 3, 2013, Fillmore County adopted and implemented a standalone ordinance- Fillmore County Subsurface Sewage Treatment Ordinance- which required the Swartzentruber Amish community to install a septic system for gray water. Pet. App. 79-83. Minnesota considers "gray water" to be the household wastewater produced from laundry, bathing, and cooking activities and which does not contain toilet waste. Minn. Admin. R. 7080.1100 subps. 37, 73, 85.

In June 2014, 48 Swartzentruber Amish representatives from all of the Fillmore County church districts sent a letter to the Minnesota Pollution Control Agency stating their religious objections to the septic system requirement. In August 2015, 55 representatives from all of the church districts sent a second letter to the Minnesota Pollution Control Agency further explaining their religious objections. In

2016, the Minnesota Pollution Control Agency filed lawsuits against the Amish attempting to coerce them into installing Fillmore County's septic tank based system. In these cases, the government sought compliance through threats of criminal penalty, weekly community service requirements, and fines. Many Amish yielded to the government's demands or left the state. During 2016, a total of 62.2 percent of all the Minnesota Pollution Control Agency's cases filed statewide for any type of environmental concern were filed against Fillmore County Swartzentruber Amish families who refused to install septic tanks on religious grounds. (Case filing data available at: http://pa.courts.state.mn.us/default.aspx).

The Swartzentruber Amish are willing to use religiously compliant alternatives to the septic system. Specifically, the Swartzentruber Amish would like to adopt a system based upon the gray water reuse methods and principles permitted in twenty other states. Such a system would comply with their *Ordnung* and also provide a level of wastewater management superior to that already permitted by the County in other circumstances. The Swartzentruber Amish also do not object to the government requiring minimum sizes for their mulch basins, establishing setbacks, or requiring soil testing to be done to determine where these gray water systems should be placed. But none of these alternatives has been acceptable to Fillmore County.

III. Proceedings and Decisions Below

On April 7, 2017, petitioners filed a declaratory judgment action in state court against the County of Fillmore and the Minnesota Pollution Control Agency, alleging that the septic system requirement, as applied to the Swartzentruber Amish,

infringed upon and substantially burdened their free exercise of religion as protected by the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*, and the Minnesota Constitution, art. I, § 16. Petitioners agreed to withdraw their claims under the federal constitution. Prior to trial, three of the petitioners installed small test mulch basins to determine if using this method would be religiously acceptable to the rest of their community and if they could use it throughout a Minnesota winter.

In the trial of this matter, Fillmore County challenged the assertion that petitioners' objections were based upon sincerely held religious beliefs and presented evidence of the Swartzentruber Amish's selective use of modern technology. The district court rejected this argument finding "I am convinced that such a conclusion -- that Amish peoples' limited use of telephones, for example, or their acceptance of rides in automobiles for certain purposes, betrays an insincerity in their religious beliefs -- is mistaken." Pet. App. 43. The district court also rejected Fillmore County's argument that the Bible compels submission to secular authority, finding "that is not a judgment for any court to make." Pet. App. 44. The district court rejected the government's argument that installing a septic tank system would only be a *de minimis* burden and found this requirement to be a significant burden on petitioners' religious beliefs.

> Requiring these religious people to build, own, and use on their properties an item of technology unused and unknown to prior Amish generations, to which they sincerely object as a way of the world prohibited in their lives by scripture, is a significant burden on their faith. So they testified; and I believe them." Pet. App. 52.

However, the district court held that the government met its burden to prove that it had a compelling interest in protecting "public health and the environment". Pet. App. 53. Petitioners stipulated that the government had a general compelling interest in protecting Minnesota's ground water from pollution and the health of its citizens, but never agreed that this interest was compelling as applied to gray water disposal on their farms. The court also held that a septic system was the least restrictive method to achieve the governmental goals of protecting human health and the environment because "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." Pet. App. 74. The court did not consider evidence that Wyoming and Montana, which share similar climate to Minnesota, permit gray water reuse systems. Nor did the government present evidence that local soil conditions were significantly different than soil conditions in the many different topographies covered by the twenty states which do permit gray water reuse systems.

The Court of Appeals failed to consider RLUIPA's "to the person" standard. They instead considered only the state's general interest in protecting human health and preventing groundwater contamination. Pet. App. 6-8. The Court of Appeals did not make the proper inquiry into how this standard applies to these systems on rural farms. The Court of Appeals likewise failed to apply the proper standard on least restrictive means. Pet. App. 8-12.

The Minnesota Supreme Court denied review on August 25, 2020. Pet. App. 76.

REASONS FOR GRANTING THE WRIT

The courts below decided important questions of federal law in ways that conflict with decisions of this Court. Those decisions will have dire consequences for the Swartzentruber Amish, forcing them to choose between their faith and their homes.

The courts below committed two serious errors on important questions of federal law. First, the courts relied on broadly formulated interests rather than considering whether the government's interest in regulating gray water was compelling as applied "to the person"—these Amish farmers. Evidence demonstrated that the county failed to regulate even more serious wastewater issues, and that the county had not proved their interest was compelling as to these specific petitioners, Swartzentruber Amish farmers living on farms in a remote part of the state. Yet the courts below relied upon a broadly formulated interest in protecting groundwater contamination and health generally. This is contrary to this Court's decision in *Gonzales v. O Centro*, 546 U.S. 418.

Second, the courts adopted an erroneous standard under RLUIPA's less restrictive alternative prong. The Supreme Court has decided that RLUIPA bars a government from imposing a policy that violates an individual's sincerely held religious belief when that individual's proposed less restrictive alternative is acceptable in multiple other jurisdictions. See *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853 (2015). The courts below rejected that formulation, allowing the government to rely upon generalizations regarding comparisons with other states. Petitioners

presented evidence that twenty states allow for various types of gray water reuse systems that are distinctly different from the government's proposed septic tank system. The lower courts' standard allows governments to avoid serious consideration of alternatives proven effective elsewhere.

I. The government failed to demonstrate that their interest is compelling as applied to the Swartzentruber Amish.

The courts below failed to use the proper standard on an important question in federal law. RLUIPA, like RFRA, imposed the requirement that a government justify any substantial burden on the free exercise of religion, even by a neutral law of general applicability, by showing that its law is the least restrictive alternative means of furthering the government's compelling interest. *See*, 42 U.S.C. § 2000bb-1(b)(2). The Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), noted that "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *Id.*, 521 U.S. at 534. RLUIPA was passed with *City of Boerne* as the backdrop. RLUIPA reimposed on states the same compelling interest balancing test described by the Court in *City of Boerne*, but limited to land use and people residing in institutions. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005). RLUIPA's standard, like RFRA, requires the Court "to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. at 726–27, quoting *O Centro* at 431 (2006).

This Court has previously considered RFRA's strict scrutiny standard in *O Centro*. There, the unanimous Court determined that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. This requires that the court look beyond broad general mandates which are insufficient on their own to meet the RFRA's compelling interest test. *Id*. RLUIPA uses the same "to the person" standard as RFRA. 42 U.S.C. 2000cc-1(b). Yet the courts here failed to adopt the "to the person" standard for RLUIPA, relying instead upon the government's general interest in health and environmental protection. It is not enough for the government to establish that interest is generally compelling; it must be compelling as applied to the Fillmore County Swartzentruber Amish. This requires the government to not just claim that it has a general compelling interest in protecting human health and the environment, but to show how this interest would be adversely affected by granting an exemption from the septic tank requirement for the Swartzentruber Amish for gray water disposal.

As to the government's protection of human health goals, petitioners presented evidence that there has never been a documented case of a disease attributed to gray water contact, a fact of which the government agreed. Pet. App. 53. An estimated 7 million people are currently reusing gray water in some manner. This is strong evidence of its extremely low risk to human health. Furthermore, common sense dictates that illness transmission is much more likely to spread from human-

to-human contact inside a home where individuals are in direct contact with each other. The government does not have compelling interest in protecting against the hypothetical possibility of human-to-gray water-back to human disease transmission.

As to the government's environmental protection goals, the only evidence the government presented was that gray water can contain nitrogen and phosphorous from commercial soaps and detergents. They offered no evidence on how these nutrients would negatively impact the environment. Nor did they offer evidence on how much nitrogen or phosphorus these products contain, or how much is in present in gray water. There are many other sources of nitrogen and phosphorous on petitioners' farms, such as cow manure which is extremely high in both. *See* Brad C. Joern and Sarah L. Brichford, *Calculating Manure and Manure Nutrient Application Rates* available at https://bit.ly/39Ox5J3. There was no evidence on how the nitrogen and phosphorous levels in gray water compare with these other sources. The government cannot claim a compelling interest in protecting the environment without offering at least some evidence that gray water on the petitioners' farms would actually harm the environment.

Under the 'to a person' standard, is not enough for the government to establish that its interest in protecting human health and the environment is compelling generally, it must be compelling as applied to these Swartzentruber Amish on their farms. The government failed to do this.

The court below erred for a second, related reason. This Court was clear in *O Centro* that even if the government's interest is compelling in the abstract, it cannot

be compelling when it is not pursued against analogous conduct. There, the exception for peyote use by Native Americans doomed a claim to compelling interest in banning a similar hallucinogen used by a Brazilian group. *O Centro* at 433. Minnesota has created a secular exemption for recreational camping which exempts "hand-carried gray water" from treatment and allows it to be disposed of directly to the ground surface. Minn. Admin. R. 7080.1500, subp. 2. The Swartzentruber Amish's *Ordnung* requires them to hand carry water for any household task. Fillmore County previously interpreted the "hand-carried gray water" exemption as applying to the Swartzentruber Amish's practices. This interpretation exempted them from the septic tank requirement. Fillmore County could continue to interpret this policy as exempting the Swartzentruber Amish but chooses not to.

Fillmore County has taken no action to restrict recreational campers' disposal of untreated hand carried gray water in its local campgrounds. Nor has the Minnesota Pollution Control Agency sought to restrict this practice at the hundreds of other campsites across Minnesota. The government's failure to regulate untreated hand-carried gray water being disposed of directly to the ground surface in campgrounds undercuts its argument that it has a compelling interest in protecting against the alleged threats posed by gray water. Even if the government has a general interest in protecting human health and the environment in the abstract, it cannot be considered compelling for hand-carried gray water.

Nor can its interest in requiring a septic tank for gray water be compelling when Minnesota does not require the same for black water. It is not disputed that

gray water poses a substantially less risk to human health and the environment in comparison to black water. Pet. App. 53-54. An outhouse does not have a septic tank and relies solely on the soil beneath the earthen pit for treatment. It provides adequate protection using only minimum cubic foot capacity for the pit, setbacks, and appropriate soil conditions. Minn. Admin. R. 7080.2280. The government cannot have a compelling interest in requiring a septic system for gray water when it does not require the same for the significantly more hazardous black water.

The courts' erroneous standard is most apparent when comparing what the county prohibits (a mulch basin system) with what the county allows (a septic system). Both are soil treatment systems. A septic system is designed to handle all household waste, including toilet waste. A mulch basin system may only be used for gray water. Both use the earth's natural soil as its treatment mechanism. Dr. Sara Heger, a University of Minnesota research engineer and the government's expert witness, testified "the key thing a septic tank doesn't do is remove bacteria and viruses". Reporter's Official Tr. 912. Nor does the mulch basin itself remove any of these potentially harmful wastewater components. Treatment in either system only occurs when the wastewater flows into the soil and the earth's natural purification process removes any components potentially harmful to human health and the environment. Pet. App. 56-61.

Any soil-based treatment system requires soil analysis to determine if there exists "three feet of separation" for proper treatment whether it is underneath the

septic tank's buried drain field, a mulch basin, or an outhouse's earthen pit.[2] Minn. Admin. R. §§7080.2280, 7080.2150, subp. 3 (C), Pet. App. 79. Soil-based treatment systems also require designated setbacks from water sources, property lines, and structures. Minn. Admin. R. 7080.2150 subp. 2 (f), U.P.C. §1503.4.

In reviewing these two systems, septic systems provide less reliable soil treatment when compared to a mulch basin. Septic tanks must be pumped of its waste approximately every three years. Mulch basins have no such requirement. Once a septic tank is pumped, Minnesota allows the contents to be applied to the land. Minnesota provides an exemption for farmers which allows them to do this without a subsurface treatment system license. Minn. Admin R. 7083.0700 subd. (d). The farmers may apply untreated septic tank contents to their fields provided they comply with a federal requirement of either incorporating the sludge into the soil within 6 hours or injecting it directly into the ground. *Id.*, 42 C.F.R. §503, *et seq.* Local governments are allowed to create additional regulations governing this practice, but Fillmore County has not done so. 40 C.F.R. §503.5(b). In terms of soil- which is the treatment mechanism- a mulch basin provides more reliable treatment than a septic tank. The government cannot have a compelling interest in favoring a septic tank-

[2] The lower courts erroneously analyzed the "three feet of separation" requirement. Pet. App. 10, 57, 60, 65-68, 70-71. The same requirements are needed for any soil-based treatment system: septic tanks, outhouses and mulch basins. Pet. App. 79, Minn. Admin. R. 7080.2150 subp. 3 (C). Further, petitioners have outhouses which, in order to be approved, would have needed to have been determined to have the required soil conditions.

which allows waste disposal to unverified soil conditions- over a mulch basin system which only discharges to an area with verified appropriate soil conditions.

II. A government cannot meet its "least restrictive means" burden when alternatives exist in twenty other states and the Uniform Plumbing Code.

The decisions below pose an important question of federal law, one that applies both under RLUIPA and under similar constitutional standards: when numerous other jurisdictions have adopted a less restrictive alternative, can the government still bear its burden to prove the alternative is unworkable? The answer, here and elsewhere, should be "no." As this Court unanimously stated in *Holt*, "RLUIPA, however, demands much more. Courts must hold prisons to their statutory burden, and they must not 'assume a plausible, less restrictive alternative would be ineffective.'" *Holt v. Hobbs*, 574 U.S. 352, 369 (2015). The fact that twenty, rather than forty, states permit an alternative should be powerful, if not entirely conclusive, evidence that the alternative works. The Court faced a similar issue in *McCullen v. Coakley*, where even under intermediate scrutiny it held that the government failed to bear its burden where "the Commonwealth has available to it a variety of approaches that appear capable of serving its interests," approaches which were currently in use in other jurisdictions. 573 U.S. 464, 494 (2014). Such evidence should at minimum bear more weight than the courts below afforded it here. This is a question of significant practical importance for the Swartzentruber Amish, but it does not stop with them. Any litigant in RLUIPA cases, RFRA cases, and Constitutional cases generally need to know how to apply the least restrictive means standard. This Court should not permit any improper analysis to stand.

"The least-restrictive-means standard is exceptionally demanding…," requiring the government to show "that it *lacks other means* of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Burwell* at 728 (emphasis added). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000).

Petitioners' proposed an alternative system that reuses gray water instead of disposing it. Gray water reuse policies have developed as more governments recognize that gray water is a substantially safer component of household wastewater and more homeowners are looking to engage in water conservation for financial reasons and environmental concern. In the 1990s, the State of California created the first gray water specific code in the United States in response to a drought and strong public support for conservation efforts. A growing number of states have since to adopt codes allowing gray water to be used for irrigation purposes. Since California changed its law, many others followed suit and have changed their laws to allow its residents to reuse gray water as an alternative to disposing of it. Not only have these states changed their existing laws, but several local governments even provide inducements for residents who practice these policies such as free classes, vouchers for plumbing parts, discounts on water bills, and financial incentives.

The International Association of Plumbing and Mechanical Officials (IAPMO) has a model code titled the Uniform Plumbing Code. This code approved the reuse of gray water using mulch basins in 2012. Members of the IAPMO are plumbing and/or

mechanical inspectors, engineers and code officials, plumbing and mechanical contractors, manufacturers of plumbing, mechanical, and building products, and others having an interest in Uniform Codes. Gray water reuse systems, such as a mulch basin system, have currently been approved in at least twenty jurisdictions which include the states of: California, Oregon, Washington, Montana, Wyoming, Arizona, and New Mexico.

States vary in their gray water reuse policies. Some states regulate gray water by incorporating general best practice standards such as: volume limits, a subsurface discharge requirement, avoiding floodplains, restrictions as to when gray water irrigated crops can be harvested, and the prohibition of hazardous chemicals, direct contact, pooling, or runoff. *See* e.g. Ariz. Admin. Code R18-9-D701 (A) 1; California Plumbing Code 1502.1.1 (4); Wyo. Admin. Rules, §17(a)(i)(A). The Uniform Plumbing Code shares these general restrictions but sets forth minimum size, depth, and square footages for the mulch basins based on the amount of household water use and soil type. U.P.C. §§1501.5, 1504.2, 1504.6.2, 1504.6.3.

If the proper "least restrictive means" standard had been applied here, petitioners would have prevailed. The jurisdictions that allow mulch basins systems all share the same goals as Fillmore County. When asked by the district court, Dr. Heger stated a mulch basin system could perform the same as a septic system but it would require additional maintenance and oversight:

> Q: "Could the same goal of water purification and protection of the environment be achieved with those materials as you would with a standard 270 – Exhibit 270 system? Reporter's Official Tr. 1667-68.

Dr. Heger answered that with proper soil conditions:

> A: "…I think you then could have a system with a very high level of maintenance and oversight that would achieve the goal."
> Q: "With using those materials?"
> A: "Using those materials." Reporter's Official Tr. 1668.

The testimony makes it clear that the government can protect human health and the environment using an alternative. This testimony also makes it clear that proper soil separation beneath the disposal area is the critical factor, not which system is used before the waste reaches the soil for treatment.

Dr. Heger's qualifiers of increased maintenance and oversight do not meet the government's high burden under this Court's strict scrutiny test. As far as the higher level of maintenance required, the Swartzentruber Amish are willing to do this. The government has no interest in requiring a homeowner install a system on the basis that it would be easier for them to maintain. The Amish way of life is replete with examples that require more effort than other available alternatives. An outhouse needs to be periodically cleaned out with a shovel. Despite this requirement, outhouses have met the government's goals in a way religiously acceptable to the Swartzentruber Amish since they moved to Minnesota. Despite being more labor-intensive than toilets, they continue to use outhouses because they believe it is how God calls upon them to live their lives. If the Swartzentruber Amish are willing to shovel toilet waste from their outhouses, there is no reason to believe they would be unwilling to shovel decomposed mulch from gray water systems. It is disputed that the government would have increased oversight obligations with a mulch basin

system. In states that allow these systems, many local authorities do not require a permit before one can be installed. The government offers no rationale as to why Fillmore County would be required to provide a high level of governmental oversight for these systems when other jurisdictions have found that these systems need none. Nevertheless, even if more oversight is required, RLUIPA states "this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C.A. § 2000cc-3(c).

The district court rendered its decision because it considered that septic systems were better than mulch basin systems. The "least restrictive means" test requires more than a direct comparison between two proposed methods. The government's burden is not to prove that their method is "better". They must prove that their method is the only means to achieve their compelling interest. Besides, this is an apples-to-oranges comparison. A septic system is designed to treat toilet waste. A mulch basin system is designed to reuse gray water. The lower courts side-by-side comparison analysis demonstrate that this critical point was not considered. It also fails to recognize that for both systems it is not the systems themselves but the soil that provides the actual treatment.

The district court's decision also makes assumptions that the petitioners' proposed alternative would not be appropriate for Minnesota's climate. Pet. App. 73-74. The fact Minnesota and other Upper Midwest states have not amended their laws to allow gray water reuse through mulch basins, does not satisfy the government's high burden in proving that no less restrictive alternative exists. The government's

burden cannot be satisfied with a judicial assumption of "if the government doesn't allow something, it must mean it cannot be used". More weight should have been given to the fact that Wyoming and Montana have similar climates to Minnesota and have changed their laws to allow gray water reuse. Additionally, further consideration should have been given to the petitioners' test systems which were used throughout a twenty-below-zero Minnesota winter without freezing because petitioners insulated their lines with sawdust and wood shavings.

There are other plausible reasons besides climate as to why Upper Midwest states have not changed their existing laws. First, they may simply be unaware of the relatively recent developments in gray water reuse. While the government's witnesses were experts in Minnesota's septic tank system, none had any training, experience, or knowledge of the mulch basin system being proposed as an alternative. Reporter's Official Tr. 1413, 1544-45, 1796, 1798. Gray water reuse reforms have been largely driven by public demand for water conservation efforts and sustainable use policies. It is plausible that public demand for these reforms is higher in "water-stressed states" than it is in Minnesota, the self-proclaimed "Land of 10,000 Lakes". Finally, a climate-based rationale to conclude that a septic tank is the only means of gray water disposal in Minnesota is directly contradicted by neighboring Wisconsin's code which allows for "an alternative sewage system approved by the department including a substitute for the septic tank or soil absorption field…" Wisc. Stat. § 145.01(12).

It is also incorrect to have held that the government met its very high burden because the Swartzentruber Amish's initial attempt at a mulch basin system performed poorly. Petitioners experimented with the mulch basin concept to see if their community would find them acceptable under their *Ordnung* and to determine if such a system could be used throughout the winter. Reporter's Official Tr. 1105, 1172. Petitioners did not follow a plan or a plumbing code and were created and installed without any expert guidance. Laura Allen, an expert with 19 years of experience with gray water reuse systems and who serves on the IAMPO technical committee for water efficiency standards, inspected the test mulch basins and explained the necessary improvements that would be required for future successful use. These recommendations were later incorporated in a professionally designed plan admitted at trial as Exhibit 42. Pet. App. 77-78. After trial, the recommended improvements were made and the system has been properly functioning during the appeal process.

When other jurisdictions adopted gray water reuse policies they faced much more challenging circumstances in terms of protecting human health and the environment: regulating gray water use in homes with close neighbors, small lots, and with gray water emanating from modern trappings such as automatic dishwashers, bathroom sinks, kitchen sinks, and showers. If these other jurisdictions have found that a gray water reuse system can be safely used under these much more complex circumstances, these systems can work for the Swartzentruber Amish's simple living and hand-carried water practices on remote farms.

Finally, if the government prefers a different system, it has the resources and wherewithal to develop another non-septic tank-based system using the gray water reuse methods employed in other states. The district court asked this very question to Dr. Heger.

> "Q. So would it be fair to say that you could envision your team of PhDs coming up with a system that might have the same performance as the Exhibit 270 system, but it would have to be monitored carefully and it would be labor intensive; is that correct?
> A. Yes." Reporter's Official Tr. 1672.

The government does not need to force the Swartzentruber Amish to choose between their faith and their farms. Strict scrutiny analysis requires that if a less restrictive means exists, the government must allow it. In this case there is an alternative that satisfies the government's health and safety goals and does not violate the Swartzentruber Amish's sincerely held religious beliefs.

III. In the alternative, the Court should hold this petition pending the outcome of other cases.

This Court is currently considering at least two cases involving the strict scrutiny and least restrictive alternative standards. In *Fulton v. Philadelphia*, No. 19-123, the parties have argued over the proper application of the least restrictive means standard, and invoked evidence of policies in other states. In *Americans for Prosperity v. Becerra*, No. 19-251, and *Thomas More Law Center v. Becerra*, No. 19-255, the petitioners have raised questions regarding the proper application of the least restrictive means standard. These cases may clarify the law and provide guidance to the courts below. Since the issues considered in those cases overlap with

the issues presented here, the Court may wish to delay consideration of this petition until those cases are resolved.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari or, in the alternative, delay consideration of this petition until the Court has resolved *Fulton v. Philadelphia*, No. 19-123, *Americans for Prosperity v. Becerra*, No. 19-251, and *Thomas More Law Center v. Becerra*, No. 19-255.

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Respectfully submitted,

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