

No. 07-1158

FILED

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LIVING WATER CHURCH OF GOD,

Petitioner,

v.

MERIDIAN CHARTER TOWNSHIP, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. Whether Petitioner has presented compelling reasons to grant the Petition, where the issue of whether Respondents' denial of a special use permit violates the Religious Land Use and Institutionalized Persons Act of 2000, Section 2(a), 42 U.S.C. § 2000cc *et seq.*, has been mooted by Petitioner's purchase of a new facility.

- II. Whether Petitioner has presented compelling reasons to grant the Petition, where the issue of the proper definition of "substantial burden" as used in the RLUIPA has not yet percolated through the court system and is not properly refined for Supreme Court review.

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INTRODUCTION

On December 10, 2007, the Sixth Circuit issued its opinion reversing the district court's conclusion that Respondents violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* *Living Water Church of God v. Charter Township of Meridian*, 2007 WL 4455434 (6th Cir. December 13, 2007). (Pet. App. at 1a). Specifically, the Sixth Circuit opined that denial of a special use permit to construct a building in excess of the square footage allowed by the township ordinance did not constitute a "substantial burden" on Petitioner's religious exercise. (Pet App. at 30a). Petitioner now seeks review of the Sixth Circuit's decision, arguing that it applied an improper test in defining what constitutes a "substantial burden" under the RLUIPA. Petitioner points to a split among the federal appellate circuits to support its contention that Supreme Court review is warranted. (Pet. App. at 12a-20a).

The Supreme Court's review on a writ of *certiorari* is discretionary and is limited to cases in which a petitioner has presented "compelling reasons" to grant the writ. *See* Sup. Ct. R. 10. Here, several factors militate against review of the Sixth Circuit's decision. First and foremost, Petitioner's case is mooted by its recent purchase of property in Bath Township, which was publicly reported in the Lansing State Journal on March 9, 2008. By its own concessions, Petitioner makes clear that it intends to use this new property for religious education, the same purpose for which it sought the special use permit at issue in this appeal. The second factor militating against the Court's review is the fact that the issue of the proper standard to be applied in determining what constitutes a

“substantial burden” under the RLUIPA has not yet been properly refined for Supreme Court review. The mere fact that different circuits have announced variants of a rule does not warrant the creation of a final, nationally-binding rule when further percolation is desirable. Here, such percolation is desirable, where (1) not all circuits have opined on the proper test to be applied in defining “substantial burden,” and (2), the circuits which have opined have not yet applied the rule often enough to evaluate whether that framework is workable.

In short, Petitioner has failed to carry its burden of presenting compelling reasons for the Court to grant its Petition for a Writ of *Certiorari*. Absent any such reasons, the Petition is properly denied.

STATEMENT OF THE CASE

This land use litigation arises out of the impartial denial of a request by Petitioner, the Living Water Church of God, d/b/a Okemos Christian Center (“Living Water”), to expand its existing facilities in excess of the square footage allowed by a Meridian Township ordinance. Living Water owns 2630 Bennett Road in Meridian Township, which is zoned RA, single-family residential, medium density. (R. 1 V.1 Tab 1: 28). Living Water’s 10,925 square foot single-story sanctuary and day care center is situated on approximately six acres of property. (R. 7 V.1: 125). Meridian Township Ordinance 86-658 requires the grant of a special use permit before constructing “any building or group of buildings with a combined gross floor area greater than 25,000 square feet[.]” (R. 34 V.1 Tab 17: 448). The purpose of the special

use permit is to monitor the impact development has upon “adjacent property owners, neighbors, and public infrastructure.” (*Id.*). Ordinance 86-658 applies equally to any and all buildings irrespective of their intended purpose. (*Id.*).

Since 1995, Living Water has operated as a non-residential use under a special use permit approved by the Planning Commission (“the Commission”). In 2000, the Commission granted Living Water’s request for a special use permit to increase its permitted maximum enrollment of its day care center to 72 children and to construct an approximately 28,500 square foot school for grades K-8 with a maximum of 280 students and no gymnasium. (R. 1 V. 1 Tabs 2-3: 55-59). In 2001, Living Water began operation of its school, the Dominion Academy, utilizing a building located in Grand Ledge. (R. 84 V. 2: 843). Ten students enrolled during the 2001-2002 academic year. (R. 84 V. 2: 844). In September 2002, fueled by logistical concerns, Living Water moved the Academy to a five acre, 1,200 square foot house and office located at Mt. Hope and Hagadorn Road. (R. 84 V. 2: 753). The 2000 special use permit to construct the school eventually expired because Living Water lacked the necessary funds. (R. 84 V. 2: 842).

In March 2001, the Township announced that, pursuant to a legal interpretation of its ordinances, it could no longer consider requests for extensions of special use permits. (R. 85 V. 2: 958). The Township first announced this no-renewal policy in conjunction with a special use permit request submitted by Wal-Mart. (R. 85 V. 2: 958-959). Under this policy, any request for extension of a special use permit must be treated as an

application for a new permit, subject to all new permit requirements. The Township has consistently applied the change in policy with regard to extensions of special use permits, including subsequent requests. (R. 85 V. 2: 959-960).

In 2003, Living Water applied for a special use permit (#03-94071) to construct a 35,000 square foot school building on its Meridian Township property for grades K - 12 with a maximum of 125 students, nine classrooms, and one gymnasium. (R. 34 V. 1 Tab 3: 241). The Commission, possessing authority to approve use of property and to make recommendations to the Board, conducted two public hearings on Living Water's permit request. (R. 34 V. 1 Tabs 2, 4: 223, 247). By a 3-2 vote, the Commission approved the use of permit no. 03- 94071 and recommended that the Board approve the permit, even though the size of the combined buildings would exceed the 25,000 square feet limit set forth in Ordinance 86-658. (R. 34 V. 1 Tab 6: 270).

On August 7, 2003, the Township Clerk received an appeal of the Commission's approval of the use of the property for a religious-oriented school. (R. 34 V.1 Tab 7: 276). At its Board meeting on October 21, 2003, the Township denied the appeal of the Commission's decision regarding proper use of the property, relying upon a packet provided by the Commission and consisting of comparison of lot sizes, building size, and enrollment at public and private schools in the area. (R. 34 V. 1 Tab 7: 273). Concurrently, the Board denied Living Water's special use permit to construct a 35,000 square foot building on the ground that such permit violated Ordinance 86-658. (R. 1 V.1 Tab 11: 99-100). Specifically, the Board concluded that the proposed combined size of the existing church

and new school building was out of proportion in relation to the 6-acre lot. (*Id.*). The denial of the special use permit left Living Water with several other viable alternatives. Living Water could have built an approximate 14,000 square foot addition to its existing building without the need for a special use permit. (R. 85 V. 2: 810). Another option was for Living Water to build a school at alternate sites in Meridian Township or surrounding townships.

Despite these facts, on January 7, 2004, Living Water filed suit against the Township and its Board members, alleging, among other things, that the denial of Living Water's 2003 special use permit violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42. U.S.C. § 2000cc *et seq.*, by imposing a "substantial burden" on its religious exercise. (R. 1 V. 1: 23-48). Living Water sought injunctive, declaratory, and compensatory relief. (R. 1 V. 1: 46 - 47). Upon removal to federal court, the Township sought summary judgment, which was denied. (R. 32 V. 1: 173-179; R. 59 V. 2: 509). The parties stipulated to a two-day bench trial on Living Water's RLUIPA claim. (R. 88 V. 2: 567-568). The district court ruled in favor of Living Water on the RLUIPA claim, concluding that the Township's denial its special use permit application imposed a substantial burden on Living Water's religious exercise even though it was entitled to add approximately 14,000 square feet to the existing church. (R. 88 V. 2: 581). The district court based its conclusion on Living Water's contention that the "facilities are too small for the needs of the congregation and staff." (R. 88 V. 2: 584). The district court also concluded that the Township's interest in density was not compelling and that denial of the special use permit

was not the least restrictive means of accomplishing that purpose. (R. 88 V. 2: 587-588). Consistent with these findings, the district court entered an order and judgment granting Living Water declaratory and injunctive relief. (R. 89 V. 1: 104).

The court of appeals reversed. At the outset, the court noted that although the term “substantial burden” is not defined in the RLUIPA, the legislative history indicates that the term is to be interpreted by reference to First Amendment free exercise jurisprudence. (Pet. App. at 11a). Summarizing this body of caselaw, the court of appeals “decline[ed] to adopt a bright line test by which to “measure” a “substantial burden,” but rather, looked for a framework to apply to the subject facts. (Pet. App. at 19a). The court of appeals framed the pertinent inquiry as follows:

[T]hough the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of religion?

(Pet. App. at 19a).

The court of appeals answered this inquiry in the negative, finding that the Township’s denial of the special use permit did not constitute a “substantial burden” within the meaning of the RLUIPA. (Pet. App. at 20a). The court reasoned that although approval of

the permit would provide Living Water with “an unlimited and ever-expanding place of worship,” and denial of the permit would make Living Water’s religious exercise more difficult or expensive, it did not place substantial pressure on Living Water to violate its religious beliefs. (Pet App. at 24a-25a). Nor did denial of the permit “effectively bar” Living Water from using its property for religious purposes. (Pet. App. at 25a).

The court of appeals also noted that Living Water was able to construct a 14,075 square-foot facility for its school without exceeding the Township’s zoning ordinance. (Pet. App. at 29a). Based on these facts, the court of appeals found that Living Water failed to demonstrate that the Township’s denial of the special use permit prohibited it from fulfilling its church missions and ministries. (*Id.*).

REASONS FOR DENYING THE PETITION

Living Water has presented no “compelling reasons” to grant its Petition for a Writ of *Certiorari* (“Petition”). Living Water’s recent purchase of a new facility in another township represents a change in circumstances which renders this controversy academic and the case moot. Additionally, the issue upon which Living Water seeks this Court’s review has not yet been refined, as evidenced by the fact that more than half of the circuits have not defined “substantial burden” as used in the RLUIPA. For these reasons, this Petition for a Writ of *Certiorari* should be denied.

I. Living Water's Case is Moot.

Living Water seeks this Court's review of a decision banning it from constructing a building addition which would have exceeded the 25,000 square foot limit contained in the Township's zoning ordinances. (Pet. App. at 9a). Living Water's sole claim for relief throughout this appeal from the Township's denial of its special use permit has been based upon the inability of Living Water to effectively further its religious beliefs through worship and educational training at its current facility. (Pet App. at 6a-8a). The Sixth Circuit issued its opinion on this issue on December 10, 2007. (Pet App. at 1a). However, in March 2008, the Lansing State Journal published an article indicating that Living Water had purchased Lakeside Christian School with the intention of using this space as an educational center. This property is located in Bath Township and is not subject to a permit requirement. As a result, Living Water's case is now moot, and this Court should deny its Petition for lack of jurisdiction.

Article III of the United States Constitution limits the federal court's jurisdiction to the adjudication of actual, ongoing cases or controversies only. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895). This "case or controversy"

requirement exists at all stages of federal judicial proceedings. *Lewis, supra*. “It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals.” *Deakins, supra*, citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), and *Steffel v. Thompson*, 415 U.S. 452 (1974).

If the controversy becomes academic through changed circumstances, jurisdiction ceases and the case is rendered moot. Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, pg. 815 (8th ed. 2002). The Court has placed an affirmative duty on counsel to call facts giving rise to mootness problems to its attention so that it does not improperly exercise its jurisdiction. *Board of License Comm’rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

In March 2008, the Lansing State Journal published an article stating that Living Water had purchased Lakeside Christian School, a 13-acre campus located at 7868 Old M-78 in Bath Township, and that it had placed its Meridian Township property up for sale. (Resp. App. A at 1a).¹ A similar article published on the same date, entitled “Higher power: Okemos church case heads to top U.S. court,” stated that Living Water had tested the new school gym and pronounced it “workable” as a worship area. (Resp. App. B. at 5a). This article goes on to state that Living Water had not yet voted to finalize a move to the Bath Township site. (*Id.*).

1. Since the facts that give rise to issues of mootness typically occur after the lower court record has been closed, the rule against reference to facts outside the record does not apply. Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, pg. 828 (8th ed. 2002).

An announcement on Living Water's website confirms its purchase of the Bath Township property and indicates that it is in the process of reconstructing Lakeside Christian School for use as a school:

For almost 4 years OCC has been attempting to extend and fulfill our calling to reestablish education upon a full-orbed Christian Biblical Worldview. During this time we have been involved in a long legal battle with Meridian Township. However God has graciously allowed us to pursue this ministry even as we continue to fight the Township's discrimination. Recently our church purchased Lakeside Christian School located at 7878 Old M-78 in East Lansing (See the conceptual drawing of what it may look like in a year) and we are looking forward to revamping every area and offering educational excellence to Christian parents in the greater Lansing Area!

(Resp. App. C at 13a-14a). Living Water's website also posts several photographs of the School and a conceptual drawing of what the School "may look like in a year." (Resp. App. C. at 14a).

Because this case is moot, further review of the merits of Living Water's claim is no longer possible, and the Petition for a Writ of *Certiorari* should be denied.

II. The Issue of the Proper Test to be Applied in Defining “Substantial Burden” under the RLUIPA has not Fully Percolated through the Court System.

Living Water argues that the existence of various tests for determining what constitutes a “substantial burden” under the RLUIPA serves as a compelling reason to grant its Petition. (Pet App. at 12a). Specifically, Living Water maintains that among the five federal appellate circuits to review this issue, three different standards have emerged: the “effectively impracticable” standard, the “coercion” standard, and the *Constantine* standard. (Pet App. at 12a-18a). Living Water argues that it is necessary to reconcile the circuit split at this juncture.

Living Water is incorrect. The mere fact that different courts have announced variants of a rule does not require this Court to review the issue precipitously “as soon as it appears.” *California v. Carney*, 471 U.S. 386, 401 n.11 (1985). Traditionally, the Court will wait while a conflict percolates through the judicial system and the issue becomes fully refined before “eradicating disuniformity.” *Id.* In *Carney*, this Court explained the benefits of percolation:

Disagreement in the lower courts facilitates percolation – the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The

Supreme Court, when it decides a fully percolated issue, had the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable.”

Id. n.11.

The issue of the proper standard to be applied in determining what constitutes a “substantial burden” within the meaning of the RLUIPA warrants further refinement before this Court’s review. As Living Water concedes, not all circuits have opined on this issue. (Pet. App. at 12a). The First, Fourth, Fifth, Eighth, and Tenth Circuits have yet to announce the meaning of “substantial burden.” Moreover, the circuits which have announced a rule, namely, the Second, Third, Seventh, Ninth, and Eleventh circuits, have not yet applied the rule often enough to evaluate whether a particular framework is workable. Given these facts, the Court should allow this issue to further percolate through the remaining circuits before creating a nationally binding rule. By abstaining from review until this issue has been independently evaluated by the remaining circuits, the Court will receive “the benefit of the experience of those lower courts.” *Carney, supra.*² Contrary to Living

2. The Court’s recent denial of a substantially similar petition for writ of certiorari in *The Greater Bible Way Temple of Jackson v. City of Jackson*, 2008 WL 467875 (February 15, 2008), is consistent with the Township’s position that the Court should allow this issue to fully percolate through the court system.

Water's assertion, the Court "should not be compelled to intervene to eradicate disuniformity" before the issue has been fully refined merely because a circuit split exists. 471 U.S. at 401 n.11. This issue is not yet suitable for Supreme Court review.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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