

No. 06-0074

In the Supreme Court of Texas

**PASTOR RICK BARR AND
PHILEMON HOMES, INC.,
Petitioners,**

vs.

**THE CITY OF SINTON,
Respondent.**

On Petition for Review from the Court of Appeals
for the Thirteenth District of Texas at Corpus Christi

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STATEMENT OF THE CASE

- Nature of the Case:* This is a religious freedom case involving the proper interpretation of the Texas Religious Freedom Restoration Act (“Texas RFRA”)
- Trial Court (TC):* Hon. Janna K. Whatley, 343rd Dist. Ct. of San Patricia Cty.
- TC Disposition:* Final Judgment in favor of Defendant-Respondent
- Parties on Appeal:* Plaintiffs-Petitioners: Pastor Rick Barr and Philemon Homes, Inc.
Defendant-Respondent: The City of Sinton
Amici Curiae: Prison Fellowship, the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, and Representative Scott Hochberg
- Court of Appeals (CA):* Corpus Christi-Edinburg Court of Appeals, Chief Justice Valdez, R (author), joined by Justices Hinojosa and Rodriguez
- CA Disposition:* Affirmed the judgment for Defendant-Respondent
- CA Opinion:* Memorandum Opinion, November 23, 2005

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under the Texas Government Code sections 22.001(a)(3) and 22.001(a)(6), in that this case offers this Court the opportunity to interpret the Texas Religious Freedom Restoration Act (“Texas RFRA”) and to provide guidance to Texas courts on its meaning and proper application.

ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in creating a per se exception to Texas RFRA for land-use regulation by incorporating a determination into its analysis of whether religious exercise constitutes an “auxiliary religious operation”?

AMICUS STATEMENT OF INTEREST

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League (“ADL”) is today one of the world’s leading organizations fighting hatred, bigotry, discrimination and anti-Semitism. To that end, ADL works to oppose government interference, regulation, and entanglement with religion and strives to advance individual religious liberty. Thus, while ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment,¹ it is equally an adherent of the Free Exercise Clause. In particular, ADL embraces the diversity of religion in our society, and believes that in such a religiously diverse society a zealous defense of the Free Exercise Clause will strengthen our democracy and preserve our Republic.²

No counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, made a monetary

¹ One of the issues that has arisen in this case is whether Philemon Homes had a contract with the state to run its homes. ADL believes that it is unclear from the record whether, in fact, there was such a contract. Compare Petitioners’ Brief on the Merits, at 24, with Respondent’s Brief on the Merits, at 4. ADL notes, however, that based on its staunch support for separation of Church and State, it has consistently opposed faith-based initiatives lacking strong constitutional safeguards. These safeguards are essential to avoid unconstitutional government support of and entanglement in religious activity. From over 90 years of day-to-day experience, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. As Justice Black has put it: “A union of government and religion tends to destroy government and degrade religion.” Engel v. Vitale, 370 U.S. 421, 431 (1962).

² In furtherance of these beliefs, ADL has participated as *amicus* in the major church-state cases of the last half-century to have reached the Supreme Court. See ADL briefs of *amicus curiae* filed in Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Lee v. Weisman, 505 U.S. 577 (1992); Witters v. Washington Dep’t of Servs. for the Blind, 474 U.S. 481 (1986); Lynch v. Donnelly, 465 U.S. 668 (1984); Comm. For Public Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Engel v. Vitale, 370 U.S. 421 (1962); and McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

contribution to the preparation or submission of this brief. Copies of this brief have been served on all parties.

STATEMENT OF FACTS

Petitioner in this case, Pastor Rick Barr, owns two homes that are operated by his corporation, Philemon Homes, Inc., to provide housing for parolees and probationers. See Barr v. City of Sinton, No. 13-03-727-CV, 2005 WL 3117209, at *1 (Tex. App.—Corpus Christi 2005). The homes were located across the street from Pastor Barr’s church and within the boundaries of the City of Sinton. Id. In April 1999, the City enacted Ordinance No. 1999-02, which prohibited the act of locating a correctional or rehabilitation facility with 1,000 feet of certain entities, including churches. Id. This ordinance effectively prohibited Pastor Barr from running Philemon Homes in the City of Sinton.

Pastor Barr and Philemon Homes thereafter brought a declaratory action, seeking a determination of whether the ordinance was constitutional and whether it violated the Texas Religious Freedom Restoration Act. Id. The trial court denied Pastor Barr’s requested relief, and Pastor Barr then appealed. The Court of Appeals for Corpus Christi likewise denied Pastor Barr’s requested relief, holding, in relevant part, that “zoning ordinances do not substantially burden . . . auxiliary religious operations.” Id. at *5. Given this conclusion, the Court of Appeals ruled that Pastor Barr’s religious rights were not substantially burdened by the ordinance in violation of Texas RFRA.

SUMMARY OF THE ARGUMENT

The Court of Appeals' decision in this case eviscerates Texas RFRA by creating a per se exception to the statute for zoning and similar land-use ordinances. This interpretation, which creates an unwarranted "auxiliary function" test, directly contravenes the explicit language of the statute providing that no showing of the "centrality" of religious exercise need be made. Further, the Court of Appeals' use of this "auxiliary" test allows courts and communities to determine theological issues rather than religious groups, allowing discrimination against such groups to continue under the guise of land-use regulation.

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS' USE OF AN "AUXILIARY" TEST CREATES A PER SE EXCEPTION FOR LAND-USE REGULATION THAT DIRECTLY CONTROVERTS THE CLEAR LANGUAGE AND IMPORT OF TEXAS RFRA

Texas RFRA, like the Federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. ("RLUIPA"), and other state RFRAs, was implemented in order to prevent state and local government officials from substantially burdening religious practices without a compelling justification for doing so. Specifically, Texas RFRA provides:

(a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.

(b) Subsection (a) does not apply if the government agency demonstrates that application of the burden to the person:

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that interest.

Tex. Civ. Prac. & Rem. Code § 110.003.

Texas RFRA was enacted in the wake of the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), which held that generally applicable laws that are not applied in a discriminatory fashion do not violate the Free Exercise Clause. As the Houston and Austin Courts of Appeals have explained, Texas RFRA "was enacted to provide greater protection for religious practices than the federal constitution as currently interpreted [in Smith]." Balawajder v. Tex. Dep't of Crim. Justice Inst'l Div., ---S.W.3d---, 2006 WL 2192613, *9 n.4 (Tex. App.—Houston [1st Dist.] July 31, 2006, no pet.); Voice of Cornerstone Church Corp. v. Pizza Prop. Partners, 160 S.W.3d 657, 672 (Tex. App.—Austin 2005, no pet.).

In furtherance of this goal, the language of the Texas RFRA mandates that "religious exercise" does not have to be "motivated by a central part or central requirement of the person's sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). The Court of Appeals' decision in this case that Philemon Homes' land-use was "an auxiliary religious operation" flies in the face of this explicit language.

To put it differently, in determining that Pastor Barr's operation of Philemon Homes was an "auxiliary" aspect of his religious belief, the Court of Appeals vitiated section 110.001(a)(1) because this determination suggests that Pastor Barr's activities are not central to his religious beliefs, but are "auxiliary." There is no basis in Texas RFRA for differentiating between "central" and "auxiliary" religious beliefs. Rather, as *amici* the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, and Representative Scott Hochberg have pointed out,

“the statute protects all religiously motivated acts regardless of whether there are other means by which a person may carry out the tenets of his faith.” Brief of *Amici Curiae* at 4. The Court of Appeals’ importation of the central-auxiliary analysis into its decision therefore undermines the purposes behind Texas RFRA because it creates a per se exception for land use regulations that controverts the explicit language of the statute and is not justified by its history.³

A look at the parallel federal statute, RLUIPA, illustrates the problem inherent in the Court of Appeals’ analysis. RLUIPA, in relevant part, prevents federal government agencies from applying land-use regulations to substantially burden religious exercise without a narrowly tailored compelling interest. 42 U.S.C. § 2000cc(a)(1). Texas courts have made clear that it is entirely appropriate therefore to refer to RLUIPA and federal case law construing RLUIPA in analyzing Texas RFRA. See Balawajder, 2006 WL 2192613, at *3; Jesuit College Preparatory Sch. v. Judy, 231 F. Supp.2d 520, 534 (N.D. Tex. 2002), vacated on other grounds, 2003 WL 23323003 (5th Cir.). With respect to analyzing section 110.001(a)(1), it is particularly appropriate to turn to federal case law interpreting RLUIPA because, like Texas RFRA, the federal statute makes clear that “religious exercise” does not have to be “compelled by, or central to, a system of religious belief.” 24 U.S.C. § 2000cc-5(7)(A).

³ Section 110.010 of the Texas Civil Practice and Remedies Code does nothing to undermine the directive in section 110.01(a)(1) that no showing of centrality need be made to trigger the provisions of Texas RFRA. As Petitioners convincingly point out in their Reply Brief and *amici curiae* American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, and Representative Scott Hochberg illustrate in their brief, section 110.010 does not provide a per se exception to zoning officials to abridge religious free exercise. See Petitioners’ Reply Brief at 11-19; Brief of *Amici Curiae* at 13-16.

Federal courts have found that given this language in RLUIPA, pre-RLUIPA federal cases holding that zoning decisions do not generally impose a substantial burden on religious exercise are inapplicable because they all consider whether the “religious exercise” implicated by zoning decisions is integral to a believer’s faith. See Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004) (distinguishing Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir.1983); Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221, 1224 (9th Cir.1990); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824-25 (10th Cir.1988); and Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 306-07 (6th Cir.1983)). Reference to these pre-RLUIPA land-use cases that regard the integral nature of a religious function is equally inappropriate in interpreting Texas RFRA. Since Texas RFRA explicitly prohibits a centrality analysis, courts cannot properly consider whether the religious exercise at issue is integral or “auxiliary,” as the Court of Appeals did here.

In sum, then, Texas RFRA explicitly prohibits any examination of the integral nature of religious exercise. The Court of Appeals therefore erred in engaging in such an analysis.

II. THE COURT OF APPEALS’ USE OF THE “AUXILIARY TEST” ALLOWS DISCRIMINATION AGAINST RELIGIOUS GROUPS IN LAND-USE CASES

The Court of Appeals’ interpretation of Texas RFRA would have dire consequences for all religious communities in Texas, including Texas’ Jewish communities, because it would establish a per se exception for land-use regulation based

on the notion that any claims of liberty on the part of religious groups “involve only property rights.” Douglas Laycock, State RFRA's and Land Use Regulation, 32 U.C. Davis L. Rev. 755, 757 (1999).

During the Congressional hearings that preceded the passing of RLUIPA, an extraordinary amount of evidence was amassed to show that land-use laws are consistently used to discriminate against religious groups. Douglas Laycock, who testified before the Texas legislature prior to the enactment of Texas RFRA, has noted that land-use regulation of religious groups has provided a lightning-rod for the airing of otherwise latent animus against religion and religious communities—particularly minority religious communities—that is unfortunately prevalent in our society. See Reply Brief of Petitioners, Tab 24 at 61-62; Laycock, supra, at 756-62. Professor Laycock has observed:

Some [people] are hostile to religion and to churches, either in general or in certain manifestations. [. . .] What is much more widespread is suspicion of, or hostility to, religious intensity. People who are religious themselves are often hostile to unfamiliar faiths, to high intensity faiths, and to the conservative and evangelical churches associated with the “Religious Right.” [. . .] A desire not to have members of a minority sect as neighbors is closely related to a desire not to have the minority sect’s church as a neighbor.

Id. at 760.

In a 1997 study submitted to Congress, Brigham Young University Law School, together with the law firm of Mayer, Brown & Platt, determined that minority religious groups were vastly overrepresented in reported zoning cases. The study found that religious groups representing less than 9 percent of the general population accounted for

nearly 50 percent of reported litigation involving location of churches and more than 33 percent of reported litigation involving “accessory” uses (such as operating homeless shelters or soup kitchens). Statement of Prof. W. Cole Durham, Brigham Young Univ., Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., at 223 (June 1998).

Indeed, a survey of the case law shows that, for example, communities have consistently used land-use regulations to prevent Jewish people—especially Orthodox Jews—from establishing synagogues, schools, and orphanages. See, e.g., Westchester Day School v. Village of Mamaroneck, 386 F.3d 183 (2d Cir. 2004) (land-use regulations used to prevent renovations of Orthodox Jewish day school); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) (land-use regulations used to prohibit establishment of Orthodox Jewish synagogues); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) (incorporation of township used to prohibit establishment of Hasidic community); Village of Univ. Heights v. Cleveland Jewish Orphans’ Home, 20 F.2d 743 (6th Cir. 1927) (land-use regulations used to prevent establishment of orphanage for Jewish children); Congregation Kol Ami v. Abington Township, No. Civ A 01-1919, 2004 WL 1837037, *8 (E.D. Pa. Aug. 17, 2004) (land-use regulations used to prevent establishment of Jewish Reform congregation); Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo, 593 F. Supp. 655 (S.D.N.Y. 1984) (land-use regulations used to prevent Orthodox Jewish community from running a nursery school);

Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd., 552 A.2d 772, 773 (Pa. Cmmw. Ct. 1989).

In LeBlanc-Sternberg, there was testimony that the land-use regulations at issue—the incorporation of part of the Town of Ramapo into the town of Airmont—was specifically aimed at keeping Hasidic Jews out of the town. One community member testified, “[I] will not have a [H]asidic community in my backyard.” LeBlanc-Sternberg, 67 F.3d at 418. And the first president of the Airmont Civic Association told a Hasidic developer that “the reason [for] forming this village is to keep people like you out of this neighborhood.” Id. at 419.

Professor Laycock has likewise documented the fact that “religious hostility is openly expressed in the zoning process.” Laycock, supra, at 780. During the hearings for the Religious Liberty Protection Act (the predecessor to RLUIPA), Attorney Bruce Shoulson, who has handled more than 30 cases in northern New Jersey in which towns have endeavored to exclude Jewish synagogues, described a hearing in which “an objector turned to the people in the audience wearing skull caps and said ‘Hitler should have killed more of you.’” Statement of Bruce D. Shoulson, Attorney, Religious Liberty Protection Act of 1998, Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. (July 1998); Laycock, supra, at 780. Anti-Semitic views were openly expressed in the campaign for the Ohio referendum voting down the Jewish proposal that had received land use approval. Statement of Marc D. Stern, American Jewish Congress, The Need for Federal Protection of Religious Freedom and Boerne v. Flores, II: Hearing Before the Subcomm. on the Constitution of

the House Comm. on the Judiciary, 105th Cong. (March 1998); Laycock, supra, at 780. And during the hearings on Texas RFRA, “one witness was in tears as she described the construction of a synagogue and Jewish community center on a forty-acre tract near her home.” Id. at 758.

In sum, land-use regulation is time and again used to discriminate against religious communities, particularly minority communities. To whole-cloth exempt such regulation out of the Texas RFRA by importing an analysis that distinguishes between central and auxiliary religious functions, as the Court of Appeals has done in this case, contravenes the clear language of the statute and undermines its purpose and history.

III. THE COURT OF APPEALS’ CREATION OF THE CENTRALITY-AUXILIARY TEST ALLOWS COURTS AND COMMUNITIES TO DECIDE QUESTIONS OF THEOLOGY RIGHTFULLY LEFT TO RELIGIOUS GROUPS

The Court of Appeals’ distinction between central and auxiliary religious activity also has the effect of creating a loophole in the Texas RFRA that would allow communities to discriminate against any religious activities that the community or a court deemed auxiliary to religious practice, regardless of the religious group’s belief about that practice. This would affect not only religious groups’ ability to worship, but also their ability to pursue other religious directives. The City of Sinton’s assertion in its brief that regulation of Philemon Homes in this case did not violate Texas RFRA because “No one was prevented from attending church,” Respondent’s Brief at 22, is an explicit example of this kind of judgment that impedes religious practice. Or, as Justice Brennan has explained in a different context:

Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights [D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 344 (1987) (Brennan, J., concurring) (internal citation omitted).

Thus, the Court of Appeals' determination that Philemon Homes' land-use was an "auxiliary religious operation" undermines the purpose of Texas RFRA's extension of protection to *all* conduct "substantially motivated by sincere religious belief," which is to avoid government entanglement in religion. The test instituted by the Court of Appeals, which allows the court to decide "issue[s] of religious law[,] . . . [to] determine the authoritative sources of law for the religion in question and to interpret the commands emanating from those sources," Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir 1996), vacated on other grounds, 522 U.S. 801 (1997), flies in the face of Justice Brennan's concerns and the well-established doctrine that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Hernandez v. Commissioner, 490

U.S. 680, 699 (1989); see also Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 716 (1981) (same).

A look at the Jewish religion provides a neat illustration of this problem.⁴ In the Jewish faith, there are three pillars of religious practice: Study of the Torah (Hebrew scriptures), prayer/service to God, and tikkun olam, or repairing the world. Thus, many Jewish communities consider the ability to study Judaism's sacred texts or to run a soup kitchen central to religious practice and faith, see, e.g., Adat Shalom Tikkun Olam Guidelines, at <http://www.jrf.org/adatsmd/tiunola.html>; Levine Academy Tikkun Olam, at http://www.ssadallas.com/jewish_life/tikkunolam.aspx, even though a court may see such functions as being "auxiliary" because they do not involve prayer (or as the City of Sinton puts it, "attending church"). Allowing land-use regulations to impede on these activities without a showing that such regulations were motivated by a compelling interest could hamper Jewish religious exercise. It is for this reason that the mandate in Texas RFRA that "religious exercise" does not have to be "motivated by a central part or central requirement of the person's sincere religious belief," Tex. Civ. Prac. & Rem.

⁴ Illustration by way of looking at Judaism does not mean that this problem does not arise in the context of other religions. Again, the legislative history of RLUIPA establishes that a community's determination that certain religious practice is "auxiliary" threatens the free exercise of all religions. For example, during the House hearings to consider the Religious Liberty Protection Act, there was testimony that a community in Florida purposefully deemed a mission church a "social service agency" in order to expel it from the neighborhood. The Refuge Pinellas, Inc., was a mission church in a depressed part of St. Petersburg, Florida whose congregants included homeless, poor, addicted, or mentally ill people. As the Refuge also provided food to the hungry and sponsored counseling for alcoholics and AIDS sufferers, St. Petersburg zoning officials decided to classify the Refuge as a "social service agency" and ordered the Refuge to vacate because churches, but not social services agencies, were permitted in the neighborhood. The zoning officials' decision to uproot the Refuge from its neighborhood coincided with the introduction of the new Tampa Devil Rays baseball team at nearby Tropicana Field. In a court filing, the City was candid about its reasons for classifying the Refuge as a "social service agency" and forcing it out of the neighborhood: "[I]f the rose begins to smell like a stink weed, it can still call itself a rose and may look like one, but it is no longer functioning as one, and so it is eventually going to have a negative impact on the rose garden and be weeded out and moved to the weed patch for the sake of all those living around the garden." Religious Liberty Protection Act of 1998, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. at 216-17 (May 1999).

Code § 110.001(a)(1), is important. As set forth above, the Court of Appeals' decision to vitiate this provision and create a per se exception to Texas RFRA for land-use regulations by looking at whether the religious exercise at issue is "auxiliary" constitutes error.

PRAYER

For the reasons set forth above, *amicus* respectfully requests that the Court grant the petition, reverse the decision of the Court of Appeals, and remand the case for application of the strict scrutiny required by Tex. Civ. Prac. & Rem. Code § 110.003.

Respectfully submitted,



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CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the above Brief Amicus Curiae of the Anti-Defamation League was served upon all counsel of record, as listed below, via Federal Express, on this 20th day of March 2007 pursuant to TEXAS RULE OF APPELLATE PROCEDURE 9.5:

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