No. 04-____

IN THE
Supreme Court of the United States

DONALD M. ADKINS,
Petitioner,
v.
DON KASPAR, CHAPLAINCY DEPARTMENT, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

ANTHONY R. PICARELLO, JR.
DEREK L. GAUBATZ
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
(202) 955-0095

GREGORY G. GARRE*
MICHELLE D. MORRIS
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5665

* Counsel of Record

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether this Court should resolve the circuit conflict—both expressly acknowledged and deepened by the Fifth Circuit in this case—over what constitutes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act.

2. Whether the Fifth Circuit properly declined—in conflict with the decisions of this Court and other circuits—to vacate its decision after being informed that the petitioner had been released on parole before the date of that decision.

PARTIES TO THE PROCEEDINGS

Petitioner Donald M. Adkins was the plaintiff-appellant below. Respondents were defendants-appellees below and are officials within the Coffield Unit of the Texas prison system: Don Kaspar, Chaplaincy Department; Roy A. Garcia, Warden, Coffield Unit; Michael W. Sizemore, Assistant Warden, Coffield Unit; Kenneth M. Reynolds, Chaplain, Coffield Unit; Larry Hart, Assistant Chaplain, Coffield Unit; Kevin Moore, Senior Warden, Coffield Unit; and Leonard Sanchez, Senior Chaplain, Coffield Unit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
I. THE FIFTH CIRCUIT'S DECISION DEEPENS THE CIRCUIT CONFLICT OVER WHAT CONSTITUTES A "SUBSTANTIAL BURDEN" ON RELIGIOUS EXERCISE UNDER RLUIPA	10
II. CERTIORARI IS WARRANTED TO DETERMINE WHETHER THE FIFTH CIRCUIT'S DECISION MUST BE VACATED DUE TO MR. ADKINS'S RELEASE FROM PRISON	18
CONCLUSION	24
APPENDICES	
Appendix A: Opinion of the United States Court of Appeals for the Fifth Circuit (Dec. 8, 2004)	1a

TABLE OF CONTENTS—Continued

		Page
Appendix B:	Order of the United States District Court for the Eastern District of Texas Adopting Report and Recommendation of the United States Magistrate Judge and Entering Final Judgment (Nov. 27, 2002)	21a
Appendix C:	Report and Recommendation of United States Magistrate Judge for the District Court for the Eastern District of Texas (Aug. 21, 2002).....	24a
Appendix D:	Order of the United States Court of Appeals for the Fifth Circuit Denying Motion to Recall the Mandate (Mar. 10, 2005)	45a
Appendix E:	Defendants-Appellees' Response and Opposition to Plaintiff's Motion to Recall Mandate and Vacate Decision for Apparent Lack of Jurisdiction	47a
Appendix F:	Statutory Provisions Involved.....	53a

TABLE OF AUTHORITIES

Page

CASES:

Abdul-Akbar v. *Watson*, 4 F.3d 195 (3d Cir. 1993) 19

Agrawal v. *Briley*, 2004 WL 1977581 (N.D. Ill. Aug. 25, 2004) 17

Amalgamated Ass'n of Street, Elec., Ry. & Motor Coach Employees v. *Wisconsin Employment Relations Bd.*, 340 U.S. 416 (1951) 3, 22

Braxton v. *United States*, 500 U.S. 344 (1991) 10

Charles v. *Frank*, 101 Fed. Appx. 634 (7th Cir.), *cert. denied*, 125 S. Ct. 479 (2004) 14, 16

Charles v. *Verhagen*, 348 F.3d 601 (7th Cir. 2003) 13

Church of Scientology of Cal. v. *United States*, 506 U.S. 9 (1992) 18, 19

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 11

Civil Liberties for Urban Believers v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2816 (2004) 13

Clarke v. *United States*, 915 F.2d 699 (D.C. Cir. 1990) 23

Cutter v. *Wilkinson*, No. 03-9877 ..... 3, 12

DeHart v. *Horn*, 390 F.3d 262 (3d Cir. 2004) 12, 16

TABLE OF AUTHORITIES—Continued

Page

Duke Power Co. v. *Greenwood County*, 299 U.S. 259 (1936) 21

Employment Div. Dep't of Human Res. v. *Smith*, 494 U.S. 872 (1990) 10, 11, 15

Figel v. *Overton*, 121 Fed. Appx. 642 (6th Cir. 2005) 16

Ford v. *McGinnis*, 352 F.3d 582 (2d Cir. 2003) 13, 16

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000) 22

Ganther v. *Ingle*, 75 F.3d 207 (5th Cir. 1996) 9

Gator.Com Corp v. *L.L. Bean, Inc.*, 398 F.3d 1125 (9th Cir. 2005) 22

Gillespie v. *Crawford*, 858 F.2d 1101 (5th Cir. 1988) 19

Henderson v. *Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) 12, 16

Honig v. *Doe*, 484 U.S. 305 (1988) 22

Humphreys v. *DEA*, 105 F.3d 112 (3d Cir. 1996) 23

IAL Aircraft Holding, Inc. v. *FAA*, 216 F.3d 1304 (11th Cir. 2000) 19, 23

Jones v. *Temmer*, 57 F.3d 921 (10th Cir. 1995) 22

Karcher v. *May*, 484 U.S. 72 (1987) 21

TABLE OF AUTHORITIES—Continued

Page

Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. *Missouri*, 361 U.S. 363 (1960) 22

Mack v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996) 5

Martin v. *Sargent*, 280 F.2d 1334 (8th Cir. 1985) 19

Mayweathers v. *Newland*, 314 F.3d 1062 (9th Cir. 2002), *cert. denied*, 540 U.S. 815 (2003) 15

McAlpine v. *Thompson*, 187 F.3d 1213 (10th Cir. 1999) 19

Micklus v. *Carlson*, 632 F.2d 227 (3d Cir. 1980) 19

Midrash Sephardi, Inc. v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1295 (2005) 13, 14, 17

Mills v. *Green*, 159 U.S. 651 (1895) 19

Morales v. *Schmidt*, 489 F.2d 1335 (7th Cir. 1973) 19

Murphy v. *Missouri Dep't of Corrections*, 372 F.3d 979 (8th Cir.), *cert. denied*, 125 S. Ct. 501 (2004) 12, 15

Murray v. *Silberstein*, 882 F.2d 61 (3d Cir. 1989) 23

Pounders v. *Kempker*, 79 Fed. Appx. 941 (8th Cir. 2003) 16

Powell v. *McCormack*, 395 U.S. 486 (1969) 18

TABLE OF AUTHORITIES—Continued

Page

Rosales-Garcia v. *Holland*, 238 F.3d 704 (6th Cir.), *vacated on other grounds*, *Thomas* v. *Rosales-Garcia*, 534 U.S. 1063 (2001) 19

San Jose Christian College v. *City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) 13

Shakur v. *Selsky*, 391 F.3d 106 (2d Cir. 2004) 17

Sherbert v. *Verner*, 374 U.S. 398 (1963) 11

Sts. Constantine & Helen Greek Orthodox Church, Inc. v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) 14

United States v. *Alaska S.S. Co.*, 253 U.S. 113 (1920) 22

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 513 U.S. 18 (1994) 9, 21, 22

United States v. *Johnson*, 23 Fed. Appx. 832 (9th Cir. 2001) 19

United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 3, 9, 18, 22, 23, 24

Weir v. *Nix*, 114 F.3d 817 (8th Cir. 1997) 12

Wilson v. *Moore*, 2002 WL 950062 (N.D. Fla. Feb. 28, 2002) 17

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 11

CONSTITUTION:

U.S. Const. art. III 18

TABLE OF AUTHORITIES—Continued

	Page
U.S. Const. amend. I	2
U.S. Const. amend. XIV, § 5	11
STATUTES:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2106	24
42 U.S.C. § 2000bb *et seq.*	11
42 U.S.C. § 2000bb(b)	11
42 U.S.C. § 2000bb-1	11
42 U.S.C. § 2000cc *et seq.*	2
42 U.S.C. § 2000cc-1	11, 15
42 U.S.C. § 2000cc-3(g)	15
42 U.S.C. § 2000cc-5(7)(A)	13
RULE:	
S. Ct. Rule 10(a)	10
LEGISLATIVE MATERIALS:	
Joint Statement of Senator Hatch and Senator Kennedy on RLUIPA, 146 Cong. Rec. S7774 (daily ed. July 27, 2000)	12
H.R. Rep. No. 219, 106th Cong., 1st Sess. (1999)	12

IN THE

Supreme Court of the United States

No. 04-____

DONALD M. ADKINS,

Petitioner,

v.

DON KASPAR, CHAPLAINCY DEPARTMENT, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Donald M. Adkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 393 F.3d 559 and is reproduced in the appendix hereto ("App.") at 1a. The report and recommendation of the United States Magistrate Judge is reproduced at App. 24a. The order of the United States District Court for the Eastern District of Texas adopting that recommendation and entering judgment is reproduced at App. 21a. The order of the Fifth Circuit denying petitioner's

motion to recall the mandate and vacate the court of appeals decision is reproduced at App. 45a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 2004. *Id.* at 1a. On February 25, 2005, Justice Scalia granted petitioner's application for an extension of time within which to file a petition for a writ of certiorari to and including April 7, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

The relevant provisions of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*), are reproduced in the appendix to this petition at App. 53a.

INTRODUCTION

This case involves a claim brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, by a state prisoner, petitioner Donald M. Adkins, who was barred by prison officials, respondents, from assembling to observe the Sabbath and other holy days of his religion—activities that "easily qualify as 'religious exercise' under RLUIPA." App. 13a. In rejecting that claim, the Fifth Circuit expressly acknowledged and deepened the multi-dimensional circuit conflict over "[w]hat constitutes a 'substantial burden' under the RLUIPA." *Id.* The direct circuit conflict over the Act's definition of "substantial burden" has created nationwide confusion for religious adherents and state and local officials alike. That is particularly true in the United States prison system, where religious exercise has vital importance to

hundreds of thousands of individuals and prison officials are routinely required to make decisions about what religious practices to accommodate. Indeed, respondents themselves have declared that the decision in this case is of the "utmost importance" because of the size of Texas's prison population and number of RLUIPA claims. *Id*. at 49a. This Court's guidance is critically needed to resolve the growing conflict over the scope of RLUIPA's "substantial burden" test.[1]

This case also presents a threshold question that is even more fundamental to the operation of the federal courts than the scope of RLUIPA's "substantial burden" requirement. Shortly before the Fifth Circuit rendered its decision, Mr. Adkins was released on parole. Because Mr. Adkins's complaint sought only equitable relief, his release appears to have mooted his RLUIPA claim. The Fifth Circuit, however, refused to vacate its decision after being apprised of Mr. Adkins's release. That ruling is necessarily grounded on one of two holdings: either the Fifth Circuit (1) concluded that the case was not moot, in conflict with the decisions of other circuits; or (2) it adopted respondents' request to invoke an "important issue" exception to the mootness doctrine, in direct conflict with this Court's decisions. *See, e.g.*, *Amalgamated Ass'n of Street, Elec., Ry. & Motor Coach Employees* v. *Wisconsin Employment Relations Bd*., 340 U.S. 416 (1951); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Either way, the court's refusal to vacate its decision deepening the conflict on RLUIPA's "substantial burden" test independently warrants this Court's review.

STATEMENT OF THE CASE

Mr. Adkins's Incarceration and Religious Practice. Mr. Adkins was incarcerated in the Texas prison system from

[1] In *Cutter* v. *Wilkinson*, No. 03-9877 (argued Mar. 21, 2005), this Court is weighing a challenge to the constitutionality of RLUIPA. That claim is not presented by this case. App. 18a n.52. However, the Court may wish to defer consideration of this petition until that threshold constitutional challenge is resolved.

1987 through October 2004. In December 1999, he was baptized into the Yahweh Evangelical Assembly (YEA), after concluding that he needed to "change his life, because if he d[id] not, he ha[d] nothing to get out of prison for." App. 31a. The YEA faith "contains certain elements of traditional Judaism as well as a belief in Yahshua (Jesus) as the Messiah." *Id.* at 25a. The fundamental religious tenets of YEA include a Sabbath, lasting from Friday sundown to Saturday sundown. *Id*. at 28a. YEA requires its adherents to meet on the Sabbath and to observe particular holy days. *Id.* at 3a. In the YEA faith, "failure to assemble for worship on the Holy Days amount[s] to 'sin,' for which the penalty is 'death.' " *Id*. at 42a n.7. Mr. Adkins is a devout member of YEA and student of his faith. *Id*. at 30a.

During the relevant time period, Mr. Adkins was imprisoned at the Coffield Unit (Coffield) within the Texas prison system. There are at least 20 to 25 inmates at Coffield who are "active, participating members of [YEA]" and several others who receive YEA literature. *Id*. at 36a. YEA inmates incarcerated at Coffield are permitted to assemble and observe only *one* Sabbath per month and are not otherwise permitted to observe their holy days. *Id*. at 29a. By contrast, "Christians [at Coffield] get services every week, Jehovah's Witnesses get services once a week, and Muslims get services twice a week." *Id*. at 31a.

Respondents acknowledge that they deny YEA members the right to assemble and hold services on their Sabbath and holy days—including "the most important holy day of the year" for adherents to the YEA faith, *id*. at 32a—unless an "accredited [outside] religious volunteer" is present. *Id*. at 4a. And even though other individuals had completed the requisite training and sought permission to lead YEA services at Coffield, respondents refused to grant "accredited religious volunteer" status to anyone but a single volunteer, YEA elder Jerry Healan. *Id.* at 29a-31a. Mr. Healan, who lives 175 miles from the prison in Atlanta, Texas, is able to

attend prison services only once per month. *Id.* at 30a, 36a.

While the prison allows YEA adherents to meet without an outside volunteer on Mondays to watch video and audio tapes of sermons, the prison will not allow those meetings on the Sabbath. *Id.* at 32a. Muslims, on the other hand, regularly hold Saturday religious meetings without an outside volunteer. When Mr. Adkins asked why Muslims could hold Saturday services while YEA adherents could not, a prison official replied that "we all know what they had to go through to get what they got." *Id.* This apparently referred to a court order permitting Muslims to conduct services without an "accredited religious volunteer." *Id.* at 9a, 35a.

In May 2001, Mr. Adkins filed a pro se lawsuit against respondents in the District Court for the Eastern District of Texas, alleging, among other things, that respondents' refusal to allow him to assemble with other YEA adherents on the Sabbath and holy days violated RLUIPA. *See id*. at 2a ("The gravamen of [Mr. Adkins's] complaint is that he has not been permitted to observe particular days of rest and worship (each Saturday for the Sabbath and a number of specific holy days), which is a requirement of his faith."). Mr. Adkins sought only an injunction permitting him to properly observe the Sabbath and religious holidays, because "he just want[ed] to be allowed to practice his faith." *Id.* at 34a. He chose not to seek monetary damages. *Id*.; *see also id.* at 22a.

District Court Proceedings. The district court referred Mr. Adkins's lawsuit to a magistrate judge. *Id.* at 24a. On August 21, 2002, the magistrate judge filed a report and recommendation (*id.* at 24a-44a) to dismiss Mr. Adkins's RLUIPA claim as a matter of law. *Id.* at 43a. The magistrate judge applied the "substantial burden" test adopted by the Seventh Circuit in *Mack* v. *O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996). Under that formulation, "[a] 'substantial burden' is one which forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression which manifests a central tenet of a person's

religious beliefs, or compels conduct or expression that is contrary to those beliefs." App. at 40a-41a.

Applying the Seventh Circuit's test, the magistrate judge held that permitting YEA inmates "to gather only once a month for communal worship" is not a substantial burden on the practice of Mr. Akins's religion. *Id.*; *see id.* at 41a-42a. The magistrate judge further observed that other YEA religious ceremonies to be held on particular days (*e.g.*, the Day of Pentecost) should simply be scheduled by YEA faithful for the meeting allowed by respondents "once a month." *Id.* at 42a. The magistrate judge acknowledged that, according to Mr. Adkins's religious beliefs, "failure to assemble for worship on the Holy Days amounted to a 'sin,' for which the penalty is death," but held that the "significance" of the religious practice does not mean that the "curtailment" of that practice "necessarily was a 'significant burden' upon the practice of his religion." *Id.* at 42a n.7.

On November 27, 2002, the district court issued an order adopting the report and recommendation of the magistrate judge and dismissing Mr. Adkins's action. *Id.* at 21a-23a. Mr. Adkins filed a timely pro se appeal in December 2002.

Mr. Adkins's Release from Prison. On October 26, 2003, after the completion of briefing in the court of appeals and after the case had been calendared for decision without oral argument—but before the Fifth Circuit issued its decision in the case—Texas released Mr. Adkins from its prison system on parole, *i.e.*, supervised release subject to numerous conditions. A copy of the "Certificate of Mandatory Supervision" issued by the Texas Department of Criminal Justice, Pardons, and Parole Division is attached as Exhibit 2 to Mr. Adkins's Application for Extension of Time to File Application for Writ of Certiorari (Appl. for Ext. of Time).[2] Mr. Adkins, who was still proceeding pro se at the

[2] Under the Certificate of Mandatory Supervision (at 1), Mr. Adkins "shall be permitted to be at liberty in the legal custody of the State of Texas but subject to the orders of the [Texas Board of

time, notified the district court that his address had changed on November 8, 2004. *See* Appl. for Ext. of Time, Exh. 3. The district court forwarded this change of address to the Fifth Circuit. Docket Entry 64, *Adkins* v. *Kaspar*, 6:01-cv-00244-JH (Hannah, J.) (E.D. Tex.). However, neither Mr. Adkins nor respondents notified the district court or the Fifth Circuit that his new address stemmed from his parole.

Fifth Circuit Decision. On December 8, 2004—more than a month after Mr. Adkins was released from prison—the Fifth Circuit issued a published decision affirming the dismissal of Mr. Adkins's RLUIPA claim on the merits. App. 1a-20a. The court of appeals held that "[t]he activities alleged to be burdened in this case—YEA Sabbath and holy day gatherings—easily qualify as 'religious exercise' " covered by RLUIPA, and that the key question in this case is therefore "whether the government practice in question places a 'substantial burden' on Adkins's religious exercise." *Id.* at 13a. Accordingly, the court focused its RLUIPA analysis on whether respondents' actions imposed a substantial burden on the exercise of Mr. Adkins's religion.

The court observed that "[w]hat constitutes a 'substantial burden' under the RLUIPA is a question of first impression in this circuit," and acknowledged that "the courts that have assayed it are not in agreement." *Id*. at 13a. After canvassing the various positions adopted by the Seventh, Eighth, Ninth, and Eleventh Circuits on the scope of RLUIPA's "substantial burden" requirement, as well as this Court's pronouncements on the "substantial burden" test in the Free Exercise Clause context, *see id.* at 13a-16a, the court staked out the Fifth Circuit's position on the issue: "[F]or

---

Pardons and Paroles] and Texas Department of Criminal Justice Parole Division, and under the rules and conditions of Mandatory Supervision" set forth in the Certificate. The Certificate further provides that, during his parole, Mr. Adkins "remain[s] in the legal custody of the State of Texas subject to the orders of the [Parole] Board and Parole Division." *Id*. at 3.

purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Id*. at 16a.

Under that test, no substantial burden may arise from a rule of general applicability. As the Fifth Circuit explained, "a government action or regulation does *not* rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id.* at 17a (emphasis added). In addition, the court also stated that "no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system." *Id.* Under the Fifth Circuit's test, however, a RLUIPA plaintiff has "the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." *Id*.

Applying that test, the Fifth Circuit held that—even though "Adkins was and is prevented from congregating with other YEA members on many Sabbath and YEA holy days," *id*. at 18a—respondents had "not placed a substantial burden on Adkins's free exercise of his YEA religion, within the contemplation of the RLUIPA," *id*. at 19a. In reaching that conclusion, the court focused on the "uniform requirement for all religious assemblies at Coffield *with the exception of Muslims*" to have "an outside observer" present for worship. *Id*. (emphasis added). Thus, because meetings of religious groups without an outside volunteer present are not "generally allowed" at the prison, the court held, there was no "substantial burden" on Mr. Adkins's religious exercise.[3]

[3] Mr. Adkins pointed to several similarly situated groups who allegedly met regularly without an accredited religious volunteer. *See* Pet. Fifth Circuit Br. at 13-14; Pet. Fifth Circuit Reply Br. at 5.

Fifth Circuit Refusal to Vacate its Decision. The Fifth Circuit's mandate issued on December 30, 2004. Undersigned counsel were thereafter retained to represent Mr. Adkins on a pro bono basis and evaluate Mr. Adkins's options. In doing so, counsel learned that Mr. Adkins had been released from prison on October 26, 2004. Mr. Adkins's release from prison appeared to moot his challenge to the conditions of his confinement under RLUIPA before the Fifth Circuit issued its December 8, 2004 decision. Accordingly, Mr. Adkins's newly retained counsel filed a motion asking the Fifth Circuit to recall the mandate and vacate its decision for apparent lack of jurisdiction. The motion explained that—to the extent that Mr. Adkins's release from prison mooted his RLUIPA claim—vacatur was required under this Court's decisions in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), and *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), as well as circuit case law and other authority.

Respondents opposed Mr. Adkins's motion on the ground that the Fifth Circuit's decision is of the "utmost importance." App. 49a; *see id*. at 47a (characterizing Fifth Circuit decision as an "important decision"); *id*. at 47a-48a ("significant decision"). Respondents explained that, although "the general rule is to vacate the judgment" if a case

---

The Fifth Circuit, however, addressed only the Muslim population, which the court characterized as being subject to "a special court order." App. 19a. At a minimum, the record establishes a disputed issue of material fact as to whether members of YEA are subjected to discriminatory treatment under the prison's purportedly "uniform [volunteer] requirement." *Id*.

Moreover, in their merits brief before the Fifth Circuit, respondents did not reference any court order establishing an exemption from the "uniform" rule for Muslim inmates. Instead, they observed that YEA inmates were "members of a minority faith, in contrast to the Muslim inmates," and that the Fifth Circuit allows prisons to provide less accommodation to religions with fewer practitioners. Resp. Fifth Cir. Br. at 5 (filed Sep. 22, 2003) (citing *Ganther* v. *Ingle*, 75 F.3d 207, 211 (5th Cir. 1996)).

becomes moot during appeal, "this doctrine is an equitable one," *id*. at 48a, and that here "the equities favor[] retaining the decision" because of its "importance" to the Texas prison system, *id*. at 49a. Respondents further suggested that the "remedy" in this situation was for Mr. Adkins to "file a petition for certiorari" with this Court. *Id*. at 50a.

On March 10, 2005, the Fifth Circuit issued a per curiam order refusing to vacate its decision. *Id.* at 45a.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION DEEPENS THE CIRCUIT CONFLICT OVER WHAT CONSTITUTES A "SUBSTANTIAL BURDEN" ON RELIGIOUS EXERCISE UNDER RLUIPA

The "principal purpose" for the exercise of this Court's certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals." *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991); S. Ct. Rule 10(a). As the Fifth Circuit expressly acknowledged, the federal circuits "are not in agreement" on "[w]hat constitutes a 'substantial burden' under RLUIPA." App. 13a. The Fifth Circuit deepened that conflict in this case by rejecting the "substantial burden" tests employed by the Seventh, Eighth, Ninth, and Eleventh Circuits and adding its own—brand new—test to the mix "for purposes of applying the RLUIPA in [the Fifth] Circuit." *Id*. at 16a. RLUIPA's "substantial burden" requirement is the gateway to federal relief from discrimination on the basis of religion, unequal religious accommodations, and unjustified infringement of the free exercise of religion for hundreds of thousands of incarcerated individuals across the United States. A uniform federal standard is needed on that critical civil rights issue.

1. Congress enacted RLUIPA in 2000 in response to a chain of events set in motion by this Court's decision in *Employment Division Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, this Court held that

laws that are neutral and generally applicable are not subject to strict scrutiny under the Free Exercise Clause. *Id*. at 879-882. In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb *et seq.* The stated purpose of RFRA was to "restore the compelling interest test as set forth in *Sherbert* v. *Verner* and *Wisconsin* v. *Yoder*" and to apply that test to all government acts, including laws of general applicability, that "substantially burdened" religious exercise. 42 U.S.C. §§ 2000bb-1, 2000bb(b). In *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997), however, this Court concluded that RFRA was unconstitutional as applied to state and local governments because it was beyond the scope of Congress's authority under Section 5 of the Fourteenth Amendment.

Congress responded by enacting RLUIPA. In pertinent part, RLUIPA reinstated RFRA's application of strict scrutiny to burdens on religious exercise, but limited the scope of the statute to two specific contexts—land use ordinances and institutionalized persons. Section 3 of RLUIPA, the provision involved in this case, lifts government-imposed burdens on the religious exercise of institutionalized persons. It lays down a "[g]eneral rule" that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless that burden "is in furtherance of a compelling governmental interest." *Id*. § 2000cc-1(a)(1). Section 3 further specifies that—notwithstanding the constitutional rule established by *Smith*—the government is prohibited from imposing such a burden "even if the burden results from a rule of general applicability." *Id*. § 2000cc-1(a)(1). Rather than relying on its Section 5 authority in enacting Section 3 of RLUIPA, Congress instead invoked its authority under the Spending Clause and the Commerce Clause. *See* 42 U.S.C. §§ 2000cc-1(b)(1) and (2).[4]

[4] Before enacting RLUIPA, Congress compiled substantial evidence during three years of hearings establishing that, in the

2. In the four-plus years since RLUIPA was enacted, confusion has plagued the lower courts over the meaning of the Act's "substantial burden" test. That confusion is at least partly attributable to the fact that RLUIPA does not define the term "substantial burden"; questions over the interplay between RLUIPA and RFRA; and uncertainty surrounding this Court's free exercise jurisprudence prior to *Smith* as well as the interrelationship between that jurisprudence and RLUIPA. In any event, regardless of the source of that confusion, the federal circuits—as the Fifth Circuit expressly acknowledged in this case—"are not in agreement" over "[w]hat constitutes a 'substantial burden' under the RLUIPA." App. 13a; *see id*. at 13a-14a (discussing conflict).

a. The Eighth and Third Circuits have concluded that "Congress intended that the language of the act is to be applied just as it was under RFRA." *Murphy* v. *Missouri Dep't of Corrections*, 372 F.3d 979, 987 (8th Cir.), *cert. denied*, 125 S. Ct. 501 (2004); *see DeHart v. Horn*, 390 F.3d 262 (3d Cir. 2004) (concluding that RLUIPA did not enact new substantive standard of review for prisoner religious claims). RFRA's "substantial burden" standard looks to whether the government practices "significantly inhibit or constrain conduct or expression that manifests some *central tenet* of a [person's] individual [religious] beliefs," or "den[ies] a [person] reasonable opportunities to engage in those activities that are *fundamental* to a [person's] religion." *Murphy*, 372 F.3d at 988 (quoting *Weir* v. *Nix*, 114 F.3d 817, 820 (8th Cir. 1997)) (emphasis added). *See also Henderson* v. *Kennedy*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (RLUIPA did not alter requirement to inquire into importance of

---

absence of federal legislation, persons committed to prisons and other state institutions were the brunt of substantial, unwarranted, and discriminatory burdens on religious exercise. *See, e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999); *Joint Statement of Senator Hatch and Senator Kennedy on RLUIPA*, 146 Cong. Rec. S7774 (daily ed. July 27, 2000); U.S. Br., *Cutter* v. *Wilkinson*, No. 03-9877, at 3-4 (discussing evidence).

religious practice), *cert. denied*, 535 U.S. 986 (2002); *Ford* v. *McGinnis*, 352 F.3d 582 (2d Cir. 2003) (examining importance of feast under Islam in determining whether substantial burden was imposed by denying feast). That approach is directly contradicted by RLUIPA, which defines "religious exercise" as "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

b. The Fifth, Seventh, Ninth, and Eleventh Circuits, in contrast, have recognized that RLUIPA imposes a different "substantial burden" test than RFRA. For example, the Seventh Circuit rejected its previous RFRA formulation—which was the same as the Eighth Circuit's current "substantial burden" test—and held that it is inapplicable to RLUIPA claims because of the broader definition of "religious exercise" contained in RLUIPA. *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2816 (2004); App.14a. Under the Seventh Circuit's formulation of the "substantial burden" test, the government regulation must "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise * * * *effectively impracticable*." *Id.* at 761 (emphasis added). Both the Fifth Circuit—in this case, App. 16a—and the Eleventh Circuit have rejected that definition. *See Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) , *cert. denied*, 125 S. Ct. 1295 (2005). By contrast, the Ninth Circuit has followed it. *San Jose Christian College* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (defining "substantial burden" as "a significantly great restriction or onus upon such exercise" and finding definition "entirely consistent" with the Seventh Circuit's "effectively impracticable" standard).[5]

[5] The Seventh Circuit itself has deviated from that strict version of the "substantial burden" test in certain prison cases. For example, in *Charles* v. *Verhagen*, 348 F.3d 601, 604-605 (7th Cir.

The Eleventh Circuit has adopted a much more relaxed inquiry than the Seventh Circuit's "effectively impracticable" test. In the Eleventh Circuit, a "substantial burden" results "from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc.*, 366 F.3d at 1227. Under that formulation of the "substantial burden" test, an inmate may satisfy RLUIPA by showing that the government regulation *tends* to force him to forego his religious precepts, as opposed to having to show that the regulation renders religious exercise "effectively impracticable."

c. In this case, the Fifth Circuit considered and rejected the "substantial burden" tests adopted by the Seventh, Eighth, Ninth, and Eleventh Circuits. *See* App. 13a-14a. The Fifth Circuit agreed with the Seventh, Ninth, and Eleventh Circuits—in conflict with the Third and Eighth Circuits—that the RFRA "substantial burden" standard does not apply to RLUIPA, and it held that "no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system." *Id*. at 14a, 17a. The Fifth Circuit, however, declined to follow any of the various "substantial burden" tests adopted by the Seventh, Eighth, Ninth, or Eleventh Circuits for RLUIPA claims. Instead, the Fifth Circuit

---

2003) the Seventh Circuit affirmed the district court's conclusion that the prison violated RLUIPA by refusing to allow a Muslim prisoner to keep a reasonable quantity of prayer oil in his cell. Likewise, in *Charles* v. *Frank*, 101 Fed. Appx. 634 (7th Cir.), *cert. denied*, 125 S. Ct. 479 (2004), a Muslim inmate protested a prison rule preventing him from wearing prayer beads around his neck. According to the court, the regulation, though generally applicable, imposed a substantial burden on religious exercise (albeit one that the court found to be justified in the inmate's case). *Id*. at 635. *Cf. Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

adopted yet another definition of "substantial burden," stating that, "for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Id.* at 16a.

The Fifth Circuit's test adds a new—and fallacious—limitation on RLUIPA's touchstone "substantial burden" requirement. As the court explained, under the Fifth Circuit rule, "a government action or regulation does *not* rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is *not otherwise generally available* or acting in a way that is *not otherwise generally allowed*." *Id.* at 17a (emphases added). In other words, in the Fifth Circuit, no substantial burden may arise from a generally applicable government action or regulation. That position directly contravenes the text of RLUIPA, which declares that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution * * * *even if the burden results from a rule of general applicability*." 42 U.S.C. § 2000cc-1(a) (emphasis added).

Moreover, the Fifth Circuit's "substantial burden" test effectively—and paradoxically—transforms RLUIPA into a statutory version of *Smith*, in which this Court held that the First Amendment does not protect burdens on religion imposed by laws of general applicability. But the genesis of Section 3 of RLUIPA was Congress's effort to *bolster* the protections afforded by the First Amendment—in the wake of this Court's decision in *Smith*. *See* 42 U.S.C.A. § 2000cc-3(g) ("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.") (emphasis added); *Mayweathers* v. *Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002) (RLUIPA "raises" First Amendment standard), *cert. denied*, 540 U.S. 815 (2003); *Murphy*, 372

F.3d at 986 ("[RLUIPA] established a statutory free exercise claim encompassing a higher standard of review than that which applies to constitutional free exercise claims.").

The Fifth Circuit's "substantial burden" test also conflicts with the decisions of other circuits that have examined whether generally applicable prison rules create a substantial burden on religion. *See, e.g.*, *DeHart*, 390 F.3d at 273 (prisoner requesting exemption from general rule for special diet that conformed with Buddhist religion); *Henderson*, 265 F.3d at 1074 (general prohibition on selling message-bearing T-shirts on National Mall); *Ford*, 352 F.3d at 585 (prohibition on inmates in disciplinary housing receiving Muslim feast); *Pounders* v. *Kempker*, 79 Fed. Appx. 941 (8th Cir. 2003) (denial of sweat lodge to Native American inmates); *see also Figel* v. *Overton*, 121 Fed. Appx. 642 (6th Cir. 2005) (prisoner who sued because officials refused to grant exception to rule requiring publications from "authorized vendor" for books sent to him by the Philadelphia Church of God stated claim under RLUIPA); *Charles* v. *Frank*, 101 Fed. Appx. 634, 635 (7th Cir. 2004) (generally applicable prison rule that prevented Muslim inmate from wearing prayer beads around his neck).

Applying its new test to the facts of this case, the Fifth Circuit held that—even though "Adkins was and is prevented from congregating with other YEA members on many Sabbath and YEA holy days," *id*. at 18a—respondents had "not placed a substantial burden on Adkins's free exercise of his YEA religion, within the contemplation of the RLUIPA," *id*. at 19a. In reaching that conclusion, the court grounded its decision on the "uniform requirement for all religious assemblies at Coffield" to have "an outside volunteer" present for worship. *Id*. Thus, because meetings of religious groups without an outside volunteer present are not "generally allowed" at the prison, the court held that there was no "substantial burden" on Mr. Adkins's religious exercise. That was the end of the matter. The court made no

effort to inquire into the hardship imposed on Mr. Adkins, or whether the application of the prison's rule would cause Mr. Adkins or other YEA adherents to "forego religious precepts." *Midrash Sephardi, Inc.*, 366 F.3d at 1227. Nor did the court seriously consider whether respondents had applied that rule in a discriminatory fashion.[6]

3. The opportunity to exercise religion behind prison walls is of vital importance to thousands of individuals incarcerated in the United States. RLUIPA establishes a fundamental national safeguard against discriminatory practices against religion in the state prison system and thus a potentially critical civil right for inmates. The multi-dimensional—and growing—circuit conflict over RLUIPA's "substantial burden" requirement has created enormous confusion from the standpoint of both prisoners and prison officials over the religious activities that are protected by federal law and has subjected inmates in different circuits to different treatment under federal law. This Court's guidance is needed to resolve that undeniable conflict and confusion.

---

[6] The result in this case thus conflicts with the decisions of other courts. The Fifth Circuit held that it was not a "substantial burden" on Mr. Adkins's religion to deny him certain religious days of rest and worship. But the Second Circuit has held that denial of a single religious holiday can constitute a "substantial burden" on religion in violation of RLUIPA. *See, e.g., Shakur* v. *Selsky*, 391 F.3d 106 (2d Cir. 2004) (refusing inmate non-mandatory religious feast was "substantial burden" on religion); *see also Agrawal* v. *Briley*, 2004 WL 1977581, at *6 (N.D. Ill. Aug. 25, 2004); *Wilson* v. *Moore*, 2002 WL 950062 (N.D. Fla. Feb. 28, 2002) (refusing to dismiss RLUIPA claims based on, *inter alia*, inability to meet weekly without an outside volunteer).

II. CERTIORARI IS WARRANTED TO DETERMINE WHETHER THE FIFTH CIRCUIT'S DECISION MUST BE VACATED DUE TO MR. ADKINS'S RELEASE FROM PRISON

The first question presented meets all the customary criteria for certiorari. This case, however, presents an even more fundamental question concerning the operation of the federal judicial system that also merits this Court's review. As explained above, although Mr. Adkins was released from prison on parole before the Fifth Circuit decided his case (and remains on supervised release), the Fifth Circuit declined to vacate its decision in this case for mootness. That ruling directly conflicts with the decisions of this Court and of other circuits, not to mention the "established practice" of this Court. *Munsingwear*, 340 U.S. at 39.

1. As explained, Mr. Adkins was released from prison on parole (*i.e.*, supervised release) more than a month before the Fifth Circuit issued its decision in this case. Counsel filed a motion advising the court of appeals that Mr. Adkins had been released from prison by the date of its decision and requesting that the court vacate its decision for apparent lack of jurisdiction. The court denied that motion in a per curiam order. App. 45a. There are only two plausible explanations for the court's order: (1) either the Fifth Circuit determined that Mr. Adkins's case was not moot, or (2) the court accepted respondents' central contention that the Fifth Circuit's decision in this case was simply too "important" to vacate. Either way, the Fifth Circuit's ruling refusing to vacate its decision squarely conflicts with the decisions of this Court and of other circuit courts, and therefore provides an independent basis for this Court's review.

2. Under the settled rule—which is grounded in Article III's "case or controversy" requirement—"a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496, (1969); *see also Church of*

Scientology of Cal. v. *United States*, 506 U.S. 9, 12 (1992) (a claim is moot when "an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' ") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). Applying that rule, courts have held that when, as here, an inmate sues only for equitable relief challenging his conditions of confinement, the lawsuit becomes moot if the inmate is released from prison. *See, e.g., IAL Aircraft Holding, Inc.* v. *FAA*, 216 F.3d 1304, 1306 (11th Cir. 2000); *McAlpine* v. *Thompson*, 187 F.3d 1213, 1218 (10th Cir. 1999); *Gillespie* v. *Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc) (per curiam).[7]

The only conceivable basis for concluding that Mr. Adkins's release from prison did not moot his RLUIPA claim is his parole status. Mr. Adkins was released on "supervised release" subject to numerous conditions and, under the terms of his Certificate of Mandatory Supervision, his parole may be revoked for violation of those conditions. *See* Certificate of Mandatory Supervision, *supra*, at 3. During his parole, Mr. Adkins "remain[s] in the legal custody of the State of Texas subject to the orders of the [Parole] Board and Parole Division." *Id*. Courts have reached different conclusions as to whether an inmate's parole or other conditional release is sufficient to avoid a mootness challenge to a conditions-of-confinement claim. *Compare McAlpine*, 187 F.3d at 1215; *United States* v. *Johnson*, 23 Fed. Appx. 832, 833 (9th Cir. 2001) *with Morales* v. *Schmidt*, 489 F.2d 1335, 1336 (7th Cir. 1973) (suggesting that prisoner's challenge of his prison conditions might not be moot even after his release from

[7] Other courts have concluded likewise in similar circumstances. *Abdul-Akbar* v. *Watson*, 4 F.3d 195, 206-207 (3d Cir. 1993) (unconditional release); *Martin* v. *Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985) (transfer). *But see Rosales-Garcia* v. *Holland*, 238 F.3d 704, 713 (6th Cir.) (holding that a challenge to an INS detention is not moot where detainee is released but required to remain in a supervised release program), *vacated on other grounds*, *Thomas* v. *Rosales-Garcia*, 534 U.S. 1063 (2001).

prison because "there is always the possibility that [the prisoner] during his period of parole will violate the terms of his conditional release and thus be returned to prison"); *Micklus* v. *Carlson*, 632 F.2d 227, 232-233 (3d Cir. 1980) (finding that because youth offender could be recommitted if Parole Commission determined he would benefit from recommittal, parole did not moot claim for equitable relief).

To the extent that the Fifth Circuit held that Mr. Adkins's RLUIPA claim was not moot because of his continuing parole status during the appeal, then the court's ruling conflicts with the decisions of other circuits. This Court should review and resolve the question whether, or in what circumstances, an inmate's supervised release from prison on parole moots an equitable challenge to prison conditions. Moreover, to be clear, to the extent that Mr. Adkins's conditional release from prison did not moot his RLUIPA claim, he continues to press that claim and to seek relief from the judgment below. Mr. Adkins has an interest in ensuring that, if he is found to have violated the terms of his release, he is not returned to a prison environment in which—under the Fifth Circuit's decision in this case—prison officials are free to discriminate against his religious practices by hiding behind the veil of "generally applicable" rules.

3. The other and perhaps more likely basis for the Fifth Circuit's ruling denying Mr. Adkins's motion to vacate the decision below is that the court agreed with respondents' contention that the decision was too important to vacate.

As discussed above, respondents opposed Mr. Adkins's motion on the ground that the Fifth Circuit's decision is of the "utmost importance." App. 49a. Respondents explained that, although "the general rule is to vacate the judgment" if a case becomes moot during appeal, "[t]his doctrine is an equitable one." *Id*. at 48a. And respondents argued that, in this case, "the equities favor[] retaining the decision" in light of its "importance" to the Texas prison system. *Id*. at 49a. In support of that contention, respondents declared:

> Until this decision was issued, there were no guidelines in this circuit detailing the analysis to use in claims brought under the RLUIPA. *A decision declaring and clarifying the law is of utmost importance* and, in light of the complete absence of case law interpreting the RLUIPA in this circuit, *it would not be prudent to withdraw the opinion*.

Id. at 49a (emphasis added).

To the extent that the Fifth Circuit embraced that argument, its ruling directly conflicts with this Court's decisions. As this Court recognized in its seminal *Munsingwear* decision, the "established practice * * * in dealing with a civil case from a court in the federal system which has become moot [during the appeal] * * * is to reverse or vacate the judgment below and remand with a direction to dismiss." 340 U.S. at 39. Indeed, the Court described that time-honored practice as "the duty of the appellate court." *Id*. at 40 (quoting *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936)). The Court recently reaffirmed that practice in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 25 (1994). In *Bonner Mall*, the Court held "that mootness by reason of *settlement* does not justify vacatur of a judgment under review." *Id*. at 29 (emphasis added). The Court reiterated, however, that vacatur remains the only appropriate action "where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties.' " *Id*. at 23 (quoting *Karcher* v. *May*, 484 U.S. 72, 83 (1987)). In addition, the Court emphasized that, when the losing party cannot appeal the opinion due to "the vagaries of circumstance," he "ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25. Mr. Adkins did not release himself from prison, and thus this Court's precedents strongly counseled the Fifth Circuit to vacate its opinion.

Furthermore, this Court has emphatically rejected the notion that the federal courts ought to adopt "a practice of deciding questions of importance even though the case has

become moot." *See Amalgamated Ass'n of Street, Elec., Ry. & Motor Coach Employees* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 416, 418 (1951). In *Amalgamated Association*, the Court declined the invitation of the parties to follow the "importance" exception to the mootness doctrine adopted by the Wisconsin courts. As the Court explained, "whatever the practice in Wisconsin courts, 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants before it.' " *Id*. (citing *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115 (1920)); *see also Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union* v. *Missouri*, 361 U.S. 363 (1960). To the extent that it adopted respondents' position, the Fifth Circuit's ruling in this case denying Mr. Adkins's motion to vacate flatly contradicts that precedent. [8]

In addition, the Fifth Circuit's action conflicts with the decisions of other circuits. As the Tenth Circuit stated in *Jones* v. *Temmer*, 57 F.3d 921, 923 n.1 (10th Cir. 1995):

> We * * * reject out of hand defendants' argument that vacatur should be denied because of an asserted "governmental interest" in having the lower court

[8] In *Friends of the Earth, Inc.* v. *Laidlaw Env'tl Servs.*, 528 U.S. 167, 191-192 (2000), this Court observed that "[t]o abandon the case at an advanced stage [due to mootness] may prove more wasteful than frugal." Some have pointed to *Laidlaw* and argued that "the Supreme Court is moving toward the prudential mootness doctrine advocated by Chief Justice Rehnquist in his concurrence in *Honig* v. *Doe*, [484 U.S. 305, 329-332 (1988)]." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1141 (9th Cir. 2005) (en banc) (Fletcher, J., joined by Graber and Paez, JJ., dissenting). This Court itself has not abandoned the enduring principles underlying cases such as *Bonner Mall*, *Munsingwear*, and *Amalgamated Association*. But to the extent that *Laidlaw* creates any doubt on this score, it only heightens the need for review in this case to clarify the Court's position on this fundamental and recurring question of federal jurisdiction and practice.

> opinion available as precedent. The Supreme Court has never indicated that such an interest is a factor to be considered in the treatment of moot cases.

See also Murray v. *Silberstein*, 882 F.2d 61 (3d Cir. 1989) (vacating decision as moot despite its asserted importance).[9]

The fact that the Court's decision in this case—issued without the benefit of oral argument—decides an important federal question on which the circuits are divided only heightens the need for following the customary vacatur practice here. *Cf. Clarke* v. *United States*, 915 F.2d 699, 708 (D.C. Cir. 1990) ("Vacatur appears particularly appropriate where retention of the precedent creates a gratuitous conflict with a co-equal branch of government."). Indeed, one of the reasons that this Court utilizes its vacatur practice is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 40-41. That consideration is particularly appropriate in this case in view of the circuit conflict over RLUIPA's "substantial burden" test and the fact that the rule adopted by the Fifth Circuit directly contravenes RLUIPA itself.

Nor does it serve the interests of this Court to condone a practice whereby the lower courts improperly refuse to vacate their own decisions due to mootness at the urging of the prevailing party, leaving certiorari as the only avenue of vacating a moot decision. In opposing Mr. Adkins's motion to vacate, respondents suggested to the court of appeals that the "remedy" in this situation was for Mr. Adkins to "file a petition for certiorari" with this Court. App. at 50a. A

---

[9] Furthermore, Mr. Adkins was paroled *before* the Fifth Circuit decided his case. If the "case or controversy" required by Article III ceased to exist before the Fifth Circuit issued its decision, then that court lacked jurisdiction to enter a judgment. *IAL Aircraft Holding, Inc*, 216 F.3d at 1307 (concluding that jurisdiction ceased "the moment the alleged mooting event occurred"); *Humphreys* v. *DEA*, 105 F.3d 112, 115 (3d Cir. 1996) (choosing not to vacate decision because at "the time [the] decision was filed, there was indisputably a live controversy between the parties").

litigant might believe that—if they can succeed in convincing a lower court that its decision is too important to vacate for mootness—there is "safety in numbers" in this Court's certiorari docket. This Court should deter any such litigation strategy on the part of parties seeking to preserve favorable decisions that have been mooted by happenstance.

Accordingly, even if the Court concludes that plenary review is not warranted on the "substantial burden" question, this Court should grant the petition and consider whether the Fifth Circuit properly declined to vacate its decision after it was informed that Mr. Adkins had been released.[10]

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed or, at a minimum, vacated.

Respectfully submitted,

ANTHONY R. PICARELLO, JR.
DEREK L. GAUBATZ
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
(202) 955-0095

GREGORY G. GARRE*
MICHELLE D. MORRIS
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5665

* Counsel of Record

Counsel for Petitioner

[10] If the Court concludes that this case is moot and that plenary review is not warranted, the Court should grant the petition, vacate the Fifth Circuit's decision, and remand with instructions to dismiss Mr. Adkins's complaint without prejudice. *See Munsingwear*, 340 U.S. at 39-41; 28 U.S.C. § 2106.