This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
PASTOR RICK BARR AND PHILEMON HOMES, INC.,
v.
THE CITY OF SINTON.
No. 06-0074.

March 22, 2007

Appearances:
JAMES C. HO, Gibson, Dunn & Crutcher LLP, LOS ANGELES, CA.
CARLOS VILLARREAL, Hermansen, McKibben, Woolsey & Villarreal, L.L.P., CORPUS CHRISTI, TX.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

CONTENTS
ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF CARLOS VILLARREAL ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 06-0074, Pastor Rick Barr and Philemon Homes Inc. v. the City of Sinton.
SPEAKER: Mr. Ho will present argument for the petitioners. The petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER

MR. HO: May it please the Court. This case presents a fundamental question. What [inaudible] and conflicts with the religious practice? The Texas Legislature answered that question when it enacted the Religious Freedom Restoration Act. In that act, the legislature made a policy judgment that courts should favor the religious practice, unless the government can override that presumption.
JUSTICE MEDINA: Well, how does requiring this facility to move to a different part of the county have an impact or an effect on religious practice here?
MR. HO: In this case, your Honor, the ordinance effectively requires a preexisting facility -- expels it from the city limits. That's not just a substantial burden, your Honor, that is an outright prohibition and that satisfies any accepted definition of the term "substantial burden."
JUSTICE MEDINA: Was the ordinance enacted after the facility and

the church in this ministry were in place or was it -- the ordinance -- did the ordinance exist first?

MR. HO: The facility was in operation --

JUSTICE MEDINA: Then the ordinance came?

MR. HO: Right. And if you think about sort of the typical zoning ordinance, you know, ordinarily you have a zoning ordinance that sets up a scheme and it often grandfathers in preexisting uses. The fact that this was a preexisting use of (inaudible), we would submit that any move, to be honest, would constitute substantial burden. But this case is particularly easy and extreme on that regard.

CHIEF JUSTICE JEFFERSON: The briefs contradict each other on whether the record shows that felons are among the inhabitants of the facilities. Can you straighten that out?

MR. HO: I would be happy to, your Honor. There have been felons in the past, nonviolent offenders. The record is clear on that point. Pastor Barr additionally noted that going forward in the future, he would be interested in limiting it to just misdemeanor offenses.

CHIEF JUSTICE JEFFERSON: Does the disposition of that case turn on whether felons are inhabitants or not of these facilities?

MR. HO: I don't think so, your Honor, and it goes to the heart of what the compelling interest standard adopted by the Texas RIFRA statute is all about.

CHIEF JUSTICE JEFFERSON: So, a felon -- so if that doesn't turn the case, then assume with me that the church's ministry reached out -- that their ministry reached out to sexually violent predators, felons who have a sexually violent predator history. Could a city prohibit people, those sorts of convicts from being residents within so many yards of the school?

MR. HO: I welcome the opportunity, your Honor, to try to ease the Court's concerns on that regard. A couple of thoughts: First, let's keep in mind that under the city's view, you and I aren't even allowed to have this conversation. This is a conversation that should have taken place in the trial court. Texas RIFRA does not provide a free pass to either government or religion. It is simply providing a process under which the government would have the opportunity and the burden to come in and explain its considerations. The case that you played out, your Honor, the government will undoubtedly have ample evidence, and it will win that case. This case is very, very different. The government here first of all denied it had any duty whatsoever to present any case. It could just fold up its arms and say, "Look at the law" and that is the end of the story. In addition, this ordinance does not distinguish between misdemeanor traffic offenses and sexual offenders, serial murderers, or other more severe categories. That's exactly the problem with this ordinance, your Honor. It treats the homes as if they have an open door policy to every criminal in the state when, quite the contrary, it is undisputed in the record of this case that Pastor Barr has employed a very carefully screened process. He's not interested in violent offenders. He's said that from the outset. That's completely undisputed.

CHIEF JUSTICE JEFFERSON: But that's -- but your case doesn't turn on whether the felons would be inhabitants or not, right? I just don't understand why that makes a difference to the church's case.

MR. HO: Well, it shouldn't make a difference in this case, your Honor, because the city simply has not even acknowledged its duty, let alone presented the evidence.

CHIEF JUSTICE JEFFERSON: I'm trying to -- we're gonna be having to write an opinion that governs not just this case but other cases that

may come in the future. And so, my question is, is it a point that turns our decision whether felons are inhabitants - whether violent or nonviolent or sexually violent predators? I mean, does the character of the ex-convicts make a difference or not?

MR. HO: I think what turns this case is not the character or a particular category of offenses, but rather the kinds of evidence that the city presents. Let's say, for example, the city at trial, let's say on remand, submitted ample evidence that was convincing to a court that every felon in the state should not have -- should not be in this facility. That's not what they did here, they didn't pres -- I didn't. Let us say they had. Even then, even in that situation, your Honor, Pastor Barr would be entitled to an injunction. That would be a limited injunction. It would be crafted only with respect to certain kinds of offenders, misdemeanors only, for -- would be a particularly narrow class. But we would still be entitled to an injunction.

I would refer the Court's attention, for example, to the very recent and unanimous decision by the United States Supreme Court in Gonzales v. UDV. In that case, applying the Federal RIFRA Law, the Court found that it is not enough for the government to simply sit back and say, 'Look at this law, it's a very important law, and that is all we need.' The U.S. Supreme Court specifically instructed that the government has to present evidence, not about the statute, but about the application of that statute to particular class of individuals. Not only that, not only are we concerned about the class of individuals who might be accepted as residents, but what kinds of measures? What are the least restrictive means for furthering any particular interest the government has? Why do you need outright prohibition, as in this case? There could have been more moderate measures, in fact the city talks about supervision, security. Those might have --

CHIEF JUSTICE JEFFERSON: Were any other facilities impacted by the ordinance?

MR. HO: There are no facilities in the record, your Honor, that would have been affected one way or another. This appears to be the only one and, in fact, this was the motivation for the ordinance.

JUSTICE WAINWRIGHT: Without the Religious Freedom of Restoration Act, would the standard applicable here be strict scrutiny or some lesser standard?

MR. HO: That is an interesting question. It is thankfully one that we don't address but sort of hypothetically, there are a couple of things that we would look to. First, there will be this Federal or LUPA statute which would apply to any zoning, any land use in the country, so long as it meets the federal jurisdictional requirements, interstate commerce, that sort of thing. Second, even if we don't have that, this is something on which scholars disagreed, but what does Smith leave? There appears to be an argument that Sherbert actually survives Smith in this narrow setting when you have individualized government assessments. In fact, there have been cases where, after Smith, courts continue to cite -- I'm sorry -- continue to apply compelling interest in zoning cases. None of those academic questions are necessary here, of course, because we do have the Texas RIFRA statute as well as the Federal LUPA statute.

JUSTICE MEDINA: Is there a distinction between religious belief and religious activity? Because, you know, their beliefs don't seem to be impacted by this ordinance but certainly their activity is impacted.

MR. HO: Certainly, your Honor, I think Texas RIFRA itself answers this question. In point 001 of the statute, the legislature defines what it means by free exercise of religion, what it's trying to protect

in the statute. And it says, 'not just the belief, but an act or refusal to act that is substantially motivated by sincere, religious belief.' In this case, there is no dispute, and the Court of Appeals in fact stipulated, that this was, in fact, substantially motivated by sincere religious belief.

JUSTICE JOHNSON: (Inaudible) in the Atkins case, the Fifth Circuit has examined these court cases and has come up with a definition, and they say that the governmental action creates a substantial burden on religious exercise. That would be the conduct we're talking about here. If it freely pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs, now is -- before we ever get to the question of compelling state interest, we have to have a substantial burden, is that correct?

MR. HO: That is correct, your Honor.

JUSTICE JOHNSON: And do you agree or disagree with the Atkins' definition of substantial burden?

MR. HO: Well, that case, your Honor, like many others, does specify, just sort of states a general proposition. There are additional cases which supply a zoning-specific definition of what substantial burden is. And let's look to the Fifth Circuit, for example, in the Islamic Center decision. There you had a facility, a new facility, a proposed facility, where there were alternative locations even within city limits. Even in that case, your Honor, the Fifth Circuit said that was, in fact, a substantial burden. And in fact, it was a constitutional violation in that case. Now this case is even easier, and there are the two factors that I would point to. One, it's not just a move, we would submit that any move would pose a burden, but here it's an expulsion from the city. Second, this is expulsion of a facility that could have been grandfathered in, it preexisted the ordinance. I would submit, if that is not a substantial burden, we have essentially carved out zoning from the statute.

JUSTICE JOHNSON: Well, is substantial burden simply, if you just have to move from one place to another, does that impose a substantial burden? What if they had to move two blocks down the street?

MR. HO: Well, there are two --

JUSTICE JOHNSON: I know that's not your case, but what if that's all that were required, would that be a substantial burden?

MR. HO: In that different case, your Honor, I would propose that the Seventh Circuit test, articulated by Judge Posner, is an appropriate standard. In that case, Judge Posner, analyzing pre-1990 case law, says that any delay, uncertainty, or expense would in fact constitute substantial burden.

JUSTICE JOHNSON: Not just a burden, but any delay. In that case you wouldn't even have to have a material -- there is a difference between a burden and a substantial burden. And so, your position would be any type of burden that made them alter their conduct, i.e. walking two blocks down the street to conduct this activity, would be a substantial burden?

MR. HO: Well, it won't always be. I mean, if we are talking about just walking down the street --

JUSTICE JOHNSON: Well, if that's the example I just gave you, if the ordinance required only to be moved two blocks down the street and they can do it in the house down there, is that a substantial burden? So that any movement or if not, how much is a substantial burden as opposed to a burden? That's what I think I'm struggling with.

MR. HO: Certainly. Thankfully, this case is an easier one but I understand the idea of wanting to articulate a broader rule. Judge

Posner, I think, had articulated a standard that is faithful to the text. It has to be a substantial burden. It doesn't mean insurmountable and it doesn't mean incidental. For example, if a zoning ordinance were to say, you have to -- a fire code, for example, you have to allow inspectors to come into your facility to make sure you're complying with fire codes. First of all, that would presumably be a compelling interest. I'm not even sure that would be a substantial burden.

JUSTICE JOHNSON: What is the religious, what is the religious practice that's being a burdened here? Is it the rehabilitation, is it the teaching, or is it the meeting in a particular place?

MR. HO: In this case, your Honor, I would submit that it is all of the above. It is unquestionable --

JUSTICE JOHNSON: Meeting in a particular place is religion? Is the religion to simply meet in a particular place?

MR. HO: Well, not in theory, your Honor, not in the abstract. I think it depends specifically on the particular facts in the case and the particular record that's available. In this case, there's no question of insincerity and there's no question that Pastor Barr firmly believes, and his application process firmly confirms, that living together with others who are traveling the same path, that is not only a religious activity, it's a powerful positive reinforcement. I take it that's the central --

JUSTICE JOHNSON: Where? Where? Does that have to be, I mean, does he have to be there? If simply -- if they let him do it, if he moves six blocks away? But he can do the same thing six blocks away. Get him in there -- he -- gets to conduct his religious activities, to have them together and to teach them, but he just has to move a little further away. That is still a substantial burden?

MR. HO: Well, I think there are two questions in what your Honor is saying. One is what constitutes the religious activity and separately, what would be a burden on that activity.

JUSTICE JOHNSON: Exactly.

MR. HO: So going to the first point, what is religious activity? In this case --

JUSTICE JOHNSON: Well, let's go to this question. Is the place where it's conducted religious activity? That's what we're talking about here. They haven't said you can't do it. You just can't do it in certain places which we're gonna make you move out. Is the place it's conducted a religious activity?

MR. HO: Well, let us start with the couple of, sort of, maybe easier propositions. First of all, the fact that a church is necessary to engage in group worship. You could take the position where you don't have to be in a church. You could practice at home. You could do it individually. Nevertheless, the courts are consistent in regarding the protection of churches as a place of group worship, as religious activity. Second, in this case, living together with others traveling the same religious path as you in a particular setting designed for such activities, I would submit, is a religious activity. Here, the record is clear at page 33, everyday starts at 5:30 with prayer --

JUSTICE JOHNSON: Couldn't they do it outside the city?

MR. HO: Well again, that's the substantial burden point. And we would submit --

JUSTICE JOHNSON: Fine. That's what I'm saying. On religion, that's a substantial burden on where they're doing it. Is that a substantial burden on religion because the location has to be changed?

MR. HO: Well, the Fifth Circuit has told so in the Islamic Center case. We could also look, for example, to the U.S. Supreme Court in

Sherbert. There, all we're talking about is getting another job or losing your unemployment compensation. In that case, the Court was quite clear that just a few dollars, or probably substantial dollars, nevertheless, that's a substantial burden. That is exactly why Judge Posner, in the Seventh Circuit case, presents the notion that really any substantial delay, uncertainty, or expense would constitute a substantial burden. Here, what more could the city have done to prohibit this entity?

JUSTICE HECHT: Do you think any regulation that targets religious activity can be insubstantial?

MR. HO: I suppose it is possible. It's unlikely, I mean, if an ordinance is designed to go after a religion.

JUSTICE HECHT: But you claim, in this case, it's designed -- there's evidence in this case that this ordinance was designed to do something about these homes.

MR. HO: It is a part of the record of this case and it's undisputed. It's also unnecessary to winning this case. All we have to show is that there was, in fact, a substantial burden and the government failed to present its burden of proof.

JUSTICE O'NEILL: Can you walk me through what that burden of proof would look like? Assume you clear the substantial burden hurdle, and assume with me that the state does not meet its burden on the remaining elements, does that create a special class for religious institutions?

MR. HO: I see my time has expired. May I answer?

CHIEF JUSTICE JEFFERSON: Would you, please?

MR. HO: So if I understand your Honor's question, substantial burden is met, the government fails to present its burden. That is a unique case and that is -- happens to be this case. Typically, the government would at least attempt to satisfy its burden. In this case, it has not done so, presented no evidence, and under the Gonzales v. UDV U.S. Supreme Court decision recently, the facility, the religious activity, would win.

JUSTICE O'NEILL: That's what I'm saying. Does that then not elevate a religious institution as a special class that's immune from a general safety regulation?

MR. HO: Well, not immune in all cases. Immune in [inaudible] burden, but yes, your Honor. I think that's exactly what Texas RIFRA was designed to do. That's the policy judgment that the legislature unanimously adopted.

JUSTICE O'NEILL: To exempt religious institutions from safety regulations?

MR. HO: Not to exempt but to provide a process where the government would have to present its evidence. Normally, the government just sort of sits back, sees an ordinance, decides if it wants to enforce the law, and doesn't have to explain, you know, "Why me?" It just says the law is what the law is. Under Texas RIFRA, the government has to do more than that. The government has to explain, "Well, this is why we want to apply the statute to this particular activity." I take it that is expressly what is provided in the Texas RIFRA statute.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Mr. Ho. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Villarreal will present argument for the respondents.

ORAL ARGUMENT OF CARLOS VILLARREAL ON BEHALF OF THE RESPONDENT

MR. VILLARREAL: May please it the Court. Carlos Villarreal here for the city of Sinton, the small city of Sinton. We have about 6,000 residents in Sinton, take about two square miles in area, and consistent with what I think most small towns try to do, it tries to protect its citizens within the bounds of the law. In this regard, what happened here is, all of a sudden, neighbors in a residential neighborhood found themselves with convicts showing up in a house; a house that was unsupervised. Mr. Barr didn't live there. It was a situation that had no safety measures whatsoever with regard to the ingress and egress of these prisoners. And they contacted, obviously, the authorities.

JUSTICE GREEN: These are prisoners under the supervision of the Texas Department of Corrections?

MR. VILLARREAL: Yes, your Honor. They are still under the legal custody of the Texas Department of Corrections. And they have been paroled to his facility which, the evidence in the record is clear, does not meet state statutes or state guidelines with regard to correctional or rehabilitation facilities. And --

JUSTICE GREEN: But the state released them to the custody of this halfway house?

MR. VILLARREAL: I'm sorry, your Honor?

JUSTICE GREEN: But the state did release them to the custody of this, essentially, a halfway house.

MR. VILLARREAL: Yes, that is correct. That's correct. I think the record shows that a total of 15 parolees, or maybe 14 parolees and one probationer were actually in this facility over the course of its operation.

JUSTICE BRISTER: So why didn't the citizens contact the state and say, 'You need to' --

MR. VILLARREAL: That's exactly what happened, your Honor. The testimony, I regret that it is not in any of the statement of facts, but the testimony of Joe Schuman, who is the police chief, was this was going on, it came to his attention, and he called up because he thought it was a violation of state law but he did not want to go out there and start shutting people down. So, he called the parole people and asked them what's going on. And this was actually before the ordinance was passed. I believe this is in violation of state law. They confirmed that, in fact it, it was operating in violation of state law. And so at that point, they approached Mr. Barr and say, 'What are you doing? You shouldn't be doing this. This is in violation of state law.' And the response is, 'Well, I don't have a contract with the state so those don't apply to me, 509 of the government code and 244 of the local government code that provide setoffs, that provide a requirement for adequate security measures for the population served. I don't have to adhere to them,' was Mr. Barr's response.

JUSTICE O'NEILL: So you, you acknowledge that the ordinance was directed at this home in particular, these homes in particular.

MR. VILLARREAL: Your Honor, I think the testimony was that the ordinance came after this inquiry was made and Mr. Barr says, 'It doesn't apply to me.' Then the ordinance came in and what the city was trying to do was to make the same requirements that are applicable in state law applicable to the city of Sinton. And what -- there's a side light, and it's a minor point but I do urge it as an issue at this point, that the trial court found that in fact, these places violated 244 of the Local Government Code and 509 of the Government Code and

therefore, any relief with regard to the ordinance being declared unconstitutional doesn't give them the relief they request.

JUSTICE HECHT: But I don't understand that because the ordinance would keep them from being located where they are whether they complied with state law or not, wouldn't it?

MR. VILLARREAL: Well, the state law would prevent them from operating the way they want to operate, your Honor. Is -- that's the finding of the trial court; that these facilities were in violation of state law.

JUSTICE HECHT: But if they could operate within the bounds of state law, the ordinance would still prohibit them from being located where they are, within a thousand feet of a residence, church --

MR. VILLARREAL: If they complied with state law, then they would be complying with the ordinance.

JUSTICE HECHT: No, no.

MR. VILLARREAL: Because the ordinance and the state law are co-terminus in terms of distances from residential neighborhoods, parks, and churches, etc.

JUSTICE HECHT: Well, then I guess I'm confused.

MR. VILLARREAL: 244 of the Local Government Code says, and it's kind of convoluted in its explanation, but basically you've got a thousand foot buffer zone between a correctional rehabilitation facility and a residential neighborhood, a church, a school, etc., parks.

JUSTICE BRISTER: Have a grandfather provision?

MR. VILLARREAL: I'm sorry?

JUSTICE BRISTER: When it was passed, did it have a grandfather provision?

MR. VILLARREAL: The Texas -- the 244 of the Local Government Code? I have not seen any, your Honor.

JUSTICE BRISTER: I mean, it's a little different if you have a code in place and then the church wants to come in and build there, or if you have a church that's there and then you passed the code.

MR. VILLARREAL: I understand, your Honor --

JUSTICE BRISTER: But one is an unconstitutional taking, or at least arguably.

MR. VILLARREAL: Well, there was no unconstitutional taking claim urged and there were a lot of constitutional claims made, but there's no question that these residences still have value so I don't think you would have a takings claim, but with regard to the ordinance coming after these homes started to operate, first of all, they're in violation of state law anyway, but secondly --

JUSTICE BRISTER: So, I'm confused then. Do you think it's in violation of state law -- the police chief? Who went out? The police chief --

MR. VILLARREAL: The police chief, Joe Schuman.

JUSTICE BRISTER: -- goes out. The resident says, 'No, I'm not' and then the police chief stops. Is that what the police chief normally does when people are violating the state law in Sinton and they say, 'No, I'm not' and he just throws up his hands and gives up?

MR. VILLARREAL: Well, I think he is trying to tactfully deal with the situation, Judge.

JUSTICE BRISTER: By going to the city and --

MR. VILLARREAL: -- by going to the city and saying this is his explanation and at that point the ordinance was passed. So I mean, in terms of which came first, well the statute came first.

JUSTICE BRISTER: Oh, I'm -- see, I'm -- you're saying we're not

doing anything other than what the state says, but then at the same time you're saying the state is not doing anything.

MR. VILLARREAL: Well, the state is doing something. That's -- I mean, that there is no question that 244 is on the books.

JUSTICE MEDINA: Why do you need the ordinance that apparently targets this facility so that the sheriff or whoever the law enforcement is there now has the authority of the city to act when, according to your argument, he had the authority of the State Law of Texas to act?

MR. VILLARREAL: Absolutely. The trial court has so found. The trial court found them in violation and that's why I have argued that this is moot because they didn't challenge the state law. They're just challenging the ordinance.

JUSTICE HECHT: Well, what's the answer to the question, though? Why do you need the ordinance if you have got a state law? What is the answer to that?

MR. VILLARREAL: The answer to that question is you don't need the ordinance.

JUSTICE HECHT: Well, then why did you pass it?

MR. VILLARREAL: Well, it was passed to make sure that even if this facility wasn't contracting with the state, which was his contention, that it will still be subject to the same requirements of state law. Now, the fact that matters is that the trial court found that he had a contract with state law, with state authorities, and therefore the state law does apply. But if he didn't have a contract with the state, then the ordinance would apply.

JUSTICE HECHT: Let me ask you this. Is there any other facility, we asked the petitioner, is there any other facility in the city of Sinton to which this would apply?

MR. VILLARREAL: No, sir.

JUSTICE O'NEILL: Now let me make sure I understand. If these homes came into compliance, if - they would still be in violation of the ordinance?

MR. VILLARREAL: If they came into compliance -- I'm not sure what you mean. If they came into compliance they would have to be a thousand feet away from a residential neighborhood.

JUSTICE O'NEILL: (inaudible) be in compliance with the state law governing halfway houses?

MR. VILLARREAL: That is what state law provides under 244.

JUSTICE O'NEILL: That would still be in violation of the ordinance.

MR. VILLARREAL: Yes. Well --

JUSTICE O'NEILL: The ordinance is not the least restrictive measure available to rectify the safety concerns.

MR. VILLARREAL: Your Honor, I'm not sure I have made myself clear. 244 of the Local Government Code provides for a thousand foot setoff. The ordinance provides for a thousand foot setoff. Therefore, if you are in compliance with state law, then you are in compliance with the ordinance.

JUSTICE HECHT: And that is for the facilities run by the state?

MR. VILLARREAL: That is for facilities in which a private contractor has a contract with the state.

JUSTICE HECHT: But the new ordinance applies to a residential facility that does not have a contract with the state.

MR. VILLARREAL: Right. The ordinance applies to people who have not contracted with the state. That is correct.

JUSTICE HECHT: And the statute would not apply to them?

MR. VILLARREAL: This statute would not apply to them on these terms. That is correct.

JUSTICE HECHT: So, the reason that you could not do anything under the statute is because it did not apply?

MR. VILLARREAL: No, that is not what the trial court found. The trial court found that it does apply because there is a contract with the state because Mr. Barr does have an agreement with the parole people. They are signing off on agreements with regard to who is being released to his premises, etc. So, so there --

JUSTICE HECHT: So this ordinance doesn't even apply then?

MR. VILLARREAL: The ordinance is as applicable as state law.

JUSTICE HECHT: The ordinance applies if it is not operated by the state. The state law applies but is operated by the state --

MR. VILLARREAL: That is right and the trial court found --

JUSTICE HECHT: Those two are different.

MR. VILLARREAL: That is right.

JUSTICE HECHT: One is over here, one is over here --

MR. VILLARREAL: I understand that you are trying to make them mutually exclusive, Judge.

JUSTICE HECHT: I'm just trying to understand.

MR. VILLARREAL: And all I'm saying is that in this case, his contention was he was not operating under state law because he did not have a contract with the state but the trial court found otherwise.

JUSTICE HECHT: So the ordinance doesn't even apply [inaudible].

MR. VILLARREAL: In my estimation, the ordinance would not need to apply because state law applies.

JUSTICE WILLETT: But state law has to apply with RIFRA, and RIFRA applies to state law as well, doesn't it? Not just the city ordinances but state statutes too.

MR. VILLARREAL: Yes, your Honor, that is correct but RIFRA has not, I mean, they have not utilized RIFRA to challenge the state law that is applicable. There is absolutely no challenge to 244 or 509 in any of the plaintiff's pleadings. Judges, what amazes me is that we've been here now, I guess they argued for 15 minutes and I have argued for ten now, 25 minutes and nobody has mentioned 1-10-10 of the Civil Practice and Remedies Law.

CHIEF JUSTICE JEFFERSON: Well, he did talk a little bit about the pre-1990 law and Justice -- it was Judge Posner's decision in Seventh Circuit.

MR. VILLARREAL: Judge Posner's decision was not pre-1990. Judge Posner's decision that he is talking is about is under RLUIPA, which was passed in the year 2000.

CHIEF JUSTICE JEFFERSON: Then why was he talking about pre-1990 federal court interpretation?

MR. VILLARREAL: Well, I did not catch that. What I understand is he is quoting from Posner's opinion that came, I believe, it was a '96 case or whatever but -- or maybe after that, but it was under - after that because it was under RLUIPA. At least what they have cited in their briefing is, you know, the Religious Land Use and the Incarcerated Person's Act, and that was passed in 2000 by the federal government. And it's very important that the court appreciate that's a distinct act with distinct definitions and standards for what you are applying. If you look at the way courts have interpreted and the way substantial burdens are defined under RLUIPA, it is a much easier standard to meet. If you look at the way, as Judge Johnson was mentioning earlier, that the courts have defined substantial burden under RIFRA pre-1990, it's a much more difficult standard to meet.

Simply moving your church, indeed there are only six federal cases that have ever addressed this issue of zoning and a free-exercise challenge to a zoning provision. In those six cases, five of them held that the ordinance was constitutional, and they involved location of churches. The sixth case they cite is the Islamic Center v. Starfield case. And it's very important because I didn't have a chance to respond to their reply brief. Their reply brief misstated that the Fifth Circuit in that case applied a compelling interest standard. If you look at it, they did not apply a compelling interest standard. Indeed, they distinguished the compelling interest standard that was talked about in the Lakewood case.

JUSTICE BRISTER: If they concede that the city ordinance could not be applied to churches, you couldn't pass the same city ordinance and make it 'churches cannot be located within a thousand feet?'

MR. VILLARREAL: Your Honor, actually, there are so many, as I say the precedence pre-1990 --

JUSTICE BRISTER: That's a yes or no. It's hypothetical, I understand. Could you pass the city ordinance? Could the city say, in Sinton, 'No churches within a thousand feet of a residential area park, etc?'

MR. VILLARREAL: Under the pre-1990 case law, I think that they can, consistent with that case law because that case law repeatedly held that the zoning provisions where they restricted the location of these chapels were indeed constitutional. Those cases also recognize -- they didn't even get to the compelling interest standard. What we know from the Texas legislative history as --

JUSTICE BRISTER: I just want to be clear. You think, we're talking about Texas RIFRA now, and you think consistent with that law, Sinton could pass an ordinance saying, 'No churches within a thousand feet of all these residential, etc?'

MR. VILLARREAL: Your Honor, as I said I think that's what the case law pre-1990. Yes.

JUSTICE BRISTER: I'm just asking. You keep changing my question. My question is just whether RFRA does not, I mean, my impression is, I didn't follow this that closely, my impression is the legislatures over there would be shocked that they passed this ordinance and you say it would have been perfectly fine with them to move churches away from everything inhabitable. Is that really what they intended when they passed the RFRA?

MR. VILLARREAL: Their explicit language, which is what I had to gauge their intent by, is that not withstanding any other provision of the Texas RIFRA, the federal case law pre-1990, the authority to zone is governed by that case law pre-1990 federal cases, and those cases did indeed repeatedly allow for zoning authorities to zone out, indeed in those cases, churches.

JUSTICE HECHT: The sponsors of the legislation, House and Senate sponsors, have joined an amicus brief signing Professor Laycock's testimony at some of the hearings that Section 10 really does nothing but restate the act as it applies to zoning ordinances. What's your response to that?

MR. VILLARREAL: I think that it's clearly wrong your Honor. If we look at the legislation --

JUSTICE HECHT: It is kind of hard of the sponsors to take that position.

MR. VILLARREAL: Well, no, I don't think it is because what we ought to look at is what those sponsors said during the legislative process. I have quoted to you a colloquy between Representative Danburg

and Representative Hartburg, in which Representative Danburg says, you know, because they introduced the purpose provision, and Justice Willett knows all about this, but they introduced a purpose provision that asked them to limit the compelling interest standard that they are utilizing to the interpretation given in Sherbert v. Werner and Wisconsin v. Yoder. And it did not pass. And it did not pass after substantial testimony that there was a hundred years of jurisprudence applying many different tests aside from the compelling interest standard. And so -- and Representative Hartburg was asked by Representative Danburg, what about these other cases? What about this other jurisprudence? Shouldn't we be open it up to consideration of all this? And Representative Hartburg accepted that. And indeed, we know that the purpose provision didn't make to the legislation, didn't make to statute. So, I think what you can interpret that as, as the legislature recognizing that, in fact, the case law from all those cases prior to 1990. I can cite at least nine of them that did not use a compelling interest standard. There are many cases, and they're all cited in the Smith case, they're cited in my brief, they're quoted in the Smith case extensively, showing you that, in fact, the compelling interest standard was not the standard that was controlling, and indeed we can discern that from the six zoning cases that I have just talked about. The substantial burden standard was applied differently. They required that the ordinance or statute coerce you to violate your religion, or deprive you of a benefit or privilege because of your religion. And here, none of that is taking place. So you don't meet the substantial burden standard under the case law pre-1990.

JUSTICE HECHT: Why would you -- what do you think the legislature, from your looking at the history of it, why do you think the legislature would single out in Section 10 just one kind of case?

MR. VILLARREAL: Let me just add one more thing to what your prior question -- I have mentioned Representative Hartburg, I forgot that Representative Sibley also is on the -- or Senator Sibley rather, was on the record stating to Ms. Arinson, you know, 'You have -- whatever authority you had pre-1990, you are going to have it. You lose no authority by consequence of this bill. So whatever authority that was to zone pre-1990 is what we are talking about here.' That is what Representative Sibley on the record said this legislation is about.

JUSTICE HECHT: But Professor Laycock said was there was no difference, and you disagree with that?

MR. VILLARREAL: Professor Laycock said there was no difference. Professor David said there was, from Baylor. Professor Hamilton said there was too. The assistant city attorney, I think his name is Enkle from San Antonio said the compelling interest standard had never been applied to zoning cases. So the legislators got an earful as to there being a number of different standards that were applied pre-1990, not just the compelling interest standard.

JUSTICE WAINWRIGHT: How do you deal with the City of Lukumi case, a city out of Florida, where the U.S. Supreme Court said an ordinance that is directed at religious practice is not good.

MR. VILLARREAL: Yes, your Honor. I think it is clearly distinguishable. If we look at what went on at those city council meetings --

JUSTICE WAINWRIGHT: Well, obviously, it doesn't involve interpretation of the statute but we're talking about the standards. I want you to incorporate that reasoning from that case into your argument.

MR. VILLARREAL: Well, the Lukumi case, of course in the Santeria

religion, they want to ban animal sacrifices, but what the legislative history there showed was that they wanted to shut down that church. The mayor of the city or the president of the city council stated on the record, 'What can we do to keep this church from opening?' The - another councilman said --

JUSTICE HECHT: But how is that distinguishable? It looks like, I thought your intent here was to shut these down, at least inside the city?

MR. VILLARREAL: No, your Honor. Number one, it was not our intent to shut it down in the city. We had a thousand foot setoff and there is testimony on the record, and they completely -- I guess you hear it enough from amicuses and from these other people and they keep misrepresenting the fact. The testimony is there were minimal locations in Sinton where these could be located. That's the testimony and we have got to interpret that using a deferential standard to the trial court's fact-finding.

JUSTICE WAINWRIGHT: And you acknowledge that the only facility that came within the purview of the ordinance is the facility at issue in this case?

MR. VILLARREAL: That is correct, your Honor. There is no question this facility raised the issue.

JUSTICE WAINWRIGHT: The city undertook an investigation. There is only one facility that would come within the purview of the ordinance, correct?

MR. VILLARREAL: Your Honor, yes. I think the evidence before the court is clear. This facility --

JUSTICE WAINWRIGHT: And that investigation occurred before the ordinance was passed, that review or analysis?

MR. VILLARREAL: The citizens came to the city complaining about what was going on in their neighborhood. I think if you look at the city council minutes, you will see several citizens very concerned with this going on. They were concerned about the security in their neighborhoods. They were concerned about the location of these premises. They were concerned about some intimidation that they perceived that was going on from this facility. So, that is how it came up.

JUSTICE WILLETT: Do you dispute that Pastor Barr's ministry is, in fact, a ministry?

MR. VILLARREAL: I don't know what you mean by that.

JUSTICE WILLETT: It is religious expression. That he had been kind of living out --

MR. VILLARREAL: I think he was pursuing religious, yes, his religion.

JUSTICE JOHNSON: What is your definition -- what definition would you use as to substantial burden, and did this substantially burden his ministry?

MR. VILLARREAL: Your Honor, what I go back to is, again, 1-10-10 of the Texas RIFRA refers us to the pre-1990 case law and if we look at that case law, if you look at the Brownfield opinion, I think it is Brownfield v. Brown, and if you look at the Ling v. National Forest People, those cases speak in terms of the substantial burden requiring a showing that the ordinance coerced you to violate your religion or alternatively deprived you of some privilege or benefit as a consequence of your religion, and that simply is not here. The standard for substantial burden has changed. They cite you a lot of RLUIPA cases and they cite you a lot of more recent authorities where the definition of that standard has changed. The court needs to be very careful to

look at the pre-1990 cases because I think the standard there clearly warrants the finding that this (inaudible)--

JUSTICE JOHNSON: Assuming they had to move out of the city to do this, and your opinion is, your position is, it would not substantially burden under the appropriate standards.

MR. VILLARREAL: Your Honor, that is true but I want to make it clear. The testimony before this Court was that there were minimal locations within Sinton where there was --

JUSTICE JOHNSON: We will look at the record. We will look at the record.

MR. VILLARREAL: And if you look at, and I have provided with the census map of what Sinton is. And what amazes me is that you will find that there are these areas that are covered on all three sides by the city of Sinton. There are huge fields out there and you have got to keep in mind that the trial court judge knows Sinton, even the appellant court judges know Sinton. If you know this community, you don't drive through it for miles being in city limits while there are fields and fields, but there are plenty of fields outside of the city limits.

CHIEF JUSTICE JEFFERSON: Other questions?

JUSTICE WAINWRIGHT: Just one other question chief. Just in a sentence or two, precisely how do you believe the standard, the definition of substantial burden has changed pre-1990 versus post?

MR. VILLARREAL: Yes, your Honor. Pre- 1990, I think I just articulated and I will not bore the Court by repeating that. Post-1990, as I see the opinions is, basically, if you are inhibited in a material way from practicing your religion then that is a substantial burden and I think a change that RLUIPA brought.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you counsel.

REBUTTAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER

MR. HO: May it please the Court. The city is here today demanding a carve-out of zoning from RIFRA, from 0-1-0. The legislature's text is clear. It does not provide a carve-out and if you want to look for a carve-out, look no further than the very next provision, 0-1-1. That is a carve-out of human rights, that is not the language provided in 0-1-0 for zoning.

JUSTICE MEDINA: Excuse me Mr. Ho. I'm familiar with the City Sinton. I have driven through it. It seems to be an open area. What if - is there any situation where this ordinance would be valid? Let's say if this home existed in a very nice neighborhood in Houston, like River Oaks, and the city of Houston decided to pass this type of ordinance. Does it matter where it is located? It seems to me-- I just want to make sure the standards are applied whether this type of situation existed in a barrio or existed River Oaks. I mean, it seems to me we wouldn't hear of the same uproar.

MR. HO: Let me try to ease your Honor's concerns. All we are talking about at the first stage is substantial burden. If there is a compelling interest, the government can step in and explain its interest. In this case, there was no evidence whatsoever because the court, because the city did not acknowledge that Texas RIFRA provides any protection whatsoever. If a city has a reason, if it doesn't want like sex offenders, drug offenders, any number of categories, it can

walk in and it can win that case. I want to talk about the pre-1990 case law very quickly --

JUSTICE MEDINA: Could you expand on it? How could they do that -- by raising what the compelling interest is to protect our children from sex offenders?

MR. HO: You can have a city mayor or a city official come into court and testify that this is the reason we passed this ordinance. This is why it has to be applied specifically to the religion. In this case, there was no such testimony. They simply folded their arms and said, 'It's the law and that's all that matters.' The pre-1990 case law is unequivocal. Every single case to have addressed this issue before 1990 applied the compelling interest test to zoning. The Fifth Circuit did that in the Islamic Center. There are the Sixth Circuit, Ninth Circuit, and the Eleventh Circuit cases. With respect to substantial burden, they cite not a single case relevant to our fact pattern, where we have an expulsion of a preexisting facility from city limits. And the Fifth Circuit in the Islamic Center found a substantial burden from even less facts, where there was - where it was a new facility and where they were locations within the city.

JUSTICE GREEN: Do you agree that the state law provides the same setback as the city ordinance?

MR. HO: Yes. Yes, your Honor.

JUSTICE GREEN: And so, if the facility is in violation of the state law, why would it be allowed to exist under those conditions?

MR. HO: This facility doesn't violate state law. The Court of Appeals never found such. The state law simply doesn't apply in this case.

JUSTICE MEDINA: Well, there is a trial finding on that issue, correct?

MR. HO: There is a trial court finding but it is plainly rejected by the law by the expressed provisions of the state statutes, and that is why the Court of Appeals did not agree.

JUSTICE JOHNSON: Have you challenged that here?

MR. HO: We have not challenged that here because it doesn't apply here. The state law applies to state-owned or state- contracted facilities.

JUSTICE JOHNSON: But if the trial court found that you were in violation of the state law and it's not been challenged on appeal. What does that - first of all, let me make sure. Have you challenged the trial court finding that you are in violation state law on appeal? Have you challenged that, either in the Court of Appeals or here?

MR. HO: What we have challenged is exactly what happened here. The city said that the ordinance needs to be enforced. That is the reason why the state officials decided to go along with what the city was asking.

JUSTICE JOHNSON: But if the trial court found you were in violation of a state law, has that finding been challenged on appeal?

MR. HO: I'm sorry.

JUSTICE JOHNSON: The trial court found you were in violation of state law, as I understand. Is that, is that - Do you agree with that?

MR. HO: I believe that is one of the factual findings.

JUSTICE JOHNSON: Has that finding been challenged on appeal?

MR. HO: What we are challenging is exactly what the Court of Appeals addressed. The Court of Appeals - it was challenged. Let me say that.

JUSTICE JOHNSON: It was challenged in the Court of Appeals and then the Court of Appeals did not reach it.

MR. HO: Exactly. I apologize for the confusion. The decisions below and the city's position here present essentially a road map for local governments to resist the policy judgments of the legislature in the area of zoning. Deny that zoning laws ever impose a substantial burden. Deny that zoning laws are ever subject to compelling interest to the least restrictive means requirements. And deny that the city has any burden whatsoever to present any evidence. This Court should do at least two things. One, reverse the decision of the Court of Appeals below and make clear that Texas RIFRA does in fact provide protection to churches and to ministries against zoning laws when those zoning laws are unjustified. The second thing this Court should do is -- I see that my time is up.

CHIEF JUSTICE JEFFERSON: You can complete your sentence.

MR. HO: Thank you, your Honor. The second thing this Court should do is to instruct the trial court that injunction is appropriate in this context, and the only question is what kind of injunction. How broad, how narrow? Which individuals may be allowed to live and what measures? Outright prohibition versus security or supervision. Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you very much, Mr. Ho. The cause is submitted. That completes the arguments for this morning and the Marshall will adjourn the court.

SPEAKER: All rise. Oyez, Oyez, Oyez.

2007 WL 5224717 (Tex.)