Bryan v. City of Bryan

United States Court of Appeals for the Sixth Circuit

September 5, 2024, Filed

No. 24-3625

Reporter

2024 U.S. App. LEXIS 22738 *

DAD'S PLACE OF BRYAN, OH, Plaintiff-Appellant, v. CITY OF BRYAN, OH, et al., Defendants-Appellees.

Counsel: [*1] For DAD'S PLACE OF BRYAN, OH, Plaintiff - Appellant: Philip D. Williamson, Taft, Stettinius & Hollister, Cincinnati, OH; Jeremy Dys, Ryan Nathan Gardner, David J. Hacker, First Liberty Institute, Plano, TX.

For CITY OF BRYAN, OH, Defendant - Appellee: Zachary W. Anderson, John T. McLandrich, Frank H. Scialdone, Mazanec, Raskin & Ryder, Cleveland, OH; Marc A. Fishel, Fishel, Downey, Albrecht & Riepenhoff, New Albany, OH.

For MAYOR CARRIE SCHLADE, in her official and personal capacities, JAMIE MENDEZ, in his official and personal capacities, ANDREW J. WATERSON, in his official and personal capacities, DOUG POOL, in his official and personal capacities, Defendants - Appellees: John T. McLandrich, Zachary W. Anderson, Frank H. Scialdone, Mazanec, Raskin & Ryder, Cleveland, OH; Marc A. Fishel, Fishel, Downey, Albrecht & Riepenhoff, New Albany, OH.

Judges: Before: COLE, READLER, and BLOOMEKATZ, Circuit Judges.

Opinion

ORDER

Plaintiff Dad's Place, a church in Bryan, Ohio, appeals a district court's order denying its motion for a preliminary injunction preventing Defendants—the City of Bryan, Mayor Carrie Schlade, Police Captain Jamie Mendez, Planning and Zoning Administrator Andrew J. Waterston, and Fire Chief [*2] Doug Pool (collectively, "the City")—from enforcing city ordinances and fire codes that prohibit Dad's Place from allowing its congregants to sleep in the church without first obtaining a permit or variance. Dad's Place moves for an injunction pending appeal and seeks an expedited decision on the motion. It also moves to supplement the record with filings from a state court action brought against it by the City.

One procedural point deserves mention at the outset. Dad's Place has moved for an administrative stay and a preliminary injunction pending its appeal of the district court's order denying injunctive relief. But because the district court denied the church a preliminary injunction, we understand the church to be, in essence, seeking only a preliminary injunction pending appeal. As a result, we need not resolve whether the church has failed to comply with Federal Rule of Appellate Procedure 8 because it is unlikely to succeed on the merits of its appeal.

With respect to Dad's Place's request for a preliminary injunction pending appeal, we balance four factors in determining whether to grant an injunction pending appeal: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the [*3] movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 572-73 (6th Cir. 2002). "When a party seeks a preliminary injunction on the basis of a potential constitutional violation," however, "the likelihood of success on the merits often will be the determinative factor." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam) (order) (internal quotation marks and citation omitted). We review the district court's legal conclusions de novo and its findings of fact for clear error, but "the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief' for an abuse of discretion. *Id.* (citation omitted).

Likelihood of Success on the Merits

Dad's Place argues that it is likely to succeed on the merits of its substantial burden claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and its free exercise claims under the federal and Ohio constitutions. We disagree.

a. *RLUIPA Claim*

RLUIPA provides that "[n]o government shall impose or implement a land [*4] use regulation in a manner that imposes a substantial burden on the religious exercise of a . . . religious assembly or institution" unless it can show that the burden furthers "a compelling government interest" and "is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000cc(a)(1). The parties do not dispute on appeal that RLUIPA applies only to the City's zoning ordinances, not the fire code. Thus, the question is whether the zoning laws at issue—here, the requirement that Dad's Place be properly zoned so that people may lawfully sleep at the church—substantially burden its religious exercise.

In the context of RLUIPA, a burden is "substantial," if it has "some degree of severity" and is "more than an inconvenience." *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1003 (6th Cir. 2017). We have declined to adopt "a bright line test" for determining whether a zoning law's burdens on a religious institution are substantial. *Id.* at 1002. In an analogous context, we considered factors such as whether the burden is self-imposed, whether the religious institution can feasibly operate out of an alternate location, and whether the imposition of the ordinance will cause the religious institution to suffer substantial delay, uncertainty, or expense. *Id.* at 1004. These factors, [*5] while "helpful," are not exhaustive. *Id.* Our ultimate inquiry is "functional and factually driven." *Id.* at 1011.

Dad's Place fails to show that it will likely succeed on establishing that the City's zoning laws substantially burden its religious exercise. It argues that it faces a substantial burden in the form of criminal prosecution and fines. But the criminal charges were filed against Chris Avell—the pastor at Dad's Place—who is not a party to this case. In any event, the burdens alleged by Dad's Place are self-imposed. Dad's Place is located in Bryan's commercial district, and its building is now zoned for mercantile use (front half of the building) and assembly use (back half of the building). The City provides a process by which entities in the commercial district can seek a variance or conditional use permit ("CUP") allowing them to operate as residential facilities. Indeed, a Christian organization next door to Dad's Place has obtained permission from the City to operate as a homeless shelter. Yet, despite being opened in 2018, Dad's Place has never applied to the City for a CUP or variance allowing it to operate as a residence, and it began operating as such while being zoned for mercantile [*6] and assembly use. RLUIPA does not entitle Dad's Place to engage in unauthorized uses without ever seeking a permit or variance to do so. *See Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 737 (6th Cir. 2007) ("[RLUIPA] is not intended to operate as 'an outright exemption from land-use regulations.' (quoting *C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003))); *Livingston Christian Schs.*, 858 F.3d at 1003 (similar); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 n.11 (11th Cir. 2004) (rejecting plaintiffs' contention "that the burden of requiring them to apply for a CUP constitutes a substantial burden on religious exercise").

Additionally, Dad's Place has not shown that it lacks adequate alternatives. For example, it can use a second floor as a residential facility or open a second facility. It asserts that such alternatives "transform the nature of the Church's ministry," but it gives no explanation as to why its ministry requires people to sleep on the ground floor of the building as opposed to the second floor, or why its ministry would be less effective if people slept in a different building that was properly zoned for residential use. *See Livingston Christian Schs.*, 858 F.3d at 1011 ("Allowing a plaintiff to make out a substantial-burden claim where the plaintiff . . . in fact has easy access to suitable property in a neighboring jurisdiction is beyond the protection of RLUIPA.").

In short, because Dad's Place has not shown a likelihood of success [*7] in demonstrating that the zoning ordinances substantially burden its religious exercise, we need not assess whether the ordinances survive strict scrutiny under RLUIPA. *Livingston Christian Schs.*, 858 F.3d at 1005.

b. *Free Exercise Claims*

As a preliminary matter, Dad's Place argues that the district court's failure to address its claim under the Ohio constitution's free exercise clause itself merits an injunction. The City disagrees, arguing that Dad's Place made only cursory mentions of its Ohio constitution claim in its filings below. Dad's Place asserts that it referenced the claim in multiple briefs. A review of the filings demonstrates that these references were merely cursory mentions of the issue, not developed arguments. And although Dad's Place argues that the issue was discussed extensively at a preliminary injunction hearing, it has not provided us with a transcript of that hearing. Because it appears from the available record that Dad's Place is inappropriately using this court as one of first view, its Ohio constitution claim fails. *See Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 365 (6th Cir. 2022) (quoting *McLane Co. v. EEOC*, 581 U.S. 72, 85, 137 S. Ct. 1159, 197 L. Ed. 2d 500 (2017)).

Turning to the federal claim, the Free Exercise Clause of the First Amendment, applicable to local governments through the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.

U.S. Const. amend. I. A free exercise [*8] challenge typically prompts two questions: (1) Has the government burdened religious exercise? And if so, (2) is the burden constitutionally permissible? *See, e.g.*, *Fulton v. City of Philadelphia*, 593 U.S. 522, 532-33, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022). Here, the church's claim fails at step one because it has not shown that the City has burdened its religious exercise. As for the zoning ordinances, Dad's Place has not, for example, demonstrated that it cannot use a second floor to operate its religious ministry. *See Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 731-33 (6th Cir. 2021) (per curiam). And as for the fire code, Dad's Place has not explained why installing a sprinkler system would prevent it from exercising its religion. *See id.* The district court ably put it this way: "Dad's Place does not identify the burdens [or costs] . . . of being required to install [a sprinkler system]." R.47, PageID 1396. To the extent Dad's Place suggests the City has targeted it based on religious status by enforcing the fire code in discriminatory ways, Dad's Place has failed to show "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated" its operation of a homeless shelter. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 634, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

Because Dad's Place has not adequately demonstrated that the City burdened its religious exercise, it has not shown that it [*9] is likely to succeed on the merits of its free exercise claim.

Irreparable Harm

The loss of "First Amendment freedoms, for even [a] minimal period[] of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). This court has also held that "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). Dad's Place has not shown a likelihood of success on its free exercise claim, and so has not shown that it faces the loss of its First Amendment rights. In addition, Dad's Place, through Avell, has repeatedly asserted that it will not force anyone to leave the premises absent a biblically valid reason. There is no indication that Dad's Place has softened on that stance since filing its appeal. If Dad's Place is not actually ceasing its 24/7 ministry, then it is not experiencing irreparable harm on that basis, and an injunction is not necessary to preserve the status quo.

Balance of Harms

Because Dad's Place does not prevail on the first two factors of the injunction inquiry, we need not resolve the others. *Cf. Cath. Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 447 (6th Cir. 2023) (explaining that, in free exercise cases, the likelihood of success on the merits is often the dispositive [*10] factor).

Finally, Dad's Place moves to supplement the record or, in the alternative, for us to take judicial notice of state court filings in the City's civil action against the church showing that the City continues to treat secular activities—here, operating a motel—more favorably than religious activities. Federal Rule of Appellate Procedure 10(e)(2) governs corrections and modifications to the record and provides that "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected . . . by the court of appeals." The rule is meant "to allow the district court to correct omissions from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals." *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982). Because the state court filings are new evidence, they are not properly included in the record under Rule 10(e).

On the other hand, a court of appeals may take judicial notice of facts that are not subject to reasonable dispute if they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). But judicial records are only "a source of 'reasonably indisputable accuracy' when they record some judicial action such as dismissing [*11] an action, granting a motion, or finding a fact." *United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012) (quoting 21B Charles Alan Wright et al., *Federal Practice & Procedure* § 5106.4 (2d ed. 2005)). Dad's Place attaches for our consideration the City's supplemental motion for a temporary restraining order in its lawsuit against Dad's Place and Dad's Place's response to that motion, including an affidavit by one of its attorneys stating that two motels in Bryan do not have sprinkler systems installed in the rooms. But these are not records of judicial action, and we have no way of determining whether the attorney's affidavit is accurate. Therefore, we decline to take judicial notice of the state court filings.

Accordingly, the motions for an injunction pending appeal and to supplement the record are **DENIED**, and the motion to expedite is **DENIED AS MOOT**.

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