

**IN THE SUPREME COURT OF ARIZONA**

**MICHAEL SALMAN in Custody at  
the Maricopa County Jail,**

**PETITIONER,**

**v.**

**JOSEPH M. ARPAIO, Sheriff of  
Maricopa County, in his official  
capacity,**

**RESPONDENT.**

**Case No.**

**Prisoner No. P884174**

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF APPLICATION  
FOR WRIT OF HABEAS CORPUS**

**(REQUEST FOR HEARING)**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION FOR WRIT OF HABEAS CORPUS FOR  
MICHAEL SALMAN**

**INTRODUCTION**

Petitioner seeks a writ of habeas corpus because he is currently serving a sentence of imprisonment as a result of exercising his right to religious freedom under the First and Fourteenth Amendments to the United States Constitution, the Religious Land Use and Institutionalized Persons Act, and A.R.S. § 41-193 by holding Bible studies and engaging in religious worship on his private property with family and friends. Despite the fact that Petitioner's case directly implicates some of the most basic rights enshrined in the United States Constitution, the lower state courts have heretofore refused to take cognizance of these defenses. The

federal courts, on the other hand, have abstained from considering Petitioner's plight on the basis of the doctrines set forth in Younger v. Harris, 401 U.S. 37 (1971), Heck v. Humphrey, 512 U.S. 477 (1994), and Rooker-Feldman.

A writ of habeas corpus from this Court is Petitioner's last hope for judicial intervention with the sentence of imprisonment he is serving solely because he refused to stop worshiping God with friends and family on his own property.

### **FACTUAL SUMMARY**

Michael and Suzanne Salman are Christians who have been holding private Bible studies (not open to the general public) and religious worship at their residence in Phoenix since 2005. In 2007, their neighbors began to complain to the City about the Bible studies.

In February, 2007, the City sent Salman a letter indicating that "Bible studies are not allowed to be conducted in your residence or the barn on your property as these structures do not comply with the construction code for this use." The Salmans continued to hold the Bible studies, and the neighbors continued to complain. The City sent Salman a second letter in 2008, warning him that "all religious meeting must cease" or he would be in violation of construction codes.

In May, 2007, the Salmans submitted plans to the City to construct a separate building on their property to be used for Bible studies and worship. They worked hard to comply with the requirements set forth by City officials, but

withdrew their application after the City moved for a change in the parking requirements for “places of worship.” The Salmans applied for a building permit to erect a new structure in November, 2008. The permit was issued in 2009 after reassurance from the Salmans that the structure “would not be used for a public place of worship,” and the structure was built. Each week, approximately 40-50 of the Salmans’ family and friends gathered for Bible studies or worship, but the site was not advertised as a public place of worship.

In June, 2009, City inspectors served the Salmans with a search warrant and searched the property. As a result of the inspection, the City Inspector issued a notice of violation. The Salmans met with City officials to seek an explanation as to why the meetings were not allowed under the Code. Their efforts to reach an understanding were unsuccessful.

### **PROCEDURAL HISTORY**

In the City of Phoenix Municipal Court, Salman (acting pro se) raised his battery of constitutional and statutory defenses both in pre-trial hearings and during the trial. However, Judge Sallie Gaines refused to consider or rule on these arguments. Rather, she stated that they would be “excellent issues for appeal”:

COURT - “...And – but you have excellent issues for appeal, for the Constitutionality of the actual City Code, but we’re not dealing with that right now.”

(Pre-trial Transcript, p. 12, lines 5-7). Similarly, at trial, when Salman began to question the constitutionality of the City's Code, the court precluded this line of defense:

COURT - So we're going to deal with what's been presented so far. And you have plenty of time to present your defense. But so far, let's just go on what this witness knows and is relevant to this case.

MR. SALMAN – Well, there's, your Honor, if – if, you know, the Court would please excuse me in this matter, the State is stating, Your Honor, that this is an A3 Occupancy because it is a religious use. They're basing the occupant load on use and square footage. So, my question to them is – and where I'm –where this is all going is, if this can be used as a home theater without being –without having to have an A1 Occupancy, why could this not be used as a religious use without having an A-3 Occupancy.

COURT – Okay. Than that would be something you would take up with the individuals who wrote this particular code. All right? So, in other words – or you can argue that. That would be your argument. But this is not the time to argue with this witness what the code is. Okay?

MR. SALMAN– I understand. But he's an expert to the code, your Honor. He is here because he believes---

COURT – Okay. But that would be my ruling.

(Trial Transcript, p. 389, lines 2-25).

Consequently, in August, 2010, Salman was convicted in the City of Phoenix Municipal Court of violating 67 building codes and zoning ordinances. He was sentenced to 60 days in jail, 3 years of probation, and \$12,000 in fines; he was prohibited from having more than 12 people in his residence at a time. Salman again tried to raise his religious freedom rights in a Motion to Vacate the Judgment. The court responded:

COURT – Thank you. Mr. Salman, well you’re entirely correct, that this Court cannot change the law. I am duty bound by the law in Arizona and the City of Phoenix, and because of that, I have to deny the motion to vacate judgment, but you certainly have some interesting issues on appeal.

(Post-trial Transcript, p. 70, lines 1-5).

On appeal, the Maricopa County Superior Court upheld the convictions. Salman (still acting pro se) made every effort to argue that the Code and its discriminatory enforcement against him violated his constitutional and statutory rights, but the court appeared to afford them scant notice.

On April 4, 2011, the Salmans filed a complaint in the U.S. District Court for the District of Arizona pursuant to 42 U.S.C. § 1983, alleging that the City’s laws were unconstitutional and that their enforcement violated the Salmans’ constitutional rights and statutory rights. They also filed a Motion for a Temporary Restraining Order enjoining the City from implementing and enforcing the Codes and Ordinances against them to prohibit private worship, Bible studies, and signs with religious messages on their property, and from prosecuting, sentencing, arresting, or incarcerating them. At the time of this Motion, Salman’s appeal of his conviction was pending before the Arizona Court of Appeals. The U.S. District Court denied the Motion for a Temporary Restraining Order and dismissed the Salmans’ claims under the doctrines of Younger v. Harris, 401 U.S. 37 (1971) and

Heck v. Humphrey, 512 U.S. 477 (1994). Salman v. City of Phoenix, 2011 WL 5024263 (D. Ariz. 2011).

The Arizona Court of Appeals refused to consider Salman's appeal on the basis that it lacked jurisdiction to do so under A.R.S. § 22-375 and that it was untimely filed.

Petitioner again sought relief in federal court pursuant to 28 U.S.C. § 1983. The district court found Petitioner's claims to be barred by collateral estoppel (based on the district court's previous decision), Heck, and the Rooker-Feldman doctrine. Salman v. City of Phoenix, 2012 WL 226118 (D. Ariz. 2012). Petitioner's appeal of this ruling is currently pending before the United States Court of Appeals for the Ninth Circuit.

## **LEGAL ARGUMENTS**

### **I. Procedural Due Process**

The state courts below have repeatedly refused to consider Petitioner's most meritorious defenses to the charges against him, which are based on his right to free exercise of religion under the First Amendment, The Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. §2000cc, and the Arizona Free Exercise of Religion Act; his right to equal protection under the Fourteenth Amendment; and his right to be free from prosecution under laws that are impermissibly vague or overbroad under the Fourteenth Amendment. Petitioner's incarceration without

having had the opportunity to have these defenses considered and adjudged is a violation of Petitioner's right to due process under the Fourteenth Amendment. See, e.g., Bradley v. Duncan, 315 F.3d 1091 (9<sup>th</sup> Cir. 2002) (trial court's refusal to submit elements of defendant's defense to jury violated due process).

## **II. Free Exercise of Religion**

Petitioner is incarcerated as a result of his engaging in worship with friends and family on his private property. It is indisputable that the City's enforcement of its code and ordinances against him in this manner constitutes a substantial burden on his religious exercise under the First Amendment, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. §2000cc, and the Arizona Freedom of Religious Exercise Act. The City has come nowhere near making the required showing to demonstrate that its actions toward Petitioner constitute the least restrictive means of furthering a compelling government interest. Nor would it be possible for the City to do so.

The case of Murphy v. Zoning Commission of the Town of New Milford, 148 F.Supp.2d 173 (D. Conn. 2001) is directly on point. There the federal court held that the local government's interpretation of its ordinances to prohibit the plaintiff from having regular religious gatherings in his home with more than 25 people was "precisely the type of 'substantial burden' Congress intended to trigger the RLUIPA's protections; indeed, it is the concern which impelled adoption of the

First Amendment.” Id. at 189. The court went on to find that while the City had articulated a compelling government interest in regulating traffic and safety, its cease and desist order was not the least restrictive means of doing so. Id. at 190.

Petitioner submits that the violations of his religious freedom rights are even more egregious in this case, as the City has made it clear that its actions against him are not based purely on objective considerations such as the number of persons on his property at a given time, but rather are based on the *character* of the gatherings as “religious.” If other persons within the City were to hold gatherings of the same number of persons for a Cub Scout meeting, Tupperware party, or game night, they would not be held to the exacting standards being applied to Petitioner. Thus, the City’s actions toward Petitioner are distinctly a form of religious oppression.

### **III. Equal Protection**

Again, Petitioner has been convicted of violating the City’s code and ordinances based solely on the fact that the gatherings he has hosted on his property were for the purpose of engaging in religious worship. His conviction and sentence on this basis is therefore a denial of Petitioner’s rights under the Equal Protection Clause of the Fourteenth Amendment.

### **IV. Vagueness and Overbreadth**



The City's interpretation and enforcement of its code and ordinances to prohibit Petitioner and others from inviting friends and family to their personal residences for religious worship is unconstitutionally vague and overly broad under the Fourteenth Amendment.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). A vague law that touches upon First Amendment activity offends three distinct constitutional values. First, by failing to provide citizens fair warning of what conduct is proscribed, a vague ordinance threatens to trap the innocent. Id. Second, vague laws delegate an impermissible degree of discretion to those charged with enforcing them, thus posing a danger of arbitrary and discriminatory enforcement. Id. at 108-109. And finally, vague laws that touch upon the exercise of constitutional rights create an unacceptable chilling effect on citizens' fundamental freedoms. Id. at 109.

Petitioner has been convicted and sentenced under Phoenix laws that do not provide a person of average intelligence with fair warning about the point at which a religious person or family will be classified as a church or religious assembly for purposes of the City's zoning ordinance and building code. The City's interpretation demands that Petitioner conform his home to the same requirements imposed upon a commercial entity or a building open to the general public. A

person of ordinary intelligence would likely assume that so long as he or she does not advertise his residential property as generally open to the public, he or she would be treated on equal terms with other property owners who invite groups of friends and family onto their properties from time to time for various secular purposes. This is not the case in Phoenix. Yet nothing in the City's laws apprises citizens of the circumstances under which private residential property is converted to a "church." Courts have held that City ordinances violate the Fourteenth Amendment where their interpretation and/or enforcement is based on factors or definitions not ascertainable from the laws themselves. See Deegan v. City of Ithaca, 444 F.3d 135 (2d Cir. 2006) (holding City noise ordinance unconstitutionally vague where it was enforced based on a single factor not mentioned in the statute).

Even if the conduct allegedly prohibited by the City code and ordinance were described with sufficient specificity to survive a vagueness challenge, the prohibitions are nevertheless unconstitutionally overbroad if they encompass protected conduct. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). See also Karlan v. City of Cincinnati, 416 U.S. 924, 925-26 (1974). The showing that a law punishes a substantial amount of protected First Amendment activity along with conduct that may legitimately be prohibited suffices to invalidate all enforcement of that law until and unless a limiting construction or partial

invalidation so narrows it as to remove the threat to constitutionally protected expression. Virginia v. Hicks, 539 U.S. 113, 119 (2003) (citing Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973)).

Thus, even if the City could legitimately impose upon Petitioner the zoning ordinance and building code requirements applicable to actual churches based upon the number of participants, amount of traffic, or some other factor(s), its interpretation of these laws contains no limiting principles that preclude it from applying such onerous requirements to small, intimate gatherings which the City has no legitimate interest in prohibiting. For this reason, the City's laws, as interpreted and applied, are overbroad.

### CONCLUSION

Petitioner's conviction and incarceration on the basis of his private religious exercise represents a grave injustice of the most serious nature. For all of the reasons presented herein, Petitioner requests that this Court grant him a Writ of Habeas Corpus and vindicate his most basic civil liberties.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of July, 2012.

By \_\_\_\_\_  
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and of the law firm of Wilenchik & Bartness, P.C.  
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I hereby certify that a copy of the foregoing document was mailed this \_\_\_\_ day of July, 2012, to:

Tom Horne  
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Signature