No. 24-1327

IN THE
Supreme Court of the United States

SPIRIT OF ALOHA TEMPLE, A HAWAII NONPROFIT CORPORATION, ET AL.,
Petitioners,

v.

MAUI COUNTY, HAWAII, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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July 30, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - continued

TABLE OF AUTHORITIES - continued

TABLE OF AUTHORITIES - continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES - continued

INTEREST OF THE AMICUS CURIAE[1]

The **Jewish Coalition for Religious Liberty** ("JCRL") is an association of American Jews dedicated to protecting the ability of all Americans to practice their faith freely, to protect Jewish beliefs particularly, and to foster cooperation between Jews and adherents of other faiths. JCRL's leaders have filed *amicus* briefs in the U.S. Supreme Court and lower federal courts, published op-eds in prominent news outlets, and established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership. See, *e.g.*, *Whole Woman's Health* v. *Smith*, 896 F.3d 362, 372 (5th Cir. 2018) (citing to JCRL brief for guidance on First Amendment question), *cert. denied sub nom. Whole Woman's Health* v. *Tex. Cath. Conf. of Bishops*, 139 S. Ct. 1170 (2019) (mem.).

JCRL has a strong interest in religious rights of particular importance to minority faiths, such as those secured by the land-use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and frequently briefs such issues. See, *e.g.,* Br. of Jewish Coal. for Religious Liberty & Chabad Lubavitch of Nw. Conn. as *Amici Curiae* in Support of Appellants, *Spirit of Alpha Temple* v. *Cnty. of Maui*, No. 19-16839 (9th Cir. March 7, 2020); Br. of Jewish Coal. for Religious Liberty as *Amicus Curiae* in Support of Petitioner, *Tree of Life Christian Schs.* v. *City of Upper Arlington*, 139 S. Ct. 2011 (2019) (mem.) (No. 18-944), 2019 WL 949895 (urging certiorari grant

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[1] Counsel has obtained consent of all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

on circuit split regarding RLUIPA, explaining impact on observant Jewish communities).

INTRODUCTION AND SUMMARY OF ARGUMENT

The importance of land to religious practice is as ancient as religious practice itself. In Judaism, as in many other traditions, the ability to establish places of worship, to gather for prayer and reflection, and to congregate in sorrow or celebration—including for marriages—goes to the very heart of the free exercise of religion. Indeed, dating back to God's original covenant to Abraham to deliver for him and his successors a Promised Land, the use of land has played a central role in Judaism for millennia.

Recognizing that local land regulation can—inadvertently or perniciously—hamper this core religious exercise, Congress enacted RLUIPA to safeguard religious land use. See Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5). For 25 years, RLUIPA has provided important protections for all faiths, and particularly faiths more likely to be overlooked or even targeted by local land-use decisions.

This protection is at risk in the Ninth Circuit. In the decision below, the Ninth Circuit held that an RLUIPA claimant must first show that it is precluded from using other sites within a municipality's jurisdiction. Only after satisfying this—and possibly another, see Pet. Br. 12—extra-statutory precondition may the religious institution receive a ruling on its substantial burden claim. This imposes a burden that exists for no other group simply seeking fair treatment from local land-use officials. And it hollows out RLUIPA to serve

only as a protection against getting literally run out of town.

RLUIPA does not impose such a requirement on religious organizations. To the contrary, it protects such organizations against any land-use decision that "imposes a substantial burden" on their religious exercise. 42 U.S.C. § 2000cc(a)(1). The Ninth Circuit, though, converts the RLUIPA protection into its own kind of burden, forcing organizations to conduct the costly and time-consuming process of betting all potential alternative sites. This rule will also raise significant administrability questions in the lower courts, which will further burden religious exercise. For example, how are courts to assess whether there is a suitable alternative—should lower courts second guess religious leaders' decisions of what locations are appropriate for sacred ground?

Affirming the decisions below would thus weaken protections guaranteed to all faiths—protections that are particularly important today. As its members are readily identifiable religious minorities, *amicus* is well aware of the disturbingly frequent and concerted discrimination against such groups, including anti-Semitic opposition to the establishment, growth, and flourishing of Jewish communities. RLUIPA and the First Amendment form a valuable bulwark against overt and subtle anti-Semitism. The decision below dilutes these statutory and constitutional protections and threatens to make some American communities less hospitable homes for American Jews.

ARGUMENT

For a religious institution, "having 'a place of worship . . . is at the very core of the free exercise of religion,'" since "'[c]hurches and synagogues cannot

function without a physical space adequate to their needs and consistent with their theological requirements.'" *Int'l Church of Foursquare Gospel* v. *City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011) (omission and alteration in original). Yet in the religious land use context, courts have observed the "vulnerability of religious institutions—especially those that are not affiliated with the mainstream"—"to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). Because RLUIPA is concerned with "subtle forms of discrimination," its protections against substantial burdens on religious exercise extend to all "individualized" assessments—even those based on "generally applicable land use regulations." *Chabad Lubavitch of Litchfield Cnty., Inc.* v. *Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 193–95 (2d Cir. 2014).

Congress enacted RLUIPA to ensure that vulnerable religious groups could defend their chosen means of religious exercise against adverse land-use decisions. Nothing in RLUIPA's text or history suggests that claimants must prove that their chosen site is the only available option or that they must search exhaustively for alternatives before bringing a claim. And yet the Ninth Circuit, in the opinion below, did just that. To make matters worse, the Ninth Circuit leaves the initial land-use decision essentially unreviewable, weakening the substantial burden provision's effectiveness as a backstop to RLUIPA's anti-discrimination provision.

Amicus emphasizes that this decision will have a significant impact on religious minorities. Recent experience—and particularly the experience of the Orthodox Jewish community represented by *amicus*—suggests that the concerns animating RLUIPA persist. See *Guru Nanak Sikh Soc'y* v. *Cnty. of Sutter*, 456 F.3d 978, 994 (9th Cir. 2006) (noting that in nine hearings preceding RLUIPA's enactment, Congress heard how "governmental entities nationwide purposefully exclude unwanted religious groups by denying them use permits through discretionary and subjective standards and processes"). For example, when an Orthodox Jewish organization recently sought to open an outreach center in an insular beach community and the town leadership responded by attempting to seize the property through eminent domain, RLUIPA and the First Amendment protected that organization's right to use their property for their religious mission. See Brandon Cruz, *Long Island Mayor Quits After Jacking Up Taxes 87%, Costing Village Nearly $1.5 Million over Antisemitism Lawsuit*, NY Post (July 4, 2024), https://perma.cc/35BL-4Z3Q. Under the Ninth Circuit's rule, that organization may have been forced to prove, to the satisfaction of a secular judge, that no other parcel in town would have similarly advanced the group's religious mission.

This Court should not ratify reasoning that could increase the burden on RLUIPA claimants while simultaneously undercutting valuable anti-discrimination protections. *Amicus* therefore urges this Court to preserve RLUIPA by granting certiorari.

I. THE NINTH CIRCUIT'S DECISION ERODES RLUIPA'S FREE EXERCISE AND ANTI-DISCRIMINATION PROTECTIONS.

RLUIPA empowers religious communities targeted by adverse land-use decisions. But the Ninth Circuit now requires those communities to prove that an adverse decision not only burdens or discriminates against their religious practice, but first that it precludes them from using other sites within a jurisdiction before ruling on their RLUIPA claim. The decision below thus undercuts religious communities' autonomy and enables discriminatory land-use denials.

A. RLUIPA Empowers Religious Institutions to Defend their Chosen Means of Religious Exercise.

RLUIPA is a powerful statutory defense of religious communities' autonomy. Before RLUIPA, these communities had little recourse against most land-use decisions. This Court has long held that the First Amendment does not require carve-outs for a practitioner's chosen means of expression. For example, heavily burdensome prison rules do not violate the First Amendment where faithful prisoners were not "deprived of 'all means of expression'"—just their chosen means. *O'Lone* v. *Est. of Shabazz*, 482 U.S. 342, 352 (1987) (quoting *Turner* v. *Safley*, 482 U.S. 78, 89–90 (1987)); see also *Braunfeld* v. *Brown*, 366 U.S. 599, 605–06 (1961) (plurality op.). And under *Employment Division* v. *Smith*, this Court held that municipalities could outlaw all forms of religious exercise incidentally impacted by neutral, generally applicable laws. 494 U.S. 872, 878–82 (1990).

Especially relevant for RLUIPA, all but the most egregious land-use regulations fall well within the *Smith* formulation of the Free Exercise Clause. See cf. *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542, 545–46 (1993) (City of Hialeah's anti-Santeria activity involved, in part, gerrymandering zoning ordinances). *Smith* offers no help to religious communities hoping for permission to build new churches on sites appropriate for their needs. Indeed, if denied, these communities have one option: "'[M]igrate to some other and more tolerant region.'" *Smith*, 494 U.S. 872, 920 (1990) (Blackmun, J., dissenting) (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972)).

Congress determined this would not do. Amid the fallout from *Smith*—and then *City of Boerne* v. *Flores*, 521 U.S. 507, 515–16 (1997)—Congress recognized the need for change. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 714–16 (2005). Uniquely concerning to Congress was *Smith*'s impact on religious communities' authority to defend the kind of exercise they believe their faith dictates. Congress found it "indispensable" to the First Amendment that religious institutions determine what "physical space [is] adequate to their needs and consistent with their theological requirements," endeavoring to protect their "right to build, buy, or rent such a space." 146 Cong. Rec. 16,698, 16,698 (2000) (joint statement of Sens. Hatch and Kennedy).

Congress also recognized that permitting neutral land-use *regulations* would leave religious communities exposed to discriminatory land-use decisions. *Id.* ("[D]iscrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or not consistent with the city's land use plan.") (quotations omitted). Congress had no trouble

finding an epidemic of such decisions, especially against religious minorities. It noted prevalent "discrimination against small and unfamiliar denominations," finding "massive evidence" that land controls "frequently violate[]" religious rights, especially those of "new, small, or unfamiliar" houses of worship. 146 Cong. Rec. at 16,698–99.

Congress enacted RLUIPA to meet these goals. RLUIPA prohibits governments from imposing or implementing land-use regulations in two relevant ways: First, in a manner "that imposes a substantial burden on the religious exercise of a . . . religious assembly or institution," 42 U.S.C. § 2000cc(a)(1); and second, in a manner "that discriminates against any assembly or institution on the basis of religion or religious denomination," *id.* § 2000cc(b)(2).

RLUIPA does separately prohibit discriminatory and substantially burdensome land-use decisions. But "RLUIPA's substantial burden provision usefully 'backstops the explicit prohibition of religious discrimination in the later section of the Act.'" *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007) (quoting *Sts. Constantine & Helen*, 396 F.3d at 900). Indeed, a substantial burden claim may lie where the "nature of a defendant's challenged action suggests that a religious institution received less than even-handed treatment." *Id.*; see also *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004); see also *cf. Sts. Constantine & Helen*, 396 F.3d at 900 ("If a land-use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion . . . influenced the decision."); *Fortress Bible Church* v.

Feiner, 694 F.3d 208, 219 (2d Cir. 2012). The two provisions, in other words, work in tandem.

RLUIPA also dictates that an affected religious institution need take no action before bringing a claim. The institution's cause of action arises upon the government's implementation of the land-use regulation. 42 U.S.C. § 2000cc-2(a). And while it provides that a claim vanishes if the government "alleviat[es] [the] burdens on religious exercise," RLUIPA places no corollary obligation to cure on the claimant. *Id*. § 2000cc-3(e). RLUIPA even has a special provision establishing that it should "be construed in favor of a broad protection of religious exercise." *Id*. § 2000cc-3(g).

If Congress had expected an afflicted religious institution to attempt to unburden itself, it could easily have said so. Indeed, RLUIPA represents a departure—in favor of free exercise—from the restrictive constitutional analysis. This Court has recognized as much. In a prisoner case, this Court noted that an RLUIPA claimant need not show whether it "is able to engage in other forms of religious exercise" permitted by a regulation; the question is simply whether the proscribed or limited religious exercise reflects a substantial burden that cannot satisfy strict scrutiny. *Holt* v. *Hobbs*, 574 U.S. 352, 361–62 (2015); see also *Ramirez* v. *Collier*, 595 U.S. 411, 425–26 (2022); Pet. Br. 15. RLUIPA, in other words, does not look back—it marches forward.

Indeed, many other civil rights statutes have an exhaustion requirement—though RLUIPA does not. *Murphy* v. *Zoning Comm'n*, 223 F. Supp. 2d 377, 382 & n.3 (D. Conn. 2002). But Congress did not require RLUIPA claimants to vet and rule out all alternative locations; it simply asked whether the decision under

review imposed a substantial burden. Even where other suitable properties exist, requiring a religious community to move from its chosen site only compounds the institution's burden. "[S]elling the current property and finding a new one" brings with it "'delay, uncertainty, and expense.'" *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 557 (4th Cir. 2013); see also *Westchester Day Sch.*, 504 F.3d at 349; *Sts. Constantine & Helen*, 396 F.3d at 901; *New Harvest Christian Fellowship* v. *City of Salinas*, 29 F.4th 596, 602 (9th Cir. 2022) ("[O]ther circumstances may create a substantial burden even where an alternative location is technically available."). And a religious institution that has already faced one zoning board denial "would understandably be hesitant to propose [building] on another" similar site without some sense that it would be successful. *Guru Nanak*, 456 F.3d at 991.

In practice, whether a religious community can build elsewhere in the jurisdiction does not make sense as a precondition to a claim. Consider an example involving two Florida synagogues. The town in which the two congregations were meeting demanded that they relocate to a zone permissible for churches. *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1219–22 (11th Cir. 2004). The Eleventh Circuit did not require the synagogues to move to the new site, apply for a variance to remain at the current site, or look for compliant sites. Merely by being asked to relocate from their chosen site, the synagogues stated an RLUIPA claim: "[E]ven if a 'suitable property' existed in [the other] district, the congregations believe they have a legal right to remain in the business district." *Id.* at 1224.

The Eleventh Circuit recognized here the key theme underlying RLUIPA—religious communities, not local officials or courts, should be able to defend a location they believe complies with their faith.

B. The Ninth Circuit's Decision Undermines RLUIPA's Protection.

Contrary to RLUIPA's text and history, the Ninth Circuit now requires claimants to show that a municipality has precluded a claimant from building *anywhere* within its boundaries. This not only eliminates RLUIPA's assurance that a religious institution can defend its preferred site but also undermines RLUIPA's anti-discrimination goals.

The Ninth Circuit's analysis was wrong nearly from the start. It stated at the outset that it would consider the "totality of the circumstances," including "whether [the Spirit of Aloha Temple ("the Temple") was] precluded from other locations in the county" and "whether the County's reasons for denying the special use permit were arbitrary and could apply to [the Temple's] future applications." Pet. App. 16a. But it considered no circumstances besides these two, despite ample evidence of the Temple's burden. See Pet. Br. 16–18. And perhaps more concerning, it then scrutinized *the Temple's* behavior: The Temple "did not attempt to relocate," the Temple "was looking specifically for agricultural land," and there was no "evidence that [the Temple] even considered other locations." Pet. App. 18a. This "blame the victim" approach has nothing to do with whether the land-use regulation imposes a substantial burden on the Temple's decision to exercise its religion at a certain location.

Practically, the decision will prove a headache for courts and congregations alike. The Ninth Circuit offers religious communities little guidance as to how it will judge whether there are any alternatives. For one, the court does not explain how far a claimant must look, suggesting a distant second site might be sufficient. Maui County—like many others—is vast, covering more than 2,000 square miles and spanning four islands. Further, lower courts will struggle to interpret the faith principles driving a claimant's search and dictating what sites are available. Many churches will be left with three bad options: build distantly, build insufficiently, or do not build at all.

No other civil right is so geographically circumscribed—nor should any be. It would make no sense to ask a black man denied a meal or a room at a hotel whether there were other restaurants and other hotels nearby that would welcome him. Nor may a bank remain inaccessible simply because other banks in town are ADA compliant. So too here, the County should not be absolved of its unduly burdensome land-use regulations simply because a court did not think the Temple devoted enough time to vetting a fallback option.

For any future RLUIPA claimant within the Ninth Circuit, the message is clear. Once burdened by an adverse land-use decision, it must conduct an exhaustive and expensive search for any possible alternative site within the local official's territory. It must do this while already suffering from the consequences of an initial adverse land-use decision. And if it does not search thoroughly enough, the Ninth Circuit will boot it out of court.

Worse still, the Ninth Circuit will now be reviewing only the most clearly discriminatory land-use

decisions. Religious communities will rarely have "evidence of intentional or purposeful discrimination," which is necessary to make out a prima facie case under RLUIPA's anti-discrimination provision. *Church of Scientology of Ga., Inc.* v. *City of Sandy Springs*, 843 F. Supp. 2d 1328, 1370 (N.D. Ga. 2012) (collecting cases); see also *id.* at 1360 (noting "few published cases" in RLUIPA's first decade). In the real world, discriminatory animus often manifests in subtler ways. The Ninth Circuit used to fill this gap while deciding substantial burden claims, see *San Jose Christian Coll.*, 360 F.3d at 1035, but those claims are now significantly harder to bring. Without the substantial burden backstop, religious communities lose a valuable weapon against discrimination.

II. MINORITY RELIGIOUS GROUPS DEPEND ON RLUIPA TO DEFEND THEIR OWN DECISION-MAKING AND FIGHT DISCRIMINATION.

The Ninth Circuit's decision harms all religious communities. But perhaps the most disadvantaged will be minority religious groups. Without broad social support and often misunderstood, these groups rely on RLUIPA not only to protect their basic faith practices but also to counter discrimination.

In enacting RLUIPA, Congress took note of prevalent "discrimination against small and unfamiliar denominations," finding "massive evidence" that land controls "frequently violate[]" religious rights, especially those of "new, small, or unfamiliar" houses of worship. 146 Cong. Rec. at 16,698–99. In fact, Congress recognized that Jewish communities were some of the most at-risk, finding that "zoning board members or neighborhood residents explicitly offer race or religion as the reason

to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues." 146 Cong. Rec. at 16,698.

Adverse zoning decisions are particularly problematic for *amicus*'s Orthodox Jewish members, whose observance of the Jewish Sabbath and other festivals requires locating synagogues and ritual baths within walking distance of residential neighborhoods. Testifying in support of RLUIPA, the Director of the Union of Orthodox Jewish Congregations of America ("Orthodox Union") explained that the "flourishing of traditional Jewish communities has given rise to another, more unfortunate trend, the use of land-use regulations and zoning boards to discriminate against religious communities." *Religious Liberty: Hearing on Issues Relating to the Constitutionality of a Religious Protection Measure Before the S. Comm. on the Judiciary*, 106th Cong. 21, 24 (1999) (prepared statement of Nathan J. Diament, Dir. of Inst. for Pub. Affairs, Orthodox Union).

Because RLUIPA allows a religious institution to defend its chosen form of religious exercise—rather than demand it show the absence of other options—it is particularly protective of Jewish congregations. Facially neutral land-use regulations can impede practices essential to Jewish life. For example, local governments have long sought to prevent Orthodox Jewish communities from constructing eruvs, symbolic enclosures that allow practitioners to push strollers, transport food, and carry basic items like keys outside their homes on the Sabbath. See, *e.g.*, Diana Neeves & Evan Seeman, *Mahwah, NJ Agrees to Settle Eruv Dispute*, RLUIPA Defense Blog (Feb. 7, 2018), https://perma.cc/SAM3-9NYH; *Smith* v. *Cmty. Bd. No. 14*, 491 N.Y.S.2d 584 (Sup. Ct. 1985); see also

Barry Black, *How Courts Paved the Way for the Eruv*, N.Y. Law J. (Mar. 1, 2019), https://perma.cc/Q4AW-MQR2 (noting that eruv litigation "goes back decades" and is often "hard fought").

Local governments have also blocked the construction of mikvahs, ritual immersion baths that Orthodox women visit after completing their menstrual cycle and before resuming marital intimacy. See, *e.g.,* Complaint, *United States* v. *Borough of Woodcliff Lake*, No. 2:18-cv-10511 (D. N.J. June 13, 2018); Evan Seeman, *Clifton, NJ Pays $2.5 Million to Settle RLUIPA Dispute*, RLUIPA Defense Blog (Jan. 10, 2019), https://perma.cc/J4JG-T87B.

Unfamiliarity with religious requirements such as eruvs and mikvahs leads to confusion and misunderstandings, resulting in zoning denials that overlook or disparage the Orthodox community's needs. See, *e.g., Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002) (describing the "vehement objections" of community members leading to denial of a proposed eruv, including one council member's "serious concern that Ultra-Orthodox Jews might stone cars that drive down the streets on the Sabbath" (internal quotation marks and alteration omitted)); Sharonne Cohen, *What Is An Eruv?*, My Jewish Learning (Nov. 22 2017), https://perma.cc/U66N-B7TX. Preventing Orthodox Jews from building such foundational structures can prevent Jews from moving into a community as effectively as a restrictive covenant barring selling homes to Jews.

The Ninth Circuit's new precondition thus substantially disadvantages Jewish communities. Confusion and misunderstanding surrounding the requirements of the Jewish faith will spill over into

courtrooms, as the Jewish communities try desperately to explain why they were not completely precluded from building within the jurisdiction. It is not hard to imagine a court and the community disagreeing about whether other sites were available.

The Ninth Circuit's erosion of RLUIPA's anti-discrimination objectives, too, will have a significant effect on Jewish communities. Land controls and community planning have long served as vehicles for discrimination by state and private actors against religious Jews. See Lucien J. Dhooge, *A Case Law Survey of the Impact of RLUIPA on Land Use Regulation*, 102 Marq. L. Rev. 985, 1022–25 (2019) (finding only 5 successful outcomes and 1 settlement in the 37 reported RLUIPA claims brought in state court). Robust enforcement of RLUIPA is thus crucial for members of *amicus*, whose free religious exercise at home, in synagogue, and at community centers can face prejudice by local decisionmakers.

Unabashed anti-Semitic vitriol too often seeps into local land controls. In 2016, a New Jersey town prohibited a Chabad-Lubavitch rabbi from hosting small weekly prayer services of ten to fifteen people at his residence. Complaint ¶ 2, *Chabad Jewish Ctr. of Toms River, Inc.* v. *Twp. of Toms River*, No. 3:16-cv-01599 (D.N.J. Mar. 22, 2016). In the lead-up to the denial, the town's mayor likened ultra-Orthodox Jews moving in to an "invasion." *Id.* ¶¶ 3, 128. When asked if he regretted this remark, he stated "I have nothing to apologize for. . . . I don't feel like I did anything wrong." *Id.* ¶ 3 (omission in original). Town residents also evinced anti-Semitic hostility, etching "Burn the Jews" on local playground equipment, referring to Orthodox Jews in offensive and derogatory terms, placing lawn signs reading "DON'T SELL!" and

issuing veiled threats against Jewish residents if prayer meetings were permitted. *Id.* ¶¶ 127–50; see, *e.g.,* Justin Auciello, *Police Investigating Anti-Semitic Graffiti in Toms River*, WHYY (Mar. 2, 2016), https://perma.cc/HPZ4-TFUZ.

In early 2019, another group in the same New Jersey county counseled their neighbors against selling their homes to Orthodox Jews. The group blamed the Jewish community for "pressure sales," "build[ing] homes at the expense of the environment," and "[seizing] control" of the local governing bodies, but it insisted that its concerns were only about "zoning, housing density and local support for public schools" rather than motivated by anti-Semitism. See Ben Sales, *Insisting It Is Not Anti-Semitic, NJ Group Sees Haredi Orthodox as a Threat to 'Quality of Life,'* Jewish Telegraphic Agency (Jan. 23, 2019), https://perma.cc/L5MK-2LLZ.

A similarly ugly chapter played out in the Gatsby-esque beach community of Atlantic Beach in 2023. Another Chabad organization bought a long-vacant commercial building for use as a center for religious worship, education, and outreach. Local officials days later moved swiftly to seize the property through eminent domain—ostensibly to build a community center, but in practice to keep Chabad out. After the district court entered a preliminary injunction, discovery revealed concerted action by the village's leadership to "move fast" to prevent Chabad and groups like it from "buying the world – town by town city by city." Admitting in private what was apparent to the public, the mayor and a member of the local judiciary mused that "most people don't want the Chabad and just don't want to say it. Any secular Jew doesn't want them." [Proposed] First Amended

Complaint ¶ 5, 7, 8, *Chabad Lubavitch of the Beaches, Inc.* v. *Vill. of Atlantic Beach*, No. 2:22-cv-04141-JS-ARL (E.D.N.Y Dec. 6, 2024), ECF No. 89-1; see also Order, *Chabad Lubavitch of the Beaches, Inc.* v. *Vill. of Atlantic Beach*, No. 2:22-cv-04141-JS-ARL (E.D.N.Y July 29, 2025), ECF No. 116 (order granting joint motion for entry of consent decree).

The rising tide of anti-Semitism is not limited to Greater New York. Multiple third-party organizations have observed a spike since 2017 in anti-Semitic hate crimes in the United States nationwide and in California specifically. Sarah Brown, *Growing Anti-Semitism in California and Globally*, Pacific Council on International Policy (Oct. 11, 2019), https://perma.cc/MHR7-Q4ND; see Anti-Defamation League, *ADL H.E.A.T. Map*, https://perma.cc/Q7CW-J3PH (last visited July 23, 2025) (estimating 18,226 reported incidents of anti-Semitism in 2023 and 2024, with more than 2600 in California alone).

RLUIPA has provided crucial protection for religiously oriented land users. For example, after the incidents discussed above, Chabad Jewish Center of Toms River brought an RLUIPA suit in federal court, alleging, in part, a substantial burden without a narrowly tailored or compelling government interest. The judge entered judgment on the pleadings, determining that the local board's denial of the application to use the property as a Chabad house violated RLUIPA. See *Chabad Jewish Ctr. of Toms River, Inc.* v. *Twp. of Toms River*, No. 3:16-01599, 2018 WL 1942360 (D.N.J. Feb. 5, 2018).

Sadly, discriminatory denials like this one remain a feature of zoning regulations. See, *e.g., Cent. UTA of Monsey* v. *Vill. of Airmont*, No. 18 CV 11103, 2020 WL 377706 (S.D.N.Y. Jan. 23, 2020) (rejecting motion to

dismiss Hasidic school's RLUIPA claims against municipality for preventing its expansion and refusing to provide transportation and special-needs services); *Congregation Kollel, Inc.* v. *Twp. of Howell*, No. 16-2457, 2017 WL 637689 (D.N.J. Feb. 16, 2017) (finding ripe Orthodox seminary's RLUIPA substantial burden and religious discrimination challenge to zoning denial); *Bikur Cholim, Inc.* v. *Vill. of Suffern*, No. 7:05-cv-10759, 2011 WL 2893071 (S.D.N.Y. June 29, 2011) (awarding attorneys' fees in successful RLUIPA challenge to municipality's denial of a zoning permit for use of property as a guesthouse within walking distance of hospitalized patients).

Even where hostility is not as overt as in some of the examples above, suspicion and misunderstandings about Orthodox Jews often inform adverse land-use decisions. Yet these improper motives can be invisible on the record, insulating a local decision against review under RLUIPA's anti-discrimination provision. See Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725, 726 (1999) (describing how "ignorance and even hostility toward religion sometimes operate behind the facade of ostensibly neutral land use regulations"); Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 Notre Dame L. Rev. 1, 5, 21 (2009) (explaining that "discrimination is so hard to unearth" in land-use decisions because they are "often handed down with insufficient reasoning, and so commonly governed by standards that leave ample room for subjectivity, that courts have a difficult time policing them for antireligious activity"). Discrimination cloaked in neutral terms is especially problematic for visibly different minority faiths like *amicus*. See Roman P.

Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 941 (2001) (noting that religions with practices unfamiliar or distasteful to the general public face a higher risk of discrimination in land-use decisions).

Robust scrutiny often exposes the ostensible neutral basis for an adverse land-use decision against Orthodox groups as pretextual. For example, the Second Circuit affirmed a district court finding that Pomona, New York used its zoning laws as a pretext for discriminating against an Orthodox rabbinical college. See *Congregation Rabbinical Coll. of Tartikov, Inc.* v. *Vill. of Pomona*, 280 F. Supp. 3d 426, 463, 465 (S.D.N.Y. 2017) (anti-discrimination provision), *aff'd in relevant part*, 945 F.3d 83 (2d Cir. 2019).

Similarly, in Mamaroneck, New York, a local zoning board denied an Orthodox day school a permit to expand. *Westchester Day Sch.*, 504 F.3d at 345–46. The Second Circuit ultimately concluded that the zoning board substantially burdened the school where the concerns the board advanced failed to justify denying the permit. *Id.* at 346. The real reason for opposition was to appease a "small but influential group of neighbors who were against the school's expansion plans." *Id.* As the court explained, an "arbitrary, capricious, or unlawful" denial "suggests that a religious institution received less than even-handed treatment." *Id.* at 351.

Thus, Jewish communities also depend on RLUIPA to vitiate the particular burden of discriminatory land-use denials. And as discussed above, these decisions are often too subtle to make out an RLUIPA anti-discrimination claim. Unfortunately, in the Ninth

Circuit, those decisions will now escape review entirely—unless the Jewish community undertakes an expensive, exhaustive, and very likely fruitless search for alternative sites.

RLUIPA empowers religious institutions to defend their chosen form of religious expression and to strike back against discrimination in land-use decisions. Minority religious groups, including the Jews, thus depend on RLUIPA. But the Ninth Circuit's decision substantially weakens the law by establishing extratextual preconditions. By granting the Temple's petition, this Court can remedy the Ninth Circuit's error and send a clear message about the continued need to enforcement RLUIPA enforcement.

CONCLUSION

Amicus respectfully requests the Court to grant the petition.

Respectfully submitted,

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July 30, 2025