No. 17-647

In the Supreme Court of the United States

ROSE MAY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the takings-specific ripeness doctrine developed in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), should be limited with respect to religious land-use litigation.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit law firm that protects the free expression of all religious faiths and the freedom of religious people and institutions to participate fully in public life. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Included in its mission of protecting the freedom of religious people to participate fully in public life is vindicating the concomitant First Amendment right of religious people to find property to gather on and put to religious use. Becket has therefore long been involved in land-use litigation under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* Becket brought the nation's first RLUIPA land-use case after the statute was enacted in 2000, see *Haven Shores Cmty. Church* v. *City of Grand Haven*, No. 1:00-cv-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000); and since then has been involved in RLUIPA litigation on behalf of a wide variety of religious leaders and institutions whose religious land uses have been discriminated against or unnecessarily burdened. See, *e.g.*, *Elijah Grp., Inc.* v. *City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011) (counsel for small Christian church); *Guru Nanak Sikh Soc'y of*

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Petitioner and Respondents have consented to the filing of this brief.

Yuba City v. *Cty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (*amicus* supporting Sikh temple); *Murphy* v. *New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005) (*amicus* supporting Christian prayer-group organizers); *Islamic Ctr. of Murfreesboro* v. *Rutherford Cty.*, No. 3:12-cv-0737 (M.D. Tenn. 2012) (counsel for mosque which obtained temporary restraining order permitting it to open for Ramadan). Becket has also participated in other land-use litigation in which a decision against the property owner threatened damaging consequences for religious land use. See Br. for the Becket Fund for Religious Liberty as *Amicus Curiae*, *Kelo* v. *City of New London*, 545 U.S. 469 (2005) (No. 04-108).

Becket is concerned with this case because the *Williamson County* bar on takings claims challenged by Petitioner here has been applied by some lower courts not just to takings claims, but to RLUIPA and related First Amendment claims as well. These applications of *Williamson County* flout both the rationale underlying the *Williamson County* decision and the statutory language and purpose of RLUIPA. Becket files this brief to inform the Court of the variety of different applications the much-criticized *Williamson County* doctrine has spawned in the lower courts, and to explain that, whatever the continuing vitality of *Williamson County* after the Court's decision in this case, the Court should make clear that there is no justification for applying the doctrine to non-takings claims like those under RLUIPA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If "a precedent is not always extended to the limit of its logic," *Hein* v. *Freedom From Religion Found.*,

Inc., 551 U.S. 587, 614-15 (2007), still less should lower courts extend this Court's precedent *beyond* those logical limits. Yet that's exactly what has happened with this Court's decision in *Williamson County*. "In the 30 years since the Court decided *Williamson County*, individual Justices have expressed grave doubts about the validity of that decision and have called for reconsideration." *Arrigoni Enters., LLC* v. *Town of Durham*, 136 S. Ct. 1409, 1412 (2016) (Thomas, J., dissenting from denial of certiorari). Yet over that same period, many lower courts have expanded *Williamson County*'s application, uprooting it from its native soil of the Takings Clause and planting it in the path of unfortunate plaintiffs pressing a variety of different claims, from due process to equal protection to RLUIPA land-use claims.

But the transformation of *Williamson County* into an all-purpose land-use doctrine finds no basis in the rationale of the opinion itself, which imposed its extra-Article III requirements of finality and exhaustion as a means of determining when an unconstitutional "tak[ing]" "without just compensation" has occurred. See U.S. Const. amend. V. And it is especially troubling in the RLUIPA context. RLUIPA gives religious land-use plaintiffs a statutory cause of action to challenge "discriminat[ion] against" and "substantial burden[s]" on their religious land use, 42 U.S.C. § 2000cc—not takings. And religious plaintiffs are especially vulnerable to the sort of "gamesmanship" on the part of government officials that *Williamson County* encourages, see *Arrigoni*, 136 S. Ct. at 1411, because the unique characteristics of houses of worship make them uniquely unpopular with local zoning officials. See generally Douglas Laycock & Luke W.

Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021 (2012).[2]

This case presents the opportunity for this Court to put an end to *Williamson County* creep. *Amicus* agrees with Petitioner that *Williamson County* should be overruled at least in part, even as applied in its original, Takings Clause context. But to whatever extent *Williamson County* survives the Court's decision here, the Court should reiterate that *Williamson County* is a Takings Clause doctrine, not a general amendment to Article III applicable to all land-use claims irrespective of their source. Doing so would allow this Court's decision to not only remove an "imped[iment to] the orderly development of takings law," Pet. 2, but also to correct a misreading of this Court's precedent that, in the RLUIPA context, has generated open disagreement and uncertainty among the circuits.[3]

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[2] RLUIPA's prisoner provisions, 42 U.S.C. § 2000cc-1, are not at issue here. Exhaustion of remedies in the prison context is governed by the Prison Litigation Reform Act, 42 U.S.C. § 1997e. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 n.12 (2005).

[3] Compare *Murphy* v. *New Milford Zoning Comm'n*, 402 F.3d 342, 347-50, 352 (2d Cir. 2005) (finding *Williamson County* "appropriate to apply" to plaintiffs' RLUIPA claims); *Congregation Anshei Roosevelt* v. *Planning & Zoning Bd.*, 338 F. App'x 214, 217-19 (3d Cir. 2009) (following *Murphy*); *Grace Cmty. Church* v. *Lenox Twp.*, 544 F.3d 609, 613-18 (6th Cir. 2008) (same); *Guatay Christian Fellowship* v. *Cty. of San Diego*, 670 F.3d 957, 976-79 (9th Cir. 2011)

ARGUMENT

I. Flawed even in the takings context, *Williamson County* has metastasized to interfere with other land-use claims, including RLUIPA claims.

Williamson County is a takings-specific doctrine motivated by takings-specific concerns. Petitioner convincingly explains why the doctrine is misguided even in its original takings context, and preexisting rules of Article III ripeness should apply. Pet'r's Br. 33-41. *Amicus* writes to add that *Williamson County* should be overruled or limited not just because it has caused problems in the Takings Clause context, but also because its problems have proliferated. Courts around the country have applied it not just to takings claims, but to land-use disputes more generally—including claims under RLUIPA.

The *Williamson County* doctrine is about the meaning of the Takings Clause, not other constitutional provisions, and not federal statutes. In *Williamson*

(same) with *Roman Catholic Bishop of Springfield* v. *City of Springfield*, 724 F.3d 78, 91-93 & n.12 (1st Cir. 2013) (Lynch, J.) (declining to apply *Williamson County*'s "specialized Takings Clause ripeness doctrine" to RLUIPA claim); *Temple B'Nai Zion, Inc.* v. *City of Sunny Isles Beach*, 727 F.3d 1349, 1356-57 (11th Cir. 2013) (finding *Williamson County* "an inappropriate tool for the" RLUIPA claim presented there). See also *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 287 n.7 (5th Cir. 2012) (noting the application of *Williamson County* to RLUIPA and First Amendment claims "is an open question in this circuit").

County, the Court set out "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court." *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997). First, "a plaintiff must demonstrate that she has * * * received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing the regulations.'" *Id.* at 734 (quoting *Williamson Cty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985)). This hurdle requires that the plaintiff "follow the procedures for requesting the applicable zoning relief, and have its request denied, before bringing a claim in court." *Roman Catholic Bishop of Springfield*, 724 F.3d at 91 (Lynch, J.). Second, she must have "sought 'compensation'" for the alleged taking "'through the procedures the State has provided for doing so.'" *Suitum*, 520 U.S. at 734 (quoting *Williamson County*, 473 U.S. at 194). Both requirements purported to derive from the specific language of the Fifth Amendment: the first "follows from the principle that only a regulation that 'goes too far' results in a *taking*" in the first place; and the second "stems from the Fifth Amendment's proviso that only takings without '*just compensation*' infringe that Amendment." *Ibid.* (emphasis added, citation omitted).

The *Williamson County* doctrine thus was designed to help courts determine when a plaintiff has suffered a particular type of injury: a "taking" without "just compensation." But some lower courts—invoking "policy considerations" set out in *Williamson County*—have held that the doctrine should not be "so strictly confined." *Murphy*, 402 F.3d at 349.

On this reasoning, lower courts have applied *Williamson County* to "various types of land use challenges," including challenges based on substantive due process, procedural due process, equal protection, and the "First Amendment rights" of assembly and free exercise. *Murphy*, 402 F.3d at 350, 353. Perhaps most perversely, numerous courts have applied the *Williamson County* doctrine to claims under RLUIPA—a statute enacted by Congress for the precise purpose of minimizing the expense, uncertainty, and delay commonly incurred by houses of worship at the hands of local zoning officials. See *Temple B'Nai Zion*, 727 F.3d at 1356 (collecting cases); see also, generally, Laycock & Goodrich, 39 Fordham Urb. L.J. 1021. This misapplication of *Williamson County* has generated open disagreement in the circuits, with the First and Eleventh Circuits declining to apply *Williamson County*'s "specialized Takings Clause ripeness doctrine" to RLUIPA claims, even while noting that the Second, Third, Sixth, and Ninth Circuits have done so. *Roman Catholic Bishop of Springfield*, 724 F.3d at 91-93 & n.12; see also *Temple B'Nai Zion*, 727 F.3d at 1357.

This misapplication began with *Murphy*, in which the Second Circuit "recognize[d] that the Supreme Court developed the *Williamson County* ripeness test in the context of a regulatory takings challenge," but nonetheless applied the decision to RLUIPA claims based on "policy considerations." 402 F.3d at 348-50. The court did so without considering whether those policy considerations were consistent with the statute Congress enacted. *Ibid.* And although the *Murphy* court acknowledged that it needed to be "cautious[]" in extending *Williamson County* outside the takings con-

text, it purported to exercise that caution by articulating a two-step "preliminary inquiry" that it would apply before applying *Williamson County* in RLUIPA cases, *id.* at 350-51—making the process of deciding whether a RLUIPA claim is ripe still more complex and creating confusion even among the courts that follow *Murphy*. See *Opulent Life Church*, 697 F.3d at 287 n.7; *New Life Evangelistic Ctr., Inc.* v. *City of St. Louis*, No. 4:15-cv-00395, 2015 WL 6509338, at *3-6 (E.D. Mo. Oct. 27, 2015) ("[A]lthough the Ninth Circuit has chosen to apply *Williamson* without further inquiry, this Court will adopt the cautious approach of the Second and Sixth Circuits.").

The concerns that motivated Congress to pass RLUIPA are at loggerheads with the procedural hurdles erected by the application of *Williamson County*. Indeed, application of *Williamson County* to RLUIPA claims is often inconsistent with the terms of RLUIPA itself. Under RLUIPA, a plaintiff makes out a prima facie case if she shows that a land-use regulation discriminates against religion, or that a land-use regulation has been "impose[d] or implement[ed] in a manner that imposes a substantial burden on" her "religious exercise." 42 U.S.C. § 2000cc(a)(1), (b). And these injuries may become manifest even before the plaintiff has cleared the *Williamson County* hurdles.

Regarding discrimination, this Court explained just last Term that religious discrimination is an injury in itself, one which occurs at the point when a religious organization is prohibited from being treated on equal grounds with secular organizations. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017). This Term, the Court explained that Free Exercise Clause violations may occur during

the administrative review process itself, when religious entities are deprived of "full and fair consideration" of their claims. *Masterpiece Cakeshop Ltd.* v. *Colo. Civil Rights Comm'n*, No. 16-111, slip op. 18, 584 U.S. ___ (June 4, 2018). And regarding substantial burdens, local procedures for applying for zoning relief may be futile in a particular case, or zoning officials' conduct may give rise to questions of bias, or a house of worship may face an unusual application process so byzantine or prohibitively expensive that being forced to comply with the process would *itself* constitute a substantial burden. (We discuss several such examples in Part II.B. below.) To apply *Williamson County* in these circumstances—and thus to dismiss a plaintiff's RLUIPA claim unless she complies with the very procedures alleged to be substantially burdensome—is to nullify Congress's handiwork.

Several cases illustrate the point.

In *Miles Christi Religious Order* v. *Township of Northville*, 629 F.3d 533 (6th Cir. 2010), the Sixth Circuit applied *Williamson County* to dismiss a religious order's Free Exercise and RLUIPA claims. There, zoning authorities determined that a small religious order's longstanding use of a home had "intensified" to the level of "a small church or place of worship," and thus that the order would have to "go through the town's site review process, beginning by submitting a site plan, to ensure" that the property met the heightened requirements. *Id.* at 543 (Batchelder, J., dissenting). But "completing and submitting the site plan itself" would cost $30,000, such that the fathers and brothers were "being put to the choice of either paying for an expensive site plan or curtailing or eliminating [their] religious activities." *Id.* at 543, 546. Further,

the religious order alleged that the intensity determination was based on discriminatory animus, an allegation that was supported by the government's "troubling" statements at oral argument. *Id.* at 540 (majority); *id.* at 549 (Batchelder, J., dissenting). Still, the court held that the order's Free Exercise and RLUIPA claims were unripe under *Williamson County*, and that the order must either submit a site plan or appeal the intensity determination before asserting a RLUIPA claim, simply to continue the same religious exercise it had conducted at the property for years. *Id.* at 537-42.

Another example is *Guatay Christian Fellowship* v. *County of San Diego*, 670 F.3d 957 (9th Cir. 2011). There, the plaintiff church held services on its property for 22 years without incident, but was then informed it must undergo a burdensome and cost-prohibitive permitting process to continue using the building as a church. Specifically, in 2008, after more than two decades of unchanged land use, zoning authorities warned the church that its "continued operation" on the property was "illegal," and threatened to "cut all electrical power to the Church complex" if the church continued meeting there without obtaining a special-use permit. *Id.* at 965. But completing the process of applying for a special-use permit—including paying the "fees," resolving the "project issues," and handling the "public reviews that had to be completed before a Use Permit could issue"—would cost the church "between $214,250 and $314,250" and take "approximately fourteen months to three years." *Id.* at 967-68. Nonetheless, applying *Williamson County*, the Ninth Circuit dismissed the church's RLUIPA claim, holding that because the church had not applied for a

special-use permit, its "RLUIPA claims [were] unripe." *Id.* at 976-80.

Miles Christi and *Guatay* are representative of the problems inherent in applying *Williamson County* to RLUIPA claims, but they are not alone. A number of lower-court decisions have applied *Williamson County* in similar circumstances. See, *e.g.*, *Congregation Anshei Roosevelt*, 338 F. App'x at 217-19; *Life Covenant Church, Inc.* v. *Town of Colonie*, No. 1:14-CV-1530, 2017 WL 4081907, at *5-9 (N.D.N.Y. Sept. 13, 2017); *Congregation Rabbinical College of Tartikov, Inc.* v. *Vill. of Pomona*, 915 F. Supp. 2d 574, 597-607 (S.D.N.Y. 2013) (dismissing RLUIPA claim under *Williamson County* even though "troubling" statements by officials indicated that the challenged ordinance was passed specifically to exclude the plaintiff Jewish congregation); *Cassidy* v. *City of Brewer*, No. 1:12-cv-137, 2012 WL 5844897, at *1 & n.3 (D. Me. Nov. 19, 2012).

These cases fail to grapple with the fact that *Williamson County*'s finality and exhaustion requirements were designed to determine when a plaintiff had suffered a particular type of injury—an uncompensated taking. Those requirements are simply out of place when applied to a statute that addresses *different* injuries that may crystalize sooner than a taking. And RLUIPA is just such a statute. In RLUIPA cases involving religious discrimination, the relevant injury is the government's failure to treat religious land use on equal footing with nonreligious use—an injury that could easily be complete long before *Williamson County*'s procedural restrictions are satisfied. See *Trinity Lutheran*, 137 S. Ct. at 2022.

And in substantial-burden cases, there are many situations in which requiring the plaintiff to comply with *Williamson County* could *itself* substantially burden the plaintiff's religious exercise. A burden may be "substantial" if it "places considerable pressure on the plaintiff to" forgo the exercise, *Yellowbear* v. *Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.)—a standard that is met by land-use actions that create excessive or unusual hurdles to the use of a property for religious worship. See, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cty. Council*, 706 F.3d 548, 552-54, 555-58 (4th Cir. 2013) (county changed its laws twice in response to African-American church's application, rendering that application futile); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 348-53 (2d Cir. 2007) (zoning authorities' "stated willingness to consider a modified proposal was disingenuous," rendering modified application unnecessary). To the extent that complying with *Williamson County*'s finality requirement by following local procedures for seeking the applicable zoning relief would itself place considerable pressure on the plaintiff to simply forego the religious exercise altogether, applying *Williamson County* to RLUIPA claims is inconsistent with RLUIPA.

This is not to say that every court has extended *Williamson County* to religious land-use claims. In fact, there is a circuit split over the issue, as several courts have recognized that *Williamson County* is "an inappropriate tool for" RLUIPA claims. *Temple B'Nai Zion*, 727 F.3d at 1357; see also *Roman Catholic Bishop of Springfield*, 724 F.3d at 92; *Sisters of St. Francis Health Servs., Inc.* v. *Morgan Cty.*, 397 F. Supp. 2d 1032 (S.D. Ind. 2005); cf. *Israelite Church of*

God in Jesus Christ, Inc. v. *City of Hackensack*, No. 11-5960, 2012 WL 3284054, at *2 (D.N.J. Aug. 10, 2012) ("*Williamson* is not on all fours, as [a RLUIPA] case is not a takings case.").

For instance, in *Roman Catholic Bishop of Springfield*, the First Circuit refused to apply *Williamson County*'s "specialized Takings Clause ripeness doctrine" to a RLUIPA claim. 724 F.3d at 91. Judge Lynch explained that *Williamson County*'s finality requirement "is compelled by the very nature of the inquiry required by the Just Compensation Clause," *id.* at 91-92 (quoting *Williamson County*, 473 U.S. at 190); while a law's effect on "free exercise rights may well become clear at a different point than that contemplated by takings law," *id.* at 92. The First Circuit held that the burden on the church's free exercise rights had indeed become clear even though the church had not complied with *Williamson County*'s finality requirement, because requiring it to apply for an exception to the challenged land-use regulation before suing (as *Williamson County* would) would "impose[] delay, uncertainty, and expense" and force it to "subject[] its religious decisions * * * to secular administrators." *Id.* at 92-93. This meant that there was "a present burden on" the plaintiff's "free exercise of religion." *Id.* at 92.

Likewise, the Eleventh Circuit in *Temple B'Nai Zion* declined to apply *Williamson County* to a RLUIPA claim, finding it "an inappropriate tool for the specific facts presented" there. 727 F.3d at 1357. The court reasoned that because the plaintiff alleged that the challenged land-use decision—the designation of its property as a historical landmark—"was motivated by discriminatory animus, *Williamson County* is inap-

propriate because the injury is complete upon the municipality's initial act." *Ibid.* The court therefore reversed the district court's decision that the plaintiff's claim was unripe, even though it was undisputed that the plaintiff had failed to seek a variance from or waiver of the building restrictions concomitant with the landmark designation before suing. *Id.* at 1355.

Finally, the district court's decision in *Sisters of St. Francis Health Services* is to similar effect. There, the court held that a religious order whose mission was to heal the sick could bring a RLUIPA challenge even before it applied for county approval to expand its hospital. 397 F. Supp. 2d at 1035, 1047-49. The court explained that because the plaintiff had presented evidence that the "application procedure *itself* is ill-defined, vague, and imposes a substantial burden on [the plaintiff's] plans for expansion, including effects on its construction schedule and recruitment of personnel," *Williamson County* could not require it to comply with that procedure. *Id.* at 1048 (emphasis added).

The courts on this side of the split properly recognize the limitations of *Williamson County*. This Court "has only applied *Williamson County*'s finality rule to regulatory takings claims," *Opulent Life Church*, 697 F.3d at 287 n.7—and for good reason, since *Williamson County*'s finality and exhaustion requirements are, according to *Williamson County* itself, "compelled by the very nature of the inquiry required by" the Fifth Amendment. 473 U.S. at 190. But RLUIPA requires a different inquiry, and to apply *Williamson County* to RLUIPA claims is to create "a gaping loophole" in the statute that would give zoning authorities "license to impose illegal burdens by delaying the land use approval process endlessly." *Israelite Church of God*,

2012 WL 3284054, at *5. By reiterating that *Williamson County* is limited to the takings context, this Court can take an important step toward ensuring that those whose religious exercise has been discriminated against or substantially burdened by a land-use regulation are able to seek a prompt remedy in court, as the plain text of RLUIPA requires.[4]

II. *Williamson County* is particularly inappropriate in the context of RLUIPA land-use claims.

The cases that have applied *Williamson County* to RLUIPA land-use claims have done so based on four "policy considerations" first outlined in the Second Circuit's decision in *Murphy*. But the *Murphy* approach is contrary to the policy Congress created with RLUIPA. Both the text and legislative history of RLUIPA demonstrate that Congress did not intend to impose *Williamson County*-esque procedural hurdles on RLUIPA plaintiffs. Further, the application of RLUIPA over the last seventeen years demonstrates that Congress's concerns were well founded, and

[4] This is not to suggest that religious organizations should have a free pass to sue under RLUIPA without first making any efforts to comply with local zoning procedures. For one thing, traditional Article III standing and ripeness would apply to bar claims where the injury is merely hypothetical or speculative. See *Roman Catholic Bishop of Springfield*, 724 F.3d at 90-91 (rejecting the application of *Williamson County*'s additional ripeness requirements to an RLUIPA case, but applying Article III's requirements). In addition, RLUIPA itself provides a limit by requiring that actionable burdens on religious exercise be *substantial*.

proper application of the statute is necessary to protect houses of worship from burdensome restrictions, arbitrary decisionmaking, and covert discrimination.

A. RLUIPA was intended to remedy burdensome and discriminatory actions by local land-use authorities.

RLUIPA was passed by both houses of Congress unanimously and signed into law by President Clinton in 2000. Laycock & Goodrich, 39 Fordham Urb. L. J. at 1022-23 & nn.4-5 (2012). The law brought together a coalition of ideologically diverse groups united in support of religious freedom. In enacting RLUIPA, Congress emphasized that the right to acquire property is inexorably connected to the rights protected by the First Amendment. As Senators Kennedy and Hatch explained, "[t]he right to assemble for worship is at the very core of the free exercise of religion" and the ability to acquire "physical space adequate to * * * [a congregation's] needs" is an indispensable adjunct of the core First Amendment right to assemble for religious purposes. 146 Cong. Rec. 16698 (2000) (Joint Statement of Senators Hatch and Kennedy).

Over more than three years, Congress held numerous rounds of hearings which found "massive evidence" of discrimination against religious persons and organizations by both local and state officials in land-use decisions. 146 Cong. Rec. 16698. This burden fell particularly on smaller or unfamiliar denominations. *Id.*

Congress found that existing zoning laws excluded churches from certain areas completely or left the right to worship at the hands of local land-use regulators who had broad discretion in granting necessary

permits. H.R. Rep. No. 106-219 at 19 (hearings regarding the Religious Liberty Protection Act of 1999, a precursor to RLUIPA). Zoning boards and other local land-use authorities regularly used their "authority in discriminatory ways." 146 Cong. Rec. 16698. Such discriminatory burdens were "often covert" and difficult to detect, *id.* at 16699, because discrimination often "lurks behind such vague and universally applicable reasons as traffic, aesthetics" or the common refrain that a religious land use is "not consistent with the city's land use plan." *Id.* at 16698. Such land-use processes were "not controlled by neutral and generally applicable rules" and therefore were "often vague, discretionary, and subjective." H.R. Rep. No. 106-219 at 24.

The hearings revealed several egregious examples of such behavior, such as a city rezoning a parcel for the sole purpose of excluding a church, and a city issuing a building permit to a church and then revoking the permit—after the church had begun building—because of an alleged parking requirement miscalculation. H.R. Rep. No. 106-219 at 20. Congress also heard evidence of the severe burden caused by procedural delays. For instance, houses of worship often struggled to pay a costly lease or commit to a mortgage to hold a property they could not use as the process dragged on. *Id.* Congress sought to ease these procedural and substantive burdens by enacting RLUIPA. See Laycock & Goodrich, 39 Fordham Urb. L.J. at 1022.

Unlike the prisoner provisions of RLUIPA, which on their face incorporate the Prison Litigation Reform Act's requirement that prisoners exhaust all prison remedies before bringing an RLUIPA claim, see *Cut-*

ter, 544 U.S. at 723 n.12, the land-use provisions contain no exhaustion requirement. RLUIPA's lack of an exhaustion requirement for land-use claims parallels other civil-rights claims brought under 42 U.S.C. § 1983—a statute the Supreme Court has held does not require exhaustion. *Patsy* v. *Bd. of Regents of Fla.*, 457 U.S. 496, 507 (1982); Pet'r's Br. 27. Accordingly, many courts have held that exhaustion of state remedies is not required under RLUIPA. *Jesus Christ Is The Answer Ministries, Inc.* v. *Baltimore Cty.*, No. CV RDB-17-3010, 2018 WL 1521873, at *8 (D. Md. Mar. 27, 2018) (collecting cases). Unfortunately, by applying *Williamson County*, courts have imposed exhaustion-type requirements where Congress enacted none.

B. Application of *Williamson County* to RLUIPA may encourage the use of burdensome and discriminatory procedures.

The use of *Williamson County* in RLUIPA cases is not only contrary to the statute's text and purpose, it may actually encourage precisely the sort of behavior that RLUIPA was passed to remedy. The now seventeen-year history of RLUIPA's application demonstrates that some local governments continue to abuse zoning and permitting processes to attempt to exclude religious organizations. This "slow burn of bureaucratic tedium" can be "devastating" for religious land use.[5] And it may grow worse if cities can avoid RLUIPA "just by running applicants in infinite circles" rather than denying applications outright. *Israelite*

[5] Emma Green, *The Quiet Religious-Freedom Fight That Is Remaking America*, The Atlantic (Nov. 5, 2017), https://goo.gl/VFmwZy.

Church of God, 2012 WL 3284054, at *5. Several prominent examples illustrate how municipalities can improvise additional procedural hurdles.

The case of *Congregation Etz Chaim* v. *City of Los Angeles* is one such example. The congregation's struggle to establish a synagogue began long before RLUIPA was enacted—and indeed was one of the examples that key sponsors such as Senator Kennedy and Representative Hyde invoked to show the need for the statute.[6] Congregation Etz Chaim first applied for a conditional-use permit to operate its synagogue in 1996, but its application was denied three times. *Congregation Etz Chaim* v. *City of Los Angeles*, No. CV97-5042 CAS (Ex), 2009 WL 1293257, at *1 (C.D. Cal. May 5, 2009). After RLUIPA passed, the city settled, but local residents banded together to challenge the settlement. *League of Residential Neighborhood Advocates* v. *City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007). The Ninth Circuit held for the challengers and invalidated the settlement, but left open the possibil-

[6] See Protecting Religious Freedom After *Boerne* v. *Flores*, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 32-36 (1998) (statement of Rabbi Chaim Baruch Rubin, Congregation Etz Chaim, Los Angeles, California); see also H. Rep. No. 106-219, at 22 (discussing the Etz Chaim case); 146 Cong. Rec. S6678-02, S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy criticizing the city for "putting the neighborhood effectively off-limits for Orthodox Jews"); 146 Cong. Rec. E1564-01, E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

ity that the settlement could go forward if the congregation could demonstrate a RLUIPA violation. *Id.* at 1057-58.

Etz Chaim then filed a new application for a conditional-use permit and attempted to revive the settlement under RLUIPA. *Congregation Etz Chaim*, 2009 WL 1293257, at *4-5. But the district court concluded that—even though the case had been going on for *thirteen years* at that point—Etz Chaim's claims were still unripe under *Williamson County*. *Id.* at *6-7. Because the congregation had again applied for a permit, the court determined that it could not yet decide the legality of the first three permit denials or the validity of the settlement agreement. Unsurprisingly, the permit was once again denied—but the city then argued that those claims were res judicata. *Congregation Etz Chaim* v. *City of Los Angeles*, No. CV 10-1587 CAS (Ex.), 2011 WL 12462883, at *6-7 (C.D. Cal. Jan. 6, 2011). Finally, in July 2011, ten years after RLUIPA's passage and fifteen years after the congregation's initial application, the synagogue obtained a ruling upholding its right to a conditional-use permit under RLUIPA. C*ongregation Etz Chaim* v. *City of Los Angeles*, No. CV10-1587 CAS EX, 2011 WL 12472550, at *10 (C.D. Cal. July 11, 2011).

The decade-and-a-half struggle of Etz Chaim shows not only why RLUIPA is necessary, but also how *Williamson County* can be used to thwart application of the statute. Because the synagogue made a second good-faith attempt to seek a permit, it was subjected to additional litigation and uncertainty.

Etz Chaim's example is extreme, but it is not alone. Other RLUIPA plaintiffs have been subjected to years

of burdensome and sometimes futile land-use processes. These cases illustrate why the application of *Williamson County*'s extra-Article III procedural hurdles are especially inappropriate in the RLUIPA context.

The case of Castle Hills First Baptist Church shows how city planners can use land-use processes and multiple permit procedures to create hurdles to religious land use, rendering the process itself substantially burdensome. When Castle Hills sought to expand to accommodate its growing church and school, the city amended its ordinances to prevent construction. See *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *13 (W.D. Tex. Mar. 17, 2004). The city created delays and issued conflicting decisions; at one point, the city allowed the church to build an additional floor on its new building, but refused to entertain an application for the use of that floor. *Id.* at *4. After Castle Hills filed a lawsuit under RLUIPA, the church and the city were ordered into mediation, and Castle Hills was required to submit three additional applications. *Id.* at *6. The city waited a year, then rejected those applications, too. *Ibid.* The matter was eventually resolved years later, on summary judgment in federal court.

For Castle Hills, the process from purchase to "final" denial took nearly four years. And each step of the way the city imposed additional requirements on the church. The continued application of *Williamson County*'s finality requirement to RLUIPA claims would allow, or even encourage, hostile city officials to take actions similar to those of the City of Castle Hills, prolonging procedures and demanding that religious organizations make repeated and futile appeals.

The application of *Williamson County* is especially inappropriate in light of the history of RLUIPA cases in which local governments changed the rules during the permitting process. An egregious example is that of World Outreach Conference Center, a Christian church and community center operating in inner-city Chicago. The church bought the building from the YMCA and continued using it in substantially the same fashion as its previous owner. But when the church applied for a permit, the city refused and amended its zoning ordinance to exclude community centers—and then filed a lawsuit against *the church*, which the Seventh Circuit characterized as "frivolous." *World Outreach Conference Ctr.* v. *City of Chicago*, 591 F.3d 531, 536 (7th Cir. 2009). The city's irrational bias against World Outreach even led it to deny FEMA's request to use the center to shelter Hurricane Katrina victims. *Ibid.*

Similarly, Montgomery County, Maryland, changed its rules repeatedly to prevent the construction of a new house of worship for Bethel World Outreach Church—a church with many African-American members in a less diverse part of the county. Bethel purchased land zoned for church use, but when it applied for water and sewer connections, the county denied its application and, in the same council meeting, amended the ordinance to prohibit large institutions from obtaining water and sewer connections in that zone. *Bethel World Outreach Ministries*, 706 F.3d at 553. Bethel then applied to build a smaller church that could operate on private well and septic connections. While its application was pending, the county once again changed the rules to prohibit any institutions from building in the zone, regardless of water source,

and "deferred" Bethel's application indefinitely. *Id.* at 553-54. The Fourth Circuit later recognized that the county's actions likely violated RLUIPA and that the deferral was an effective denial. *Id.* at 557-59.

All these cases demonstrate how local governments may change the rules of the game to frustrate land-use applications and render them futile. The application of *Williamson County* to such situations would deprive houses of worship of the remedy Congress crafted and embolden unlawful behavior by local officials. Local land-use commissions and city councils frequently subject religious organizations to a shifting and Kafkaesque kaleidoscope of restrictions and limitations.

Further, because local planning boards are particularly susceptible to the whims of public pressure or the biases of individual commission members, see Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 Harv. J.L. & Pub. Pol'y 717, 736 (2008), the process is ripe for abuse against disfavored religious organizations—perhaps explaining why a strikingly disproportionate number of RLUIPA land-use cases involve religious minorities. Laycock & Goodrich, 39 Fordham Urb. L.J. at 1029 (although "Jews, Muslims, Buddhists, and Hindus constitute only about 3% of the United States population," "in the first ten years under RLUIPA, they represented 34% of DOJ's caseload" enforcing the statute). As Congress found when it enacted RLUIPA, local land-use decisionmaking was "not controlled by neutral and generally applicable rules" and was "often vague, discretionary, and subjective." H.R. Rep. No. 106-219 at 24. These "often covert" burdens are precisely what RLUIPA is intended to remedy, and *Williamson County* stands in the way.

CONCLUSION

RLUIPA was enacted to protect houses of worship from constitutional violations. *Williamson County*'s finality and exhaustion requirements interfere with that relief and are incompatible with the civil rights protections that RLUIPA guarantees. Even if this Court retains *Williamson County* in the takings context, it should nevertheless take the opportunity to emphasize that such additional procedural restrictions are inapplicable outside of that context, especially when critical rights such as the right of religious freedom are at stake.

Respectfully submitted.

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JUNE 2018