

No. 25-965

In the Supreme Court of the United States

DANIEL GRAND, *Petitioner*,

v.

CITY OF UNIVERSITY HEIGHTS, OHIO, ET AL.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

**BRIEF OF *AMICUS CURIAE*
PROTECT THE FIRST FOUNDATION
SUPPORTING PETITIONER**

ERIK S. JAFFE
Counsel of Record
HANNAH C. SMITH
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Amicus Curiae

SEPTEMBER 7, 2026

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*¹

Petitioner Daniel Grand cancelled a prayer meeting at his home after the City’s officials threatened to punish him for violating zoning laws should he pray with a small group of co-religionists in his home without first seeking a permit to turn the home into a formal “house of worship.” Grand brought claims against the City alleging that its actions burdened his right to freely exercise his religion. But the district court and the Sixth Circuit held that his claims were unripe because Grand withdrew the permit application that the City had insisted on before the City could deny it. This was wrong. The Court should hold that religious land-use claims do not require administrative finality to ripen. Instead, they are live controversies as soon as the government threatens enforcement in a way that could chill religious exercise.

As this case shows, a city can chill worship in the home simply by threatening to enforce discretionary zoning laws. And since even the momentary “loss of First Amendment freedoms” is “irreparable injury,” *Mahmoud v. Taylor*, 606 U.S. 522, 569 (2025) (citation omitted), federal courts should be open to prevent such harms even before the government has insisted upon a person’s seeking a permit to pray with friends at home. In holding otherwise, the lower courts here left

¹ This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel or members made a monetary contribution toward the brief’s preparation or submission.

landowners without redress when zoning laws chill their free exercise rights.

In the First Amendment context, this Court's precedents confirm that regimes that predicate a person's right to engage in First Amendment activity on his first seeking discretionary government permission are suspect. After all, permission that must be granted can be denied. *E.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). And some speakers, rather than face the burden and uncertainty of seeking discretionary government permission to engage in First Amendment activity, will keep silent. The resulting self-censorship is itself a redressable First Amendment harm.

The same rule applies when religious rights are at issue. When Grand cancelled a religious meeting in response to government threats, his First Amendment rights were violated by the threat itself and the demand that he submit his protected activity to prior government review, no less than if he had affirmatively sought a permit only for it to be denied. Yet the Sixth Circuit erroneously found no cognizable final harm.

That error is particularly troubling to *amicus* Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable areas of law. *Amicus* agrees with Grand (at 39) that this Court's "traditional treatment of religious-liberty claims," and not zoning law's finality requirement in run-of-the-mill land-use cases, should apply to land-

use restrictions that suppress religious exercise on private property.

Amicus writes separately to emphasize two points. First, a zoning scheme that conditions worship on a discretionary special use permit is a “mechanism for individualized exemptions,” *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (citation omitted), subject to strict scrutiny as soon as the government threatens enforcement—not merely when a permit is finally denied. Second, the record shows that the City’s threats were not grounded in any legitimate land-use interest but instead in unconstitutional animus against Grand’s Jewish faith. That animus hid behind the mask of a discretionary permitting system. Indeed, it is precisely the ability to mask the unconstitutional animus that makes discretionary systems so suspect.

This Court should reverse. A threat that chills worship is a ripe First Amendment injury. And the fact that the City could hide that threat inside a discretionary permitting scheme is a reason to allow federal courts to hear the claim immediately, not a reason to require them to tolerate ongoing First Amendment harm while waiting for finality under the inappropriately deferential standard articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

STATEMENT

Petitioner Grand is an Orthodox Jew required to “pray thrice daily with a group of ten men”—a minyan—on his Sabbath and High Holy Days. App.2a. But he lived too far from his temple to pray with others there because Orthodox Jews may not use cars or other means of transport on the Sabbath. When he tried to organize a minyan to pray in his home, a neighbor complained, and the City sent Grand a “cease-and-desist letter” threatening pretextual “building code citations” for violating the City’s zoning laws. App.3a. Grand cancelled the meeting in response. App.3a.

At the City’s insistence, Grand then sought a special use permit from the City’s planning commission that would allow him to use his home for “periodic religious gatherings,” App.3a-4a. As Grand later learned, however, that permit, if granted, would have converted his home into a house of worship and deprived him of the ability to live there at all since a building cannot be both a residence and a house of worship. See University Heights Codified Ordinance § 1274.02(f)(4); J.A.73, 130, 229-230. Even apart from that Catch-22, the permit process was impermissibly discretionary. The planning commission considers several loosely defined factors when deciding whether to grant a special use permit. App.27a-28a (parking and traffic considerations, lighting, noise, etc.). But the ordinance has a catch-all allowing the commission to deny permits “contrary to the public health, safety and welfare.” App.28a.

While Grand’s application was pending, he was subjected to unusual and burdensome scrutiny. Police “dr[o]ve past Grand’s house” trying to catch him praying with others and an inspector searched inside checking for violations. App.5a. Before the commission could resolve Grand’s permit application, he withdrew it, explaining that he did not want to operate a house of worship as the zoning ordinance defined it. App.5a. His withdrawal was seemingly due, at least in part, to learning that he could not continue living in his home if his permit were granted.

After withdrawing his application, Grand sued, claiming, among other things, that the City violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, and the First Amendment by requiring him to get a permit to pray with friends in his own home—a permit that also would have effectively evicted him from that home. App.5a. But even though Grand had already been forced to cancel a prayer meeting, the lower courts found his claims unripe since the City never denied his permit application. App.2a.

ARGUMENT

I. Application of a Discretionary Mechanism for Individualized Exemptions Triggers Strict Scrutiny Even Before a Final Permit Denial.

Both the Free Exercise Clause and RLUIPA protect Grand’s right to pray with a minyan in his home without having to seek discretionary government permission to do so and without having to vacate his home in order to deem it a house of worship

where the City deigns to permit prayers. That right is violated not only when a religious claimant is *denied* such permission, but whenever the government applies a regime that requires claimants to seek it or to make an unreasonable sacrifice as a condition of such permission. As Grand shows (at 45), the text of RLUIPA rejects any claim to a finality requirement by providing that the rules for standing to bring an RLUIPA claim are the same as the “general rules of standing under article III of the Constitution.” 42 U.S.C. § 2000cc-2(a). And the same is also true for his claim under the Free Exercise Clause.

1. In the First Amendment context, discretionary permitting regimes are highly suspect and subject to strict scrutiny. In *Saia v. New York*, for example, the Court reviewed an ordinance that allowed public use of loudspeakers to share “news and matters of public concern” only with “permission obtained from the Chief of Police.” 334 U.S. 558, 558 n.1 (1948). After a minister was denied that permit and convicted for spreading his religious message anyway, *id.* at 559, this Court held that his conviction facially violated the First Amendment because the ordinance “establishe[d] a previous restraint on the right of free speech” and placed the “right to be heard” in the Chief’s “uncontrolled discretion,” allowing denials for reasons as petty as “some people find the ideas annoying.” *Id.* at 559-562.

Likewise, in *Largent v. Texas*, the Court reviewed a system under which permits to solicit or sell were available only if “the Mayor deem[ed] it proper or advisable.” 318 U.S. 418, 418-419 (1943) (citation omitted). After Largent was convicted for distributing

religious materials, *id.* at 419-420, this Court reversed because that standard left the “[d]issemination of ideas depend[ent] upon the” Mayor’s entirely discretionary approval—“administrative censorship in an extreme form.” *Id.* at 422.

In each instance, it was not merely the denial of permission that violated the speaker’s rights, but being subject to the unconstitutionally discretionary regime in the first place.

2. What is true for speech is also true for religious liberty. This Court rejects the application of discretionary systems making religious exercise dependent on the arbitrary preferences of government officials. In *Fulton v. City of Philadelphia*, this Court explained that laws that burden religion are subject to the same strict scrutiny as laws that burden other First Amendment activities if they contain a discretionary “mechanism for individualized exemptions.” 593 U.S. 522, 533 (2021) (citation omitted). This rule is self-executing. It applies “regardless whether any exceptions have been given.” *Id.* at 537. The Court explained that the mere “creation of a formal mechanism for granting exceptions renders a policy not generally applicable” to both religious and non-religious activities (and hence not entitled to more deferential review) because it invites “the government to decide which reasons for not complying with the policy are worthy of solicitude.” *Ibid.* (citing *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)).

A sister rule independently requires strict scrutiny when the government “treat[s] any

comparable secular activity more favorably than religious exercise.” *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam).

3. Those principles control here. The zoning scheme at issue conditioned Grand’s worship in his own home on his first seeking a special use permit that could be denied in the planning commission’s discretion. App.2a-5a. Under *Fulton*, this regime thus presents a classic discretionary “mechanism for individualized exemptions.” *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). Constitutional injury subject to strict scrutiny therefore attached when the City threatened enforcement and insisted on prior permission to pray in the home—not when, or if, the commission issued a final decision.

Worse still, the insistence on a permit was itself disingenuous, as Grand later learned, because the permit, if granted, would have converted his home into a house of worship in which he would no longer be able to reside. There thus was no actual mechanism to allow prayer in the *home*. Instead, there was a Hobson’s choice: Grand could either give up praying with a minyan on his property or give up living there.

Independently, application of the permitting regime (even if it were not disingenuous) is also subject to strict scrutiny because it sanctions favoritism for nonreligious activity. Grand had to seek a permit to gather a group to pray in his home. Anyone else could have freely hosted a group of any size for personal, nonreligious reasons without first seeking a permit, much less without having to abandon living in their home entirely. As Grand explains (at 8), the “City

has never required permits for non-religious gatherings of similar (or much larger) size or sent out cease-and-desists when such gatherings have occurred.” Indeed, a book club with 10 members would face no such hardship, unless the book happened to be the Torah, the New Testament, the Book of Mormon, or the Koran. Under *Tandon*, since comparable secular activity was not regulated while the religious activity was, injury occurred and strict scrutiny applied from the start, even without the performative request for a disingenuous permit. 593 U.S. at 62.

4. The same conclusion follows from *Saia* and *Largent*, both cases in which this Court sought to cabin discretionary decision-making that can mask viewpoint or religious discrimination. The City’s ordinance lacks clear standards governing the planning commission’s permitting decision. True, the ordinance requires the planning commission to consider traffic, lighting, and sound. App.27a-28a. But it goes no further. How much traffic is too much? When would a home hosting a minyan be too bright? When would it be too loud? The ordinance gives no answer to those questions. Instead, it places the authority to answer them in the planning commission’s sole discretion.

Worse, even if an applicant happened to satisfy the commission on each of those listed factors, the application could still be denied for unspecified and hopelessly vague catch-all reasons such as the planning commission’s view about whether granting the permit would harm the “public health, safety and welfare.” App.28a (citation omitted). This broad language essentially gives the planning commission

complete discretion to deny permits for any reason, including bowing to the religious animus of neighbors who dislike the applicant's particular beliefs or means of religious exercise. See App.3a-4a.

Under *Saia* and *Largent*, forcing an individual to subject himself to burdensome government scrutiny and wait for the planning commission's discretionary permission before exercising his religion on private property is a present and immediate First Amendment harm, regardless of the eventual answer. *Saia*, 334 U.S. at 559-562; *Largent*, 318 U.S. at 422. All the more so where even a favorable decision on the permit would carry the unreasonable cost of no longer being able to live in one's own home. Such a regime is both improperly discretionary and improperly punitive toward religious exercise.

5. Those harms are complete once landowners must seek permission to use their land for religious purposes or else desist. Under RLUIPA and the First Amendment, aggrieved persons need not wait for the denial of a special use permit, a zoning exemption, or an eviction notice to sue. As this Court recently reiterated, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mahmoud v. Taylor*, 606 U.S. 522, 569 (2025) (citation omitted).

To prevent such irreparable harms to landowners, this Court should reverse in an opinion that clarifies that government action that chills religious activity is a First Amendment harm immediately remediable in federal court in its own right, without having to wait

for further compounding harms from the grant or denial of a permit.

II. This Case and Many Others Show that Discretionary Permitting Regimes Are Uniquely Prone to Discriminatory Animus Forbidden by the First Amendment.

This Court’s First Amendment hostility toward discretionary permitting regimes is well-grounded because discretion can be—and often is—abused to mask religious or viewpoint discrimination.

1. This Court’s free-exercise cases have long treated official hostility to religion as unconstitutional. A law that targets religious practice is neither neutral nor generally applicable. *Smith*, 494 U.S. at 879. Thus, when a law imposes “special disabilities” on a person because of religious status, the Free Exercise Clause has a “role” to play. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993). The same is true of “official expressions of hostility to religion,” even where a regime is nominally generally applicable. *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm’n*, 584 U.S. 617, 638-639 (2018). In short, antireligious animus is never a legitimate government interest.

Yet the record here shows that animus was a guiding factor in the City’s insistence that Grand obtain a permit to pray with a few others in his own home. The controversy began after Grand emailed his neighbors and invited them to three prayer sessions “for the inauguration of the Shomayah Tefillah Beis Hakeneset” at his residence. App.23a-24a. He also listed davening times for Erev Shabbos, Shabbos

Shacharis, and Mincha—the Friday evening, Saturday morning, and Saturday afternoon prayers. App.24a. It was *this* email, loaded with Jewish terminology and religious significance, that a neighbor sent to the Mayor who then sent it to the City’s “Law Director.” App.24a-25a. The Director then sent Grand a cease-and-desist letter, telling him that he could only host a minyan if he first obtained a special use permit that would let him use his home as a house of worship. J.A.200.

Grand did what he was told, cancelled his proposed prayer meetings, and applied for the permit. But this too drew community outrage. His request resulted in neighbors’ showing up to a planning meeting to oppose the application for a host of pretextual reasons. Those included (1) the size of the gathering, (2) traffic, parking, and fire concerns, and (3) the fact that Grand had advertised his home gathering on the internet. App.4a. The traffic claim is particularly disingenuous since Grand sought to gather on the Sabbath, a day on which driving is not permitted by the religious beliefs that Grand and those who would join the minyan share. App.4a.

The antisemitic hostility also manifested in other ways. Some neighbors submitted letters expressing concern that, if the permit were granted, it would result in their neighborhood being “labeled as Jewish.” J.A.279-280. One neighbor said Grand’s “Orthodox Jewish character” made her “suspicious.” J.A.31. Others yelled that he had “a temple in [his] house” and that they “don’t want [his] kind here.” J.A.32.

Worse, members of the planning commission knew that the community's opposition was grounded in antisemitism. One commissioner said in private deliberations that she "intended to deny the application based purely on the opposition," only to instead table it because an outright denial would have "toed the line of violating fair housing law." J.A.29. In the process, she acknowledged the "antisemitic rhetoric and sentiment" among Grand's opponents. J.A.30. And she admitted what the City would not say in its cease-and-desist letter: "We don't require other social gatherings occurring in a private home to have a special use permit." J.A.30. Antisemitic animus thus ran throughout this process—or so a jury could have found if the lower courts had not dismissed the case on ripeness.

Frustrated with the pretextual process, and perhaps because he had learned that the permit would paradoxically make his home uninhabitable, Grand withdrew his application before the second hearing. App.5a. The Mayor refused to believe that Grand had actually cancelled his plans to use his home to host a minyan and "asked community members to report" Grand if he had friends over to pray. App.5a. Likewise, the police "directed patrol units to drive past Grand's house and check for code violations" and a City prosecutor had "a housing inspector search[] the house for violations." App.5a. Such a surveillance-state response hunting for religious exercise likewise reflects (or could be found to reflect) hostility towards Grand's religion.

2. This record is more than enough to establish unconstitutional antireligious animus masked by a

discretionary permitting regime. And the facts also confirm why the Sixth Circuit's finality holding is so damaging.

That holding tells Grand, a believer whose worship was already chilled by hostile officials, that his only path through the courthouse doors was to finish a discretionary process controlled by the same discriminatory officials whose decision would have forced him out of his home even if they granted him permission to form a synagogue—an outcome he never even wanted. This Court's cases do not require that. When the government threatens religious exercise out of animus, the constitutional injury is complete without having to wait for still further injury down the line.

Moreover, the source of that animus does not change the answer to the constitutional question. To be sure, when it is the government official that harbors antireligious animus, the analysis is easy. *Masterpiece Cakeshop*, 584 U.S. at 634, 638-639. But the same is true when the government actor is merely the conduit through which public disapproval of religious exercise or belief is channeled. As this Court has explained, “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases” for treating one home differently from all the others. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985). Thus, the City “may not avoid the strictures of [the Constitution] by deferring to the wishes or objections of some fraction of the body politic.” *Ibid.* While “[p]rivate biases may be outside the reach of the law,” “the law cannot, directly or indirectly, give them

effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (citation omitted).

3. Other examples provide ample support for this Court’s longstanding view that discretionary rules often mask viewpoint or religious discrimination.

RLUIPA’s sponsors, for example, found a “widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes” that “readily lend themselves to discrimination” and “make it difficult to prove discrimination in any individual case.” 146 Cong. Rec. S7774, S7775 (July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy).

Such discrimination continued even after RLUIPA’s enactment. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, for example, the Ninth Circuit cited the “highly individualized and discretionary processes of land use regulation” when it held that Sutter County’s denial of a conditional-use permit for a Sikh temple imposed a substantial burden under RLUIPA. 456 F.3d 978, 981-982, 987 n.9, 989-992 (9th Cir. 2006).

Nor is this the only case involving discrimination against people of faith seeking to worship in the home. In *Konikov v. Orange County*, for example, the Eleventh Circuit reversed summary judgment for Orange County after the County cited a Chabad rabbi for holding minyans in his house. 410 F.3d 1317, 1319-1321, 1327 (11th Cir. 2005). Foreseeing what would decades later become *Tandon*’s rule, the court held that the code treated religious assemblies worse than comparable secular gatherings and that the rabbi

“presented evidence that tends to show that the law does in fact delegate too much” discretionary “authority to those charged with enforcing it.” *Id.* at 1330-1331.

Similarly, in *Spirit of Aloha Temple v. County of Maui*, the Ninth Circuit invalidated a special-use standard—whether the use would “adversely affect surrounding property”—as a facial prior restraint because that phrase gave officials “unbridled discretion” and was “as general, flimsy, and ephemeral as ‘health or welfare’ or ‘aesthetic quality.’” 49 F.4th 1180, 1192 (9th Cir. 2022). After all, “[a]n adverse effect could just as easily be causing a sinkhole or creating unsafe road conditions as it could be cutting off public access to fishing or”—as here—“engaging in religious activities that neighbors dislike.” *Ibid.*

While hardly an exhaustive list, this case and others confirm what this Court has long known: Discretionary permitting regimes invite decisions that may serve as a mask for religious or viewpoint-based animus and can chill First Amendment activities.

CONCLUSION

At the very latest, Grand’s Free Exercise and RLUIPA claims accrued when he cancelled a prayer meeting after the government threatened to sanction him for violating its zoning rules. Once his free exercise was chilled, he should have been able to challenge even the momentary loss of his freedom to worship in his home. But the lower courts did not allow him to do so on the theory that zoning’s unique finality rules concerning run-of-the-mill land uses rather than traditional First Amendment principles apply. In the

process, they disregarded palpable record evidence that the City's threats were grounded in animus against Grand's religion rather than in any legitimate government interest. The Court should reverse.

Respectfully submitted,

ERIK S. JAFFE

Counsel of Record

HANNAH C. SMITH

JOSHUA J. PRINCE

SCHAERR | JAFFE LLP

1717 K Street NW, Suite 900

Washington, DC 20006

Telephone: (202) 787-1060

ejaffe@schaerr-jaffe.com

Counsel for Amicus Curiae

SEPTEMBER 7, 2026