No Legs to Stand On:
A Catch-22 in Religious Land Use Justiciability

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Introduction

In the fall of 2004, Tartikov purchased over one hundred acres of land in the Village of Pomona, New York, to construct a religious university that would produce *dayanim* (rabbinical judges). His efforts were quickly frustrated by the passage of a series of laws seemingly targeted to impede any efforts to build the college. Pomona sits only forty-five minutes north of New York City and is a predominantly Christian town. The rabbinical college would serve the larger Jewish community of the Village and region by giving aspiring students and their families a place to live, worship, and learn. Tartikov contends that there was a serious lack of rabbinical colleges capable of producing *dayanim*, giving his project special urgency. Tartikov maintains that the village has obstructed his efforts to build a religious college because of his Jewish beliefs and those of his potential students (*Petition for Writ* 2020: 2-3).

Pomona passed suspiciously targeted legislation in both 2004 and 2007 impeding any efforts to build the college. The 2004 Pomona law prohibited student-family housing in the village while also requiring schools to be accredited before operating within Pomona. This created an impossible situation for the college as it had to exist to be accredited under New York State law, but it could not be built on the purchased land without first being accredited according to Pomona law. In 2007, Pomona passed two additional laws, one limiting the amount of land that could be devoted to student housing and one "Wetlands Law" whose limitations on development completely barred access to Tartikov's purchased property (*Petition for Writ* 2020: 3-4).

The Village of Pomona is governed by a Board of Trustees elected by its citizens (Castelluccio 2017). Multiple times throughout its meetings during the 2000s the board exhibited thinly-veiled animus towards Tartikov and his efforts. In a 2004 meeting, Trustees notably voiced their opposition to the project because it was sponsored by Orthodox Jews (*Petition for Writ*, 4). Mayor Sanderson and two individual Trustees running for office campaigned to "fight this plan" and "stand up to this threat," slogans which Tartikov contends were specifically aimed at him (*Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 915 F.Supp.2d 574 [2013]; hereafter refered to as "*Tartikov I*"). Tartikov further contends that, in 2007, Mayor Sanderson stated that "the single most important issue facing the village at this time is the as yet un-proposed, but leaked, rabbinical college development" and that the Village should "maintain its cultural and religious diversity." Allegedly, the

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village's attorney, while speaking at a seminar on RLUIPA, said "residents should not cave into them and sell our houses" (*Tartikov I*, 586).

Tartikov filed suit in 2007, arguing that the Village laws impermissibly infringed upon his constitutionally protected and statutorily reinforced religious liberties (*Petition for Writ*, 4). A large portion of Tartikov's action was brought under the *Religious Land Use and Institutionalized Persons Act* (RLUIPA; 42 U.S.C. §2000cc), a federal statute that governs federal, state, and local governments alike. Further, the majority of those claims were brought under RLUIPA's "substantial burden" prong which states that the government may not impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a religious assembly unless the Government can show that the imposition of the burden is the least restrictive way of achieving a compelling government interest. The federal district court found that Pomona's laws made it impossible for the college to exist and that this was a substantial burden on Tartikov's ability to exercise his sincerely held beliefs. The Village appealed, and the United States Court of Appeals for the Second Circuit found in favor of the Village. The circuit court did not analyze whether Tartikov faced a substantial burden on his religion under RLUIPA, but ruled that Tartikov lacked standing to assert the burden claims because he had failed to submit a formal proposal for the land use and thus the case lacked "finality." This put Tartikov in an untenable catch-22 situation. Tartikov must pursue a final action from a local government that does not want him there, as shown by their religious animus, to have standing to pursue federal action. The problem is that the state decision would likely preclude any federal relief due because the matter already had been decided by a competent court, precluding pursuit by the same parties. Thirteen years after Tartikov brought his initial action, the religious college still does not exist and its potential students, as well as the larger community, have been deprived of their religious education (*Petition for Writ*, 7).

This article argues that Tartikov's RLUIPA claims were wrongly dismissed by the Second Circuit Court of Appeals due to the misguided application of a now-defunct principle of "finality" that has improperly added to the standing requirements of RLUIPA. The Second Circuit Court of Appeals drew this "finality" requirement from another body of Supreme Court case law dealing with standing to challenge government takings of land. The Supreme Court, however, has since reversed these cases, and now requires only Article III standing in those cases, undercutting the Second Circuit's "finality" addition to traditional standing rules.

Moreover, the added "finality" requirement violates the letter and spirit of RLUIPA and improperly obstructs religious freedom claimants like Tartikov. RLUIPA resulted from a decade-long tug-of-war between Congress and the Supreme Court, and it was designed to combat exactly the types of discriminatory actions taken by the Village of Pomona described above (Matthews 2017: 1026). The law offers a framework to the courts to balance religious freedoms and rights against the needs and powers of local governments. As a means of accomplishing this goal, the law provides that no government may create a land use regulation that imposes a substantial burden on religious exercise unless the government can show both that it has a compelling government interest and that the regulation is the least restrictive way of achieving that interest. The stated purpose of RLUIPA was to empower religious claimants to combat pervasive discrimination against churches and other houses of worship in countless land-use decisions especially by state and local governments across the

country. Congressional supporters of the bill remarked that RLUIPA was explicitly designed to protect the free exercise of religion from government interference and that the legislation specifically was aimed at protecting the right to gather and worship (see 146 Cong. Rec. E1563 [22 September 2000], statement of Rep. Charles Canady; 146 Cong. Rec. H7190 [27 July 2000]). In later cases such as *Holt v. Hobbs* (574 U.S. 352 [2015]), the United States Supreme Court further strengthened RLUIPA by requiring that the government show a compelling state interest in imposing its laws on the particular claimant in question—an even higher burden of proof than required by the "strict scrutiny" standard of other areas of constitutional law.

RLUIPA makes it easier for religious liberty advocates to bring claims against government action by providing that the courts should apply nothing beyond the traditional Article III standing requirements. The text of RLUIPA itself states that standing for these issues is to be determined under traditional Article III standing requirements. Article III standing requires that plaintiffs show injury, causation, and redressability.[1] Despite this rather clear statutory direction, some courts, including the Second Circuit Court of Appeals, have added a fourth element for RLUIPA claims requiring that the plaintiff has received some sort of final determination from the local governing body on the regulation in question. By requiring something beyond simple Article III standing, this group of circuit courts has seemingly gone beyond the clear instructions of RLUIPA. Problematically, other circuit courts also have applied the "finality" standard requiring plaintiffs to have received a final determination on their land issue from the local governing body—a standard used by the Supreme Court in *Williamson County v. Hamilton Bank* (473 U.S. 172 [1985])—to create an unnecessarily difficult ripeness standard that runs counter to the intent of RLUIPA (for example, see *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533 [2010]: 540–542*; Congregation of Anshei Roosevelt v. Planning & Zoning Bd. of Roosevelt*, 338 Fed. Appx. 214 [2009]). On the other side of a widening gulf of jurisprudence is another group of circuit courts that have correctly maintained that RLUIPA requires nothing beyond the traditional Article III standing elements (see *Opulent Life Church v. City of Holly Springs, Mississippi*, 697 F.3d 279 [2012]: 279; *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Florida*, 727 F.3d 1349 [2013]; *Church of Our Lord and Savior Jesus Christ v. City of Markham, Illinois,* 913 F.3d 670 [2019]). The Second, Third, Sixth, and Ninth Circuits hold that standing under RLUIPA requires an additional final action, whereas the First, Fifth, Seventh, and Eleventh Circuits have correctly held that standing under RLUIPA requires nothing more than Article III standing.

This article argues that the Supreme Court should intervene to eliminate the circuit split and hold that RLUIPA claimants need not show anything beyond the traditional Article III standing requirements and specifically do not need to prove additional ripeness or finality requirements. This intervention is even more necessary in light of the Supreme Court's

[1] A litigant must show three things in order to have standing to sue: that he has suffered an "injury in fact"; that the injury is fairly traceable to the challenged action of the defendant; and that it is likely that a favorable decision will fully redress the injury; see *Lujan v. Defenders of Wildlife* (504 U.S. 555 [1992]). These three requirements are derived from Article III of the U.S. Constitution, which limits the judicial power to "Cases" and "Controversies."

recent overruling of *Williamson County v. Hamilton Bank*, which undermines the supporting logic behind the additional fourth standing requirement called for by some Circuits (see *Knick v. Township of Scott*, 139 S.Ct. 2162 [2019]).

This argument proceeds in four parts. Part I presents the relevant background and history leading up to the passage of RLUIPA and RLUIPA itself, while Part II analyzes the finality requirement, discusses the principles of standing and ripeness, presents a breakdown of the current circuit split, and highlights the reasoning applied by each Circuit on both sides. Part III addresses the various issues presented by the promulgation and adoption of the finality requirement in RLUIPA cases, and Part IV charts a way forward, arguing for the universal application of traditional Article III standing requirements to cases brought under RLUIPA and the end to the finality requirement and shows the value of that analysis for Tartikov.

I. The Purpose of RLUIPA

From 1963 to 1990, the United States Supreme Court and lower federal courts regularly applied a strict scrutiny standard to review government actions that were being challenged as unconstitutional burdens on the free exercise of religion protected by the First Amendment (*Sherbert v. Verner,* 374 U.S. 398 [1963]; see Rohr 2004: 18-19). That changed dramatically in 1990 when the Supreme Court, in *Employment Division v. Smith* (494 U.S. 872), decided that neutral and generally applicable laws were not subject to strict scrutiny. In *Smith*, the Court was confronted with a man who was denied state unemployment benefits after using peyote as part of a Native American religious ceremony. The Court held that, although Oregon's policy of withholding benefits from employees discharged for criminal cause did burden Smith's religious practice, the policy itself was neutral toward religion and could be applied equally to all members of society (ibid., 879). However, the Court in *Smith* also stated that strict scrutiny would apply if a government action was specifically targeted toward religion (ibid., 884). This decision was a sharp departure from the 1963 decision in *Sherbert* which held that strict scrutiny was needed for all free exercise cases and not just those involving obvious religious discrimination.

In response to the *Smith* decision, in 1993 Congress enacted the *Religious Freedom Restoration Act* (RFRA; P.L. 103-141, 107 Stat. 1488). RFRA was passed by an overwhelming majority in both houses of Congress, suggesting a strong distaste for the severity of *Smith* (Bernstein 2013: 288). RFRA reinstated the rule that any government action imposing a substantial burden on religious exercise would be judged through a strict scrutiny analysis. The Supreme Court saw this response as an overreach by the United States Congress, and in the 1997 case of *City of Boerne v. Flores* (521 U.S. 507) held that RFRA was unconstitutional as applied to state law. The Court determined that RFRA exceeded Congress's power under Section V of the Fourteenth Amendment.[2] As Justice Kennedy explained, "Congress … has

[2] Section V of the Act gives Congress the power to enforce the guarantees of the Fourteenth Amendment as those have been interpreted by the Court, including the Court's decision to incorporate the First Amendment free exercise guarantee into the Due Process Clause.

been given the power to enforce not the power to determine what constitutes a constitutional violation" (519). *Boerne* left RFRA standing as applied to Congress, but not as applied to state and local governments.

Boerne v. Flores was a religious land use case decided under RFRA. Plaintiffs argued that under RFRA, the local ordinances denying them the right to renovate and expand their church violated their newly congressionally-reinforced First Amendment rights. The Supreme Court disagreed, and, in response, in 2000 an overwhelming majority of Congress passed RLUIPA, a more targeted statute designed to protect against such burdensome regulations on religious land use. RLUIPA, as Representative Canady put it, was "designed to protect the free exercise of religion from unnecessary governmental interference [and] … to protect one of the most fundamental aspects of religious freedom, the right to gather and worship …" (146 Cong. Rec. H7190 [27 July 2000]). Learning from their previous mistakes with RFRA, in passing RLUIPA Congress focused on two specific areas where religious liberties were regularly infringed: land use and prisons. In debate, members of Congress expressed a desire to continue to legislate around *Smith's* narrow view of religious freedom, albeit now by piecemeal measures (ibid., statement of Rep. Nadler).

RLUIPA contains four provisions relating to land-use regulations. First, governments are prohibited from adopting or implementing a "land-use regulation in a manner that imposes a substantial burden on the religious exercise of a person" in the absence of a showing of compelling state interest and that the imposition of the burden is the least restrictive way of achieving that interest.[3] This first provision is often referred to as the "substantial burden" provision (see Matthews 2017: 23). The substantial burden prong states that "no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." The exception to this general rule is that the burden can persist if the government can show that the imposition of the burden against that individual is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

The second provision prohibits the government from establishing a land-use regulation "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." This second provision is often referred to as the "equal-terms provision." The third provision prohibits governments from implementing land-use regulations that discriminate against individuals or institutions on the basis of religion or their denomination. The last provision provides that governments are prohibited from excluding, or unreasonably limiting, religious assemblies in their jurisdictions.

However, Section V does not empower Congress to alter the meaning of the "Free Exercise" clause of the First Amendment as a means of enforcing the First Amendment.

[3] A "land-use regulation" is defined as "a zoning or landmarking law, or the application thereof, that limits or restricts a claimant's use or development of land" if the person has a present property interest or a contract to acquire one. Religious exercise includes "the use, building, or conversion of real property" by individuals or entities for religious purposes.

RLUIPA explicitly sets out its standing requirements: "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding … Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution." In the statute Congress is clear about their intent to require nothing more than simple Article III standing requirements to bring a cause of action under RLUIPA. There is no evidence in the legislative history to indicate any dissent from this standing requirement.

RLUIPA is meant to protect religious freedom claimants as much as possible without violating the "No Establishment" clause (see *Holt v. Hobbs*, 859). The law itself calls for it to be interpreted broadly. The Department of Justice has affirmed that interpretation, stating that "[w]hen there is a conflict between RLUIPA and the zoning code or how it is applied, RLUIPA, as a federal civil right law, takes precedence and the zoning law must give way" ("Statement of the Department of Justice" 2010: 4).

II. The Finality Requirement in RLUIPA Actions

In *Williamson County,* the Supreme Court introduced a "final decision" standard for evaluating government land use cases. Though not a case involving religious freedom, *Williamson County v. Hamilton Bank* subsequently would be used as justification for elevated ripeness and standing requirements for government religious land use cases moving forward (see *Miles Christi v. Northville*; *Anshei Roosevelt v. Planning & Zoning Bd.*).

Williamson County resulted from a change in Tennessee zoning requirements and the effect it had on the value and potential use of a privately owned plot of land. In 1973, Williamson County passed a series of zoning ordinances that allowed for land to be developed according to a certain density percentage. Under this ordinance, plans for the development of the land in question were preliminarily approved. Subsequently, in 1977, the County passed a new zoning ordinance that greatly restricted the development potential of parcels of land including the one in question in the case. Plans that were previously approved under the 1973 zoning codes were now disallowed, in theory, by the new ordinances. In 1980, Hamilton Bank of Johnson City took control of the property through forecclosure, and immediately expressed the desire to develop the land for further housing. The zoning Commission refused to apply the earlier 1973 zoning ordinances to the land, and the bank sued. The plaintiff argued that the government had effectively "taken" its land under the Fifth Amendment through the disparate enforcement and application of various zoning ordinances and by not applying the earlier zoning restrictions to the land in question (*Williamson County v. Hamilton Bank*, 177-180.).

In this case, Justice Blackmun introduced the "final decision" requirement holding that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" (*Williamson County v. Hamilton Bank*, 186). The Court reasoned that the bank should have sought out "variances" from the zoning board that would have allowed much of the development of the land to begin (ibid., 183).

Relevant to our inquiry here is the Court's proclamation that for a case involving government land use regulations and their effects to be heard, plaintiffs must avail themselves of all available state remedies. To date, the Second, Third, Sixth, and Ninth Circuits have all extended the *Williamson County v. Hamilton Bank* final action standard beyond its logical limits and used it as a means of denying religious claimants the ability to have their cases decided on the merits (see *Miles Christi v. Northville*; *Anshei Roosevelt v. Planning & Zoning Bd.*).

Standing is an amorphous concept that lies at the center of our inquiry here. Various courts have grappled with attempts to define standing (*Lujan v. Defenders of Wildlife*, 504 U.S. 555 [1992]; *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 [2000]). In its most basic formulation, standing is simply "intended to be a threshold issue at least tentatively decided at the outset of the litigation" that establishes a plaintiff's "right" to "stand at the bar" and bring an action and the court's ability to entertain that action (*Tartikov I*, 589; *Pettus v. Morgenthau*, 554 F.3d 293 [2009]; *Licensing by Paolo, Inc. v. Sinatra [In Re Gucci]*, 126 F.3d 380 [1997]). Through years of opinions, the courts have arrived at an understanding of Article III standing as requiring a plaintiff to show it has suffered an "injury in fact" that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; that the injury is fairly traceable to the challenged action of the defendant; and that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision (*Tartikov I,* 589). It is always the burden of the party bringing the action to establish their own standing (see *Lujan v. Defenders of Wildlife*).

In fact, injury, the first requirement of Article III standing has been interpreted to mean that the plaintiff must have personally suffered an injury (*W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP,* 549 F.3d 100 [2008]). The plaintiff must be able to show a personal stake in the action and "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" (*Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464 [1982]: 472, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 [1979], 99). It is not enough for someone to claim a future or potential harm; there must be an actual concrete injury or the meaningfully imminent threat of personal injury. Beyond this, the plaintiff must also illustrate a personal stake in the outcome of the litigation (*Ross v. Bank of Am., N.A.*, 524 F.3d 217 [2008]). Sometimes, courts construe this requirement liberally and allow for potential harms to constitute injury in fact: "a plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate a certainty that it will be prosecuted under the statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it" (*Roman Catholic Archdiocese of N.Y. v. Sebelius*, 907 F.Supp.2d 310 [2012], 322).

Causation, the second requirement of standing, calls for the plaintiff to link the established injury in fact to the challenged actions of the defendant. Plaintiffs do this by highlighting the existence of an "intermediate link" between the challenged regulations or actions and the injury (*Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341 [2008]). Courts have concluded that causation is lacking if the claimed injury is the result of an independent action by a third party, not party to the lawsuit (see *Lujan*). The "fairly traceable" standard does introduce some leniency into the causation requirement. Plaintiffs don't need to claim that the defendant's actions were the last step in a chain of events leading to an injury in fact, but a link in the chain of causation (*Bennett v. Spear*, 520 U.S. 154 [1997]). That said, plaintiffs

must demonstrate a sufficient connection between the challenged action and the injury in fact.[4] A claim cannot be brought based on the independent actions of a third party (*Hollingsworth v. Perry*, 570 U.S. 693 [2013]).

The third requirement of standing is redressability, which requires that there is a "non-speculative likelihood that the injury can be remedied by the requested relief"(*Coalition of Watershed Towns v. EPA*, 522 F.3d 216 [2008], 218, quoting *Huff. v. Deloitte & Touche*, 107). To meet this standard, a plaintiff must present facts that show it is likely (as opposed to "merely speculative") that the injury will be redressed by a favorable decision. Courts have denied standing in instances where a favorable decision would not actually cure the alleged harm. For example, courts have stopped short of invalidating parts of a zoning code given that another separate code was also contributing to the plaintiff's injury (*M.J. Entertainment Enterprises, Inc. v. City of Mount Vernon, N.Y.*, 234 F.Supp. 2d 306 [2002]). In laymen's terms, redressability simply requires that the plaintiff's problem or injury would be solved by the court deciding the claim in her favor. If the court can't fix the problem, it will not waste the time adjudicating the issues.

Ripeness is a distinct justiciability doctrine that focuses more on the temporal aspects of the claim. The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" (*Abbott Labs. v. Gardner,* 387 U.S. 136 [1967], 148). Article III limits the jurisdiction of the federal courts to "cases or controversies of sufficient immediacy and reality and not hypothetical or abstract disputes" (*Authors Guild, Inc. v. HathiTrust*, 902 F.Supp.2d 445 [2012]). Claims are not ripe when they involve contingent future events (*Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568 [1985]). To determine ripeness, courts must evaluate the readiness of the issues for judicial decision and the harm suffered by parties by withholding adjudication; "the hardship to the parties prong … injects prudential considerations into the mix requiring [courts] to gauge the risk and severity of injury to a party that will result if the exercise of jurisdiction is declined" (*Murphy v. New Milford Zoning Commission,* 402 F.3d 342 [2005], 347). If a court determines that more facts need to develop, the case will not be considered ripe.

Thus, standing requires that plaintiffs show that they have been harmed, that the harm is caused by the actions of the defendant, and that the harm will be ameliorated by a favorable judicial ruling. In order for claims to be heard and argued, they must be based on an actual, timely, and tangible injury caused by the actions of the defendant that will be redressed by a favorable ruling from the courts (see *Lujan v. Defenders of Wildlife*).

Nonetheless, the relationship between standing and ripeness often produces confusion, and may seem duplicative at times. However, the two doctrines are meant to be separate inquires carried out at the onset of litigation. Standing demands that the plaintiff

[4]Although "causation" and "redressability" were initially viewed as two parts of a single requirement, the Court now views them as separate inquiries (see *Sprint Commications Co., L.P. v. APCC Services*, 554 U.S. 269 [2008]). To the extent there is a difference, it is that causation evaluates the connection between the allegedly unlawful conduct and the injury, whereas redressability examines the causal connection between the alleged injury and the judicial relief requested.

show that they have been (or imminently will be) injured. (Chemerinsky 1991: 682). Ripeness instead focuses on whether the matter is ready for review and asks if the plaintiff has suffered or imminently will suffer an injury (*Poe v. Ulman*, 367 U.S. 497 [1961]). The purpose of the ripeness doctrine is "to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements" (*Abbott Labs. v. Gardner*, 148). On the issue of injury, the two concepts seem to intersect. The two are distinct in that standing focuses on whether the type of injury is sufficient in form to fulfill the requirements of Article III standing, whereas ripeness looks to the temporal question of whether the injury has occurred yet (Chemerinksy 1991: 682).

Ripeness has been understood by the Supreme Court to be a threshold question measuring whether the actual case or controversy demanded by Article III of the Constitution is met (*Steffel v. Thompson*, 415 U.S. 452 [1974]). It is a question of quality, whereas standing is a question of existence. Standing analyzes the nature and magnitude of present injuries (Nichol 1987: 172). Ripeness focuses on the substance of threatened or pending future injuries by measuring the present effects and hardships imposed by the threat of action. The issue is that this distinction between the two concepts has eroded over time, and in many areas of the law the two have seemingly combined into a larger threshold question. The danger of conflating these doctrines is our focus here; namely that plaintiffs with cases of merit, such as Tartikov, are being dismissed due to the perceived quality of their suffered injury.

Courts on the anti-plaintiff side of the circuit split have dismissed cases on the grounds of ripeness and mootness given the lack of final action (*Congregation Rabbinical College of Tartikov v. Village of Pomona*, 945 F.3d 83 [2019]; hereafter referred to as "*Tartikov IV*"; see also *Miles Christi v. Northville*; *Anshei Roosevelt v. Planning & Zoning Bd.*). Without a showing of a final determinative action from the local governing bodies cases have been determined not to be ripe (see *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 138 F. Supp. 3d 352 [2015]; hereafter referred to as "*Tartikov II*"). These courts also seemingly have conflated the standards into a single threshold question instead of addressing standing and ripeness discretely, without the added final action requirement. The common thread running through the anti-plaintiff side is that they use the final action standard is used to create an additional justiciability hurdle through which claimants must jump. The effect of this has been the denial of otherwise proper and meaningful cases from being heard, and in Tartikov's case, it has allowed clear instances of religious prejudice to persist (see *Tartikov IV*).

Following the ruling of *Williamson County v. Hamilton Bank*, several circuits adopted the finality rule to cases brought under RLUIPA (compare *Opulent Life v. Holly Springs*; *Temple B'Nai Zion v. Sunny Isles Beach*; and *Church of Our Lord v. Markham*; *Miles Christi v. Northville*; *Anshei Roosevelt v. Planning & Zoning Bd.*). The split consists of two distinct sets of Circuit Courts. One group—consisting of the First, Fifth, Seventh, and Eleventh Circuits—holds that standing under RLUIPA requires nothing more than simple Article III standing (*Opulent Life v. Holly Springs*; *Temple B'Nai Zion v. Sunny Isles Beach*; *Church of Our Lord v. Markham*). They may be thought of as "pro-plaintiff" in that they provide an easier path for litigants to bring actions against government infringements on religious land use. The other set—comprised of the Second, Third, Sixth, and Ninth Circuits—have determined that RLUIPA requires an additional element of finality beyond those called for by Article III standing (see

Miles Christi v. Northville; *Anshei Roosevelt v. Planning & Zoning Bd.*). These Circuits rely heavily on the Supreme Court's decision in *Williamson County v. Hamilton Bank* to introduce a requirement of final action for a plaintiff to demonstrate standing to assert an RLUIPA claim.

The final action standard requires that plaintiffs appeal to their local governing body for other administrative remedies exempting them from the zoning regulation burdening their religious land use. Courts applying this standard often look to see if plaintiffs filed for variance permits, submitted building plans, or challenged the ordinance in question before suing under RLUIPA.

In *Miles Christi v. Northville*, the Sixth Circuit applied *Williamson County v. Hamilton Bank*, conflating ripeness and standing and introducing a more stringent ripeness standard than that mandated by RLUIPA. Miles Christi, an international religious order, owned a five-bedroom house in Northville, Michigan which housed six members of its order (see "Miles Christi Religious Order" 2021). The house was also used for private daily masses and regular Bible studies which were open to friends and families of members of the order. After receiving complaints about the parking, the city council informed the plaintiffs that the activities going on within the home clearly precluded it from being considered a single-family home. City officials explained that to continue their Bible studies and other worship activities, Miles Christi would have to request a variance from the zoning board of appeals to allow for additional parking and submit a site plan to the Northville Planning Commission detailing the expansion (*Miles Christi v. Northville*, 554).

The religious order brought an action under RLUIPA, challenging the legality of Northville's ordinances as applied to Miles Christi. On appeal, the Circuit Court dismissed the group's claims, stating that the plaintiffs failed to meet the final decision requirement under *Williamson County* until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Until the religious order exhausted all available remedies to ameliorate the effect of the application of zoning restrictions to their property, the case lacked standing under RLUIPA, for it failed to satisfy the ripeness requirement (*Miles Christi v. Northville*, 538-539).

The court here conflated the requirements of ripeness and standing, and in doing so erected a high wall between religious claimants and any potential relief. The Sixth Circuit contended that before a court could step in and review the effect of a regulation, there must be concrete actionable harm. The court argued that it could not know of that harm until the full extent of the regulation had been allowed to go into effect against the property, and that had not occurred here as Miles Christi had not exhausted all possible appeals and variance possibilities (*Miles Christi v. Northville*, 539-540). By holding ripeness out as a threshold question, much like standing, the Sixth Circuit has introduced a standard of finality that RLUIPA was never intended to require.

In *Anshei Roosevelt v. Planning & Zoning Bd.*, the Third Circuit Court of Appeals also applied *Williamson County v. Hamilton Bank* to a RLUIPA action to dismiss a claim for lack of adequate ripeness. Just like the Sixth Circuit, the Third Circuit has folded an unnecessarily rigorous ripeness standard into their threshold questions of justiciability. The congregation in this case was a synagogue in the Roosevelt Borough of New Jersey. The synagogue itself did not violate any local zoning restrictions. The issues in this case arose once the synagogue

entered into an agreement with a local Yeshiva and began offering educational services at the same location as the synagogue. This led to neighbors complaining that it was being used as a school and not a house of worship. Upon review, the local zoning board determined that the Yeshiva was now a boarding school as much as a synagogue and thus needed to apply for variance permits allowing it to operate as such. The congregation challenged the action, and the district court determined that the congregation had not met its requirements of showing an injury in fact, due to the lack of finality in the zoning board's decision (*Anshei Roosevelt v. Planning & Zoning Bd.*, 215-216).

On appeal, the Circuit Court affirmed, and stated that the congregation's claim lacked the requisite ripeness under *Williamson County* and *Murphy* due to the lack of finality in the board's determination that a variance use permit was required. The Third Circuit announced that its decision was partially motivated by a fear that allowing such cases to be heard on the merits would open the courts to act as advisory zoning boards in place of local government entities (*Anshei Roosevelt v. Planning & Zoning Bd.*, 219). In the eyes of the court, the congregation needed to take the extra steps to apply for the variance use permit, and be denied, before the claim represented adequate harm to justify being judged on the merits.

The stances taken by both the Sixth and Third Circuits are emblematic of the misguided application of *Williamson County v. Hamilton Bank* taken by these circuits, and the negative effects that has had on potential religious claimants pursuing action under RLUIPA. On the other hand, the First, Fifth, Seventh, and Eleventh Circuits have correctly decided that the finality requirement is not an appropriate standard to use in religious land use cases filed under RLUIPA. These circuits have focused instead on simple Article III standing requirements and basic questions of ripeness without the additional final action requirement to determine issues of justiciability. This approach has led to greater relief for religious claimants and seems to be aligned with both the text and spirit of RLUIPA.

In *Church of Our Lord v. Markham*, the Seventh Circuit Court of Appeals determined that the plaintiff church had Article III standing and thus met their standing requirements under RLUIPA. Congregants had constructed the church building out of an existing single-family home in which they had successfully operated for over fifteen years, until the city became aware of the issue and sought an injunction in state court to stop the church from operating without a conditional use permit (*Church of Our Lord v. Markham*, 672). The church responded by applying for a permit and after, the application was denied, brought an action asserting that the city's denial, and insistence on various permits for the church's operation, violated RLUIPA (ibid., 672, 680).

The court held that the church had met the requirements of Article III standing under RLUIPA (*Church of Our Lord v. Markham*, 680). The city had challenged the church's standing by arguing that the church could not make arguments about the city's zoning ordinances while it did not own property in all of the relevant zones. In response, the court noted that all RLUIPA requires to meet standing is an injury in fact that is fairly traceable to the challenged conduct, and that is likely to be redressed by a favorable decision. These requirements directly mirror Article III standing as interpreted by various Supreme Court decisions (see *Lujan*). The court dispensed with the city's argument by noting the zoning injury already suffered by the church was enough to satisfy the injury in fact requirement of standing. Notably, the court here did not require the church to show specific harm in each

district affected by the zoning laws, nor did it require anything beyond simple Article III standing requirements (*Church of Our Lord v. Markham,* 680). The decision was a reversal of an earlier district court decision that conversely found that the church's claim lacked ripeness (ibid., 676).

The Eleventh Circuit Court of Appeals contended with a similar issue while deciding that the plaintiffs in *Temple B'Nai Zion v. Sunny Isles Beach* met the requisite standing elements under RLUIPA. In this case, the Temple was denied the ability to make several modifications to the property to conform it to requirements of the Orthodox Jewish tradition. Due to growing animosity between the city and the congregation, the city moved to designate the Temple a historic site, effectively barring it from making any of its desired modifications. As in *Tartikov* (and some of the other cases we will examine), city officials exhibited religiously motivated animus towards the plaintiff group. Eventually, the city council voted to designate the property an historic site; notably, this was the first property in the history of Sunny Isles to be designated such (*Temple B'Nai Zion v. Sunny Isles Beach*, 1351-53). In response to the city's action, the congregation brought suit, claiming that the city's designation of the property as a historic site violated RLUIPA.[5]

The district court, citing *Williamson County v. Hamilton Bank*, dismissed the action for lack of ripeness. The court argued that the religious community first had to submit formal plans for the building modifications and then have these plans denied for the case to be a ripe harm under RLUIPA. The court did not discuss the standing requirement by itself but seemed to conflate standing and ripeness.

The Eleventh Circuit reversed and rejected the application of *Williamson County*'s finality requirement to RLUIPA standing and ripeness considerations, concluding that "the injury is complete upon the municipality's initial act" (*Temple B'Nai Zion v. Sunny Isles Beach*, 1357). The Circuit Court was careful to note that when coupled with evidence of religious animus in various statements made by city council members, the mere passing of a regulation itself can create actionable harm and a substantial enough burden under RLUIPA. In this case, the Court explained, "the mere enactment of the resolution declaring it to be a historic landmark violates RLUIPA … in other words, the Temple alleges an injury stemming from the City's initial act of designating it to be a historic site, not from the application of any land use regulation" (ibid.). Determining that both standing and ripeness were satisfied by the mere passing of the historic designation, the Eleventh Circuit joined with the Seventh Circuit and did not require plaintiffs to hurdle an additional obstacle to reach standing requirements under RLUIPA.[6]

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[5] The suit alleged violations under Florida's *Religious Freedom Restoration Act* (FRFRA).

[6] In addition to the Seventh and Eleventh Circuits, the Fifth Circuit has also determined that plaintiffs need not hurdle the additional obstacle of a finality requirement at the time of establishing standing. In *Opulent Life v. Holly Springs*, the court held that ripeness was a separate inquiry from standing and that the church had met the basic Article III standing requirements even though the church had not been affirmatively or officially denied any benefit by the local jurisdiction.

III. The Finality Requirement is Inappropriate as Demonstrated Through Tartikov

As stated above, Mr. Tartikov filed his initial suit on July 10, 2007, to challenge the four Pomona laws which kept him from operating a Rabbinical college on his land. (*Tartikov I*). This action resulted in three discreet district court decisions. (*Tartikov I*; *Tartikov II*; *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 280 F.Supp.3d 426 [2017]; hereafter referred to as "*Tartikov III*"). In the 2013 decision, the district court held that the congregation sufficiently alleged standing to challenge the validity of ordinances and that the congregation sufficiently alleged various claims under RLUIPA (*Tartikov I*).[7] However, the court found that the claims were not ripe because there was no final action and the harm alleged was theoretical, and refused to apply the "futility exception"(*Tartikov I*).[8] Two years later, the second opinion examined Tartikov's facial challenges to the village's zoning and environmental ordinances and found that the village's zoning laws restricting student housing were an insurmountable barrier to the proposed rabbinical college, and thus the Plaintiff had standing to pursue their ripe facial challenge.[9] It also found that Tartikov's facial challenges under RLUIPA's substantial burden prong were ripe for review (*Tartikov II*).[10] Accordingly,

[7] In this first decision, the court ruled on Defendant's Motion to Dismiss which asserted that Mr. Tartikov lacked standing due to his claims being unripe. The court determined that Tartikov did have an "injury in fact," as the intended use of the subject property was allegedly prohibited by the challenged ordinances. The redressability requirement was satisfied because the land in question was the only land of suitable size and location for the college, and that invalidation of the challenged zoning codes would allow for construction of the college (see *Tartikov I*, 589-92).

[8] The Futility Exception requires that the plaintiff has filed at least one meaningful application and the inevitability of refusal of the application, based on a totality of circumstances, test examining factors such as defendants hostility, delay and obstruction. The court found that Mr. Tartikov failed to file one meaningful development proposal and therefore the futility exception could not be invoked (ibid., 602–03; see also *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 [1987], 1455; *Guatay v. San Diego*, 982; *DLX, Inc. v. Kentucky*, 381 F.3d 511 [2004], 525).

[9] Facial challenges differ from as-applied challenges as they focus not on the effect of an application of the law, but rather the effect of the law unto itself. RLUIPA plaintiffs bringing pre-enforcement facial challenges to laws need not demonstrate a certainty that they will be prosecuted under the statute to show injury, but only that they have a an "actual and well-founded fear" that the law will be used against them (ibid., 381; see also *Archdiocese v. Sebelius*, 322).

[10] Such challenges to the law "by virtue of being facial challenges, are ripe and have been ripe from the moment the challenged laws were passed." Tartikov II at 385. Under RLUIPA, "a substantial burden can be imposed by the mere enactment of legislation" (ibid.).

the court denied the defendant's motion for summary judgment.[11] The third district court opinion focused on the merits of the various claims (and not standing or ripeness); however, the court did touch on the issue of a final action requirement from *Williamson County v. Hamilton Bank* (see *Tartikov III*).[12] Without explicitly saying so, by finding the claims to have the requisite standing and ripeness, the district court felt it did not need to impose a final action requirement to Tartikov's RLUIPA claim.

After a series of appeals stemming from the earlier district court opinions, the Court of Appeals for the Second Circuit took on Tartikov's case, holding that the "institution" lacked standing to pursue claims under RLUIPA's substantial burden and exclusions provisions, and that the ordinances did not violate RLUIPA's exclusion or equal terms provisions (see *Tartikov IV*). The Circuit Court began its inquiry by recognizing the difficult tug of war between larger societal goals and protection of religious rights: "Given the importance in our society of education, religion, and the usually legitimate desires of communities to regulate the manner in which the land within their boundaries is developed and used, conflicts arise when these interests come into tension" (ibid., 88). The Circuit Court devoted the next twenty-one pages of the decision to walking through the many facts, taking special care to highlight some of the troubling statements made by residents and town officials during some of the zoning hearings (ibid., 103).[13] By highlighting such statements, the Circuit Court painted a picture of hostility towards the proposed construction.

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[11] Tartikov II, Cconcluding that "because a series of disputed material facts remain as to (a) the exact form the rabbinical college must take in order to be sufficient for Plaintiff's exercise of religion" and "(b) to what extent the Challenged Laws alone make it difficult to build a rabbinical college in the Village" summary judgment must be denied as to the substantial burden RLUIPA claim.

[12] The village again attempted to counter Tartikov's RLUIPA claims by arguing a failure to establish the applicability any of the jurisdictional prerequisites because the ordinance had not been implemented and there was no permit denial or final decision. Tartikov IV, at 468. This argument is based on RLUIPA section(a)(2)(c) which states that "the substantial burden be imposed in the implementation of a land use regulation" (ibid.). The Court noted that subsection (a)(2)(b), which does not include the word "implement" instead focuses on effects on interstate commerce allows for the claim to proceed (ibid., 468-69). The court explained that "subsection (a)(1) does not require that the burden be imposed in the implementation of a land use regulation; it requires that the burden be imposed or implemented" (ibid., 469).

[13] Villagers reportedly made statements, when discussing the proposed college, such as "there is a group who wants to take over this village," and "it's really funny how we're talking about law, when you have a group that breaks every law there is" (ibid., 104). Notably, when confronted with the villager's animus towards the proposed rabbinical college, Pomona's Mayor Marshall replied, "We sitting at this table have limitations that are placed on us as to what we can say, and what we can't say, because our attorney tells us what we can say and what we can't say. I can't say what I feel – I can't – if I agree with you, I don't agree with you, I don't have that luxury of being able to say that here" (ibid.).

Despite its highlighting of clear instances of religious animosity driving the creation of targeted zoning ordinance, the Second Circuit Court of Appeals held that Tartikov lacked standing to press his RLUIPA substantial burden and exclusion claims. The Circuit Court split Tartikov's claims into two larger groups based on whether they were brought under equal protection concerns or free exercise, free speech, and RLUIPA's substantial burden and exclusion limits prongs. The court stated that Tartikov clearly had standing under the equal protection prong due to the documented animus exhibited by the Village council towards Tartikov. Turning to the second set of claims, the Circuit Court determined that Tartikov did not have standing due to his failure to assert an "injury in fact." The court reasoned that since Tartikov had not submitted a formalized building plan, or applied for any variance permits to immunize the land from land-use regulations, his injury was merely conjectural and did not rise to the level of "injury in fact." The Court applied the final action requirement from *Williamson County v. Hamilton Bank* without explicitly stating so, and by doing so denied Tartikov relief or the ability to build his rabbinical college.

There is ample legislative history surrounding the passage of RLUIPA. Floor statements and remarks made by both members of the Senate and House highlight a consistent theme. RLUIPA was intended, by those who drafted it, to be a strong tool for protecting religious liberties. The finality requirement serves to restrict access to RLUIPA's benefits to those individuals who can meet this additional standard. Clearly, this is contrary to the intended purpose of the law, which was meant to provide greater protections and avenues to enforce existing protections for religious liberty. Additionally, the explicit text of RLUIPA calls for only Article III standing. The addition of a finality requirement seems contrary not only to the illustrated intent behind the law, but also the explicit language of the law as well.

The robust legislative history surrounding RLUIPA illustrates a strong and clear intent for the law to lay an easier pathway for religious claimants to challenge government action (see 146 Cong. Rec. S6678 [2000]). This intent, and the desire to ease access, was born from the back and forth struggle between Congress and the Courts. Congress wanted to reinforce religious freedoms, and the ability for religious claimants to benefit from them, after the Court's decision in *Smith* and again in *Boerne* striking down RFRA (ibid., statement of Sen Hatch). RLUIPA)empowers religious claimants by immunizing religious land use claims from having to meet the nearly impossibly high hurdle of showing an unconstitutional motivation behind an otherwise "neutral" and "generally applicable" law (see RLUIPA, §A[1] a–b). In the pre-RLUIPA world, religious claimants would have a much harder time meeting their burdens of persuasion, and seemingly neutral yet (in application) insidious land-use regulations would be allowed to persist (see *Employment Division v. Smith)*. With the passage of RLUIPA, given that the law removes the *Smith* carveout for neutral and generally applicable laws, issues of religious land use could be reviewed under a pseudo strict-scrutiny lens. The strong legislative intent stand directly counter to the finality requirement imposed by *Williamson County v. Hamilton Bank*. The finality requirement is an additional hurdle that religious claimants must clear before being able to have their suits heard on the merits. Clearly then, a final action requirement as called for in *Williamson County* has been inappropriately applied to RLUIPA cases in a way that offends the purpose and spirits of the law.

During its introduction and debate in the Senate, the authors of the bill repeatedly highlighted the fact that RLUIPA was meant to serve as a pro-plaintiff tool allowing people to bring lawsuits to protect infringed upon religious rights (see 146 Cong. Rec. S6678 [13 July 2000], statement of Sen. Kennedy). Speaking to the source of the legislation, Senator Hatch explicitly stated that RLUIPA was a direct response to the Supreme Court's decisions in both *Smith* and *Boerne*. Congress wanted to salvage some of the protections offered by RFRA through a more tailored bill (RLUIPA) focused on traditional areas of religious freedoms infringement; religious land use, and the worship rights of institutionalized peoples (Statement of Sen. Hatch). Hatch also expressed a strong desire to offer increased protections to religious land use given that worship is "at the core of religious freedom" and that that right is often impeded by pervasive government land-use regulations. Turning explicitly to judicial issues, he lamented that after the overturning of RFRA, a religious assembly whose worship rights had been burdened by an otherwise "generally applicable" and "neutral" law could only get relief by meeting the incredibly high burden of proving the law had unconstitutional motivations behind it. This posed an exceedingly difficult task, as lawmakers usually do not keep a record of unconstitutional motivations behind the laws. As a response to this, RLUIPA required claimants to demonstrate only that "the regulation places a substantial burden on sincere religious exercises." Beyond this, Senator Hatch highlighted the fact that the RLUIPA introduced a strong pseudo strict-scrutiny level of review for religious land use cases by noting that the Government had the burden of showing that a law served a compelling interest by the least restrictive means possible. This was necessary given the insidious nature of many land-use regulations that on their face seemed neutral but in reality were motivated by something else. As he noted, "More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land-use plan" (ibid., statement of Sen Hatch). Such was the case with Tartikov's planned development. The Village of Pomona council discussed how they wanted to keep the makeup of the town the same, and how allowing Tartikov's college to be built would irreparably change the "makeup" of the town (see *Tartikov IV*). Senators Hatch and Kennedy intended for RLUIPA to be a tool to combat nationwide religious land use discrimination: "This discrimination against religious uses is a nationwide problem … Where it occurs, it is often covert" (146 Cong. Rec. S7774 [27 July 2000], joint statement of Sen. Hatch and Sen. Kennedy).

During later discussions, Senator Kennedy offered further support for the notion that RLUIPA was meant to empower religious claimants. Senator Kennedy went out of his way to note that in 1997 RFRA passed with the support of ninety-seven senators. Congress's intent could not be clearer than when Senator Kennedy noted the purpose of RLUIPA: "we carefully considered ways to strengthen religious liberties in other ways in the wake of the Supreme Court's decision" (146 Cong. Rec. S7774 [27 July 2000], joint statement of Sen. Hatch and Sen. Kennedy). RLUIPA requires that when a claimant provides *prima facie* proof of a "Free Exercise" clause violation "the burden of persuasion on most issues shifts to the government" (ibid.). According to these statements, RLUIPA was meant to reintroduce a standard of strict scrutiny to issues of government land use demonstrating a strong pro-plaintiff attitude. It seems illogical for a legislature that has explicitly made clear its desire to empower religious claimants to impose an additional standing requirement upon them such

as the final action requirement as called for in *Williamson County v. Hamilton Bank*. Imposing a final action requirement, as seen in *Williamson County,* offends the very clear purpose behind RLUIPA of empowering religious claimants to bring actions challenging pervasive government land-use regulations.

To further emphasize the need for RLUIPA, Congress had individuals testify before House Subcommittees in order to provide examples of government land-use regulations burdening religious claimants. For example, Rabbi Chaim Baruch Rubin of the Congregation Etz Chaim, an Orthodox Jewish congregation in Los Angeles, ran prayer meetings out of a rented house in a residential neighborhood. Orthodox Judaism requires adherents to walk to service on the Sabbath. After neighbors complained about the impact on the surrounding property value of congregants walking to the rented house, the city council denied the congregation a special use permit to continue its practice, all the while allowing non-religious assemblies to continue meeting in neighborhood parks. Members of a Portland, Oregon, church testified that a city official arbitrarily capped the attendance of their worship ceremonies to seventy people and shut down a food drive program that was being run out of the church. In Youngstown, Ohio, Ursuline nuns ran the "Beatitude House" which offered job training and transitional housing programs for homeless and abused women (146 Cong. Rec. E1564–01 [Sept. 22, 2000], material in extension of remarks). The Nuns wanted to turn part of an old convent into a transitional house for homeless women offering both worship services and general counseling. The nuns were denied their permit, and on appeal the appellate court held in favor of the zoning board, reasoning that the ordinance was neutral and generally applicable. These examples were offered to illustrate Congress's strong conviction and motivation to offer religious claimants a means to respond to government regulation that burdened the exercise of their religion.

The text of RLUIPA explicitly requires only Article III standing. Congress was well aware of what Article III standing required when it placed it into the text of RLUIPA. Congress was capable of including additional standing and ripeness requirements in the text of RLUIPA if it so determined. As we saw in the legislative history above, the stated justifications suggest that Congress wanted to empower religious claimants, not hinder them. The absence of any additional standing or ripeness requirements in the text speaks for itself: RLUIPA requires Article III standing, and that is all. Imposing additional standing and ripeness requirements under RLUIPA seems to be contrary to both the clear text of the law and the legislative history behind its inception and adoption.

Given that Congress has previously passed laws with a clear intent requiring plaintiffs to exhaust administrative remedies, the absence of any such language in RLUIPA further supports the notion that it requires nothing beyond simple Article III standing as stated in the text of RLUIPA. One example of a law with administrative exhaustion requirements is the *Prison Litigation Reform Act of 1995* (42 U.S.C. §1997e), which explicitly requires that prisoners exhaust potential avenues of relief before bringing an actionable suit in court: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This law was passed by a Congress largely made up of the same individuals who would later pass RLUIPA: Senator Hatch—the author and chief sponsor of RLUIPA—was a co-sponsor ("S.1279" n.d.). This

suggests that Congress knew very well how to add a finality or exhaustion requirement to a law, but chose not to do so in RLUIPA. The implementation of a final action exhaustion-like requirement into religious land use cases under RLUIPA—as the Second, Third, Sixth, and Ninth Circuits have done—appears to go against the clear language and Congressional intent behind RLUIPA.

In *Holt v. Hobbs*, the Supreme Court grappled with questions of religious liberty and RLUIPA in the context of imprisoned individuals. The Court reintroduced the standard of requiring the government to show that the law in question is the least restrictive means of accomplishing the government's compelling interest when applied to the individual in question. This represented a remarkable victory for imprisoned religious claimants under RLUIPA, as they now only need to meet their threshold burdens of standing and ripeness to shift the burden to the government. The Court's strong reading of RLUIPA here is aligned with the clear Congressional intent that RLUIPA serve as a strong offensive tool for religious claimants. Applying this to land use cases, *Holt* gives a sense that implementing an additional threshold requirement, the finality requirement, goes against the intent of RLUIPA and its application in other areas of the law.

In *Holt*, the Court evaluated claims brought by Gregory Houston Holt (a.k.a. Abdul Maalik Muhammad), who was imprisoned in an Arkansas state prison. Mr. Holt, a devout Muslim, contended that he must be allowed to grow a beard, one-half inches in length, in accordance with his sincerely held religious beliefs. Mr. Holt's desire to grow his beard clashed directly with an Arkansas Department of Corrections grooming policy which prohibited inmates from growing beards in the absence of a particular dermatological condition.[14]

The district court hearing this case determined that Mr. Holt could practice his religion in meaningful ways without a beard, and thus found in favor of the prison. The Circuit Court largely echoed the district court's opinion and stated that extreme deference must be given to prison policies. On review, the Supreme Court noted that Mr. Holt's desire to grow a beard came from a sincerely held religious belief, as required under RLUIPA.[15] The Court rejected the district court's reasoning by stating that the availability of alternative worship methods, such as the ability to use a prayer rug to pray throughout the day, is meaningless under RLUIPA as long as a sincerely held religious exercise is being burdened (see also *O'Lone v. Estate of Shabazz*, 482 U.S. 342 [1987]).

The Department failed to meet its burden of showing that the grooming policy was the least restrictive way of achieving a compelling state interest (*Holt v. Hobbs*, 862). This is even more the case under RLUIPA which demands a focused inquiry into the application of a regulation to the individual in question. This is a remarkable protection offered by RLUIPA, as government land use and prisoner regulations can no longer escape scrutiny by

[14] The Government argued that the grooming policy was meant to prevent prisoners from hiding contraband in their beards or shaving their beards in order to change their appearance for the purpose of escape.

[15] Justice Alito also noted that Holt clearly met his burden of showing that the grooming policy substantially burdened his exercise of his religion.

being neutral and generally applicable (see *Holt*, citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 [2000]). Notably, the Court looked to other state prison policies in which prisoners were double photographed to eliminate the possibility of using facial hair to elude corrections officers or escape prison. The Court also summarily rejected the Department's "slippery slope" argument, determining that RLUIPA does not allow for such arguments because the inquiry is narrowly focused on the application of the regulation to the individual in question. In the end, the Court reversed the decision of the Eighth Circuit Court of Appeals and concluded that the State policy in question impermissibly burdened Mr. Holt's religious exercise and was not the least restrictive way of achieving the State's compelling interests (*Holt v. Hobbs*, 864).

In this landmark decision, the Court took time to discuss the spirit behind RLUIPA. The Court noted that Congress passed RLUIPA and RFRA to provide broad and robust religious liberty protections (see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 [2014]). That was, and is, the pro-plaintiff spirit of RLUIPA. RLUIPA effectively re-introduced the strict scrutiny standard of RFRA to religious freedom cases involving prisoners; namely that no government may impose a substantial burden on the religious exercise of an individual even if the burden results from generally neutral and applicable regulation. The Court also took time to note "the expansive protections for religious liberty" created by RLUIPA's defining religious exercise to include any exercise of religion. Further, the Court solidified the interpretation of congressional intent behind RLUIPA explored here by stating that "Congress mandated that this concept shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution" (*Holt v. Hobbs*, 860).

It is worth noting that the Court used RLUIPA to vindicate the rights of a Muslim prisoner, specifically in Arkansas, which is 79% Christian and only 2% Muslim (Kiprorp 2018). Even religious minorities may use RLUIPA to defend their sincerely held religious beliefs, a strong policy argument in favor of a more robust reading of RLUIPA. Religious minorities often have been maligned in American culture and their beliefs dismissed. RLUIPA allows for religious minorities to stand up to a seemingly monolithic Christian government and have their beliefs respected under the law.

Applying this reasoning to Tartikov, we can see that the added finality requirement goes against the clear spirit of RLUIPA as shown by both congressional statements, and by the Supreme Court's interpretation and application of RLUIPA with regard to institutionalized persons. Mr. Holt easily met his threshold questions of ripeness and standing. The Court did not spend time grappling with any question of final action or a finality requirement. Holt's burden was clearly an injury in fact. This application of ripeness and standing is aligned with the pro-plaintiff spirit of RLUIPA. Congress did not pass a law—requiring only Article III standing and clearly intended to empower religious claimants—in the hope that lower courts would somehow import an additional threshold requirement, the finality requirement, to bar otherwise legitimate claims from being brought. The conclusion of the Court of Appeals for the Second Circuit that Tartikov did not meet the final action requirement goes against the Court's reading of RLUIPA here (see *Tartikov IV*). The Court did not engage in a discussion of standing and ripeness in the *Holt* opinion, or use a finality requirement (as created in government takings cases), to dismiss a claim. As seen in their

interpretation of RLUIPA in *Holt,* the Supreme Court seemingly has adopted a strong pro-plaintiff understanding of RLUIPA. The type of threshold questioning seen in the Tartikov circuit court decision runs directly against this reading, suggesting that the court is searching for a reason to not hear Mr. Tartikov's case. As a result, the final action requirement prolongs the suffering created by the burdening of sincerely held religious beliefs while ignoring the simple reality that this added requirement allows for ongoing government incursions into religious worship and exercise. Adding a finality requirement to the questions of standing and ripeness goes against not only the clear text of RLUIPA but also the spirit of the law as seen in congressional statements, and the Supreme Court's reading of RLUIPA in the institutionalized person's sphere.

In the 2019 decision *Knick v. Scott*, the Supreme Court explicitly overruled *Williamson County v. Hamilton Bank* by holding that a property owner had an actionable Fifth Amendment takings claim when the government takes her property without paying for it, and that the individual may pursue federal action before exhausting potential avenues of state relief. The Court's opinion offers a harsh rejection of the final action requirement for land takings cases, and thus can be read logically as a rejection of the wrongful application of that final action requirement to religious land use cases. This undercuts the validity of the reasoning of the Second, Third, Sixth, and Ninth Circuits in applying any such final action requirement to religious land use cases (see *Miles Christi v. Northville*; *Anshei Roosevelt v. Planning & Zoning Bd.).*

Mary Ann Knick owned 90 acres of land in Scott Township, Pennsylvania, with a small portion of the land containing a family cemetery. In December 2012, the Township passed an ordinance that required all cemeteries be kept open and accessible to the general public during daylight hours. The ordinance defined cemetery in a manner that included the family burial ground on the Knick property and allowed for code enforcement officials to enter upon any property to determine if a cemetery existed on said property. In 2013 a Township officer entered upon the Knick property, found several grave markers, and informed Ms. Knick that she was violating the ordinance by not opening up the cemetery to the public during the day. Ms. Knick responded by seeking declaratory and injunctive relief in state court, arguing that the ordinance equated to a taking of her property.

The state court failed to grant Ms. Knick relief by determining that there was no longer an enforcement action and thus Ms. Knick failed to illustrate harm in fact. Knick then filed in district court, arguing that the ordinance violated the "Takings" clause of the Fifth Amendment. The district court dismissed the claim and, citing *Williamson County v. Hamilton Bank*, stated that Ms. Knick failed to meet the final action requirement. The court found that Ms. Knick lacked standing because she had not pursued an inverse condemnation action in state Court (see *United States v. Clarke,* 445 U.S. 253 [1980]). The Third Circuit Court of Appeals affirmed the district court's opinion, and the Supreme Court granted certiorari to "reconsider" the holding of *Williamson County*.

Specifically, the Court reexamined the final action requirement from *Williamson County v. Hamilton Bank* in the sense that it reconsidered whether or not someone like Ms. Knick would have to exhaust state procedures for compensation before bringing a federal claim for takings. Announcing an overarching and general holding, the Court held that the "state-litigation" requirement imposed an unjustifiable burden on plaintiffs and that it conflicted with the Court's general jurisprudence. Justice Roberts noted that this final action

requirement often created a catch-22 situation in which plaintiffs must bring a state action before they can bring a federal action, but the result of that state action may preclude the federal claim.[16] The Court bemoaned the fact that the *Williamson County* standard effectively stripped the Takings Clause of its efficacy. Likewise, the application of the *Williamson County* final action requirement to religious land use cases not only undercut effectively the free exercise clause, but also RLUIPA and its explicit requirement of Article III standing.

The Court announced a direct overturning of *Williamson County v. Hamilton Bank* by stating that "Contrary to *Williamson County*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it" (*Knick v. Scott*, 2170). Claims would be considered ripe and having met standing without requiring plaintiffs to pursue every possible avenue of state relief first. The violation itself would be considered complete at the time of the taking. While this decision was not made in the context of religious land use, one can see how the Court's decision in *Knick* greatly undercuts the efficacy and veracity of any application of a final action requirement against religious land use plaintiffs.

The circuit court's logic—in which both *Miles Christi v. Northville* and *Anshei Roosevelt v. Planning & Zoning Bd.* made use of the *Williamson County* standard to block the claims of religious claimants due to their failure to satisfy the final action requirement—requires scrutiny in light of *Knick*. In *Miles Christi,* the court seemingly combined ripeness and standing into one consideration by implementing the *Williamson County* final action standard as a threshold question. The court reasoned that since Miles Christi had yet to apply for a variance use permit there was no final decision from the State and thus no actionable harm for which Miles Christ could sue. The inherent flaws in this reasoning—namely forcing the religious organization to endure further harm to bring a claim—are made even more glaring by *Knick's* overruling of *Williamson County v. Hamilton Bank*.

The Third Circuit's reasoning in *Anshei Roosevelt v. Planning & Zoning Bd.* is similarly weakened by *Knick's* overruling of *Williamson County*. In *Anshei Roosevelt*, the court specifically names *Williamson County v. Hamilton Bank* and states, "the Supreme Court … held that the takings claim was not ripe until the government entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue" (*Anshei Roosevelt v. Planning & Zoning Bd.*, 186). Applying that principle to the case, the court determined that the Yeshiva's claims were not ripe because, as an organization, it had not filed for any variance use permits with the city. The representatives of the Yeshiva argued that the city council's determination—that it was not a house of worship and thus not afforded protections from the land regulations in question—was the city's final action. But the question of whether a final action had occurred was neither longer relevant nor appropriate; the *Williamson County* final action standard had been overruled explicitly by the Supreme Court in *Knick v. Scott*. Thus, the Anshei congregants were wrongfully denied a chance to argue their case in court.

[16] To bolster this assertion, the Court looked to a previous decision where the Court noted that a state court's resolution of takings claim under state law generally has a preclusive effect in any subsequent federal action (*Knick v. Scott*, 2167, citing *San Remo Hotel L.P. v. City and County of San Francisco*, 545 U.S. 323 [2005]).

These two decisions are emblematic of the reasoning employed by the Second, Third, Sixth, and Ninth circuits to deny religious claimants their day in court through the application of the *Williamson County* standard. Given that the *Williamson County* standard has since been overruled by *Knick*, the reasoning of these courts has been greatly undercut and their decisions would not be justifiable given today's jurisprudence. Further, there is nothing in the text or history of RLUIPA offering an alternate path to create a new final action requirement; the application of a *Williamson County*-like final action requirement to religious land use cases brought under RLUIPA is both inappropriate and jurisprudentially wrong now.

IV. The Way Forward

It would seem that the Supreme Court ought to intervene on this question to elucidate the fact that they have removed the final action requirement for land use cases through their decision in *Knick v. Scott*. While initially it may seem that the *Knick* decision solves this problem, in reality the Courts still have applied erroneously the final action standard (or something very similar to it) to land use cases to bar plaintiffs from bringing certain actions (see *Tartikov IV*, decided months after *Knick*). If this is allowed to continue, more religious claimants will be denied the ability to use their land for their sincerely held religious beliefs and practices due to seemingly innocuous government land-use regulations. In their introduction of RLUIPA, Senators Hatch and Kennedy provided countless examples of religious land use discrimination going on throughout the country (146 Cong. Rec. S7774 [2000], joint statement of Sen. Hatch and Sen. Kennedy). The amount of RLUIPA litigation following the passing of the bill further illustrates the importance of this issue (see the list of key RLUIPA cases provided by the Becket organization, *Becket.org* 2021). *Tartikov* is a glaring example of the problem facing the current application of RLUIPA. Seventeen years have passed since Tartikov purchased his land in Pomona (*Petition for Writ of Certiorari* 2020). Seventeen years have passed while the local Jewish community has been deprived of a Rabbinical College and place of worship. For those congregants and potential religious scholars, this issue matters (see *Motion for Leave* 2020).

The need for Supreme Court intervention is highlighted by *Tartikov IV*, which was decided after *Knick v. Scott* overruled *Williamson County v. Hamilton Bank*. Nonetheless, the Court of Appeals for the Ninth Circuit still applied a pseudo-final action requirement. The Court began by laying out the basics of Article III standing; namely that a plaintiff must "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision" (109; see *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 [2019], quoting *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 [2016]). Expanding on the first requirement, the Court stated that an injury in fact that is sufficient to create standing is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical" (*Tartikov IV*, 109). The Court here broke from earlier district court opinions by concluding that Tartikov's injuries, in the context of his RLUIPA substantial burden and exclusion claims, were not concrete enough to constitute the requisite "injury in fact." The Court recognized that all of Tartikov's claims were based on "the alleged" invasion of Tartikov's

right to be free from state discrimination and unequal treatment under the law due to his religious convictions. The Court next split Tartikov's claims into two groups: the claims that the Village adopted four challenged laws at least in part for the purpose of discriminating against Tartikov on the basis of religion; and that the challenged laws prevent Tartikov from building and operating a rabbinical college on the property, thus impermissibly infringing on his religious freedoms. The Court placed the RLUIPA substantial burden and exclusion claims into this second group.

The Circuit Court seemingly adopted the *Williamson County* final action requirement without explicitly saying so, when it noted: "Tartikov, however, never submitted a formal proposal for the building project, applied for a permit, or engaged in any other conduct that would implicate or invoke the operation of the challenged zoning laws" (109). This is likely the case given that this decision was announced a few months after *Knick* overruled *Williamson County v. Hamilton Bank*; so the court may have been trying to avoid directly citing newly made bad law. This further illustrates the importance of Supreme Court intervention in this area. Courts such as the Second Circuit Court of Appeals are still using their own version of the final action requirement to deprive religious claimants of their right to argue their case in court. Given that neither Tartikov nor Tartikov Rabbinical College, Inc., had applied for any permit, or appealed the zoning laws, the court determined that no harm had occurred. The harm was merely conjectural and only had the potential to become injury in fact once the zoning laws were implemented against Tartikov. In holding this, the court seemingly ignored the fact that the laws that seemed motivated by anti-Semitic attitudes had, for over seventeen years, deprived Tartikov, and all potential students and their families, of the ability to build a rabbinical college on his rightfully purchased land. Somehow, the court determined there was no harm in that seventeen-year deprivation and frustration of purpose. The court distinguished these claims from the discrimination claims where the injury in fact—discrimination and disparate treatment by the community—had been established by the various recorded instances of stated animus towards Tartikov by the Village. The court ignored the reality that it was requiring Tartikov to file for permits through the same individuals that the Court just acknowledged had exhibited unconstitutional discriminatory behavior toward Tartikov. If that was not the case, then there also would be no injury in fact for the discrimination claim. This arbitrary treatment of injury in fact was only allowed given the court's cryptic and adoption of the debunked *Williamson County* final action standard. The court concluded that, with regard to Tartikov's "substantial burden and exclusion and limits claims" related to RLUIPA, it lacked jurisdiction, and thus vacated the judgment "with respect to these claims and remand with instructions for the district court to dismiss them" (*Tartikov IV*, 110).

The court's application of a final action requirement here is flawed for two reasons. It forces individuals such as Tartikov to pursue pointless avenues of local relief from the same individuals that the court noted had shown unconstitutional animus towards him, and it makes use of a bastardized version of the *Williamson County* standard that has been overruled by *Knick.* Tartikov's case is emblematic of why the Supreme Court ought to intervene in this area. It should make it clear that standing under RLUIPA requires no more than Article III standing, and that the addition of a final action requirement is jurisprudentially untenable

and patently incorrect. The Supreme Court has already passed on the opportunity to do so through *Tartikov*, but could do so with a case involving these same issues.

Beyond the arguments borne from the clear text and spirit of the law, there are strong policy considerations in favor of interpreting RLUIPA as requiring only Article III standing without the addition of a finality requirement. The folding of ripeness into standing with the addition of a finality requirement from *Williamson County v. Hamilton Bank* has had a disastrous effect on potential religious litigants in those circuits. (see *Miles Christi v. Northville*; *Anshei Roosevelt v. Planning & Zoning Bd.*; *Guatay Christian Fellowship v. City of San Diego*, 670 F.3d 957 [2011]). In the extreme, potential claimants such as Tartikov have waited over seventeen years to have their cases heard on their merits (*Tartikov IV*). Courts seemt to have made use of this misguided application of a finality requirement to shirk their unflagging obligation to hear and decide a case (see *Petition for Writ of Certiorari* 2020). This prolonged suffering for the sake of an arbitrary and uncalled for judicial hurdle is both wrong and dangerous. It is wrong for the reasons stated above, and dangerous because laws such as RLUIPA are often among the strongest protections offered to religious minorities in this country. Tartikov is a practicing Orthodox Jew (a community of less than two percent of the U.S. population; see Smith et al. 2020) trying to practice his sincerely held religious beliefs in a village concerned with maintaining the "make up" of its largely Christian population. RLUIPA offers two key protections; first, it protects the rights of religious individuals to use the land for religious purposes, and second, it protects the rights of persons confined to government institutions, such as jails. The freedom to practice one's religion is embodied in the First Amendment and ought not to be infringed upon based on an arbitrary (and now defunct) judicial standard imported from government takings cases.

Religious freedom requires not only protections from discrimination (such as that exhibited by the Pomona council members), but also should provide protection for religious exercise (see Dreiband 2020). As noted above, when drafting RLUIPA Congress took time to point out that religious groups often face discrimination when seeking zoning approval for houses of worship, and that religious discrimination is often coupled with racial and ethnic discrimination. RLUIPA was supported by more than seventy religious and civil rights groups such as the American Civil Liberties Union, the Baptist Joint Committee, the American Jewish Committee, the Union of Orthodox Jewish Congregations, and the Christian Legal Society (see 146 Cong. Rec. S7774 [27 July 2000], joint statement of Sen. Hatch & Sen. Kennedy). The issues discussed here regarding standing and ripeness matter greatly to the individuals making up, and represented by, these groups. Religious claimants in the Second, Third, Fourth, and Ninth circuits have been wrongly denied these protections through the erroneous application of a finality requirement to RLUIPA cases. In those circuits, claimants must endure discrimination until some sort of final action occurs, even in the face of clear religious animus and the total frustration of purpose for the properties in question by lawmakers. Evidence shows that religious institutions are often treated worse in zoning decisions than secular institutions: "Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes" (ibid.). This finding of religious discrimination again speaks to the need for a law

such as RLUIPA to be available to all claimants bringing action due to the frustration of a sincerely held religious belief.

In the twenty years since it's passing, RLUIPA has been used effectively to defend the rights of a myriad of religious groups, including Christians, Muslims, Jews, Hindus, Buddhists, and Sikhs. In that time, the Department of Justice has opened one hundred fourty-eight RLUIPA formal land-use investigations, filed twenty-five RLUIPA land-use lawsuits, and filed twenty-nine amicus briefs involving RLUIPA land-use provisions. Over two-thirds of Department of Justice investigations resulted in the local government modifying, striking down, or otherwise correcting laws to remedy RLUIPA issues (ibid.). The protections of RLUIPA need to extend to all Americans, not just those lucky enough to reside in a circuit that interprets RLUIPA as requiring only basic Article III standing and ripeness (see Dreiband 2020).

For religious minorities, the importance of RLUIPA again becomes even clearer. Of the Department of Justice investigations mentioned above, fifty-six percent have involved Christian groups while twenty-three percent have involved Muslims, ten percent involved Jewish groups, three percent involved Buddhist groups, three percent involved Hindu groups, and one percent involved Native American groups. Jews and Muslims represent around three percent of the U.S. population yet, as these numbers show, they disproportionately have used RLUIPA effectively. Since the law's passage, thirty-five percent of RLUIPA filings have involved mosques and Islamic schools. Examples of successful RLUIPA land-use litigation include *United States v. City of St. Anthony Village*, in which a Minnesota city was forced to amend a law that originally had limited the use of a local center to secular assemblies, thereby enabling a predominantly black and Islamic group to use it as a house of worship (No. 14-CV-03272; see also *U.S. v. Maui County*, 298 F.Supp. 2d. 1010 [2003]; *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F.Supp. 2d 1140 [2003]; *United States v. Township of Bernards, N.J.*, No. 3:16-CV-08700 [2017]). Under RLUIPA, the addition of a finality requirement to the questions of standing and ripeness serves only to keep religious minorities such as those seen in *U.S. v. St. Anthony* (as well as *Tartikov*) from exercising their constitutionally protected rights of worship.

A criticism of this approach to RLUIPA standing and ripeness is that it will open up the flood gates of baseless litigation brought by people misusing America's reverence for religious freedoms. The fear is twofold; first, people lacking sincerely held religious beliefs will circumvent legitimate government regulations, and second that certain regulations will become powerless given the number of exemptions granted. Justice Alito took time in *Holt* to address exactly these concerns, or as he refers to them, the "classic rejoinder of bureaucrats throughout history; if I make an exception for you, I'll have to make one for everybody, so no exceptions" (*Holt v. Hobbs*, 866). The slippery slope argument against requiring only Article III standing and ripeness fails for two reasons; the narrowly tailored view of RLUIPA and the requirement of a sincerely held belief. RLUIPA requires the court to examine the effect of a law on the individual, or individual group, bringing the action. This means that each RLUIPA inquiry done by the court is narrowly tailored and focused on the individuals and the effects of RLUIPA, and cases are likewise prescribed only to those individuals involved. Therefore, a favorable decision in a RLUIPA case does not automatically create a broad exemption that can be applied outside the context of the case.

The inquiry and the effect are likewise narrow in scope; thus, an exception for one will not result in an exception for all, or even a few. Second, the beliefs behind the actions must be sincerely held. Courts can and ought to examine the core beliefs of plaintiffs and how they interact with insincere worship practices to determine that the beliefs are sincerely held and not simply a smokescreen to evade government regulations. It is not hard to imagine the court effectively carrying out this task. Even if the courts fail at the initial juncture in determining the validity of belief, if upon review it becomes clear that the underlying beliefs were merely pretext for an evasion attempt then the court can reverse any granted exemptions. As Justice Alito noted in *Holt,* even if the underlying beliefs may be sincere, an institution may be entitled to withdraw an accommodation if "the claimant abuses the exemption" in a manner that undermines the government's compelling interest in regulation (867).

By briefly applying the threshold questions of standing and ripeness without the added final action requirement, we can see how the advocated approach would allow for Tartikov's case to be heard on its merits, and the likely effect that would have. The Second Circuit Court of Appeals' rejection of Tartikov's RLUIPA action was firmly grounded in the determination that he lacked standing and ripeness. The court here does not refer to the final action requirement by name but states that Tartikov's injuries were merely "conjectural" injuries since he had not applied for any sort of building permit or variance. This determination ignores the simple reality that the exact people with whom the court wants Tartikov to apply for a permit or variance are the same individuals whose religious animus had been well documented. Tartikov would have to apply for a permit from individuals who commented that "it just seems unfair that the burden should be placed on the people who have lived in the village by other people who want to come in and change the makeup of the village" (*Tartikov IV*, 103-104). These xenophobic and possibly anti-Semitic sentiments were well known to Tartikov during this time. Regardless, the simple fact remains that Tartikov purchased the land over seventeen years ago to carry out his sincerely held religious beliefs, and this purpose has been frustrated by targeted local zoning regulations which have rendered the construction or use of the property impossible.

Applying basic Article III standing and ripeness doctrines we see that Tartikov clearly meets both of those expectations. Article III standing requires a plaintiff to show that it has suffered an "injury in fact" that is concrete and particularized and actual or imminent (and not conjectural or hypothetical); that the injury is fairly traceable to the challenged action of the defendant; and that it is likely (as opposed to merely speculative) that the injury will be redressed by a favorable decision. Tartikov clearly has suffered a personal injury in fact, by not having been able to use the land he lawfully purchased for the purpose of religious education and exercise. The 2004 law explicitly prohibited student family housing, an integral part of Tartikov's proposed rabbinical college. Beyond that, local law requires schools to be accredited before it can be established within the village, but the State of New York requires the school to be established before it can be accredited. Thus, Tartikov is stuck in a catch-22 in which local laws have made it impossible for him to move forward. The connection between the injury and the laws is clear; Pomona's enactment of the 2004 law imposed a previously nonexistent ban on student housing. Tartikov also meets the requirement of redressability; were the 2004 law to be repealed, Tartikov would be able to

construct student-family housing on the land. The Second Circuit's addition of a final action requiring the plaintiff to petition a legislative body is erroneous and beyond the scope of Article III standing in RLUIPA. Looking to other circuits we see that legislative action similar to the 2004 law can be a harm unto itself (see *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d. 78 [2013]). Tartikov's case ought to be heard on the merits because he clearly meets basic Article III standing requirements without the additional final action requirement.

Tartikov likewise meets normal ripeness requirements as understood by a majority of circuit courts. This is not an abstract disagreement, but rather an ongoing and very real dispute (see *Abbot Labs*). The controversy in this case is mature because the litigation has been ongoing for over seventeen years, despite the Second Circuit's formulation of the harm here as being hypothetical or abstract. We have a timely issue involving a real controversy and harm. Tartikov clearly meets not only Article III standing but also general ripeness requirements not withstanding the additional final action requirement erroneously applied by some circuit courts. The merits of the claim are beyond the scope of the inquiry, but the clear religious animus demonstrated by village officials gives a sense that Tartikov would likely prevail if given his constitutionally granted and legislatively reinforced rights. If Tartikov's case were heard and he were successful, he would be entitled to relief either by being excluded from the targeted legislation or by having the law repealed.

Conclusion

The folding of ripeness into standing—with the addition of a finality requirement—has had a disastrous effect on religious litigants such as Tartikov. Certain circuits have erected this final action standard as an additional justiciability hurdle to be overcome, and by doing so have denied claimants from having their cases judged on the merits. In the extreme, this has left certain religious claimants waiting to obtain a final determination from a local governing body while suffering the loss of enjoyment of their property. Tartikov purchased his land over seventeen years ago; as of this writing, construction still has not begun.

The final action requirement runs afoul of both the spirit and text of RLUIPA. The drafting legislators behind RLUIPA left us with a plethora of floor statements, all of which repeat the same idea. RLUIPA was, and is, meant to empower religious claimants in their ability to have issues of religious land use resolved favorably. Introducing an arbitrary justiciability standard only serves to restrict access to RLUIPA's protections. Beyond the clear spirit of the law, the text of RLUIPA itself only calls for Article III standing and no more.

Those circuits adopting the final action standard have wrongly imported it from Fifth Amendment takings cases. Even so, the underlying case behind the principle, *Williamson County v. Hamilton Bank*, has since been overruled by the Supreme Court. *Knick v. Scott* undercut the logic of the final action standard in the area of religious land use which has been overruled directly as a standard in government takings cases. Nonetheless, some courts such as the Second Circuit Court of Appeals have still made use of the final action standard. The Supreme Court ought to intervene to resolve this growing circuit split now, when the make-up of the Court is seemingly so pro-religious freedom. Explicitly denouncing the final action

standard in the RLUIPA context will help the application of the law remain true to the intent and purpose behind RLUIPA.

Throughout the country, the sincere exercise of religion is being burdened unnecessarily by local government and zoning decisions. People such as Tartikov should not be forced to suffer the loss of enjoyment of their property due to insidiously targeted local zoning ordinances. By removing the final action standard, the door will be widened for religious litigants to bring action over issues of land use. There is no slippery slope to be feared as RLUIPA demands a narrow inquiry and produces equally narrow decisions. Courts can also determine the sincerity of a plaintiff's exhibited beliefs and practices. In the end, removing the final action standard will create a more workable and effective version of RLUIPA that serves the intended purpose behind the law.

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