No. 20-7028

IN THE

Supreme Court of the United States

AMOS MAST, MENNO MAST, SAM MILLER, and AMMON SWARTZENTRUBER,

Petitioners,

v.

COUNTY OF FILLMORE and MINNESOTA POLLUTION CONTROL AGENCY,

Respondents.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

BRIEF OF *AMICI CURIAE* JEWISH COALITION FOR RELIGIOUS LIBERTY AND NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae the Jewish Coalition for Religious Liberty (JCRL) is an incorporated group of rabbis, lawyers, and professionals who practice Judaism and are committed to religious liberty. As adherents of a minority religion representing members of the legal profession, JCRL's members have a strong interest in ensuring legal protection for the diversity of religious viewpoints and practices in the United States. The group aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith communities. To that end, JCRL's leaders have filed *amicus* briefs in this Court as well as lower federal and state courts, have published op-eds in prominent news outlets, and have established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership. JCRL currently serves as co-counsel in *Young Israel of Tampa, Inc.* v. *Hillsborough Area Regional Transit Authority*, No. 8:21-cv-00294 (M.D. Fla. filed Feb. 5, 2021), to protect the free speech rights of Orthodox Jews in Tampa.

JCRL also often writes on religious land use questions arising under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and like statutes. See, *e.g.*, *Tree of Life Christian Schs.* v. *City of Upper*

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[1] Per Rule 37.2(a), counsel for *amici* provided notice to all parties at least 10 days prior to the due date, and all parties granted consent. Per Rule 37.6, *amici* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. This brief has been prepared in part by a clinic operated by Yale Law School, but does not purport to present the School's institutional views, if any.

Arlington, 139 S. Ct. 2011 (2019) (*amicus* brief on equal-terms provision); *Spirit of Aloha Temple* v. *Cty. of Maui*, No. 19-16839 (9th Cir. filed Sept. 19, 2019) (*amicus* brief on RLUIPA preclusion issues). And JCRL has also served as co-counsel in cases involving the application of strict scrutiny to restrictions on religious communities. See *Lebovits* v. *Cuomo*, No. 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020). As an organization dedicated to protecting religious freedom, JCRL has a significant interest in ensuring that the strong protections RLUIPA has afforded minority faith communities in the courts—including Jewish communities—are not diluted.

The National Committee for Amish Religious Freedom was founded in 1967 by non-Amish to preserve the religious liberty of the Old Order Amish (and related Anabaptist groups including Mennonites). It litigated *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), to prevent states from compelling the Amish to educate their children beyond the eighth grade. The Amish defendants' objection to post-primary education in *Yoder* was inherently religious—they believed that such education endangered their salvation and that of their children. *Id.* at 209, 210–11. This Court held that requiring the Amish to send their children to school beyond the eighth grade violated the protections of the First and Fourteenth Amendments. *Id.* at 234. Since *Yoder*, the National Committee has continued to advocate for religious liberty and seeks to ensure that the United States is a country "where all religions are free . . . to practice their religious way of life as long as they pose no grave dangers to themselves or others." *Introduction*, Nat'l Comm. for Amish Religious Freedom, http://bit.ly/38aMjIu (last visited Mar. 4, 2021). *Amicus* therefore has a significant interest both in advocating for the general principles of religious freedom in this

case, and for the religious liberty of the Old Order Amish in particular.

INTRODUCTION AND SUMMARY OF ARGUMENT

From before the Founding, the United States has offered succor for adherents of uncommon or disfavored faiths. From Puritans to Catholics, from Jews and Muslims to the Ukrainian Orthodox and Amish, our nation has been a haven from religious persecution. In the United States, practitioners of diverse faiths are not merely "tolerated," but welcomed as members of the community and fellow citizens.

To be sure, we have at times fallen short of our ideals of religious freedom. Sometimes those deviations have been blatant, such as the military attempt to expel Jewish persons from Tennessee; the expulsion of Puritan minister Roger Williams from the Massachusetts Bay Colony for spreading "d[i]vers[e] new[ ] & dangerous opinions"; or Missouri's "Extermination Order" directing that "Mormons must be treated as enemies, and must be exterminated or driven from the state." Janet Maslin, *The Exodus From Paducah, 1862*, N.Y. Times (Apr. 4, 2012) (reviewing Jonathan D. Sarna, *When General Grant Expelled the Jews* (2012)), http://nyti.ms/2OnVLBn; Henry S. Burrage, *Why Was Roger Williams Banished?*, 5 AM. J. THEOLOGY 1, 3 (1901); Mo. Exec. Order No. 44 (Oct. 27, 1838).

Government targeting of religious communities for discriminatory treatment lives on in recent memory. For example, Jewish persons were targeted for "selective prosecution" under New Deal health laws partly to strengthen support for those laws, even where their practices posed no health danger. See Brief of the Muslim Public Affairs Council et al. at 5–6, *Agudath Isr. of*

Am. v. *Cuomo*, No. 20A90 (U.S. Nov. 17, 2020) (collecting sources). Some Amish were abused for refusing to fight in World War I, and Amish families have been criminally punished for schooling their children according to their beliefs. See *Amish in America*, PBS: Am. Experience, http://to.pbs.org/3bhTgJR (last visited Mar. 4, 2021). And indeed, this Court has recognized that vestiges of *de jure* religious "bigotry" have persisted into the present. See *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020).

Congress has recognized that governments at all levels have fallen short of our commitments to religious minorities, and that discrimination may deny religious individuals and communities the ability to live and worship consistently with their faith. See 46 Cong. Rec. 16,698 (2000) (joint statement of Senators Orrin Hatch and Ted Kennedy). To help square American practices with American ideals, Congress unanimously passed, and President Clinton signed, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*). This was especially needed after the Supreme Court narrowed the scope of the First Amendment in *Employment Division* v. *Smith*.

RLUIPA subjects any land use regulation imposing a substantial burden on religious exercise to strict scrutiny, permitting application of the regulation only if "the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). Unfortunately, courts have often diluted this strict scrutiny test.

The Amish community to which Petitioners belong objects to Respondents' new mandate that they install septic systems on their property to process "gray water"—waste water from laundry, cooking, and bathing. Pet. 4. Petitioners' community has for generations hand-carried and disposed of gray water through soil, consistent with their religious tradition of eschewing modern technology, which the septic mandate contravenes. *Id.* at 17.

The decisions below failed to hold Respondents to their burden to show that their generic interests in public health and environmental protection were so compelling in this specific application as to justify trampling Petitioner's religious beliefs. Nor could Respondents meet that burden, when they allow hikers and campers to engage in precisely the same soil-disposal practices now prohibited to Petitioners. Pet. 17. Furthermore, Respondents failed to carry their burden of proving that mulch basin recycling, an alternative gray water solution used in twenty other states, would not serve Respondents' health and environmental interests just as well as the septic requirement. *Id.* at 20–27. Respondents cannot satisfy RLUIPA strict scrutiny when they have granted secular exemptions for campgrounds but denied religious accommodations for the Amish; nor when they have refused—without explanation—to adopt a religiously acceptable alternative already widely used in other jurisdictions.

Ensuring proper application of RLUIPA strict scrutiny is crucial for all minority religious groups but especially for Jewish communities. In recent years, local governments have increasingly relied on generalized or abstract interests in controlling traffic, maintaining tax revenue, and preserving aesthetic interests as justifications for denying zoning approvals and building permits, effectively blocking Jews from building

schools and religious facilities. See *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 351–52 (2d Cir. 2007) ("traffic" and "parking" concerns had no "basis in fact" in connection with actual school proposal); *Gagliardi* v. *City of Boca Raton*, No. 16-CV-80195-KAM, 2017 WL 5239570, at *1–3 (S.D. Fla. Mar. 28, 2017) ("religious animus" mixed with "desire to protect the residential quality" of neighborhood in attempt to bar construction of a Chabad religious center), *aff'd sub nom. Gagliardi* v. *TJCV Land Tr.*, 889 F.3d 728 (11th Cir. 2018). The approach taken by the Minnesota Court of Appeals would render RLUIPA impotent against misguided and pretextual land use regulations that have the effect or even the purpose of disfavoring the practice of Judaism and other minority faiths.

Amici urge the Court to grant certiorari to make clear that state and local governments bear the burden of proving a particularized compelling interest in burdening religious exercise, including by rebutting obvious and less burdensome existing alternatives. To the extent that this Court and its Members have recently clarified these principles in *Diocese of Brooklyn*, *South Bay,* and *Dunn*—decided long after the decision below—vacatur and remand to apply those cases in the first instance may also be appropriate.

ARGUMENT

I. PROPER INTERPRETATION OF RLUIPA'S STRICT SCRUTINY BURDEN IS UNIQUELY IMPORTANT FOR OBSERVANT JEWISH COMMUNITIES.

A. Anti-Semitism Remains A Significant Problem In American Life, Including In Land Use Decisions.

The United States has served as a haven for Jewish adherents fleeing persecution since the Founding. George Washington's 1790 address to the Newport Hebrew Congregation promised that "the Children of the Stock of Abraham" would—in the words of the scriptures—"sit in safety under his own vine and figtree, and there shall be none to make him afraid."[2] Guided by its Constitution and principles, America today remains one of the freest and most welcoming places in the world to practice the Jewish faith.

But even in the United States, anti-Semitism has reared its ugly head, including in local government land use decisions. To be sure, naked bigotry is less common today than in the past. Nonetheless, suspicion of uncommon or unfamiliar practices, and of differently dressed or cultured persons, often leads to discrimination against Jewish organizations, traditions, and individuals. Discrimination against and burdening of Jewish religious practice is often concealed in generalized expressions of concern about traffic conditions, environmental protection, property values, and other government interests.

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[2] President Washington to the Hebrew Congregation of Newport (Aug. 18, 1790), *in* 6 *The Papers of George Washington: Presidential Series, July-November 1790*, 286, 286 n.1 (Dorothy Twohig et al. eds., 1986).

Periodically throughout U.S. history, promises of religious protection have been undercut by lingering anti-Semitism. Blatant acts of targeted harassment, vandalism and assault against Jews still occur, and have unfortunately increased in recent years. James Jay Carafano & Sara A. Carter, *Anti-Semitism Is All of Our Problem*, Heritage Found. (Jan. 5, 2021), http://herit.ag/3qgLUuc. Subtler forms of anti-Semitism were present in the twentieth century as well, including attempts to exclude Jews through restrictive city covenants. Until this Court intervened in 1948, many cities, from Seattle to Baltimore, enforced restrictive covenants that operated to exclude Jews. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); see, *e.g.*, Catherine Silva, *Racial Restrictive Covenants History: Enforcing Neighborhood Segregation in Seattle*, Seattle C.R. & Lab. Hist. Project (2009), http://bit.ly/2O3e6DJ; Garrett Power, *The Residential Segregation of Baltimore's Jews*, GENERATIONS, Fall 1996, at 5, https://bit.ly/3uUIdxR. Today, such restrictive covenants may no longer be enforced, but the impulse to exclude has not disappeared. Just five years ago, the town of Toms River, New Jersey saw anti-Semitic graffiti scratched into a playground. Soon after, the town's mayor referred to an "invasion" of Jews into the city, and residents responded by openly resisting selling their homes to Jews. See Eli Steinberg, *The Re-Ghettoizing of the Jews*, Wash. Exam'r (Jan. 23, 2020), http://washex.am/2OiGDFg.

During the COVID-19 pandemic, state and local government leaders have "[s]ingl[ed] out" Jewish communities while restricting, in the name of public health, the ability of religious adherents to gather for worship. See Brett Harvey & Howard Slugh, Opinion, *Orthodox Jews Face Collateral Damage From Unbalanced COVID-19 Measures*, Religion News Serv. (July 10,

2020), http://bit.ly/38ceB5n; see also Liam Stack, *Backlash Grows in Orthodox Jewish Areas Over Virus Crackdown by Cuomo*, N.Y. Times (Oct. 7, 2020), http://nyti.ms/30fJm4W; Ismail Royer, *RFI Urges Cuomo to Stop "Scapegoating" Orthodox Jews, Files Court Brief Supporting Jewish Students*, Religious Freedom Inst. (Oct. 23, 2020), http://bit.ly/3uTAujv. Most overtly, New York Governor Cuomo singled out Orthodox Jews for restrictive treatment with his "cluster zones" initiative. See *Some Groups, Residents Say Gov. Cuomo Has Taken Criticism of Orthodox Jewish COVID-19 Noncompliance Too Far*, CBS N.Y. (Oct. 15, 2020), http://cbsloc.al/30cwXyN. This Court granted injunctive relief from those burdensome, religiously discriminatory restrictions, after which the Second Circuit unanimously decided in favor of the Jewish plaintiffs. See *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Agudath Isr. of Am.* v. *Cuomo*, 983 F.3d 620 (2d Cir. 2020).

At other times, bigotry or insensitivity to religious practice has been couched in neutral language. Traffic safety, environmental protection, property values, and other generally important interests (and, in some cases, transparently unimportant interests) serve as pretexts to justify burdening Jewish practitioners when those interests are not actually served by the proposed burdens. For example, in *Westchester Day School*, a zoning board initially approved but then rescinded a zoning modification for a Jewish school that wished to construct a new building on its existing campus. 504 F.3d at 345–46. The district court "surmised that the [zoning] application was in fact denied because . . . [of] the public opposition of the small but influential group of neighbors who were against the school's expansion plans," not because of "the effect the project would have on traffic and concerns with respect

to parking and the intensity of use." *Id.* at 346. In *Ben-Levi* v. *Brown*, a prison refused to allow a Jewish inmate to meet once a week with other Jewish inmates to pray and study Torah, citing its interest in maintaining order and safety, yet saw no problem with allowing adherents of other religions to congregate for prayer. 136 S. Ct. 930, 931, 934 (2016) (mem.) (Alito, J., dissenting from the denial of certiorari). Yet another example involved a city's attempts to remove an Orthodox Jewish community's *eruv*[3] in the name of "preventing permanent fixtures on its utility poles," even though it "allowed its residents to nail house numbers to [those same] utility poles." *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 172 (3d Cir. 2002).

Sometimes, this insensitivity has arisen due to confusion or presumptions about unfamiliar religious practices. In *Ben-Levi*, the disparate treatment was based on a government agency's "understanding of Jewish doctrine" based on input from a single rabbi, which was a mistaken interpretation of the petitioner's "actual beliefs." 136 S. Ct. at 931, 934 (Alito, J., dissenting from the denial of certiorari); see Michael A. Helfand, Opinion, *Why Can't Prison Figure Out How a Minyan Works? It's Not That Complicated!*, The Forward (Mar. 7, 2016), http://bit.ly/3v4TFaq. And opposition to *eruvs* have sometimes been accompanied by confused assertions that Orthodox Jewish communities are "trying to annex land," with a

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[3] The *eruv* is "a ceremonial demarcation of an area" that "extends the space within which pushing and carrying is permitted on the Sabbath beyond the boundaries of the home, thereby enabling, for example, the plaintiffs to push baby strollers and wheelchairs, and carry canes and walkers, when traveling between home and synagogue." 309 F.3d at 152.

strained connection to Israeli policy regarding "Palestine."[4]

So too in this case. The County government accused Amish Petitioners of not properly understanding their own faith, pointing to their willingness to use telephones in an emergency and to the biblical command of "submission to secular authority." See Pet. 7, 11. Respondents' inappropriate theologizing regarding Petitioners' religious beliefs may well have motivated the unnecessarily hard line the County drew in its septic regulation. Yet while the trial court criticized Respondents on this point, see *id.* at 11, it nevertheless concluded that the County's generic interest in public health and the environment justified the substantial burden the septic regulation imposed on Petitioners.

B. RLUIPA Strict Scrutiny Is An Important Bulwark Against Anti-Semitism.

RLUIPA strict scrutiny has protected Jewish religious schools and institutions for more than two decades. In *Westchester Day School*, strict scrutiny ensured that opposition from neighbors did not prevent the expansion of a Jewish school, despite the zoning board's asserted interest "in enforcing zoning regulations and ensuring residents' safety through traffic regulations." 504 F.3d at 353. The Second Circuit found that there was no particularized evidence of an impact on traffic safety, but there *was* evidence that the zoning board had "refused to consider" less restrictive alternatives to denying the school's zoning application. *Id.* Thus, the government action neither served a compelling interest nor was the least restrictive means of furthering such an interest. *Id.*

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[4] Complaint ¶ 35, *Porrino* v. *Twp. of Mahwah*, No. 2:17-CV-11988 (D.N.J. Nov. 22, 2017), ECF No. 1.

Similarly, in *Agudath Israel*, the Second Circuit applied strict scrutiny to New York's COVID-19 restrictions on synagogue attendance because "where government regulations 'single out houses of worship for especially harsh treatment,' the government must demonstrate that its policies are narrowly tailored." 983 F.3d at 636. Not only could New York make no such demonstration, but for some of its policies it "never seriously contended" that they had been narrowly tailored to begin with. *Id.* at 633. Strict scrutiny thus protected religious minorities from a burden that even the state itself did not actually believe was necessary. In cases like these, RLUIPA strict scrutiny serves the crucial role of distinguishing real and important government interests from assertions of interests so insubstantial that they betray a pretext for discrimination, a complete indifference to Jewish citizens as members of the community, or, in less severe cases, a simple misunderstanding of or insensitivity to the need and importance of Jewish practice.

Conversely, when strict scrutiny is abandoned or misapplied, the results can gravely undermine sincerely held religious beliefs. For example, in *Warner* v. *City of Boca Raton*, in order to avoid "cemetery anarchy," the district court construed Florida's version of RFRA not to protect religious practice regarding the shape and placement of grave markers in public cemeteries. 64 F. Supp. 2d 1272, 1283 (S.D. Fla. 1999), *aff'd*, 420 F.3d 1308 (11th Cir. 2005). Following a "limited inquir[y] into religious doctrine," the district court concluded that—despite the plaintiffs' claims to the contrary—"the particular manner in which [grave] markers and religious symbols are displayed—vertically or horizontally—amounts to a matter of purely personal preference" and was therefore unprotected by

Florida's RFRA. *Id.* at 1284–85. The court thus improperly declared what was—or, was not—orthodox.

RLUIPA was enacted to protect precisely what the district court in *Warner* called the "absurd results" of protecting sincerely held religious belief. *Id.* at 1283. The need for a proper application of strict scrutiny is particularly acute where, as here, a land use regulation would functionally exclude a religious community altogether. RLUIPA was enacted in response to this Court's decision in *Smith*, which the statute's drafters knew would force religious adherents—such as the *Smith* plaintiffs themselves—to choose between practicing their religion and living in the jurisdiction whose neutral laws of general applicability burdened their free exercise rights. See *Emp't Div., Dep't of Human Res.* v. *Smith*, 485 U.S. 660 (1988). This case presents exactly the scenario Congress anticipated in RLUIPA, and the Court should clarify that RLUIPA strict scrutiny forbids the effective exclusion of the Amish from Fillmore County.

II. RLUIPA REQUIRES THE STATE TO SHOW A PARTICULARIZED COMPELLING INTEREST AND TO REBUT OTHER JURISDICTIONS' LESS BURDENSOME ALTERNATIVES.

Once a plaintiff has shown a *prima facie* burden on religious exercise, the government must demonstrate both that it has a compelling interest in regulating the particular conduct of the particular plaintiff, and that its regulation is the least restrictive means of achieving that compelling interest. Where, as here, other similarly situated jurisdictions have successfully implemented alternative and less burdensome regulations, the least-restrictive-means analysis requires the government to demonstrate why it cannot implement a similar alternative.

The courts below misapplied strict scrutiny twice over: they did not require the government to demonstrate a *particularized* compelling interest, and they did not require the government to show why other, similarly situated jurisdictions' less-burdensome regulations could not be adopted in Fillmore County.

A. RLUIPA Requires The State To Show That It Has A Compelling Interest In Regulating The Particular Conduct Of A Particular Plaintiff.

RLUIPA, like RFRA, requires an inquiry "more focused" than a "categorical approach" in which the government must "justify[ ] the general applicability of [the] government mandate[ ]." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014). District courts must "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants" and "'look to the marginal interest in enforcing' the challenged government action in that particular context." *Holt* v. *Hobbs*, 574 U.S. 352, 362–63 (2015) (alteration in original) (quoting *Hobby Lobby*, 573 U.S. at 726–27). In other words, to show a compelling interest under RLUIPA, a state must establish that it has a compelling interest in preventing a particular risk to a particular state interest posed by a particular plaintiff. The assertion of a generic interest in traffic safety, public health, property values, or the like is not enough.

RLUIPA's plain text demands a particularized compelling interest, requiring the government to demonstrate a compelling interest in "imposition of the burden *on that person*." 42 U.S.C. § 2000cc(a)(1) (emphasis added). Construing the statute as the courts below did—to require only the demonstration of a compelling

interest in public health or environmental protection—makes the statutory words "on that person" meaningless. See *Twp. of Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.").

RLUIPA's history reinforces this particularity requirement. RLUIPA's compelling interest test mirrors that of RFRA, 42 U.S.C. § 2000bb-1(b), the purpose of which was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1). In *Sherbert*, the petitioner was fired from her job because her beliefs as a Seventh-day Adventist forbade her to work on Saturdays. 374 U.S. at 399. South Carolina denied her unemployment benefits because, in the state's view, the petitioner's religious beliefs did not constitute "good cause" to refuse employment. *Id.* at 399–401. This Court did not consider the government's generic assertion of the "possibility that . . . fraudulent claims" would be filed by "unscrupulous claimants" to constitute a "compelling state interest" justifying a burden on the appellant's free exercise of religion. *Id.* at 406–07. Instead, the Court demanded evidence of the asserted compelling interest and concluded that "there [was] no proof whatever to warrant such fears of malingering or deceit." *Id.* at 407. The Court in *Yoder* reiterated this standard when it required the state to "show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." 406 U.S. at 235–36. Consistent with RFRA, *Sherbert*, and *Yoder*, RLUIPA means what

it says: a generic interest, even if compelling in the abstract, cannot justify burdening religious practice.

Before this Court's decision in *Holt*, state and local governments often asserted only generic interests in regulating religious practice, such as health, security, or environmental protection, without explaining why the interest was compelling as applied to a particular plaintiff. Unfortunately, lower courts sometimes credited these generic interests when they should have been applying strict scrutiny. See, *e.g.*, *Rich* v. *Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 529, 533–34 (11th Cir. 2013) (reversing the district court's denial of a prisoner's petition for kosher meals based in part on the prison system's concern over security risks). This approach threatened to dilute the strict scrutiny required by RFRA and RLUIPA to little more than the *Smith* standard—the very standard that the statutes were enacted to augment. A generic interest like "protecting public health" has no discernable endpoint or limiting principle. If there were no requirement to particularize this interest, it would give the government a blank check to burden religious liberty—or any other civil right subject to that standard—at will, even where strict scrutiny applies. After all, a government always has a generic interest in incrementally protecting public health, and that interest will never be satisfied unless all of its citizens become immortal.

Holt made clear that a purportedly compelling interest must be particularized to preventing the "harm of granting specific exemptions." 574 U.S. at 363. Yet state and local governments have continued to assert generic interests, and lower courts have at times countenanced them. In *Harbor Missionary Church Corp.* v. *City of San Buenaventura*, for example, the Ninth Circuit held, without analysis, that a generic interest in "promoting public safety and . . . preventing crime"

was sufficiently "compelling," for RLUIPA strict scrutiny purposes, to justify land-use regulation of a church's homeless ministry.[5] 642 F. App'x 726, 730 (9th Cir. 2016).

In majority and separate opinions, this Court has already reiterated this Term that generic claims of compelling interests cannot justify broadly defined restrictions on religious exercise. In *Roman Catholic Diocese of Brooklyn*, the Court found "no evidence that [the Diocese of Brooklyn and Agudath Israel] have contributed to the spread of COVID–19." 141 S. Ct. at 67. The Court underscored the district court's findings that "there ha[d] not been any COVID–19 outbreak in any of the Diocese's churches since they reopened," noting Governor Cuomo's agreement that "there ha[d] been no outbreak of COVID–19 in [Agudath Israel's] congregations." *Id.* (first alteration in original) (highlighting the "stricter safety protocols" that were "rigorously implemented" by the Diocese and Agudath Israel). Absent specific evidence of viral spread, the Governor's restrictions on houses of worship were "far more severe than ha[d] been shown to be required." *Id.*

In *Dunn* v. *Smith*, the Court declined to vacate an Eleventh Circuit injunction halting an Alabama execution because the state had excluded the prisoner's pastor from the execution chamber. 141 S. Ct. 725 (2021) (mem.). Justice Kagan concurred, joined by Justices Breyer, Sotomayor, and Barrett, noting that a generic "need to close the execution chamber to all but those whom the warden ha[d] found 'trustworthy'" was

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[5] The court went on to hold that denying the church a zoning permit to operate its homeless ministry was not narrowly tailored. 642 F. App'x at 730. However, the danger of diluting strict scrutiny remains: if a generic interest is sufficient under the "compelling interest" prong, then strict scrutiny is really nothing more than a narrow tailoring test. This is not the law.

not enough to justify burdening the prisoner's religious practice. *Id.* at 726 (Kagan, J., concurring in denial of application to vacate injunction). States—and reviewing courts—cannot "simply presume that every clergy member will be untrustworthy." *Id.* Instead, they must show how *this* prisoner's request "to have his pastor with him as he dies" would threaten prison security. *Id.* at 725. Without specific evidence to support such a particularized claim, RLUIPA does not permit states to burden practices rooted in sincerely held religious belief.

In this case, Minnesota and Fillmore County failed to demonstrate a compelling interest in enforcing their regulation against Petitioners. Nevertheless, the trial court found that "untreated or inadequately treated gray water presents substantial and serious danger to public health and risk to the environment, and that the [g]overnment has a compelling interest in protecting against those dangers." Pet. App. 6–7 (alteration in original). The Minnesota Court of Appeals upheld this finding over Petitioners' objections. *Id.* at 8. Given the Amish's extensive history of following their traditional practices rather the current regulations—with the County's apparent blessing—the court should have required Respondents to show that Petitioners' current handling of gray water has affected Respondents' asserted interests in public health and the environment. Since there was no such evidence, the trial court had no basis to hold that Respondents' stated interests were compelling.

Instead, the trial court's finding describes precisely the sort of generic interest that this Court has rejected in the RLUIPA context, and the trial court said nothing about how the state's sewer regulation would achieve even that generic purpose. Under RLUIPA, the courts below should have required the government

to show a compelling interest not in regulating gray water generally, but in requiring *these Petitioners* to install septic tanks.

B. RLUIPA Requires The State To Rebut Obvious, Existing Alternative Regulations In Use In Other Jurisdictions That Are Less Burdensome To Religion.

The courts below further erred by ignoring evidence that *twenty states* permit mulch basin gray water treatment systems, which naturally remove contaminants from gray water and allow the water to be safely reused. Pet. App. 73–74 & n.35. Even assuming the state's asserted interests were compelling and particularized, the courts below should have required the state to meet the "exceptionally demanding" least restrictive means test, which requires a showing "that [the government] lacks other means of achieving its desired goal without imposing a substantial burden." *Holt*, 574 U.S. at 364–65 (quoting *Hobby Lobby*, 573 U.S. at 728). When "so many other" jurisdictions permit installation of such systems, the burden is on the state to, "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Id.* at 368–69.

In *Diocese of Brooklyn*, a majority of this Court suggested that the challenged regulations were not "narrowly tailored" because they were "far more restrictive than any COVID–related regulations that have previously come before the Court" and "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic." 141 S. Ct. at 67. Separate opinions this Term have also emphasized the importance of interstate comparisons. In *Diocese of Brooklyn*, Justice Gorsuch and Justice Kavanaugh emphasized that the regulations at issue were outliers, with other states hav-

ing adopted less-restrictive solutions to the same public-health problem. *Id.* at 69 (Gorsuch, J., concurring) (noting that only "certain States" imposed such burdensome regulations); *id.* at 72–73 (Kavanaugh, J., concurring) (describing the problematic regulations as "much more severe than most other States' restrictions"). Likewise, writing for herself and three colleagues in *Dunn*, Justice Kagan described it as "[s]till more relevant" to the strict scrutiny inquiry that "other jurisdictions have allowed" the requested alternative. 141 S. Ct. at 725–26 (Kagan, J., concurring). The existence of even a few "other jurisdictions" that employed a less burdensome alternative rule was enough to require Alabama to explain why it could not offer the same alternative. *Id.*

Unfortunately, the trial court reversed the burden in this case, imposing it on the religious objectors, not on the state, and thus disregarded the reasoned alternative offered by twenty other states because Petitioners had not submitted detailed evidence showing that this water treatment system would work identically in Minnesota. Even Minnesota's near-neighbors like Montana, Wyoming, and Wisconsin with similar climates to Minnesota, permit mulch basin gray water treatment systems. Pet. App. 73–74 & n.35. Yet the Minnesota appellate court deferred to the trial court's dismissal of other jurisdictions' alternatives, considering it a finding of fact. *Id.* at 5. But the allocation of the burden to distinguish other jurisdictions' less-burdensome alternatives is a question of law that the Court of Appeals should have reviewed *de novo*. Put differently, the trial court did not necessarily err in its *factual* finding that it was unclear whether other states' less burdensome alternatives would be workable in Minnesota. *Id.* at 74. Rather, it erred in its *legal* conclusion that, because the proposed alternative was

an "unproven quantity" in Minnesota, the state had carried its burden of rejecting alternative regulations. *Id.* The existence of alternative regulations in other jurisdictions should have shifted the burden to the state to show that the alternatives were *not* workable; instead, the trial court put the burden on Petitioners to show that the alternatives *were* workable. And that burden shifting often makes all the difference, including for Jewish religious accommodation claims. See *United States* v. *Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1347 (11th Cir. 2016) (government's failure to provide "enough information" as to why cost of kosher food program would be unworkable made "summary judgment" against the prison system appropriate).

Placing the burden on the state, as the courts below should have done, is not only correct as a matter of law, it also makes sense as a matter of policy. Religious objectors will be highly motivated to identify analogous alternative regulations in other states, but the state has far greater access to detailed and sometimes non-public information about other states' practices, as well as greater knowledge of its own policy goals. Therefore, RLUIPA properly asks the state, not the objector, to investigate whether adopting another state's alternative regulation would be feasible and adequate to achieve the state's particularized compelling interest.

That the state is not prepared to demonstrate the unworkability of any other state's alternative suggests that the state has not actually investigated the available alternatives and cannot plausibly assert that its regulation is narrowly tailored. To hold otherwise would mean that RLUIPA's least restrictive means test is not what this Court has repeatedly said it is: "exceptionally demanding." *Holt*, 574 U.S. at 364–65 (quoting *Hobby Lobby*, 573 U.S. at 728).

III. VACATUR AND REMAND IN LIGHT OF *DIOCESE OF BROOKLYN*, OR HOLDING THIS PETITION PENDING DISPOSITION OF OTHER PENDING CASES, MAY BE APPROPRIATE.

Diocese of Brooklyn gave state and local governments and the lower courts significant new guidance regarding how to apply strict scrutiny to health and safety regulations. It would therefore be appropriate for this Court to vacate the decision below and remand for reconsideration in light of the intervening decision in *Diocese of Brooklyn*.

Alternatively, Petitioners have pointed to three cases pending decision this Term—*Fulton*, *Americans for Prosperity Foundation*, and *Thomas More Law Center*—that will likely give further guidance on how strict scrutiny should be applied. Pet. 27. Delaying disposition of this petition pending decision of those cases therefore may also be appropriate. However, the clear direction of *Diocese of Brooklyn*—even without the further guidance in the separate opinions in *Dunn* and *South Bay*—is sufficiently contrary to the decision below to justify vacatur and remand.

CONCLUSION

The petition for a writ of certiorari should be granted. Additionally, the Court should vacate and remand the case for further consideration in light of recent precedent.

Respectfully submitted,

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