No. 19-16839

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPIRIT OF ALOHA TEMPLE, INC. et al.,

Plaintiffs-Appellants,

v.

COUNTY OF MAUI

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Hawaii
No. 1:14-CV-00535-SOM-WRP
Hon. Susan Oki Mollway

MOTION FOR LEAVE TO FILE BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

James A. Sonne
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1422
jsonne@law.stanford.edu

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF

The Becket Fund for Religious Liberty moves under Federal Rule of Appellate Procedure 29(a) for leave to file the accompanying amicus curiae brief in support of Plaintiffs-Appellants and reversal in this case. Plaintiffs-Appellants consent to the filing of the proposed brief. Defendant-Appellee, however, has not responded to the request by Becket's counsel for their consent.

MOVANT'S INTEREST

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the legal rights of all religious traditions. To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Included in Becket's mission of protecting the freedom of the faithful to participate in public life is vindicating the concomitant First Amendment right to secure and use property for religious purposes. Becket has therefore long been involved in land use litigation under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2018).

Becket brought the nation's first RLUIPA land use case after the statute was enacted in 2000. *See Haven Shores Cmty. Church v. City of Grand Haven*, No. 1:00-cv-175 (W.D. Mich. Dec. 20, 2000). Since then, it has been involved in RLUIPA litigation on behalf of a wide variety of religious believers and institutions across the

country. *See, e.g.*, *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011) (counsel for small church); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (amicus supporting Sikh temple); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005) (amicus supporting Christian prayer-group organizers); *United States v. Rutherford Cnty.*, No. 3:12-cv-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012) (counsel for mosque securing temporary restraining order allowing it to open in time for Ramadan); *see also Holt v. Hobbs*, 574 U.S. 352 (2015) (counsel for Muslim inmate seeking religious accommodation).

Becket is concerned that the lower court's approach threatens a central aspect of RLUIPA's protections against the vicissitudes—or worse—of local land use planning. Specifically, in deferring to a planning commission's findings when reviewing RLUIPA claims, the court violated that statute's express mandate for independent judicial review of local decisions when it comes to religious land use.

REASONS FOR GRANTING THE MOTION

The motion should be granted because Becket's brief offers a deep and unique dive into the history, purpose, and text of RLUIPA on the appeal's central question of preclusion. Whereas the relevant briefing by Plaintiffs-Appellants concerns the preclusive effect of the Maui Planning Commission decision under Hawai'i law—*see* Appellants' Br. at 15-33—Becket's brief focuses exclusively on whether such

law applies at all under RLUIPA's full faith and credit provision—*see* Becket AC Br. at 5-24. Indeed, the independent impact of RLUIPA on the preclusion question makes Becket's brief indispensable to resolving that issue.

Additionally, this motion should be granted because of Becket's expertise in RLUIPA land use matters and the broad implications of this appeal for religious communities throughout this Circuit—including its impact on other minority faiths and the communities they serve. Absent consideration of Becket's arguments, these wider concerns under that civil rights statute would lack sufficient briefing.

CONCLUSION

The Court should grant this motion and permit Becket to file its concurrently submitted brief as amicus curiae in support of Plaintiffs-Appellants and reversal.

Dated: March 6, 2020

Respectfully submitted,

s/ *James A. Sonne*

James A. Sonne
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1422
jsonne@law.stanford.edu

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the date indicated below. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 6th day of March, 2020.

s/ *James A. Sonne*
James A. Sonne

No. 19-16839

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPIRIT OF ALOHA TEMPLE, INC. et al.,

Plaintiffs-Appellants,

v.

COUNTY OF MAUI

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Hawaii
No. 1:14-CV-00535-SOM-WRP
Hon. Susan Oki Mollway

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

James A. Sonne
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1422
jsonne@law.stanford.edu

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Becket Fund for Religious Liberty does not have any parent corporation. Nor does any publicly held corporation own 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative Materials

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the legal rights of all religious traditions. To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Included in Becket's mission of protecting the freedom of the faithful to participate in public life is vindicating the concomitant First Amendment right to secure and use property for religious purposes. Becket has therefore long been involved in land use litigation under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2018).

Becket brought the nation's first RLUIPA land use case after the statute was enacted in 2000. *See Haven Shores Cmty. Church v. City of Grand Haven*, No. 1:00-cv-175 (W.D. Mich. Dec. 20, 2000). Since then, it has been involved in RLUIPA litigation on behalf of a wide variety of religious believers and institutions across the country—including in this Circuit. *See, e.g.*, *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011) (counsel for small church); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (amicus supporting Sikh temple); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005)

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity other than amicus or its counsel contribute money to this brief's preparation or submission.

(amicus supporting Christian prayer-group organizers); *United States v. Rutherford Cnty.*, No. 3:12-cv-0737, 2012 WL 2930076 (M.D. Tenn. July 18, 2012) (counsel for mosque securing temporary restraining order allowing it to open in time for Ramadan); *see also Holt v. Hobbs*, 574 U.S. 352 (2015) (counsel for Muslim inmate seeking religious accommodation).

Becket is concerned about this case because the lower court's approach threatens a central aspect of RLUIPA's protections against the vicissitudes—or worse—of local land use planning. Specifically, in deferring to a planning commission's findings when reviewing RLUIPA claims, the court violated that statute's express mandate for independent judicial review of local decisions when it comes to religious land use. Absent reversal, religious landholders and the communities they serve would lose a critical tool in fighting local prejudice—with the many new and marginalized faiths Becket represents being most at risk.

SUMMARY OF ARGUMENT

The chief concern of Congress in passing RLUIPA's land use provisions was infringement by local government on the ability of religious communities to use their property to meet their needs. Whether out of bigotry, indifference, or politics, the obstacles facing these communities cried out for judicial oversight.

In response, Congress did not just famously subject local authorities to strict scrutiny where their actions substantially burden religious exercise. It also withheld the deference to local land use findings that courts typically afford local authorities. Specifically, Congress adopted a statute-specific presumption against the preclusive effect of non-federal findings in the course of attendant judicial review—lest the scrutiny entrusted to courts become a mere paper barrier.

Congress understood, of course, that the clear-error standard typically applies to state court review of local land use findings; and, in turn, state court decisions are normally afforded full faith and credit in federal court. But when it comes to religious land use, however, Congress made clear in RLUIPA that these default rules should be altered in recognition that the devil is often in the procedural details when confronted with the treatment of such uses by local governments.

Specifically, RLUIPA insists that state or local adjudications of a claim under that statute "shall *not* be entitled to full faith and credit in a Federal Court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum." 42

U.S.C. § 2000cc-2(c) (2018) (emphasis added). In other words, preclusive effect cannot be afforded to clear-error determinations by state courts in assessing local religious land use decisions. Nor can there be any deference to agency findings in the first instance absent procedural rights akin to those afforded court litigants.

And all of this is assuming a local agency can be tasked with adjudicating whether its decision satisfies RLUIPA standards where that agency is the would-be offender—an assumption the Department of Justice and other lower courts have rejected as wholly improper, and rightly so. As the federal government put it in a 2010 statement of interest in an analogous case, the whole purpose of RLUIPA oversight "would be thwarted if zoning boards are able to insulate actions that would violate RLUIPA by making a ruling purportedly under RLUIPA and then arguing that a claimant is precluded from challenging the ruling."

Unfortunately, in giving preclusive effect to the findings of the Maui County Planning Commission when deciding Plaintiffs' RLUIPA claims, the District Court abdicated the scrutinizing role required of it by Congress under that statute. Absent reversal, therefore, the harm Congress feared will return—and to the detriment not only of those seeking to practice their faith at the Spirit of Aloha Temple property but marginalized religious groups throughout the Ninth Circuit.

ARGUMENT

I. CONGRESS PASSED RLUIPA TO PROVIDE JUDICIAL RELIEF FROM PROCEDURAL ABUSE BY LOCAL LAND USE AGENCIES.

A. Congress saw the need for judicial oversight.

In the years leading to RLUIPA's unanimous passage in 2000, nothing had become more urgent for the protection of religious land use than the need for judicial oversight of local decision-making. As the Congressional committees that drafted RLUIPA found, the problem was not simply the substantive articulation of the right to freely assemble at a house of worship; rather, it was all too often the procedural hurdles at the local planning stage.

Of concern were three dynamics in particular: (1) agency discretion; (2) parochialism; and (3) xenophobia. *See* 146 Cong. Rec. E1564-67 (statement of Rep. Henry J. Hyde) (laying out examples of unchecked local authority). And all these under a system of judicial review limited to the administrative record on a deferential standard. *See, e.g.*, *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 201 (1998) (statement of Bruce D. Shoulson, attorney).

First, the wide latitude provided by state and local land use rules to local planning authorities is a unique threat to religious uses. As Senate co-sponsors Kennedy and Hatch stressed, local zoning codes frequently lack districts in which houses of worship can be built as of right, and therefore require special,

individualized permits for their construction and use. *See* 146 Cong. Rec. S7774 (daily ed. July 27, 2000). And these determinations are often, in turn, governed by "vague, discretionary, or subjective" standards. *Religious Liberty: Hearing Before the H. Comm. on the Judiciary*, 106th Cong. 84-85 (1999) [hereinafter *House Judiciary Hearing*] (statement of Douglas Laycock, Professor, University of Texas School of Law); *see also* Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 Notre Dame L. Rev. 1, 5 (2009) (lamenting in religious land use context that "[l]ocal zoning authorities are often governed by vague standards and have tremendous discretion").

In the process, the risk of pretextual or politicized decision-making is acute. With few standards, local planning bodies can offer almost any justification. As one expert noted, a church can be "excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic." *House Judiciary Hearing*, *supra*, at 84 (statement of Professor Laycock).

Moreover, vagueness creates undue pressure. Neighbor accountability renders zoning boards "intensely local and responsive to the views of community activists." *Id*. at 86. This can be good in many contexts. But here, it tempts local boards to "couch[] their grounds for refusal to permit [religious] use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers." *Am. Friends*

of Soc'y of St. Pius, Inc. v. Schwab, 417 N.Y.S.2d 991, 993 (N.Y. App. Div. 1979); *see also* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1035 (2016) (citing as a concern the subjecting of religious exercise to "the standardless whim of neighbors").

Second, and relatedly, the drift of discretionary authority can result in a parochial failure to recognize the broader—and often lesser-known—importance of the religious interests at stake. Local officials, for example, might be more concerned about "taking property off the tax rolls" than they are about the spiritual importance of a new religious assembly. *House Judiciary Hearing*, *supra*, at 84 (statement of Professor Laycock). Likewise, these local officials are more prone to a "secular blindness" that prioritizes parking, traffic, and preservation concerns—which are more in their anticipated bailiwick—over "the concrete needs of religious activity." *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. 13 (1998) [hereinafter *Senate Judiciary Hearing*] (statement of W. Cole Durham, Jr., Professor, Brigham Young University).

The third, and most disturbing, dynamic encouraged by discretionary land use authority concerns the sad reality of either a "community climate of suspicion or hostility toward religious intensity" or local officials who are themselves antagonistic toward religion. *House Judiciary Hearing*, *supra*, at 85 (statement of Professor Laycock); *see also* 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint

statement of Sen. Hatch and Sen. Kennedy). If, as Senator Kennedy recounted, a planning official can simply proclaim her actions to be "quasi-judicial" and assert she is "not required to explain decisions," the risk of hidden abuse is high. 146 Cong. Rec. S6689 (daily ed. July 13, 2000).

And the impact of this discrimination falls particularly on "new, small, or unfamiliar" religious communities, as officials are prone to prefer the known to the foreign. 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Hence the need for independent judicial scrutiny—which, before the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), had a relatively successful track record of addressing similar problems. *See* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725, 730 n.11 (1999).

B. Congress responded by insisting on judicial scrutiny.

In the end, the multi-faceted problem of local discretion when it comes to religious land use decisions led Congress to an inevitable and necessary conclusion: where religious exercise would be burdened, such decisions must be subjected to independent scrutiny by the courts. As Senator Hatch stressed, therefore, RLUIPA provides "procedural helps to ensure a full day in court for believers who must litigate . . . in areas of predominately state jurisdiction." 144 Cong. Rec. S5791 (daily ed. June 9, 1998).

Accordingly, RLUIPA expressly provides that "[a]djudication of a claim of a violation of [RLUIPA's land use provisions] in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum." 42 U.S.C. § 2000cc-2(c). And, as Professor Laycock—who helped draft RLUIPA—testified, this presumption against full faith and credit "includes both issue preclusion and claim preclusion." *Senate Judiciary Hearing*, *supra*, at 59 (statement of Professor Laycock); *see also* Laycock & Goodrich, *supra*, at 1068 (warning that the specter of preclusion would be "the end of RLUIPA").

As the Department of Justice has observed, "Congress enacted RLUIPA to serve as a federal statutory solution to religious discrimination and violation of the free exercise of religion by state and local entities, including zoning boards, planning commissions, and their respective agencies of appeal." United States of America's Statement of Interest in Opposition to the City of Los Angeles' Motion for Judgment on the Pleadings at 10, in *Congregation Etz Chaim v. City of Los Angeles*, No. CV 10-1587, 2011 WL 12462883 (C.D. Cal. Nov. 15, 2010) [hereinafter 2010 DOJ Statement]. Thus, the Department added, "[t]his congressional purpose would be thwarted if zoning boards are able to insulate actions that would violate RLUIPA by making a ruling purportedly under RLUIPA and then arguing that a claimant is precluded from challenging the ruling." *Id.*; *see also Congregation Etz Chaim*, 2011

WL 12462883, at *7 ("The text of RLUIPA itself indicates congressional intent to limit the application of federal common law in the area of preclusion.").

Granted, the RLUIPA presumption against preclusion can be overcome where there has been "a full and fair adjudication" in the non-federal forum. 42 U.S.C. § 2000cc-2(c). But, as Professor Laycock observes, this requirement is a strict one that "should include reasonable opportunity to obtain discovery and to develop the facts relevant to the federal claim." *Senate Judiciary Hearing*, *supra*, at 59.

In particular, as Laycock emphasizes further, "full and fair adjudication" is a requirement that is not easily met by local land use authorities or the typical state court review that would follow their decisions:

> [I]f, for example, a zoning board with limited authority refuses to consider the federal claim, does not provide discovery, or refuses to permit introduction of evidence reasonably necessary to resolution of the federal claim, its determination would not be entitled to full faith and credit in federal court. And if in such a case, a state court confines the parties to the record from the zoning board, so that the federal claim still cannot be effectively adjudicated, the state court decision would not be entitled to full faith and credit either.

Id. Furthermore, in a situation where the local decision-maker is itself the offending party—a not uncommon occurrence—even the foregoing procedures would be insufficient since the violation arises from that body's decision. *See Congregation Etz Chaim*, 2011 WL 12462883, at *8 (finding it "would undercut the purpose and effectiveness of RLUIPA" to give preclusive effect "where the alleged discriminatory act arises from the administrative proceeding itself").

Finally, Congress made clear that RLUIPA "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." 42 U.S.C. § 2000cc-3(g); *see also Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (applying canon of interpreting remedial statutes broadly). For this further reason, therefore, preclusion that effectively dodges independent court review should be disfavored in any event. *Congregation Etz Chaim*, 2011 WL 12462883, at *7.

II. RLUIPA'S ANTI-PRECLUSION PRESUMPTION REPEALS THE REQUIREMENT OF DEFERRING TO STATE PRECLUSION LAW.

A. In RLUIPA, Congress rejected the full faith and credit default.

Under 28 U.S.C. § 1738, the default rule is that state court decisions "shall have the same full faith and credit in every court in the United States . . . as they have by law or usage in the courts of such State." In other words, federal courts are required to follow state preclusion law—on both claims and issues—when determining whether findings made by a state court prevent their relitigation in a federal forum. Moreover, this requirement has a federal common law analogue that applies to findings of non-federal administrative agencies, so long as the proceedings meet certain criteria. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966).

That said, Congress can always decide whether state preclusion law will govern a particular context and thereby dispatch with the default rule. And, as the

Supreme Court observed in *Kremer v. Chemical Construction Corp.*, Congress can create such "partial repeal" expressly or implicitly. 456 U.S. 461, 468 (1982).

Express repeal is just that, whereas the Court has described two categories of implied repeal as follows:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Id. (internal quotation marks omitted). The primary focus, therefore, is the intent of Congress; and to divine such intent, courts look to the statute's text, purpose, and legislative history. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 97-104 (1980).

Turning to RLUIPA, then, Congress made clear its intent to repeal Section 1738—whether expressly or implicitly—in its provision that any non-federal determination "shall not be entitled to full faith and credit" in federal court absent a "full and fair adjudication." 42 U.S.C. § 2000cc-2(c).

For starters, the express yet polar opposite phrasing of the respective statutes—"shall have the same full faith and credit" versus "shall not be entitled to full faith and credit"—evinces specific intent to negate the general rule of preclusive effect for non-federal decisions. In other words, the RLUIPA provision "covers the whole subject of [Section 1738] and is clearly intended as a substitute." *Kremer*, 456 U.S. at 468. Likewise, RLUIPA's divergent directive creates an "irreconcilable

conflict" with Section 1738's requirement of affording preclusion to non-federal judicial decisions without exception. *Id*.[2]

The legislative history is in accord. Indeed, those who drafted RLUIPA described its full faith and credit provision as applying to all land use decisions, regardless of whether they had been reviewed by state courts—which is impossible were Section 1738 to apply. *See* 146 Cong. Rec. E1563 (statement of Rep. Canady). Moreover, in describing this RLUIPA provision, House co-sponsor Canady invoked the leading Section 1738 case of *Kremer* in discussing problems caused by state-court preclusion—particularly where there is no full and fair adjudication at the local level. *Id*.

For that matter, RLUIPA's "full and fair adjudication" proviso only exacerbates the conflict with Section 1738. As the Supreme Court has observed, to qualify for full faith and credit under Section 1738, "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause." *Kremer*, 456 U.S. at 481. Consequently, RLUIPA's requirement of a "full and fair adjudication" stands in stark contrast,

[2] Notably, Section 1738 and the relevant provision of RLUIPA each include in their headings the precise phrase "full faith and credit," which likewise supports repeal from the text. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 221 (2012) ("Title[s] and headings are permissible indicators of [statutory] meaning."); *see also Yates v. United Sates*, 135 S. Ct. 1074, 1083 (2015) (looking to statutory headings as "cues" of legislative intent).

further creating an "irreconcilable conflict" for partial repeal. *Id*. at 468. Furthermore, RLUIPA's general rule of broad construction to protect religious liberty, together with canons of statutory interpretation, counsel a narrow reading of the proviso in any event. *See* 42 U.S.C. § 2000cc–3(g) (insisting on broad construction of RLUIPA protections); Antonin Scalia & Bryan A. Garner, *Reading Law* 154 (2012) (statutory provisos should be interpreted narrowly).

Finally, even when it comes to applying the "full and fair adjudication" proviso, the legislative history makes clear it is a strict exception that applies both to state court decisions and underlying local determinations—in recognition of the statute's central purpose of providing religious observers a right to *de novo* judicial scrutiny. Permit decisions have no preclusive effect if, for example, they lack a "reasonable opportunity to obtain discovery and to develop the facts relevant to the federal claim;" nor does any follow-on state court review of the mere administrative record. *Senate Judiciary Hearing*, *supra*, at 29 (statement of Professor Laycock); *see also* 146 Cong. Rec. E1563 (statement of Rep. Canady) (rejecting full faith and credit absent robust procedural guarantees at either the agency or state court level).

B. The Department of Justice and district court authority in this Circuit support RLUIPA's narrow approach to preclusion.

As noted above, the Department of Justice has insisted that in the preclusion context it would "eviscerate" the congressional purpose of RLUIPA to allow "zoning boards and similar bodies, as a general matter, to bar recourse [to the

statute's protections] by asserting preclusion." 2010 DOJ Statement at 3. Of particular concern to Congress, the Department observed, was procedural mischief by "zoning boards, planning commissions, and their respective agencies of appeal," only to be followed by deferential state court review. *Id.*; *see also Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 994 (9th Cir. 2006).

In the Central District of California case for which the Department of Justice submitted its statement, the court determined in turn that preclusion is largely at odds with RLUIPA's text, purpose, and history. *See Congregation Etz Chaim*, 2011 WL 12462883, at *7. The text, the court found, "indicates congressional intent to limit the application of federal common law in the area of preclusion." *Id.* Likewise the purpose, for as the court stressed, "congressional purpose would be thwarted if zoning boards are able to insulate actions that would violate RLUIPA by making a ruling purportedly under RLUIPA and then arguing that a claimant is precluded from challenging the ruling." *Id.* (quoting 2010 DOJ Statement); *see also* Laycock & Goodrich, *supra*, at 1067-69. Moreover, the court found further support in RLUIPA's requirement of construal "in favor of a broad protection of religious exercise." *See Congregation Etz Chaim*, 2011 WL 12462883, at *7 (quoting 42 U.S.C. § 2000cc–3(g)). In sum, the court insisted, "there should be, at a minimum, a strong presumption against finding preclusion, to ensure that Congress's intent . . . is not undermined." *Id.*

C. The particulars of *Allen* and *Kremer* likewise support RLUIPA's repeal of Section 1738 in the religious land use context.

A review of the leading two cases where the Supreme Court has dealt with statute-specific repeals of Section 1738 most extensively—*Allen* and *Kremer*—also demonstrates the care taken by RLUIPA's framers on the matter of repeal. Despite their holdings in the context of those cases that there had been no repeal there, the Court's reasoning features key factors that further support RLUIPA's repeal of Section 1738 for religious land use.

Allen v. McCurry concerned a habeas corpus petition of a state prisoner under 42 U.S.C. § 1983. 449 U.S. at 90. The Court's analysis began by rejecting a textual argument: "nothing in the language of § 1983 remotely expresses any congressional intent" to repeal Section 1738. *Id.* at 97-98. As for history and purpose, although the Court acknowledged Section 1983 was meant to give federal courts authority to enforce federal civil rights against state officials and governments, the legislative history showed Congress recognized state court adjudication as another mechanism to do so. *Id.* at 99-100. In other words, Congress presumed concurrent jurisdiction. Finally, the Court noted the legislative history did not suggest state courts were part of the problem. *Id.* at 100-01.

In *Kremer*, the Court revisited the question of partial repeal; this time under Title VII of the Civil Rights Act of 1964. 456 U.S. at 461. Specifically, the plaintiff in *Kremer* argued Title VII's provisions allowing the EEOC to bring a civil action

and requiring that agency to "accord substantial weight to final findings and orders made by State and local authorities" amounted to a repeal of Section 1738. *Id.* at 469 (internal quotation marks omitted). Rejecting this reading, the Court reasoned there is no clear indication the non-preclusive reference to "State and local authorities" includes state courts. *Id.* at 470. Even if it did, the Court continued, the "substantial weight" requirement "indicates only the minimum level of deference the EEOC must afford all state determinations; it does not bar affording the greater preclusive effect which may be required by § 1738 if judicial action is involved." *Id.*

Beyond this textual analysis, the Court in *Kremer* found further reason for no partial repeal in Title VII's legislative history. Specifically, that history revealed the provision allowing for a trial *de novo* was motivated by a desire to give defendants a forum more conducive to proving their innocence, not to give plaintiffs a second bite at the apple. *Id.* at 474. Similarly, the Court found that the "substantial weight" provision was added out of specific concern that the EEOC did not give enough deference to state agencies. *Id.* at 474-75. As in Section 1983, Congress encouraged state collaboration. *Id.* at 472-73. Finally, *Kremer* highlighted various statements by legislators opposing relitigation of Title VII claims in federal court. *Id.* at 475-76.

Unlike Section 1983 and Title VII, however, the text and legislative history of RLUIPA address Section 1738 head on. As detailed above, RLUIPA's full faith and credit provision—i.e., non-federal decisions "shall not be entitled to full faith

and credit" absent a "full and fair adjudication"—flat-out rejects Section 1738's contrary default rule. As such, RLUIPA can be plainly distinguished from Section 1983's silence on preclusion and Title VII's equivocal, at best, reference to according "substantial weight" to findings of "State and local authorities."

RLUIPA is also distinguishable in terms of scope. In both *Allen* and *Kremer*, the Court voiced concern that any repeal in those contexts would be unqualified, thus allowing for full relitigation of issues decided after a trial on the merits in state court. *Kremer*, 456 U.S. at 470; *Allen*, 449 U.S. at 104. RLUIPA's exception for proceedings in which claimants had an attendant "full and fair adjudication," however, narrows the scope of its preclusion bar to those instances where state proceedings were deficient on that score.

RLUIPA's legislative history likewise demonstrates Congress had *Kremer* and *Allen* in mind when crafting its mandate against full faith and credit, together with its "full and fair adjudication" exception. Again, Representative Canady made express reference to *Kremer* in explaining the RLUIPA provision:

> Section [2(c)] requires a full and fair opportunity to litigate land use claims arising under section 2. This is based on existing law; no judgment is entitled to full faith and credit if there was not a full and fair opportunity to litigate. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 480–81 (1982), interpreting 28 U.S.C. § 1738 (1994). The rule has special application in this context, where a zoning board may refuse to entertain a federal claim because of limits on its jurisdiction, or may confine its inquiry to the individual parcel and exclude evidence of how places of secular assembly were treated. If a state court then confines itself to the record before the zoning

> board, there has been no opportunity to litigate essential elements of the federal claim, and the resulting judgment is not entitled to full faith and credit in a federal suit under section 2 of this Act.

146 Cong. Rec. E1563. In these remarks, Representative Canady made clear that RLUIPA's default rule contradicts Section 1738; specifically, by citing the part of *Kremer* where the Court had rejected as improper under that Section a common-law "full and fair opportunity to litigate" standard. In short, RLUIPA's "full and fair" exception was intended as a repudiation of Section 1738.

As for *Allen*—which, like *Kremer*, had also rejected a "full and fair hearing" exception to Section 1738 in the habeas corpus context, *Allen*, 449 U.S. at 101—Professor Laycock's testimony shows RLUIPA was intended to forbid preclusion absent strong procedural guarantees:

> Full and fair adjudication should include reasonable opportunity to obtain discovery and to develop the facts relevant to the federal claim. Interpretation of this provision should not be controlled by cases deciding whether habeas corpus petitioners had a "full and fair hearing" in state court. Interpretation of the habeas corpus standard is often influenced by hostility to convicted criminals seeking multiple rounds of judicial review. Whatever the merits of that hostility, a religious organization seeking to serve existing and potential adherents in a community is not similarly situated.

House Judiciary Hearing, *supra*, at 91 (statement of Professor Laycock). Laycock's description of the "full and fair" standard is significant not only because it shows Congress was aware it was creating its own standard separate from the dictates of Section 1738, but also because RLUIPA meant to set a higher default rule.

Finally, RLUIPA's legislative scheme further distinguishes it from *Allen* and *Kremer* in its conception of the role of non-federal entities. When enacting Section 1983 and Title VII, Congress viewed non-federal involvement as a sign of success. *See Kremer*, 456 U.S. at 472-75; *Allen*, 449 U.S. at 99-100. In contrast, RLUIPA arose after decades of concurrent jurisdiction that had not solved the problem. *See, e.g.*, *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000); *Am. Friends of Soc'y of St. Pius,* 417 N.Y.S.2d at 991.

While Congress did not disturb shared responsibility over religious liberty cases, it provided an avenue of relief that went beyond what had come before in First Amendment litigation and which was designed to empower federal courts to ensure free exercise protection against the obstacles faced by religious communities in non-federal forums.

III. RLUIPA IS DESIGNED TO AVOID THE STATE AND LOCAL BARRIERS FACING PLAINTIFFS HERE.

This case offers a particularly egregious example of the injustice Congress sought to address in RLUIPA's presumption against preclusion in the religious land use context. To be sure, Congress's general concerns are applicable here, including: (1) vague and discretionary land use standards; (2) lack of procedural safeguards to protect free exercise rights; and (3) inappropriateness of land use processes for such adjudication. Worse yet, however, the Maui Planning Commission went even further by using RLUIPA's own language to subvert its purpose.

First, the Planning Commission's decision-making process was marked by the very type of "vague, discretionary, or subjective" authority Congress feared would give local zoning boards an unchecked ability to couch their decisions in any plausible reason. Appellants' Br. at 31, 35-36, 39; *House Judiciary Hearing*, *supra*, at 84 (statement of Professor Laycock).

The Commission, for example, sided with neighbors for the stated reason that granting approval "would increase vehicular traffic" and "adversely affect the health and safety of residents"—a curious result given that the Planning, Police, and Fire Departments had studied those issues and recommended approval. ER 393-96, 400-01, 429-30, 440. Regardless the virtue of such political responsiveness in this or other contexts, the risk of harm to minority faiths in the absence of pertinent judicial oversight is acute in these circumstances. *See* 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Kennedy and Sen. Hatch) (noting risks to "new, small, or unfamiliar" faiths); Keetch & Richards, *supra*, at 729-30 (on political barriers facing minority faiths in the face of neighbor opposition).

Second, review in both the Planning Commission and state court typified the proceedings Congress used to describe as failing to meet a "full and fair" standard. Appellants' Br. at 27-30; *see also Senate Judiciary Hearing*, *supra*, at 59 (statement of Professor Laycock). In the Commission, for example, Plaintiffs were not represented by counsel; were not entitled to discovery; and had no opportunity to

cross-examine witnesses or evidence. Appellants' Br. at 28-29. And in state court, the evidence was limited to the Commission record, and its findings were subjected to the highly deferential "clearly erroneous" standard. *See id*. at 38; Haw. Rev. Stat. § 91-14(g) (2019). As could be expected when any decision under a vague and neutral law is subject to a clear-error standard, the court affirmed it.

Third, this case illustrates Congress's concern about land use adjudication being an inappropriate forum for religious liberty claims in any event. In a context where the only issue before the Commission was the grant of a permit under state law—*see* Haw. Rev. Stat. § 205-6 (2019)—Plaintiffs here were limited to merely alerting the Commission of their RLUIPA rights by letter. *See* Appellants' Br. at 21, 29. This is like reminding a police officer of your Fourth Amendment rights before he barges into your house. *See Guru Nanak Soc'y of Yuba City v. Cnty. of Sutter*, 326 F. Supp. 2d 1128, 1133 n.2 (E.D. Cal. 2003) (rejecting local agency's argument that its land use decision had preclusive effect "simply because that body had been informed that its actions were unconstitutional"). Then, the Hawai'i court's review was limited to a "clearly erroneous" standard with no exception for religious uses or the violation of federal rights. *See* ER 15; Haw. Rev. Stat. § 91-14. It is in these precise circumstances that RLUIPA gave federal courts the responsibility to ensure that when religious exercise arises in the local and state land use context, it will not bar subsequent litigation of attendant claims in a court of general jurisdiction.

Worst of all, the Maui Planning Commission appropriated RLUIPA's own language to deprive Plaintiffs of a judicial forum apart from land use processes to adjudicate their free exercise claims. In its decision, the Commission referred to the RLUIPA phrases "compelling governmental interest" and "least restrictive means." ER 404. But a mere invocation of magic words does not give officials the power to "decide[ ] on the legality of their own decision." *Congregation Etz Chaim*, 2011 WL 12462883, at *7. The Commission's task was to decide whether to grant or deny the permit—not to adjudicate whether that decision, having been made, satisfied RLUIPA's standards. *Id*. Finally, and in any event, these issues could not have been brought before the Commission in the first place since there was no wrongful action until its decision. *Id.*; *see also* 42 U.S.C. § 2000cc(a)(1) (RLUIPA claim arises once land use regulation is "impose[d]" or "implement[ed]"). It is hard to imagine Congress meant for its carefully crafted full faith and credit provision to be gutted in this self-referential fashion.

By including an independent full faith and credit provision, Congress hoped to ensure the availability of a RLUIPA claim does not turn on the intricacies of state and local law or a court's ability to accurately interpret them. Thus, even if such issues were within the Commission's jurisdiction to decide, affording those findings preclusive effect is exactly what RLUIPA was designed to prevent. Absent reversal by this Court, the opportunities for mischief are legion.

CONCLUSION

The District Court's deference to the Planning Commission's findings concerning the free exercise rights of Plaintiffs violated RLUIPA's broad mandate for independent judicial scrutiny. The decision below should be reversed.[3]

Dated: March 6, 2020

Respectfully submitted,

s/ *James A. Sonne*

James A. Sonne
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, California 94305
(650) 723-1422
jsonne@law.stanford.edu

Counsel for Amicus Curiae

[3] Amicus thanks Stanford Law School students Claire Greenberg and Nathaniel Bernstein, who assisted in the preparation of this brief.

CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify the following statements are true:

1. This brief complies with the type-volume limitations and page limitations imposed by Federal Rule Appellate Procedure 29(a)(5) and Circuit Rule 32-1(a). It contains 5,841 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure32(a)(5) and (a)(6). It has been prepared in a proportionally spaced typeface using the Microsoft Office Word 2019 word processing system in 14-point Times New Roman font.

Executed this 6th day of March, 2020.

s/ *James A. Sonne*
James A. Sonne

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the date indicated below. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 6th day of March, 2020.

s/ *James A. Sonne*
James A. Sonne