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DISCRIMINATING AGAINST THE DEAD: HOW TO PROTECT MUSLIM CEMETERIES FROM EXCLUSIONARY LAND USE MECHANISMS

Abstract: U.S. Muslims face virulent, entrenched opposition in constructing the cemeteries that allow them to bury their dead according to Islamic law and tradition. Despite state and federal laws designed to guard against acts of religious discrimination such as the federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”), local governments impede Muslim cemetery constructions via zoning ordinances and adjudicative permit denials. As a result of these efforts, Muslims experience unfair discrimination as local land control bodies unduly delay or block their attempts to build cemeteries. To better protect Muslims’ rights in land use disputes, this Note advocates for amendments to RLUIPA’s key provisions, namely, adding a definition of “substantial burden,” delineating what land uses constitute “religious exercise,” and creating measures to punish discriminatory action by local governments.

INTRODUCTION

In 2016, the Islamic Society of Greater Worcester (“Islamic Society”) purchased a fifty-five acre plot of farmland in the small town of Dudley, Massachusetts.¹ The Islamic Society intended to convert the plot into a burial ground where members could bury their dead according to Islamic tradition.² In Islamic

¹ David Boeri, *Proposal for Muslim Cemetery in Dudley Meets Opposition from Residents*, WBUR: ALL THINGS CONSIDERED (Feb. 5, 2016), <http://www.wbur.org/all-things-considered/2016/02/05/muslim-cemetery-proposal> [<https://perma.cc/T92Z-J8PA>] [hereinafter Boeri, *Proposal for Muslim Cemetery*]. Based on the 2010 census, Dudley has a population of 11,390. *Dudley Demographics*, <http://dudleyma.gov/about/demographics> [<https://perma.cc/WB56-FF3U>]. Dudley is located in south central Massachusetts, along the Connecticut border. *Id.* It is about twenty-two miles south of Worcester and fifty-nine miles southwest of Boston. *Id.* The Islamic Society of Greater Worcester (“Islamic Society”) is a community of over 350 Muslim families based around Worcester. *About Us*, ISLAMIC SOCIETY OF GREATER WORCESTER, <http://isgw.us/about-us> [<https://perma.cc/N948-97MZ>].

² Boeri, *Proposal for Muslim Cemetery*, *supra* note 1. Muslim laws and customs espouse strict and detailed rules about how the dead are to be buried. Mohamed Ebrahim Siala, *Authentic Step by Step Illustrated Janazah Guide*, MISSION ISLAM, <http://www.missionislam.com/knowledge/janazah-stepbystep.htm> [<https://perma.cc/387W-K6LN>]. Burial responsibilities begin even before the individual has deceased; when an individual is close to death, relatives and friends gather around them, recite various prayers, and offer comfort and support. *See id.* After death, the decedent’s eyes are to be closed, jaw bound, and body covered in a clean sheet. *Id.* The body is then carefully washed by family members or trusted friends in a deliberate process. *Id.* After washing, the decedent is shrouded with several inexpensive white sheets and a funeral service is held. *Id.* The burial then occurs as soon as possible and should be near where the deceased lived. *Id.* The Islamic burial style is “characterized by

tradition, Muslims must be buried in their own cemeteries.³ The only other Muslim cemetery near Dudley, Massachusetts is located in Enfield, Connecticut, which is over sixty miles away.⁴ This is a far distance for Islamic Society members to travel to bury their dead, posing additional challenges for them to follow Muslim burial procedures.⁵ The fifty-five acre plot of farmland was therefore a prime location to construct a much closer Muslim cemetery.⁶ The process for converting that plot of farmland originally appeared as easy as buying the land and getting a permit to build the cemetery, but instead turned into a year-long fight between the Islamic Society and the town of Dudley (“Dudley”), attracting national and international attention.⁷

The fifty-five acre plot proposed for the construction of a cemetery was zoned as a residential area.⁸ Dudley law therefore required the Islamic Society to apply for a special permit to construct the cemetery.⁹ It was clear that the Islamic Society would face an uphill battle from the start of the special permit application process, an initial hearing on February 4, 2016 in front of the Dudley Zoning Board of Appeals (“Dudley Zoning Board”).¹⁰ Many Dudley residents attended the hearing to express their concerns and objections to the cemetery.¹¹

humility, simplicity and economy in costs and . . . avoids glorifying the dead with elaborate monuments.” *Id.* The grave consists of a deep vertical hole in the ground, into which the decedent is placed on his or her right side, facing Mecca. *Id.* The decedent is not placed into a casket or a concrete vault. *See id.*

³ Siala, *supra* note 2.

⁴ Denise Lavoie, *Backlash Greet Plans for Muslim Cemeteries Across US*, ASSOCIATED PRESS (Apr. 25, 2016), <https://apnews.com/58d4287818d94658ac52db51ddd94f36> [<https://perma.cc/X883-2WEB>] [hereinafter Lavoie, *Backlash*].

⁵ Boeri, *Proposal for Muslim Cemetery*, *supra* note 1. Islamic burial practices call for the deceased to be buried as soon as possible after death, even on the same day if feasible. *Id.*

⁶ *Id.*

⁷ Associated Press, *Cemetery Talks Between Muslim Group, Town at a Standstill*, DAILY MAIL (Oct. 28, 2016), <http://www.dailymail.co.uk/wires/ap/article-3881748/Cemetery-talks-Muslim-group-town-standstill.html> [<https://perma.cc/P7BS-UNYQ>]; David Boeri, *As Negotiations with Town of Dudley Falter, Islamic Society Seeks State, Federal Action*, WBUR NEWS (Oct. 26, 2016), <http://www.wbur.org/news/2016/10/26/dudley-cemetery-state-federal-action> [<https://perma.cc/4TJ3-LUM8>] [hereinafter Boeri, *Negotiations Falter*]; Denise Lavoie, *Feds to Investigate Town’s Rejection of Muslim Cemetery*, ASSOCIATED PRESS (Aug. 18, 2016), <https://apnews.com/e66c50bb793a48d28d8592a34ffb24cf/feds-investigate-towns-rejection-muslim-cemetery> [<https://perma.cc/Z2U2-RPEY>] [hereinafter Lavoie, *Feds to Investigate*]. The dispute expanded beyond the town of Dudley and the Islamic Society as the Massachusetts Attorney General’s office, U.S. Attorney’s Office, and the American Civil Liberties Union became involved in the case. Boeri, *Negotiations Falter*, *supra*.

⁸ Town of Dudley Massachusetts, *Zoning 2016 02 04*, YOUTUBE (Sept. 14, 2016), https://youtube/dD9pi09BB_0 [<https://perma.cc/YV8U-AWXF>] [hereinafter *Zoning Board Video*] (recording of zoning meeting).

⁹ *Id.* Dudley allows cemeteries to be constructed in residential districts upon receipt of a special permit from the Dudley Zoning Board of Appeals (“Dudley Zoning Board”). DUDLEY, MASS., ZONING BYLAWS § 2.03.02 (2014). Residential districts are geographical areas designated for residential use and they exclude uses that could be detrimental to residential use. *Id.*

¹⁰ Boeri, *Proposal for Muslim Cemetery*, *supra* note 1.

¹¹ *Id.*; *Zoning Board Video*, *supra* note 8.

For example, one Dudley resident explained, “I really don’t want to see any cemetery here . . . it’s quiet and I’d like to keep it that way.”¹² Other residents expressed health concerns over possible contamination of the town’s ground and well water due to the Muslim practice of burying the dead directly in the ground instead of in caskets.¹³ Other residents expressed more general concerns about the Islamic Society’s Muslim identity.¹⁴ The Islamic Society emphasized that they were fellow Massachusetts residents simply looking for a place to bury the dead in their community.¹⁵ Moreover, as a religious organization, the Islamic Society argued that Massachusetts state law exempted it from municipal zoning ordinances and, therefore, the Dudley Zoning Board had to approve the cemetery proposal.¹⁶

At a second hearing on March 3, 2016, the Islamic Society’s troubles continued.¹⁷ Dudley residents once again expressed their opposition to the proposal;

¹² Boeri, *Proposal for Muslim Cemetery*, *supra* note 1. The irony in this concern is apparent; cemeteries are typically very quiet places. Christina Couch, *Living Next to Cemeteries: Plots with Peace, Quiet—and Great Home Values?*, AOL: FINANCE (June 30, 2010), <https://www.aol.com/2010/06/30/living-next-to-cemeteries-peace-quiet-and-great-home-values/> [https://perma.cc/2KTK-AFSQ].

¹³ Boeri, *Proposal for Muslim Cemetery*, *supra* note 1. Residents expressed concerns because of the high water table of the parcel and the presence of ponds and other wetlands on the land. *See Zoning Board Video*, *supra* note 8. The threat of groundwater contamination is a common argument against Muslim cemeteries. *See* Chris Joyner, *Fear of the Dead One of Many Fringe Ideas Fueling Mosque Debate*, ATL. J.-CONST. (Oct. 27, 2016), <http://www.myajc.com/news/news/local-govt-politics/fear-of-the-dead-one-of-many-fringe-ideas-fueling-/nsx9M/> [https://perma.cc/77LQ-KBGN] (similar fears expressed against proposal in Newton County, Georgia). Researchers have determined that such fears of water contamination are largely unfounded. *See id.*

¹⁴ Boeri, *Proposal for Muslim Cemetery*, *supra* note 1. One person asked when the group would propose to build a mosque; another questioned when he would have to listen to the “crazy music” of the call to prayer. *Id.* The Muslim call to prayer, also known as Adhan, is a message broadcast five times per day from mosques indicating times for prayer. Isaac A. Weiner, *Calling Everyone to Pray: Pluralism, Secularism, and the Adhan in Hamtramck, Michigan*, 87 ANTHROPOLOGICAL Q. 1049, 1054 (2014). Loudspeakers are often used to convey the call and critics complain of the noise. *See, e.g.*, Tara John, *Israel Wants Mosques to Lower the Volume on the Muslim Call to Prayer*, TIME (Dec. 12, 2016), <http://time.com/4597619/muslim-call-to-prayer-israel-mosques> [https://perma.cc/M762-873H].

¹⁵ Boeri, *Proposal for Muslim Cemetery*, *supra* note 1.

¹⁶ *Id.*; *Zoning Board Video*, *supra* note 8. The Islamic Society, represented by attorney Jason Talerma, argued that the Dover Amendment to Massachusetts laws governing municipal zoning was dispositive of the proposal and that the Dudley Zoning Board could not legally deny the permit absent extraordinary circumstances. *Zoning Board Video*, *supra* note 8. Talerma conceded, however, that the Dudley Zoning Board could “reasonably regulate” the proposal. *Id.* Reasonable regulations could include imposing dimensional, parking and emergency vehicle access requirements. *Id.* The Dover Amendment discusses what land uses are exempt from zoning requirements. MASS. GEN. LAWS ch. 40A, § 3 (2016). The amendment states that no zoning ordinance or by-law shall “prohibit, regulate or restrict the use of land or structures for religious purposes.” *Id.* Religious uses, however, may still be “subject to reasonable regulations.” *Id.*

¹⁷ David Boeri, *Battle Continues over Proposed Muslim Cemetery in Town of Dudley*, WBUR: ALL THINGS CONSIDERED (Mar. 4, 2016), <http://www.wbur.org/all-things-considered/2016/03/04/dudley-rejects-muslim-cemetery> [https://perma.cc/G5JP-VNLY] [hereinafter Boeri, *Battle Continues*].

Town Administrator Greg Balukonis commented that the proposal had no public benefit and “provided no tax revenues, jobs[,] or recreational opportunities” to the town.¹⁸ Other residents took issue with the Islamic Society for being an outsider to the community; one Dudley resident explained “[t]hey don’t live in Dudley, they’re not bringing anything into Dudley. They’re not going to pay taxes in Dudley. They basically just want to buy a piece of land and utilize it for whatever they want to do.”¹⁹ The Islamic Society reiterated that, because the cemetery was intended for religious use, it was protected under the Dover Amendment and the Dudley Zoning Board could not deny the special permit.²⁰ Town Counsel Gary Brackett cautioned that the cemetery proposal might not be exempt from zoning ordinances, arguing that the cemetery might actually be a commercial—and not a religious—use.²¹ Furthermore, Brackett pointed out that Massachusetts law prohibited burial ground constructions without permission from the town and the board of health.²² The Dudley Zoning Board denied the Islamic Society’s application for a special permit, but asked for another proposal providing more details about the cemetery and its potential impact on the land and the surrounding neighborhood.²³

At yet another hearing on April 7, 2016, the battle between Dudley and the Islamic Society continued.²⁴ Town Counsel Gary Brackett once again questioned the cemetery’s characterization as a religious use of the land.²⁵ In June 2016, the Dudley Zoning Board finally reached a decision—it officially denied the special permit.²⁶ The Dudley Zoning Board claimed it was not denying the Islamic Society from obtaining a special permit on the merits, but was instead ruling that the group did not actually have standing to seek a special permit for that plot of land in the first place.²⁷ It further explained that the seller of the plot did not properly notify the town that she intended to sell the parcel and, because of the

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* The Dover Amendment does not apply to commercial uses of land. *See* MASS. GEN. LAWS ch. 40A, § 3 (offering protection for “religious purposes” and not commercial).

²² Boeri, *Battle Continues*, *supra* note 17; *see* MASS. GEN. LAWS ch. 114, § 34 (2016) (requiring land used for burial to have permission of town and the board of health).

²³ Boeri, *Battle Continues*, *supra* note 17.

²⁴ David Boeri, *In Dudley, Debate Continues over Proposed Muslim Cemetery*, WBUR: ALL THINGS CONSIDERED (Apr. 8, 2016), <http://www.wbur.org/all-things-considered/2016/04/08/dudley-muslim-cemetery-debate> [<https://perma.cc/RQS9-6FWF>].

²⁵ *Id.* Brackett argued that the Islamic Society had not explained whether religious ceremonies would take place at the cemetery along with burials, or if the religious ceremonies would take place at a mosque and the cemetery would only be used for burials. *See id.* He implied that the latter would not constitute a religious use. *See id.*

²⁶ David Boeri, *Town of Dudley Zoning Board Denies Permit for Proposed Muslim Cemetery*, WBUR (June 10, 2016), <http://www.wbur.org/Morningedition/2016/06/10/dudley-denies-muslim-cemetery-permit> [<https://perma.cc/Q7HR-GVFS>].

²⁷ *Id.*

land's special tax status, the town had a right of first refusal to buy the land before it could be sold to the Islamic Society.²⁸

In light of the Dudley Zoning Board's decision, the Islamic Society filed a lawsuit against Dudley in the Massachusetts Land Court, arguing that the town was being "unfair and prejudicial."²⁹ The Islamic Society's struggle then caught the attention of the U.S. Attorney's Office, which began investigating Dudley for potential civil rights violations.³⁰ The announcement of the federal investigation garnered attention from national media sources and the American Civil Liberties Union.³¹ In response to the national spotlight, Dudley announced that it would not exercise the right of first refusal to the land and expressed hope of reaching a diplomatic solution with the Islamic Society.³² In December 2017, the Islamic Society and Dudley reached an agreement to allow the cemetery's construction subject to final, routine approval.³³ Then, in March 2017, the Dudley Zoning

²⁸ *Id.* In the real estate context, the right of first refusal is the right to purchase a property from the seller before it is given to a third party. Bernard Daskal, *Right of First Refusal and the Package Deal*, 22 FORDHAM URBAN L. J. 461, 461–62 (1995). The Dudley Zoning Board claimed that it had the right of first refusal to the land in question under Massachusetts General Laws, chapter 61A because the land had a special agricultural tax status. Kim Ring, *Islamic Society Taking Dudley to Court over Cemetery Permit Denial*, TELEGRAM.COM (June 30, 2016), <http://www.telegram.com/news/2016/06/30/islamic-society-taking-dudley-to-court-over-cemetery-permit-denial> [https://perma.cc/77U5-5YGP]; see MASS. GEN. LAWS ch. 61A, § 14 (giving municipalities the option to purchase land taxed under the chapter).

²⁹ David Boeri, *With Civil Rights Probe, Town of Dudley Is in the Spotlight for Muslim Cemetery Controversy*, WBUR (Aug. 18, 2016), <http://www.wbur.org/Morningedition/2016/08/19/dudley-cemetery-civil-rights-investigation> [https://perma.cc/C2NR-W92E] [hereinafter Boeri, *Civil Rights Probe*]; *Islamic Center Sues Town of Dudley over Rejection of Proposed Cemetery*, WBUR NEWS (July 1, 2016), <http://www.wbur.org/news/2016/07/01/islamic-center-sues-town-of-dudley-over-rejection-of-proposed-cemetery> [https://perma.cc/FWZ3-9KF5]. The Massachusetts Land Court ("the Land Court") has jurisdiction over most property issues including appeals from zoning boards of appeals. *Land Court Department*, MASS.GOV, <http://www.mass.gov/courts/court-info/trial-court/lc/> [https://perma.cc/P7A3-VQYY].

³⁰ Boeri, *Civil Rights Probe*, *supra* note 29. U.S. Attorney for the District of Massachusetts Carmen Ortiz announced that she would look into whether the Dudley Zoning Board unreasonably blocked the proposal in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and discriminated against the Islamic Society on the basis of religion. Lavoie, *Feds to Investigate*, *supra* note 7.

³¹ Boeri, *Civil Rights Probe*, *supra* note 29; Lavoie, *Feds to Investigate*, *supra* note 7.

³² Boeri, *Civil Rights Probe*, *supra* note 29. Dudley waived its right of first refusal in the hopes that the case in the Land Court would be remanded back to the Dudley Zoning Board, but the Land Court disagreed and retained jurisdiction over the case to determine if the Islamic Society had a protected legal right to build the cemetery. David Boeri, *Case of Proposed Muslim Cemetery in Dudley Will Remain in Land Court*, WBUR NEWS (Sep. 7, 2016), <http://www.wbur.org/news/2016/09/07/dudley-muslim-cemetery-case-land-court> [https://perma.cc/S5NG-8JGR].

³³ David Boeri, *Islamic Society, Town of Dudley Reach Deal for Muslim Cemetery*, WBUR NEWS (Dec. 23, 2016), <http://www.wbur.org/news/2016/12/23/dudley-muslim-cemetery-approval> [https://perma.cc/W5VW-XTWR] [hereinafter Boeri, *Deal for Muslim Cemetery*]. In the settlement, Dudley agreed that the cemetery was a religious use and qualified for protection under state law. *Id.*

Board approved the cemetery proposal and issued a special permit.³⁴ Despite this approval, the Islamic Society ultimately canceled the proposal and decided to pursue building the cemetery in Worcester.³⁵

The story of the Islamic Society's process to construct their cemetery, while ultimately having a favorable ending, did little to secure the legal rights of Muslims to build cemeteries.³⁶ First, the Islamic Society got lucky; efforts of other Muslim groups across the country have faced similar challenges in attempting to build their own burial sites and have not been successful.³⁷ Second, the Islamic Society's proposal ended in a settlement, without the establishment of binding precedent, and thus the law remains unresolved.³⁸ This Note examines the ways that the current legal and political frameworks of land use regulations do not adequately protect Muslims' rights and therefore allow local governments to unfairly discriminate against their religious practices by unduly delaying or blocking their attempts to build cemeteries.³⁹ Part I discusses the history and current state of land use regulation, the incorporation of cemeteries into those regulatory schemes, and relevant state and federal mechanisms that protect religious land uses.⁴⁰ Part II analyzes the ways that the politicized nature of the regulatory frameworks and the shortcomings in federal land use protection jurisprudence allow discrimination against Muslims to persist.⁴¹ Finally, Part III advocates for an expansion of the current land use jurisprudence and the creation of punitive measures to dissuade local governments from discriminating against Muslims.⁴²

³⁴ Brian MacQuarrie, *Plan for Muslim Cemetery in Dudley Clears Last Hurdle*, BOS. GLOBE (Mar. 3, 2017), <https://www.bostonglobe.com/metro/2017/03/03/plan-for-muslim-cemetery-dudley-clears-last-hurdle/Xx4WdlQ7WX4tywuuRXu5qJ/story.html> [<https://perma.cc/M8XM-TGH4>].

³⁵ Brian MacQuarrie, *After Bitter Fight for Approval, Islamic Society Abruptly Drops Plan for Cemetery in Town of Dudley*, BOS. GLOBE (Apr. 13, 2017), <https://www.bostonglobe.com/metro/2017/04/13/after-bitter-fight-for-approval-islamic-society-abruptly-drops-plan-for-cemetery-town-dudley/JZ7H61XR2fxMc88AcZp6ZN/story.html> [<https://perma.cc/FZD7-TT97>]. While the dispute between the Islamic Society and the town was still ongoing, Worcester officials approached the Islamic Society and offered them a portion of an existing cemetery in the city. *Id.*

³⁶ See Lavoie, *Backlash*, *supra* note 4 (identifying other situations where Muslims faced opposition to cemetery construction).

³⁷ *Id.* Other locations where Muslim cemetery proposals faced similar obstacles are Farmersville, Texas; Walpole, Massachusetts; Carlisle, Pennsylvania; and Farmington, Minnesota. *Id.* Newton County, Georgia faced a similar situation where residents urged the local adjudicative body to block the construction of a Muslim cemetery, basing their concerns on the potential for groundwater contamination. Joyner, *supra* note 13.

³⁸ See Boeri, *Deal for Muslim Cemetery*, *supra* note 33 (explaining that as part of the settlement, the Islamic Society agreed to drop the suit in the Land Court).

³⁹ See *infra* notes 43–180 and accompanying text.

⁴⁰ See *infra* notes 43–105 and accompanying text.

⁴¹ See *infra* notes 106–180 and accompanying text.

⁴² See *infra* notes 181–259 and accompanying text.

I. HOW THE DEAD FELL UNDER THE CONTROL OF MUNICIPAL LAND USE MECHANISMS

Land use in the United States is regulated by an extensive framework of ordinances, legislation, and other mechanisms.⁴³ These regulations control and limit how property owners can purchase and sell their land, what uses are allowed on the land, what structures can be built on the land, where those structures must be located on the land, and numerous other aspects of land use and development.⁴⁴ Because these land use regulatory powers affect all land in the United States, the regulation of religious land use is inevitable.⁴⁵ The First Amendment to the United States Constitution, however, affords certain protections to the exercise of religion which is reflected in land use regulations to an extent.⁴⁶ As an exercise of religion, cemeteries fall within, and are regulated by, this larger land use regulatory framework.⁴⁷

A. The Land Use Regulatory Framework

The government's ability to regulate land use and development is a substantial intrusion into private property owners' rights yet courts have long recognized the legitimacy of the government's power to do so.⁴⁸ Authority for land use regulation resides primarily at the local level in the hands of municipal government, rather than at the state and federal level.⁴⁹ One common way that municipal governments exercise their land use powers is through zoning ordinances.⁵⁰

⁴³ See Michael W. Macleod-Ball, Note, *The Future of Zoning Limitations upon Religious Uses of Land: Due Process or Equal Protection?*, 22 SUFFOLK U. L. REV. 1087, 1087 (1988) (discussing zoning one of the principle land use mechanisms). Local agencies, such as the board of health, also impact land use. See Boeri, *Battle Continues*, *supra* note 17 (noting permission of the town board of health is necessary for cemetery constructions in Massachusetts).

⁴⁴ See, e.g., DUDLEY, MASS., ZONING BYLAWS § 1.01.00 (outlining the town's land use controls and the limits they place on use of the land).

⁴⁵ Macleod-Ball, *supra* note 43, at 1087.

⁴⁶ *Id.* at 1087 n.3. The Free Exercise Clause of the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

⁴⁷ See DUDLEY, MASS., ZONING BYLAWS § 2.03.02 (identifying cemeteries as being included as part of the land use control mechanisms).

⁴⁸ *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (recognizing legality of municipal zoning); Macleod-Ball, *supra* note 43, at 1090–91.

⁴⁹ See John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 821 (2006) (explaining the power of land use control is retained by the states who delegate the powers to local governments). Cities and towns are created by state legislatures and can exercise a wide range of powers delegated to them by the legislature. See, e.g., MASS. GEN. LAWS ch. 40, §§ 1–69 (2016) (outlining powers and duties of cities and towns). The federal government generally does not engage in zoning at the local level, but rather exercises its regulatory powers on narrower issues with national implications. See Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466 (2017) (creating a program

In 1926, the United States Supreme Court recognized the legality and legitimacy of municipal zoning in *Village of Euclid, Ohio v. Ambler Realty Company*.⁵¹ The Court upheld zoning measures designed to control the locations of industrial development in the Village.⁵² The Court reasoned that zoning laws, a relatively new development at the time, were valid exercises of the municipality's police powers to protect the community's health, safety, and welfare.⁵³ Through zoning ordinances, municipal governments are able to exert substantial control over the land under its jurisdiction.⁵⁴

Zoning ordinances are created by the municipal government's legislative body.⁵⁵ State law requires a board of appeals to oversee the administration of zoning issues.⁵⁶ Zoning ordinances provide a comprehensive list of what land uses are permitted in the various districts established by the ordinance.⁵⁷ Some of the land uses are allowed by right, whereas others require the use of a special permit.⁵⁸ Uses by special permit allow a given board to function as an adjudicative body and exercise discretion in whether it chooses to approve, deny, or con-

to regulate land uses "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations"); Nolon, *supra*, at 822.

⁵⁰ Macleod-Ball, *supra* note 43, at 1090–91. Zoning ordinances control what uses are allowed on a particular piece of land as well as the dimensional, density, and set back requirements of the lots. See, e.g., DUDLEY, MASS., ZONING BYLAWS § 1.01.00.

⁵¹ *Euclid*, 272 U.S. at 390; Macleod-Ball, *supra* note 43, at 1091.

⁵² *Euclid*, 272 U.S. at 390. To control new development in the town emanating from the expansion of nearby Cleveland, Ohio, the town of Euclid created a zoning scheme whereby the town's land was classified according to six categories of uses ranging from residential to industrial. *Id.* at 379–80. Ambler Realty Company sought to develop a parcel of land that was zoned as residential and challenged the constitutionality of the zoning scheme. *Id.* at 379, 384.

⁵³ *Id.* at 387; Macleod-Ball, *supra* note 43, at 1091. The Court recognized that the circumstances of urban development necessitated new land use control mechanisms. *Euclid*, 272 U.S. at 386–87. Recognizing *Euclid*'s "authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitution," the Court held that the zoning ordinance was valid given its rational relation to health, safety, and welfare. *Id.* at 389–90. Some of the factors that bore on the relationship to health, safety, and welfare were the zoning ordinance's capacity to reduce street and traffic accidents, ensure better deployment of fire-fighting equipment, and increase overall safety. *Id.* at 394.

⁵⁴ Macleod-Ball, *supra* note 43, at 1090.

⁵⁵ See MASS. GEN. LAWS ch. 40A, § 5 (indicating zoning ordinances and by-laws are created by the city council or board of selectmen, which are legislative bodies). Massachusetts General Laws chapter 40A, section 5 outlines the procedures for adopting and creating zoning ordinances. *Id.* A proposed ordinance must be presented to the city council or board of selectman. *Id.* The planning board must then hold a public hearing and provide a report to the board of selectman or city council. *Id.* The ordinance will not be adopted or changed unless there is a two-thirds majority of the board of selectmen, city council, or residents in favor of the ordinance. *Id.*

⁵⁶ *Id.* at §§ 12, 14. The zoning board of appeals possesses the power to "hear and decide appeals[,] applications for special permits[,] and petitions for variances." *Id.* at § 14.

⁵⁷ See, e.g., DUDLEY, MASS., ZONING BYLAWS § 2.03.02.

⁵⁸ *Id.* Uses "by right" are permitted to the property holder without the need to obtain a special permit. *Id.* Uses by special permit require the zoning board of appeals to grant a permit. *Id.*

ditionally approve the application.⁵⁹ Special permits are therefore another powerful tool for municipalities to regulate land use.⁶⁰

Municipal governments' power to engage in land use regulation through zoning ordinances and special permits is broad and difficult for challengers to overturn in court.⁶¹ Courts defer to the legislative power of municipal governments and only overturn zoning ordinances if they are "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals or general welfare."⁶² Challengers to special permit denials or overly burdensome conditions face a similarly high burden.⁶³ A zoning board's power is "discretionary, but not without limits;" it cannot act "arbitrar[ily], whimsical[ly], or capricious[ly]."⁶⁴ Given the deference courts show towards municipalities, individuals or organizations who feel aggrieved by the process face a very difficult road to challenge municipal decisions.⁶⁵ For religious organizations seeking to overturn a municipal ordinance restricting certain religious land uses, achieving a victory in court is exceedingly challenging.⁶⁶

⁵⁹ MASS. GEN. LAWS ch. 40A, § 9. Massachusetts General Laws chapter 40A, section 9 requires a zoning board of appeals to review special permit applications at a public hearing. *Id.* Special permit applications are approved by a two-thirds vote of that zoning board. *Id.* That board must issue its decision within ninety days after the hearing. *Id.*

⁶⁰ *See id.* (identifying the considerable discretion municipal governments have over special permit applications).

⁶¹ *See Euclid*, 272 U.S. at 395 (providing the standard for zoning ordinances to be declared unconstitutional).

⁶² *Id.*; *see also* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 987 (Cal. 2015) (holding ordinances are presumed to be valid and the party challenging an ordinance has the burden of showing the lack of a reasonable relationship to public welfare).

⁶³ *See* Murphy v. Zoning Bd. of Appeals of Lawrence, 317 N.E.2d 90, 91 (Mass. App. Ct. 1974) (describing the standard courts use to review challenges to special permit decisions); Vazza Props., Inc. v. City Council of Woburn, 296 N.E.2d 220, 222 (Mass. App. Ct. 1973) (holding zoning boards have discretion to deny an application for a special permit, but it cannot be an arbitrary decision).

⁶⁴ *See* Murphy, 317 N.E.2d at 91 (quoting Gulf Oil Corp. v. Bd. of Appeals of Framingham, 244 N.E.2d 311, 313 (Mass. 1969)). Special permit conditions are limited by the requirements that the Supreme Court set forth in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*—that conditions must bear a rational nexus and rough proportionality to the harm caused by the proposed land use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013) (summarizing the combined effect of *Nollan* and *Dolan*); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (establishing the rough proportionality requirement); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (establishing the nexus requirement).

⁶⁵ *See* Cal. Bldg. Indus. Ass'n, 351 P.3d at 991 (explaining the difficulty challengers to municipal land use actions face given municipalities' broad discretion to take action for public welfare).

⁶⁶ *See id.*

B. *The Interment of Cemeteries into the Land Use Framework*

Death is one of humanity's most sobering, ubiquitous, and unavoidable certainties.⁶⁷ From a pragmatic, psychological, and sociological standpoint, deciding what to do with the human body after death has been one of society's greatest dilemmas.⁶⁸ Throughout human history, different civilizations and cultures have responded to this dilemma in diverse ways.⁶⁹ In Judeo-Christian-Islamic tradition, burial is the most common method of disposing human remains.⁷⁰ As populations in America began shifting to densely concentrated cities during the nineteenth century, burying the dead became an important concern of urban planning.⁷¹

Today, cemeteries are more often located independently from church sites and are designed with considerable care.⁷² Managing current cemeteries and future development falls under the purview of municipal land use powers.⁷³ Municipalities, as well as state and federal governments, have developed ways to control and regulate cemeteries.⁷⁴ At the local level, many municipalities classify cemeteries as a land use that requires a special permit to construct.⁷⁵ Accordingly, to construct a cemetery, a builder must apply for and obtain a special permit from a municipal government.⁷⁶ As such, cemeteries have been incorporated into the larger land use regulatory framework.⁷⁷ Because cemeteries are part of the land use framework, municipal governments are able to exercise considerable

⁶⁷ See *Benjamin Franklin Quotes*, NOTABLE QUOTES, http://www.notable-quotes.com/f/franklin_benjamin.html [<https://perma.cc/PU8S-UBQD>] (Benjamin Franklin referred to death as one of life's two certainties).

⁶⁸ See generally William J. Whalen, *How Different Religions Pay Their Final Respects*, in DEATH DYING & BEREAVEMENT (George Dickinson et al. eds., 4th ed. 1998) (explaining the various ways different religions and cultures have dealt with death and disposing human remains).

⁶⁹ *Id.*

⁷⁰ *Id.* at 176–77. Part of the reasoning for this is the idea that the body must be preserved for the resurrection during the final judgment. *Id.* at 177.

⁷¹ See *History*, MOUNT AUBURN CEMETERY, <http://mountauburn.org/category/history> [<https://perma.cc/NBP9-AK38>] (describing how burials became a concern of urban planning during the nineteenth century).

⁷² See, e.g., *id.* (noting Mount Auburn Cemetery located in Cambridge, Massachusetts as an example of the trend of the development of independently located cemeteries).

⁷³ MASS. GEN. LAWS ch. 114, § 34; DUDLEY, MASS., ZONING BYLAWS § 2.03.02.

⁷⁴ See MASS. GEN. LAWS ch. 114, § 34 (state); DUDLEY, MASS., ZONING BYLAWS § 2.03.02 (municipalities). The federal government maintains an extensive system of national cemeteries used for the interment of deceased service members and veterans. See 38 U.S.C. §§ 2400–2414 (2017) (providing for national cemeteries and memorials).

⁷⁵ See e.g., DUDLEY, MASS., ZONING BYLAWS § 2.03.02. The Dudley zoning ordinances require cemeteries in residential districts to obtain a special permit. *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*; see *Foster v. Mayor of City of Beverly*, 53 N.E.2d 693, 696 (Mass. 1944) (holding ordinances regulating cemeteries were a valid exercise of police powers).

control over their construction and expansion.⁷⁸ The power to control where a religious organization can bury their dead—or if a particular group can bury their dead at all—therefore rests in the hands of local politicians.⁷⁹

C. The Special Protections for Religious Land Uses

Constitutional protections for the free exercise of religion and the restrictive nature of municipal land use regulations create potential conflicts between the right of municipalities to regulate land and the right of religious groups to practice their faith.⁸⁰ Both state and federal governments have therefore taken certain measures to ensure that religious land uses are protected.⁸¹

Protection for religious land uses is codified at the federal level under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).⁸² RLUIPA was designed to protect religious land uses from discriminatory decisions by local municipalities.⁸³ With limited exceptions, RLUIPA prohibits government entities from implementing land use regulations that impose a substantial burden

⁷⁸ See *Foster*, 53 N.E.2d at 696 (allowing municipal government to determine where to locate cemeteries).

⁷⁹ See DUDLEY, MASS., ZONING BYLAWS § 2.03.02 (stipulating cemeteries can only be constructed with a special permit granted by the town zoning board of appeals).

⁸⁰ See U.S. CONST. amend. I (preventing government prohibition of the free exercise of religion); Macleod-Ball, *supra* note 43, at 1087–88, 1087 n.3 (explaining an example of this conflict would be a zoning ordinance that prohibits churches or the denial of a special permit to build or modify a church).

⁸¹ MASS. GEN. LAWS ch. 40A, § 3; Anthony C. Zecca, Jr., Note, *A Decade Since 9/11: Religious Land Use Discrimination and the Continued Need for Protective Judicial Measures Under RLUIPA*, 21 TEMP. POL. & CIV. RTS. L. REV. 275, 276 (2011). The principle statutory protection for religious land uses in Massachusetts is the Dover Amendment, which states that zoning ordinances, or by-laws, cannot regulate or restrict the use of land for religious uses. MASS. GEN. LAWS ch. 40A, § 3. The Dover Amendment does not exclude religious organizations from all municipal land use controls, as it permits municipalities to reasonably regulate the land subject to bulk, dimension, setbacks, parking, and other similar regulations. *Id.* Municipalities, however, cannot “through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to ‘nullify’ the use exemption.” *Bible Speaks v. Bd. of Appeals of Lenox*, 391 N.E.2d 279, 284 (Mass. App. Ct. 1979). The legislature’s rationale for providing these protections to religious land uses was to ensure that a municipality could not “exercise its preferences as to what kind of . . . religious denominations it will welcome . . .” *Needham Pastoral Counseling Ctr., Inc. v. Bd. of Appeals of Needham*, 557 N.E.2d 43, 44 (Mass. Ct. App. 1990). Furthermore, the Dover Amendment “adopts the constitutional principle that local authority may not, without compelling state interest, use zoning regulations to burden religious practices . . .” *Id.* at 47. The Dover Amendment provides religious organizations with a significant ability to challenge municipal land use regulations that would prevent their religious building projects. MASS. GEN. LAWS ch. 40A, § 3.

⁸² 42 U.S.C. § 2000cc(a)(1) (2017); Zecca, *supra* note 81, at 276. RLUIPA only protects religious groups from discrimination by means of land use mechanisms. 42 U.S.C. § 2000cc(a)(1).

⁸³ Zecca, *supra* note 81, at 276. RLUIPA was a more tailored attempt to protect religious land uses than Congress’s previous attempt, the Religious Freedom and Restoration Act of 1993 (“RFRA”). *Id.* RFRA required government actions that “substantially burden[ed]” the exercise of religion to be subjected to a stricter degree of judicial review. *Id.* The Supreme Court, however, held RFRA unconstitutional in *City of Boerne v. Flores*. 521 U.S. 507, 536 (1997); Zecca, *supra* note 81, at 276.

on the free exercise of religion.⁸⁴ RLUIPA allows plaintiffs to seek “appropriate relief” in judicial proceedings and allows the United States to bring an action against a municipality seeking injunctive or declaratory relief for violations of its provisions.⁸⁵ Despite these significant protections, the United States Supreme Court has not interpreted RLUIPA to provide the fullest possible protection for religious land uses that RLUIPA’s broad language implies.⁸⁶ Additionally, courts have been hesitant to subject land use measures to strict scrutiny absent overt discrimination.⁸⁷ Moreover, zoning ordinance challengers must prove that the ordinance imposes a substantial burden on the free exercise of religion, a threshold that is often difficult to meet.⁸⁸ Similarly, municipalities are still allowed to

⁸⁴ See 42 U.S.C. § 2000cc(a)(1). RLUIPA provides:

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, unless 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.

Id. In addition, section (b)(3) provides that “[n]o government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” *Id.* § 2000cc(b)(3).

⁸⁵ *Id.* § 2000cc–2(a), (f).

⁸⁶ See *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n of Town of Newtown*, 941 A.2d 868, 888–89 (Conn. 2008) (explaining RLUIPA’s definition of “religious exercise” is broader than the Supreme Court’s traditional definition in its First Amendment jurisprudence and declining to hold that any regulation that affects the land used for religious purposes could trigger RLUIPA’s protections).

⁸⁷ See *Zecca*, *supra* note 81, at 277; see also *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007) (*Westchester III*) (finding the arbitrary, capricious, and unlawful character to be significant in the analysis of discrimination). Strict scrutiny is the highest standard of judicial review in a due process analysis. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006). Courts will strike down government actions under a strict scrutiny review unless the government can show (1) a compelling interest justifying the actions, and (2) that the action is the least restrictive means of achieving that interest. *Id.* Applying strict scrutiny, courts will generally invalidate laws that infringe upon religious practices because of their religious motivation unless they are justified by a compelling state interest and are narrowly tailored to advance that interest. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 526, 547 (1993) (holding ordinances that restricted animal sacrifices of the Santeria religion were invalid).

⁸⁸ *Westchester III*, 504 F.3d at 348–50. Substantial burden is “a term of art in the Supreme Court’s free exercise jurisprudence.” *Id.* at 348. The Court finds a substantial burden to exist where an individual is forced to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.” *Id.* Courts have found that in the land use context, religious institutions do not face the same dilemma. *Id.* at 348–49. The denial of a religious institution’s building proposal will not impose a substantial burden when there are opportunities for the institution to submit a second application or if the denial will only have a minimal impact on the religious exercise. *Id.* at 349. Accordingly, “courts confronting free exercise challenges to zoning restrictions rarely find the substantial burden test satisfied even when the resulting effect is to completely prohibit a religious congregation from building a church on its own land.” *Id.* at 350.

require special permits for religious land uses, provided that they do not impose a substantial burden on the exercise of religion.⁸⁹ Therefore, although it provides religious organizations with a federal cause of action against discriminatory ordinances, RLUIPA does not completely protect religious organizations from discrimination.⁹⁰ Moreover, although RLUIPA provides an auspicious sign for Muslim organizations, including the Islamic Society, such groups face an additional obstacle—their faith.⁹¹

D. Anti-Muslim Sentiment

In the wake of the September 11, 2001 terrorist attacks on the United States, Muslims living in the United States have faced serious and overt discrimination.⁹² This discrimination manifests in many forms and poses a serious threat to Muslim-Americans' legal rights, their well-being, and their lives.⁹³ Muslim-Americans have been physically assaulted, Muslim-American children have been harassed and denied the opportunity to pray in schools, and mosques have been vandalized and set on fire.⁹⁴

Anti-Muslim sentiments reemerged with vigor during the 2016 U.S. Presidential election.⁹⁵ Throughout his campaign, President Donald Trump's rhetoric fueled these sentiments.⁹⁶ While campaigning, President Trump announced plans to ban Muslim immigration to the United States in its entirety or, alternatively, subject potential Muslim immigrants to "extreme vetting."⁹⁷ President Trump also announced a plan to require all Muslims currently living in the United

⁸⁹ *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 998–99 (7th Cir. 2006) (holding conditions that only amounted to a minor burden on religious exercise did not impose a substantial burden); see also *Grace Church of Roaring Fork Valley v. Bd. of Cty. Comm'rs of Pitkin Cty., Colo.*, 742 F. Supp. 2d 1156, 1163 (finding denial of Church's application for a special permit was not a substantial burden on exercise of religion but rather only prevented the church from using a particular property).

⁹⁰ *Zecca*, *supra* note 81, at 277 (outlining the persistence of discrimination despite RLUIPA).

⁹¹ *Id.* at 275 (explaining Muslims experience particularly virulent discrimination).

⁹² *Id.* at 276. The September 11 attacks were carried out by al-Qaeda, a group of Islamic extremists. Peter L. Bergen, *September 11 Attacks*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/September-11-attacks> [<https://perma.cc/RHV8-CHWU>].

⁹³ See U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 1–2 (Sept. 22, 2010), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa_report_092210.pdf [<https://perma.cc/8WJ8-78QD>] (outlining discrimination and violence against Muslims).

⁹⁴ *Id.* Post 9/11, such anti-Muslim sentiments have resulted in an overwhelming number of hate crimes against Muslim communities. Eric Lichthblau, *U.S. Hate Crimes Surge 6%, Fueled by Attacks on Muslims*, N.Y. TIMES, Nov. 14, 2016, at A13. This number has increased over time as 2015 saw the highest level of hate crimes against Muslims since 2001. *Id.* In 2015, there were 257 reports of attacks on Muslims and mosques, a sixty-seven percent rise from 2014. *Id.*

⁹⁵ Lichthblau, *supra* note 94.

⁹⁶ Madeline Conway, *Trump Stokes Fears He'll Pursue Muslim Ban*, POLITICO (Dec. 22, 2016), <http://www.politico.com/story/2016/12/trump-muslim-ban-kellyanne-conway-232912> [<https://perma.cc/SN36-NFA8>].

⁹⁷ *Id.*

States to be placed on a government registry.⁹⁸ These statements correlated with heightened levels of Muslim hate crimes; following the call to ban Muslims from entering the United States in the wake of the San Bernardino terrorist attack, there was an eighty-seven percent rise in hate crimes against Muslims.⁹⁹ Soon after taking office, President Trump followed through on his campaign promise and issued an executive order barring refugees and individuals from certain, predominately Muslim countries from entering the United States.¹⁰⁰

In the land use context, these anti-Muslim sentiments have a pernicious impact on Muslims' ability to construct religious structures.¹⁰¹ Building proposals for Muslim religious structures have routinely encountered fierce resistance from communities who resent their presence.¹⁰² Local governments, influenced by these community pressures, respond with discriminatory actions that stall or delay the projects.¹⁰³ It is within this larger social context that Muslim organizations such as the Islamic Society attempt to construct their religious infrastructure.¹⁰⁴ The impact that these anti-Muslim sentiments can have on municipal land use bodies is significant, and the current regulatory framework does not

⁹⁸ *Id.*

⁹⁹ Clare Foran, *Donald Trump and the Rise of Anti-Muslim Violence*, THE ATLANTIC (Sept. 22, 2016), <http://www.theatlantic.com/politics/archive/2016/09/trump-muslims-islamophobia-hate-crime/500840> [<https://perma.cc/LDZ3-Q7FZ>]. The San Bernardino terror attack was a December 2, 2015 incident where two heavily armed Muslim individuals went on a shooting spree in San Bernardino, California, killing fourteen people and injuring seventeen. Adam Nagourney et al., *San Bernardino Shooting Kills at Least 14; Two Suspects Are Dead*, N.Y. TIMES, Dec. 2, 2015, at A1.

¹⁰⁰ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017). The executive order barred refugees from entering the United States for 120 days and prohibited the admission of individuals from certain Middle Eastern countries for ninety days. *Id.* In addition, the order barred entry into the United States by those from seven Muslim-majority "countries of concern": Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen. *See id.*; *Full Text of Trump's Executive Order on 7-Nation Ban, Refugee Suspension*, CNN (Jan. 28, 2017), <http://www.cnn.com/2017/01/28/politics/text-of-trump-executive-order-nation-ban-refugees/index.html> [<https://perma.cc/TQ2J-WRBB>] (identifying the "countries of concern"). Federal courts rendered that executive order unconstitutional and President Trump then issued a second order, which was also ruled unconstitutional. Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (second executive order); Matt Zapotosky, *Second Federal Judge Blocks Revised Trump Travel Ban*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/local/social-issues/second-federal-judge-blocks-revised-trump-travel-ban/2017/03/16/dc47cd1e-0a2a-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.0fd708035533 [<https://perma.cc/8R7Y-WR4W>].

¹⁰¹ Zecca, *supra* note 81, at 275.

¹⁰² *See* Heather Greenfield, Comment, *International Law, Religious Limitations, and Cultural Sensitivity: The Park51 Mosque at Ground Zero*, 25 EMORY INT'L L. REV. 1317, 1317 (2011). For example, resistance towards an attempt to build a mosque near Ground Zero in New York City was highly publicized, with President Trump expressing his opposition to the proposal saying "[i]t is wrong" and offering to buy the property himself. *Id.*; Donald Trump (@realDonaldTrump), TWITTER (Dec. 10, 2012, 2:45 PM), <https://twitter.com/realdonaldtrump/status/278269256657956865> [<https://perma.cc/E8VY-EREZ>].

¹⁰³ Zecca, *supra* note 81, at 275.

¹⁰⁴ *See* Greenfield, *supra* note 102, at 1317.

provide sufficient protection for Muslims against these negative external pressures.¹⁰⁵

II. WHY MUSLIM CEMETERY PROPOSALS SUFFER SUCH MORBID FATES IN THE COURT SYSTEM

Muslim organizations seeking to build cemeteries and other religious structures face significant obstacles in getting their building projects approved under the current land use regulatory framework.¹⁰⁶ The primary obstacles are the political systems that comprise the local government entities in charge of land use regulation and the lack of effective judicial remedies.¹⁰⁷ The politicized nature of municipal governments and insufficient judicial remedies prevent Muslim groups from enjoying their full rights to construct and expand religious structures without being unduly delayed or denied.¹⁰⁸ Although these problems are magnified for Muslims, they have the potential to affect other religious groups as well.¹⁰⁹

A. *The Politicized Nature of the Land Use Regulatory Framework*

Land use control mechanisms, such as ordinances and special permit requirements, exist as part of an extensive regulatory framework.¹¹⁰ Because most land use control occurs at the local level, it is therefore municipal governments who are charged with administering the land use regulatory framework.¹¹¹ Municipal governments create zoning ordinances or bylaws, change the ordinances, decide what land uses require special permits, and adjudicate special permit applications.¹¹² The power municipal governments can exercise in the context of land use controls is broader and much more extensive than that of the federal government.¹¹³

¹⁰⁵ See Zecca, *supra* note 81, at 276 (identifying the shortcomings of RLUIPA that allow discrimination to persist).

¹⁰⁶ See Greenfield, *supra* note 102, at 1317 (describing the difficulties Muslims experience constructing mosques).

¹⁰⁷ See Zecca, *supra* note 81, at 276–77 (identifying the unsatisfactory nature of RLUIPA jurisprudence and hostile political climates as problems for Muslims in the land use context).

¹⁰⁸ See *id.*

¹⁰⁹ See Greenfield, *supra* note 102, at 1317.

¹¹⁰ See Macleod-Ball, *supra* note 43, at 1087, 1090 (describing government administration of the land use regulatory system).

¹¹¹ See *id.*

¹¹² See, e.g., DUDLEY, MASS., ZONING BYLAWS § 1.01.00 (2014) (outlining the land use powers of Dudley, Massachusetts).

¹¹³ See Nolon, *supra* note 49, at 822 (explaining local governments have the power “to adopt land use plans, to establish uniform zoning districts . . . to review and approve land subdivision and site development . . . to achieve proper development patterns and to mitigate the adverse impacts of land development on natural resources and the environment”). See generally MASS. GEN. LAWS ch. 40, §§ 1–69 (2016) (outlining powers and duties of cities and towns). The federal government is one of

Cities and towns delegate their land use powers to various internal bodies in differing ways.¹¹⁴ In Massachusetts, for example, the power to create and change zoning ordinances or bylaws rests in the hands of a city council or board of selectmen.¹¹⁵ A zoning board of appeals oversees zoning issues and adjudicates special permit applications.¹¹⁶ These two bodies differ in their organization and in the ways their membership is conferred.¹¹⁷ Zoning board of appeals members are appointed by the legislative branch of a municipality's government.¹¹⁸ In contrast, members of a city council or board of selectmen are elected by a locality's residents.¹¹⁹ Despite organizational differences, the bodies are ultimately responsible to, and held accountable by, the local electorate.¹²⁰ The fact that these land use regulators must answer to people on Election Day undoubtedly impacts their decisions.¹²¹

The local officials in charge of overseeing the community's land use mechanisms are politicians; they are not isolated from the public through long-term appointments, but instead face frequent elections.¹²² Therefore, these officials

limited powers; powers not delegated to the federal government in the Constitution are reserved to the states. U.S. CONST. amend. X. Because the Constitution does not mention local level land controls, those powers are regarded as being retained by the states, that then delegate them to cities and towns. *See id.* at art. I (enumerating the powers of the federal government and not listing the power to engage in land use regulation); Nolan, *supra* note 49, at 822, 827. The Commerce Clause however, gives the federal government the authority to engage in land use regulation in a limited fashion. *See* U.S. CONST. art. I, § 8 (providing “[t]he Congress shall have power to . . . regulate commerce . . . among the several states”); Nolon, *supra* note 49, at 825.

¹¹⁴ MASS. GEN. LAWS ch. 40A, § 5 (2016). Cities and towns possess essentially the same powers and responsibilities, but their internal structures differ. MASS. GEN. LAWS ch. 39, § 1 (2016) (providing cities and towns have the same powers and comparing the differing entities who wield the powers); *Del Duca v. Town Adm’r of Methuen*, 329 N.E.2d 748, 753 n.6 (Mass. 1975) (explaining that towns are traditionally governed directly by the people and, in contrast, cities are traditionally governed by the people through representatives).

¹¹⁵ MASS. GEN. LAWS ch. 40A, § 5.

¹¹⁶ *Id.* §§ 12, 14.

¹¹⁷ MASS. GEN. LAWS ch. 39, § 1; MASS. GEN. LAWS ch. 40A, § 12.

¹¹⁸ MASS. GEN. LAWS ch. 40A, § 12. Zoning board of appeals members are typically appointed by the mayor (if the given municipality uses a mayoral structure) and must be confirmed by the city council or the board of selectmen. *Id.* The board is comprised of between three and five members with their term limits structured so that one person's expires each year. *Id.* Board members can be removed for cause by the city council or board of selectmen. *Id.*

¹¹⁹ *See* MASS. GEN. LAWS ch. 43, § 82 (2016) (cities); MASS. GEN. LAWS ch. 43A, § 4 (2016) (towns). City councils consist of either seven or nine members who are elected and serve two-year terms. MASS. GEN. LAWS ch. 43, § 82

¹²⁰ *See* MASS. GEN. LAWS ch. 43, § 82 (cities); MASS. GEN. LAWS ch. 43A, § 4 (towns). Although the zoning board of appeals is not directly accountable to residents through direct elections, they are indirectly accountable to the people by virtue of being appointed by a democratically elected legislative body. *See* MASS. GEN. LAWS ch. 40A, § 12.

¹²¹ *See* MASS. GEN. LAWS ch. 40A, § 12; MASS. GEN. LAWS ch. 43, § 82.

¹²² MASS. GEN. LAWS ch. 40A, § 12; MASS. GEN. LAWS ch. 43, § 82.

usually act in a way that reflects the will of their constituents.¹²³ Local officials are thus incentivized to respond to their communities' needs and desires.¹²⁴ More precisely, local officials respond to the needs and desires of those voters in the majority, a trend that is often problematic for minorities.¹²⁵ Minority groups, by their definition, are especially vulnerable to discriminatory actions by local governments.¹²⁶ When a majority of a local electorate opposes an ethnic, religious, or other minority group, they can pressure their local government to restrict that minority group.¹²⁷ Taken to the extreme, such restrictions can seriously infringe on the personal liberty of minority individuals.¹²⁸ Once these discriminatory policies are entrenched into society, they are difficult to overcome.¹²⁹ Minority groups often do not have the votes needed to influence local governments to protect their rights when a hostile majority is organized in opposition against them.¹³⁰

Muslims in the United States are in the minority and are therefore highly susceptible to discrimination from governments.¹³¹ Although all minority groups

¹²³ See Thad Kousser et al., *Ideological Adaptation? The Survival Instinct of Threatened Legislators*, 69 J. POL. 828, 829 (2007) (analyzing election trends and concluding threatened legislators modify behavior in response to ideological shifts by their constituents).

¹²⁴ See Christine Keller Palus, *Responsiveness in American Local Governments*, 42 ST. & LOC. GOV'T REV. 133, 145 (2010) (concluding that local officials respond to the ideological views of their constituents); *Politics and Local Government: Urbane Development*, THE ECONOMIST (Aug. 1, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/08/politics-and-local-government> [<https://perma.cc/7YZT-WDR6>] [hereinafter *Urbane Development*] (examining instances where local governments took actions to reflect communities' particular needs and desires). Local governments often enact measures and make decisions that are not based on the traditional partisan lines of federal and state level politics, but rather reflect the reality of the needs and expectations of the local community. *Urbane Development*, *supra*.

¹²⁵ See Sean McElwee, *Why Voting Matters: Large Disparities in Turnout Benefit the Donor Class*, DEMOS 10 (Sept. 16, 2015), http://www.demos.org/sites/default/files/publications/Why%20Voting%20Matters_0.pdf [<https://perma.cc/V59D-ETRT>] (explaining politicians enact policies that benefit the population segments who vote most frequently, usually affluent whites, and noting this trend harms minorities).

¹²⁶ See *Minority*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining minorities as "group[s] that [are] different in some respect (such as race or religious belief) from the majority and that [are] sometimes treated differently as a result," or who have been "traditionally discriminated against or socially suppressed").

¹²⁷ See *id.*

¹²⁸ See, e.g., David Pilgrim, *What Was Jim Crow*, JIM CROW MUSEUM (2012), <https://ferris.edu/HTMLS/news/jimcrow/what/index.htm> [<https://perma.cc/6CB5-7EKS>]. One of the most extreme examples of how local governments can take measures that restrict the rights of minority groups are the Jim Crow laws of the post-reconstruction American South. *Id.* These laws, passed by white Southern state governments, severely restricted blacks and other racial and ethnic minorities' public behavior. See *id.*

¹²⁹ See *id.* (noting it took until the mid-1960s for Jim Crow legislation to be eradicated).

¹³⁰ See McElwee, *supra* note 125 (explaining the lack of electoral power minority voters possess).

¹³¹ See Besheer Mohamed, *A New Estimate of the U.S. Muslim Population*, PEW RESEARCH CTR. (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population/> [<https://perma.cc/H6DE-YRYQ>] (estimating approximately three million Muslims lived in

are underrepresented in U.S. legislatures, the number of Muslim representatives is incredibly low; according to a 2015 study, fewer than six legislators across federal and state legislatures identified as Muslim.¹³² In the rare cases where a Muslim won a seat in a legislature, they often faced hostility during the election.¹³³

Anti-Islamic sentiments augment the problems that Muslims face by virtue of their numerical minority in government positions.¹³⁴ Muslims simply cannot count on local officials to provide fair treatment for their building projects and proposals.¹³⁵ Local officials can, and do, exercise their authority to either deny a proposal completely or delay the project in the hope of wearing out a particular Muslim group's will and economic ability to continue the project.¹³⁶ Because Muslims cannot always rely on local governments, they must turn to the courts to protect and enforce their rights.¹³⁷ Unfortunately, the courts often fail to provide the necessary relief.¹³⁸

B. Uncertain and Unsatisfactory Judicial Remedies for Discrimination Against Muslims

Local governments' inability to treat religious minority groups fairly when making land use decisions was precisely why Congress enacted RLUIPA.¹³⁹

the United States in 2015). Given the population of the United States is estimated to be approximately 322 million, Muslims make up about one percent of the population. *See id.*

¹³² Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, NCSL (Dec. 1, 2015) <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> [<https://perma.cc/RH7G-YE5W>]. The joint study, conducted by the National Conference of State Legislatures and the Pew Charitable Trusts, analyzed legislature demographics across the country. *Id.* The study determined that, although the number of minorities and women in legislatures has increased since the 1970s, their numbers still fall below the respective groups' percentage of the U.S. population. *Id.* Women, who made up fifty-one percent of the U.S. population at the time, only had a twenty-five percent share of state legislatures. *Id.* Blacks, making up thirteen percent of the population, had nine percent. *Id.* As for religion, Protestant and Catholics were the most represented religions, coming in at thirty-eight percent and sixteen percent respectively. *Id.* Only six percent of legislators reported being Buddhist, Hindu, or Muslim. *Id.* Forty-two percent of legislators chose not to identify their religion, so the actual numbers are likely somewhat different, though the overall trend is clear. *See id.*

¹³³ *See* Teresa Wiltz, *Why State Legislatures Are Still Pretty White*, GOVERNING (Dec. 9, 2015), <http://www.governing.com/topics/politics/legislative-boundaries-lack-of-connections-lead-to-few-minority-lawmakers.html> [<https://perma.cc/CM3F-4W94>]. For example, opponents of Sam Rasoul, a Muslim running for the Virginia state legislature, circulated a pamphlet claiming that Rasoul had been funded by an al-Qaida sympathizer. *Id.*

¹³⁴ *See* Zecca, *supra* note 81, at 276 (noting anti-Muslim sentiments present an additional obstacle for Muslims in the land use context).

¹³⁵ *See id.*

¹³⁶ *See supra* notes 8–28 and accompanying text.

¹³⁷ *See* 42 U.S.C. § 2000cc–2(a) (2017) (providing a judicial remedy for religious groups in land use disputes).

¹³⁸ *See* Zecca, *supra* note 81, at 277 (noting the shortcomings of judicial remedies in the land use context).

¹³⁹ *See id.* at 276 (discussing Congress's intent to curb religious land use discrimination through RLUIPA).

Specifically, RLUIPA prohibits land use regulations that impose a “substantial burden” on “religious exercise.”¹⁴⁰ Congress however, did not clearly define what constitutes a “substantial burden” or what uses constitute a “religious exercise.”¹⁴¹ Moreover, the United States Supreme Court has yet to grant certiorari to a case based on RLUIPA’s land use prong.¹⁴² As a result, courts presiding over RLUIPA litigation have defined “substantial burden” and “religious exercise” in slightly different ways.¹⁴³ More problematically, courts have been reluctant to construe the meaning of these terms in a way that protects religious groups to the full extent that the law permits.¹⁴⁴ It is therefore uncertain what remedies, if any, Muslims will receive upon challenging discriminatory land use decisions.¹⁴⁵

RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” and explains that “the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”¹⁴⁶ Although this language is broad, it does not clearly define what specific uses and activities constitute “religious exercise.”¹⁴⁷ While courts find many uses constitute “religious exercise” under RLUIPA, they do not find that all uses of land by religious organizations qualify as such.¹⁴⁸

In *Westchester Day School v. Village of Mamaroneck* (“*Westchester II*”), the United States District Court for the Southern District of New York determined that building an addition to a Jewish school was a religious exercise under RLUIPA.¹⁴⁹ The court reasoned that the “major portion of the proposed facilities will be used for religious education and practice or are inextricably integrated

¹⁴⁰ 42. U.S.C. § 2000cc(a)(1).

¹⁴¹ See *id.* § 2000cc–5 (defining “religious exercise” but not “substantial burden”).

¹⁴² Zecca, *supra* note 81, at 283. As of 2017 the Supreme Court has still not heard a case on RLUIPA’s land use prong.

¹⁴³ See *Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt. Cty.*, 962 A.2d 404, 427 (Md. 2008) (discussing the different definitions of “substantial burden” across circuits); Tokufumi Noda, *The Role of Economics in the Discourse on RLUIPA*, 53 B.C. L. REV. 1089, 1095 (2012) (recognizing that courts have developed different language for what constitutes a “substantial burden”).

¹⁴⁴ See *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n of Town of Newtown*, 941 A.2d 868, 889–90 (Conn. 2008) (declining to give the broader meaning of “religious exercise” implied by RLUIPA); Zecca, *supra* note 81, at 277 (noting the shortcomings of courts’ interpretations).

¹⁴⁵ See Zecca, *supra* note 81, at 277.

¹⁴⁶ 42. U.S.C. § 2000cc–5(7).

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 545–46 (S.D.N.Y. 2006), *aff’d*, 504 F.3d 388 (2nd Cir. 2007) (*Westchester II*) (finding an addition to a religious school constitutes religious exercise); *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 746 (Mich. 2007) (finding the building of an apartment building by a religious group was not religious exercise).

¹⁴⁹ *Westchester II*, 417 F. Supp. 2d at 545–46.

with, and necessary for [the school's] ability to provide religious education and practice."¹⁵⁰ Additionally, courts have not objected to the idea that displaying a sign visible to highway drivers constitutes a religious exercise.¹⁵¹ On the other hand, courts *have not* found that a religious organization's plan to construct an apartment qualifies as a religious exercise.¹⁵² Because the definition does not specify what uses qualify, it is conceivable that courts could disagree whether a given use, such as a cemetery, constitutes "religious exercise."¹⁵³

Whereas the meaning of "religious exercise" under RLUIPA is uncertain because it is broadly defined, the meaning of "substantial burden" is uncertain because there is no definition at all.¹⁵⁴ Congress did not define "substantial burden" in RLUIPA, but instead left it to be interpreted according to the United States Supreme Court's established jurisprudence concerning the term.¹⁵⁵ In *Sherbert v. Verner*, the Court explained that a substantial burden occurs when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion . . . on the other hand."¹⁵⁶ Because *Sherbert* was not a land use case, it only provides a starting point for courts reviewing RLUIPA claims.¹⁵⁷

In light of the Supreme Court's silence on the issue, the circuit courts have developed their own definition of substantial burden in the land use context.¹⁵⁸ Consequently, case law does not offer much guidance as to what exactly consti-

¹⁵⁰ *Id.* Judge William C. Connor of the United States District Court for the Southern District of New York wrote on remand from the United States Court of Appeals for the Second Circuit. *Id.* The Second Circuit had remanded his earlier decision because it held that decision, which found the project to be a religious exercise simply because the school itself was religious, was an impermissibly broad construction of RLUIPA. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 190 (2d Cir. 2004), *remanded to* 417 F. Supp. 2d 477 (S.D.N.Y. 2006), *aff'd*, 504 F.3d 388 (2d Cir. 2007) (*Westchester I*) (first appellate review). The Second Circuit affirmed Judge Connor's conclusion and reasoning the second time. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348, 357 (2d Cir. 2007) (*Westchester III*) (affirming Judge Connor in the second appellate review).

¹⁵¹ See *Trinity Assembly of God*, 962 A.2d at 427. The defendant city did not argue against the plaintiff church's assertion that the sign was a religious exercise. *Id.* Accordingly, the Court of Appeals of Maryland assumed without deciding that it was a religious exercise. *Id.*

¹⁵² See *Greater Bible Way Temple v. City of Jackson*, 733 N.W.2d 734, 746 (Mich. 2007).

¹⁵³ See 42 U.S.C. § 2000cc-5(7).

¹⁵⁴ See *id.* § 2000cc-5.

¹⁵⁵ See *Westchester III*, 504 F.3d at 348.

¹⁵⁶ 374 U.S. 398, 404 (1963); *Westchester III*, 504 F.3d at 348.

¹⁵⁷ See *Sherbert*, 374 U.S. at 399-400; *Westchester III*, 504 F.3d at 348-49 (explaining religious groups in land use contexts do not usually face the dilemma described in *Sherbert*). *Sherbert v. Verner* was a case centering on unemployment benefits. 374 U.S. at 399-400.

¹⁵⁸ *Trinity Assembly of God*, 962 A.2d at 428. The Ninth Circuit requires that a land regulation be oppressive to a "significantly great extent" and impose a significantly great restriction or onus upon the exercise of religion. *Id.* (quoting *Guru Nanak Sikh Soc'y v. Cty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006)). The Eleventh Circuit explained that a substantial burden "is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)).

tutes a substantial burden.¹⁵⁹ For example, in *Trinity Assembly of God v. of Baltimore City, Incorporated v. People's Counsel for Baltimore County*, the Court of Appeals of Maryland held that a decision preventing a church from placing a large sign on its property did not constitute a substantial burden.¹⁶⁰ Similarly, the United States Court of Appeals for the Eleventh Circuit in *Midrash Sephardi, Incorporated v. Town of Surfside* held that zoning requirements prohibiting a synagogue from remaining in a commercially zoned district did not pose a substantial burden on the exercise of religion, even though the requirements would force the synagogue to relocate to another area and make it difficult for its elderly congregation to reach the new building.¹⁶¹

In contrast to those decisions where the courts did not find a substantial burden was imposed, in *Guru Nanak Sikh Society v. County of Sutter*, the United States Court of Appeals for the Ninth Circuit found that a denial of a conditional use permit to build a Sikh temple did impose a substantial burden.¹⁶² Central to the court's reasoning in that case were the facts that it was the second denial of such a permit and the denial greatly reduced the likelihood that the temple would ever be constructed.¹⁶³ On the contrary, where religious groups have options to build elsewhere, courts are reluctant to find that a decision barring a project on a specific site constitutes a substantial burden.¹⁶⁴ These cases make clear that the question of what constitutes a substantial burden on religious exercise will continue to differ across circuits absent review by the United States Supreme Court.¹⁶⁵

The uncertainty surrounding RLUIPA's definition of "substantial burden" and "religious exercise" is magnified for religious groups seeking to construct cemeteries.¹⁶⁶ Although RLUIPA itself has been extensively litigated since it became law, its applicability to cemeteries has not.¹⁶⁷ Therefore, it is unclear

¹⁵⁹ See *Trinity Assembly of God*, 962 A.2d at 431 (examining different courts' interpretations of RLUIPA).

¹⁶⁰ *Id.* at 430.

¹⁶¹ *Midrash Sephardi*, 366 F.3d at 1221, 1228; *Zecca*, *supra* note 81, at 286 (describing the Eleventh Circuit's reasoning).

¹⁶² *Guru Nanak Sikh Soc'y*, 456 F.3d at 992.

¹⁶³ *Id.*

¹⁶⁴ See *id.* (implying a denial of a project might not constitute a substantial burden when the religious group could build in other locations); see also *Greater Bible Way Temple*, 733 N.W.2d at 750 (holding decision prohibiting church from building an apartment complex was not a substantial burden because of availability of alternate locations).

¹⁶⁵ See *Zecca*, *supra* note 81, at 277 (calling for the Supreme Court to review RLUIPA's land use prong).

¹⁶⁶ See *Roman Catholic Diocese of Rockville Ctr., N.Y. v. Inc. Vill. of Old Westbury*, 128 F. Supp. 3d 566, 585–86 (E.D.N.Y. 2015) (analyzing RLUIPA's application to a cemetery proposal).

¹⁶⁷ See *id.* A Westlaw search as of August 19, 2017 for cases containing both the terms "RLUIPA" and "cemetery" yielded 174 results. Of those 174, only one case explored the question of whether government action restricting a church's ability to construct a cemetery constituted a substantial bur-

how a court would rule on a RLUIPA claim arising out of a cemetery proposal denial—such as in the Islamic Society’s case.¹⁶⁸

C. What RLUIPA Case Law Means for Muslim Cemeteries

The limited case law discussing RLUIPA’s applicability to cemeteries suggests that a court might find the denial of a Muslim group’s cemetery proposal to be a substantial burden on religious exercise.¹⁶⁹ For example, in *Roman Catholic Diocese of Rockville Centre, New York v. Incorporated Village of Old Westbury*, the United States District Court for the Eastern District of New York denied a village’s motion for summary judgment as to the plaintiff church’s RLUIPA claim concerning a proposed church cemetery.¹⁷⁰ The court found that the village’s imposition of permit conditions for the church’s proposed cemetery were sufficient to establish a *prima facie* showing of substantial burden.¹⁷¹ The court also found that material issues of fact remained as to the regulation’s burden on the church.¹⁷² Although this decision bodes well for a religious group, a denial of summary judgment by a federal district court is not particularly persuasive, and certainly not binding precedent for cases in other jurisdictions.¹⁷³

Despite these positive signs, certain aspects of RLUIPA case law suggest that a denial of a cemetery proposal might not constitute a substantial burden.¹⁷⁴ Although courts have ruled that denials of the right to build religious structures in a given location constitute a substantial burden in some cases, they have been reluctant to do so when a structure may be built elsewhere.¹⁷⁵ Using this reasoning, a court reviewing a proposal like the one the Islamic Society put forth could conclude that the denial was not a substantial burden if it found the cemetery

den on the exercise of religion. See *Roman Catholic Diocese*, 128 F. Supp. 3d at 585–86. In comparison, a search for “RLUIPA” by itself yielded 5,696 cases.

¹⁶⁸ See *Roman Catholic Diocese*, 128 F. Supp. 3d at 585–86.

¹⁶⁹ See *id.*

¹⁷⁰ *Id.* at 597.

¹⁷¹ *Id.* at 586.

¹⁷² *Id.* at 585. The village instituted a requirement that cemeteries obtain a special permit in response to an increasing volume of permit applications the village had received. *Id.* at 574. Some of the required conditions related to minimum dimensional requirements that a lot must have in order to be eligible for a religious use. *Id.* at 575. A *prima facie* showing is one that on first appearance establishes some fact or conclusion, but remains subject to further evidence or information. *Prima Facie*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁷³ See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L. J. 787, 800 (2012) (explaining federal district courts are not bound by the decisions of other judges in their district).

¹⁷⁴ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 992; *Greater Bible Way Temple*, 733 N.W.2d at 750.

¹⁷⁵ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 992 (finding second permit denial to be a substantial burden because it greatly reduced the likelihood that the temple could be built); see also *Greater Bible Way Temple*, 733 N.W.2d at 750 (illustrating that, where religious groups have alternate locations readily available, courts are not as willing to find a substantial burden).

could simply be built elsewhere.¹⁷⁶ Such a ruling would be in line with the decision in *Midrash Sephardi* where the court did not find a zoning regulation that required relocating a synagogue to be a substantial burden.¹⁷⁷

Courts have thus far failed to apply RLUIPA in a way that consistently protects Muslim's rights, thereby allowing discrimination against them in land use cases to continue.¹⁷⁸ The judicial remedies for aggrieved Muslims are therefore unpredictable and unsatisfactory.¹⁷⁹ Without change, religious groups such as the Islamic Society will remain highly vulnerable to discrimination in the land use context.¹⁸⁰

III. REMEDIES TO ALLOW MUSLIMS TO REST IN PEACE

The problems Muslims face under the current land use regulatory framework are twofold: first, the framework's politicized nature enables discrimination and, second, the uncertain and unsatisfactory judicial remedies due to the lack of clear definitions for RLUIPA's "substantial burden" and "religious exercise" provisions.¹⁸¹ Because of the lack of clear definitions, Muslim groups such as the Islamic Society cannot predict whether a cemetery would even qualify for RLUIPA's protections.¹⁸² Moreover, by the time courts get involved in religious land use cases, municipal land use regulators may have already delayed the projects for months or even years.¹⁸³ These problems highlight the fact that Muslims are not sufficiently protected under the current land use regulatory framework.¹⁸⁴

Despite these problems, RLUIPA has the potential to adequately protect religious land uses.¹⁸⁵ With certain amendments, RLUIPA would better protect Muslims from discrimination by local land use regulatory bodies.¹⁸⁶ According-

¹⁷⁶ See *Guru Nanak Sikh Soc'y*, 456 F.3d at 992.

¹⁷⁷ See *Midrash Sephardi*, 366 F.3d at 1228.

¹⁷⁸ See Zecca, *supra* note 81, at 277.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *Roman Catholic Diocese of Rockville Ctr., N.Y. v. Inc. Vill. of Old Westbury*, 128 F. Supp. 3d 566, 585–86, (E.D.N.Y. 2015); *Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. Cty.*, 962 A.2d 404, 431 (Md. 2008).

¹⁸³ See *supra* notes 8–28 and accompanying text.

¹⁸⁴ See Zecca, *supra* note 81, at 277.

¹⁸⁵ See *id.* at 278 (arguing for continued adherence to RLUIPA).

¹⁸⁶ See *id.* As RLUIPA is a federal law, Congress has the authority to make amendments to its provisions. RICHARD S. BETH, CONG. RES. SERV., RS20617, HOW BILLS AMEND STATUTES 1 (2003). Amendments can change the law by inserting new text, striking existing text, or striking text and replacing it with new text. *Id.* An amendment to RLUIPA would occur as any other bill becomes law: it would be introduced by either a senator or representative, go through the committee process, and appear for a vote before the entire body. See *id.* Then, if it passes, it would go to the other branch and the process would repeat. See *id.* If the amendment passed both houses, it would become law provided the President did not veto it. See *How Laws Are Made and How to Research Them*, USA.GOV, <https://www.usa.gov/how-laws-are-made> [<https://perma.cc/4UAC-DRNX>]; see also TheGreatWorker, *I'm Just a Bill (School-*

ly, Congress should amend RLUIPA to provide a definition of “substantial burden” that offers broad religious protections and does not view a given municipal action in isolation, but rather considers the totality of the circumstances in each case.¹⁸⁷ Additionally, Congress should provide a clearer and more expansive definition as to what activities constitute “religious exercise” and explicitly include cemeteries.¹⁸⁸ Finally, Congress should add a provision that penalizes municipal governments for unduly delaying, stalling, or prolonging the approval process for religious land uses and allow religious groups to recover damages and attorney’s fees.¹⁸⁹ These amendments will help clarify the meaning of what constitutes a substantial burden on religious exercise, streamline and provide predictability for RLUIPA litigation, and dissuade local land use regulatory bodies from engaging in deliberate stalling tactics.¹⁹⁰ With these changes, Muslims’ right to construct cemeteries can finally be protected.¹⁹¹

A. Creating a Substantial Burden Definition that Accounts for the Totality of the Circumstances

To provide uniformity in interpreting RLUIPA across jurisdictions and to adequately protect Muslims’ rights to construct cemeteries, Congress must amend RLUIPA to provide a definition of “substantial burden.”¹⁹² Taken together, the existing circuit court decisions offer a strong baseline upon which Congress should develop its statutory definition.¹⁹³ In order to provide the strongest protections for religious groups, Congress should draw on aspects from the rea-

house Rock!), YOUTUBE (Sept. 1, 2008), <https://youtube/tyeJ55o3EI0> [<https://perma.cc/T6R4-P5ML>] (outlining the process of bills becoming laws).

¹⁸⁷ See 42 U.S.C. § 2000cc–5 (2017); *Guru Nanak Sikh Soc’y of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 991 (9th Cir. 2006). Currently, RLUIPA only defines the terms “claimant,” “demonstrates,” “Free Exercise Clause,” “government,” “land use regulation,” “program or activity,” and “religious exercise.” 42 U.S.C. § 2000cc–5.

¹⁸⁸ See 42 U.S.C. § 2000cc–5(7). RLUIPA defines religious exercise as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” and provides that “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” *Id.* The specific uses that satisfy this definition are not enumerated. See *id.*

¹⁸⁹ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 991; *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 548 (S.D.N.Y. 2006), *aff’d*, 504 F.3d 388 (2nd Cir. 2007) (*Westchester II*).

¹⁹⁰ See *Zecca*, *supra* note 81, at 277.

¹⁹¹ See *id.* at 276–77.

¹⁹² See 42 U.S.C. § 2000cc(a)(1); *Zecca*, *supra* note 81, at 276.

¹⁹³ See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (*Westchester III*); *Guru Nanak Sikh Soc’y*, 456 F.3d at 988–89; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003).

soning of several circuit and state court decisions.¹⁹⁴ Accordingly, Congress should amend RLUIPA to expressly state that a substantial burden occurs when:

an action, based on the totality of the circumstances, imposes such a restriction or limitation on religious exercise that either: (i) coerces adherents to alter their religious conduct in a way that significantly impedes their religious precepts, practices, or traditions; or (ii) renders the use of the land for religious exercise effectively impracticable.¹⁹⁵

This definition protects religious groups' rights in a way that is consistent with previous RLUIPA decisions.¹⁹⁶ Prong (i) ties the definition to the Supreme Court's traditional understanding of what constitutes a substantial burden as originally expressed in *Sherbert*.¹⁹⁷ The Court's traditional interpretation emphasized that actions that coerced or pressured an individual to abandon or act contrary to their religion imposed a substantial burden.¹⁹⁸ Where government actions result in such coercion, it clearly constitutes a substantial burden.¹⁹⁹ Given the reality that land use regulations often will not involve such clear instances of choosing between religious precepts and government approval, the definition should also include prong (ii).²⁰⁰

Under prong (ii), a substantial burden would be found—even if prong (i) was not satisfied—so long as the government action would render the use of the land for religious exercise effectively impracticable.²⁰¹ By allowing a substantial burden to be found when the use of the land for religious exercise is made effectively impracticable, the proposed definition takes a more pragmatic approach by focusing on the effect of the land use decision.²⁰²

¹⁹⁴ See *Guru Nanak Sikh Soc'y*, 456 F.3d at 988–89; *Midrash Sephardi*, 366 F.3d at 1227; *Civil Liberties for Urban Believers*, 342 F.3d at 761.

¹⁹⁵ See *Guru Nanak Sikh Soc'y*, 456 F.3d at 988–89 (explaining the burden must be “significant” to be substantial and considering external circumstances in the analysis); *Midrash Sephardi*, 366 F.3d at 1227 (holding a substantial burden “directly coerces the religious adherent to conform his or her behavior accordingly”); *Civil Liberties for Urban Believers*, 342 F.3d at 761 (explaining substantial burdens occur where the use of the land is rendered effectively impracticable).

¹⁹⁶ See *Trinity Assembly of God*, 962 A.2d at 428 (outlining differing courts' definitions of substantial burden).

¹⁹⁷ See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

¹⁹⁸ *Id.*

¹⁹⁹ See *id.*

²⁰⁰ See *Westchester III*, 504 F.3d at 348–49 (explaining land use contexts often do not involve the dilemma described in *Sherbert*).

²⁰¹ See *Civil Liberties for Urban Believers*, 342 F.3d at 761 (providing the effectively impracticable language).

²⁰² See *id.*

The proposed definition, as a whole, requires a “substantial burden” to be determined based on the totality of the circumstances.²⁰³ An analysis of a substantial burden cannot view the government action in isolation and ignore the factual setting in which such decisions take place.²⁰⁴ This analysis will ensure that municipal governments cannot accomplish discriminatory ends through carefully crafted actions that might not constitute a substantial burden under a less rigorous definition.²⁰⁵

Moreover, by focusing on the municipal action’s impact on the likelihood that a religious group will be able to use the land for religious exercise, the proposed definition eliminates the heightened showing requirements necessary in some circuits.²⁰⁶ For example, religious groups should not have to show that municipal government acted arbitrarily and capriciously as the Second Circuit in *Westchester III* implied.²⁰⁷ These required showings are an advantage for local governments and make it harder for religious groups to establish a substantial burden because such showings are often difficult to make.²⁰⁸ Likewise, though the Ninth Circuit’s willingness in *Guru Nanak* to consider the factual reality beyond the particular municipal action at issue is admirable, religious groups should not have to exhaust all other options and show that a particular plot of land and building project is the only way they would be able to exercise their religion.²⁰⁹

The proposed definition removes these hurdles and makes it easier for religious groups to show that a municipal action imposes a substantial burden.²¹⁰ Under the definition, when a local government’s decision renders the use of the land for religious exercise effectively impracticable, it has imposed a substantial burden.²¹¹ This definition would protect religious groups such as the Islamic Society because the town of Dudley’s denial of the cemetery rendered the use of

²⁰³ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 991 (finding the fact that the land use decision in question was the second denial of the proposal made it very unlikely the temple would be built and viewing that finding as key to the substantial burden determination).

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See *Westchester III*, 504 F.3d at 350–51; Zecca, *supra* note 81, at 277.

²⁰⁷ See 504 F.3d at 350–51 (finding proof that the municipality acted arbitrarily or capriciously relevant to substantial burden claim).

²⁰⁸ See *id.* at 351.

²⁰⁹ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 989–91. In *Guru Nanak Sikh Society*, the Ninth Circuit held that a denial of a special permit for a proposed Sikh temple was a substantial burden because the local government had denied the groups’ prior permit proposal. *Id.* In that case, it was the last available parcel of land in the area reasonably suited for the project, and the municipality’s failure to give a reasoned explanation for the denials indicated the arbitrary and capricious nature of their actions. *Id.* Therefore, the denial in that instance was a substantial burden because “to a significantly great extent[, it] lessened the possibility that future [special permit] applications would be successful.” *Id.* at 989.

²¹⁰ See *id.* at 989–91.

²¹¹ See *Civil Liberties for Urban Believers*, 342 F.3d at 761.

the land for religious exercise—here its use as a Muslim cemetery—effectively impracticable.²¹² Therefore, under the proposed definition, the town imposed a substantial burden and RLUIPA would require a court to overturn the action.²¹³

Although the proposed definition bolsters the rights of religious groups to build on their land, it still leaves room for a municipality to control how its land is used.²¹⁴ Denial of a project with a request for more information might not necessarily constitute a substantial burden where the denial is temporary and is imposed to require the group to respond to a problem or provide more information as to the proposal's impact.²¹⁵ Moreover, a municipality would still be able to deny a project outright provided it could satisfy RLUIPA's strict scrutiny requirements.²¹⁶ Therefore, while the proposed definition secures the rights of religious groups, it does not totally muzzle municipal land use powers.²¹⁷

B. Enumerating What Land Uses Constitute Religious Exercise

Defining what constitutes a substantial burden will help resolve the disparities between the circuit court definitions.²¹⁸ Nonetheless, to firmly protect religious groups against land use mechanisms targeting their practices, Congress should also amend RLUIPA to include a more expansive and clear definition as to what activities constitute religious exercise.²¹⁹ RLUIPA, as currently formulated, defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief” and explains “the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”²²⁰

²¹² See *id.*; *supra* notes 8–28 and accompanying text (describing how the town of Dudley's actions before the eventual settlement prevented the Islamic Society from using the land for religious exercise).

²¹³ See *Civil Liberties for Urban Believers*, 342 F.3d at 761.

²¹⁴ See *Westchester III*, 504 F.3d at 349.

²¹⁵ See *id.* (noting where “there is a reasonable opportunity for the institution to submit a modified application, the denial does not place substantial pressure on it to change its behavior and thus does not constitute a substantial burden on the free exercise of religion”).

²¹⁶ See 42 U.S.C. § 2000cc(a)(1) (providing the exception to the general rule when the government can satisfy the strict scrutiny test). If, for example, a court determined that concerns over groundwater contamination from bodies buried without caskets was indeed a compelling government interest, a municipality might be able to prevent that specific practice. See *id.* That being said, the municipal action would still have to be the least restrictive means of furthering that compelling government interest. See *id.*

²¹⁷ See *id.*

²¹⁸ See *Trinity Assembly of God*, 962 A.2d at 428.

²¹⁹ See 42 U.S.C. §§ 2000cc–5(7).

²²⁰ *Id.*

The current definition of religious exercise is already fairly broad, but it is nevertheless problematic.²²¹ It potentially protects a broader range of religious exercise than that recognized by the United States Supreme Court in its traditional First Amendment jurisprudence and some lower courts have been reluctant to adopt such a broad interpretation.²²² Furthermore, the lack of an enumerated list of what activities Congress intended to qualify as religious exercise inevitably allows courts to disagree as to whether a particular activity should be protected.²²³

Congress can easily remedy these potential issues by amending RLUIPA to enumerate certain activities that constitute religious exercise.²²⁴ Specifically, Congress should amend RLUIPA's definition section outlining "religious exercise" to add:

(C) Examples: Examples of the types of land uses that constitute religious exercise include, but are not limited to: (i) Churches, temples, mosques or other houses of worship used for hosting regular religious services. (ii) Schools or other education facilities used for religious education or practice or inextricably integrated with, and necessary for providing religious education and practice. (iii) Cemeteries, burial grounds, and other places used for the interment, storage, or disposal of human remains in accordance with religious tradition, practice, or belief. (iv) Any other use in accordance with the terms and provisions of subsection 7, parts (A) and (B) of this section.²²⁵

The enumeration of these uses would not result in any significant changes to the types of uses that qualify for RLUIPA's protection, as courts have already recognized many of these activities as religious exercises.²²⁶

Like the proposed definition of substantial burden, the proposed amendment to the definition of religious exercise would serve to reduce uncertainty, streamline litigation, and dissuade municipal governments from unduly delaying or denying religious building projects.²²⁷ Given the inherently expansive nature of RLUIPA's current formulation of religious exercise, courts have been reluctant to adopt the most expansive definition and inconsistent as to what types of

²²¹ See *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Town of Newtown*, 941 A.2d 868, 888–89 (Conn. 2008) (explaining the gap between RLUIPA's language and the Supreme Court's understanding of religious exercise).

²²² See *id.* (declining to use the broader construction).

²²³ See 42 U.S.C. §§ 2000cc–5(7). Currently, cemeteries are not listed and courts could therefore disagree as to whether they are a religious exercise. See *id.*

²²⁴ See *id.*

²²⁵ See *id.*; *Westchester II*, 417 F. Supp. 2d at 545–46.

²²⁶ See *Westchester III*, 504 F.3d at 348 (religious school); *Guru Nanak Sikh Soc'y*, 456 F.3d at 992 (Sikh temple); *Roman Catholic Diocese*, 128 F. Supp. 3d at 566, 586 (cemeteries).

²²⁷ See *Guru Nanak Sikh Soc'y*, 456 F.3d at 991.

activities qualify.²²⁸ By explicitly identifying the most common land uses that courts have deemed religious exercises, the proposed amendment will help alleviate some of the confusion.²²⁹ Additionally, the proposed definition would help streamline litigation by providing courts with clear guidelines to follow.²³⁰ When the specific land use in question is defined in the statute, the issue of whether a certain use constitutes a religious exercise would likely not need to be litigated in any significant detail.²³¹ Rather, the issue could be adjudicated early on at the summary judgment stage, allowing RLUIPA litigation to be completed much more efficiently.²³² Furthermore, delineating what is a religious exercise would help prevent courts from blending the analysis between “religious exercise” and “substantial burden.”²³³ Finally, if municipalities knew that a proposed land use clearly qualifies as a religious exercise, they would be less likely to deny or delay a proposed religious building project in the hopes that a court would rule in their favor.²³⁴ All of these benefits would come without any significant substantive changes to the law.²³⁵

Defining “religious exercise” to expressly include cemeteries would help ensure that religious groups such as the Islamic Society have an adequate place to bury their dead—the right that RLUIPA was intended to protect.²³⁶ The limited litigation in federal courts over whether cemeteries qualify as religious exercise offers a promising outlook that they would ultimately qualify for RLUIPA’s protections under its current definition.²³⁷ Nonetheless, Congress should still include cemeteries in a list of examples of religious exercise to settle the issue once and for all.²³⁸

²²⁸ See *Westchester III*, 504 F.3d at 347 (explaining situations where building projects would and would not qualify as religious exercise).

²²⁹ See *id.* at 348 (religious school); *Guru Nanak Sikh Soc’y*, 456 F.3d at 992 (Sikh temple); *Roman Catholic Diocese*, 128 F. Supp. 3d at 566, 586 (cemeteries).

²³⁰ See *Westchester III*, 504 F.3d at 347.

²³¹ See *id.*

²³² See *id.*

²³³ See *id.* at 349 (explaining there must be a “close nexus between the coerced or impeded conduct and the institution’s religious exercise for such conduct to be a substantial burden on that religious exercise”).

²³⁴ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 992.

²³⁵ See *id.*

²³⁶ See *Roman Catholic Diocese*, 128 F. Supp. 3d at 585–86.

²³⁷ See *id.* (ruling restrictions on cemetery proposal established a *prima facie* case of a substantial burden).

²³⁸ See Boeri, *Battle Continues*, *supra* note 17 (noting in the dispute between the town of Dudley and the Islamic Society, the town counsel initially expressed doubts that a cemetery could be considered a religious use).

*C. Imposing a Penalty on Local Governments for Unduly Delaying
Religious Land Use Applications*

Even if Congress amends RLUIPA to provide a definition for “substantial burden” and supplements the definition for “religious exercise,” the rights of religious groups to construct their building projects will not be totally secure.²³⁹ Local governments have the power to unnecessarily delay or prolong land use proceedings to impose a pseudo war of attrition against building proposals the municipality opposes.²⁴⁰ The ability of local governments to undertake stalling tactics is an inherent consequence of a framework that places power to decide how the community’s land is to be used in the hands of local politicians who are especially interested in responding to the will of their constituencies.²⁴¹ If a particular community, perhaps one inflamed by anti-Muslim sentiments, decided they did not want a Muslim building project to be approved, local officials might not be able to resist the pressure to deny the project.²⁴²

Despite the fact that a local government would likely lose the eventual battle in court and be required to approve the building project based on RLUIPA’s merits, religious groups would face a long, arduous, and expensive road to get a favorable court decision.²⁴³ Before a dispute gets to court, municipal land use regulatory bodies can hold repeated hearings, demand complex and incredibly detailed factual reports, make temporary denials of a proposal, and require re-submissions of modified proposals—all before outright denying the project.²⁴⁴ Once a case enters the court system, it faces further delays because of crowded dockets and clogged judicial calendars.²⁴⁵ The complete process for a religious group to overcome a hostile municipal government in the court system can take months or even years to resolve and often requires a group to spend untold amounts of money in legal fees and other required expenses.²⁴⁶ Realistically, some religious groups simply do not have the resources or time to undertake

²³⁹ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 991 (recognizing government’s actions can result in “delay, uncertainty, and expense”).

²⁴⁰ See *id.* (noting local land use bodies can require religious groups seeking to build to submit multiple proposals).

²⁴¹ See McElwee, *supra* note 125 (explaining how politicians respond to the majority of voters).

²⁴² See *id.*

²⁴³ See *Guru Nanak Sikh Soc’y*, 456 F.3d at 989–90 (deciding in favor of the religious group but only after the local government had required the group to submit multiple proposals).

²⁴⁴ See *id.*; *Zoning Board Video*, *supra* note 8 (requiring the Islamic Society to submit a more detailed proposal).

²⁴⁵ See *Westchester III*, 504 F.3d at 346.

²⁴⁶ See *id.* at 345–47. It took the Westchester Day School over six years to reach a resolution in its attempt to obtain a permit to construct an addition to its Orthodox Jewish school. *Id.* The saga involved the initial district court decision, review by the Second Circuit, remand to the district court, and then finally a second review by the Second Circuit where the court ultimately ordered the town to issue the building permit. *Id.*

such a lengthy and expensive process, which allows municipalities to accomplish discriminatory objectives even if they would ultimately lose in court.²⁴⁷

To account for this concerning reality, Congress must also amend RLUIPA to create a penalty for such deliberate stalling tactics.²⁴⁸ The proposed amendment must be sufficiently forceful and contain such negative consequences that municipalities would be dissuaded from engaging in these tactics.²⁴⁹ Therefore, the amendment should allow religious groups to recover the costs incurred in supporting their proposal, as well as punitive damages.²⁵⁰ Congress should phrase the amendment to read:

wherever a religious group can show, by a preponderance of the evidence, a government intentionally delayed, stalled, or otherwise prolonged the land use regulatory process in opposition to a valid use of land for religious exercise, such religious group shall be entitled to recover the expenses, including attorney's fees, made in furtherance of the proposal, as well as punitive damages.²⁵¹

A remedy that merely requires a municipality to approve a religious group's project—which is the current remedy under RLUIPA—does not go far enough to ensure that religious groups will actually be protected from discrimination by local governments.²⁵² The proposed penalty addresses this shortcoming of RLUIPA's current formulation.²⁵³ Although the proposed penalty requires additional judicial proceedings and may further delay a given controversy's ultimate resolution, the possible benefit to religious groups, as well as the effect on the conduct of local government, is worth the additional time.²⁵⁴ Moreover, the other proposed amendments will make RLUIPA litigation more streamlined and efficient.²⁵⁵ Therefore, the additional proceedings required for the penalty amendment may not necessarily result in a net increase of litigation.²⁵⁶

Without an additional threat of punishment, local governments will continue to exploit the land use regulatory framework to block projects for discriminatory reasons.²⁵⁷ The proposed penalty will ensure that municipal governments follow the law and honor the rights of religious groups to exercise their reli-

²⁴⁷ See *Westchester II*, 417 F. Supp. 2d at 572 (explaining that prolonged land use proceedings strain the resources of religious groups).

²⁴⁸ See *Guru Nanak Sikh Soc'y*, 456 F.3d at 991.

²⁴⁹ See *id.*

²⁵⁰ See *id.*

²⁵¹ See 42 U.S.C. § 2000cc; *Guru Nanak Sikh Soc'y*, 456 F.3d at 991.

²⁵² See 42 U.S.C. § 2000cc–2(a); *Westchester II*, 417 F. Supp. 2d at 572 (explaining that in a prolonged land use dispute, “justice so long delayed is justice denied”).

²⁵³ See *Westchester II*, 417 F. Supp. 2d at 572.

²⁵⁴ See *Guru Nanak Sikh Soc'y*, 456 F.3d at 991.

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See *id.* at 988–89.

gion.²⁵⁸ The overall effect of these proposed amendments will help to secure the rights of Muslims to build cemeteries and other religious structures, curb discrimination by local governments, and give Muslims a chance to recover expenses furnished in fighting discriminatory decisions.²⁵⁹

CONCLUSION

Muslims attempting to build cemeteries in the United States face significant challenges arising from the convergence of several unfortunate realities. The American land use regulatory framework is executed at the local level by municipal governments, entities that by and large do not include or represent the wishes of Muslims. Elected land use regulatory officials are held accountable to the interests of their constituents, who, fueled by pervasive anti-Muslim sentiments, do not want Muslims in their communities. To protect religious land uses, Congress passed RLUIPA to prevent local governments from engaging in land use actions that impose a substantial burden on religious exercise. Nonetheless, given the elusive nature of the meanings of these terms, the lack of guidance from the United States Supreme Court, and the statutory language, lower courts created their own definitions. These problems, in conjunction with the lack of case law on RLUIPA's applicability to cemeteries, have led to unpredictable and unsatisfactory results for Muslim groups seeking to build cemeteries.

To protect the rights of Muslims and other religious groups to build cemeteries and other religious structures, Congress must amend RLUIPA. Congress needs to provide a definition for what constitutes a substantial burden that reflects both the Supreme Court's traditional jurisprudence as well as the reality of a land use decision's impact by viewing municipal government actions in light of the totality of the circumstances. Congress also needs to expand the existing definition of religious exercise to include examples of the specific land uses including cemeteries, which qualify for RLUIPA's protections. These definitions will help to streamline and even perhaps dissuade litigation. Finally, Congress must amend RLUIPA to include a penalty for local governments that unduly delay or prolong land use proceedings in an attempt to erode the willpower, time, and resources of religious groups.

It is the unfortunate reality of our time that American Muslims face unfair treatment, discrimination, and violence. Federal law cannot comprehensively guarantee that Muslims can live peaceful lives free from discrimination and ostracism because of their religion, but it can guarantee that they can do so in death. Changes to RLUIPA can ensure that Muslim organizations such as the Islamic Society can achieve their last wishes: to be buried according to the tradi-

²⁵⁸ *See id.*

²⁵⁹ *See Zecca, supra* note 81, at 276–77.

tions of their faith in the land they have called home, and in so doing—to rest in peace.

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