Apples to Apples: Yes, There Is (Or Can Be!) a Unified Approach to RLUIPA Ripeness

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IN THE PAST DECADE OR SO, MANY COURTS AND SCHOLARS have addressed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and its application to local land use decisions.[1] This article addresses a threshold RLUIPA inquiry: when a religious plaintiff is challenging a local government's decision, at what point is the claim "ripe" for review? Different federal circuit courts have addressed this question differently, causing confusion among courts and parties, but a close reading of these cases reveals that a unified framework for analysis is available.

Congress passed RLUIPA as a response to a string of First Amendment decisions by the Supreme Court that Congress deemed insufficiently protective of Americans' right to free exercise of religion. In

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1. I leave for others the ongoing discussion of RLUIPA's alleged benefits, costs and constitutionality, and related legal issues. *See, e.g.,* K. A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633 (2004); A. C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485 (2009); R. W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 287 (2008) (promoting a more sensitive position in constitutional law toward the internal governance of religious institutions); M. A. Hamilton, *The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional*, 2 ALB. GOV'T L. REV. 366 (2009); I. C. Lupu & R. W. Tuttle, *The Forms and Limits of Religious Accommodation: the Case of RLUIPA*, 32 CARDOZO L. REV. 1907 (2011); A. J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41 (2010); T. F. Mark, *Rock Mountain Shootout: Free Exercise & Preserving the Open Range*, 98 GEO. L.J. 1859, 1871–72, 1882 (2010); M. W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); J. L. Monk & R. H. Tyler, *The Application of Prior Restraint: An Alternative Doctrine for Religious Land Uses*, 37 U. TOL. L. REV. 747 (2006); C. Serkin & N. Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1 (2009) (arguing that RLUIPA should not apply to condemnation proceedings).

particular, Congress objected to the Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith* that "if prohibiting the exercise of religion . . . is not the object of the [governmental action] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[2]

This holding provided little to no protection to religious persons if they were subject to a law of general applicability.[3] At least facially, land use ordinances passed by local governments are laws of general applicability. Congress was concerned, therefore, that religious land uses would be subject to heavy control by local authorities, depriving citizens of their right to freely exercise religion through the use and development of their land.[4]

RLUIPA provides in relevant part: "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 regulation can survive heightened scrutiny.[5] RLUIPA thus greatly increases the protection provided to religious plaintiffs who allege free-exercise violations under color of local land use regulations.[6] But before any claim can be heard in federal court, it must be ripe.

2. 494 U.S. 872, 878 (1990).

3. *See id.* at 891–93 (O'Connor, J., concurring in the judgment), 907 (Blackmun, J., dissenting).

4. *See, e.g.,* 146 CONG. REC. S6687–6690 (daily ed. July 13, 2000) (statement of Sen. Orrin Hatch, Utah) (introducing the bill with the intent to "provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith"); 146 CONG. REC. E1564–1567 (daily ed. Sept. 22, 2000) (statements of Rep. Henry Hyde, Ill.) (citing many examples of religious congregations attempting to exercise religion through the use of land).

5. 42 U.S.C. § 2002cc (a)(1) (2012). The prohibition applies if certain conditions are met, to wit:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

§ 2002cc (a)(1).

6. This upended the Supreme Court's decision in *Smith* as applied to land use and institutionalized persons cases. Congress had tried this with an earlier statute called "RFRA" (Religious Freedom Restoration Act), but RFRA's provisions that applied to the states fell victim to the Supreme Court in *City of Boerne v. Flores*, 527 U.S. 507 (1997). On the other hand, § 3 of RLUIPA (42 U.S.C. § 2002cc-1) survived a fa-

Ripeness has traditionally served the specific purpose of "prevent [ing] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[7] In *Abbott Labs*, the Court held that the issuance of final regulations was a "final decision" for ripeness purposes because "the expected conformity to them causes injury cognizable by a court of equity."[8] Ripeness has a two-prong framework, "requiring [the court] to evaluate both [(1)] the fitness of the issues for judicial decision and [(2)] the hardship of the parties of withholding court consideration."[9] Under this framework, some courts have viewed First Amendment-related complaints to ripen more readily than others "because of the fear of irretrievable loss."[10]

In the landmark ripeness case of *Williamson County v. Hamilton Bank*, the Supreme Court provided that a takings claim would only be "ripe" if the claimant had first obtained a "final decision" from the local land use authorities.[11] In doing so, the Court articulated a new and efficient ripeness test, which we will call the "finality rule." Following *Williamson County*, many circuit courts have imposed the finality rule on virtually all land-use-related complaints. Thus, before any land-use litigation can become ripe for federal judicial review, the local authorities must have made a final decision, which may require further action on the part of the plaintiff—such as applying for

cial challenge in *Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005) over the objection that it has the effect of advancing religion. No circuit court has yet held § 2002cc (a) unconstitutional.

7. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

8. *Id.* at 150.

9. *Id*. at 149. "The fitness prong of the ripeness test has both jurisdictional and prudential components. . . . The hardship prong, by contrast, is 'wholly prudential.' " Roman Catholic Bishop v. City of Springfield, 724 F.3d 78, 89–90 (1st Cir. 2013). This is not to be confused with what are sometimes called the two "prongs" of taking-clause ripeness analysis: finality and pursuit of compensation in state court. *See, e.g.*, Murphy v. New Milford Zoning Comm'n., 402 F.3d 342, 349 (2d Cir. 2005).

10. New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499–1500 (10th Cir. 1995) ("customary ripeness analysis . . . [is] relaxed somewhat in circumstances such as this where a facial challenge, implicating First Amendment values, is brought" because of the "chilling effect" on free expression); Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 290–91 (2d Cir. 2002) (citing *Gonzales* to support a holding that ripeness requirements are relaxed where there is a claim of retaliation under the First Amendment); *Murphy*, 402 F.3d at 350–51 (Williamson Cnty. v. Hamilton Bank, 473 U.S. 172 (1985) should be "cautiously applied" to RLUIPA claims because First Amendment-related complaints deserve relaxed ripeness analysis); *Bishop*, 724 F.3d at 90 n.10; Miles Christi Religious Order v. Twp. of Northville, 629 F.3d 533, 541 (6th Cir. 2010).

11. 473 U.S. 172 (1985). *Williamson County* included a second ripeness requirement that is inapplicable to non-takings cases, namely the requirement that plaintiffs seek compensation for their alleged taking in state court.

variances—after the local authorities first deny the plaintiff's permit or other request. In an oft-cited passage from the Second Circuit's decision in *Murphy v. New Milford Zoning Commission*, the court outlined four policy rationales for applying the finality rule to land use cases:

> First, . . . requiring a claimant to obtain a final decision from a local land use authority aids in the development of a full record. Second, and relatedly, only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel. Third, a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes. . . . [Fourth, r]equiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution.[12]

And yet, the court in *Murphy* said that it would refuse to impose the finality requirement if a RLUIPA plaintiff could show that it had suffered immediate injury, urging caution in applying *Williamson County* "mechanistically" to avoid inequitable results.[13] This article will explore this and other approaches to the finality rule in RLUIPA litigation.

I. The *Williamson County* Decision

While now often applied to RLUIPA cases, the finality rule hails from *Williamson County*, which was a regulatory takings case. In that case the Court determined that a takings claim was not ripe for judicial review because no final decision had been reached by the local government; the developer, a bank, had failed to take advantage of available variance procedures after the county planning commission denied its permit application.[14]

The bank had acquired the subject property through foreclosure from an earlier developer who had been working with the planning commission for several years.[15] The bank, however, ran afoul of amended zoning regulations, which the commission applied to the property even though it had preliminary approval under the previous regulations.[16] Refusing to seek a variance until their plat was approved,[17] the bank sued, claiming that the commission's interpretation

12. 402 F.3d at 348; s*ee* Guatay Christian Fellowship v. Cnty. of San Diego, 670 F.3d 957, 977 (9th Cir. 2011); Grace Cmty. Church v. Lenox Twp., 544 F.3d 609, 615 (6th Cir. 2008).

13. *Murphy*, 402 F.3d at 349, 351–53; *accord Miles*, 629 F.3d at 541.

14. *Williamson Cnty.*, 473 U.S. at 181, 188–91. There was no occasion there to apply the vested rights doctrine.

15. *Id.* at 176–81.

16. *Id.* at 179–82.

17. *Id.* at 188–90.

of the zoning laws would force the bank to sustain a $1 million loss on the development, thus denying the bank any economically feasible use of the property.[18] Without reaching the merits of the case, the Supreme Court ordered the lower court to dismiss the lawsuit as premature.[19]

The Court reasoned that the claim was not ripe for adjudication because, despite the denial of the bank's permit, it was unclear how the bank would be allowed to develop the land. Only "resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow [the bank] to develop the subdivision in the manner [the bank] proposed," given that the county board of zoning appeals could have granted variances to many of the commission's objections to the bank's plan.[20] Thus, "the jury's verdict indicates only that it found that [the bank] would be denied the economically feasible use of its property if it were forced to develop the subdivision" as the commission desired.[21] It might have been a different story, according to the Court, if a variance, which actually had been available and which the bank did not seek, allowed a different development.[22] Thus, it was unclear whether the bank had suffered any judicially cognizable injury.[23] Because a variance was possibly available, the claim of a taking was only abstract and hypothetical, and the Commission's position was not definite.[24]

II. A Unified Approach to RLUIPA Ripeness

Turning to RLUIPA, there at first appears to be a wide divergence in approach to the finality rule among the federal circuits. The First, Fifth, and Eleventh Circuits have all explicitly reserved decision—thus, whether the finality rule applies and in what form remains an open question in these circuits.[25] The Second and Sixth Circuits

18. *Id.* at 182, 191.
19. *Id*. at 200.
20. *Id*. at 188, 193.
21. *Id.* at 182–83, 191.
22. *Id*. at 191. The RLUIPA case law often focuses on whether or not the religious plaintiff has obtained a variance, but to say a variance application is always dispositive of ripeness under the finality rule is an oversimplification. *See Guatay*, 670 F.3d at 982–83 (claim unripe because plaintiff could have negotiated the terms of the permit process with the defendant County).
23. *See, Williamson County*, 473 U.S. at 203 (Stevens, J., concurring in the judgment) ("We do not yet know whether the harm inflicted by the zoning regulations is severe enough to lead to the conclusion that the zoning regulations 'go too far.'" (referring to Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922))).
24. *Id.* at 200 (majority opinion).
25. There are no reported decisions from the Fourth, Seventh, Tenth or Twelfth Circuits at the time of this writing.

have decided that it applies, but with the caveat that plaintiffs may avoid its application if they meet a threshold showing of immediate injury. Finally, the Third and Ninth Circuits have applied the finality rule immediately.

While at first it may appear that there is a circuit split to resolve, a closer review shows that these courts are all analyzing the question of RLUIPA ripeness in more or less the same way. They are asking the same question: whether it is prudent for a federal court to exercise jurisdiction over the given case without a final decision from a local land use authority. The courts' seemingly divergent approaches to answering that question can (and should) be reconciled using traditional ripeness principles. Furthermore, the framework proposed here, based largely on the Second Circuit's holding in *Murphy*, provides the best framework for a unified approach.

But we must first contextualize our discussion: what does "finality" actually require? The essence of finality jurisprudence in land use matters is that the plaintiff must allow the local authority to put itself definitively on the record as to its treatment of the plaintiff's property under local law before filing suit.[26] This rule serves valuable purposes under traditional ripeness inquiry, but it does not encompass every aspect of land use law and RLUIPA. Many courts seem to have recognized that, despite its utility, the finality rule by itself remains an imperfect fit with RLUIPA.[27] Where the requirement of a "final decision" is an appropriate condition precedent in regulatory takings cases, its heedless application to RLUIPA cases can sometimes serve only to perpetuate the alleged violations.[28] This is because impingements on the rights RLUIPA protects can be judicially cognizable long before any "final decision" comes down. Hence, application of the "final decision" rule in every RLUIPA case would run contrary to RLUIPA's remedial purpose.

This leads smoothly into the next preliminary point: much of the law in this area is about prudential (that is, "discretionary") decision-

26. *See* Congregation Anshei Roosevelt v. Planning & Zoning Bd., 338 F. App'x 214, 218 (3d Cir. 2009), and *Guatay*, 670 F.3d at 981. The substance of this requirement is not without controversy—see the majority and dissenting opinions in *Miles Christi*, 629 F.3d at 537–42, 544–54 (Bachelder, C.J., dissenting)—but I assume that in most cases it is relatively clear what a final decision looks like.

27. *See, e.g., Murphy*, 402 F.3d at 350 (the finality rule "is a fact-sensitive inquiry that *may*, *when circumstances warrant*, be applicable to various types of land use challenges) (emphasis added).

28. Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, 727 F.3d 1349, 1357 (11th Cir. 2013).

making in fact-driven cases.[29] After all, each land use permit application and its review by the local zoning authorities are driven by factors that are, by definition, unique to each parcel and to each community. Thus, it is impossible in this area to do two things that lawyers love doing: (1) say one court was clearly "right" and the other was clearly "wrong", and (2) create an all-inclusive analytical framework for these cases. This is because no two RLUIPA cases have been, or probably ever will be, the same or even similar enough to corral them comfortably into one pen. Local economics and redevelopment,[30] angry parishioners,[31] local schisms,[32] stingy neighbors,[33] over-zealous enforcement officials,[34] and out-and-out bigotry[35] all contribute to bringing RLUIPA cases before federal district courts. Thus, what follows is not a be-all or end-all analysis, but the beginning of a discussion on how federal courts and parties can all start explicitly looking at RLUIPA ripeness questions through the same lens.

Let us first examine the most pertinent court decisions on RLUIPA ripeness in the light most favorable to finding a coherent and unified approach to the question.

A. *Some Courts' Hesitancy to Apply the Finality Rule*

One could say that the First, Fifth, and Eleventh Circuits have all held against the finality rule, but it is more correct to say that they rightly waited to impose the rule until the opportune moment, when the right case came along. The relevant cases are *Roman Catholic Bishop v. City of Springfield*,[36] from the First Circuit ("*Bishop*"), *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*,[37] from the Eleventh Cir-

29. Roman Catholic Bishop v. City of Springfield, 724 F.3d 78, 89–90 (1st Cir. 2013). Ripeness is a legal determination—*see Temple*, 727 F.3d at 1356—but the word "discretionary" suggests otherwise, and the landscape appears to be dotted with discretionary decision-making. It does not seem possible to reconcile this perception with the prevailing standard of review courts of appeals apply to prudential ripeness decisions by district courts. It may be that prudential ripeness (as distinguished from jurisdictional ripeness) functions better as a discretionary analysis subject to abuse of discretion review, rather than *de novo* review, on appeal.

30. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1209–15 (C.D. Cal. 2002).

31. *Bishop*, 724 F.3d at 86.

32. *Temple*, 727 F.3d 1349 at 1351–1352.

33. St. Vincent de Paul Place, Norwich, Inc. v. City of Norwich, 535 F. App'x 57 (2d Cir. 2013).

34. *Miles Christi*, 629 F.3d at 535–36, 340 ("Northville thus far appears to have an undeveloped sense of the concept of religious liberty.").

35. *Temple*, 727 F.3d at 1351–52 n.1.

36. 724 F.3d 78 (1st Cir. 2013).

37. 727 F.3d 1349 (11th Cir. 2013).

cuit ("*Temple*"), and *Opulent Life Church v. City of Holly Springs*, from the Fifth Circuit ("*Holly Springs*").[38]

In *Bishop*, the defendant City had designated a church belonging to the Roman Catholic Bishop of Springfield as the City's first-ever one-lot historic district, a designation made in response to a petition by angry parishioners to block the Bishop's plan to decommission the church.[39] The Bishop alleged, *inter alia*, that by the very act of passing the ordinance and thus blocking any change to the church building without the city's approval, the City had imposed a *per se* present burden on religious exercise.[40] Ruling upon the appeal of a motion for summary judgment, the court agreed that this claim was ripe without a final decision from the City.[41]

More interesting, though, is how the court handled the Bishop's other claims. The district court had bifurcated the Bishop's claims into those that dealt with the very act of enacting the ordinance, and those that dealt with its consequences.[42] As mentioned above, the court held that the first group of claims was ripe for review, but it also held that the second group was not ripe. In doing so, the court explicitly held that the finality rule was inapposite:

> We do not rely . . . on specialized Takings Clause ripeness doctrine. . . . While constitutional challenges to land use regulations may implicate *Williamson County*'s [finality rule] in some cases, we find no such necessary implication here. It is significant, in this respect, that the Ordinance is designed to apply only to the [Bishop's] Church, unlike the neutral and generally applicable zoning or environmental ordinances that are almost always at issue when a regulatory takings claim is alleged.[43]

But this is, under the facts at issue in *Bishop*, by no means a rejection of the finality rule.

In the first instance, the court held that it did not even have Article III jurisdiction over most of the Bishop's complaint.[44] The only claim over which it clearly had jurisdiction was the claim that the enactment of the ordinance itself burdened the Bishop's religious exercise.[45] Ar-

38. 697 F.3d 279 (5th Cir. 2012).

39. The technical term, under canon law, is "deconsecrate." Also, four months later, the city did the same thing to another parish church. *Bishop*, 724 F.3d at 86.

40. *Id.* at 92.

41. *Id*. The court went on to hold in favor of the city on the merits. *Id.* at 93.

42. *Id.* at 88.

43. *Id.* at 91–92. The second sentence is ambiguous. It seems, though, to suggest a greater solicitude to RLUIPA plaintiffs than a strict application of the finality rule would entail, consistent with other cases discussed *infra*. *Id.* at 90 n.10.

44. *See id.* at 90-93. In my view, it should have held that it lacked Article III jurisdiction over the "consequences" arguments.

45. *Id.* at 90–91.

guments concerning any other burden, as the court saw it, were not even live controversies because the Bishop had not made any attempts to renovate the church subject to the ordinance.[46] The court, in essence, saw those claims as hypothetical.[47] The court further held, with respect to the claims relating to the impact of the ordinance and its consequences, that for similar reasons it would refuse to exercise jurisdiction for prudential reasons.[48] Specifically, the court desired a fuller record and needed the City's definitive position on a definitive plan from the Bishop to determine just how consequential the ordinance would be upon the Bishop's religious practice.[49]

Thus, in *Bishop*, the finality rule was not necessary to the court's holding but would not have hurt, either. The court justified its ripeness decision on much the same grounds that other courts have justified application of the finality rule.[50] Hence, the court's decision was not incongruous with the finality rule; if anything, applying the finality rule would have been deciding too much in order to resolve the case. When, as in *Bishop*, the plaintiff does not show the court what it wants to do and how the city is preventing it from doing so, there is generally no live controversy to decide. And where there is a feeble and underdeveloped controversy before the court, requiring the plaintiff to go through the processes of obtaining a final decision would further the same ends as the court desired in *Bishop*, and with greater simplicity.

Temple was a simpler case; the court held that the finality rule was inapplicable where the plaintiff alleged that its injury was motivated by discriminatory animus. This did not, however, go without a favorable mention of the rule: "[W]e agree that [t]he *Williamson County* [finality rule] is . . . applicable to various types of land use challenges."[51] Despite its esteem for the rule, though, the court held as follows:

> In our view, where, as here, the plaintiff alleges that the mere act of designating his or her property historic as motivated by discriminatory animus, [the finality rule] is inappropriate because the injury is complete upon the municipality's initial act, and staying our hand would do nothing but perpetuate the plaintiff's alleged injury.[52]

46. *Id.* at 91.
47. *Id.*
48. *Id.*
49. *Id.* It is difficult to see how the same reasoning does not deprive those claims of the court's jurisdiction, let alone its prudential attention. The court did not explain its decision on this point in great detail.
50. *See id.*; *Murphy*, 402 F.3d at 348; *Miles Christi*, 629 F.3d at 538.
51. *Temple*, 727 F.3d at 1357 (quoting *Murphy*, 402 F.3d at 350).
52. *Id.*

In *Temple*, like in *Bishop*, the defendant City had designated the Temple as its first-ever one-lot historic district, meaning that the Temple could not renovate its worship space without the City's approval. The City's move arose out of a schism in the local Jewish community. The Temple alleged that the mayor, a former Temple congregant, had a "personal vendetta" against its orthodox sect of Sephardic Judaism and that he had called its members a "bunch of pigs."[53] In federal court, the Temple alleged, *inter alia*, that the historic-district designation violated RLUIPA. The court found that the allegations of discriminatory animus made the claim ripe because the very act of classifying the temple as a historic district was a judicially cognizable harm to the Temple.

The last of the highly pertinent cases is *Holly Springs*, where the Fifth Circuit held the finality rule inapplicable to a facial attack on a zoning ordinance.[54] In essence, when the plaintiff congregation challenged an ordinance as facially invalid, it alleged that, by the "very act" of enacting the ordinance, the City had burdened its religious exercise. Thus, *Holly Springs* closely resembles *Bishop* and *Temple*. But even though the finality rule was not at issue, the court still discussed it in a footnote.[55] One can conclude from this footnote that the court was well aware of the finality rule and acknowledged that it had applied it beyond its original context of regulatory takings cases.[56] If not ambiguous, this is a cautiously favorable treatment of the rule.

Together, these cases tell us that when the plaintiff alleges that the very act of enacting the ordinance burdens its religious exercise, the finality rule does not aid the inquiry because the claim is already cognizable. None of these cases, however, stand opposed to recognizing the finality rule in a case where it would help resolve a ripeness controversy.

B. *Some Courts' Immediate Application of the Finality Rule*

Where some courts have avoided taking a position on the finality rule until a case came before them requiring a decision on the issue, every

53. *Id.* at 1351–52 n.1; *see Leviticus* 11:7 (pigs are "unclean"). Sephardic Jews are a Jewish community descended from exiles that includes Justice Benjamin Cardozo. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 1 (1990).

54. Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 287 (5th Cir. 2012).

55. *Id.* at 287 n.7.

56. *Id.*

federal circuit court to have heard such a case has adopted the rule. Two have appropriately applied an intermediary threshold inquiry, where two others have, just as appropriately, applied the rule immediately. We will start with the second group. The most important of those cases are *Congregation Anshei Roosevelt v. Planning & Zoning Board*[57] from the Third Circuit[58] ("*Anshei*"), and *Guatay Christian Fellowship v. City of San Diego*[59] from the Ninth Circuit ("*Guatay*").

Anshei involved a small residential rabbi school called a "yeshiva"[60] on the property of a synagogue. Neighbors complained of increased traffic at the Synagogue and alleged late-night outdoor wanderings by the student rabbis.[61] This eventually led to a decision by the local zoning board, which required that the host Synagogue obtain a variance in order to continue operating the yeshiva.[62] The Synagogue was a pre-existing nonconforming use and so expansion of the Synagogue, according to the zoning board, could not be as of right.[63] The Synagogue disagreed and sued in federal court, alleging a RLUIPA violation, but the court eventually held that its claims were not ripe until it had applied for a variance.[64] Less important to the court than what the Synagogue and yeshiva were called under the local zoning laws was how the Borough intended to deal with the Synagogue's expanding use, and whether and to what extent this harmed the Synagogue.[65] This, said the court, was unclear until a variance application had developed a record for decision.[66]

Guatay's facts are slightly more complicated. The plaintiff congregation ("Guatay") had operated in a former recreation hall on the premises of a trailer park for over 20 years without a valid use permit.[67] Then one day, the defendant County issued a notice of violation

57. 338 F. App'x 214, 218 (3d Cir. 2009).

58. Under the Third Circuit's internal procedure rule 5.7, 3D CIR. R. 5.7, *Anshei* is not controlling precedent in that circuit, but it still aids the analysis of how courts approach the finality rule in the RLUIPA context. And while it remains the case that the Third Circuit has not "officially" adopted the finality rule, the *Anshei* court seemed in no doubt about the circuit's future direction.

59. 670 F.3d 957, 981 (9th Cir. 2011).

60. The defendant Borough characterized the Yeshiva as a "boarding school," but this belies the fact that only six rabbis-in-training lived there. I decline to adopt the Borough's terminology.

61. *Anshei*, 338 F. App'x at 215-16.

62. *Id.* at 216.

63. *Id.*

64. *Id.* at 217–18.

65. *See infra* note 99. This seems a laudable approach to the problem therein discussed.

66. *Anshei*, 338 F. App'x at 216–19.

67. *Guatay*, 670 F.3d at 960–64, 971–72.

to Guatay's host park, including Guatay's illegal use of the former hall in its complaint against the park.[68] Under fear of prosecution by the County, Guatay vacated its premises, stopped holding Wednesday services and began conducting its Sunday services in private homes.[69] Without attempting to appeal the notice of violation or apply for a use permit, Guatay sued for, *inter alia*, an alleged violation of RLUIPA.[70] An inspection conducted after the lawsuit was filed found the building in serious disrepair.[71] Guatay repaired the most serious violations and began the process of applying for a use permit, putting down a $14,597 deposit with the County, all while the federal litigation was pending.[72] In response, the County sent Guatay a "scoping letter" informing Guatay that, among other things, the County required an additional $35,653 in fees and extensive environmental testing. Guatay's expert determined that the testing would cost between $214,250 and $314,250 and take up to three years.[73] Without attempting to negotiate the scoping letter, Guatay moved for summary judgment.[74]

The court applied the finality rule to Guatay's RLUIPA claims[75] and found them unripe, but Guatay argued that—finality notwithstanding—forcing it to comply with the permit process was itself a substantial burden on its religious practice and, thus, it had a ripe claim.[76] The court disagreed because Guatay could have negotiated the terms of the permit process with the County to make it less onerous.[77] As the court said, "[h]ad [Guatay] pursued these remedies, we might have known its definitive, particularized obligations [to the County], but it has not done so."[78]

C. *Enter the Immediate Injury Test*

The Second and Sixth Circuits also recognize and use the finality rule, but they will not apply it if the plaintiff can satisfy a threshold inquiry

68. *Id.* at 964.
69. *Id.* at 965.
70. *Id.* at 965–66.
71. *Id.* at 966–67. The court reports life-threatening structural problems. Nothing suggests that Guatay claimed that this inspection was retaliatory as Murphy did in *Murphy*. *See infra* Part III.C.
72. *Guatay*, 670 F.3d at 967–68.
73. *Id.* at 968.
74. *Id.*
75. Guatay raised a host of other claims, all of which the court dispatched more or less summarily. *Id.* at 970–76, 983–87.
76. *Id.* at 968.
77. *Id.* at 982–83.
78. *Id.* at 982.

designed to avoid inequitable application of the rule. This "immediate injury test" is described most effectively in *Murphy v. New Milford Zoning Commission*[79] as "(1) whether the [plaintiff] experienced an immediate injury as a result of [the defendant's] actions and (2) whether requiring the [plaintiff] to pursue additional administrative remedies would further define [its] alleged injuries."[80] *Dougherty v. Town of North Hempstead Board of Zoning Appeals*,[81] and *Miles Christi Religious Order v. Township of Northville*,[82] both majority and dissenting opinions, are also pertinent.

Even a cursory review of RLUIPA case law shows that *Murphy* is the most-cited circuit court case in the field. It began when the plaintiffs, homeowners who hosted weekly prayer meetings at their suburban-neighborhood home in New Milford, Connecticut, were issued a formal cease-and-desist order by the local zoning enforcement officer.[83] Instead of applying for a variance, the Murphys sued New Milford in federal court, alleging that the cease-and-desist order, *inter alia*, violated their rights under RLUIPA.[84] Reversing the district court, which had granted a preliminary injunction, the Second Circuit held the claims unripe because the Murphys had not obtained a final decision from the zoning board.[85] But before the court determined whether the finality rule applied, it engaged in a preliminary analysis.

Noting that "the finality requirement is not mechanically applied"[86] and that "for First Amendment claims, 'the ripeness doctrine is somewhat relaxed,' "[87] the court applied the immediate injury test fashioned in a prior First Amendment case to RLUIPA ripeness claims.[88] Under this test, a claim that would otherwise be unripe for lack of a "final decision" can still be adjudicated by a federal court if "(1) . . . [the

79. 402 F.3d 342, 350 (2d Cir. 2005).

80. *Id.* at 351 (citing Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83 (2d Cir. 2002)) (holding the finality rule inapplicable to a claim of First Amendment retaliation under the same threshold inquiry). This is one of three "exceptions" to the finality rule mentioned in *Murphy*, but neither of the other two get any mention here (other than this note). They are, for reference's sake, the futility exception and the remedial exception. *Id.* at 349.

81. 282 F.3d 83 (2d Cir. 2002).

82. 629 F.3d 533 (6th Cir. 2010). The two cases upon which *Miles Christi* principally relied, from the Sixth Circuit, were *Grace Community Church v. Lenox Township*, 544 F.3d 609 (6th Cir. 2008), and *Insomnia Inc. v. City of Memphis*, 278 F. App'x 609 (6th Cir. 2008).

83. *Murphy*, 402 F.3d at 345.

84. *Id.* at 345.

85. *Id.* at 346, 354.

86. *Id.* at 349.

87. *Id.* at 350–51 (quoting *Dougherty*, 282 F.3d at 90).

88. *Id.* at 351.

plaintiffs] experienced an immediate injury as a result of [the municipality's] actions and (2) . . . requiring [the plaintiffs] to pursue additional administrative remedies would [not] further define their alleged injuries."[89]

The *Murphy* court relied on its earlier case of *Dougherty* in so holding. In *Dougherty*, the court held that the finality rule applied to a claim of retaliation under the First Amendment if the plaintiff could not satisfy the immediate injury test.[90] Dougherty had an ongoing conflict with North Hempstead about the use of his co-op bungalow.[91] After he filed a federal lawsuit to challenge North Hempstead's treatment of him, North Hempstead revoked Dougherty's building permit.[92] He then added a First Amendment count to his complaint, which North Hempstead challenged as unripe.[93] With rather laconic reasoning, the court said that "Dougherty's First Amendment claim of retaliation is based upon an immediate injury. Dougherty suffered an injury at the moment the defendants revoked his permit, and Dougherty's pursuit of a further administrative decision would do nothing to further define his injury."[94] For that reason, the court declined to apply the finality rule and found Dougherty's claim ripe.

The *Murphy* court found *Dougherty* applicable because "we do not believe it necessary to distinguish the RLUIPA claim from the First Amendment Free Exercise claim when it comes to our ripeness inquiry," citing *Dougherty* to the effect that First Amendment claims relax ripeness principles.[95] The court then determined that the Murphys had not suffered an "immediate injury" for two principal reasons. First, New Milford lacked authority to enforce its cease-and-desist order with fines and imprisonment, but instead had to go to court to do so. Second, an appeal of the cease-and-desist order to the Zoning Board would stay its enforcement.[96] It also found the record in need of development.[97] The court then applied the finality rule and noted that often "failure to pursue a variance prevents a federal challenge to a local land use decision from becoming ripe."[98]

89. *Id.* at 351 (citing *Dougherty*, 282 F.3d at 90).
90. *Dougherty*, 282 F.3d at 88–90.
91. *Id.* at 86–87.
92. *Id.* at 87.
93. *Id*.
94. *Id.* at 90.
95. *Murphy*, 402 F.3d at 350–51.
96. *Id.* at 351.
97. *Id.* at 351–52.
98. *Id.* at 353.

The other highly pertinent case, the Sixth Circuit's *Miles Christi* decision, is a far more complex and difficult case. This is because the majority and dissenting opinions disagree about the substance of the applicable zoning law.[99] Miles Christi, an international religious order ("the Order"), owned a home in a residential neighborhood where between five and 15 guests regularly attended worship meetings, to the ire of the neighbors.[100] For several years, neighbors complained to the Northville township, which eventually undertook surveillance of the Order's house, including patrolling a marked car past their property several times a day.[101]

Eventually, Northville contacted the Order and informed it that it was violating the town's parking ordinance because it had increased the intensity of its use and was now operating a church.[102] Northville asked the Order to describe the measurements of its worship space and the activities that occurred there so that Northville could determine the proper amount of required parking.[103] One of the priests responded by letter, offering to expand the driveway to provide more parking, and following this, several Order members met with Northville officials, including the Director of Community Planning.[104] There, the Director told the Order that it had to provide additional parking spaces in the back of its lot, but the Order said that complying was not feasible.[105]

99. *See* William Maker, Jr., *What Do Grapes and Federal Lawsuits Have In Common? Both Must Be Ripe*, 74 ALB. L. REV. 819 (2010). Attorney Maker highlights the importance of understanding (or misunderstanding) local law in making land use decisions in federal court. There may be no better illustration of his point, at least in the RLUIPA context, than the wildly divergent views of the local zoning code displayed by the two opinions in *Miles Christi*. No attempt is herein made to determine which view of Northville's zoning code was correct. The discussion of the dissent's view is longer only because the dissent is longer and more intricate than the majority opinion.

100. *Miles Christi*, 629 F.3d at 535–36.

101. *Id.*

> [I]t may be true that Northville thus far appears to have an undeveloped sense of the concept of religious liberty, as illustrated by this statement at oral argument: "[F]ootball parties and tailgate parties" do not change "the residential nature of the use; whereas, what they're doing here, they're doing religious education and they're worshipping." Not just the Framers of the Constitution but Congress itself has distinguished between the protections afforded these distinct activities: While the United States Code contains a Religious Freedom and Restoration Act and a Religious Land Use and Institutionalized Persons Act, one will search in vain for a Freedom to Watch Football on a Sunday Afternoon Act.

Id. at 540.

102. *Id.* at 535–36.

103. *Id.*

104. *Id.* at 536.

105. *Id.*

The Director then told the Order that it had to submit a site plan and request a variance to allow parking on its front yard.[106] Among other things, Northville also threatened to ticket cars that were parked at the Order's property if there were too many or if they were parked on the lawn.[107] As a result of this pressure, the Order refrained from asking friends to join in religious or social activities on its property.[108]

The Order did not submit a site plan because, after hiring an engineering firm for $5,000 to estimate the cost of compliance with the Northville ordinance, it found that such compliance would cost $80,000 and the site plan would cost an additional $30,000.[109] After this, Northville issued the Order a ticket, which automatically began state-court proceedings to enforce the ordinance.[110] While these proceedings were ongoing,[111] the Order filed a federal lawsuit challenging Northville's actions, *inter alia* alleging that Northville had violated RLUIPA.[112]

The majority of the court held the lawsuit unripe because the Order had not (1) requested a variance or (2) sought zoning board review of the Director's determination that it needed to submit a site plan.[113] The court determined that the zoning regulations permitted an appeal of the Director's determination that the Order needed a site plan, preventing what the Order saw as "a 'Hobson's choice' of incurring 'the costs and burdens associated with submitting' a site plan on the one hand or the continuing constitutionally protected activities on the other."[114] Thus, to the majority, Northville had not yet made a final decision. The court also held that there was no immediate injury because, as in *Murphy*, an appeal of the ticket to the zoning board would have stayed its enforcement based on how the court read Northville's zoning code.[115] It also held that the case's facts needed further development.[116]

Chief Judge Batchelder, in dissent, saw things very differently. She would have held the claims ripe because, as she saw it, the "final de-

106. *Id.*
107. *Id.* at 543.
108. *Id*. at 546.
109. *Id*. at 536, 543.
110. *Id.* at 536.
111. The state trial court held the regulation void for vagueness and dismissed Northville's claim, but then the circuit court reversed and remanded. *Id.* at 543. It was then that the parties stayed their state-court action to prosecute the federal one.
112. *Id*. at 536.
113. *Id*.
114. *Id.* at 540.
115. *Id.* at 541–42.
116. *Id.* at 541.

cision" requirement had been met by the Director's determination and the subsequent ticket and, in the alternative, there was an immediate injury under the *Murphy* analysis.[117] Chief Judge Batchelder challenged the majority's view of the Northville zoning code, noting three important differences: (1) the Order's appeal to the zoning board would have been "remedial" rather than constituting part of Northville's final decision as to the meaning of its zoning laws;[118] (2) no waivers that the Order could apply for affected the Director's decision, but only would have mitigated its consequences;[119] and (3) the ability to file a less-demanding site plan, if it existed, would not have any effect on the finality of the Director's decision.[120] Based on these findings, she complained that the majority had "improperly conflate[d the Director's] intensity determination with the possible end result of the zoning process" and conflated the finality rule with the requirement to exhaust administrative remedies.[121] Instead, she saw the Director's decision as binding on Northville and, thus, as final as the finality rule required.[122]

In the alternative, Chief Judge Batchelder determined that the Order's case met the immediate injury standard articulated in *Murphy* for four principal reasons: (1) the Order had felt compelled to suspend religious worship, which was an irreparable harm; (2) Northville had threatened the Order to ticket cars parked on its lawn, causing the same chilling and irreparable harm on its religious exercise; (3) the Order had had to pay for an engineer when it had not changed the use of its property in any significant way; and (4) Northville had haled the Order into court by the very act of issuing the ticket.[123] She also addressed the majority's point that an appeal to the zoning

117. *Id.* at 542.

118. "The [Zoning Board of Appeals] would conduct a hearing, and could reverse or modify the decision '*only* if it finds that the action or decision appealed meets at least one of the following criteria: (a) [w]as arbitrary or capricious; (b) [w]as based on an erroneous finding of fact; (c) [c]onstituted an abuse of discretion; or (d) [w]as based on [an] erroneous interpretation of this chapter.'" *Id.* at 552 (quoting NORTHVILLE CODE §170-41.4 (A)(3)).

119. "Miles Christi could file with the Planning Commission a request for a waiver from, or modification of, the parking and landscaping requirements under [the zoning code] . . . . It is unclear whether Miles Christi could request such relief before filing a site plan, but given the review requirements that appears unlikely. . . . However, none of these options can serve to modify [the Director's] intensity determination. Instead, they are *remedial* measures." *Id.* at 552.

120. *See id.* at 552-53.

121. *Id.* at 551. Under *Williamson County*, this is an important distinction, but a discussion of Judge Batchelder's point is beyond the scope of this article.

122. *Id.* at 552-53.

123. *Id.* at 548–49.

board would have stayed enforcement of the ordinance, saying that at least the first two harms would not have been repaired by any such stay in enforcement.[124]

III. Framework, Defense, and Synthesis

These diverse and complex cases submit gracefully to a unified framework of analysis. Not only is the framework well-rooted in traditional ripeness principles, but these cases would all have been decided the same way if the framework had applied to them when they were decided.

A. *Unified Framework for RLUIPA Ripeness Analysis*

The framework has three parts; the court must determine (1) whether it has jurisdiction at all (i.e. whether there is a "case or controversy"); (2) whether the plaintiff can satisfy the immediate injury test; and, if not, (3) whether the plaintiff has obtained a final decision from the local authorities.

The court, in the first part, would determine whether there is even a claim before it that rises to the level of an Article III "case or controversy." In *Bishop*, the court held that some of the claims before it were so undeveloped that it did not even have jurisdiction.[125] Courts must determine this threshold matter before considering prudential ripeness, which the finality rule represents.

In the second part, the court would determine whether the plaintiff has alleged, and can show, that it has suffered an immediate injury that cannot be further developed by administrative remedies. Factors in this decision include whether local action could stay enforcement of the municipality's decision,[126] whether the harm alleged amounts to

124. *Id.* at 549. To this point, the majority responded:

> [A] claim does not become ripe at the first whiff of governmental insensitivity or whenever a government official taken an adverse legal position against someone, even if one potential response is to curtail protected activities. . . . And the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. The answer instead is to look at each case to determine the consequences of staying our hand. That does not pose a problem here, as Miles Christi may potentially resolve the issue (at less expense) by appealing to the zoning board . . . .

Id. at 540. I highlight this not only to provide the majority's reasoning, but also to note the importance of understanding substantive RLUIPA law in making ripeness determinations. *See* K. L. Chaffee & D. H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437 (2009).

125. 724 F.3d at 90–91.

126. *Miles Christi*, 629 F.3d at 541–42.

a violation of RLUIPA at all,[127] and whether the local action requires further enforcement before becoming an actual injury.[128] These, and perhaps other factors, are applied to determine whether something that might otherwise look like an immediate injury can, on closer analysis, turn out to be more abstract and less concrete. Whether administrative action can further define the injury requires examining the local zoning code to determine the effect of any provisions available to the plaintiff for review of the decision that caused its injury, keeping in mind that "finality" is not the same as exhaustion of administrative remedies.[129] This, therefore, represents a rebuttable presumption that the finality rule applies to the case.

Two types of claims that could fit neatly within this second level of review—or outside the framework altogether—are the "very act" claims as in *Temple*[130] and *Bishop*,[131] and the facial attack on the ordinance as in *Holly Springs*.[132] Doctrinally, these can easily be cast as "immediate injury" claims because they involve claims of immediate injury that cannot be further defined by administrative proceedings. In the alternative, these could be types of RLUIPA claims that fall outside of the framework. Which is the better approach is a practical question best determined by litigators and trial judges on the ground.

Under the third part of the framework, the court would determine whether any decision by the defendant municipality in the record is final. Ordinarily, the failure to seek a variance is fatal to such a claim, but there may be instances where this is not so. These include when the zoning board is only a remedial body,[133] or when any such appeal process is futile.[134] One can view these as exceptions to the finality rule, or ways of establishing finality apart from pursuing a variance. Again, which is the better viewpoint is a practical matter.

127. *Id.* at 540.
128. *Murphy*, 402 F.3d at 351.
129. *See Miles Christi*, 629 F.3d at 540–41, 552.
130. 727 F.3d at 1357.
131. 724 F.3d at 92.
132. 697 F.3d at 287.
133. For example, Chief Judge Batchelder, dissenting, determined that the variance process was only remedial in *Miles Christi*, 629 F.3d at 522; thus, the plaintiff should not, in her view, have had to avail itself of the variance process since finality is not the same as exhaustion of administrative remedies; *see also Murphy*, 402 F.3d at 349 ("[A] property owner will not be required to litigate a dispute before a zoning board of appeals if it sits purely as a remedial body.").
134. *Murphy*, 402 F.3d at 349 (noting futility when the zoning agency lacks discretion or has demonstrated intractability).

In all, this framework is a way to make easier a process that is logically simple but often factually complex. The entire ripeness discussion is ultimately about one question: whether it is prudent under all the circumstances for a federal court to exercise jurisdiction and review a local decision. As the above cases demonstrate, this simple question is often hard to answer.

B. *Doctrinal Defense of Immediate Injury*

It is important to view the immediate injury test and finality rule as two species of the same kind. The main reason why the immediate injury test works so well alongside the finality rule is that they are both ripeness tests designed to separate out ripe claims from a hodgepodge of locale-specific facts, laws, and practices. Thus, when a plaintiff can satisfy the immediate injury test, its claim is ripe and requiring a final decision in such a case is inequitable.

Indeed, in a certain sense, the immediate injury test is another version of the finality rule in that they both seek a definitive position on a definitive wrong. The immediate injury test comes from the judiciary's unique sensitivity to First Amendment matters, where ripeness is "relaxed"[135] because First Amendment violations are often irreparable.[136] It thus serves the same purpose as the finality rule, for it does not clear a case to proceed until there is a definitive wrong that cannot be further defined on the record. In effect, the decisions it seeks to bring before the courts are "final" inasmuch as the rights they affect cannot be completely recovered.

The immediate injury test also has all the trappings of a ripeness test. Again, the purpose of ripeness is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[137] To meet the demands of the immediate injury test, a case must present an injury that the court can clearly discern—not abstract—and that would benefit from no further local administrative process—not premature.[138] The problem of ripeness "is best seen in a twofold context, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[139] The immediate injury test de-

135. *Dougherty*, 282 F.3d at 90.
136. *Id.* (citing 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3532.3 (1984)).
137. *Abbott Labs*, 387 U.S. at 148.
138. *Murphy*, 402 F.3d at 351.
139. *Abbott Labs*, 387 U.S. at 149.

termines that issues are "[fit] . . . for judicial decision," and its very existence recognizes that there is "hardship" involved, unique to the First Amendment context, with forcing a plaintiff to continue to submit to illegal burdens on its religious exercise because it has not availed itself of certain local processes.[140]

Finally, the immediate injury test also addresses all four of the often-cited policy rationales for the finality rule from *Murphy*,[141] as follows: (1) "[R]equiring a claimant to obtain a final decision from a local land use authority aids in the development of a full record"—as shown in *Murphy* and *Miles Christi*, the development of a record is central to the analysis in applying the immediate injury test, for its second element asks if the immediate injury can be further defined;[142] (2) "[O]nly if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel"—in the case of immediate injury, it must be clear how the regulation will be applied to the parcel because, otherwise, no immediate injury is apparent;[143] (3) "[A] variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional disputes"—in an immediate injury case, the harm has already occurred and basic to the determination is whether staying the court's hand would only serve to perpetuate the wrong;[144] and (4) "[R]equiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution"—and yet, in immediate injury cases, the harm is so clear and justiciable that such concerns give way to the court's duty to effectuate a plaintiff's rights under RLUIPA.[145]

C. *Reconciling the Case Law with* Murphy*'s Immediate Injury Test*

The immediate injury test gathers further support from the federal circuit cases that have addressed RLUIPA ripeness. All of these cases would have been decided the same way had the test applied, and in some cases, the inquiry might have been more focused, thus making

140. *Id.*
141. *Murphy*, 402 F.3d at 348.
142. *Id.*
143. *Id.*
144. *Id.*; *Temple*, 727 F.3d at 1357 (where the injury was "complete upon the municipality's initial act . . . staying our hand would do nothing but perpetuate the plaintiff's alleged injury.").
145. *Murphy*, 402 F.3d at 348.

the litigation process easier on both the courts and the parties. The point of this exercise is threefold: (1) to encourage advocates in the first two groups of circuits to propose the immediate injury test (and, where it is not yet the law, the finality rule), safe in the assurance that they will not be asking judges to overrule their circuits' precedents; (2) to encourage judges to adopt the test by showing how smoothly, as a jurisprudential matter, it fits into the existing scheme of review; and (3) to further prove this article's thesis that the courts are all zeroing in on the same concerns to answer the same question about RLUIPA ripeness.

The first group of cases, *Temple*, *Bishop*, and *Holly Springs*, would have been decided the same way if the immediate injury test applied. In *Temple*, applying the framework would have resulted in a determination that the "very act" claim relating to discriminatory animus was ripe, either as exempt from the framework or as an immediate injury. In *Bishop*, the court first would (should) have held that most of the Bishop's claims were so underdeveloped that the court had no jurisdiction.[146] Hence, the analysis would proceed no further on those claims. As to the Bishop's "very act" claim, like *Temple*, it either would be exempt from the framework, or the court would have found an immediate injury and proceeded toward adjudication on the merits.[147] Finally, in *Holly Springs*, we would have the same result as in *Temple*: the claim would have still been ripe.[148]

In the second group of cases, the plaintiffs did not allege anything that would have cleared the immediate injury test. Thus, the courts both properly applied finality. In *Anshei*, no facts indicate an immediate injury because, as in *Murphy* and the majority's view in *Miles Christi*, an adverse finding by local authorities did not, in itself, directly impact the Synagogue.[149] More process was required to create an immediate injury. And in *Guatay*, the plaintiff probably pleaded an immediate injury, in that the County's scoping letter detailed processes with which Guatay could not comply, but Guatay would fail under the second prong of immediate injury. For to prevail under immediate injury, a plaintiff must both show that it has an immediate in-

146. *Bishop*, 724 F.3d at 90–91. The court might have been better off had it held that it lacked Article III jurisdiction. But in the event that some of the claims provided the court with jurisdiction, the court would have applied the framework to those claims and found them lacking under the immediate injury test and, in turn, the finality rule.

147. *Id.* at 92.

148. *Holly Springs*, 697 F.3d at 287.

149. *Anshei*, 338 F. App'x at 215–16.

jury *and* that the injury cannot be further defined by administrative processes.[150] The court in *Guatay* specifically provided that the plaintiff had not attempted to negotiate the scoping letter's terms—hence, it was not yet clear whether or not the County would have actually enforced that requirement upon Guatay, and Guatay's injury was thus in need of further definition.[151] In both cases, the court properly applied the finality rule and still would have if the immediate injury test applied to their cases.[152]

Finally, the third group of cases used the immediate injury test and, hence, we know what the outcome would be if they had to decide the cases under the framework. If these cases fit gracefully into a unified framework of analysis without any one of them being wrongly decided as matter of law, they must also be consistent.

IV. Conclusion

There is less confusion than one might think in RLUIPA ripeness jurisprudence. One way to definitively clear any remaining fog would be adoption of the framework proposed here. But it should be clear, whether or not the framework appears sensible, that there is no "circuit split" on RLUIPA ripeness. Clearing away fog and uncertainty helps make these difficult ripeness decisions easier for courts, and helps make the bargaining and litigation processes easier for parties. So does a framework that gathers all of these concerns into one place and proposes a clear progression of analysis.

150. *Murphy*, 402 F.3d 342 at 351.

151. *See Guatay*, 670 F.3d at 968. As in *Miles Christi*, the court could say in that case that "[*b*]*oth* parties, to say nothing of the federal courts, may benefit" from further input from local authorities. *Miles Christi*, 629 F.3d at 541.

152. Of course, the discovery process might have functioned somewhat differently and produced different facts for review by these courts. But this could only have aided the courts in making the ripeness decision, and the parties in preparing their cases. Clarity is a boon to both courts and parties in cases like these where expenses can easily reach tens if not hundreds of thousands of dollars.