No. 23-_____

IN THE

Supreme Court of the United States

TEMPLE OF 1001 BUDDHAS; MIAOLAN LEE,

Petitioners,

v.

CITY OF FREMONT,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

42 U.S.C. § 1983 provides that any person who, "under color of" state law, subjects any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]" The decisions of this Court render state municipalities "people" that are subject to liability under Section 1983. In this case, the United States Court of Appeals for the Ninth Circuit held that state municipalities are not subject to Section 1983 liability when the deprivation of rights is sufficiently diffused across municipal decision-makers. The lower court also held that a searching review is not required to investigate disparate treatment in connection with an alleged free exercise violation.

The questions presented are:

1. Whether a state municipality can be held liable under 42 U.S.C. § 1983 when decision rights and associated impingements on free exercise are distributed across municipal employees instead of perpetuated by a single decision-maker.
2. Whether, upon a showing of disparate treatment among religious and secular institutions, a searching review is required to determine if the religious institution was singled out with especially harsh treatment in violation of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners Temple of 1001 Buddhas and MiaoLan Lee were the plaintiffs and appellants below. Defendant City of Fremont was the sole defendant and appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings in the U.S. Court of Appeals for the Ninth Circuit:

Temp. of 1001 Buddhas v. City of Fremont, No. 22-15863 (9th Cir.) (June 9, 2023).

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Petitioner MiaoLan Lee, a devout Buddhist, established the Temple of 1001 Buddhas on her real property, adorning the land and its structures with precious religious artifacts for private religious use. Lee toiled for years to bring various structures on her property into compliance with city ordinance, but the City of Fremont repeatedly rebuffed her good faith attempts. City officials targeted her religious structures and artifacts, openly mocked her religion, questioned the sincerity of her faith, and imposed draconian compliance mandates before ultimately ordering demolition of Lee's religious structures. Despite Lee's cooperation with the City and willingness to work to bring the structures into compliance, the City plagued Lee with extreme harassment, such as sending police teams in riot gear to search her property while she was asleep. The City's harsh treatment of Lee stands in stark contrast to the City's sympathetic treatment of Lee's neighbors, several of whom had their properties reported for the very same code violations. In short, City officials engaged in a yearslong campaign against Lee and her religious structures, while allowing her neighbors' noncompliant, secular structures to remain unchallenged. The City's blatantly disparate treatment of Lee violates the Free Exercise Clause.

The lower courts disagree. The Ninth Circuit held that Lee did not allege unconstitutional acts flowing from "municipal policy" because she did not plausibly allege that Gary West, Fremont's chief building official, acted unconstitutionally. In so doing, the court created a troubling exception to *Monell v. Department of Social Services of City of New York*, 436 U.S. 658

(1978), wherein discriminatory conduct that is not attributable to a single, high-level officer exonerates government from liability under 42 U.S.C. §1983. Such an exception does nothing to protect citizens from a coordinated effort across multiple government officials to hinder religious practice, as Lee experienced here. If anything, it encourages local government to disperse its culpable decision-making across many actors.

The court further concluded that the City did not selectively enforce its regulations because Lee had not pleaded that her neighbors violated policy "to the same degree" as she had. This conclusion directly contravenes this Court's holding in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise"; *see also id.* ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue"). Yet, the Ninth Circuit came to its conclusion in a mere two-sentence analysis that omits any discussion of relevant government interests, and brazenly overlooks the many enumerated similarities among Lee and her neighbors' violations.

If allowed to stand, the Ninth Circuit's decision discourages local government from abiding by the Free Exercise Clause and threatens to minimize the protections offered by §1983. In dismissing Lee's claims, the lower court ignored the threat of unconstitutional government action carried out under the guise of benign policy. This Court recognized in *Monell* the potential

difficulties of "determining 'when *execution* of a government's policy or custom' can be said to inflict constitutional injury." 436 U.S. at 713 (Powell, J., concurring) (emphasis added) (citations omitted). This case presents this Court an opportunity to more clearly define those outer edges and ensure government enforcement maintains appropriate deference to religious freedom. *See Id*. Here, city officials degraded their citizen's religious practice and selectively enforced the city's regulations against Lee's religious structures, citing regulations as justification for their disparate treatment. This practice must be sharply curtailed to prevent erosion of the Free Exercise Clause.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 2023 U.S. App. LEXIS 17145 and reproduced at App.1–5. The district court's order dismissing the second amended complaint is reported at 2022 U.S. Dist. LEXIS 89928 and reproduced at App.6–33. The district court's order dismissing the first amended complaint is reported at 588 F. Supp. 3d 1010 and reproduced at App.34–72. The district court's order dismissing the original complaint is reported at 562 F. Supp. 3d 408 and reproduced at App. 73–110.

JURISDICTION

The Ninth Circuit issued its memorandum disposition on June 9, 2023. App.6–33. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTUES INVOLVED

The First Amendment and Section One of the Fourteenth Amendment to the U.S. Constitution are reproduced at App.111–112. Chapter 42 U.S.C. § 1983 is reproduced at App.113.

STATEMENT OF THE CASE

A. Factual Background

1. Miaolan Lee, a lifelong Buddhist, established Temple of 1001 Buddhas, a temple with meditation facilities, on the real property located at 6800 Mill Creek Road in Fremont, California (the "Real Property"). App.115 & 117. While Lee purchased the Real Property in 2010, in 2018, she legally transferred the property to Temple of 1001 Buddhas. App. 118–19. Lee has resided at the Real Property since 2010, and uses it for private religious worship. App.117–18. The Real Property and its structures house many sacred Buddhist objects, including a large copper bell with mantra in Sanskrit and a stone monument which was blessed and dedicated to the site by Buddhist monks; one thousand 6" Buddha statues; thirty-two 7' marble Arahats; a 9' Buddha statute; other Buddha statues; and several Hindu God statues. App.123.

The Real Property contains the following structures: (a) a Hindu God House Structure (120-square-foot gazebo with pond), (b) a modular home with carport (a structure that existed when Lee acquired the property but that was later modified), (c) the Meditation Hall (a remodeled version of the barn structure that existed when Lee acquired the property), (d) the

Main Buddha Hall (a remodeled version of a garage that existed when Lee acquired the property), (e) a Green House, (f) the Retreat House (a new two-story accessory dwelling unit (ADU) built to house individuals attending religious retreats), (g) solar panels, (h) the Main Residence (a structure that existed when Lee acquired the property), and (i) a tree house. App.36–37; App.123–33.

2. In 2014, Lee applied for and received permits from the City to finish improvement work on an old barn which became the Meditation Hall. App.135–36. During the permitting process, a City building official observed Lee's religious statues and said to Lee, "I wish the City did not know about them." App.136. On October 26, 2017, Leonard Powell, the City's Code Enforcement manager, sent Lee an email demanding inspection of the property. App.136. The next morning, Powell arrived at the Real Property with other city staff members, and photographed some of the Real Property. App.136–37. Lee requested the officials depart, as Lee had not consented to their entry, and suggested they make an appointment for a visit at a later date. App.137.

In January 2018, Powell emailed a formal request for physical inspection, indicating the City had become aware on October 25, 2017 of violations on the Real Property, including (1) unpermitted construction of, on, or in multiple buildings; (2) extensive concrete work on the property; (3) construction or alteration of a natural watercourse; and (4) business operating in a residential zone. App.138–39. On or about January 30, 2018, during a meeting between Building Official West

and Lee, West informed Lee of his urgent need to inspect her property; as soon as three days later, Lee offered her property for inspection, and provided alternative dates she would be in town, based on her travel schedule. App.139–40. West stated he was not available to do the inspection. App.139–40.

Instead, on a date Lee had advised she would be out of town, West's Building Department sought and obtained an emergency warrant, falsely representing to the court that Lee was not cooperating with the request for inspection and refused to give consent. App.140. As Lee's travel plans had changed (due to a family medical emergency), Lee was on the Real Property on February 9, 2018 when, despite her open willingness to schedule and cooperate with a city inspection, the city deployed an armed police tactical team in riot gear, K-9 units, a locksmith, and five city officials (including Gary West) to execute the search warrant. App.140. This team proceeded to aggressively search the Real Property, including Lee's personal residence, her kitchen, her food, her bedroom, her closets, and her makeup drawer. App.141. Lee was distressed by these events. App.141.

The City then placed recording devices across the street from the Real Property gate. App.142. In March of 2018, Lee wrote to the City's attorney indicating that she remained ready to cooperate with city requests and inspections. App.142. The City responded with its second Notice and Order to Abate ("NOA 2"), which cited Lee for cutting into the hillside with non-agricultural structures that allegedly presented various hazards in violation of City codes and ordinances, and demanded that Lee immediately cease

habitation and occupancy of three uninhabited structures, the main Buddha Hall, the Retreat House/ADU, and the Meditation Hall. App.142–43. According to Lee, the bases for the City's allegations are "demonstrably false," a fact which could be confirmed by "any cursory investigation of the Real Property." App.143.

3. In May 2018, Lee and her engineer, architect, and lawyers met with City officials, including Gary West and Deputy City Attorney Bronwen Lacey, to attempt to resolve the City's concerns. App.144–45. Later that month, after the *City* cancelled a scheduled inspection of the Real Property, and amidst same-day correspondence between Lee and the City where Lee was confirming with her project manager their availability for an inspection, the City sought and obtained another inspection warrant. App.145–46. The warrant was again based on falsified information that Lee was refusing to cooperate with the City's requests for inspection, among other false and offensive allegations, including accusing her of lying about her religious use of the Real Property. App.145–46. On May 24, 2018, the City executed the second warrant and searched the Real Property once more, entering while Lee was sleeping and conducting their inspection in a surprise manner that left Lee "extremely distressed and suffering from shock." App.146.

On June 8, 2018 the City commissioned a fourth inspection of Lee's residence. App.147. On June 14, 2018, City Official West issued and signed a Notice and Order to Vacate, condemning three structures on the property (the ADU/Retreat House, the Main Buddha Hall/Garage, and the Meditation Hall) as "unlawful, unsafe, and unfit for human occupancy." App.147–

48. Since June 26, 2018, Lee has not been able to use the three structures for their intended purposes, which are for meditation and faith practice. App.148. In July of 2018, Lee appealed the notice and order to abate and the notice and order to vacate. App.149. In August of 2018, Lee received a letter from the Regional Water Control Board, which later confirmed that City officials demanded that the Water Control Board investigate Lee's residence, and did not investigate Lee's neighbors' water quality issues that Lee and other residents had brought to the City's attention. App.150.

From late 2018 through early 2019, Lee and her team of consultants tirelessly attempted to comply with the City's ever-changing demands and continual threats of additional violations. App.151–52. Between June of 2018 and March of 2022, Lee had expended in excess of $1.5 million on consultants, engineers, and lawyers in attempts to comply with the City's demands and bring all of her structures into compliance with City regulations. App.153. From late 2019 through December 2020, the City continued to issue citations against Lee and the Real Property, delay resolution of the various issues via "moving targets," and ignore Lee's correspondence. *See generally* App.154–56; App.158–63.

On March 11, 2021, the City issued a third revised Notice and Order to Abate Nuisance (NOA 3), which contained repetitive information so as to appear more extensive, as if Lee had committed additional violations (she had not). App.163–64. Despite the years Lee spent working with the City to permit her existing structures, including several years of paying taxes on

the structures, NOA 3 demanded demolition of multiple structures on the Real property. App.163–64. On March 24, 2021, a city council member instructed Lee to "give [the City] some money and this should go away." App.166. Lee timely appealed NOA 3, but the City refused to cooperate to set a hearing, and ignored Lee's repeated complaints of disparate treatment of her religious property. App.166–68. Due to the City's mishandling of Lee's attempts to address the City's concerns and the City's apparent ongoing religious and racial animus against Lee, Lee held a press conference airing her concerns. App.169–70. The City eventually heard Lee's appeal of NOA 3; Lee strongly disagrees with the merits of the resulting decision and appealed it via petition for writ of mandate. App.170.

4. Throughout the course of the City's protracted enforcement of its various codes, Lee identified, and complained of, perceived disparate treatment of her property, used for private religious purposes, and the unpermitted property of her neighbors, which, upon information and belief, is not used for religious purposes. For example, Lee's neighbor, Rob Sabraw, encouraged her to develop the property without permits, and he showed Lee and her husband the various unpermitted improvements he had made to his own property, including a detached garage, a cottage, and a large deck. App.120–21. In addition to Lee, other neighbors have also complained about the City's selective code enforcement. App.123, App.144. Despite Lee's and the other neighbors' complaints, the City has not enforced its code sections against the unpermitted, secular structures, even though they are in violation

of the ordinances in the same manner as Lee's religious structures. App.123, App.174–79. Nor did the City cite or condemn Sabraw's elevated concrete and steel deck, which is within 200 feet of the riparian corridor, nor Sabraw's alleged water contamination from excessive use of RoundUp pesticide, nor did the City cite or condemn neighbor Talley Polland's unpermitted concrete driveway which passed over and around (within 200 feet of) a riparian corridor. App.174–79. Further, the City granted a permit in 2016 for a two-car garage next to the creek at 3500 Mill Creek Road. App.160. The City reported Lee to outside agencies, but did not report her neighbors or any other area resident for their respective violations. *Id.* Unlike its aggressive enforcement against Lee which threatened imminent demolition, the City encouraged neighbor Sabraw to apply online to remedy the lack of permits on his property, even though certain violations of Sabraw's are "incurable" under the City's code (e.g., structures within 200 feet of riparian corridor). *Id.*

5. Throughout the course of the City's protracted enforcement of its various codes, Lee experienced, and complained of, discrimination and harassment against her for her religious beliefs. Various officials and officers of the City of Fremont: openly mocked and questioned the sincerity of Lee's religious practices; App.145–46 (Fremont Code Enforcement Officer declared, without evidence, her belief that Lee "is lying about using the building for religious purposes"); App.158–59 (City of Fremont Deputy Community Director "accused [Lee] of fabricating her religious beliefs for permit purposes" and sarcastically asked her "Do you think Buddha is OK with the construction

you did?" and promised "you will demolish that temple"); expressed the City's displeasure with Lee's religious statues; App.136 (upon viewing Lee's religious statues on her Real Property, Fremont Building Official said to Lee, "I wish the City did not know about them"); instructed Lee to remove religious statues despite no apparent relation to code violations; App.150 (Fremont Building Official instructed Lee to remove Buddha statues from the Main Buddha Hall); restricted Lee's personal religious prayer to a small fraction of her real property; App.150 (Fremont Building Official instructed Lee that her private prayer would be restricted to the Meditation Hall or her home, and stated that Lee could not pray "anywhere else on the Real Property," which included several acres of undeveloped land); unjustifiably included photos of religious statues as evidence of "violations"; App.165–66 (Fremont's third-issued Notice and Order to Abate Nuisance contains four photographs of religious Buddha statues associated with the building but does not identify any violation associated with the statues); and acknowledged the pervasive racism and discrimination in Fremont. App.167–68 (Fremont City Councilmember told Lee that the Mayor, other councilmembers, and the City Manager and staff are all aware of racism and discrimination against Asians within the City).

6. At all relevant times, Lee sought cooperation with the City's demands and earnestly worked to bring her structures into compliance. Throughout the City's early inspection requests, Lee repeatedly indicated she would make the Real Property available by appointment. App.137–39. In early 2018, when Officer

West told Lee that he had an urgent need to schedule an inspection of the Real Property, Lee called West to ask if the City could do the inspection within three days of West's request, and provided additional availability. App.139–40. In March 2018, Lee's attorney wrote to the City's attorney stating that she remained ready to cooperate with any and all requests and inspections. App.142. In May 2018, Lee hired a team of engineers, architects, and lawyers to meet with the City to attempt to resolve the City's concerns. App.144–45. In June 2018, Lee terminated her lawyers at the City's urging and suggestion that if she did so, the parties "could work this out." App.148–49. In August of 2019, Lee once again provided the City with information about the Real Property, requested clarification of the City's interpretation of several code sections, and attempted to correct the City's "provably false" assertions about the size and character of Lee's structures and improvements to the Real Property. App.154. The City did not respond. *Id.* The record is replete with additional examples of Lee's attempts to engage the City and cooperate. *See, e.g.,* App.154–59, App.170–71.

7. Due to the City's refusal to allow Lee to bring her property into compliance, its failure to evenhandedly enforce its municipal codes, and its discrimination and harassment of Lee for her religious beliefs and practice, Lee filed her complaint in the underlying action

in the Northern District of California. Lee alleged, *inter alia*,[1] violations of 42 U.S.C. § 1983 for religious discrimination in violation of the Free Exercise Clause. The Northern District had jurisdiction under 28 U.S.C. § 1331.

B. The District Court Grants the City's Motions to Dismiss Lee's Complaint, Amended Complaint, and Second Amended Complaint

1. The district court acknowledged the prospect of municipal liability under Section 1983, but found that Lee's allegation that the City accused Lee of "hiding Behind Buddha" and the City's act of tolerating "non permitted uses of neighboring properties which are secular" were insufficient to establish municipal liability. Specifically, the district court, in its first decision, found that the only relevant municipal policy or custom was a single city code, FMC section 18.55.110. App.98. The district court concluded that Lee's allegations rested on the City employees' individual enforcement decisions and actions. App.98–99.

In assessing Lee's Section 1983 claims in her first amended complaint, the district court enumerated three circumstances which can establish culpable municipal policy under *Monell* v. *Dept. of Soc. Servs. Of City of New York*, 436 U.S. 658 (1978). App.49. Citing *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066

[1] Lee's complaint, amended complaint, and second amended complaint alleged a litany of causes of action against the City. Because Lee's violations of 42 U.S.C. § 1983 are narrowly the subject of this Petition, the ancillary causes of action are not addressed herein.

(9th Cir. 2013), the court ruled that *Monell* is satisfied where "the plaintiff was injured pursuant to [1] an expressly adopted official policy, [2] a long-standing practice or custom, or [3] the decision of a final policymaker." App.49. The court adopted its prior analysis of the single city code, FMC section 18.55.110, and rejected Lee's claims that an expressly adopted policy or long-standing practice or custom of the City had caused her constitutional injury. App.49–50. The Court reasoned that "nothing in the zoning ordinance prevents Lee from using real property for religious purposes," App.50, and found that "Lee fails to suggest that any of the isolated acts by City employees manifest a policy or custom," citing the lack of evidence that the City had an official policy or custom of confining other residents' praying to certain buildings on their property. *Id.*

Turning to whether Lee's claims against the City could survive under a "final policymaker" theory, the court concluded that regardless of whether City Official West is a final policymaker, Lee failed to identify anything within the scope of West's policymaking authority that caused constitutional harm. App.50–52. In assessing whether the City violated Lee's rights to free exercise, the court reasoned that judicially noticeable facts show a "strong factual basis that the property is in extreme noncompliance with the law" and as such, City official West used his enforcement discretion to investigate and enforce certain violations. App.54. The court concluded that the code enforcement does not "at all" coerce Lee into acting contrary to her religious beliefs or exert substantial pressure on her to modify her behavior and violate her beliefs. *Id.* The

court stated that West's order that Lee could not pray anywhere else on her property may have been "imprecise or perhaps insensitive," but it could not "appropriately be attributed" to the City. App.55.

2. In its final order granting the City's motion to dismiss Lee's second amended complaint without leave to amend, the district court adopted its prior findings on Lee's 1983 claims, and held that they failed because Lee had not alleged constitutional harm caused by a municipal policy or final policymaker. App.21–24. The court reiterated the bases for municipal liability under *Monell,* admitted the plausibility of West's acting as a final policymaker for his acts overseeing local code enforcement activities as the City's building official, but found that Lee's 1983 claims failed because West did not commit or ratify any instance of religious discrimination or retaliation while overseeing local code enforcement. App.21–22.

The court reiterated that a state actor only violates the Free Exercise Clause when it has "a tendency to coerce individuals into acting contrary to their religious beliefs or exert substantial pressure on an adherent to modify his behavior and to violate his beliefs," App.21, and found that Lee's "several-page laundry list of thirty-five alleged facts" did not sufficiently allege requisite coercion or pressure to modify or violate Lee's beliefs. App.21. The court also recognized this Court's decision in *Roman Cath. Diocese of Brookyln v. Cuomo*, 141 S. Ct. 63, 66 (2020), at least in principle, and stated that a regulation violates the Free Exercise Clause when it "single[s] out houses of worship for especially harsh treatment" vis-à-vis similarly situated secular establishments. App.21. In

granting the City's motion to dismiss, the court reasoned that "virtually none of the allegations as to [city official] West relate to Plaintiffs' religion." App.21. The court found that the "most problematic allegations" had "little or nothing to do with West or his role" and that West was not present when certain comments were made; accordingly, the court found Lee did not allege that West made "a deliberate choice to endorse" them. *Id.*

Addressing Lee's allegations of especially harsh treatment, the court found that Lee had not alleged that either neighbor was similarly situated with legal and code violations "as serious or extensive" as those on her property. *Id.* The court also took issue with Lee's allegation that the City, i.e., West, ordered Lee to pray only in one place on her property and remove religious materials from the religious buildings, finding that the latter allegation appeared to evidence West's effort to protect Lee's religious materials. *Id.* The court questioned the veracity of Lee's allegations, finding it "highly implausible" that West ordered Lee to pray in only one place on her 29-acre property. *Id.* However, even if West did make a comment to that effect, the court found that it would not have been within the scope of West's authority to interpret the building code and therefore bore no connection to the City's official acts. *Id.*

Finally, the court found that Lee had not alleged that the City falsifying evidence against her and overstating the scope and extent of violations on her property were caused by religious bias. App.22–23. To deny the motion, the court felt it would need to "as-

sume" religious bias "without concrete factual allegations." App.22–23 (listing Lee's main allegations as "(1) West investigated and enforced many legal violations on Lee's property pertaining to three buildings she uses for religious purposes; and (2) two of Lee's neighbors have at least one instance of unpermitted construction on their property, apparently for secular use, but West has not enforced the law against them.").

C. The Ninth Circuit Affirms the District Court's Dismissal of Lee's Second Amended Complaint

1. On July 7, 2023, a three-judge panel of the Ninth Circuit issued a terse unpublished memorandum affirming the district court's dismissal of Lee's second amended complaint. App.1–5. With respect to Lee's religious discrimination claims, the panel agreed that per *Monell*, 436 U.S. at 691, Lee must allege unconstitutional acts flowing from a "municipal policy." App.3. While the panel found that Lee alleged that West, as the City's chief building official, made municipal policy about building and zoning code enforcement, the panel found no plausible allegation that West's decisions violated the Constitution. App.3. Citing City public records evidencing "nine unpermitted structures totaling thousands of square feet" which posed "a fire hazard and lack of appropriate wastewater treatment, among other alleged nuisances," the Ninth Circuit found it plausible that West's decisions were driven by the code violations, and nothing more. App.3. This did not, in the court's view, demonstrate religious discrimination because Lee did not plausibly allege that West took enforcement actions against her "because of," rather than "in

spite of" the adverse effect on Lee's religious practice. App.3 (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)). The panel found that although Lee alleged that City officials made comments disparaging the sincerity of her religious practice, she did not demonstrate that West himself shared or approved of the "animus." App.3. The panel found that the only plausible interference from West's instruction not to pray on certain parts of her property "is that West was enforcing the City's orders about which structures were safe to use." App.3–4.

2. With respect to Lee's claims of especially harsh treatment as compared to her neighbors, the Ninth Circuit found that considering the "size and scale" of Lee's unpermitted construction, Lee had not pleaded that her neighbors had violated City policy "to the same degree" she did, as would be necessary to raise an inference of selective enforcement. App.4 (citing *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1159 (9th Cir. 2022).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with This Court's Precedents

A. The Decision Below Carves Out an Exception to Section 1983 Municipal Liability Where Religious Discrimination Cannot be Pinned to a Single Decisionmaker Acting in Isolation, in Contravention of *Monell* and its Progeny

Under 42 U.S.C. § 1983, any person who, "under color of" state law, subjects any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." The record below presents detailed allegations regarding the City of Fremont's calculated, protracted, and targeted deprivation of Lee's free exercise rights under the guise of enforcing local regulations. Despite this Court's ruling in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 685, 690 (1978) that "municipalities and other local government units" are "included among those persons to whom § 1983 applies[,]" the Ninth Circuit refused to hold the City of Fremont accountable for its discriminatory actions, finding that Lee did not allege unconstitutional acts flowing from a "municipal policy" because she did not plausibly allege that Fremont's chief building official, Gary West's, personal decisions violated the Constitution. App.3–4. In so doing, the Ninth Circuit created new law which stands for the proposition that a municipality may evade Section 1983 liability for discrim-

ination and disparate treatment by selectively diffusing responsibility across various levels of city government, in contravention of this Court's precedent. Thus, the Ninth Circuit held that the City of Fremont may freely commission its officers to discriminate, mock, and selectively enforce its regulations due to religious "animus," (*see* App.3–4) as long as the chief building officer does not personally (or directly) engage in these actions vis-à-vis the victim. This has never been the law of free exercise jurisprudence, and the Court should grant certiorari to clarify and affirm the same.

The decisions of this Court make clear that the purpose and intent of limiting municipal liability in this context, and rejecting more direct *respondeat superior* theories, is to limit liability to "acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479–80 (1986); *see also Monell*, 436 U.S. at 691 ("Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."). To establish liability, the plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* Thus, the Court has emphasized the importance of tying liability to the actual wrongdoer. *See*

Okla. City v. Tuttle, 471 U.S. 808, 818 (1985) (explaining that under *Monell,* questions of municipal liability with respect to constitutional deprivations require a "fault-based analysis"). Accordingly, the Court has repeatedly emphasized that it is the culpability of the municipal conduct, not the mechanism by which the culpable conduct was levied, that determines whether municipal liability attaches in a 1983 action.

Following this logic, the Court does not limit municipal liability for Section 1983 to the actions of a single decision-maker; in fact, the opposite is true. *See Monell*, 436 U.S. at 690–91 ("by the very terms of the statute, [municipalities] may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."); *see also, L.A. Cty. v. Humphries*, 562 U.S. 29, 36 (2010) (explaining that municipal liability is appropriate upon demonstration of discriminatory municipal policy, custom, usage, or practice, despite often-used shorthand of "policy or custom"). "Relying on the language of § 1983, the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a custom or usage with the force of law.' *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 167–68 (1970). That principle, which has not been affected by *Monell* or subsequent cases, ensures that most deliberate municipal evasions of the Constitution will be sharply limited." *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

In determining whether the municipality is the "actual wrongdoer" for purposes of 1983 liability, this Court has emphasized the importance of careful factual analysis. Justice Brennan's concurring opinion in *Praprotnik* reasoned that municipal officials "may as a matter of practice never invoke their plenary or oversight authority, or their review powers may be highly circumscribed." *Praprotnik*, 485 U.S. at 145. And, "[u]nder such circumstances, the subordinate's decision is in effect the final municipal pronouncement on the subject." *Id.* (reasoning that a Section 1983 plaintiff should be entitled to place these considerations before a jury, "for the law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality's actual power structure is necessarily a factual and practical one.").

Yet, flouting *Monell* and the many decisions since, the court below narrowly considered only the express personal actions taken by West, a single city official. *See, e.g.,* App.3 ("Lee's allegations do not make it plausible to infer that code violations were not the driving force behind West's decisions." […] "she does not demonstrate that West himself shared or approved of this animus"). The Court should not overlook the Ninth Circuit's unilateral and inappropriate restriction of Section 1983 municipal liability to a single decisionmaker's action or inaction. Especially where, as here, the record is replete with evidence of the City of Fremont's concerted actions of discrimination and harassment against Lee in connection with her religious practice. Moreover, discovery may well have re-

vealed the "final policymaking" nature of other decisionmakers' roles, thus rendering officials beyond West liable for their discriminatory acts under the more narrow "final policymaker" theory.

Municipal liability under Section 1983 attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483. As applied here, Lee sufficiently alleged that the City of Fremont made not one, but countless, deliberate choices to follow a discriminatory, harassing course of action from among various alternatives (including, and especially, the flexible and accommodating alternatives that the City concurrently applied to Lee's neighbors' secular activities, *see* App.169–70). Various officials and officers of the City of Fremont: **openly mocked and questioned the sincerity of Lee's religious practices**; App.145–46 (Fremont Code Enforcement Officer declared without evidence that Lee "is lying about using the building for religious purposes"); App.158–59 (City of Fremont Deputy Community Director "accused [Lee] of fabricating her religious beliefs for permit purposes" and sarcastically asked her "Do you think Buddha is OK with the construction you did?" and promised "you will demolish that temple"); **expressed the City's displeasure with Lee's religious statues**; App.136 (upon viewing Lee's religious statues on her Real Property, Fremont Building Official said to Lee, "I wish the City did not know about them."); **instructed Lee to remove religious statues despite no apparent re-**

lation to code violations; App.150 (Fremont Building Official instructed Lee to remove Buddha statues from the Main Buddha Hall); **restricted Lee's personal religious prayer to a small fraction of her real property**; App.150 (Fremont Building Official instructed Lee that her private prayer would be restricted to the Meditation Hall or her home, and stated that Lee could not pray "anywhere else on the Real Property," which included several acres of undeveloped land); **aggressively enforced code violations of Lee's religious structures and declined to enforce similar violations of Lee's neighbors' secular structures, while levying extraordinary fees against Lee**; App.155 (the City charged Lee "unprecedented" fees in connection with her Conditional Use Permit Application in 2019, the extraordinary nature of which was confirmed by a former City Building Department employee); App.160–61 (the city "did not agree to hold citations in abeyance while permit applications were pending, as it had done for neighboring properties at Mill Creek Road"); App.158–59 (City of Fremont Deputy Community Director told Lee that the City "would make this a 'miserable, expensive' process for her that 'she would regret"); **unjustifiably included photos of religious statues as evidence of "violations"** App.165–66 (Fremont's third-issued Notice and Order to Abate Nuisance contains four photographs of religious Buddha statues associated with the building but does not identify any violation associated with the statues); **intentionally provided false information in support of a search warrant** App.163 (Fremont Code Enforcement Officer provided

false information for an inspection warrant by intentionally omitting the fact that Lee had consented to the inspection); **established a series of "moving targets" for compliance with city codes, preventing Lee from bringing her religious structures into compliance despite Lee's willing and earnest cooperation** *See, e.g.,* App.151 ("On September 17, 2018, Plaintiffs were told to submit a planning application for a Conditional Use Permit. This turned out to be a moving target as the City alternately demanded demolition of the religious use structures, continually demanded more reporting and information for the Conditional Use Permit Applications every time Plaintiffs believed they were close to making their final submission, and continuously threatened additional violations during this period."); and, perhaps most damningly, **acknowledged the pervasive racism and discrimination in Fremont.** App.167–68 (Fremont City Councilmember told Lee that the Mayor, other councilmembers, and the City Manager and staff are all aware of racism and discrimination against Asians within the City).

Thus, Lee plausibly established the City's culpability under the binding precedent of this Court. The acts were unquestionably "of the municipality" (*Pembaur*, 475 U.S. at 479–80); due to the City's "deliberate conduct" (*Brown*, 520 U.S. at 404), the City was the "moving force behind the injury alleged." *Id.* Though Lee alleged a "direct causal link between the municipal action[s] and the deprivation of federal rights" (*Id.*), the Ninth Circuit failed to tie "liability to the actual wrongdoer," as required. *Tuttle*, 471 U.S. at 818.

The conduct of Fremont's city officials evidences a troubling departure from their purported roles as protectors of the City's citizens and their enumerated rights. As this Court has explained, "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). Under the new rule of the Ninth Circuit, the officials of the City of Fremont are free to abandon these constitutional obligations.

Taken together, Lee's allegations show various City officials and officers acting in concert to perpetuate a discriminatory enforcement scheme based on Lee's religious practice. At minimum, the important questions of local government structure and decision rights, including the alleged concerted efforts to discriminate, should have survived a pleadings challenge and proceeded through merits discovery. *See Praprotnik*, 485 U.S. at 144 (Brennan, J., concurring) ("The identification of municipal policymakers is an essentially factual determination 'in the usual sense,' and is therefore rightly entrusted to a properly instructed jury."). In the present action, Lee herself alleged that, upon information and belief, "the existence of other 'authorized decision makers' responsible for the harm alleged herein [would] be discovered in the course of

discovery in this matter." App.118. In ignoring Lee's many allegations of mistreatment and discrimination by the City, the below court inappropriately subjected Lee's Section 1983 claims to an unspecified heightened pleading standard, depriving her access to several fundamental tools of justice. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (rejecting application of heightened pleading standard to complaints against municipalities asserting liability under Section 1983; identifying summary judgment and discovery as essential tools in 1983 actions). Thus, allowing the Ninth Circuit's decision to stand will uniquely subject Ninth Circuit 1983 plaintiffs to more aggressive pleadings standards, which will, in cases like Lee's, deny victims' ability to remedy constitutional violations.

This Court should grant certiorari to clarify that under *Monell* and its progeny, city officials may be subject to municipal liability under Section 1983 for religious discrimination where the officials act in concert to perpetuate a yearslong scheme of discrimination, harassment, and unequal treatment of a citizen due to religious animus. In light of the numerous city officials involved in the discrimination scheme, this case presents a unique opportunity for the Court to address one of the "special difficulties" raised when a municipal policymaker delegates policymaking authority to another official. *See Praprotnik,* 485 U.S. 126. At minimum, the Court should affirm that allegations of this tenor will survive a motion to dismiss.

B. The Decision Below Permits Municipalities to Single Out Religious Activity for Especially Harsh Treatment in Violation of this Court's Recent Holdings and Fundamental Tenets of the Free Exercise Clause

In addition to its new exception for municipal liability under Section 1983, the decision below contravenes long-established precedent that forbids discriminatory treatment of religious practices by municipalities. This Court has recently affirmed that a regulation violates the Free Exercise Clause when it "single[s] out houses of worship for especially harsh treatment" as compared to similarly situated secular establishments. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam). Despite this, the Ninth Circuit concluded, in a two-sentence analysis of Lee's claims for religious targeting and unfair treatment, that "considering the size and scale" of Lee's construction, Lee had not pleaded that her neighbors violated policy "to the same degree" as she did. App.4. The Ninth Circuit's cursory analysis wholly ignores the example set forth by this Court in *Roman Catholic Diocese*, which sets forth the kind of searching analysis appropriate to assess an alleged violation of the Free Exercise Clause. The importance of careful analysis in these inquiries cannot be overstated. The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. *Church of Lukumi*, 508 U.S. at 543.

In *Roman Catholic Diocese*, Agudath Israel argued that the Governor specifically targeted the Orthodox Jewish community in the city's COVID-19 regulations and gerrymandered the boundaries of "red" and "orange" (i.e., highly regulated) zones to ensure that heavily Orthodox areas were subject to the strictest gathering regulations. 141 S. Ct. at 66. Both the Roman Catholic Diocese and the Agudath Israel maintained that the COVID-19 regulations treated houses of worship much more harshly than comparable secular facilities. *Id.* In the face of allegations regarding deprivation of free exercise and disparate treatment of religious activity, the Court carefully analyzed the parties' positions, noting that certain numerical caps applied to houses of worship but not to some secular buildings in the same area. *Id.* at 73. The Court highlighted that while factories and schools had contributed to the spread of COVID-19, they were treated less harshly than the churches and synagogues. *Id.* at 67. Because the Court found that the restrictions were not applied neutrally and in a generally applicable manner, the Court engaged in an even more searching analysis to determine whether the restrictions were narrowly tailored to serve a compelling state interest. *Id.* The Court considered the restrictive and severe nature of the regulations at issue, emphasized that there was no evidence that the Diocese and Temple had contributed to the government-identified harm, and noted that there were many other less restrictive rules that could have been adopted to minimize the relevant risks. *Id.*

These findings are important because had the Ninth Circuit engaged in the same level of review, the

level of review prescribed for disparate treatment, it would have determined the same: the regulations imposed on Lee were uniquely restrictive and severe, there was no evidence that Lee's property had contributed to the government-identified harm with respect to the local ordinances, and there were many other less restrictive rules that could have been adopted to minimize the relevant risks (including those that were expressly adopted for Lee's neighbors' secular structures). *See, e.g.,* App.123 (despite actual notice of neighbor Sabraw's unpermitted secular structures, the City did not order Sabraw to demolish the unpermitted structures; the City ordered Lee to demolish her religious structures with similar if not identical violations); App.123–33 (none of Lee's structures threaten human safety; many of them were preexisting); App.143 (none of Lee's structures lacked adequate light, ventilation, illumination, insulation, sanitary facilities, or other essential equipment); App.150 (City of Freemont targeted only Lee for Water Control Board investigation, despite City knowledge of neighbors with nearly identical alleged violations); App.169–70 (City invited neighbor Sabraw to apply for permits to legalize his unpermitted construction, despite mandating Lee demolish her unpermitted construction; City allowed Sabraw extensions for permits due to COVID despite holding Lee to strict deadlines and threatening immediate demolition).

The Ninth Circuit's casual bypass of this searching review ignores decades of the Court's Free Exercise jurisprudence. The Free Exercise Clause "forbids subtle departures from neutrality," *Gillette* v. *United*

States, 401 U.S. 437, 452 (1971), as well as "covert suppression of particular religious beliefs." *Bowen* v. *Roy,* 476 U.S. 693, 703 (1986) (opinion of Burger, C. J.). "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Church of Lukumi*, 508 U.S. at 534 (citing *Walz* v. *Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

The lower court's failure to be vigilant in the face of alleged religious discrimination and disparate treatment facilitated its ignorance of several key facts established in record. For example, the Ninth Circuit focused only on city official West's actions, despite the discrimination and harassment Lee faced by numerous other city officials. *See* Section I.A., *supra*. The lower court also referenced the "size and scale" of Lee's construction to excuse the City's disparate treatment of Lee's religious structures, despite allegations indicating that Lee did not expand the footprint of several preexisting buildings, App.123–33; that Lee's neighbor's secular-based code violations risked similar government harm, as they were likewise unpermitted structures constructed near a waterway, App.120–21, App.164 (noting similar proximity to watercourse); that the City did not enforce the city code against Lee's neighbor's noticed use of RoundUp, App.150; and that many of the City's allegations against Lee were patently untrue, *see, e.g.,* App.143 (disputing city's assertions that Lee's religious structures lacked light, ventilation, illumination, insulation, and sanitary facilities, among other refutations).

As this Court has concluded, "[i]t is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits 'gratuitous restrictions' on religious conduct, seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Church of Lukumi*, 508 U.S. at 538 (citing *McGowan* v. *Maryland*, 366 U.S. 420, 520 (1961)). This is especially true at the pleadings state, as Lee did not have the benefit of discovery to further evidence the years of discrimination and unfair treatment by the City.

This Court should embrace the opportunity to correct the Ninth Circuit's erosion of its citizens' free exercise rights. The Ninth Circuit's analysis impermissibly sidesteps any meaningful consideration of disparate treatment for places of worship as compared to similarly situated secular establishments, ignoring the precedent of this Court, which both establishes the foundation for a meaningful inquiry into an allegation of religious targeting, and emphasizes the inquiry's importance in safeguarding fundamental rights.

II. This Case is Important Given the Critical Free Exercise Implications of the Below Court's Ruling

If the below decision is left to stand, it will encourage a shift in municipal decision-making toward a distributed model of power in order to skirt 1983 liability for violations of citizens' free exercise rights. This Court has explained the critical incentives at play in this context, reasoning that the "knowledge that a municipality will be liable for all of its injurious conduct,

whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen v. Independence*, 445 U.S. 622, 651–52 (1980). Furthermore, "the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Id.* at 652. The Ninth Circuit's decision demonstrates the dangerous consequences of the opposite effect: when municipal officials have no reason to fear liability, protecting the freedoms secured by the Constitution is not a key consideration; rather, they are free to discriminate, target, and harass based on religious belief. The course of action taken by the city officials in Fremont undermines the very purpose of government in this country. *See Id.* at 651 ("How uniquely amiss it would be, therefore, if the government itself—the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct—were permitted to disavow liability for the injury it has begotten") (cleaned up).

The Court should grant certiorari to affirm the standard for municipal liability under 1983 and clarify the standard for city officials acting in concert against religious freedom. Indeed, the Court has recently seen fit to grant review when state actors are impinging on religious liberty. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (granting certiorari where state COVID-

19 policy restricted religious activities more than secular activities); *Fulton v. City of Philadelphia,* No. 19-123, 2020 U.S. LEXIS 961 (Feb. 24, 2020); *Kennedy v. Bremerton Sch. Dist.*, No. 21-418, 2022 U.S. LEXIS 500 (Jan. 14, 2022); *Groff v. DeJoy,* No. 22-174, 2023 U.S. LEXIS 403 (Jan. 13, 2023); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 2563 (2021); *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Robinson v. Murphy*, 141 S. Ct. 972 (2020); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Agudath Isr. of Am. v. Cuomo*, 141 S. Ct. 889 (2020).

Without this Court's review, the decision below answers one of the "substantial line-drawing problems" raised by *Monell*, 436 U.S. at 713 (Powell, J., concurring), in favor of suppression of free exercise. The Ninth Circuit's troubling curtail of its citizen's rights should not stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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November 3, 2023

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: July 7, 2023]

No. 22-15863

D.C. No. 3:21-cv-04661-CRB

TEMPLE OF 1001 BUDDHAS; MIAOLAN LEE,

Plaintiffs-Appellants,

v.

CITY OF FREMONT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

MEMORANDUM[*]

Submitted June 9, 2023[**]
San Francisco, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: MILLER and KOH, Circuit Judges, and LYNN,*** District Judge.

Miaolan Lee and the Temple of 1001 Buddhas (collectively, Lee) appeal from the district court's dismissal of their claims against the City of Fremont. We have jurisdiction under 28 U.S.C. § 1291, and we review de novo a grant of a motion to dismiss, "draw[ing] all reasonable inferences in favor of the plaintiff." *Doe v. Regents of Univ. of Cal.*, 23 F.4th 930, 935 (9th Cir. 2022). We affirm.

1. The district court correctly dismissed Lee's state-law damages claims because Lee failed to provide the City with written notice describing "the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted." Cal. Gov't Code §§ 910(c), 945.4. Under California law, Lee needed to offer "facts sufficient to give the [City] notice to investigate and evaluate [the] claim." *Castaneda v. Department of Corr. & Rehab.*, 151 Cal. Rptr. 3d 648, 656 (Ct. App. 2013). But Lee's written notice offered no facts at all about her claims.

2. The district court did not abuse its discretion in striking Lee's due process claims. When the district court dismissed Lee's original complaint, it gave leave to amend without limitation. After Lee filed an amended complaint, the district court dismissed with leave to amend only certain claims. Lee then filed another amended complaint containing due process claims that had appeared in neither previous complaint. The district court did not abuse its discretion in barring

*** The Honorable Barbara M. G. Lynn, United States District Judge for the Northern District of Texas, sitting by designation.

Lee from adding those new claims. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

3. Lee's operative complaint fails to state a claim under 42 U.S.C. § 1983. Because Lee sues a municipality, she must allege unconstitutional acts flowing from a "municipal policy." *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691 (1978). Lee alleges that Gary West, Fremont's chief building official, made municipal policy about building and zoning code enforcement. *See* Cal. Health & Safety Code § 18949.27; Fremont Mun. Code § 18.15.030. But she does not plausibly allege that West's decisions violated the Constitution.

According to public records of which the district court appropriately took judicial notice, the City accused Lee of building nine unpermitted structures totaling thousands of square feet. The City maintained that the structures pose a fire hazard and lack appropriate wastewater treatment, among other alleged nuisances.

To show religious discrimination, Lee must plausibly allege that West took enforcement actions against her "'because of,' not merely 'in spite of,'" the adverse effect on her religious practice. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993). Lee's allegations do not make it plausible to infer that code violations were not the driving force behind West's decisions. Significantly, Lee nowhere squarely disputes that she built numerous structures without permits, in violation of the municipal code. *See* Fremont Mun. Code § 18.55.040(a). Although Lee alleges that City officials made comments disparaging the sincerity of her religious practice, she does not demonstrate that West himself shared or approved of this animus. West allegedly told her that she could not pray on certain parts of her property, but the only

plausible inference from these comments is that West was enforcing the City's orders about which structures were safe to use.

Lee also alleges that West ignored the construction of a handful of unpermitted structures on neighbors' properties, preferring instead to target her. But considering the size and scale of Lee's concededly unpermitted construction, Lee has not pleaded that these neighbors violated policy "to the same degree" she did, as would be necessary to raise an inference of selective enforcement. *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1159 (9th Cir. 2022) (emphasis omitted).

Lee also has not established that West retaliated against her in violation of the First Amendment. West himself never expressed "opposition to [her] protected speech." *Boquist v. Courtney*, 32 F.4th 764, 777 (9th Cir. 2022). Lee does not plausibly allege that West "proffered false or pretextual explanations" for the enforcement actions. *Id.* Lee does describe instances in which the City took action shortly after her protected speech, but in the absence of other reasons to suspect retaliation, that is not enough to sustain her claim. *See Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995) (concluding that timing alone was insufficient to justify a district court's grant of a preliminary injunction when there was "little else to support the inference" of a retaliatory motive). Lee thus cannot hold the City liable on a theory that West discriminated or retaliated against her.

Lee also cannot prevail on a theory that the City has a custom of disfavoring religious practice. As noted, Lee alleges that she was subjected to discriminatory enforcement, and she also contends that a deputy city attorney said that houses of worship were prohibited on some lands. She does not describe practices "so 'persistent and widespread' that [they] constitute[] a

'permanent and well settled city policy,'" as would be necessary to establish a custom under *Monell*. *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (quoting *Monell*, 436 U.S. at 691)). Lee's section 1983 claims therefore fail.

4. Lee lacks standing to bring her claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA). She argues that Fremont Municipal Code § 18.55.110 unlawfully bars her from holding public religious gatherings on her property. But that ordinance does not injure her because, according to the operative complaint, she uses her property only for private purposes.

Similarly, Lee lacks standing to seek a declaratory judgment about the applicability of the Williamson Act, Cal. Gov't Code §§ 51200 to 51297.4, to her property. To have standing, Lee would need to show an "imminent" threat of harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But despite the City's wide-ranging actions against Lee, the City has never enforced the Williamson Act against her.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 21-cv-04661-CRB

TEMPLE OF 1001 BUDDHAS, *et al.*,

Plaintiffs,

v.

CITY OF FREMONT,

Defendant.

ORDER GRANTING MOTION TO DISMISS
WITHOUT LEAVE TO AMEND

Defendant City of Fremont moves to dismiss Plaintiffs Miaolan Lee and Temple of 1001 Buddhas' second amended complaint. For the third time, Plaintiffs allege that the City violated their constitutional rights or otherwise burdened their religious practice when it enforced thirteen violations of state and municipal laws against their property (including but not limited to the California Building Code, Electrical Code, and Plumbing Code). The Court has twice dismissed with leave to amend. The City moves to dismiss for a third time. Finding oral argument unnecessary, the Court GRANTS the motion without leave to amend.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background[1]

1. The Property

This lawsuit concerns property located at 6800 Mill Creek Road in Fremont, California. *See* SAC (dkt. 36) ¶ 15. The property consists of 29 acres. *Id.* ¶ 15. It is situated on a hillside where the slope of the land is 15% or higher, in a very high fire hazard area, and an earthquake-induced landslide zone. *See* RJN, Ex J (dkt. 38-10), at 2.[2] The property is zoned as "Open Space" and "Hill (beyond Ridgeline)" under city law. *Id.* ¶ 31. Among the purposes of the City's open space district is "to permit limited but reasonable use of open lands while protecting the public health, safety and welfare from the dangers of seismic hazards and unstable soils." Fremont Municipal Code (FMC) § 18.55.010; RJN Ex. A at 1.

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[1] In the complaint, Lee alleges hundreds of facts about the long saga of her dispute with the City. Many of these facts are put forth in the Court's earlier orders in this case. However, for the sake of clarity, the Court omits those facts that lack an apparent relation to the claims in the second amended complaint.

[2] The Court judicially notices the Final Notice and Order to Abate Nuisance issued by the City as to the property, as well as other relevant matters of public record, because they are "not subject to reasonable dispute." *See* Fed. R. Evid. 201(b); RJN (dkt. 38); *Khoja v. Orexigen Therapeutics, Inc.,* 899 F.3d 988, 1002 (9th Cir. 2018). However, the Court does not assume the truth of disputed facts in these documents. *See Khoja,* 899 F.3d at 1002. The Court does, however, find that the above facts, such as the location of the property on sloped land in a high fire hazard area, are not subject to reasonable dispute and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

In 2010, Lee purchased the property, *id.* ¶ 16, which had undergone extensive unpermitted construction by prior owners, *id.* ¶ 22. In the ensuing years, Lee initiated additional construction on the property. In March 2018, Lee deeded ownership of the property to the Temple of 1001 Buddhas, a "private religious 501(c)(3) California corporation," but Lee has continued to live there and "uses it for private religious worship." *Id.* ¶ 17.[3] The property currently contains the following structures:

1) Hindu God House Structure (120-square-foot gazebo with pond) (*id.* ¶ 27(a));
2) A modular home with carport (a structure that existed when Lee acquired the property but that was later modified) (*id.* ¶ 27(b));
3) Meditation Hall (a remodeled version of the barn structure that existed when Lee acquired the property) (*id.* ¶ 27(c));
4) Main Buddha Hall (a remodeled version of a garage that existed when Lee acquired the property) (*id.* ¶ 27(d));
5) Green House (*id.* ¶ 27(e));
6) Retreat House (a new two-story accessory dwelling unit (ADU) built to house individuals attending religious retreats) (*id.* ¶ 27(f));
7) Solar panels (*id.* ¶ 27(g)).

[3] The complaint does not clearly allege Lee's connection to the Temple, but indicates that Lee has continued to live on the property. The Court refers to Lee and the Temple collectively as "Lee."

8) Main Residence (a structure that existed when Lee acquired the property) (*id.* ¶ 27(h)); and

9) Tree House (*id.* ¶ 27(i)).

Lee alleges that her neighbors have also engaged in construction on their properties without required permits. Ron Sabraw, who is Caucasian, lives next door at 6900 Mill Creek Road. *Id.* ¶ 23, 122. Lee alleges that Sabraw once told Lee that it was very difficult to get permits for construction, so for decades everyone "just does what they have to do." *Id.* ¶ 23. He showed Lee the unpermitted improvements he had made to his own property, including "a detached [] garage, cottage and a deck supported by a steel I-beam, which was built approximately 75' from the seasonal creek bed" and that he uses Round-Up "extensively" on his property. *Id.* Lee alleges that another neighbor, Talley Polland, recently constructed "a 1/4 mile concrete driveway over and along the creek without permits." *Id.* ¶ 36. Mark Williamson, another resident of Mill Creek Road, has reported Sabraw's unpermitted structures for years. *Id.* ¶ 25.

2. Early Interactions with the City

In 2014, Lee applied for and received permits from the City to finish improvement work on a dilapidated barn (which became the Meditation Hall). *Id.* ¶ 34. During the permitting process, the City's former building official observed religious statues Lee had installed on the property and allegedly said: "I wish the City did not know about them." *Id.* ¶ 35.[4]

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[4] Although it is not clear from the complaint which statues the building official had glimpsed, they may have been some of the "thirty-two [seven-foot] marble Arahats" that have been on the site since 2012. *Id.* ¶ 26.

In October 2017, City Code Enforcement Manager Leonard Powell sent Lee an email requesting access to the property. *Id.* ¶ 37. The next day, Powell and two other City employees entered the property without permission and took pictures. *Id.* ¶¶ 38–39. In January, Powell emailed a formal request for an inspection, as the City had been made aware of the following violations: "(1) unpermitted construction of, on, or in multiple buildings; (2) extensive concrete work on the property; (3) construction or alteration of a natural watercourse; and (4) business operating in a residential zone." *Id.* ¶ 45.

Later in January 2018, Lee met with Gary West, the City's Building Department Chief, and complained that City employees discriminated against her because of her religion and that one City employee falsely suggested on his business cards that he was a lawyer. *Id.* ¶ 46. West told Lee that he urgently needed to inspect the property. *Id.* City personnel then sought and obtained an inspection warrant from the Superior Court. *Id.* ¶ 49. On February 9, City employees, including West and Powell, searched the property, including Lee's bedroom and "most closets and drawers in the residence." *Id.* ¶¶ 51, 52.

On March 28, 2018, Lee's attorney wrote to the City stating that Lee "remained ready to cooperate with any and all requests and inspections." *Id.* ¶ 57. The next day, the City issued a Notice and Order to Abate Nuisance listing numerous violations of the Fremont Municipal Code and ordering Lee to "immediately cease habitation and occupancy[]" of three structures: the main Buddha Hall, the Retreat House, and the Meditation Hall). *Id.* ¶ 58. The City stated that the three buildings lacked "adequate fire resistance-rated construction;" "adequate structural and foundation

systems," "proper on site waste disposal and waste water treatment," and that there was a "substantial risk of partial or complete collapse" in an earthquake due to the lack of "appropriate mitigation measures" during construction. *Id.* ¶ 59; *see* RJN Ex. F (dkt. 38-6).

In May 2018, Lee met with City staff "to attempt to resolve all concerns stated by the City." *Id.* ¶ 64. She agreed to allow City employees to inspect the property several days later. But the City cancelled the appointment and instead obtained an inspection warrant from the Superior Court. *Id.* ¶ 66. City employees executed the warrant and inspected the property again. *Id.* ¶¶ 67–68. On June 8, at the City's request, Tanu Jagtap, a City Code Enforcement Officer, conducted a fourth inspection of Lee's property with her own engineers and consultants present. *Id.* ¶ 70.

3. The Notices and Orders to Vacate

On June 13, 2018, Lee emailed a letter to the Mayor and City Council discussing her situation and arguing that the City had "misapprehended" her religious uses of the property, which were "private." *Id.* ¶ 71. The following day, the City sent Lee a Notice and Order to Vacate the ADU/Retreat House, the Main Buddha Hall/Garage, and the Meditation Hall/Former Barn. *Id.* ¶ 72. This Notice and Order, signed by West, stated that the buildings were "unlawful, unsafe[,] and unfit for human occupancy." *Id.* It required Lee to remove "all personal property" from them within two weeks. *Id.* According to Lee, two of these three structures were "pre-existing." *Id.* Lee refused to remove Buddha statues from the Main Buddha Hall, but she removed the meditation pillows and cushions. *Id.* ¶ 74. Later that month, City employees requested and obtained entry to the property and posted notices barring entry

on the three "condemned buildings" and at the main entrance. *Id.* ¶ 75. West visited the property and allegedly told Lee that she could only pray in the Meditation Hall or in her home. *Id.* ¶ 80. Since then, Lee has not been able to use these three buildings for their intended "meditation purposes to practice their faith." *Id.* ¶ 76.

Lee responded to the June 2018 Notice and Order in various ways. For example, she sent the City notices of appeal, retained various structural engineers and consultants to perform work on the buildings, and updated the City as she attempted to bring the buildings into compliance with the City's instructions. *E.g., id.* ¶¶ 77–78. City employees had several meetings with Lee's consultants and representatives regarding plans for the property and permit applications. *Id.* ¶¶ 79, 82–85. But these steps did not solve the problem. In May 2019, the City recorded a Notice of Substandard Building/Structure with the County Recorder's Office of the County of Alameda, indicating that the Retreat House, the Main Buddha Hall, and the Meditation Hall were "unsafe, dangerous and a public nuisance." *Id.* ¶ 86.[5]

Meanwhile, nearby resident Mark Williamson had been complaining to the City about neighboring properties. In May 2018, he made a "report of concerns" concerning discrimination and bias as to enforcement and investigation of permitting requirements. *Id.* ¶ 62. In August 2019, he made another report of concerns about Sabraw's and Polland's properties, in a complaint

[5] Lee also alleges that someone at the City asked the San Francisco Bay Regional Water Control Board to investigate compliance on Lee's property (but not on neighboring properties). *Id.* ¶ 81.

entitled "inconsistent enforcement of zoning issues on and around Mill Creek Road in Fremont." *Id.* ¶ 90. In June and again in November 2019, Lee complained to the City about these properties and alleged discriminatory code enforcement. *Id.* ¶¶ 88, 99. In December 2019, the City assigned someone to investigate Polland's property, but the complaint was closed as unfounded. *Id.* ¶ 100.

On October 7, 2019, Lee applied for conditional use permits. *Id.* ¶ 95. Shortly thereafter, some City employees made inartful statements suggesting that Lee was using religious rhetoric to obscure the problems with the property. At a December meeting, Wayne Morris, the City's Deputy Community Director, "accused [Lee] of fabricating her religious beliefs for permit purposes" and asked Lee whether she thought "Buddha is ok with the construction." *Id.* ¶ 101. Lee alleges that Morris said that she was "using the Buddha as a protective shield." *Id.* Morris then told Lee that the permit process was "going to be so expensive" that the buildings "need to come out." *Id.*

In January 2020, Morris, Powell, and James Willis (another city employee) inspected the property again. *Id.* ¶ 105. Lee repeated to Willis that her neighbor Sabraw had also performed unpermitted work on his property and that the City's application of its laws were "inconsisten[t]." *Id.* ¶ 106. In February, Lee complained to the City that it should hold her citations in abeyance while her conditional use permits were pending, as she claimed the City had done for other properties. *Id.* ¶ 109. The following month, the City withdrew some of the citations. *Id.* ¶ 110. In October, Lee submitted a modified application for permits. *Id.* ¶ 115. Willis told Lee her application was incomplete. *Id.* ¶ 116.

On March 11, 2021, the City issued a 58-page Amended Notice and Order to Abate Nuisance, which required the demolition of three buildings on the property. *See id.* ¶¶ 120, 122–26. The Amended Order documented thirteen violations of the City's zoning laws and permitting rules, as well as of California's Building Code, Electrical Code, Plumbing Code, Mechanical Code, Fire Code, Fish and Game Code, and Environmental Quality Act. *See, e.g.,* RJN Ex. J at 7, 10–11, 13–14, 17, 23–24, 26–27, 32–33, 38, 46–50, 52. Lee was "shocked" because she had reported the three structures to the County Assessor's Office in 2018 and paid the relevant taxes associated with them. SAC ¶ 121. Lee alleges that, "upon information and belief," Sabraw's deck is "in similar proximity to a watercourse" and thus violations 1 and 2 (of 13) could also apply to that property. *Id.* ¶¶ 122-23.

After several attempts to discuss her situation with Fremont's Mayor and members of the City Council, Lee held a press conference denouncing the "systemic religious and race discrimination she was facing from [the] City" on May 11, 2021. *Id.* ¶¶ 127–37.

B. Procedural History

In June 2021, the Temple and Lee filed the instant lawsuit, asserting a dozen federal and state causes of action. *See* Compl. (dkt. 1). The Court granted the City's motion to dismiss with leave to amend. *See* First Dismissal Order (dkt. 25).

The Temple and Lee filed an amended complaint asserting nine federal and state causes of action. *See* FAC. The Temple and Lee asserted two 42 U.S.C. § 1983 claims based on religious discrimination and retaliation, three claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), one claim

concerning the validity of a land conservation contract, and one claim under the California Constitution's Free Exercise Clause. Lee individually asserted additional Section 1983 claims for discrimination based on race, discrimination based on national origin, and unreasonable searches. *Id.* The Court again granted the motion to dismiss. Second Dismissal Order (dkt. 34). It granted leave to amend six of the claims, but denied leave as futile as to the Section 1983 claims for racial discrimination and unreasonable searches, as well as the land conservation contract claim. *Id.* at 30.

Plaintiffs' second amended complaint asserts seven claims: three Section 1983 claims for religious discrimination, retaliation, and substantive due process/equal protection; a RLUIPA claim; and three claims under the Right to Liberty, Free Exercise Clause, and Substantive Due Process in the California Constitution. SAC (dkt. 36) at 47– 67. Three of these seven claims were not raised in any prior complaint. The City moves to dismiss. Mot. (dkt. 37).

Meanwhile, Lee has appealed the Amended Notice and Order in state court. In August 2021, after five days of hearings, the hearing officer issued a memorandum of decision upholding nearly all of the violations the City found. *Id.* ¶ 139; RJN Ex. K. In November 2021, Lee timely filed a petition for writ of mandate to the Alameda County Superior Court. *Id.* ¶ 139.

II. GENERAL LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(f), a court may "strike from a pleading . . . any redundant [or] immaterial . . . matter." Fed. R. Civ. P. 12(f). The rule is designed to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Whittlestone,*

Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (quotation and citation omitted). Where a plaintiff raises new claims in an amended complaint after the court granted leave to amend without limitation, California district courts often consider the new claims. *E.g., Topadzhikyan v. Glendale Police Dept.,* 2010 WL 2740163, at *3 n. 1 (C.D. Cal. July 8, 2010). But "where leave to amend is given to cure deficiencies in certain specified claims, courts have agreed that new claims alleged for the first time in the amended pleading should be dismissed or stricken." *DeLeon v. Wells Fargo Bank, N.A.,* 2010 WL 4285006, at *3 (N.D. Cal. Oct. 22, 2010) (citing cases); *see, e.g., PB Farradyne, Inc. v. Peterson,* 2006 WL 2578273, at *3 (N.D. Cal. Sept. 6, 2006) (striking a claim because it was "outside the scope of the leave to amend" previously granted); *see also Sapiro v. Encompass Ins.,* 221 F.R.D. 513, 516-17 (N.D. Cal. 2004) (noting that Rule 12(f) motions can be granted "when necessary to discourage parties from filing 'dilatory' pleadings and papers").

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim for which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either a "cognizable legal theory" or "sufficient facts alleged" under such a theory. *Godecke v. Kinetic Concepts, Inc.,* 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the miscon-

duct alleged." *Id.* at 678. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). The Court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007).

If a court dismisses a complaint for failure to state a claim, it should "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Leadsinger, Inc. v. BMG Music Pub.,* 512 F.3d 522, 532 (9th Cir. 2008).

III. DISCUSSION

The Court grants the motion to dismiss. First, the Court dismisses the three claims Lee raises for the first time, as the Court's previous order limited leave to amend. Second, the Court dismisses Lee's two remaining Section 1983 claims because Lee has not plausibly alleged that the City committed religious discrimination or retaliation. Third, the Court dismisses Lee's RLUIPA claim because the City's land use ordinance does not in any way disallow her current or proposed uses of the property. Finally, Lee's California free exercise claim fails because it is once again insufficiently pleaded.

A. Motion to Strike (Claims 3, 5, and 7)

Lee raises three claims for the first time: a Section 1983 claim for violation of the due process clause and equal protection clause (Claim 3) and claims for declaratory relief under two provisions of the California Constitution: right to liberty and substantive due process (Claims 5, 7). SAC ¶¶ 167–81, 193–97, 205–11.

The Court strikes these three claims under Rule 12(f) to "avoid . . . litigating spurious issues." *See Whittlestone*, 618 F.3d at 973. "[W]here leave to amend is given to cure deficiencies in certain specified claims, courts have agreed that new claims alleged for the first time in the amended pleading should be dismissed or stricken." *DeLeon*, 2010 WL 4285006, at *3. The Court permitted Lee to amend her initial complaint without limitation. *See* First Dismissal Order. Despite this, Lee neglected to include new claims in her amended complaint. *See* FAC. In its second dismissal order, the Court again described the specific deficiencies in her reasserted claims, but certain claims were dismissed without leave to amend because amendment would be futile. *See* Order Dismissing FAC at 30. It permitted amendment only as to claims that could plausibly be amended by the inclusion of additional facts. *Id.* Lee admits that Claims 3, 5, and 7 are beyond the scope of the Court's previous order. Opp. at 7. The Court strikes these claims. *See DeLeon*, 2010 WL 4285006, at *3.

B. Section 1983 Claims (Claims 1 and 2)

Lee raises two claims against the City under 42 U.S.C. § 1983: discrimination on the basis of religion and retaliation for opposition to discrimination. SAC ¶¶ 144–56, 157– 66. As in Lee's prior two complaints, these claims fail because Lee has not alleged constitutional harm caused by a municipal policy or final

policymaker. *See Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

Under 42 U.S.C. § 1983, any person who, "under color of" state law, subjects any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." "[M]unicipalities and other local government units" are "included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690. That said, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691.

A plaintiff may maintain a cause of action against a municipality only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or implements or executes a less formal "governmental custom." *Id.* at 690–91 (quotation omitted). Although the relevant policy or custom itself need not be unconstitutional, there must be "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 387 (1989). And the policy or custom must be "the moving force behind the constitutional violation." *Id.* at 388 (alteration and quotation omitted). In short, *Monell* requires that the constitutional injury results from "[1] an expressly adopted official policy, [2] a long-standing practice or custom, or [3] the decision of a final policymaker." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013) (quotations omitted).

Under the final policymaker theory, a City is only liable for the constitutional torts of an official with

"final policymaking authority [for the City] . . . in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997). The policymaker must either commit the constitutional tort or ratify "a subordinate's unconstitutional decision or action and the basis for it." *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 802–03 (9th Cir. 2018) (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013)). Ratification requires a "deliberate choice to endorse" a subordinate's action. *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992), *overruled on other grounds* (quotation and citation omitted).

The Court finds it implausible that the City had a policy or custom that led to a constitutional violation. *See* Order Dismissing FAC at 13–14. Although Plaintiffs claim that the City has a longstanding custom "against allowing religious practice on private properties zoned 'Open Space' and 'Hill (beyond Ridgeline),'" SAC ¶¶ 150, they provide no allegation that such a custom ever existed. Their sole legal citation is to an inapposite case involving a police department policy. *See* Opp. at 12 (citing *Solis v. City of Vallejo*, 2014 WL 2768847, at *6 (E.D. Cal. June 18, 2014)).

However, the Court finds it plausible that West could have been a "final policymaker" for his acts "overseeing local code enforcement activities" as the City's building official. Cal. Health & Safety Code § 18949.27; *see* Order Dismissing FAC at 14 (concluding the same). Nonetheless, the Section 1983 claims fail because West did not commit (or ratify) any instance of religious discrimination or retaliation while overseeing local code enforcement.

1. Religious Discrimination

In their first Section 1983 claim, Plaintiffs allege that the City is liable because West "committed, ratified in approving, and/or acted with deliberate indifference to his subordinates' actions . . . in furtherance of religious bias." SAC ¶ 151. In paragraph 152, Plaintiffs include a several-page laundry list of thirty-five alleged facts (subsection a through z, then aa through ii) that they claim show religious bias. *Id.* ¶ 152.

A state actor violates the Free Exercise Clause of the First Amendment when it "substantially burdens the person's practice of their religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015). This standard requires "more than an inconvenience on religious exercise; it must have a tendency to coerce individuals into acting contrary to their religious beliefs or exert substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* (cleaned up). The Supreme Court has also recently explained that a regulation violates the Free Exercise Clause when it "single[s] out houses of worship for especially harsh treatment" vis-à-vis similarly situated secular establishments. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam).

Plaintiffs allege no plausible religious bias in West's decisions as building officer. As in Plaintiffs' previous complaints, virtually none of the allegations as to West relate to Plaintiffs' religion. The most problematic allegations have little or nothing to do with West or his role. *E.g.*, *id.* ¶ 152(ee) ("City staff mocked Plaintiffs' religious beliefs and repeatedly accused her of lying about her Buddhist faith."). Plaintiffs do not allege that West was present when any of these comments were made, *e.g.*, *id.* ¶ 101, or even that he was aware of them. Certainly they do not allege that he made a

"deliberate choice to endorse" them. *See Gillette*, 979 F.2d at 1347. And although Lee's newest complaint includes more allegations that the City has not enforced the law as to alleged unpermitted construction by two of her neighbors (Sabraw and Polland), Lee still has not alleged that either neighbor is similarly situated with legal and code violations as serious or extensive as those on the Temple's property. Thus, Plaintiffs have not pleaded that the City singled Plaintiffs out "for especially harsh treatment" compared to secular people who are similarly situated. *See Roman Cath. Diocese*, 141 S. Ct. at 66.

Nor can the Court credit Plaintiffs' allegation that "[t]he City [i.e., West] ordered Plaintiff to pray only in one place on her property and to remove religious materials from Plaintiffs' religious buildings." SAC ¶ 152(u); *id.* ¶ 80. The latter part of the comment (to remove religious materials from the condemned buildings) does not show religious bias because it appears that he was encouraging her to protect her religious materials. *See id.* ¶ 72 (noting that the Notice and Order to Vacate also required removing personal property from the buildings). And the Court finds highly implausible that West "ordered" Lee to pray in only one place on her 29-acre property. But even assuming that he did, this errant comment was not within the scope of West's authority to interpret the building code, and it bears no connection to any of the City's other official acts, such as its Notices and Orders to Abate or the Notice and Order to Vacate. It is not plausibly a constitutional violation that may be attributed to the City.

The other allegations, to the extent that they relate to code enforcement, have nothing to do with religion. *See, e.g.*, *id.* ¶ 152(m) ("The City falsely alleged

evidence to support the specific violations in NOA 2, NOA 2A, NOA 3, and the NOV."); *id.* ¶ 152(ii) ("The City ignored the fact that there were existing, unpermitted structures at the property for years, including in the same footprints that Plaintiffs' improvements were made, before Plaintiffs took ownership of the property."). The property is on a hillside with a slope of 15% or higher, in a very high fire hazard area, and an earthquake-induced landslide zone. *See* RJN, Ex J, at 2. There appears to be an extensive evidentiary record in support of the City's enforcement. *See, e.g.*, RJN, Ex G, H, I, J, K. Of course, for the purposes of this motion, the Court does not assume the truth of the City's findings. The City's evidence of Lee's violations may be erroneous, and the state court may well reach this conclusion. Yet even if West's enforcement action was based on flawed facts, Lee is far from plausibly suggesting that the errors were caused by religious bias.

In essence, Plaintiffs urge the Court to assume (without concrete factual allegations) that West acted with religious bias. Their main allegations are: (1) West investigated and enforced many legal violations on Lee's property pertaining to three buildings she uses for religious purposes; and (2) two of Lee's neighbors have at least one instance of unpermitted construction on their property, apparently for secular use, but West has not enforced the law against them. This is not sufficient to show religious bias.

Plaintiffs are not "substantially burdened" by the City's application of state and city environmental and safety laws that disallow them from practicing their religion in the three buildings they would like to use. *See Rodriguez*, 891 F.3d at 802–03. Although the code enforcement does not permit her to use those three buildings, Lee can exercise her religion elsewhere on

her property. The code enforcement does not "coerce [her] into acting contrary to [her] religious beliefs or exert substantial pressure on [her] to modify his behavior and to violate [her] beliefs." *Jones*, 791 F.3d at 1031.

2. Retaliation

Plaintiffs' second Section 1983 claim, that the City retaliated against her for her opposition to discrimination, also fails. *See* SAC ¶ 157-66. A First Amendment claim for retaliation requires a "substantial causal relationship" between a plaintiff's "constitutionally protected activity" and "adverse [government] action . . . that would chill a person of ordinary firmness from continuing to engage in the protected activity." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010).

Plaintiffs list nine instances of speech or activity they allege was protected by the First Amendment: complaints about her neighbors, complaints about inspections, and accusations that the City engaged in racial and religious discrimination. SAC ¶ 160(a)-(i). They then list six instances of alleged retaliation involving the stages of the investigation and enforcement of city and state laws. *Id.* ¶ 161(a)-(f). They allege that West "committed retaliation, ratified in approving his subordinates' retaliatory actions, and/or acted with deliberate indifference to his subordinates' retaliatory actions." *Id.* ¶ 162. Plaintiffs then list thirteen purported examples of that retaliation. *See id.* ¶ 162(a)-(m).

These allegations of retaliation fail to state a claim for largely the same reasons discussed in the Court's prior order. *See* Order Dismissing FAC at 18-19 & n.10. In fact, Plaintiffs mostly discuss the same two instances of retaliation that the Court already rejected. First, they insist that West issued the first inspection

warrant "for retaliatory reasons." SAC ¶ 162(b); Opp. at 14. This is not plausible. West indicated that he needed to inspect her property at the same meeting that Lee complained that she was being discriminated against. SAC ¶ 46. There is no "substantial causal relationship" between two contemporaneous views of the same investigation that had been pending for months. *See Blair*, 608 F.3d at 543. Plaintiffs themselves allege that the City had already informed them of violations on the property on January 12, 2018—weeks before Plaintiffs ever complained to West about discrimination. *See* SAC ¶ 45.

Second, Plaintiffs claim that West retaliated for their complaints of discrimination to the Mayor and City Council on June 13, 2018 by issuing the Notice and Order to Vacate the following day. SAC ¶ 162(e); Opp. at 13-14. But Plaintiffs also admit that West lacked personal knowledge of Lee's letter. Opp. at 13. The Court has already stated that Plaintiffs need "significantly more to connect West's enforcement action to Lee's protected activity." Order Dismissing FAC at 19. Yet still, Plaintiffs allege only that (1) they complained to some people at the City about an ongoing enforcement proceeding; and (2) another other part of government continued that enforcement proceeding. That does not plausibly allege that West took "adverse action" with a sufficiently "substantial causal relationship" to protected activity—it merely alleges that the investigation continued. *See Blair*, 608 F.3d at 543. Temporal proximity between two events with "little else" does not support a retaliation claim. *See Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995).

In sum, although West may be a final policymaker under *Monell* with respect to enforcement and interpretation of the building code, Lee has failed to plead

that he discriminated on the basis of religion or retaliated for protected activity. *See Rodriguez*, 891 F.3d at 802–03. Nor has Lee pleaded that West ratified constitutional injury perpetrated by one of his subordinates.

As the Court has twice dismissed these two claims on the same grounds, the Court concludes that amendment is futile and dismisses them without leave to amend.[6]

C. RLUIPA Claim (Claim 4)

Next, Lee argues that FMC section 18.55.110 facially violates RLUIPA because disallowing quasi-public religious uses in the "Open Space/Hill (beyond Ridgeline)" area is a "substantial burden" on Plaintiffs' religious practice. SAC ¶¶ 182-92. The Court dismisses this claim for lack of standing.

To have standing for a claim, a plaintiff must show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)).

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[6] Plaintiffs insist that they should "be permitted discovery as to the discrimination claim" because it is difficult to precisely allege discrimination at the motion-to-dismiss stage. *See* Opp. at 15-17. But the Supreme Court has made clear that the standard for passing a motion to dismiss is whether the "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). After three increasingly prolix complaints, Plaintiffs have not done so.

As relevant here, RLUIPA applies when a "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." 42 U.S.C. § 2000cc(a)(2)(c). Thus, RLUIPA is implicated "when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006). In such cases, RLUIPA "prohibits the government from imposing 'substantial burdens' on 'religious exercise' unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest." *Id.* at 985–86 (quotation omitted).

Under RLUIPA, a "land use regulation" is a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)." 42 U.S.C. § 2000cc-5(5). Safety laws such as building or construction code provisions do not qualify as "land use regulations" under RLUIPA, at least where they do not explicitly reference zoning laws. *Anselmo v. Cty. Of Shasta*, 873 F. Supp. 2d 1247, 1257 (E.D. Cal. 2012); *see Salman v. City of Phoenix*, 2015 WL 5043437, at *4 (D. Ariz. Aug. 27, 2015) (same as to "commercial or assembly construction code"); *see also Second Baptist Church of Leechburg v. Gilpin Twp.*, 118 Fed. Appx. 615, 616 (3rd Cir. 2004) (same as to a city "sewer ordinance").

Chapter 18.55 of Fremont's Municipal Code establishes an "open space district" in the City. *See* FMC Ch. 18.55; RJN Ex. A at 1. The provision's express purpose is

> to permit limited but reasonable use of open lands while protecting the public health, safety and welfare from the dangers of seismic hazards and unstable soils; preserve the topography of the city that shapes it and give it its identity; allow land to be used for agricultural production in its natural or as near natural state as possible; coordinate with and carry out regional, county, and city open space plans; and where permitted, encourage clustering of dwelling units in order to preserve and enhance the remainder of open space lands as a limited and valuable resource.

FMC § 18.55.010; RJN Ex. A at 1. To effectuate these purposes, the City's plan "identifies seven different open space land use designations to address a variety of open space opportunities and constraints." *Id.* Chapter 18.55 also sets forth building height standards, area, lot width, and yard standards, performance standards (which govern construction requirements for dwellings and other structures), land constraints, and other rules. *See* FMC §§ 18.55.010–18.55.110; RJN Ex. A.

Section 18.55.110 contains a table that "establishes allowed uses within an open space zoning district." FMC § 18.55.110; RJN Ex. A at 11. The table lists numerous categories of land use, including "agricultural," "commercial and service," "recreation and open space," "residential," "public and quasi-public," and "other." FMC § 18.55.110, tbl. 18.55.110; RJN Ex. A at 12–15. The "public and quasi-public" category lists several specific uses, then includes a catch-all for more

general public and quasi-public uses. FMC § 18.55.110, tbl. 18.55.110; RJN Ex. A at 14. The quasi-public use catch-all, in turn, includes "a use operated by a . . . religious . . . institution, with said use having the primary purpose of serving the general public." FMC § 18.25.3080; RJN Ex. B ¶ 2. Such a use is not permitted in three of the open space plan's land use designations: (1) Hill (beyond Ridgeline); (2) Hill Face; and (3) Private. *See* FMC § 18.55.110, tbl. 18.55.110; RJN Ex. A at 14. Plaintiffs' property is in the "Hill (beyond Ridgeline)" area, where the code does not permit quasi-public uses.

In their previous two complaints, and in earlier statements to the City, Plaintiffs represented that they use the property only for "private" purposes. *See, e.g.*, FAC ¶ 136; Opp. to MTD FAC (dkt. 31) at 23 (stating that the uses are "intended for private devotion"); *id.* at 25 (similar); RJN, Ex. K at 2 ("In a letter dated November 11, 2019 (Exhibit 20), Appellant clarified that the proposed religious use was private."). Thus, in its last order, the Court held that Plaintiffs lacked standing because (1) FMC section 18.55.110 did not apply to them and did not injure them; and (2) even if they suffered injury, a favorable decision could not redress it in light of the many other laws they had violated. *See* Order Dismissing FAC at 24-26.

Though Plaintiffs still allege that they use the property for "private religious worship," SAC ¶ 17, they argue that they have standing because they might (some day) pursue a quasi-public use, *see id.* ¶¶ 184, 188; Opp. at 24. Yet the Plaintiffs never present any detail about any proposed use that "ha[s] the primary purpose of serving the general public," FMC § 18.25.3080, and never allege any intention to pursue any such use soon, *see, e.g.*, Opp. at 24 n.5 (explaining that Plaintiffs

are challenging the ordinance because "they are prohibited from using the real property for quasi-public usages [sic] should they ever so desire"). Federal jurisdiction depends on their bare allegation that, at some point in the future, they might do something different with the property.

Plaintiffs therefore lack standing to challenge FMC section 18.55.110 for the same reasons explained in its prior order. The ordinance does not currently injure the Plaintiffs. *See* Order Dismissing FAC at 24-26. And the allegation that Plaintiffs may some day "desire" to open the property to quasi-public uses does not remedy this jurisdictional deficiency because it does not establish "concrete, particularized, and actual or imminent" injury. *See TransUnion,* 141 S. Ct. at 2203. It also remains true that, even if that injury were cognizable, it could not be redressed by a favorable decision because of the "dozens of other legal violations that independently require wide-ranging changes to (or demolitions of) the buildings." Order Dismissing FAC at 25. As the Court already once permitted Plaintiffs to fix this exact deficiency, the Court dismisses this claim with prejudice. *See Leadsinger,* 512 F.3d at 532.

D. California Claim (Claim 6)

In their sixth claim, Plaintiffs seek a declaration that the City's enforcement of its building codes violates the California Constitution's Free Exercise Clause. *See* SAC ¶¶ 198–204. Plaintiffs argue that the City "initiated and maintained criminal investigations, code enforcement, and abatement proceedings based upon religious animus against the religious beliefs of the Plaintiffs." *Id.* ¶ 200; *see id.* ¶ 200(a)-(f) (detailing examples alleged earlier in the complaint). Plaintiffs again fail to state this claim.

The California Constitution provides (in relevant part) that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Cal. Const. Art. I, § 4.

California's Free Exercise Clause bears some resemblance to the U.S. Constitution's Free Exercise Clause, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend I. In *Sherbert v. Verner*, the U.S. Supreme Court held that a law that substantially infringes a person's religious exercise violates the First Amendment's Free Exercise Clause absent a compelling government interest. 374 U.S. 398, 406–07 (1963). But later, in *Employment Division, Oregon Department of Human Resources v. Smith*, the U.S. Supreme Court held that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. 872, 879 (1990) (quotation omitted).

The California Supreme Court has repeatedly held that the U.S. Supreme Court's application of the First Amendment's Free Exercise Clause does not control application of California's Free Exercise Clause. *See, e.g.*, *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158 (2008); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 560–62 (2004). But the California Supreme Court has also declined to "determine the appropriate test" for challenges under California's Free Exercise Clause. *N. Coast Women's Care Med. Grp.*, 44 Cal. 4th at 1158. Indeed, the California Supreme Court has left open

whether *Sherbert*, *Smith*, "or an as-yet unidentified rule that more precisely reflects the language and history of the California Constitution" applies to challenges under California's Free Exercise Clause. *Id.* at 1159 (quoting *Catholic Charities of Sacramento*, 32 Cal. 4th at 562 (emphasis omitted).

Instead, the California Supreme Court has assumed without deciding that *Sherbert's* strict scrutiny test applies to such challenges. *See id.*; *Catholic Charities of Sacramento*, 32 Cal. 4th at 562. "Under that standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored." *Catholic Charities of Sacramento*, 32 Cal. 4th at 562. If a court determines that a challenged law passes muster under strict scrutiny, the court need not consider whether a less stringent standard should apply. *See id.*

Even under strict scrutiny, the California free exercise claim fails because Plaintiffs do not plausibly allege that the City's decisions substantially burdened their religious practice. In their opposition, Plaintiffs inaccurately argue that the City is preventing Plaintiffs from exercising their religion on the property. *See, e.g.*, Opp. at 26 ("Plaintiffs allege that the City has directly interfered with their right to free exercise of their religion by prohibiting religious use of Plaintiffs' property." (citing SAC ¶¶ 200-202)). This is not true. Although the enforcement does not permit Plaintiffs to use the three buildings that are (purportedly) in noncompliance with the law, Plaintiffs can exercise their religion elsewhere on the 29-acre property and in any buildings other than the three mentioned in the

Notice and Order to Vacate. Plaintiffs use the property "for private religious worship," SAC ¶ 17, and while they may be inconvenienced in having to do so in different buildings, they do not allege facts suggesting that this burden is "substantial" such that strict scrutiny would be triggered. *See Catholic Charities of Sacramento*, 32 Cal. 4th at 562. Without much more, code enforcements that preclude worship in a specific building for environmental or safety reasons do not violate the right to free exercise. Because the City's enforcement passes muster under strict scrutiny, the Court need not go further.

In analyzing the previous complaint, the Court stated it would permit only one more chance to amend this claim. Accordingly, the Court denies leave to amend.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the City's motion to dismiss without leave to amend. *See Leadsinger*, 512 F.3d at 532.

IT IS SO ORDERED.

Dated: May 18, 2022

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 21-cv-04661-CRB

TEMPLE OF 1001 BUDDHAS, *et al.*,

Plaintiffs,

v.

CITY OF FREMONT,

Defendant.

ORDER GRANTING MOTION TO DISMISS

Plaintiff Miaolan Lee lives on property owned by the Temple of 1001 Buddhas in Fremont, California. For the past eight years, City of Fremont employees have had numerous interactions with Lee and the property, all pertaining to whether certain structures on the property comply with various California laws and regulations and municipal codes. After numerous searches, inspections, orders, and negotiations, the City issued an amended Notice and Order to Abate Nuisance in March 2021. The 58-page Notice and Order listed thirteen violations of the Fremont Municipal Code and California laws (including but not limited to the California Building Code, Electrical Code, and Plumbing Code), and set a deadline for Lee to submit plans to fix the problems, which would require demolishing certain structures.

Lee and the Temple sued the City, asserting various federal and California claims. The Court previously granted the City's motion to dismiss with leave to

amend. Lee and the Temple filed an amended complaint with nine claims. The City now moves to dismiss again. The Court GRANTS the motion to dismiss all claims. The Court denies leave to amend Claims 2, 4, and 8, and grants leave to amend as to Claims 1, 3, 5, 6, 7, and 9.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

This lawsuit concerns property located at 6800 Mill Creek Road in Fremont, California. *See* FAC (dkt. 26) ¶ 14. The property consists of 29 acres and is zoned as "open space" under the City's laws. *Id.* ¶¶ 14, 21. It is situated on a hillside where the slope of the land is 15% or higher, in a very high fire hazard area, and an earthquake-induced landslide zone. *See* RJN, Ex I (dkt. 28-9), at 2.[1]

California's Williamson Act provides that any city may "by contract limit the use of agricultural land for the purpose of preserving such land pursuant and subject to the conditions set forth in the contract" and elsewhere in the *Act. Cal. Gov*. Code § 51240. Such a contract must exclude land "uses other than agricultural, and other than those compatible with agricultural uses, for the duration of the contract." *Id.* § 51243. After an initial ten-year term, the contract renews annually unless either party serves a notice of nonrenewal. *Id.* In 1978, pursuant to the Williamson Act, a

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[1] The Court may consider the Final Notice and Order to Abate Nuisance and other relevant matters of public record discussed here because they are incorporated by reference in the complaint and are not subject to reasonable dispute. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). For that reason, the Court grants the City's request for judicial notice (dkt. 28).

predecessor-in-interest to the property signed a "Land Conservation Contract" with the City. FAC ¶ 18. The contract with the City stated:

> During the term of this contract, or any renewal thereof, the said property shall not be used for any purpose, other than agricultural uses for producing agricultural commodities for commercial purposes and compatible uses as listed below.

Id. The contract then listed potential compatible uses, including "living quarters and home occupations," "public and quasi-public buildings," and "accessory use to the above." *Id.* The contract appears to still be in effect, as Lee does not allege that she (or the City) has ever served notice of nonrenewal. *Id.* ¶ 19.

In 2010, Lee purchased the property. *Id.* ¶ 15. In the ensuing years, Lee initiated considerable additional construction on the property. *See id.* ¶ 20. She uses several of the structures for religious purposes. *Id.* ¶ 20. In March 2018, Lee deeded ownership of the property to the Temple of 1001 Buddhas, but she has continued to live there. *Id.* ¶ 16.[2] It currently contains the following structures:

1) Main Buddha Hall (a one-story garage that existed when Lee acquired the property but that was turned into a three-story building) (*id.* ¶¶ 20(a), 52, 89);

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[2] The complaint does not clearly allege Lee's connection to the Temple, but indicates that Lee has continued to live on the property. *See* FAC ¶ 16; *see also* Opp. (dkt. 31) at 1 (referring to the property as "Lee's property"). The City has not argued that Lee's legal interest in the property is relevant. The Court refers to Lee and the Temple collectively as "Lee."

2) Meditation Hall (a barn that existed when Lee acquired the property but that was turned into a two-story structure) (*id.* ¶¶ 20(b), 52, 88);

3) Hindu God House Structure (120-square-foot gazebo with pond) (*id.* ¶¶ 20(c), 86);

4) Tree House;

5) Retreat House (a new two-story dwelling built to house individuals attending religious retreats) (*id.* ¶¶ 20(e), 44, 52, 90);

6) Green House;

7) Horse run-in shed;

8) A vacant mobile home at the creek (a structure that existed when Lee acquired the property but that was later modified);

9) Main Residence (a structure that existed when Lee acquired the property); and

10) Solar panels.

Id. ¶ 20. Although Lee does not always refer to the structures by consistent terminology, the main dispute in this case appears to concern the Main Buddha Hall, the Meditation Hall, and the Retreat House, each of which have undergone extensive construction since Lee purchased the property. *See, e.g.*, *id.* ¶¶ 44, 52.

Beginning in 2017, City employees began to have numerous interactions with Lee and the property. In October 2017, City Code Enforcement Manager Leonard Powell sent Lee an email requesting access to the property. *Id.* ¶ 30. The next day, Powell and other City

employees "trespassed" on the property and took pictures. *Id.* ¶¶ 31, 32.[3]

This upset Lee. In January 2018, Lee met with Gary West, the City's Building Department Chief, and complained that City employees were discriminating against her and had trespassed on the property. *Id.* ¶ 38. West told Lee that he urgently needed to inspect the property. *Id.* ¶ 39. He then sought and obtained an inspection warrant from the Superior Court.[4] *Id.* ¶ 40. On February 9, 2019, City employees searched the entire property, including Lee's bedroom and "most closets and drawers in the residence." *Id.* ¶ 41. They "rummaged through everything," including food in the

[3] The employees reached the front gate of the property. When the property's maintenance worker approached the gate to "see what they wanted," the gate automatically opened. FAC ¶ 31. The City employees drove inside and ignored the maintenance worker. *Id.* In December 2017, a California Department of Fish and Game warden accessed the property without permission. *Id.* ¶ 34. According to Lee, he "roamed the property . . . and then left a business card at the residence." *Id.* But Lee is suing only the City here. Lee also alleges that during a City Hall meeting with Powell, Powell told her that she "looked prettier without a hat." *Id.* ¶ 36. Lee complained about Powell's behavior and objected to Powell's use of the letters "JD" on his City-issued business cards because Powell is not a lawyer. *See id.* ¶ 38. It appears that Powell did attend law school. *See* RJN Ex. D at 21. Again, Lee has not asserted any claim based on these allegations.

[4] According to the warrant, which is attached to the City's request for judicial notice, a City employee received various complaints in October of 2017 asserting that Lee was engaging in illegal construction, unlawful operation of multiple registered businesses, and possibly human trafficking. *See* RJN (dkt. 28-4) at 40–56. These complainant was able to view the construction from "his neighboring property, and, at least in part, led to various City and Police investigation. *Id.* at 14. Although Lee mentions the warrant in her complaint, she does not discuss the basis of the warrant, and the parties do not discuss it in their briefing.

kitchen and Lee's make-up. *Id.* City employees then placed license plate recording cameras across the street from the property from February 28, 2018 to March 9, 2018. *Id.* ¶ 42.

On March 28, 2018, Lee's attorney wrote to the City stating that Lee "remained ready to cooperate with any and all requests and inspections." *Id.* ¶ 43. The next day, the City issued a "Notice and Order to Abate Nuisance" listing numerous alleged violations of the Fremont Municipal Code (FMC) and stating that no one could occupy three structures on the property (the Main Buddha Hall, the Meditation Hall, and the Retreat House). *Id.* ¶ 44. In particular, the City noted that the three buildings were:

(1) "erected and/or altered in violation of [FMC] Title 15,"

(2) "located in [a] very high fire hazard severity zone without adequate fire-resistance-rated construction and fire protection systems,"

(3) "lack[ing] adequate light, ventilation, illumination, insulation, sanitary facilities, and other essential equipment,"

(4) "on hillsides in earthquake induced landslide zones without appropriate mitigation measures,"

(5) "constructed without adequate structural and foundation systems," creating a "substantial risk of partial or complete collapse in [the] event of earthquake and earthquake induced landslides,"

(6) "constructed without plans or permits and the City [was] unable to determine the electrical connections and service for each," and

(7) lacking in "proper on site waste disposal and waste water treatment" so as to "pose contam-

> ination risk to adjoining streams, springs, and groundwater."

RJN Ex. I (dkt. 28-9). After Lee appealed the Notice and Order, the City Attorney told her that the Notice and Order would remain in effect based on the Land Conservation Contract. FAC ¶ 46.

In May 2018, Lee met with City staff "to attempt to resolve all concerns stated by the City." *Id.* ¶ 47. She agreed to allow City employees to inspect the property several days later. But Tanu Jagtap, a City Code Enforcement Officer, cancelled the appointment and instead sought and obtained an inspection warrant from the Superior Court. *Id.* The Officer's warrant application stated that Lee had not consented to City employees entering the property. *Id.* City employees executed the warrant and inspected the property again. *Id.* ¶¶ 48–49. On June 8, at the City's request, Jagtap conducted a fourth inspection of Lee's property with her own engineers and consultants present. *Id.* ¶ 50.

The City took additional action based on this inspection. In June 2018, Lee emailed a letter to Fremont's Mayor and City Council discussing her situation. FAC ¶ 51. West sent Lee a Notice and Order to Vacate the Main Buddha Hall, the Meditation Hall, and the Retreat House. *Id.* ¶ 52. This Notice and Order stated that the buildings were "unlawful, unsafe[,] and unfit for human occupancy," and was signed by West. *Id.* It required Lee to remove "all personal property" from them within two weeks. *Id.* Lee refused to remove Buddha statues from one structure. *Id.* ¶ 54. According to Lee, West informed her that she could pray in a dome meditation hall on the property and in the main house, but nowhere else. *Id.* ¶ 55. Later that month, City employees "requested and obtained entry" to the property, then posted notices barring entry on the

"condemned buildings" and at the main entrance. *Id.* ¶ 56.

Lee responded to the June 2018 Notice and Order in various ways. For example, she sent the City notices of appeal, retained various structural engineers and consultants to perform work on the buildings, and updated the City as she attempted to bring the buildings into compliance with the City's instructions. *Id.* ¶¶ 58, 61. City employees had several meetings with Lee's consultants and representatives regarding plans for the property and permit applications. *Id.* ¶¶ 64–65.

But these steps did not lead to a mutually agreeable resolution. In May 2019, the City recorded a Notice of Substandard Building/Structure with the County Recorder's Office of the County of Alameda, indicating that several buildings on Lee's property were "unsafe, dangerous and a public nuisance." *Id.* ¶ 66. The next month, Lee sent City Councilmember Raj Salwan a letter "complaining about discriminatory code enforcement" and the "inspection warrants." *Id.* ¶ 67. According to Lee, the Chief City Attorney told Salwan that the City was "ready for a lawsuit" because of Lee's opposition to the religious and racial discrimination she was experiencing. *Id.*[5] Lee alleges that despite her efforts, the City had decided to not engage in a "collaborative process." *Id.* ¶ 69. Lee applied for permits on October 7, 2019. *Id.* ¶ 73.[6]

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[5] In September 2019, the City issued citations to Lee and her bookkeeper. FAC ¶ 68. Lee was unable to determine why she was cited, but in March 2020, the City withdrew the citations. *Id.* ¶¶ 73, 77.

[6] Lee paid the City $27,250 in application fees to get conditional use permits. FAC ¶ 70. Lee alleges that the "regular price is $7,250," but the City planner insisted that Lee pay an additional $20,000 fee "for design review," even though the City does not

Shortly thereafter, City employees made inartful statements suggesting that Lee was using religious rhetoric to obscure the problems with the property. In December 2019, Lee met with Wayne Morris, the City's Deputy Community Director, and Powell. *Id.* ¶ 74. Morris and Powell "insisted that Ms. Lee was using religion as a protective shield." *Id.* According to Lee, Morris asked whether Lee thought "Buddha is ok with this construction." *Id.* Lee alleges that Morris laughed while asking whether she thought that "Buddha is ok with what you are doing?" *Id.* Morris then told Lee that the permit process was "going to be so expensive" that Lee would "give up and demolish." *Id.* Morris expressed that the buildings "need to come out." *Id.*

In January 2020, Morris, Powell, and James Willis (another city employee) inspected the property again. *Id.* ¶ 75. Two days later, Lee told Willis that her neighbor, a white man, had performed unpermitted work on his property. *Id.* ¶ 76. The unpermitted work included "a garage 75 feet from the Creek, an elevated deck, a cottage and olive orchard." *Id.* When Lee first met her neighbor, the neighbor told her that he had completed various construction projects without the City's approval and used herbicide extensively on his property. *See id.* ¶¶ 25–27. Lee alleges that her neighbor received seven separate complaints in response to these activities. *Id.* ¶ 28. But according to Lee, "the City has never done anything" about her neighbor's violations, besides sending the neighbor a letter stating that he could apply for permits "to legalize" his past "unpermitted construction." *Id.* ¶¶ 27, 76, 80, 86,

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"ordinarily . . . charge such fees at the outset of the process." *Id.* The City cashed Lee's check, but Lee never understood how the money was spent. *Id.*

97. In April 2020, Lee witnessed her neighbor looking at her property with binoculars. *Id.* ¶ 78.

In October 2020, Lee submitted a modified application for permits and requested responses for their suggested "mitigating measures," but the City "ignored the request." *Id.* ¶ 79. Willis told Lee the application was incomplete. *Id.* ¶ 80.[7]

On March 11, 2021, the City issued an Amended Notice and Order to Abate Nuisance. *Id.* ¶ 85. The 58-page document required the demolition of three buildings on the property. *Id.*[8] The Amended Notice and Order extensively documented thirteen violations of the City's zoning laws and permitting rules, as well as of California's Building Code, Electrical Code, Plumbing Code, Mechanical Code, Fire Code, Fish and Game Code, and Environmental Quality Act. *See, e.g.*, RJN Ex. I at 7, 10–11, 13–14, 17, 23–24, 26–27, 32–33, 38, 46–50, 52. Lee was "shocked" because she had reported the additional structures to the County Assessor's Office in 2018 and paid the relevant taxes associated with them. FAC ¶ 85. According to Lee, some parts of the Notice failed to address how the structures at issue violated the FMC. *See generally id.*

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[7] In December 2020, Jagtap emailed Lee that the City had not received a progress update and timeline regarding the removal and reconstruction of unlawful structures. *See* FAC ¶ 81. Lee alleges that she had provided such updates, and she responded to the email by requesting a response regarding her proposed mitigation measures. *Id.* ¶ 82. She also raised numerous complaints regarding the inspection warrants that had been executed on the property. *See id.* The City employee did not respond. *Id.* ¶ 83.

[8] According to Lee, Salwan told her to give the City employees "some money" to make her problems with the City "go away." FAC ¶ 91. Lee alleges that, on April 2, 2021, the FBI contacted her about Salwan's comments. *Id.*

¶¶ 86–90. After several attempts to discuss her situation with Fremont's Mayor and members of the City Council, Lee held a press conference denouncing the "systemic religious and race discrimination she was facing from [the] City" on May 11, 2021. *Id.* ¶ 97.

B. Procedural History

In January 2018, Lee submitted a claim for damages to the City and the California Department of Fish and Game. *See* RJN Ex. J (dkt. 12-10). The claim stated that on October 27, 2017, City employees entered the property without consent or a warrant. *Id.* It described that day's inspection and asserted various causes of action. *See id.* The same month, the City sent Lee a notice rejecting the claim. *See* RJN Ex. K (dkt. 12-11).

In April 2021, Lee submitted another claim for damages based on events involving her property from October 2017 to April 2021. *See* RJN Ex. L (dkt. 12-12). As relevant here, the claim form reads:

> What happened and why do you believe the City is responsible? Race, religion, gender discrim. Fraud, trespass, 4 amend violation of Constitution, whistleblowing to FBI on gov corruption, intentional inflection of emo distress.
>
> Description of damage or loss: Civil rights, emotional distress, invasion of privacy, abuse of power, unconstitutional invasions. Fraud, tress. $ amount is up to the jury to decide.

Id. The form did not contain additional details but provided Lee's attorney's contact information "for any questions." *Id.* In May 2021, the City sent Lee a notice of insufficiency indicating that Lee's claim lacked necessary detail. *See* RJN Ex. M (dkt. 12-13). The City directed Lee to provisions of the California Govern-

ment Code regarding the presentation of claims against public entities. *See id.*

Later in May 2021, Lee submitted an amended claim. *See* RJN Ex. N (dkt. 12-14). The amended claim again stated that the relevant injury occurred from "October 2017 to the present." *Id.* The amended claim form reads:

> What happened and why do you believe the City is responsible? The City of Fremont has interfered with and/or prevented the practice of my religion by Code Enforcement, Planning & Building Depts. Precluded my association with others of my faith, Invasion of privacy. Religious & National Origin Discrim.
>
> Description of damage or loss: Loss of use of real property and structures on real property. Damage to reputation. Emotional Distress.

Id. The City issued another notice stating that Lee's amended claim was insufficient "even when read together with the initial claim." RJN Ex. O (dkt. 12-15). The City gave Lee 15 days to submit yet another amended claim. *Id.* After Lee failed to do so, the City rejected Lee's claim. *See* RJN Ex. P (dkt. 12-16). Lee's final appeal of the City's enforcement action was rendered on August 26, 2021. RJN Ex. K.

In June 2021, the Temple and Lee filed the instant lawsuit, asserting a dozen federal and state causes of action. *See* Compl. (dkt. 1). The Temple and Lee asserted two 42 U.S.C. § 1983 claims based on religious discrimination and retaliation, five claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), and one claim under the California Constitution's Free Exercise Clause. *Id.* ¶¶ 82–90, 99–107, 132–88. Lee individually asserted additional

§ 1983 claims for discrimination based on race, discrimination based on national origin, and unreasonable searches, along with two California claims for invasion of privacy and arbitrary discrimination. *Id.* ¶¶ 91–98, 108– 31. The City moved to dismiss. *See* Mot. (dkt. 11). The Court granted that motion with leave to amend. *See* Order (dkt. 25).

The Temple and Lee filed an amended complaint asserting nine federal and state causes of action. *See* FAC. The Temple and Lee assert two 42 U.S.C. § 1983 claims based on religious discrimination and retaliation, three claims under RLUIPA, one claim concerning the validity of the land conservation contract under California's Williamson Act, and one claim under the California Constitution's Free Exercise Clause. *Id.* ¶¶ 99–108, 117–25, 133–65, 166–71, 172–80. Lee individually asserts additional § 1983 claims for discrimination based on race, discrimination based on national origin, and unreasonable searches. *Id.* ¶¶ 109–16, 126–32. The City now moves to dismiss. *See* Mot. (dkt. 27); *see also* Opp'n (dkt. 31).

II. GENERAL LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim for which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either a "cognizable legal theory" or "sufficient facts alleged" under such a theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

The Court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

If a court dismisses a complaint for failure to state a claim, it should "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

III. DISCUSSION

The Court grants the City's motion to dismiss. Lee's § 1983 claims fail because Lee is suing only the City and has not set forth allegations that establish the elements of municipal liability under § 1983. Lee's RLUIPA claims fail because she is not injured by the relevant land use provision and/or any injury is not redressable because the injury is independently caused by the other state and city law violations. Finally, Lee's California claims fail because Lee is not injured by the

land conservation contract and she once again misunderstands the relevant land use provision. The Court gives leave to amend only Claims 1, 3, 5, 6, 7, and 9.

A. Section 1983 Claims (Claims 1-4)

Lee raises four claims under 42 U.S.C. § 1983. These claims assert that Lee has suffered violation of their right to free exercise, racial and national origin discrimination, retaliation for Lee's opposition to discrimination, and unconstitutional searches. FAC ¶¶ 99–132. As in Lee's prior complaint, these claims fail because Lee has not alleged any constitutional harm caused by a municipal policy or final policymaker, as required under *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

Under 42 U.S.C. § 1983, any person who, "under color of" state law, subjects any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." "[M]unicipalities and other local government units" are "included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690. That said, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. That means "a municipality cannot be held liable *solely* because it employs a tortfeasor . . . on a *respondeat superior* theory." *Id.* (emphasis in original).

Section 1983 embraces a cause of action against a municipality only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or implements or executes a less formal "governmental

custom." *Id.* at 690–91 (quotation omitted); *see also Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1073 (9th Cir. 2016) (en banc) ("In order to establish municipal liability, a plaintiff must show that a policy or custom led to the plaintiff's injury.") (quotation omitted). That does not mean the relevant policy or custom itself must be unconstitutional. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989). But there must be "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id.* at 385. And the policy or custom must be "the moving force behind the constitutional violation." *Id.* at 388 (alteration and quotation omitted).

Three situations satisfy the *Monell* policy requirement: "when the plaintiff was injured pursuant to [1] an expressly adopted official policy, [2] a long-standing practice or custom, or [3] the decision of a final policymaker." *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013) (quotations omitted).

1. Official Policy or Custom

Lee fails to allege that any of the alleged constitutional injury in her four claims arise from either an "expressly adopted policy" or a "long-standing practice or custom." *See Ellins*, 710 F.3d at 1066. In its prior order, the Court explained:

> Based on the broader complaint, the only policy or custom relevant to this cause of action is FMC section 18.55.110. Elsewhere, Lee asserts that section 18.55.110 precludes "any form of religious use" of land in the City's open space district. As discussed above, that is not true. And this cause of action does not even mention FMC section 18.55.110. . .

> Instead, it appears to rest on City employees' individual enforcement decisions and actions.

Order at 20 (cleaned up). This analysis remains apt.

Lee continues to be incorrect in her conclusory allegation that the City "by its zoning ordinance has deprived Plaintiffs of the usage of the real property for religious purposes." FAC ¶ 103. Nothing in the zoning ordinance prevents Lee from using real property for religious purposes. FMC § 18.55.110 does not permit "quasi-public" purposes in the "Hill (beyond ridgeline)" area. *Id.* ¶ 174–75. But Lee repeatedly states that "the exercise of [these free exercise] rights, in this specific context, would be private." Opp'n. at 25. The zoning provision freely permits private religious use on her property. *See* FMC § 18.25.3080.

And Lee fails to suggest that any of the isolated acts by City employees manifest a policy or custom. For example, she never suggests that the City has an official policy or custom of confining residents' praying to certain buildings on their properties or of making derogatory remarks about Buddhism. *Cf.* FAC ¶¶ 55, 74. And despite Lee's allegation that her neighbor was treated differently, there is no allegation that he is similarly situated and no prior, similar incidents of discriminatory enforcement. *See Navarro v. Block*, 72 F.3d 712, 714–15 (9th Cir. 1996) (holding that allegations of single instances of misconduct are insufficient to establish municipal custom). Lee therefore has not pleaded any of her four claims on either of these two *Monell* theories.

2. Final Policymaker

Lee has also failed to plead that any of her four claims—violation of free exercise, racial and national origin discrimination, retaliation, or unlawful searches—

resulted from the decision of a "final policymaker." *See Ellins*, 710 F.3d at 1066. Lee's main argument is that Gary West was a final policymaker for the City. Even to the extent she is correct, Lee fails to plead that West's policy decisions caused any plausible constitutional injury.

For *Monell* liability to attach, the individual committing the constitutional tort must have "final policymaking authority" under state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality opinion). The key question is whether the individual has authority "in a particular area, or on a particular issue." *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997); *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (noting that a policy may be a "course of action tailored to a particular situation and not intended to control decisions in later situations"). In short, a person must be in a position of authority such that his final decision on that issue may "appropriately be attributed to" the city. *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004).

The final policymaker must either commit the constitutional tort or he must ratify "a subordinate's unconstitutional decision or action and the basis for it." *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 802–03 (9th Cir. 2018) (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013)). Ratification requires a "deliberate choice to endorse" a subordinate's action. *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992), *overruled on other grounds* (quoting *Pembaur*, 475 U.S. at 483).

Lee argues that West, as the City's building official, is a final policymaker with respect to the alleged injury. *See* FAC ¶¶ 11, 12; Opp'n at 9–13. Under California law, a "building official" is "invested with the responsibility for overseeing local code enforcement

activities, including administration of the building department, interpretation of code requirements, and direction of the code adoption process." Cal. Health & Safety Code § 18949.27. The California Building Code states that the building official is "authorized and directed to enforce the provisions of this code" and "to render interpretations of this code and to adopt policies and procedures in order to clarify the application of its provisions." CBC § 104.1. It goes on to state: "Such interpretations, policies and procedures shall be in compliance with the intent and purpose of this code. Such policies and procedures shall not have the effect of waiving requirements specifically provided for in this code." *Id.*

To the extent that West may "adopt policies and procedures" to apply and enforce the City's building code, Lee plausibly suggests that he has "final policy-making authority" on some "particular issues." *See McMillian*, 520 U.S. at 785. In an unpublished decision, another court so concluded when considering Section 1983 claims against another city's building official who abruptly closed a motel and evicted its tenants. *See Herrera v. City of Palmdale*, 2020 WL 7380144, at *8 (C.D. Cal. Oct. 8, 2020) (building official was plausibly a final policymaker where the municipal code "delegate[d] final policymaking authority to the Building Official to interpret, adopt, enforce, and create building code regulations, to investigate such violations, and to shut down buildings in violation of code violations"). Nonetheless, Lee's claims fail because she points to nothing within the scope of West's policymaking authority that caused any plausible constitutional harm.

a. Free Exercise and Racial Discrimination (Claims 1 and 2)

Lee's first two § 1983 claims allege that the City violated her right to free exercise of her religion and discriminated against her because of her race or national origin. A state actor violates the Free Exercise Clause of the First Amendment when it "substantially burdens the person's practice of their religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015). This standard requires "more than an inconvenience on religious exercise; it must have a tendency to coerce individuals into acting contrary to their religious beliefs or exert substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* (cleaned up). A government violates the Equal Protection Clause of the Fourteenth Amendment when it "act[s] with an intent or purpose to discriminate against the plaintiff based on" race or national origin. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001) (quotation and citation omitted).

Recall Lee's main allegations as to West. In early 2018, Lee complained to West about her experiences with Powell, another City employee. FAC ¶ 38. After City employees further investigated the property, West issued and signed a Notice and Order to Vacate the Main Buddha Hall, the Meditation Hall, and the Retreat House for various violations of state and city law. FAC ¶ 52; *see* RJN ¶ 8, Ex. H. West allegedly told Lee that she "was not allowed to pray anywhere else on the real property" other than the "'dome' meditation hall." FAC ¶ 55. West allegedly instructed her to remove all Buddha statutes from the Main Buddha Hall and the Retreat House. *Id.* City officials then posted notices barring entry to the three condemned buildings. *Id.* ¶ 56. The City later recorded a "Notice

of Substandard Building/Structure" stating that the three buildings were "unsafe, dangerous and a public nuisance." *Id.* ¶ 66. Finally, she alleges that her neighbor, who is a white man, completed unpermitted work including "a garage 75 feet from the Creek, an elevated deck, a cottage and olive orchard" but has not faced as much enforcement from the City. *Id.* ¶¶ 76, 113.

None of these allegations plausibly suggest that West, as a final policymaker, "substantially burdened" Lee's right to practice her Buddhist religion (Claim 1). *See Rodriguez*, 891 F.3d at 802–03. West used his enforcement discretion to investigate the violations on the property and to issue a Notice and Order to Vacate. Judicially noticeable facts show a strong factual basis to the conclusion that the property is in extreme noncompliance with the law. *See, e.g.*, RJN, Ex F, G, H, I, J. The property is on a hillside with a slope of 15% or higher, in a very high fire hazard area, and an earthquake-induced landslide zone. *See* RJN, Ex I, at 2. Although the code enforcement does not permit her to use (for any purpose) the three buildings that are in severe noncompliance, Lee can exercise her religion elsewhere on her property. The code enforcement does not at all "coerce [her] into acting contrary to [her] religious beliefs or exert substantial pressure on [her] to modify his behavior and to violate [her] beliefs." *Jones*, 791 F.3d at 1031.

Nor do the allegations plausibly suggest that West, as a final policymaker, discriminated on the basis of her national origin or racial identity as an Asian-American (Claim 2). Lee pleads no plausible facts to permit the inference that West had any intent to discriminate against Asian-Americans (or against Buddhists). Lee does not allege that West ever made a

comment about Lee's race or national origin. Lee also does not clearly allege that West made the decision to subject her neighbor, a white man, to less enforcement under the city's building code. But even assuming West made this decision, Lee has not alleged that her neighbor is similarly situated because she has not alleged that his legal violations are as serious as those on the Temple's property. FAC ¶¶ 26–28. And even if she had, a conclusory allegation of disparate treatment of two people is insufficient to suggest "intent or purpose to discriminate" on the basis of race, national origin, or religion. *See Lee*, 250 F.3d at 686.

The sole alleged statement that even *conceivably* suggests animus against religion is West's remark that Lee was not allowed to pray "anywhere else on the real property." FAC ¶ 55. Yet this comment does not suggest animus toward either Buddhists or Asian-Americans. In any event, it was not made under West's final policymaking authority, as such a statement is not supported by the building code or any of the City's official acts, such as its Notices and Orders to Abate or the Notice and Order to Vacate. While this remark was imprecise or perhaps insensitive, Lee has not plausibly pleaded that it can be "appropriately be attributed" to the City. *See Lytle*, 382 F.3d at 983.[9]

Lee also alleges that other City officials made religiously-charged comments, but they are irrelevant to Claims 1 or 2 because she never alleges that West ratified them. *Rodriguez*, 891 F.3d at 802–03. For example, Lee never suggests that West ratified Morris

[9] West also relayed an instruction to remove the Buddhas from the buildings, FAC ¶ 55, but this comment does not plausibly suggest animus, as it is only logical to recommend removal of her property from buildings that are unsafe to be used for any purpose and must be demolished.

and Powell's insensitive remark that Lee was "hiding behind the Buddha." *See id.* ¶ 74 (alleging that Morris laughed and said, "Do you think Buddha is ok with what your [sic] are doing?"). In the absence of plausible allegations that West made a "deliberate choice to endorse" these statements or any underlying animus, they cannot support a *Monell* claim. *See Gillette*, 979 F.2d at 1347.

b. Retaliation (Claim 3)

Lee's third § 1983 claim, which alleges that the City retaliated against her for her opposition to racial and religious discrimination, also fails. *See* FAC ¶ 121. A First Amendment claim for retaliation requires a "substantial causal relationship" between a plaintiff's "constitutionally protected activity" and "adverse [government] action . . . that would chill a person of ordinary firmness from continuing to engage in the protected activity." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010).

Lee fails to plead that West took "adverse action" with a sufficiently "substantial causal relationship" to the protected activity. *See id.* Although her complaint provides a long list of allegedly retaliatory actions, in her brief, Lee only argues two instances of retaliation: (1) West's seeking of a warrant after Plaintiff complained about alleged discrimination by Powell; and (2) West's issuing of a Notice and Order to Vacate three buildings the day after Lee's lawyers wrote a letter to the City emphasizing the religious significance of the buildings. *See* Opp'n at 15-17. But judicially noticeable facts contradict Lee's allegation that West was involved in the first instance of retaliation. Contrary to Lee's claim that West "sought and obtained an inspection warrant," FAC ¶ 40, the city attorney made the warrant application and West did not sign it or submit

a declaration in support. *See* RJN ¶ 4, Ex. D. Moreover, it is implausible that securing the warrant was retaliatory because the facts in Lee's complaint and in the warrant itself suggesting that the warrant had ample basis by that point. *See id.*

And although West signed the later Notice and Order to Vacate, Lee does not allege that he knew about Lee's letter to the City, and even if he did, Lee has not alleged a "substantial causal relationship" with that activity. The Court cannot infer a "substantial causal relationship" merely because protected activity occurred and an enforcement action followed.[10] That is particularly true in light of the voluminous evidence that the enforcement action was already ongoing because the property was in apparent noncompliance with a bevy of city and state laws. *See* RJN, Ex F (prior Notice and Order to Abate Nuisance). Without significantly more to connect West's enforcement action to Lee's protected activity, Lee does not plausibly allege that he engaged in any retaliation in his capacity as final policymaker.

c. Unreasonable Searches (Claim 4)

Lee's fourth § 1983 claim is that West, in his policymaking authority, engaged in unconstitutional searches (Claim 4). Lee alleges that the City engaged in trespass; falsified information in order to obtain inspection warrants; sought inspection warrants without prior

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[10] Although temporal proximity *may* indicate causation, the cases Lee cites arise in the very different employment context, and none have similar facts to those here. *See Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 507 (9th Cir. 2000); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir. 1986). Her third case does not even discuss causation at all. *Soranno's Gasco v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989).

notice to plaintiff; exceeded the scope of the warrants; installed cameras outside the gates of the Subject Property; utilized neighborhood informants; and engaged in overhead surveillance of the property. FAC ¶ 129. This claim fails both because the statute of limitation has passed and because it is insufficiently pleaded.

First, this claim must be dismissed because it is untimely. The statute of limitations for section 1983 actions is that of personal injury actions in the forum state. *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004). In California, there is a two-year statute of limitations for such actions. Cal. Code of Civ. Proc. § 335.1; *Maldonado*, 370 F.3d at 954. The events Lee complains of all occurred before the summer of 2018: the City entered Lee's property with warrants on February 9, 2018 and May 24, 2018 and placed cameras outside the property from February 28, 2018 through March 9, 2018. The complaint was filed on June 17, 2021, well over two years after these actions.

Even if the claim were timely, it would still fail. Many of the underlying actions do not even violate the Fourth Amendment, and the others are insufficiently pleaded. Moreover, none resulted from West's policy decisions as building official or were subsequently ratified by him in that capacity. *See Rodriguez*, 891 F.3d at 802–03.

As noted in the Court's prior order, there is nothing unlawful about using informants, placing a camera outside a property to record who comes and goes, or securing a warrant without notice to the property owner. Order at 22. Lee still fails to concretely allege any overhead surveillance. *See id.* To the extent that Lee attacks the warrants, Lee does not sufficiently plead that they were materially false or that West was involved. FAC ¶¶ 40, 48. She alleges that, "[a]t the

direction of West, the City falsely represented to the Court that Ms. Lee did not consent" to the search. *Id.* ¶ 40. Lee's vague allegation of falsehood is implausible. And, as noted above, West was not involved in the City's securing of the first warrant application, *see* RJN ¶ 4, Ex. D, or its second, *see* FAC ¶ 47; RJN ¶ 7, Ex. G.

Finally, Lee's allegation that City officials exceeded the scope of the February 8, 2018 warrant—including opening closets and inspecting "her food in the kitchen" and her "makeup drawer," FAC ¶ 41—also fails. First, based on judicially noticeable facts, it is unclear whether any City official actually exceeded the scope of the warrant. *See* RJN ¶ 4, Exh. D at 78 (allowing "for inspection of the interior and exterior of the main house" to determine compliance with various state and municipal codes). Second, any theoretical violations are not sufficiently connected to West's policymaking authority. While Lee alleges that West was present during the search, Lee does not plausibly attribute his actions to his "final policymaking authority" under state law. *See Praprotnik*, 485 U.S. at 124.

In sum, although West may be a final policymaker under *Monell* with respect to enforcement and interpretation of the building code, Lee has failed to plead that he violated Lee's free exercise rights, discriminated on the basis of race or national origin, retaliated for protected activity, or committed an illegal search. *See Rodriguez*, 891 F.3d at 802–03. Nor has West pleaded that he ratified a constitutional injury perpetrated by one of his subordinates.[11]

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[11] Lee also asserts that Tanu Jagtap, as a City Code Enforcement Officer, was a final policymaker because Bronwen Lacey, a Deputy City Attorney, told Lee that he "possessed the full authority of the [Fremont City Manager]." FAC ¶ 11.

The Court therefore dismisses Claims 1-4 as insufficiently pleaded under *Monell*. Because the unreasonable searches claim (Claim 4) is untimely, amendment would be futile. *See Leadsinger*, 512 F.3d at 532. Further, in her two complaints, Lee has not produced a single concrete allegation that a City official commented on or took action because of her race or national origin; she includes only innuendo and vague allegations about her neighbor. The Court therefore denies leave to amend Claim 2 as well. The Court grants leave to amend only the religious discrimination and retaliation claims (Claims 1 and 3).

B. RLUIPA Claims (Claims 5-7)

Lee next asserts three claims under RLUIPA. Lee argues that FMC section 18.55.110 violates RLUIPA, either facially (Claim 5), as applied when West told Lee

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Lee's allegations do not establish that Jagtap is a final policymaker. It's true that city managers in many California cities are final policymakers under state law. *See Ellins v. Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013) (citing *Cal. Gov*. Code § 34851). The same appears to be true in Fremont. *See* FMC § 2.10.080(a) (the city manager has the power "[t]o see that all laws and ordinances of the city are duly enforced"). Yet Jagtap is a code enforcement officer, FAC ¶ 12, and she is not transformed into a final policymaker solely by a conclusory allegation that a deputy city attorney once said that the city manager delegated her power.

Even if Jagtap were a final policymaker, it would not matter because she never committed or ratified any constitutional tort. *See Rodriguez*, 891 F.3d at 802–03. While Jagtap signed the Notice and Orders to Abate Nuisance, *see* RJN, Ex. F at 45, Ex. H at 54, the Court has explained that Lee has not plausibly pleaded that this enforcement was discriminatory or retaliatory in nature. Lee does not allege that Jagtap made any statement or act based on discriminatory animus or had intent to discriminate on the basis of religion, race, or national origin. Nor does Lee allege that Jagtap ratified anyone else's statements or actions.

that she could only pray in two structures (Claim 6), or as applied in the Amended Notice and Order to Abate (Claim 7). But Plaintiffs repeatedly declare that they use the property only for *private* religious uses, so FMC section 18.55.110 does not apply to Plaintiffs' situation (if it ever did). And although injury-in-fact might be implied because the provision is cited in five of thirteen violations in the Amended Notice, such injury is not redressable because each of those five violations is also based on countless other violations of state and city laws that are not subject to RLUIPA. In other words, at this time, enjoining the City's enforcement of FMC section 18.55.110 would make no difference whatsoever to Plaintiffs.

1. Legal Standard

To have standing for a claim, a plaintiff must show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)).

As relevant here, RLUIPA applies when a "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." 42 U.S.C. § 2000cc(a)(2)(c). Thus, RLUIPA is implicated "when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 986

(9th Cir. 2006). In such cases, RLUIPA "prohibits the government from imposing 'substantial burdens' on 'religious exercise' unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest." *Id.* at 985–86 (quotation omitted). This burden must rise above mere inconvenience. *Id.* at 988-99.

Under RLUIPA, a "land use regulation" is a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)." 42 U.S.C. § 2000cc-5(5). Safety laws such as building or construction code provisions do not qualify as "land use regulations" under RLUIPA, at least where they do not explicitly reference zoning laws. *Anselmo v. Cty. Of Shasta*, 873 F. Supp. 2d 1247, 1257 (E.D. Cal. 2012); *see Salman v. City of Phoenix*, 2015 WL 5043437, at *4 (D. Ariz. Aug. 27, 2015) (same as to "commercial or assembly construction code"); *see also Second Baptist Church of Leechburg v. Gilpin Twp.*, 118 Fed. Appx. 615, 616 (3rd Cir. 2004) (same as to a city "sewer ordinance").

2. FMC 18.55.110 (Claims 5 & 7)

In Claim 5, Lee facially challenges FMC section 18.55.110 and its associated table, arguing that it imposes a "substantial burden" on religious exercise by prohibiting "quasi-public uses" from land designated "Open Space/Hill (beyond Ridgeline)." FAC ¶ 135. In Claim 7, Lee challenges FMC section 18.55.110 and its associated table as applied in the March 2021 Amended Notice and Order to Abate Nuisance, which cites the provision (among many others) in five of the thirteen violations. *Id.* ¶ 156.

The City makes strong arguments that, taking all facts as alleged by Plaintiffs, FMC section 18.55.110 poses no "substantial burden" on religious exercise because it does not single out religion and is justified by health, earthquake safety, and environmental concerns. Mot. at 19-22. However, the Court cannot reach the merits because Plaintiffs lack standing to challenge FMC section 18.55.110 under RLUIPA. Their repeated factual statements make clear that (1) the plain terms of section 18.55.110 do not apply to Plaintiffs; or (2) to the extent it might injure them, the injury could not be redressed by a decision by this Court. *See TransUnion*, 141 S. Ct. at 2203.

Chapter 18.55 of Fremont's Municipal Code establishes an "open space district" in the City. *See* FMC Ch. 18.55; RJN Ex. A at 1. The provision's express purpose is

> to permit limited but reasonable use of open lands while protecting the public health, safety and welfare from the dangers of seismic hazards and unstable soils; preserve the topography of the city that shapes it and give it its identity; allow land to be used for agricultural production in its natural or as near natural state as possible; coordinate with and carry out regional, county, and city open space plans; and where permitted, encourage clustering of dwelling units in order to preserve and enhance the remainder of open space lands as a limited and valuable resource.

FMC § 18.55.010; RJN Ex. A at 1. To effectuate these purposes, the City's plan "identifies seven different open space land use designations to address a variety of open space opportunities and constraints." *Id.* Chapter 18.55 also sets forth building height standards, area, lot width, and yard standards, performance

standards (which govern construction requirements for dwellings and other structures), land constraints, and other rules. *See* FMC §§ 18.55.010–18.55.110; RJN Ex. A.

Section 18.55.110 contains a table that "establishes allowed uses within an open space zoning district." FMC § 18.55.110; RJN Ex. A at 11. The table lists numerous categories of land use, including "agricultural," "commercial and service," "recreation and open space," "residential," "public and quasi-public," and "other." FMC § 18.55.110, tbl. 18.55.110; RJN Ex. A at 12–15. The "public and quasi-public" category lists several specific uses, then includes a catch-all for more general public and quasi-public uses. FMC § 18.55.110, tbl. 18.55.110; RJN Ex. A at 14. The quasi-public use catch-all, in turn, includes "a use operated by a . . . religious . . . institution, with said use having the primary purpose of serving the general public." FMC § 18.25.3080; RJN Ex. B ¶ 2. Such a use is permitted, with a conditional use permit, in four of the open space plan's seven land use designations. But it is not permitted in three of the open space plan's land use designations: (1) Hill (beyond Ridgeline); (2) Hill Face; and (3) Private. *See* FMC § 18.55.110, Table 18.55.110; RJN Ex. A at 14. The property at issue here is in the "Hill (beyond Ridgeline)" are, so the code does not permit quasi-public uses.

Previously, in dismissing this facial challenge, the Court explained:

> Because this cause of action is based on the faulty premise that FMC section 18.55.110 excludes all religious uses from open space areas, it fails. The Court thus grants the City's motion to dismiss this claim. Lee may attempt to amend this claim, but must allege a

> substantial burden based on what FMC section 18.55.110 actually does, or how the City has implemented it.

Order at 24. Plaintiffs persist in the same misunderstanding of FMC section 18.55.110. Essentially the only difference is that, in addition to the facial challenge, they now also include a conclusory claim that the City's implementation of section 18.55.110 violated RLUIPA.

FMC section 18.55.110 has not caused Lee and the Temple an injury-in-fact that would be redressable by this Court. *See TransUnion*, 141 S. Ct. at 2203. It's true that the Amended Notice and Order to Abate *cites* to FMC 18.55.110 in the context of violations 1, 2, 4, 5, and 9. *See* RJN, Ex. I. Yet the decision on appeal of the Amended Notice and Order does not mention FMC 18.55.110 and does not engage at all with the scope of Lee's uses. *See* RJN, Ex. J; *e.g., id.* at 1 ("Appellant has stated that she uses the Former Barn for private religious purposes, a use that is not at issue in this proceeding."); *id.* at 12 n.4 ("NOA 3, and the testimony of Ms. Jagtap reveal concern about the impermissible uses of the property but do not actually charge the appellant with illegal use."). Plaintiffs repeatedly declare to this Court that their religious use is private, which indicates that FMC 18.55.110 does not apply to them. *See* FAC ¶ 136 (alleging that FMC 18.55.110 deprives Lee of the "private religious use" of her property). In opposition, they again declare that their use is wholly private. *See* Opp'n at 23 ("[T]he religious usage Plaintiffs seek to use the property is neither public or quasi public but, is instead, intended for private devotion."); *id.* at 25 ("[T]he exercise of [these free exercise] rights, in this specific context, would be private."). They have made such declarations for years.

See RJN, Ex. J, at 2 ("In a letter dated November 11, 2019 (Exhibit 20), Appellant clarified that the proposed religious use was private."). Therefore, on their own account, Plaintiffs' proposed use does not "hav[e] the primary purpose of serving the general public" and is no way prohibited by the zoning code. FMC § 18.25.3080.

Plaintiffs erroneously insist, as they have previously, that FMC section 18.55.110 prohibits private religious uses because it does not explicitly discuss them. *See* FAC ¶ 136; Opp'n at 25 (emphasizing that "no provision is made for strictly private religious usages"). But in dismissing their last complaint, the Court explained that Lee had "assume[d]" this interpretation of the provision "without support." Order at 24 n.14. The Court again finds that Plaintiffs' interpretation of FMC section 18.55.110 is unsupported by authority and defies common sense.

Further, even if the Court granted that Plaintiffs face a possible injury by "application of" of FMC section 18.55.110, it would not be redressable. Each of the five violations in the Amended Notice and Order that cite section 18.55.110 also cite and describe dozens of other legal violations that independently require wide-ranging changes to (or demolitions of) the buildings. *Cf.* RJN, Ex. J at 15 (hearing officer's decision noting the "extraordinary extent of Appellant's code violations"). Although these five violations mention section 18.55.110, they otherwise "appl[y]" other laws that are not "land use regulations" under RLUIPA.[12]

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[12] Some courts have held that RLUIPA applies where the ends of zoning are pursued by means other than direct application of zoning laws, such as permitting and environmental quality statutes. *See Fortress Bible Church v. Feiner*, 694 F.3d 208, 217 (2d Cir. 2012) (holding that use of a state environmental law was an "application" of a zoning law under RLUIPA because it was used

See Anselmo, 873 F. Supp. 2d at 1257. The appeal of the Amended Notice and Order nowhere cites section 18.55.110. Plaintiffs essentially acknowledge this redressability problem but argue that, "in the event that the other violations are remedied . . ., the violations grounded upon FMC Chapter 18.55.110 will continue in effect, thus precluding use of the structures at issue." FAC ¶ 157. The Court disagrees. An injunction can make no difference to a plaintiff who is burdened in the same way—to an equal or greater extent—by many other laws.

In sum, FMC section 18.55.110 cannot injure plaintiffs with no desire to pursue a quasi-public use. *See TransUnion*, 141 S. Ct. at 2203. And even if Plaintiffs faced some risk of enforcement, it would not be redressable by an injunction as to FMC section 18.55.110 because all other violations would still stand. Although the Court does not see how Plaintiffs can amend in light of judicially noticeable facts, the Court will nonetheless permit to leave to amend Claims 5 and 7. *See Leadsinger*, 512 F.3d at 532.

3. West's Statement (Claim 6)

In her sixth claim, Lee argues that the City violated RLUIPA when West "instruct[ed] Plaintiff Lee that she could only pray on the property in the main house or in the dome Meditation Hall and nowhere else on the Real Property." FAC ¶ 147. Lee contends that this

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as a "vehicle for determining the zoning issues related to the Church's land use proposal"); *United States v. Cty. of Culpeper, Virginia*, 245 F. Supp. 3d 758, 768 (W.D. Va. 2017) (refusing to permit an "end-run around RLUIPA's expansive protections under the guise of environmental, safety, or building code regulations"). However, on the facts here, Plaintiffs have not plausibly alleged that these many construction and building code violations provide a "vehicle" for zoning.

act was "an implementation of a land use regulation." *Id.* In its prior order, this Court noted that Lee's allegations were "not entirely clear" but suggested that Lee might reframe her earlier facial challenge in this way. *See* Order at 25.

However, the Court now concludes that Lee does not state a claim on this basis because Lee does not plausibly allege that this remark constituted the "application of [a zoning or landmarking law" within the meaning of RLUIPA. *See* 42 U.S.C. § 2000cc-5. There are no allegations that West made this statement to apply FMC 18.55.110 to the subject property. There are no allegations that anyone from the City ever expressed the view that FMC 18.55.110 prevented Lee from praying "[anywhere] else on the property." None of the Notices and Orders to Abate gesture at this view. Specific factual allegations were necessary because the clear text of FMC § 18.55.110 and common sense indicate that it in no way proscribes private religious uses.

None of Lee's allegations permit the inference that West's one statement allegedly limiting her prayer on her property was an "application of" FMC section 18.55.110 or any other zoning law. The Court dismisses this claim with leave to amend.

C. California Claims (Claims 8 and 9)

1. Contract Claim (Claim 8)

Lee's eighth cause of action seeks a declaration that "the quasi-public or private religious use of the [property] are [sic] permissible under the land conservation contract." FAC ¶ 169. The land conservation contract provides that the parties "desire to limit the use of said property to agricultural and compatible uses in order to preserve a maximum amount of agricultural land."

RJN ¶ 3; Ex. C at 1. After the initial ten-year term, the contract renews annually unless either party serves a notice of nonrenewal. Mot. at 23; *see* Cal. Gov. Code § 51243. Lee has not served notice but may do so at any time.

The Court concludes that Lee lacks standing for a declaratory judgment or injunctive relief on the land conservation contract. The contract does not in any way cause her "injury in fact that is concrete, particularized, and actual or imminent." *TransUnion*, 141 S. Ct. at 2203. The City's code enforcement action was not at all based on the contract. RJN Ex. I. While prior notices to Lee referred to the contract, all alleged violations were of state or city law. *See generally id.* Lee does not plausibly plead that the City is likely to enforce the terms of the contract rather than the many other codes that provided the basis for the thirteen violations in the Amended Notice and Order and the hearing officer's final order. *See* RJN Ex. I, Ex. J 12–14; *see id.* at 12 n.4 ("NOA4 notes possible non-compliance with the Williamson Act contract binding the property but does not charge Appellant with actual violation."). The fact that Lee may end the contract at the end of the annual term makes it even less likely that any hypothetical disagreement about the contract will ever injure Lee. Any dispute under the contract is not sufficiently imminent to permit the Court to issue a declaration or injunction. The Court dismisses the contract claim and denies leave to amend as futile.

2. Free Exercise (Claim 9)

Lee argues that FMC section 18.55.110 violates the California Constitution's Free Exercise Clause. FAC ¶¶ 174–77. She again argues that the provision does not "permit the use of [property] zoned 'Open Space' / 'Hill Beyond the Ridgeline'" to be used for private

religious purposes on her property. FAC ¶¶ 182. Lee requests an order declaring FMC section 18.55.110 "unenforceable and void" and an injunction preventing the City from enforcing it. *Id.* ¶¶ 179–80. The Court dismisses this claim because it again misunderstands FMC section 18.55.110.

The California Constitution provides (in relevant part) that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Cal. Const. Art. I, § 4.

California's Free Exercise Clause bears some resemblance to the U.S. Constitution's Free Exercise Clause, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend I. In *Sherbert v. Verner*, the U.S. Supreme Court held that a law that substantially infringes a person's religious exercise violates the First Amendment's Free Exercise Clause absent a compelling government interest. 374 U.S. 398, 406–07 (1963). But later, in *Employment Division, Oregon Department of Human Resources v. Smith*, the U.S. Supreme Court held that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. 872, 879 (1990) (quotation omitted).

The California Supreme Court has repeatedly held that the U.S. Supreme Court's application of the First Amendment's Free Exercise Clause does not control application of California's Free Exercise Clause. *See, e.g.*, *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158 (2008); *Catholic Charities*

of Sacramento, Inc. v. Superior Court, 32 Cal. 4th 527, 560–62 (2004). But the California Supreme Court has also declined to "determine the appropriate test" for challenges under California's Free Exercise Clause. *N. Coast Women's Care Med. Grp.*, 44 Cal. 4th at 1158. Indeed, the California Supreme Court has left open whether *Sherbert*, *Smith*, "or an as-yet unidentified rule that more precisely reflects the language and history of the California Constitution" applies to challenges under California's Free Exercise Clause. *Id.* at 1159 (quoting *Catholic Charities of Sacramento*, 32 Cal. 4th at 562) (emphasis omitted).

Instead, the California Supreme Court has assumed without deciding that *Sherbert's* strict scrutiny test applies to such challenges. *See id.*; *Catholic Charities of Sacramento*, 32 Cal. 4th at 562. "Under that standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored." *Catholic Charities of Sacramento*, 32 Cal. 4th at 562. If a court determines that a challenged law passes muster under strict scrutiny, the court need not consider whether a less stringent standard should apply. *See id.*

Here, Lee asserts that FMC section 18.55.110 violates California's Free Exercise Clause because her property cannot be used for quasi-public religious purposes. FAC ¶ 174–75. Yet, as discussed repeatedly above, Lee concedes that she does not use her property for quasi-public purposes. *See, e.g.*, Opp'n at 25 ("[T]he exercise of [these free exercise] rights, in this specific context, would be private."). Lee again misunderstands the FMC and how it applies—or does not

apply—to her property.[13] The Court pointed out similar problems last time. The Court will permit one more attempt to amend this claim. If Lee does so, the Court suggests that Lee focus it not on FMC section 18.55.110, which does not burden her, but rather on how (specifically) the abatement order itself burdens her free exercise.

IV. CONCLUSION

For the foregoing reasons, the Court grants the City's motion to dismiss. With respect to claims 2, 4, and 8, the Court denies leave to amend as futile. With respect to claims 1, 3, 5, 6, 7, and 9, the Court gives leave to amend. Lee may file an amended complaint within 21 days of the date of this order.

IT IS SO ORDERED.

Dated: March 4, 2022

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

[13] Lee again argues that section 18.55.110 also implicates her privacy rights, such that her ninth claim is a "hybrid rights" claim. Opp'n. at 25. But the claim lacks allegations suggesting that the City's open space zoning plan could possibly burden Lee's privacy rights. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

Case No. 21-cv-04661-CRB

TEMPLE OF 1001 BUDDHAS, et al.,

Plaintiffs,

v.

CITY OF FREMONT,

Defendant.

ORDER GRANTING MOTION TO DISMISS

Plaintiff Miaolan Lee lives on property owned by the Temple of 1001 Buddhas in Fremont, California. For the past eight years, City of Fremont employees have had numerous interactions with Lee and the property, all pertaining to whether certain structures on the property comply with the City's land use laws and various California laws and regulations. After numerous searches, inspections, orders, and negotiations, the City issued an amended Notice and Order to Abate Nuisance in March 2021. The 58-page Notice and Order listed violations of the Fremont Municipal Code and California laws (including but not limited to the California Building Code, Electrical Code, and Plumbing Code), and set a deadline for Lee to submit plans to fix the problems, which would require demolishing certain structures.

Lee and the Temple sued the City, asserting a dozen claims under federal and California law. The City now moves to dismiss. The Court determines that oral argument is unnecessary and grants the City's motion to dismiss with leave to amend.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

This lawsuit concerns property located at 6800 Mill Creek Road in Fremont, California.

Although Lee did not own the property until 2010, the story begins more than thirty years earlier. In 1978, a predecessor in interest to the property signed a "Land Conservation Contract" under California's Williamson Act with the City. Compl. (dkt. 1) ¶ 15. The Williamson Act provides that any city may "by contract limit the use of agricultural land for the purpose of preserving such land pursuant and subject to the conditions set forth in the contract" and elsewhere in the Act. Cal. Gov. Code § 51240. Such a contract must exclude land "uses other than agricultural, and other than those compatible with agricultural uses, for the duration of the contract." *Id.* § 51243.

Consistent with that requirement, the predecessor in interest's contract with the City stated:

> During the term of this contract, or any renewal thereof, the said property shall not be used for any purpose, other than agricultural uses for producing agricultural commodities for commercial purposes and compatible uses as listed below.

Compl. ¶ 15. The contract then listed potential compatible uses, including "living quarters and home

occupations," "public and quasi-public buildings," and "accessory use to the above." *Id.*

Lee purchased the property, which remains subject to the Land Conservation Contract, in 2010. *Id.* ¶¶ 13, 16. In March 2018, Lee deeded ownership of the property to the Temple of 1001 Buddhas, but she has continued to live there. *Id.* ¶ 14.[1] The property is zoned as "open space" under the City's laws, and it contains various structures that Lee has used for religious purposes. *Id.* ¶¶ 17, 19.

Starting several years after Lee's purchase, City employees have had numerous interactions with Lee and the property, culminating in the instant lawsuit.[2]

As relevant here, in October 2017, City Code Enforcement Manager Leonard Powell sent Lee an email requesting access to the property. *Id.* 27. The

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[1] The complaint does not clearly allege Lee's connection to the Temple, but indicates that Lee has continued to live on the property. *See* Compl. ¶ 14; *see also* Opp. (dkt. 17) at 1 (referring to the property as "Lee's property"). The City has not argued that Lee's legal interest in the property is relevant. The Court refers to Lee and the Temple collectively as "Lee."

[2] The complaint contains some allegations with no clear relevance to Lee's claims. For example, Lee alleges that in 2013 and 2014, City Building Department Chief Chris Gale visited the property. Compl. ¶ 25. According to Lee, Gale gave her "permission" to use the property as a place of "prayer for her and her family." *Id.* Lee was surprised to learn that "she needed permission to pray." *Id.* Although a person needing permission to pray would cause obvious constitutional problems, Lee does not appear to have asserted any claim based on this conversation. Gale also told Lee that Lee would need to obtain a permit if she wished to make any improvements to a barn on the property, which she later did. *Id.* Again, this allegation has no clear relevance to Lee's claims.

next day, Powell and other City employees "trespassed" on the property and took pictures. *Id.* ¶¶ 28, 29.[3]

This upset Lee. And in January 2018, Lee met with Gary West, the City's Building Department Chief, and complained that City employees were discriminating against her and had trespassed on the property. *Id.* ¶ 34. West told Lee that he urgently needed to inspect the property. *Id.* ¶ 35. He then sought and obtained an inspection warrant from the Superior Court. *Id.* ¶ 36. On February 8, 2019, the City hung a notice of inspection on the property's front gate. *Id.* The next day, City employees searched the entire property, including Lee's bedroom and "most closets in the residence." *Id.* ¶ 38. They "rummaged through everything," including food in the kitchen and Lee's make-up. *Id.* City employees then placed license plate recording cameras across the street from the property from February 28, 2018 to March 9, 2018. *Id.* ¶ 39.

Soon it became apparent why City employees had entered the property. On March 29, 2018, the City issued a "Notice and Order to Abate Nuisance" listing numerous alleged violations of the Fremont

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[3] The employees reached the front gate of the property. When the property's maintenance worker approached the gate to "see what they wanted," the gate automatically opened. Compl. ¶ 28. The City employees drove inside and ignored the maintenance worker. *Id.* In December 2017, a California Department of Fish and Game warden accessed the property without permission. *Id.* ¶ 30. According to Lee, he "roamed the property . . . and then left a business card at the residence." *Id.* But Lee is suing only the City here. Lee also alleges that during a City Hall meeting with Powell, Powell told her that she "looked prettier without a hat." *Id.* ¶ 32. Lee complained about Powell's behavior and objected to Powell's use of the letters "JD" on his City-issued business cards because Powell is not a lawyer. *See id.* ¶ 34. Again, Lee has not asserted any claim based on these allegations.

Municipal Code (FMC) and stating that no one could occupy three structures on the property (the main Buddha hall, the dwelling unit, and the meditation hall). *Id.* ¶ 40. In particular, the City noted that the three buildings were (1) "erected and/or altered in violation of [FMC] Title 15," (2) "located in [a] very high fire hazard severity zone without adequate fire-resistance-rated construction and fire protection systems," (3) "lack[ing] adequate light, ventilation, illumination, insulation, sanitary facilities, and other essential equipment," (4) "on hillsides in earthquake induced landslide zones without appropriate mitigation measures," (5) "constructed without adequate structural and foundation systems," creating a "substantial risk of partial or complete collapse in [the] event of earthquake and earthquake induced landslides," (6) "constructed without plans or permits and the City [was] unable to determine the electrical connections and service for each," and (7) lacking in "proper on site waste disposal and waste water treatment" so as to "pose contamination risk to adjoining streams, springs, and groundwater." RJN Ex. I (dkt. 12-8). After Lee appealed the Notice and Order, the City Attorney told her that the Notice and Order would remain in effect based on the Land Conservation Contract. *See* Compl. ¶ 42.[4]

In May 2018, Lee met with City staff "to attempt to resolve all concerns stated by the City." *Id.* ¶ 43. She agreed to allow City employees to inspect the

[4] The Court may consider the Notice and Order and other relevant documents discussed here because they are incorporated by reference in the complaint. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018). For the same reason, the Court grants the City's request for judicial notice (dkt. 12).

property several days later. But a City Code Enforcement Officer cancelled the appointment and instead sought and obtained an inspection warrant from the Superior Court. *Id.* The Officer's warrant application stated that Lee had not consented to City employees entering the property. *Id.* City employees executed the warrant and inspected the property again. *Id.* ¶¶ 44–45.

The City took additional action based on this inspection. In June 2018, West sent Lee a Notice and Order to vacate three buildings on the property (a new two-story structure, a three-story building that had been a one-story garage, and a two-story building that was formerly a barn). *Id.* ¶ 47. This Notice and Order stated that the buildings were "unlawful, unsafe[,] and unfit for human occupancy." *Id.* It required Lee to remove "all personal property" from them within two weeks. *Id.* Lee refused to remove Buddha statues from one structure. *Id.* ¶ 48. According to Lee, West informed her that she could pray in a dome meditation hall on the property and in the main house, but nowhere else. *Id.* ¶ 49. Later that month, City employees "requested and obtained entry" to the property, then posted notices barring entry on the "condemned buildings" and at the main entrance. *Id.* ¶ 50.

Lee responded to the June 2018 Notice and Order in various ways. For example, she sent the City notices of appeal, retained various structural engineers and consultants to perform work on the buildings, and updated the City as she attempted to bring the buildings into compliance with the City's instructions. *Id.* ¶¶ 52, 55. City employees had several meetings with Lee's consultants and representatives regarding plans for the property and permit applications. *Id.* ¶¶ 57–58.

But these steps did not lead to a mutually agreeable resolution. In May 2019, the City recorded a Notice of Substandard Building/Structure with the County Recorder's Office of the County of Alameda. *Id.* ¶ 59. The next month, Lee sent City Councilmember Raj Salwan a letter "complaining about discriminatory code enforcement" and the "inspection warrants." *Id.* ¶ 60. According to Lee, the Chief City Attorney told Salwan that the City was "going to sue Ms. Lee" because of Lee's opposition to the religious and racial discrimination she was experiencing. *Id.* ¶ 60.[5] Lee alleges that despite her efforts, the City had decided to not engage in a "collaborative process." *Id.* ¶ 62. "In fact, it was impossible" for her to "complete the application process" and get the necessary permits because the City "wanted the Temple to be torn down." *Id.* Lee nonetheless applied for permits on October 7, 2019. *Id.* ¶ 63.[6]

Shortly thereafter, City employees made inartful statements suggesting that Lee was using religious rhetoric to obscure the problems with the property. In December 2019, Lee met with Wayne Morris, the City's Deputy Community Director, and Powell. *Id.* Morris and Powell "insisted that Ms. Lee was using religion as a protective shield." *Id.* According to Lee, Morris asked whether Lee thought "Buddha is ok

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[5] In September 2019, the City issued citations to Lee and her bookkeeper. Compl. ¶ 61. Lee was unable to determine why she was cited, but in March 2020, the City withdrew the citations. *Id.* ¶¶ 65, 69.

[6] Lee paid the City $27,250 in application fees to get conditional use permits. Compl. ¶ 63. Lee alleges that the "regular price is $7,250," but the City planner insisted that Lee pay an additional $20,000 fee "for design review," even though the City does not "ordinarily . . . charge such fees at the outset of the process." *Id.*

with this construction." *Id.* Lee alleges that Morris laughed while asking whether she thought that "Buddha is ok with what you are doing?" *Id.* Morris then told Lee that the permit process was "going to be so expensive" that Lee would "give up and demolish." *Id.* Morris expressed that the buildings "need to come out." *Id.*

In January 2020, Morris, Powell, and James Willis (another city employee) inspected the property again. *Id.* ¶ 67. Two days later, Lee told Willis that her neighbor had performed unpermitted work on his property. *Id.* ¶ 68. When Lee first met her neighbor, the neighbor told her that he had completed various construction projects without the City's approval and used herbicide extensively on his property. *See id.* ¶¶ 23–24. But according to Lee, "the City has never done anything" about her neighbor's violations, besides sending the neighbor a letter stating that he could apply for permits "to legalize" his past "unpermitted construction." *Id.* ¶¶ 23, 80. In April 2020, Lee witnessed her neighbor looking at her property with binoculars. *Id.* ¶ 70.

Lee continued attempting to work with the City to address the issues on the property. In October 2020, she submitted a modified application for permits. *Id.* ¶ 71. The application described certain "mitigating measures" that Lee needed the City to address for Lee to "move on with the process." *Id.* ¶ 72. Willis told Lee that the application was incomplete. *Id.* ¶ 72.[7]

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[7] In December 2020, a City Code Enforcement Officer emailed Lee that the City had not received a progress update and timeline regarding the removal and reconstruction of unlawful structures. *See* Compl. ¶ 73. Lee alleges that she had provided such updates, and she responded to the email by requesting a response regarding her proposed mitigation measures. *Id.* She

On March 11, 2021, the City issued an Amended Notice and Order to Abate Nuisance. *Id.* ¶ 75. The 58-page document required the demolition of three buildings on the property based on violations identified in inspections after the City issued its June 2018 Notice and Order. *Id.*[8] And the Amended Notice and Order listed numerous violations of the City's zoning laws, along with violations of the City's permitting rules and California's Building Code, Electrical Code, Plumbing Code, Mechanical Code, Fire Code, Fish and Game Code, and Environmental Quality Act. *See, e.g.*, RJN Ex. I at 7, 10–11, 13–14, 17, 23–24, 26–27, 32–33, 38, 46–50, 52.

B. Procedural History

In January 2018, Lee submitted a claim for damages to the City and the California Department of Fish and Game. *See* RJN Ex. J (dkt. 12-10). The claim stated that on October 27, 2017, City employees entered the property without consent or a warrant. *Id.* It described that day's inspection and asserted various causes of action. *See id.* The same month, the City sent Lee a notice rejecting the claim. *See* RJN Ex. K (dkt. 12-11).

In April 2021, Lee submitted another claim for damages based on events involving her property from October 2017 to April 2021. *See* RJN Ex. L (dkt. 12-12). As relevant here, the claim form reads:

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also raised numerous complaints regarding the inspection warrants that had been executed on the property. *See id.* The City employee did not respond. *Id.*

[8] According to Lee, Salwan told her to give the City employees "some money" to make her problems with the City "go away." Compl. ¶ 79.

> What happened and why do you believe the City is responsible? *Race, religion, gender discrim. Fraud, trespass, 4 amend violation of Constitution, whistleblowing to FBI on gov corruption, intentional inflection of emo distress.*
>
> Description of damage or loss: *Civil rights, emotional distress, invasion of privacy, abuse of power, unconstitutional invasions. Fraud, tress. $ amount is up to the jury to decide.*

Id. The form did not contain additional details but provided Lee's attorney's contact information "for any questions." *Id.* In May 2021, the City sent Lee a notice of insufficiency indicating that Lee's claim lacked necessary detail. *See* RJN Ex. M (dkt. 12–13). The City directed Lee to provisions of the California Government Code regarding the presentation of claims against public entities. *See id.*

Later in May 2021, Lee submitted an amended claim. *See* RJN Ex. N (dkt. 12-14). The amended claim again stated that the relevant injury occurred from "October 2017 to the present." *Id.* The amended claim form reads:

> What happened and why do you believe the City is responsible? *The City of Fremont has interfered with and/or prevented the practice of my religion by Code Enforcement, Planning & Building Depts. Precluded my association with others of my faith, Invasion of privacy. Religious & National Origin Discrim.*
>
> Description of damage or loss: *Loss of use of real property and structures on real property. Damage to reputation. Emotional Distress.*

Id. The City issued another notice stating that Lee's amended claim was insufficient "even when read together with the initial claim." RJN Ex. O (dkt. 12-15). The City gave Lee 15 days to submit yet another amended claim. *Id.* After Lee failed to do so, the City rejected Lee's claim. *See* RJN Ex. P (dkt. 12-16).

In June 2021, the Temple and Lee filed the instant lawsuit, asserting a dozen federal and state causes of action. *See* Compl. The Temple and Lee asserted two 42 U.S.C. § 1983 claims based on religious discrimination and retaliation, five claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), and one claim under the California Constitution's Free Exercise Clause. *Id.* ¶¶ 82–90, 99–107, 132–188. Lee individually asserted additional § 1983 claims for discrimination based on race, discrimination based on national origin, and unreasonable searches, along with two California claims for invasion of privacy and arbitrary discrimination. *Id.* ¶¶ 91–98, 108–131.[9]

The City now moves to dismiss. *See* Mot. to Dismiss (dkt. 11).

II. GENERAL LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim for which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either a "cognizable legal theory" or "sufficient facts alleged" under such a theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads

[9] As noted above, the Court refers to the Temple and Lee collectively as "Lee." *See supra* note 1.

enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

The Court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

When dismissing a case, courts generally must give leave to amend unless it is "determined that the pleading could not be cured by the allegation of other facts" and therefore amendment would be futile. *Cook, Perkiss & Leihe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

III. DISCUSSION

The Court grants the City's motion to dismiss. Lee's California causes of action fail because Lee did not comply with California's statutory claim presentation requirements. Lee's federal § 1983 claims fail because Lee is suing only the City and has not set forth allegations that establish the elements of municipal liability under § 1983. Lee's federal RLUIPA claims fail because they either (1) rely on erroneous

interpretations of the Fremont Municipal Code and the Land Conservation Contract, or (2) broadly challenge the entire 2021 Amended Notice and Order, much of which does not implement any land use regulation. The Court gives Lee leave to amend her complaint in its entirety.

A. California Law Claims (Claims 5, 6, and 12)

Lee asserts three California causes of action. None satisfies California's statutory claim presentation requirements.

1. Claim Presentation Requirements

In California, "no suit for money damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim . . . has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board." Cal. Govt. Code § 945.4. To satisfy this presentation requirement, a claim "shall show" certain information. *Id.* § 910. As relevant here, this information includes "[t]he date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted," "[a] general description of the . . . injury, damage or loss incurred so far as it may be known at the time of presentation of the claim," "[t]he name or names of the public employee or employees causing the injury, damage, or loss," and "[t]he amount claimed," unless that amount exceeds $10,000, in which case no dollar amount is necessary but the claim "shall indicate whether the claim would be a limited civil case." *Id.* §§ 910(c)–(f).

Despite the statute's seemingly mandatory language, California courts apply "the substantial compliance test" to these requirements. *Cnty. of Los Angeles v.*

Superior Court, 159 Cal. App. 4th 353, 360 (2008). Under that test, the requirements "should not be applied to snare the unwary where [their] purpose has been satisfied." *Donohue v. State of California*, 178 Cal. App. 3d 795, 804 (1986). Instead, (1) there must be "*some* compliance with *all* of the statutory requirements," and (2) the claim must disclose "sufficient information to enable the public entity adequately to investigate the merits of the claim so as to settle the claim, if appropriate." *Cnty. of Los Angeles*, 159 Cal. App. 4th at 360 (quotation omitted) (emphasis in original). When a claim "fails to set forth the factual basis of recovery," *Watson v. State of California,* 21 Cal. App. 4th 836, 845 (1993), or when a plaintiff asserts a cause of action based on "a set of facts entirely different from those first noticed" via a claim, *Fall River Joint Unified School Dist. v. Superior Court*, 206 Cal.App.3d 431, 435 (1988), there is no substantial compliance.

California law also establishes limitations periods for causes of action to which the claim presentation requirements apply. If a public entity has provided written notice that a claim has been rejected, the claimant can assert the relevant cause of action in court "not later than six months after the date such notice [was] personally delivered or deposited in the mail." Cal. Govt. Code § 945.6(a)(1).

2. Application

Lee's California causes of action are barred by these presentation requirements, even under the forgiving "substantial compliance test." *See Cnty. of Los Angeles*, 159 Cal. App. 4th at 360.

a. Invasion of Privacy (Claim 5)

Lee's fifth cause of action for "invasion of privacy" and "government snooping" is based on various past actions taken by City employees. Compl. ¶¶ 117–119. In particular, this cause of action arises from Lee's allegations regarding City employees' alleged "unauthorized entries" onto the property, falsification of information in inspection warrant applications, and failure to give Lee notice before seeking the inspection warrants, plus City employees exceeding the scope of those warrants while on the property, installing cameras outside the property to monitor visitors, using "neighborhood informants" to monitor activity on the property, and conducting overhead surveillance of the property. *Id.* ¶ 119.

Before asserting this cause of action in the instant lawsuit, Lee did not present a claim that substantially complies with California's presentation requirements. More specifically, Lee's claim form did not articulate any "factual basis for recovery" relating to this cause of action. *See Watson*, 21 Cal. App. 4th at 845. In January 2018, Lee submitted a claim that described (in some detail) City employees' entries on and inspections of the property in October and December 2017. *See* RJN Ex. J. Because Lee did not sue within six months of the City's rejection of that claim, *see* RJN Ex. K, Lee cannot assert a cause of action based on those details here, see Cal. Govt. Code. § 945.6(a)(1). Thus, the Court must examine only Lee's more recent claim. See RJN Exs. L, N. In Lee's first May 2021 claim, as relevant to this cause of action, she said only that the city had engaged in "trespass" and a Fourth Amendment "violation" that caused her to suffer "invasion of privacy" and "unconstitutional invasions." RJN Ex. L. Lee's amended

claim said even less, stating only that Lee had suffered an "invasion of privacy." RJN Ex. N. The amended claim also failed to name any City employees who invaded Lee's privacy or engaged in impermissible snooping. *See* Cal. Govt. Code § 910(e). Because there was no compliance with some of the statutory requirements—namely, the requirements that Lee provide some factual basis for the claim and name the City employees involved—there was not "*some* compliance with *all* of the statutory requirements." *Cnty. of Los Angeles*, 159 Cal. App. 4th at 360 (emphasis in original).

Therefore, the Court grants the City's motion to dismiss this cause of action with leave to amend. Although Lee cannot seek damages, Lee could conceivably amend this cause of action to seek only injunctive and declaratory relief and thereby avoid California's claim presentation requirements. Of course, to state a viable claim, Lee's allegations (accepted as true) would have to entitle her to such prospective relief.

b. Arbitrary Discrimination (Claim 6)

Lee's sixth cause of action asserts that the City "has a policy and practice of discriminating against Asians and Buddhists" and that City employees' actions with respect to Lee and the Temple were motivated by "discriminatory animus." Compl. ¶¶ 125, 127–28. Lee invokes California's Unruh Civil Rights Act, which prohibits discrimination based on race and religion. *See* Cal. Civ. Code §§ 51, 52(a).

Here again, Lee did not present a claim that substantially complies with California's presentation requirements because Lee's claim form provided no "factual basis for recovery." *See Watson*, 21 Cal. App. 4th at 845. In Lee's initial May 2021 claim, she said

only that the city had engaged in "race, religion, [and] gender discrim[ination]," without further detail. RJN Ex. L. Similarly, Lee's amended claim stated only that Lee had been subjected to "religious & national origin discrim[ination]." RJN Ex. N. Such bare conclusions, devoid of any supporting details, could not have enabled the City "to investigate the merits of the claim so as to settle the claim, if appropriate." *Donohue*, 178 Cal. App. 3d at 804. And again, the May 2021 claim and amended claim named no City employees who had discriminated against Lee. Thus, there was not *"some* compliance with *all* of the statutory requirements." *Cnty. of Los Angeles*, 159 Cal. App. 4th at 360 (emphasis in original).

Therefore, the Court grants the City's motion to dismiss this cause of action with leave to amend. Again, Lee could conceivably amend this cause of action to seek only prospective relief.

c. Free Exercise of Religion (Claim 12)

Lee's twelfth cause of action asserts that FMC section 18.55.110 violates the California Constitution's Free Exercise Clause. Compl. ¶¶ 181–83. Lee requests an order declaring FMC section 18.55.110 "unenforceable and void" and an injunction preventing the City from enforcing it. *Id.* ¶¶ 185–86. But Lee acknowledges that she also seeks "monetary compensation," Opp. at 14, based on the "severe emotional distress" and "monetary losses" that the City's enforcement efforts have caused, Compl. ¶¶ 187–88.

i. Presentation

California's claim presentation requirements apply to a cause of action seeking both monetary and non-monetary relief if the monetary relief is not "incidental" to the other relief sought. *Lozada v. City and Cnty. of*

San Francisco, 145 Cal. App. 4th 1138, 1146 (2006). Lee argues that California's claim presentation requirements do not apply to this cause of action because Lee requests monetary compensation only "as an incident" to declaratory and injunctive relief. Opp. at 14.

Monetary relief is "incidental" when entitlement to declaratory or injunctive relief necessarily results in an award of monetary damages without further litigation. One thing is "incident" to some other thing when it is "[d]ependent on, subordinate to, arising out of, or otherwise connected with" that other thing. *See Incident (adj.)*, Black's Law Dictionary (10th Ed. 2014). Consistent with that typical usage, the U.S. Supreme Court has explained (in another context) that damages are "incidental" to other relief when they "flow directly from liability." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 365–66 (2011) (quotation omitted). That means monetary relief is "incidental" when it necessarily arises from entitlement to other relief. For example, when an employer must reinstate a former employee, California courts have awarded "back pay and benefits as incidental to the injunctive and declaratory relief of employment reinstatement" because entitlement to back pay and benefits follows logically from entitlement to reinstatement. *See Lozada*, 145 Cal. App.4th (collecting cases).

California's claim presentation requirements apply to Lee's California Free Exercise Clause cause of action because the monetary relief that Lee seeks is not incidental to the other relief that she seeks. If Lee were entitled to prospective relief (such as an order enjoining the City from enforcing FMC section 18.55.110), the monetary relief that Lee seeks would not necessarily follow. *See Dukes*, 564 U.S. at 366. Even if FMC section 18.55.110 or its enforcement

violated Lee's rights under the California Constitution's Free Exercise Clause, Lee would not necessarily be entitled to damages for Lee's "emotional pain and suffering" and "monetary losses" without further litigation. *See* Compl. ¶¶ 187–88. Indeed, Lee characterizes the monetary relief she seeks "as an incident" to other relief without ever explaining why that is so. *See* Opp. at 14.

Applying California's claim presentation requirements, Lee's first May 2021 claim said nothing about her religious activities. *See* RJN Ex. L. Lee's amended claim said that the City had "interfered with and/or prevented the practice of my religion by Code Enforcement, Planning & Building Depts. Precluded my association with others of my faith." RJN Ex. N. The amended claim was thus devoid of any factual detail supporting this cause of action and (once again) failed to name any City employees. *See Watson v. State of California*, 21 Cal. App. 4th at 845.

As with Lee's other California causes of action, the Court grants the City's motion to dismiss with leave to amend because Lee could conceivably state a claim for non-monetary relief and avoid application of California's claim presentation requirements.

ii. Failure to State a Claim

Although Lee's California Free Exercise Clause cause of action fails based on California's claim presentation requirements, the Court briefly addresses the merits to avoid the need for repeated amendments. Lee's complaint asserts that FMC section 18.55.110 violates California's Free Exercise Clause because it "totally excludes religious uses from an open space zoning district," and thus "precludes the 'free exercise and enjoyment of religion' within the

boundaries" of such a district. Compl. ¶ 182. But that is not a plausible interpretation of FMC section 18.55.110.

*

The California Constitution provides (in relevant part) that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Cal. Const. Art. I, § 4.

California's Free Exercise Clause bears some resemblance to the U.S. Constitution's Free Exercise Clause, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend I. In *Sherbert v. Verner*, the U.S. Supreme Court held that a law that substantially infringes a person's religious exercise violates the First Amendment's Free Exercise Clause absent a compelling government interest. 374 U.S. 398, 406–07 (1963). But later, in *Employment Division, Oregon Department of Human Resources v. Smith*, the U.S. Supreme Court held that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. 872, 879 (1990) (quotation omitted).

The California Supreme Court has repeatedly held that the U.S. Supreme Court's application of the First Amendment's Free Exercise Clause does not control application of California's Free Exercise Clause. *See, e.g.*, *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158 (2008);

Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal.4th 527, 560–62 (2004).

But the California Supreme Court has also declined to "determine the appropriate test" for challenges under California's Free Exercise Clause. *N. Coast Women's Care Med. Grp.*, 44 Cal.4th at 1158. Indeed, the California Supreme Court has left open whether *Sherbert*, *Smith*, "or an as-yet unidentified rule that more precisely reflects the language and history of the California Constitution" applies to challenges under California's Free Exercise Clause. *Id.* at 1159 (quoting *Catholic Charities of Sacramento*, 32 Cal.4th at 562) (emphasis omitted).

Instead, the California Supreme Court has assumed without deciding that *Sherbert's* strict scrutiny test applies to such challenges. *See id.; Catholic Charities of Sacramento*, 32 Cal.4th at 562. "Under that standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored." *Catholic Charities of Sacramento*, 32 Cal.4th at 562. If a Court determines that a challenged law passes muster under strict scrutiny, the court need not consider whether a less stringent standard should apply. *See id.*

*

Here, Lee challenges FMC section 18.55.110 under California's Free Exercise Clause. Chapter 18.55 of Fremont's Municipal Code establishes an "open space district" in the City. *See* FMC Ch. 18.55; RJN Ex. A at 1. The provision's express purpose is "to permit limited but reasonable use of open lands while

protecting the public health, safety and welfare from the dangers of seismic hazards and unstable soils; preserve the topography of the city that shapes it and give it its identity; allow land to be used for agricultural production in its natural or as near natural state as possible; coordinate with and carry out regional, county, and city open space plans; and where permitted, encourage clustering of dwelling units in order to preserve and enhance the remainder of open space lands as a limited and valuable resource." *See* FMC § 18.55.010; RJN Ex. A at 1. To effectuate these purposes, the City's plan "identifies seven different open space land use designations to address a variety of open space opportunities and constraints." *Id.* Chapter 18.55 also sets forth building height standards, area, lot width, and yard standards, performance standards (which govern construction requirements for dwellings and other structures), land constraints, and other rules. *See* FMC §§ 18.55.010–18.55.110; RJN Ex. A.

Section 18.55.110 contains a table that "establishes allowed uses within an open space zoning district." FMC § 18.55.110; RJN Ex. A at 11. The table lists numerous categories of land use, including "agricultural," "commercial and service," "recreation and open space," "residential," "public and quasi-public," and "other." FMC § 18.55.110, Table 18.55.110; RJN Ex. A at 12–15. The "public and quasi-public" category lists several specific uses, then includes a catch-all for more general public and quasi-public uses. FMC § 18.55.110, Table 18.55.110; RJN Ex. A at 14.[10] The quasi-public use catch-all, in turn, includes "a use

[10] The table excludes certain categories of public or quasi-public use, not relevant here, from the catch-all *See* FMC § 18 55 110 Table 18 55 110; RJN Ex A at 14.

operated by a . . . religious . . . institution, with said use having the primary purpose of serving the general public." *See* FMC § 18.25.3080; RJN Ex. B ¶ 2. Such a use is permitted, with a conditional use permit, in four of the open space plan's seven land use designations. Such a use is not permitted in three of the open space plan's land use designations (land designated as (1) Hill (beyond Ridgeline), (2) Hill Face, and (3) Private). *See* FMC § 18.55.110, Table 18.55.110; RJN Ex. A at 14.

Lee's complaint asserts that FMC section 18.55.110 violates California's Free Exercise Clause because it "totally excludes religious uses from an open space zoning district," and thus "precludes the 'free exercise and enjoyment of religion' within the boundaries" of such a district. Compl. ¶ 182. Lee's complaint does not allege that FMC section 18.55.110 violates California's Free Exercise Clause on any other basis.

This cause of action would fail on the merits because it rests on an erroneous interpretation of the City's open space plan. Section 18.55.110 allows (with a conditional use permit) for the operation of a religious institution in four of the plan's seven land use designations. *See* FMC § 18.55.110, RJN Ex. A at 14; FMC § 18.25.3080, RJN Ex. B ¶ 2. Thus, Lee's assertion that FMC section 18.55.110 precludes all religious uses in the open space zoning district is wrong.

Lee's opposition to the City's motion to dismiss asserts a different theory. It argues that because Lee's property is designated as Hill (beyond ridgeline), Lee cannot use the property for quasi-public religious purposes. *See* Opp. at 24–25. And Lee asserts that because "no provision is made for strictly private religious usages" either, the City's zoning scheme violates California's Free Exercise Clause. *Id.* at 25.

Because the complaint neither asserts this theory of liability nor contains allegations supporting it, the Court cannot consider it.[11]

If Lee attempts to assert this cause of action again in an amended complaint, Lee should be mindful of not only California's claim presentation requirements, but also how FMC section 18.55.110 actually works.

B. Section 1983 Claims

Lee raises four claims under 42 U.S.C. § 1983. These claims assert that Lee has suffered religious discrimination, national origin discrimination, and retaliation for Lee's opposition to the City's allegedly discriminatory actions, and that City employees unlawfully searched Lee's property. Compl. ¶¶ 82–114. Each claim fails for the same reason: Lee has sued only the city, but Lee's allegations do not give rise to municipal liability under § 1983. The Court thus grants the City's motion to dismiss these claims with leave to amend.

1. Legal Standard

Under 42 U.S.C. § 1983, any person who, "under color of" state law, subjects any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." "[M]unicipalities and other local government units" are "included among those persons to whom § 1983 applies." *Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658,

[11] Lee argues that section 18.55.110 also implicates her privacy rights, such that her twelfth cause of action is a "hybrid rights" claim. Opp. at 25. But the cause of action (as articulated in the complaint) lacks allegations relating to Lee's privacy interests. Nor is it apparent how the City's open space zoning plan, on its face, could possibly burden Lee's privacy rights.

690 (1978). That said, "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. That means "a municipality cannot be held liable *solely* because it employs a tortfeasor . . . on a *respondeat superior* theory." *Id.* (emphasis in original).

Thus, § 1983 embraces a cause of action against a municipality only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or implements or executes a less formal "governmental custom." *Id.* at 690–91 (quotation omitted); *see also Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1073 (9th Cir. 2016) (en banc) ("In order to establish municipal liability, a plaintiff must show that a policy or custom led to the plaintiff's injury.") (quotation omitted). That does not mean the relevant policy or custom itself must be unconstitutional. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989). But there must be "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id.* at 385. And the policy or custom must be "the moving force behind the constitutional violation." *Id.* at 388 (alteration and quotation omitted). In other words, "city policymakers" must make "a deliberate choice to follow a course of action" that "reflects deliberate indifference to the constitutional rights of [the city's] inhabitants." *Id.* at 389, 392 (quotations omitted).

2. Application

a. Religious Discrimination (Claim 1)

Lee's first § 1983 claim asserts that the City has deprived Lee of her right to use the property for religious purposes based on religious animus. Compl. ¶ 86. According to Lee, the City's code enforcement actions were motivated by animus because City employees accused Lee of "hiding behind the Buddha" and tolerated "non permitted uses of neighboring properties which are secular." *Id.* ¶ 87. Lee believes that the code enforcement actions have denied her "equal protection of the laws" under the Fourteenth Amendment and the "free exercise" of her religion under the First Amendment. *Id.* ¶ 83, 88. And Lee alleges that the City "acted unreasonably because it knew and/or should have known that its code enforcement activities would cause [her] emotional pain and suffering." *Id.* ¶ 90.

These allegations are not enough to establish municipal liability under § 1983. They do not show that "there is a direct casual link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton*, 489 U.S. at 385. Based on the broader complaint, the only policy or custom relevant to this cause of action is FMC section 18.55.110. Elsewhere, Lee asserts that section 18.55.110 precludes "any form of religious use" of land in the City's open space district. Compl. ¶ 20. As discussed above, that is not true. *See* part III.2.c.ii.[12] And this cause of action does not even mention FMC section 18.55.110.

[12] If Lee wishes to assert that section 18.55.110 is a policy that has caused her constitutional deprivation and that reflects deliberate indifference to constitutional rights, she must allege why that is so based on the provision's actual content.

Thus, this cause of action does not challenge the constitutionality of any City policy or custom, or assert that any particular policy or custom "reflects deliberate indifference to the constitutional rights" of the City's inhabitants. *See City of Canton*, 489 U.S. at 392. Instead, it appears to rest on City employees' individual enforcement decisions and actions. Lee did not sue those employees as individuals, and she cannot sue the City for employing constitutional tortfeasors. *See Monell*, 536 U.S. at 691.[13]

The Court need go no further. Because Lee is suing only the City and failed to plausibly allege municipal liability under § 1983, the Court grants the City's motion to dismiss this cause of action with leave to amend.

b. National Origin Discrimination (Claim 2)

Lee's § 1983 national origin discrimination claim is almost identical to her § 1983 religious discrimination

[13] The Ninth Circuit has held that if a municipal employee was acting as a "final policymaker," the employee's decision can give rise to *Monell* liability. *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004) (quotation omitted). "For a person to be a final policymaker, he or she must be in a position of authority such that a final decision by that person may appropriately be attributed to the [municipality]." *Id.* at 983. Lee has not alleged that any City employee was acting as a "final policymaker" here. Although Lee argues in her supplemental brief that Gary West is a city policymaker, *see* Lee Supp. Br. (dkt. 23) at 1, the allegations in Lee's complaint fail to establish that West engaged in conduct giving rise to Lee's § 1983 claims while acting as a final policymaker. Relatedly, the Court denies Lee's requests for judicial notice as improper attempts to amend her complaint during briefing on the City's motion to dismiss. *See* Request for Jud. Notice (dkt. 17-1); Supp. Request for Jud. Notice (dkt. 23-1). Lee can include these additional allegations in an amended complaint.

claim. According to Lee, the City's different treatment of her neighbor shows that animus drove the City's code enforcement actions. *See* Compl. ¶ 95. And Lee alleges that the City "acted unreasonably because it knew and/or should have known that its code enforcement activities would cause [her] emotional pain and suffering." *Id.* ¶ 98.

These allegations are not enough to establish municipal liability for the same reasons discussed above. Because Lee is suing only the City and failed to plausibly allege municipal liability under § 1983, the Court grants the City's motion to dismiss this cause of action with leave to amend. The Court also notes that the complaint contains no allegations establishing or indicating that City employees discriminated against Lee based on her race or national origin.

c. Retaliation (Claim 3)

Lee's § 1983 retaliation claim alleges that "Lee has opposed actions by [the] City that discriminated against her on the basis of her race/national origin and . . . religion." *Id.* ¶ 102. Lee alleges that the City "has taken retaliatory action" by obtaining two inspection warrants for the property, exceeding the scope of the inspection warrants, placing cameras outside her property, and issuing notices and citations. *Id.* ¶ 103. Lee asserts that each of these actions was an "unlawful reprisal for protected activity," and that they "should be considered collectively as part of a continuing campaign of reprisal designed to punish [Lee] for opposing the discriminatory practices of [the] City." *Id.* ¶ 104.

Here again, Lee has not alleged that the City's actions were caused by, or even linked to, any policy or custom. That means Lee's allegations are not

enough to state a § 1983 claim against the City. The Court thus grants the City's motion to dismiss this cause of action with leave to amend.

d. Property Searches (Claim 4)

Lee's § 1983 claim based on property searches asserts that "[f]rom October 26, 2017, up to and including the present," the City "engaged and continues to engage in unreasonable searches and seizures." Compl. ¶ 111. This cause of action incorporates Lee's allegations about City employees trespassing onto the property, falsifying information to obtain inspection warrants on two occasions, seeking inspection warrants without prior notice to Lee, exceeding the scope of the warrants, installing cameras outside the property, using "neighborhood informants to monitor" activity on the property, conducting "[u]nnecessary inspections," and engaging in "overhead surveillance" of the property. *Id.*

Here again, Lee has not alleged that the City's actions were caused by, or linked to, any policy or custom.

The Court also notes that this cause of action appears to have additional defects. Lee has provided no details about any "overhead surveillance," which (in any event) does not always constitute a Fourth Amendment search. *See, e.g., Florida v. Riley*, 488 U.S. 445, 449–451 (1989). Nor is there anything unlawful about using informants, *see United States v. White*, 401 U.S. 745, 749 (1971), or placing a camera outside a property to record who comes and goes, *see United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991). Lee also fails to cite any authority for the proposition that she was entitled to notice before the City sought a warrant to search her property. And the Court is unable to tell whether City employees

exceeded the scope of the relevant inspection warrants without knowing the scope of those warrants. The City has also argued that Lee did not timely assert this cause of action based on the dates of the underlying incidents. *See* Mot. to Dismiss at 15. Lee failed to respond to any of these points in her opposition to the City's motion to dismiss.

The Court thus grants the City's motion to dismiss this cause of action. Despite its apparent weakness Lee's failure to defend it, the Court grants Lee leave to amend.

C. RLUIPA Claims

Lee asserts five causes of action under RLUIPA. Several rest on an erroneous reading of FMC section 18.55.110 or the Land Conservation Contract. Another omits necessary detail by broadly challenging the entire March 2021 Amended Notice and Order. The Court thus grants the City's motion to dismiss these causes of action with leave to amend.

1. Legal Standard

Three of RLUIPA's prohibitions are relevant here.

First, RLUIPA "prohibits the government from imposing 'substantial burdens' on 'religious exercise' unless there exists a compelling governmental interest and the burden is the least restrictive means of satisfying the governmental interest." *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 985–86 (9th Cir. 2006) (quotation omitted). This rule applies if "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." 42 U.S.C. § 2000cc(a)(2)(c). That means "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Guru Nanak*, 456 F.3d at 986.

Second, RLUIPA prohibits the government from imposing or implementing land use regulations "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). A city violates this "equal terms provision" only if it treats a religious assembly or institution "on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria." *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011). If a City law "appears" to treat religious assemblies or institutions differently than similarly situated secular assemblies or institutions, the City has the "burden" of showing that the treatment results from "a legitimate regulatory purpose, not the fact that the institution is religious in nature." *Id.* at 1171–73.

Third, RLUIPA prohibits the government from imposing or implementing a land use regulation that "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

2. Application

a. Substantial Burden (Claim 7)

Lee's seventh cause of action asserts that FMC section 18.55.110 "on its face" violates RLUIPA because it is a land use regulation that imposes a

substantial burden on Lee's religious exercise. Compl. ¶¶ 134. Lee's complaint also asserts that the "City has no compelling governmental interest in excluding all religious uses" from open space areas, and that even if it has a compelling interest in forbidding some religious uses, "it has not used the least restrictive means of achieving whatever that compelling interest would be." *Id.* ¶ 135.

Because this cause of action is based on the faulty premise that FMC section 18.55.110 excludes all religious uses from open space areas, it fails. The Court thus grants the City's motion to dismiss this claim. Lee may attempt to amend this claim, but must allege a substantial burden based on what FMC section 18.55.110 actually does, or how the City has implemented it.[14]

The Court notes that some of Lee's allegations (taken as true) could state an RLUIPA claim that is different from the one Lee attempted to assert here. Instead of asserting that FMC section 18.55.110 facially violates RLUIPA, Lee might have asserted that the City's implementation of FMC section 18.55.110 violates RLUIPA. *See* 42 U.S.C. § 2000cc(a)(1). Informing a person that she cannot use dangerous or non-compliant buildings for any purpose, including prayer, is one thing; telling a person that she can pray only in

[14] Lee appears to assume, without support, that if a city's zoning scheme does not expressly permit private prayer, then private prayer is not allowed on any property. Lee also assumes, without support, that if a "house of worship" (i.e., a quasi-public religious structure) is not permitted on a particular piece of property under a City's zoning laws, the zoning scheme violates RLUIPA, regardless of whether certain features of the property make it unsuitable for such use. *See, e.g.,* Opp. at 23 (citing Compl. ¶ 42).

specific, limited areas on a property (and not pray anywhere else on the property) is another. Lee's allegations, while not entirely clear, seem to state that in implementing FMC section 18.55.110, City employees told her that she could pray only in limited, specific places. *See* Compl. ¶ 49. If true, that could constitute a substantial burden on Lee's religious exercise, and might not be narrowly tailored to a compelling governmental interest. *See* 42 U.S.C. § 2000cc(a)(1).[15] But that is not the cause of action before the Court.

b. Unequal Terms (Claim 8)

Lee's eighth cause of action states that FMC section 18.55.110 "on its face violates RLUIPA because it treats religious institutions . . on less than equal terms than non-religious institutions." *Id.* ¶ 145.

This cause of action also fails. Again, it rests on the premise that section 18.55.110 precludes all religious uses within the City's "open space" area. *Id.* ¶ 147. That is not true. FMC section 18.55.110 does not forbid all religious uses or otherwise treat religious uses differently than other quasi-public uses that are permitted (or not) on the same terms. Nor is there any indication that, in practice, the City treats religious assemblies or institutions differently from "similarly situated" secular assemblies or institutions. *Centro Familiar*, 651 F.3d at 1173. Lee's allegation that her neighbor also violated various City property laws and was treated differently does not establish that the neighbor was similarly situated in general or

[15]City employees may have merely been identifying structures that were not condemned, and indicating that Lee could pray in those structures. But Lee's complaint suggests that the City employees went further, and the Court cannot resolve factual questions at this stage.

with respect to any particular zoning criterion. *See id.* The Court thus grants the City's motion to dismiss this claim with leave to amend.

c. Unlawful Exclusion (Claim 9)

Lee's ninth cause of action is similar to Lee's seventh and eighth. It states that FMC section 18.55.110 "violates RLUIPA because it totally excludes religious uses from an open space zoning district." Compl. ¶ 153. Because that is not true, this claim fails. Lee may attempt to amend this claim with allegations showing that the City either "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc(b)(3).

d. Abatement Proceedings (Claim 10)

Lee's tenth cause of action states that the City's March 2021 Amended Notice and Order to Abate Nuisance was "imposed in the implementation of a land use regulation or system of land use regulations, under which the City . . . makes, or has in place formal or informal procedures or practices that permit it to make, individualized assessments of the proposed uses" for property. Compl. ¶ 163. Thus, per Lee, the Amended Notice and Order "purports to be an implementation of one or more land use regulations that imposes a substantial burden" on Lee's religious activities. *Id.* ¶ 161. That is because if the structures on the property "are demolished," Lee's religious activities "will be severely limited in that the private temple and attendant facilities . . . will no longer be available for . . . use." *Id.* ¶ 165. Lee also states that the March 2021 Amended Notice and Order "is neither in furtherance of a compelling governmental interest . . . nor . . . the least restrictive

means of furthering that governmental interest." *Id.* ¶ 161. Lee asserts that although the City "contends that the structures . . . are nuisances or are in some fashion hazardous for human use," this is not the case, as "the structures[,] which existed before [Lee] purchased the . . . property[,] are in a better and safer condition now than when [Lee] acquired the . . . property. *Id.* ¶ 164.

The City argues that the Court should dismiss this cause of action because the Amended Notice and Order "is not based solely on a 'zoning or landmarking law, or the application of such a law.'" Mot. to Dismiss at 23 (quoting 42 U.S.C. § 2000cc-5(5)). Although the Amended Notice and Order refers to some FMC Chapter 18.55 violations, it also refers to "violations of *other* code sections that are not zoning or landmarking laws, such as the California Building Code, California Electrical Code, California Plumbing Code, California Mechanical Code, and California Fire Code," plus a "lack of permits" and "failure to undergo environmental review under the California Environmental Quality Act." *Id.* (emphasis in original).

The Court grants the City's motion to dismiss because this cause of action challenges the entire Amended Notice and Order. As both parties seem to acknowledge, the Amended Notice and Order lists violations of FMC Chapter 18.55 and requires Lee to remedy those violations in ways that would restrict Lee's use of the property. *See* Mot. to Dismiss at 23; Opp. at 21. And nothing in RLUIPA precludes Lee from challenging the Amended Notice and Order merely because it also references violations of other California laws. *See* 42 U.S.C. § 2000cc-5(5). Lee could thus challenge the Amended Notice and Order to the extent its corrective demands implement the

City's zoning laws. But Lee's complaint does not do that. Indeed, Lee's complaint fails to identify which parts of the Notice and Order constitute applications of zoning laws that limit or restrict Lee's use of the property. *See* Compl. ¶¶ 160–70. And Lee does not argue that the other relevant California laws constitute land use regulations. *See* Opp. at 21–22.[16]

Thus, the Court grants the City's motion to dismiss this cause of action with leave to amend. Lee may add necessary detail explaining which parts of the Amended Notice and Order she is challenging and why they violate RLUIPA.

e. Land Conservation Contract (Claim 11)

Lee's eleventh cause of action seeks a declaration that "all structures" at issue "are authorized and permitted under the Land Conversation Contract" signed in 1978. Compl. ¶ 174. But Lee also asserts that "any attempt to enforce a prohibition contained in [that] contract . . . against use of the . . . property for religious purposes violates . . . RLUIPA" by treating "a religious institution on less than equal terms with a non[-]religious institution". *Id.* Lee thus seeks a declaration that Lee's use of the property "as a private religious temple . . . is consistent with" the contract and that "any attempt . . . to compel compliance" with the contract via limiting the use of the property for "religious purposes" would violate RLUIPA. Id. ¶ 176.

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[16] The Court also notes that the mere fact that the relevant structures "are in a better and safer condition now" than they were in 2010, *see* Compl. ¶ 164, does not imply that the structures are safe or compliant with applicable state and local laws and regulations.

After the City pointed out that the Land Conservation Contract does not treat religious institutions differently than non-religious institutions and that applying the contract to limit religious uses of land on the same terms that it limits secular uses of land would not violate RLUIPA, see Mot. to Dismiss at 24-25, Lee has attempted to recharacterize this cause of action as merely seeking a declaration that the structures at issue in this lawsuit do not violate the Land Conservation Contract, *see* Reply at 22-23. But that purely contractual question has nothing to do with RLUIPA. Accordingly, the Court grants the City's motion to dismiss this RLUIPA cause of action with leave to amend.

IV. CONCLUSION

Lee's complaint has several structural defects. First, it contains allegations without any apparent relevance to the claims that Lee asserts. *See supra* notes 2-3, 5-8. Second, it does not contain allegations establishing the elements of those claims. Third, it rests largely on an erroneous reading of FMC Section 18.55.110. Fourth, it does not assert some of the legal theories that Lee has belatedly asserted in her opposition to the City's motion to dismiss and in supplemental briefing. The Court has granted Lee leave to amend her complaint in its entirety. But the Court advises Lee to prepare an amended complaint with allegations that more rigorously track the elements of the claims that she asserts.

*

For the foregoing reasons, the Court grants the City's motion to dismiss with leave to amend. Lee may file an amended complaint within 45 days of the date of this order.

IT IS SO ORDERED.

Dated: September 28, 2021

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

APPENDIX E

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX F

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No: 21-CV-04661-CRB

TEMPLE OF 1001 BUDDHAS AND MIAOLAN LEE,

Plaintiffs,

vs.

CITY OF FREMONT,

Defendant.

Angela Alioto (SBN 130328)
Steven L. Robinson (SBN 116146)
Jordanna G. Thigpen (SBN 232642)
Angela Mia Veronese (SBN 269942)
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Email: jgt@aliotolawoffice.com

Attorneys for Plaintiffs
Temple of 1001 Buddhas and MiaoLan Lee

SECOND AMENDED COMPLAINT FOR

1. Discrimination on the Basis of Religion (42 U.S.C. § 1983);
2. Religious/Race Discrimination – Retaliation in Violation of 42 U.S.C. § 1983

3. Violation of the Due Process Clause (Substantive Due Process) and Equal Protection Clause of the Fourteenth Amendment – 42 U.S.C. § 1983
4. Declaratory Relief – Violation of RLUIPA – Substantial Burden
5. Declaratory Relief – California Constitution – Right to Liberty (Art. I, § 1)
6. Declaratory Relief – California Constitution – Denial of Religious Free Exercise (Art. I, § 4)
7. Declaratory Relief Substantive Due Process (Cal. Const. Art I, § 7)

DEMAND FOR JURY TRIAL

I. INTRODUCTION

1. Plaintiffs Temple of 1001 Buddhas and Miaolan Lee seek to establish a temple and meditation facilities at 6800 Mill Creek Road, Fremont California 94539.

2. In the nearly four years this active controversy has been pending, Defendant City of Fremont ("Defendant" or "City") has (1) issued four Notices and Orders to Abate and one Notice to Vacate; (2) issued citations to Plaintiff MiaoLan Lee ("Lee") for $86,000; (3) charged $27,225 in permit application fees so far (which continue to accrue and be demanded); (4) caused armed police and investigators to search the residence on two occasions, and to cause and conduct numerous other "inspections" of the property in the hopes of finding technical violations; (5) caused the City of Fremont Police Department to investigate Plaintiffs and Plaintiff Lee's husband for criminal activities including purported "fraud"; (6) applied erroneous standards in assessing the requests of Plaintiff Temple of 1001 Buddhas ("Temple," and with

Lee, "Plaintiffs") for permits at the site; and (7) conducted a defective administrative hearing, which resulted in the decision that is the subject of a separate Writ of Mandate filed in Alameda County Superior Court. In doing so, Defendants have repeatedly violated Plaintiffs' constitutional rights.

3. Defendant City of Fremont says that quasi-public religious use of the property is impermissible, and has made private religious use impossible by targeting Plaintiffs and demanding removal of Plaintiffs' worship structures. Plaintiffs seek relief under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, et seq.

II. SUBJECT MATTER JURISDICTION

4. Subject matter jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1331 on the grounds that there is a substantial federal question. Specifically, the acts of Defendant City of Fremont as herein alleged abridge the right for quasi public religious use of real property commonly known as 6800 Mill Creek Road, Fremont California in contravention of the provisions of the RLUIPA. In addition, Plaintiffs allege that Defendant City opposes *all* religious use of the property. Accordingly, they assert claims of discrimination and violation of their Constitutional Rights pursuant to the provisions of 42 U.S.C. § 1983.

5. This Court has supplemental jurisdiction over Plaintiffs' state law claim for relief arising out of the same case or controversy as the civil action over which this Court has original jurisdiction. 28 U.S.C. § 1367(a).

III. VENUE

6. Venue is proper in this Court because the wrongful acts complained of herein occurred within

the territorial boundaries of the Northern District of the United States District Court of California. Venue is also proper in this court because this matter concerns the status of real property located within the territorial boundaries of the Northern District of the United States District Court of California.

IV. PARTIES

7. Plaintiff Temple of 1001 Buddhas ("Temple") is a non-profit public benefit corporation, with a principal place of business at 6800 Mill Creek Road, Ca 94539. The purpose of the Temple is to facilitate and encourage the observance of the Buddhist religion.

8. Plaintiff Temple is a religious institution. See 42 U.S.C. § 2000cc(a)(1).

9. The Temple is a religious institution but not a religious assembly.

10. Plaintiff Miaolan Lee (a U.S. citizen) is an individual of Asian national origin and is a master of the Buddhist religion. Plaintiff Lee was born in Asia and came to America at a very young age. She grew up in Pennsylvania, Kansas and then California. Plaintiff went to high School at Newark Memorial High in Newark, California. Plaintiff went to College at San Jose State and the University of Washington/(PCBS). Plaintiff has been practicing Buddhism all her life. She teaches individuals the ways of Buddhism in the United States and overseas. She does not accept donations or money for her teachings.

11. Defendant City of Fremont ("City") is a municipality incorporated under the laws of the State of California.

12. Defendant City is the Government for purposes of RLUIPA. See 42 U.S.C. § 2000cc.

13. At all times herein relevant, individual designated as "The Building Official" of Defendant City had all the authority and responsibility accorded the office by California Health and Safety Code Section § 18949.27. The Building Official, Gary West, had the authority to enforce and interpret the provisions of the California Building Code. CBC § 104.1. The Building Official had and has the authority to issue permits for the erection, demolition and moving of buildings. CBC § 104.2. Building Official West had and has the right to "issue necessary orders to assure compliance with this code." CBC § 104.3. At all times herein relevant, the Building Official was the authorized decision maker of Defendant City of Fremont with regard to the acts alleged in the present complaint.

14. Plaintiffs herein are informed and believe that the existence of other "authorized decision makers" responsible for the harm alleged herein will be discovered in the course of discovery in this matter.

V. STATEMENT OF FACTS

A. The Real Property

15. This litigation concerns real property commonly known as 6800 Mill Creek Road, Fremont California 94539. Assessor's Parcel number 513 070600400, and described as follows: Parcel 4, as shown on Parcel Map No. 2173, filed February 21, 1978, Book 101 of Parcel Maps 42 and 43, Alameda County Records (hereinafter referred to as "Real Property"). The Real Property is approximately 29 acres.

16. Plaintiff Lee purchased the Real Property on October 29, 2010.

17. On March 11, 2018, the Real Property was legally transferred to Temple of 1001 Buddhas. Temple

is a private religious 501(c)(3) California corporation. Plaintiff Lee has resided at the Real Property since October 29, 2010, and uses it for private religious worship. At all relevant times except where mentioned for background, Plaintiffs were the sole legal, successive owners of the Real Property.

18. On or about February 17, 1978, a predecessor in interest to Plaintiffs signed a Land Conservation Contract with Defendant City pursuant to the Williamson Act (which is currently codified at California Government Code § 51200 *et seq*.). The contract states, in pertinent part, "[d]uring the term of this contract, or any renewal thereof, the said property shall not be used for any purpose, other than agricultural uses for producing agricultural commodities for commercial purposes and compatible uses as listed below" Following those words 13 compatible uses are listed. Three of those uses are: "(f) Living quarters and home occupations"; "(i) Public and quasi-public buildings"; and "(n) Accessory use to the above."

19. The Land Conservation Contract signed on or about February 17, 1978, has subsequently been renewed multiple occasions, and it is still in effect.

B. The History of the Property

20. Though located in the City of Fremont, the Real Property is located in a rural area of rolling foothills known as the "Southern Hill Area", on the north side of Mission Peak. There are a small number of single family residences located along Mill Creek Road, and Alameda County owns parcels where the road ends, east of the Real Property. Other property owners in the area, likewise subject to valid Williamson Act contracts, conduct agricultural operations nearby, including but not limited to an olive orchard and a winery.

21. Lee purchased the property on October 26, 2010, from a bank foreclosure involving the former owner John Wynn Nguyen. Mr. Wynn had purchased the property from M.O. Sabraw, a retired Alameda County judge and First District appellate justice, who passed away in 2013.

22. M.O. Sabraw constructed the main residence on the property. He also: operated an Arabian horse ranch at the Lee Residence, including grading a particular area for a horse track, cut and paved concrete driveways, installed multiple septic facilities, constructed a residence, barn, and other accessory buildings, added water storage tanks, added a permanent mobile home with a wooden deck directly adjacent to the creek, and made a number of other improvements and building structures on the property, all largely without permits. Because the purchase was a foreclosure, Lee did not receive any disclosures and had no idea that M.O. Sabraw had made extensive unpermitted improvements on the Real Property.

23. Ron Sabraw ("Mr. Sabraw"), the son of M.O. Sabraw, lives next door with his wife Cheri Sabraw at 6900 Mill Creek Road. Ron Sabraw is also a retired judge of the Alameda County Superior Court. Lee and her husband Tu Nguyen once attended a neighborhood meeting at Sabraw's home. Sabraw told Lee and Nguyen that it was very difficult, if not impossible, to get permits, and for decades everyone "just does what they have to do." He showed Lee and Nguyen the unpermitted improvements he had made to his own property, including a detached a garage, cottage and a deck supported by a steel I-beam, which was built approximately 75' from the seasonal creek bed. He also told Lee and Nguyen that he uses Round-Up extensively on his property and that he sprayed it in

bulk on his olive orchard, using a tank attached to a tractor. Sabraw's olive oil labels contain the statement "this oil was not (organically grown). Yes, we used Roundup and some pesticides to kill weeds and the olive fruit fly so we could actually make the oil. While this product is not genetically modified, we would have done so if we knew how. Consume at your own risk. The olives which made this oil were grown on the TK Rancho in Mission San Jose, California." Lee's family drinks water from their well, which is located a few hundred feet away and downward elevation from Ron Sabraw's olive orchard.

24. Satellite images of Ron Sabraw's property confirm the extensive construction that has taken place, including his large deck within 200 feet of the creek and his unpermitted "cottage" that was supposed to be demolished, but which was not. The photograph below shows Ron Sabraw's property in October 2008, before he built his deck.

The photograph below shows Ron Sabraw's property in August 2011 when an elevated concrete and steel deck first appears, and which is still present:

The following photograph shows the detached garage on Ron Sabraw's property, which his visible from Mill Creek Road despite prohibitions on construction being visible from the street in the Hillside Area.

25. Lee has since discovered that another neighbor, Mark Williamson, who also resides at Mill Creek Road, has reported Sabraw's unpermitted structures for years, and that the City never requested Sabraw to demolish the unpermitted, secular structures, even though those structures are in violation according to the City's interpretation of Measure T and other Codes that is being applied to Plaintiffs.

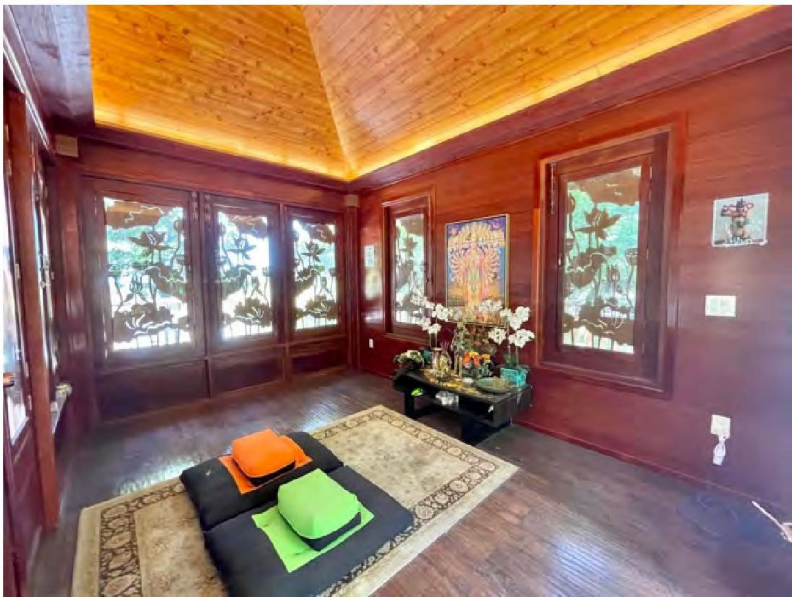
26. Since purchasing it, Plaintiffs have been using the Real Property for religious purposes. Just some of the sacred objects at the Real Property include the following: A large copper bell with mantra in Sanskrit and stone monument (on site since 2013 and 2012 respectively), and blessed and dedicated to the site by Buddhist monks; 1,000 6" Buddha statues inside the Meditation Hall (on site since 2011); thirty-two 7' marble Arahats (on site since 2012); a 9' Buddha statute and other Buddha statues inside the Main Buddha Hall (on site since 2018); and several Hindu God statues at the God House/gazebo (on site since 2015).

C. The Structures at the Property

27. At the time of the filing of this action, and as of the filing of this Second Amended Complaint, the following structures are present on the Real Property:

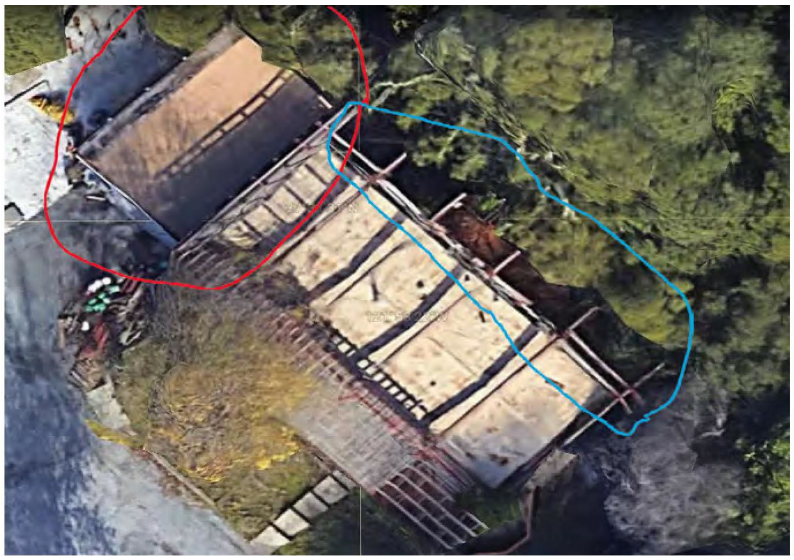
a. Hindhu God House/120 sf Gazebo, with pond (identified as a "tea house" by the City) to hold emergency 60,000+ gallons of water for fire protection: The God House has removable, carved wooden screen doors and has a surrounding pond which is filled with emergency water storage. The God House does not threaten human safety. The photograph below shows the exterior of the God House:

The photograph below shows the interior of the God House, with the screen doors closed:



b. Modular Home with Carport (enclosed as a garage): This structure does not threaten human safety. The photograph below is a satellite image from 2017 of the existing modular home (40-50 years old) with pre-existing original decks (blue outlined) which

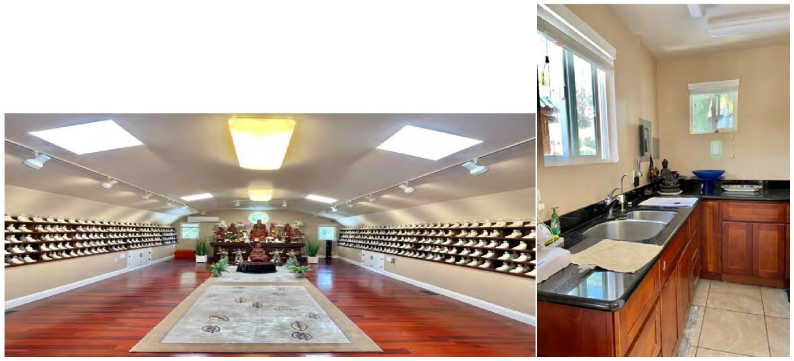
have never been modified by Plaintiffs, and pre-existing original carport (red outlined):



The left image below shows the existing carport as the garage, which was made simply by adding two walls and a rollup door to enclose the existing, original carport. No other changes were made to the modular home or its deck and nothing threatens human safety.

c. Meditation Hall/Former Barn: There are no threats to "human safety" and none have ever been identified. The photograph below shows the original condition of the two-story Mediation Hall/Former Barn, constructed by M.O. Sabraw without permits, the same square footage:

And the same building exterior and portions of interior following improvements, and permitted as-built by Plaintiffs in 2014:



d. Main Buddha Hall/Pre-Existing Garage: The photographs below show (1) the existing condition of the Main Buddha Hall/Garage (built without permits by M.O Sabraw), and (2) a satellite overview of the building (the blue line shows the area where Plaintiff made the existing roof line even to repair the damaged metal):

The photograph below shows the improved Main Buddha Hall/Garage, with no change to the existing footprint of the building – same exact height, same floor levels:

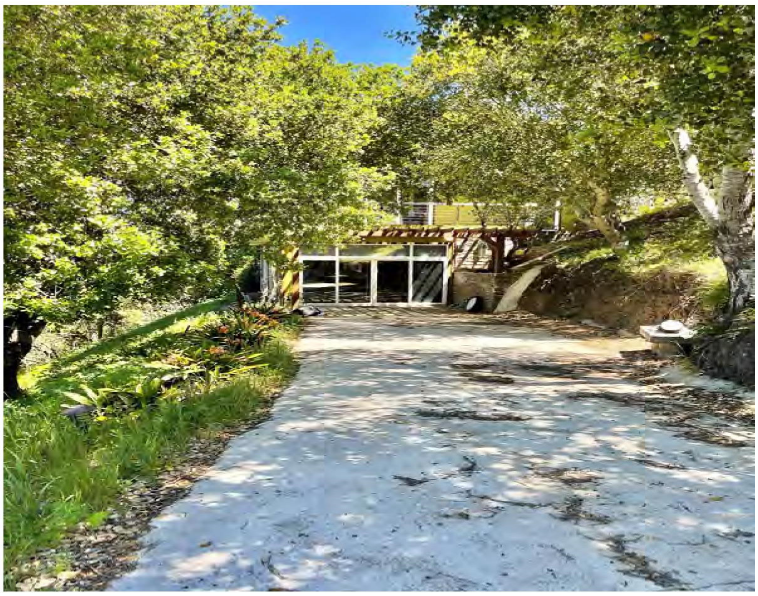
The photograph below shows the interior of the Main Buddha Hall – it is clearly not lacking in light and sanitation.

e. Greenhouse: The satellite image below is from June 2007; Plaintiff Lee bought the Lee Residence in 2011.

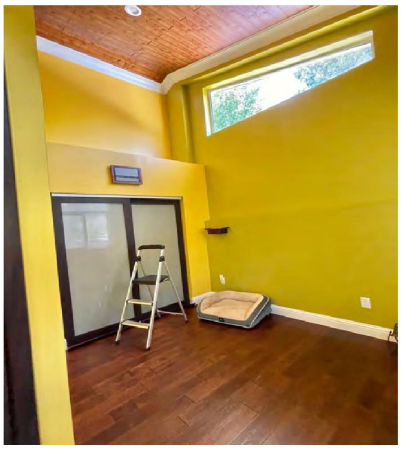
The photographs below show the interior of the greenhouse (a standard agricultural building):

129a

f. **Accessory Dwelling Unit (Retreat House):** This is a new structure that was built safely and according to a workmanlike and professional standard. The photograph below shows the exterior of the ADU:



The photographs below show portions of the interior of the ADU:



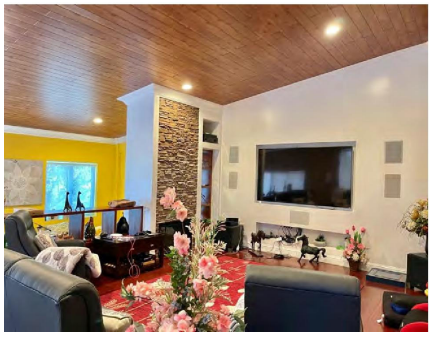
g. **Solar Panels:** Plaintiffs added three additional solar panels, which they are in the process of permitting.

h. **Main Residence (with pre-existing water tanks):** The main residence was pre- existing for at least 50-60 years. The old garage was converted into living space, an old carport was converted into a new garage, and a covered parking space was converted to a media room. The footprint did not expand and no grading was performed. In addition, there were no new water tanks – the old water tanks were replaced with a different color. The photograph below shows the previous condition of the Main Residence, along with the approximate location of the new enclosed garage, which was built on the existing footprint:

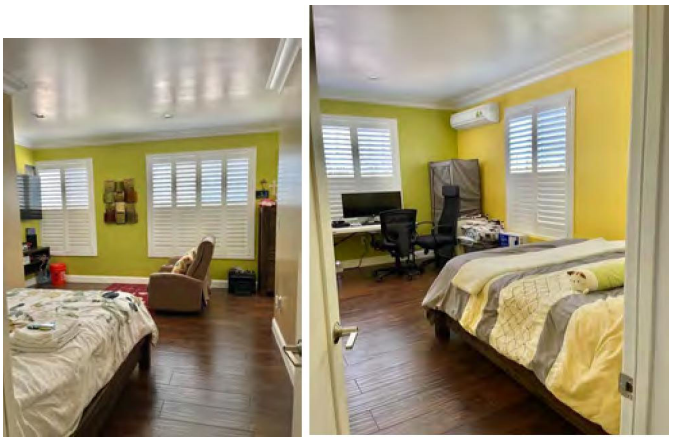
The photograph below shows the present condition of the same are:

The photograph below shows the carport before renovation:

And the photograph below shows the same carport after renovation:



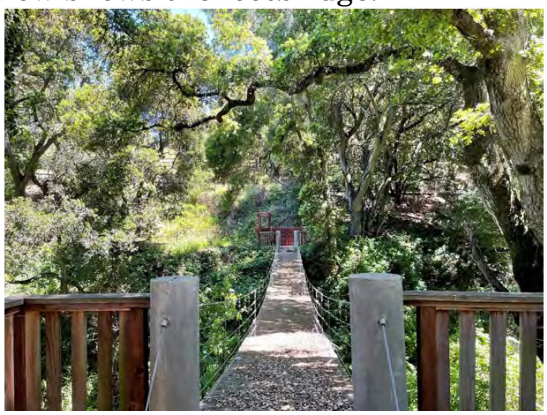
The former garage at the Main Residence became a two bedroom area:



i. Tree House: The tree house was especially built to avoid damage to the tree; there are multiple tree houses on Mill Creek Road (including on at 3670 Mill Creek Road that is adjacent to the public road). Below is a photograph of the tree house at the Lee Residence:

The photograph below left depicts an original, disintegrating treehouse on the Real Property that was built by M.O. Sabraw; the right is a tree house down the street at 3670 Mill Creek Road. Tree houses do not need permits.

28. In addition, though they are not structures, there is a stone tile footpath and a rope suspension pedestrian footbridge with posts on each side of the creek, and a driveway that leads from Mill Creek Road to the various buildings. In addition, more than 1,000 Buddha Statues and Hindu statues grace the Property, including 32 Arahats (7'-tall white marble statues) and there are additional religious shrines. The photograph below shows the footbridge:



This photograph shows the garden-variety stone tile footpath, similar to what is found in thousands of California yards, and some of the 32 Arahats, outside the Meditation Hall:

29. The City also falsely accused Plaintiffs of grading a new dirt road into the hillside. In fact, the road was cut into the hillside by M.O. Sabraw without permits. At least one of his children was even married on the property and used the area that Plaintiffs were accused of clearing. The City also accused Plaintiffs, without evidence, of killing trees on the property. Plaintiffs did not kill or remove any trees.

30. The foregoing photographs and explanations are merely examples of Plaintiff's refutation to the allegations in the notices and violations. Plaintiffs have responses to each and every allegation against the, to be set forth in more detail at the appropriate time.

31. At all relevant times, the Real Property is and was generally zoned as "Open Space" and specifically zoned "Hill (beyond Ridgeline)" pursuant to the zoning ordinances of the City of Fremont.

32. At all relevant times, the Real Property is and was subject to the provisions of Fremont Municipal Code Section 18.55.110, which – through an associated table – prescribes uses permissible within areas zoned "Open Space" and "Hill (beyond Ridgeline)." The ordinance also prescribes the conditions under which permissible uses are allowed in areas zoned "Open Space" and "Hill (beyond Ridgeline).

33. While religious usage of structures is permitted in some areas zoned "Open Space" as "Quasi-Public" uses, such is not the case in areas designated "Hill (beyond Ridgeline)," which is the zoning for Real Property.

D. Defendant's Actions Against Plaintiffs

34. In or about 2014, Plaintiff Lee applied for and received permits from the City of Fremont to finish

improvement work on a dilapidated barn that had been built without permits by a prior property owner. The barn (which subsequently became the Meditation Hall) was described in the permits as a "non-habitable structure [used] for religious purposes." This structure remains non-habitable and houses over 1,000 Buddha statues.

35. During the permitting process for the barn, former Fremont Building Official Christopher Gale came onto the property and inspected the structure. At that time there were several religious statues on site. Building Official Gale took one look at them and said to Plaintiff Lee "I wish the City did not know about them."

36. On October 25, 2017, Plaintiff Lee conducted necessary fire break work and repair on the pre-existing driveway on the Real Property to create a better fire break. A cement truck visited the Real Property and the property of Talley Polland, who, on information and belief, was constructing a 1/4 mile concrete driveway over and along the creek without permits on her respective property.

37. On October 26, 2017, Leonard Powell, the City's Code Enforcement manager, sent Plaintiff Lee an email demanding inspection of the Property.

38. Before Plaintiff Lee could answer Mr. Powell's email, he arrived at her Property the next day (October 27, 2017) at 9 AM, with two other City staff members (Building Inspector Randy Bohnenstiehl and Environmental Specialist Val Blakely). Before entering the Property, the City staff held a discussion with Cheri Sabraw, the wife of Ron Sabraw, on Mill Creek Road directly outside the gate to the Lee Residence. When Plaintiff's maintenance worker Edwin Virgen went to

the gate to see what they wanted, the gate automatically opened, as is the norm. Virgen tried to asked them what they wanted, but the three men proceeded to drive through and did not respond, totally ignoring him. Permission had not been given for them to enter the Real Property. Virgen immediately called Lee's husband to inform him that people had driven into the property, uninvited.

39. Powell, Blakely and Bohenstiehl then drove to the creek and started taking photographs. Plaintiff Lee was walking down by the creek and was surprised when she saw them. She confronted them and demanded they leave the property. Powell handed Lee his official City of Fremont business card that had the letters, "JD" after his name. Lee was intimidated by Powell's representation that he was a lawyer for the City. However, she instructed him and the other two men to immediately leave the Real Property and to contact her so that they could make an appointment to inspect the Real Property. Powell took photographs of the creek and the pre-existing Modular Home. They said they wanted to take more photographs but Lee asked them to please make an appointment and that she would be available at most times.

40. That day, after they departed, Plaintiff Lee wrote to the City asking what they were looking for, attaching numerous photographs of the Property to her message. On October 30, 2017, Plaintiff Lee emailed Leonard Powell with instructions to contact her prior attorney to arrange an appointment to access the Real Property. Her attorney did not receive any response from Defendant City. However, Powell emailed Lee later again for appointment but not her attorney.

41. On December 11, 2017, Plaintiff Lee went to Defendant City Hall looking for Building Official Chris

Gale. However, by that time Gale had separated from the City and been replaced by Gary West. Plaintiff was told to meet with Leonard Powell instead. Powell had previously entered her property without permission on October 27, 2017. That day, Plaintiff was wearing a hat.

42. In the presence of Environmental Specialist Val Blakely and another City employee, Leonard Powell said "*You look prettier without a hat*." Plaintiff Lee felt extremely uncomfortable with the comments and the way Powell was looking at her when he made them.

43. On December 23, 2017, Powell requested to conduct another inspection, and Plaintiff Lee offered the first available time (the third week of January), based on the holidays and her travel schedule.

44. On December 28, 2017, Plaintiff Lee sent an email to Leonard Powell telling him his entry onto the Real Property on October 27, 2017, was without her consent and was unlawful. In the email Plaintiff stated, "[Y]ou and your team repeatedly violated my Fourth Amendment, these actions have proven to me that you/ City of Fremont, are using your authority over Asian Religious Woman, harassing and discriminating/ single me out on and off, for the past few years." Powell then forwarded the email to the Deputy City Attorney, Bronwen Lacey. Plaintiff never received any response to that email. The City has never addressed or investigated this complaint of discrimination based on religion or anything else.

45. On January 12, 2018, Powell emailed a formal request for a January 18, 2018 physical inspection, indicating the City had become aware on October 25, 2017 of violations on the Property including "(1) unpermitted construction of, on, or in multiple buildings; (2) extensive concrete work on the property; (3) con-

struction or alteration of a natural watercourse; and (4) business operating in a residential zone." Plaintiff again asked the City to contact her attorneys to set the appointment, but it did not, and the inspection did not proceed on January 18, 2018 as a result.

46. On or about January 30, 2018, Plaintiff Lee met with Building Official Gary West. In that meeting, Plaintiff Lee complained that she was being discriminated against because of her religion. She also complained of the City's unauthorized October 27, 2017 entry onto her property. Plaintiff Lee also told West she objected to Powell's use of the letters "JD" on his City-issued business cards. Plaintiff told West that if Powell really was an attorney he should have known that he could not enter onto her property without permission. West, the Building Official of the City of Fremont, acknowledged that Powell was not a lawyer. In other words, Leonard Powell was misrepresenting his status through his calling card that implied he is a lawyer. Later, the JD initials were removed from his card. The designation of "JD" was also removed from most of the documents on the internet. Lee also requested that the City appoint someone other than Powell to interface with her because Powell's remark about her being "prettier without the hat" (and his attitude when confronted about his prior unauthorized entry to her property) made her uncomfortable. This request was completely ignored by the City. During this meeting, Building Official West told Plaintiff Lee that he had an urgent need to schedule an inspection of the Real Property.

47. Two days later, on February 1, 2018, Plaintiff Lee emailed West for clarification about the ordinances that he contended applied to the Real Property, and the same day, Lee called West to ask if the City could

do the requested inspection the next day (February 2, 2018) or any day after February 19, 2018 since she was then planning to be out of town on February 5, 2018 for two weeks. Mr. West stated he was not available to do the inspection.

48. On February 7, 2018, Plaintiffs' attorney wrote the City requesting a meeting.

49. No meeting was scheduled. Instead, on February 7, 2018, West's Building Department, without notice to Plaintiff, and apparently believing that Plaintiff Lee would be out of town, sought and obtained an emergency inspection warrant from the Alameda County Superior Court to search the Real Property on February 9, 2018. City personnel falsely represented to the Court that Lee was not cooperating with the request for inspection and refused to give consent. Leonard Powell also declared that the Lee Residence constituted a threat to the neighbors and the public. Because of her truthful representations to West, City staff apparently expected Plaintiff Lee to be out of town at that time and therefore, would not be present for the inspection.

50. On February 8, 2018, Plaintiff Lee's mother-in-law had a medical emergency and Lee had to cancel her planned trip.

51. On the morning of February 9, 2018, the City conducted an inspection of the Real Property with an armed police tactical team in riot gear, K-9 units, a locksmith, and multiple City staff: Building Official Gary West, Code Enforcement Manager Leonard Powell, Code Enforcement Officer Tanu Jagtap, Building Inspector Randy Bohnenstiehl, and Environmental Specialist Val Blakely. Plaintiff Lee opened the gate so that they would not break it down.

52. The entire property was searched. Though the warrant and resulting inspection were supposed to be in furtherance of resolving allegedly unsafe and threatening unpermitted structures, the City's police and staff went through all the rooms of Plaintiff's residence, including Plaintiff Lee's bedroom, and opened most closets and drawers in the residence. They rummaged through all of Plaintiff Lee's and Tu Nguyen's belongings and personal possessions, including her food in the kitchen, and took photos of the food. They even inspected Plaintiff Lee's makeup drawer.

53. In response to the City's assertions that she had lied about being out of town, Plaintiff provided the City with proof of the hospitalization of her mother-in-law (and later the same was emailed to the City, with no response). Lee was extremely distressed and upset by both the fact of the unacceptable search and the method in which it was conducted.

54. Plaintiff noticed Fremont Police Sgt. Paul McCormick among the group and said hello to him (Plaintiff's brother had worked as a police sergeant for the City of Newark and stationed in and out of the City of Fremont for approximately 16 years). Leonard Powell was present and thereafter pulled Fremont Police Sgt. Paul McCormick aside as they walked ahead of Plaintiff on the property. Plaintiff overheard Powell say sternly to Sgt. McCormick "you're supposed to support us not her."

55. City personnel were present on the real property for about three hours. It was horrifying to Plaintiff Lee. No "probable cause" was ever told to Plaintiff. Lee was petrified and shaking and had no idea what the City wanted.

56. From February 28, 2018, through March 9, 2018, Defendant City placed license plate reading and recording cameras across the street from the Real Property gate so as to see who was entering and leaving the Real Property. Plaintiff Lee and her husband did not know who had placed the cameras there. Plaintiffs contacted Bronwen Lacey, but Bronwen Lacey disavowed any knowledge of the cameras. To find out, Plaintiff placed cameras of her own. On March 9, 2018, footage from the Plaintiff's cameras showed a pale blue van without license plates stop in front of the Real Property gate. Two Fremont City Police Officers were present in the van, specifically Jason Valdes and Natasha Johnson. Both individuals got out of the van and removed the two cameras, put them in the van and drove away. When Plaintiff continued to ask both Bronwen Lacey and Gary West, they disavowed any knowledge of the cameras, even though the subsequent police report (confirming no evidence of any crimes) indicated that the investigation was performed to "assist" Gary West's Building Department.

57. On March 28, 2018, Plaintiffs' attorney wrote to Deputy City Attorney Bronwen Lacey stating that Plaintiff remained ready to cooperate with any and all requests and inspections but requested that Leonard Powell not be present, given Powell's prior conduct towards Plaintiff Lee.

58. On March 29, 2018, Defendant responded to that request by serving Lee with a Notice and Order to Abate ("NOA 2") (COD2018-00421) based on the February 9, 2018 inspection of the Property. NOA 2 cited Plaintiffs for "cutting into the hillside" with "non-agricultural structures" that "present potentially hazardous conditions to the occupants and guests, adjacent

residences, the natural wildlife, and environment in violation of the City's municipal code, its adopted ordinances, as well as regional, state, and federal regulations." The City also cited the Williamson Act. The City demanded that Plaintiff Lee "immediately cease habitation and occupancy[]" of three uninhabited structures: (1) The main Buddha Hall; (2) the accessory dwelling unit/Retreat House; and (3) the Meditation Hall. Plaintiff Lee was shocked to receive this notice.

59. The allegations of NOA 2 are demonstrably false, as any cursory investigation of the Real Property and its structures reveals. For example, NOA 2 alleges that the buildings were constructed without: (1) "adequate fire resistance-rated construction; (2) "adequate light, ventilation, illumination, insulation, sanitary facilities, and other essential equipment"; (3) adequate structural and foundation systems"; and (4) "proper on site waste disposal and waste water treatment." This is not only untrue. None of the buildings lacked these items. NOA 2 also alleged that the buildings were constructed "without appropriate mitigation measures" for earthquakes and a resulting "substantial risk of partial or complete collapse" which was unsupported by any expert's report whatsoever for earthquakes which is untrue. Regardless, the Real Property sits on rock mountain, not liquefaction. NOA 2 also alleged that the structures were constructed so as to "pose contamination risk to adjoining streams, springs, and groundwater." No contamination has ever been made or found.

60. On April 11, 2018, Plaintiffs' attorney filed an appeal of NOA 2, based on abuse of discretion, factual errors, and an unlawful search.

61. On April 11, 2018, Bronwen Lacey responded to the appeal stating that NOA 2 would remain in place since the Williamson Act does not allow anything other than agriculture. Of course, this is not accurate; the Williamson Act permits a variety of compatible uses (including religious facilities) on properties that are covered by valid contracts.

62. On May 13, 2018, Hillside Area resident Mark Williamson made a "report of concerns" to the City outlining concerns of discrimination, bias, and abuse of power based on the fact that there were no citations or investigations of the unpermitted and nonconforming circumstances at Ron Sabraw's or Talley Polland's Hillside Area properties (not to mention any other Hillside Area properties), which involve secular use and do not involve religious use. No response was made to Williamson's complaint.

63. On May 18, 2018, Bronwen Lacey, Deputy City Attorney of Defendant Fremont stated to Plaintiffs' Counsel that NOA 2 would remain in effect because of the Williamson Act Contract. Lacey claimed that under the contract, a "House of Worship is not allowed [on the Real Property]." As will be shown below, Lacey's statement was not correct.

64. On May 21, 2018, at the request of Building Official Gary West and Deputy City Attorney Bronwen Lacey, Plaintiff Lee and her retained engineer, architect and lawyers met with West, Lacey, and three City staff members to attempt to resolve the City's concerns. At that meeting, with Lacey, West, and representatives of all interested City Departments present, Plaintiff voluntarily agreed to allow the staff of Defendant City to inspect the Real Property. Plaintiff stated that everyone was welcome, and yet again requested that another investigator be physically

present instead of Leonard Powell given her complaints about discriminatory and harassing conduct from him. Lacey and West laughed at Plaintiff. Nonetheless, an inspection was confirmed for May 25, 2018 given that Plaintiff was scheduled to return from a planned trip late on the evening of May 23, 2018.

65. However, on May 22, 2018, the City cancelled the May 25, 2018 meeting and demanded to inspect on May 24, 2018, even though its staff knew Plaintiff Lee was not available that day. Plaintiff provided her flight records to the City to prove her schedule.

66. On May 23, 2018, the City asked if May 29, 2018 at 9 AM would work. Plaintiff responded that it worked for her, but that her project manager's mother had just passed away and she would need one day to confirm his availability. Without waiting for Plaintiff's response, that same day the City submitted an application to the Alameda County Superior Court for a *second* warrant for inspection, once again falsely claiming that (1) Plaintiff was refusing to cooperate with requests to inspect the Property; (2) that she had lied about being out of town on February 9, 2018; and that (3) incredibly, that she was lying about the religious use of the Real Property (as stated in Officer Jagtap's supporting declaration: "I believe Ms. Lee is lying about using the building for religious purposes and she exclusively uses it for business purposes.") In support of the warrant application, Code Enforcement Officer Jagtap, who works at the direction of Building Official Gary West, declared under penalty of perjury that there was "no consent." Officer Jagtap signed the warrant declaring that "*absent consent to enter private property, a warrant is required prior to entry*." City personnel, including but not limited to Officer Jagtap, Gary West, Leonard Powell, and Bronwen Lacey, knew

very well that Plaintiffs had not only fully consented for a voluntary inspection, but there was an appointment for May 25, 2018 that Jagtap, herself, had cancelled. The second warrant application also once again claimed purported "hazardous conditions" and threats to "adjacent residences," without supporting evidence of such conditions, and even though there are no adjacent residences near any structures on the Real Property.

67. On May 24, 2018, using the false information submitted in connection with the second warrant application, Defendant conducted a second physical inspection of the Lee Residence. Plaintiff Lee had returned from her trip in the middle of the night and was sleeping when, at 8:00 AM, City personnel showed up with a police officer and a Fire Department Official. From Plaintiff Lee's observation, other than Fire Department personnel opening the gate using the emergency code, the Police and Fire Department personnel never left their cars, and they did not walk the property. City Code Enforcement Officials, acting on behalf of Gary West, once again wandered the Real Property and entered all the structures.

68. Plaintiff Lee was awakened by a phone call and went outside to see what was going on. Plaintiff Lee asked for a copy of the second warrant, but Leonard Powell just laughed in her face and refused to provide Plaintiff Lee with a copy, even though it is required by law. The inspection lasted two hours and left Plaintiff Lee extremely distressed and suffering from shock.

69. Later, Plaintiffs' attorney was not able to obtain a copy of the warrant when he asked the City Attorney's office. Plaintiff Lee finally obtained a copy of the warrant and its application on May 31, 2018,

and was shocked to see the false statements that the City had used to justify the warrant.

70. On June 8, 2018, a **fourth** inspection of the Lee Residence was conducted by Code Enforcement staff member Tanu Jagtap at the City's request, so that the City could look for additional violations. At least seven separate City staff members were present, along with three of Plaintiffs' consultants and engineers representing Plaintiffs who attempted to explain the residential and religious use of the Property, once again to no avail.

71. On June 13, 2018, Plaintiffs' attorney wrote Mayor and City Council of Fremont demanding an explanation for its treatment of Plaintiff and the false statements made in connection with both warrant applications. Among other matters stated in the letter was the following:

> An important issue related to the investigation is how the allegedly nonconforming conditions on the Real Property relate to our clients' religious practices. It appears city staff may have misapprehended the religious and cultural nature of our clients' activities on the Property, such as the use of a building as a private Hindu-Buddhist temple/house of worship.

72. On June 14, 2018, the day after receipt of the letter from the Plaintiffs' lawyer, Building Official Gary West issued and signed a Notice and Order to Vacate, Case No. COD2018-00421 ("NOV"). In the NOV, the City condemned three structures on the Property and declared them "unlawful, unsafe, and unfit for human occupancy": (1) the ADU (Retreat House); (2) the Main Buddha Hall/Garage; and (3) the

Mediation Hall/Former Barn. Two of these three structures were not only pre-existing, but are the chief structures used for religious purposes. The Plaintiffs were ordered to remove all personal property from the structures by July 28, 2018. The City notified Plaintiffs that they could appeal on the basis of Fremont Municipal Code § 15.45.130 and 15.05.060.

73. Five days later, on June 19, 2018, the City issued an amended Notice of Order to Abate ("NOA 2A") (amending the NOA 2 that was issued on March 29, 2018).

74. Plaintiff Lee refused to move the Buddha statues from the Main Buddha Hall and she communicated that refusal to West and Powell. In response, Powell ordered her to remove from the Main Buddha Hall the meditation pillows and the cushions that people use to bow to the Buddhas. Plaintiff Lee complied with this demand.

75. On June 26, 2018, City Officials yet again requested entry to the Real Property, to which Plaintiffs voluntarily consented. The officials then "red tagged" (i.e., posted notices barring entry) to the three condemned buildings and on the main entrance to the Real Property itself, even though the Real Property itself had not been condemned.

76. Since June 26, 2018, the Plaintiffs have not been able to use the three buildings for their intended purposes. The intended purposes are for meditation purposes to practice their faith.

77. On or about June 2018, Fremont City Councilman Raj Salwan had suggested that Plaintiff Lee work with the City directly, without her attorneys or her previous consultants. He later told her that if she wanted to get the three buildings properly permitted she must

"disarm [her] lawyers" as they were "costing the City too much resource." If she would do that, "we could work this out." Erroneously believing it would help resolve the matters, and based directly on Salwan's representation, Plaintiffs followed his advice and hired Arun Shah and Kevin Weiss as her new project managers and terminated her prior lawyer and his team of consultants. Neither of these consultants lacks experience or ability to perform their work with the City: Shah is a former City of Fremont Building Department Structural Engineer for more than twenty years, while Kevin Weiss is a highly experienced engineer, project manager, and developer who has many years of experience working on projects with the City of Fremont.

78. On or about July 2, 2018, Plaintiffs filed an appeal of the NOV and NOA 2A, Case No. COD2018-00421, based on: (1) abuse of discretion in issuance of the NOV; (2) the unlawful search; and (3) numerous factual errors, including the false statements in the warrants and the false allegation that the buildings were unfit for human occupancy. The City never set the appeal for hearing.

79. On or around early July 2018, Plaintiff Lee met with Dan Schoenholtz, Community Development Director, which was suggested by Raj Salwan, Fremont City Council Member. Plaintiff Lee told Schoenholtz that, for religious reasons, she could not remove Buddha's Altars and the Buddha Statues as requested by City Officials. Schoenholtz visited the Real Property and viewed the altars and statues and saw that the property is genuinely put to religious use. However, Schoenholtz refused to assist Plaintiffs in resolving the reported discrimination.

80. On July 6, 2018, Gary West came to the Real Property for yet another inspection. While at the property, Building Official West told Plaintiff Lee that from now on, she could only pray in the Mediation Hall or in her home. West stated that Plaintiff Lee was not allowed to pray anywhere else on the Real Property. Lee was so shocked that she couldn't even speak. West's directive to Lee about where she could or could not pray inside the boundaries of her own property was abusive and frightening to the Plaintiff, and she believed it was discriminatory. West also told Plaintiff Lee to remove the Buddha statues in the Main Buddha Hall. Plaintiff refused and demanded that West confirm his directive in writing. The City also mandated that Plaintiffs turn off all of the utilities in any of the structures except the main residence.

81. On August 1, 2018, Plaintiffs received a letter from the San Francisco Bay Regional Water Control Board (copying Defendant's Code Enforcement personnel), and on November 27, 2018, a representative from the San Francisco Bay Regional Water Control Board visited the Lee Residence, even though as a pre-existing single-lot, the Lee Residence is not subject to CEQA and Water Control Board review. Water Control Board officials confirmed that the City demanded that the Water Control Board perform this investigation at the Lee Residence, but not at Sabraw's property for the use of RoundUp for his olive orchard near the creek as reported by Mark Williamson, and the Lee Residence is directly downstream from the Sabraw residence. Water Board Officials have confirmed that he has never received a report from the City of Fremont to investigate any other properties in the riparian corridor with unpermitted structures involving secular use (belonging to Ron Sabraw and Talley Polland).

82. Plaintiffs were now acting without counsel, a status Plaintiffs had been told would mollify the City. Plaintiffs proceeded to engage in what can only be described as a Kakfa-esque process of receiving and responding to the City's bizarre demands. On September 17, 2018, Plaintiffs were told to submit a planning application for a Conditional Use Permit. This turned out to be a moving target as the City alternately demanded demolition of the religious use structures, continually demanded more reporting and information for the Conditional Use Permit Applications every time Plaintiffs believed they were close to making their final submission, and continuously threatened additional violations during this period.

83. For example, on March 14, 2019, Plaintiffs' consultant Arun Shah met with City staff to go over a progress civil/survey drawing. The City informed Plaintiffs' representative that Plaintiffs were still missing items; Shah confirmed by email that day that Plaintiffs understood they needed to include multiple additional reports, including but not limited to a title report, soils report, and more. The City's emailed response was simply "I'd recommend you involve other disciplines in the future," without specifying what "other disciplines" would be needed or explaining the demand to enable Plaintiff to do what the City wanted. Nonetheless, Shah complied with the City's requests.

84. Also, notwithstanding the work done on Plaintiffs' behalf and notwithstanding the fact that the City was continually updated on the progress of the work, on March 8, 2019, Code Enforcement Officer Tanu Jagtap, working at the direction of Gary West, threatened to impose further penalties on the Plaintiffs within 30 days.

85. On April 24, 2019, a further meeting was held with City personnel and Arun Shah along with two other agents for Plaintiffs. Per the meeting minutes, "[t]he meeting discussed the proposed timeline for complete application submittal to the city and what needs to be included in the package."

86. But despite being fully aware that the application was still in process due to the City's continually shifting and increasingly arbitrary requests, on May 3, 2019, the City recorded a document – signed by Gary West and notarized – entitled "Notice of Substandard Building/Structure" indicating that the ADU (Retreat House), the Main Buddha Hall/Garage, and the Meditation Hall were "unsafe, dangerous and a public nuisance." There was absolutely no reason to make this recording; in the year since the City had been receiving documents relating to the Conditional Use Permit Application, no conditions had changed at the Real Property. Strangely, at the administrative hearing, Deputy City Attorney Bronwen Lacey stated that Gary West had not signed the document (even though his signature was notarized).

87. The Notice contained several misstatements of fact, including but not limited to that Plaintiff had made "construction of new buildings in excess of 12,000 sf," constructed a "tea house" in the riparian corridor, and that "unsafe/hazardous excavation and grading conditions exist." The reference to a "tea house" appears to be based on the City's misperception that the God House/gazebo is a *chashitsu* (Japanese tea house), notwithstanding the fact that (1) Plaintiff Lee is not Japanese and (2) the God House/gazebo is not constructed in the form of a traditional *chashitsu*. In addition, there was no data or evidence whatsoever that the buildings were "substandard" or structurally

unsound. To the contrary, Plaintiff's expert, Dr. Kit Miyamoto (the Chairman of the California Seismic Safety Commission and a renowned seismic safety expert) has performed a detailed analysis with wind load/earthquake simulation, which demonstrates that the structures are safe and sound. Despite signing this recorded document, Gary West claimed under oath last year in the administrative proceeding that he knows nothing about the property.

88. On June 3, 2019, Plaintiff Lee sent a letter to City Council member Raj Salwan, complaining about discriminatory code enforcement and about the inspection warrants. In the letter, Plaintiff Lee described her belief that she was experiencing discrimination based on religion. Councilmember Salwan said he gave the letter to Chief City Attorney Harvey Levine. Salwan conveyed to Plaintiff Lee that several days later Levine told him defiantly that "the City is ready for a lawsuit" and that to the contrary, the City was going to sue Lee because of her protected activity of opposing unlawful, systemic religious and racial discrimination.

89. Plaintiffs and their consultants and engineers diligently worked from September to June 2019 to put together surveys, plans and reports needed to bring all of the structures into compliance on an as-built basis. The cost to Plaintiffs of all of these reports and the attorneys' fees spent since receipt of the June 2018 NOA 2A and the NOV – which were never set for appeal despite request – now exceeds $1.5 million.

90. On August 18, 2019, Hillside Area resident Mark Williamson made his second report of concerns about neighboring properties belonging to Ron Sabraw and Talley Polland, in a complaint entitled "inconsistent enforcement of zoning issues on and around Mill Creek Road in Fremont."

91. On August 19, 2019, Plaintiff once again provided the City with requested information about the Real Property, requesting clarification of the City's interpretation of several Codes, and once again attempted to correct the City's ongoing provably false misapprehensions about the size and character of the structures and improvements to the Real Property. The City did not respond.

92. On September 25, 2019, Defendant City, by Code Enforcement Officer Jagtap, issued two citations regarding the Real Property, each with separate case numbers. One was directed toward Plaintiff and the other directed toward, Chau Lawson, the Plaintiff's bookkeeper who had no interest in the Real Property. Aside from the recipients of the citations, they were identical and each imposed fines. Each citation imposed a fine of $21,500, totaling $43,000. In 30 days, the amount doubled to $86,000.

93. On October 2, 2019, Plaintiffs requested that the City meet with them to discuss the City's interpretation of applicable Codes and ordinances so that Plaintiff could submit a Conditional Use Permit Application that met the City's standards, and that the City engage in a collaborative process to resolve any permit issues at the Real Property. The City did not agree to meet.

94. On October 4, 2019, Kevin Weiss, one of the Plaintiffs' consultants, wrote to the Defendant City of Fremont, again asking for clarification of some of the applicable Codes, stating "based on recently presented fine notice and no response to a meeting request, it appears that the City does not want to engage in the proposed collaborative process."

95. With no response from the City, Plaintiff Temple decided it had no choice but to go ahead and submit a Conditional Use Permit Application (the "Cycle 1 Submission"). On October 7, 2019, Plaintiff Temple submitted an application for necessary permits for the Real Property. Plaintiffs also paid the City Planning Department $27,250 in fees for the applications to get conditional use permits for the structures that the City claimed had no permits. The regular price is $7,250.00 but the City planner James Willis, acting at the direction of Gary West, insisted that Plaintiff pay an additional $20,000 fee for design review. According to Plaintiffs' Consultant, Arun Shah (a former City of Fremont Building Department employee), the practice of the City is ordinarily not to charge such fees at the outset of the process, and this was unprecedented. Defendant City cashed the check but has never accounted to Plaintiffs on how the money was spent.

96. The City responded on November 4, 2019 making comments and requesting additional information for a planned November 6, 2019 meeting.

97. On November 6, 2019, Plaintiffs' consultants and Plaintiff Lee met with City staff (among them representatives from the Fire, Code Enforcement and Planning Departments) to discuss the City's November 4, 2019 comments. During this meeting, Plaintiffs' consultant Kevin Weiss raised the issue that there were other properties on Mill Creek Road in the Hillside Area that had made similar improvements as the Plaintiffs (or were in the process of doing so), but the City personnel present in the meeting refused to address the fact that the City was not enforcing Codes as to any other properties. City personnel later testified that on November 6, 2019, they decided on demolition as the only solution.

98. Also on November 6, 2019, Plaintiff Lee emailed the City (Ms. Jagtap) to ask that the September 25, 2019 citations be stayed while the application process was pending, or else, Plaintiffs wanted to appeal the citations. Jagtap did not respond at all, once again ignoring Ms. Lee. According to Arun Shah, the usual practice of the City would be to refrain from issuing further citations while work was in progress to remediate earlier violations. No one employed by Defendant City ever told the Plaintiffs or their consultants the grounds for the double citations.

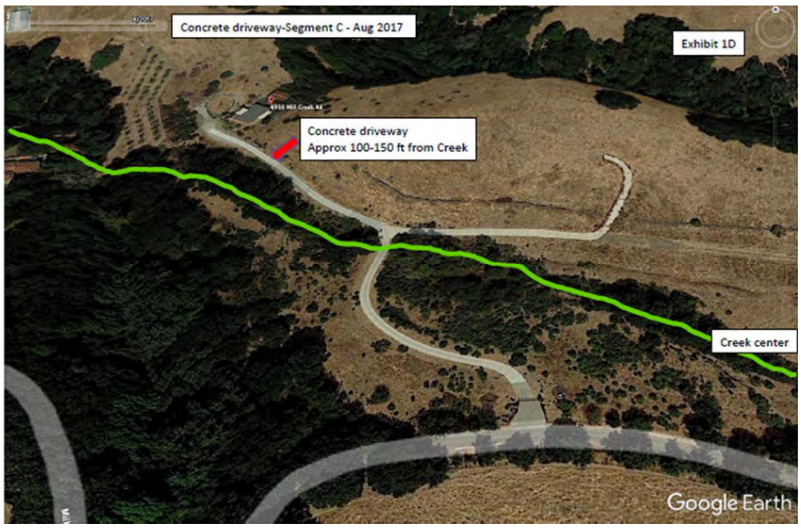
99. On November 11, 2019, Plaintiff Lee refiled her report of concern about neighboring properties (including Ron Sabraw's property at 6900 Mill Creek Road) who had performed construction on Mill Creek Road without permits. She also once again declared to the City that her use of the property was for residential and private religious purposes, not commercial use.

100. On or about December 10, 2019, the City assigned someone to "investigate" the complaint of unpermitted driveway modifications on Talley Polland's property at 6950 Mill Creek Road. After a perfunctory "investigation" that may or may not have occurred, the complaint was closed as "unfounded" despite the existence of Google Earth satellite images revealing the precise unpermitted construction that was the subject of the complaint – the very same source of images that the City relied upon in its investigation of Plaintiffs.

Here is Talley Polland's property in 2011:

And here is the same property in 2014, after the driveway was partially constructed:

And the same property in 2017, after the driveway was fully constructed:



101. On December 12, 2019, Plaintiff Lee met with Wayne Morris, Deputy Community Director to discuss the double citations. Lee asked why she had been issued the citations by Jagtap. Morris told Plaintiff Lee that Leonard Powell, not Jagtap, had personally issued the citations, and that the City would make this a "miserable, expensive" process for her that "she would regret." When Leonard Powell suddenly appeared at the meeting, apparently at Morris' request, Morris accused Plaintiff of fabricating her religious beliefs for permit purposes, and sarcastically asked her "Do you think Buddha is OK with the construction you did?" and vowed "you will demolish that temple." Lee again asked why she received two citations, but neither Morris nor Powell answered Lee's questions. Instead, Morris and Powell both berated and harassed Lee for her religious beliefs. Morris said: "You are using the Buddha as a protective shield." Plaintiff Lee was shocked and did not respond. Morris also told Lee

"This [the permit and the City's enforcement process] is going to be so expensive for you that you are just going to give up and demolish." Plaintiff Lee was so upset that nearly broke down crying in front of them.

102. On December 13, 2019, Plaintiffs' consultant Arun Shah went to see Wayne Morris separately, without Plaintiff Lee present, to get some questions answered. While Shah was working with Morris, Morris made it very clear that Gary West and Bronwen Lacey believed "things (buildings) need to come out" and that the directive from management (Gary West) was to demolish "everything" at the Real Property.

103. On December 18, 2019, Plaintiff Lee wrote a letter to Wayne Morris of the City indicating that Morris' comments to her that she was fabricating her religious beliefs were not only untrue, incredibly offensive, but easily disproved, and once again, she complained about the false evidence offered in support of the two warrants. The City never responded.

104. However, on or about January 14, 2020, Plaintiff Lee, and Chau Lawson received "Official Tax Offset Notices" for the citations, each threatening to report Plaintiff and Lawson to the Franchise Tax Board for "delinquent debts" due to the City's Code Enforcement department, and outlining daily violations accruing at the rate of hundreds of dollars per day since September 24, 2019. Receipt of these notices was extremely stressful for Plaintiff Lee and for Lawson.

105. On January 15, 2020, Wayne Morris, Leonard Powell and James Willis conducted yet another inspection of the Real Property, which Plaintiffs consented to. Trying to address the City's contentions that she was lying about her religious beliefs for permit purposes, Plaintiff showed the City staff the sacred objects at the

site: the Buddhas, the Arahats (7'-tall white marble religious statues), a bell and a religious stone monument containing mantras in Sanskrit, and various religious artefacts she had collected and was using in honor of the Buddha. Plaintiff Lee showed Morris the date of the bell, which was 2013, and the date of the monument, which was 2012.

106. On January 17, 2020, for at least the third time, Lee sent James Willis of the Planning Department the information about unpermitted structures at 6900 Mill Creek Road (Ron Sabraw's property), and information regarding 3500 Mill Creek Road, a nearby property which had been granted a permit in 2016 for a two-car garage next to the creek, in an effort to demonstrate the inconsistency in the direction to Plaintiffs that per Measure T, they could not build or improve any structures at the Lee Residence. Lee asked for clarification on the City's interpretation of Measure T as applied to all the properties on Mill Creek Road. The City never responded to Plaintiff's request for clarification about Measure T or otherwise to her complaints.

107. On February 3, 2020, Plaintiffs wrote the City to question the duplicate September 2019 citations issued for the Real Property, and again informed the City that the information on the citations was inaccurate in part because one of the citations was issued to Plaintiff Lee's bookkeeper, Chau Lawson, who is not an owner. The City did not respond.

108. On February 10, 2020, Plaintiffs submitted a response (the "Cycle 2 Submission") to the City's Cycle 1 Comments.

109. On February 13, 2020, Plaintiff Lee wrote again to the City, once again questioning the duplicate

citations, the improper issuance to Chau Lawson, and questioning why the City did not agree to hold citations in abeyance while permit applications were pending, as it has done for neighboring properties at Mill Creek Road. The City never responded, but it removed the two September 25, 2019 citations from its public online records of the Real Property without explanation or notice to Plaintiff.

110. Finally, in March 2020, Defendant City withdrew, without explanation, the double citations issued on September 25, 2019.

111. On March 11, 2020, the City informed Plaintiffs that several reviewers were out sick and it would be a while before the City would get back to Plaintiffs.

112. On or about mid-March 2020, the Governor declared a state of emergency related to the COVID-19 pandemic, which has yet to be lifted.

113. In April 2020, Plaintiff Lee witnessed her neighbor Ron Sabraw monitoring the Real Property with binoculars.

114. On April 1, 2020, the City returned comments (the Cycle 2 Comments") to the Cycle 2 Submission, but informed Plaintiffs that its staff were still working from home because of the pandemic. The comments were mostly uninformed or arbitrary and capricious, such as the assertion that a "statement of operations" for the greenhouse was needed "to explain how it would operate within the requirements of FMC 18.55.110" because per that statute "agriculture is not a permitted use in lands designated Hill – Beyond the Ridgeline in the General Plan." However, not only has the parcel has been subject to a Williamson Act contract since 1978 (Plaintiffs' predecessor-in-interest, M.O. Sabraw, ranched Arabian horses at the Real Property for

decades), but other neighbors have Williamson Act contracts in the area – Ron Sabraw operates his olive orchard next door at 6900 Mill Creek Road under his own Williamson Act contract, and a winery operates at 8116 Mill Creek Road.

115. On October 2, 2020, the City wrote again and asked Plaintiffs to re-submit the permit application package. Plaintiffs were unsure exactly what to submit given the City's consistent misunderstanding of the use for the Real Property, but on November 4, 2020, they decided to just resubmit the package with clarifications and additional documents (the "Cycle 3 Submission"), proposing mitigation of the allegedly problematic conditions on the Real Property.

116. On November 6, 2020, James Willis of Defendant's Planning Department advised Plaintiff Lee the application was still "incomplete" and rejected it. Plaintiffs contend the denial was improper because the requests were not applicable to the use of the Lee Residence – Defendant instead was applying a standard set of checklists applicable to proposed new commercial development. Plaintiffs responded that they needed clarification as had been repeatedly requested both verbally and in writing, so that the proper plans could be drawn up. No response was made.

117. On December 3, 2020, Code Enforcement Officer Tanu Jagtap communicated with Plaintiffs, in writing that: "The City requested on multiple occasions a progress update and timeline from the representing parties, including but not limited to the progress of removal and reconstruction of unlawful structures" but that no response was forthcoming from Plaintiffs.

118. In response, in an email dated December 17, 2020, Plaintiff Lee again asked for a response from the

City regarding the proposed mitigation measures. In the same communication, Lee reminded Jagtap that Jagtap herself had disputed that fact that the Plaintiffs used the property for religious purposes, notwithstanding the obvious presence of Buddhist oriented statues and the religious shrines. Plaintiff Lee also pointed out that Jagtap had provided false information in the application for the second inspection warrant by intentionally omitting the fact that Plaintiffs had consented to the inspection.

119. On December 17, 2020, Plaintiff Lee sent the City an email once again requesting a response to the Plaintiffs' proposed mitigation measures. Lee also asked why the City's employee Tanu Jagtap had falsified information in her declaration submitted for the warrant application for May 24, 2018. The City did not respond to either request.

120. Instead, in keeping with its usual custom and practice of enhancing penalties every time Plaintiff complained about religious discrimination and questioned the enforcement Plaintiffs were receiving, on March 11, 2021, the City issued a revised Notice and Order to Abate Nuisance ("NOA 3"), demanding demolition of multiple structures on Plaintiffs' property. NOA 3 was largely, but not entirely, duplicative of NOA 2 and NOA 2A. It was 58 pages of cut-identical, repetitive, and and-pasted materials and photographs, a tactic which served to enhance the size of the document, so that it would appear as if Plaintiffs had committed additional violations (when in fact, nothing whatsoever had changed). The vast majority of the document alleged "potential" violations and based liability on things that the author assumed without citation to proof were "likely" to have occurred. The document represents the culmination of Defendant's

years-long "witch hunt": an effort to destroy the Plaintiffs financially, physically, and emotionally.

121. Plaintiff Lee was shocked because not only had Plaintiffs not requested demolition of any structures, but because they had started, paid for, and been actively engaged in the process to fully permit the structures. In addition, since 2018, they had reported the additional structures to the County Assessor's Office, and ***actually paid taxes on the structures***, at least part of which was distributed to Defendant City.

122. Violation 1 of NOA 3 pertains to the God House/gazebo, a wooden accessory structure of 120 sf. NOA 3 relies in part on FMC Code Section 18.55.050. NOA 3 does not state how that structure violates that particular ordinance. The God House appears to be an accessory structure as that term is defined by FMC 18.25.3000 and which may be allowed as a "Conditional Use" under the table associated with Fremont Municipal Code Section 18.55.050(a). Contrary to the statement in NOA 3, Plaintiffs have sought to obtain a Conditional Use permit for such structure which, itself, does not pose a hazard to the watercourse, and even though the structure itself does not require a permit based on the size. Moreover, a deck in similar proximity to a watercourse on the property owned by Caucasian neighbor Ron Sabraw has been and remains in use without any rebuke from Defendant City. Upon information and belief, that deck is not permitted. To Plaintiffs' knowledge, the deck on Sabraw's property has no apparent religious purpose.

123. Violation 2 of NOA 3 pertains to the minor landscaping improvements of a suspension footbridge and surrounding "structures" (the unadorned, approximately 3' high posts that secure the suspension on

either side through the laws of physics) which are utilized by Plaintiffs pursuant to "walking meditation" practice as part of their religion. NOA 2 here relies in part on FMC Code Section 18.55.050. NOA 3 does not state how these bridges and walkways violate that particular ordinance. Moreover, a deck in similar proximity to a watercourse on the property owned by Caucasian neighbor Ron Sabraw has been and remains in use without any rebuke from Defendant City. Upon information and belief, that deck is not permitted.

124. Violation 4 of NOA 3 pertains to the "Meditation Hall" which received permit approval for use as a non-habitable accessory structure. The Plaintiffs use this building for religious purposes (i.e., meditation). NOA 3 claims the building has been modified so that it is a "potential habitable space" not that it is being inhabited. NOA 3 refers to Plaintiff Temple of 1001 Buddhas being registered at 6800 Mill Creek Road (so that its officers can receive their mail) but nothing in the registration connects the corporate Defendant with this particular building. The NOA 2 cites a decorative sign "Temple of 1001 Buddhas" outside the building but does not show a photograph and does not present photographs showing the Corporate Defendant actually utilizing office space in the "Mediation Hall."

125. Violation 5 of NOA 3 concerns a former garage, called the "Main Buddha Hall" by the Plaintiffs. This building is utilized by Plaintiffs as a place for private worship. NOA 3 cites interior finishes and amenities (i.e., data ports) as this structure is being utilized for business or habitation purposes. NOA 3 states that two businesses are registered as doing business at 6800 Mill Creek Road but does not state any facts connecting them to this specific building. In fact, the

City is or should be aware that Plaintiff conducts her business at her offices in the urban area of the City as she has disclosed these addresses in connection with her separate business license. Disturbingly, the NOA 3 contains four photographs of Buddha statues associated with the building that are indicative of religious usage, yet does not identify any supposed violation associated with these statutes.

126. Violation 9 of NOA 3 concerns a dwelling, known as "Retreat House" utilized for religious purposes to house Plaintiff's individual guests (not groups) attending retreats with Plaintiff Lee or present on the property to worship.

127. Plaintiffs were stunned by the allegations in NOA 3, which demanded the demolition of structures which were used for private religious purposes. On March 12, 2021, Lee timely appealed NOA 3 by filing (with the City Clerk) a request for a hearing with the Fremont City Council. She also wrote the City to confirm that she never requested NOA 3, as was represented in the City's March 11, 2021 email to her.

128. On March 24, 2021, Plaintiff Lee spoke to City Council Member Raj Salwan, who told her to "Give them some money and this should go away." It will be recalled that it was Salwan who advised Ms. Lee to "disarm your lawyers." On April 2, 2021, Plaintiff was called and met with the FBI on the issue of being asked to give money to city employees. Evidently that was and is an ongoing investigation.

129. Also on March 24, 2021, Plaintiffs were told they would get a hearing officer. The City contracted with Ann Danforth, an attorney working in private practice, to perform the role (a quasi-judicial function), and set the hearing for 15 days later based on Fremont

Municipal Code § 8.60.130. Ms. Danforth is Of Counsel to Renne Public Law Group, which represents the City of Fremont (*see* https://rennepubliclawgroup.com/clients/, last accessed March 25, 2022). The hearing was set for April 5 and 6, 2021. Plaintiff disputed the procedure and Code section being utilized and requested the normal procedure for appeals, with the hearing at the City Council meeting. The City refused.

130. On March 26, 2021, Plaintiff Lee wrote another email to City Clerk and cc'd the Fremont Mayor, City councilmembers, certain City Attorneys, and the City Manager and requested a hearing before the Fremont City Council as suggested by Councilman, Raj Salwan. However, the City Clerk responded that a hearing could only be scheduled with Administrative Hearing Officer (even though Plaintiff Lee was told by City Council member Raj Salwan that she could schedule the hearing with the City Council). In this email Plaintiff Lee stated that "I believe this is another trap by Code Enforcement Dept. They have been setting traps for the past few years to harm me every step of the way. They never intend to work with me to resolve the concerns. Therefore, I requested a hearing to be heard by Mayor and City Council Members. Per Councilman, Raj Salwan, the appeal procedures can also be appealed to City Council members. City of Fremont also has a policy that any citizen may appeal at City of Fremont if he/she has concerns regarding harassment, racism, discrimination and etc . . . City deliberate indifference to not allow Plaintiff Lee this opportunity is another violation of policy by top policymakers and doesn't matter how many times Plaintiff Lee has requested for meetings/appeals."

131. On March 26, 2021, Raj Salwan told Plaintiff Lee that he had asked Mayor Lily Mei and other City

Councilmembers to talk about Plaintiff Lee's concerns of racism on several occasions. On each occasion, Lily Mei declined and said she was busy or else declined to pick up the phone. Plaintiff Lee spoke to Councilmember Keng, who told Plaintiff Lee that the Mayor, other councilmembers, and the City Manager and staff are all aware of racism and discrimination against Asians within the City, but no one is taking any steps to do anything about it but let citizens complain, get tired of it, then move on.

132. On March 26, 2021, Plaintiff Lee wrote three emails to City Manager, Mark Danaj personally asking for assistance. Plaintiff Lee wrote "I am not sure your staff informs you the magnitude and severity of the situation." She offered to provide additional information, but he never responded.

133. On March 31, 2021, Plaintiff wrote an email to the Mayor, City councilmembers, and the City Manager yet again requesting a hearing. Plaintiff stated that she had received over 6,000 signatures on a change.org petition in favor of permitting her to use her property for private religious purposes. Plaintiff Lee again complained of discriminatory treatment. The Mayor and City Council again did not respond to Plaintiff Lee except for Raj Salwan and Teresa Keng who recommended Plaintiff Lee hire an attorney.

134. On March 31, 2021, Plaintiff Lee texted Yang Shao, Council Member/Vice Mayor to set up an appointment regarding her complaints made to Mayor Lily Mei and other City Councilmembers, but did not hear back. Raj Salwan said he tried to call and texted Mayor Lily Mei but she again didn't answer his calls.

135. On March 31, 2021, Susan Gauthier, City Clerk, informed Plaintiffs that Fremont Municipal

Code 8.60.130(e), (f) will apply if the property owner fails to abate a nuisance and does not appeal a notice of violation or abatement. However, NOV 1, which Plaintiff appealed but which the City refused to set for hearing, was what ordered Plaintiffs to demolish the structures. This inconsistency confused Plaintiffs and it has yet to be resolved.

136. Also on March 31, 2021, Plaintiffs once again requested a hearing in front of the City Council. On April 1, 2021, staff from the Fremont City Attorney's office, and Hearing Officer Danforth told Plaintiffs they wanted to proceed with scheduling a hearing. Plaintiff Lee insisted on having a hearing with the City Council and the Mayor, as she had been told by City Councilman Raj Salwan was typical in addition to any hearings with a hearing officer, given that the interpretation and application of a statute (Measure T) was at issue. The City refused to schedule a hearing with the City Council.

137. Plaintiff Lee held a press conference on May 11, 2021, denouncing the systemic religious and race discrimination she was facing from Defendant City. The next day, May 12, 2021, 18 months after the inspection of unpermitted work a City letter to Ron Sabraw. Defendant City of Fremont sent Ron Sabraw, a letter stating he could apply for permits "to legalize 10 years old unpermitted construction" on-line. However, according to what Plaintiff Lee has been told, any structure within 200 feet of the creek, is "unsafe" and "hazardous." The letter to Sabraw, goes on to state "that due to COVID pandemic the City of Fremont had closed its facilities to the public and has granted extensions to owners required to obtain permits." Plaintiffs, by contrast, were constantly pushed and

threatened with the imposition of fines, COVID notwithstanding.

138. At no time since June 26, 2018, have the Plaintiffs been able to use the three red tagged buildings for their intended purposes, which is as places of worship and places for meditation.

139. Hearings for NOV 3 were held remotely over five days June 30, 2021, July 1, 2021, July 20, 2021, August 4, 2021, and August 16, 2021. The City personnel testified that as to the enforcement activities. Plaintiff's witnesses included three separate seismic, structural, and civil engineers, among others. The Hearing Officer's resulting August 26, 2021 Decision provided for certain deadlines for Plaintiffs to (1) submit applications for permits (which types of permits was not specified, but given that the conditional use process must take place before anything else, Plaintiffs are reasonably interpreting "permits" to mean "conditional use permits"); (2) "remove" all of the work that was done if the City does not issue permits; and (3) demolish multiple structures, including but not limited to the God House/120 sf Gazebo with pond, the footpath and pedestrian bridge used to provide access to and egress from the Lee Residence, the Greenhouse, the repairs to the driveway to enhance fire safety, and the ADU (Retreat House). Plaintiffs do not agree with the removal of any of the work and do not agree that demolition of any of the structures is appropriate or warranted. In November 2021, Plaintiff timely appealed the decision to the Alameda County Superior Court with a Petition for Writ of Mandate.

140. Meanwhile, in September 2021, and in an effort to try to comply with as much of the Hearing Officer's decision as possible and to keep trying to resolve the issues with the City, Plaintiffs requested a

meeting with the City and Plaintiffs' consultant to further clarify the City's interpretation of the Hearing Officers' decision and what it was looking for with the upcoming permit application. The City refused to meet with Plaintiffs.

141. On October 26, 2021, Plaintiffs submitted a Conditional Use Permit Application seeking to permit all of the structures at the Lee Residence on an as-built base and otherwise issue permits for any non-conforming issues. The City returned correspondence on November 9, 2021 once again refusing to acknowledge the residential use of the property or any of Lee's other requests for clarification on the standards the City is applying for review, and once again, rejecting the submission as "incomplete." The City also threatened unspecified "abatement."

142. Based on the City's erroneous decision to red-tag Plaintiffs' Real Property, Plaintiffs have lost use of their intended buildings since June 26, 2018. Based on the targeted and vicious campaign of enforcement directed to Plaintiffs, Plaintiffs' rights have been violated.

143. Through public records requests made to the City, which have only partially been complied with, Plaintiffs have learned that the City directed its City of Fremont police force to conduct an invasive (and completely baseless) investigation of Plaintiff Lee and her husband Tu Nguyen for "fraud." The basis for this fraud investigation appears to be direction from Code Enforcement, as well as that, like thousands of other Californians, Plaintiff Le and Nguyen used their residence address as their mailing and service address for some of their registered California entities. Only Plaintiff Lee and her husband were investigated for "fraud," and had their personal finances reviewed by

the City of Fremont Police Department, while other Mill Creek Road property owners with nonconforming and unpermitted uses were not.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
Discrimination on the Basis of Religion
In Violation of 42 U.S.C. § 1983
(By Both Plaintiffs)

144. Plaintiffs incorporate by reference all of the allegations contained in Paragraphs 1 through 143 with the same force and effect as if fully pleaded at length herein.

145. Plaintiffs have a constitutional right under the Fourteenth Amendment to the United States Constitution to equal protection of the laws.

146. Plaintiffs have a constitutional right under the Fourteenth Amendment to the United States Constitution to substantive due process.

147. Plaintiffs have a Constitutional Right to freely exercise the religion of their choice pursuant to the First Amendment of the United States Constitution.

148. Defendant City acted under color of State Law when it deprived Plaintiffs of their rights, privileges or immunities secured by the Constitution, and are therefore liable pursuant to 42 U.S.C. § 1983.

149. Defendant's Building Officials, including Chris Gale and Gary West, are "invested with the responsibility for overseeing local code enforcement activities, including administration of the building department, interpretation of code requirements, and direction of the code adoption process." Cal. Health & Safety Code § 18949.27.

150. Defendant City is liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because Defendant has a longstanding custom and practice against allowing religious practice on private properties zoned "Open Space" and "Hill (beyond Ridgeline)." This bias is evidenced in at least the following ways:

a. Building Official Gale commented to Plaintiff Lee regarding the presence of religious statues at the Real Property: "I wish the City did not know about them [referring to the Arahats, the religious statues].";

b. The false statement by the City (made by its Deputy City Attorney Bronwen Lacey) representing Gary West's Building Department's official position that NOA 2 would remain in effect because under the Williamson Act contract, a "House of Worship is not allowed [on the real property]";

c. The City's second warrant application contained a declaration from its Building Department Code Enforcement Officer Tanu Jagtap which accused Plaintiff of fabricating her religious beliefs;

d. The City condemned the structures used for religious purposes, and ordered Plaintiff to remove specific religious objects from the buildings;

e. Gary West told Plaintiff she could only physically pray in two specific sites at the property;

f. Morris and Powell accused Plaintiff of fabricating her religious beliefs for permit purposes, and mocked, ridiculed, and harassed her when she met with them;

g. Morris and Powell told Plaintiff ""Do you think Buddha is OK with the construction you did?", "You will demolish that temple", "You are using the Buddha as a protective shield." They made these comments while they were threatening her with a "miserable" and "expensive" enforcement process and demolition and destruction of her property, including her religious structures.

151. Defendant City is liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because the City, acting through its policymakers (including but not limited to Gary West, himself committed, ratified in approving, and/or acted with deliberate indifference to his subordinates' actions described herein, including in Paragraph 151.

152. Defendant City is liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because the City, acting through its policymakers (including but not limited to Gary West) has a longstanding practice and custom of failing to ensure and thus acting with deliberate indifference as to whether code enforcement actions are performed in a lawful and nondiscriminatory manner. Defendant City is also liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because its policymakers, including City Building Official Gary West, himself committed, ratified in approving, and/or acted with deliberate indifference to his subordinates' actions, the following acts in furtherance of the religious bias that they had demonstrated against Plaintiffs:

a. The City did not cite or condemn Ron Sabraw's unpermitted structures visible from Mill Creek Road, despite numerous complaints from the community.

b. The City did not cite or condemn Ron Sabraw's unpermitted elevated concrete and steel deck that is within 200 feet of the riparian corridor, despite numerous complaints from the community.

c. The City did not cite or condemn Ron Sabraw's property for alleged water contamination resulting from excessive use of RoundUp pesticide, despite the known carcinogenic properties of that pesticide and safety concerns reported from people drinking from wells in the area, and despite numerous complaints from the community.

d. The City did not cite or condemn Talley Polland's property after she constructed a large unpermitted concrete driveway on her property over and around (within 200 feet of) the riparian corridor, despite numerous complaints from the community.

e. The City reported Plaintiffs to outside agencies, but not Talley Polland, Ron Sabraw, or any other Hillside Area resident for any reported violations.

f. City investigators entered, inspected, and photographed Plaintiff's private property without permission and without a warrant on October 27, 2017.

g. The City obtained the first warrant based on the false allegation that Plaintiff had not consented to inspection of her property, when she had in fact done so.

h. The City permitted its code enforcement personnel to represent that they were acting as attorneys for the City, when they were not.

i. The City did not respond to numerous requests from Plaintiffs, who were the subject of enforcement action, to meet to address the violations.

j. Despite Plaintiffs' multiple requests, the City did not reassign enforcement personnel (Leonard Powell) who was the subject of Plaintiffs' sexual harassment and discrimination complaints, and instead, forced Plaintiff as the complaining party to continually meet with this individual and even though he continued to have apparent free rein to increase the amount of penalties she was being subjected to, following her complaints.

k. The City did not have any evidence or good faith basis to allege that Plaintiffs' Real Property contained substandard, dangerous buildings that were unsafe for human occupancy and therefore should be condemned.

l. The City did not have any evidence or good faith basis to allege that Plaintiffs were committing "fraud" and thus to investigate their financial affairs, given that the only basis for this investigation was that Plaintiffs used their mailing address for service of process for their nonprofit and their businesses.

m. The City falsely alleged evidence to support the specific violations in NOA 2, NOA 2A, NOA 3, and the NOV.

n. The City refused to schedule the appeal for NOA 2A and the NOV.

o. The City provided a false declaration in support of the second warrant application that once again alleged that Plaintiff would not consent to inspection.

p. The City provided a false declaration in support of the second warrant application that falsely accused Plaintiff of lying about her religious belief and her travel plans.

q. Despite demand, the City refused to provide copies of the warrant and its application to Plaintiffs and their attorneys.

r. The City conducted multiple, unnecessary inspections of the property in a continual effort to try to find additional violations, even as Plaintiffs were paying to remediate the existing violations they had already been cited with.

s. The City condemned the three specific religious structures on Plaintiff's property.

t. The City red-tagged Plaintiffs' entire property.

u. The City ordered Plaintiff to pray only in one place on her property and to remove religious materials from Plaintiffs' religious buildings.

v. The City directed personnel outside the Building Department not to assist Plaintiff with resolving her issues, such as by refusing to permit Dan Schoenholtz to exist, by refusing to permit its City Council and Mayor to schedule hearings on Plaintiffs' appeals.

w. The City applied incorrect standards meant for commercial property when Plaintiffs submitted their conditional use permit applications, and otherwise refused to engage in appropriate dialogue to permit Plaintiffs' structures on an as-built basis.

x. The City recorded a "Notice of Substandard Building/Structure" indicating that Plaintiffs' religious structures were "unsafe, dangerous,

and a public nuisance" and which contained numerous misstatements of fact.

y. Gary West, who signed and approved the Notice of Substandard Building/Structure, claimed that he knows nothing about the property.

z. The City refused to accept the conditional use permit applications submitted by Plaintiffs as they attempted to mitigate and address the violations they had been cited with.

aa. The City issued two citations to Plaintiff and her individual bookkeeper, which it then reported to taxing authorities when the citations remained unpaid, and which it did not remove from their records despite Plaintiffs' numerous complaints on the issue.

bb. The City Building Department staff did not respond to numerous requests of Plaintiffs' consultants to meet about Plaintiffs' property.

cc. The City permitted Ron Sabraw to apply online to remedy the lack of permits on his property even though some of the violations are supposedly incurable (i.e., structures within 200 feet of the riparian corridor).

dd. City staff told Plaintiff that the Building Department was targeting Plaintiff and forcing her to engage in a "miserable, expensive process" that would end in demolition of her religious structures.

ee. City staff mocked Plaintiffs' religious beliefs and repeatedly accused her of lying about her Buddhist faith.

ff. The City continued to assess violations against Plaintiffs even as it refused to accept Plaintiffs'

submissions to addressing existing violations, placing Plaintiffs in an unending rondelay of punitive measures with no end in sight.

gg. The City issued NOA 3 demanding demolition of private religious structures on the basis of provably false, and otherwise unsubstantiated, allegations regarding the property conditions, and which was a deceptively large document consisting mostly of repetitive statements (designed to increase the volume of pages to make the violations seem more severe than they were).

hh. The City denied Plaintiffs the right to have a hearing before the City Council despite repeated demands to do so.

ii. The City ignored the fact that there were existing, unpermitted structures at the property for years, including in the same footprints that Plaintiffs' improvements were made, before Plaintiffs took ownership of the property.

153. The Defendant knew of the discrimination against Plaintiff because Plaintiff repeatedly complained to the City about the City's wrongful acts and discrimination against Plaintiffs and yet nothing was done.

154. The Defendant, by Building Official Gary West, abridged the rights of Plaintiffs to the free exercise of their religion as herein described and through the issuance of the NOV issued on June 14, 2018. As a result of said order, Plaintiffs have been denied usage of three buildings which they had intended to use for religious purposes.

155. As a result of the improperly conducted code enforcement and other actions of Defendant City,

Plaintiffs have and will incur monetary losses as a result of the code enforcement activities of Defendant City.

156. As a result of the improperly conducted code enforcement and other actions of Defendant City of Fremont, Plaintiff Lee herein has suffered and will continue to suffer severe emotional distress because: the actions of Defendant City precluded her from the free exercise of her religion; invaded her privacy; subjected her to unwanted publicity; and precluded Plaintiff Lee from the use of her property for religious purposes. Defendant City acted unreasonably because it knew and/or should have known that its code enforcement and other activities would cause emotional pain and suffering to Plaintiff Lee.

SECOND CLAIM FOR RELIEF
Religious/Race Discrimination – Retaliation
In Violation of 42 U.S.C. § 1983
(By Both Plaintiffs)

157. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 156 with the same force and effect as if fully pleaded at length herein.

158. Plaintiff Lee has a constitutional right under the Fourteenth Amendment to the United States Constitution to equal protection of the laws regardless of her race, national origin or religion.

159. Plaintiff Lee has the Constitutional Right to petition the government for the redress of grievances and for freedom of speech under the First Amendment to the United States Constitution.

160. As alleged hereinabove, Plaintiff Lee engaged in activity protected by the First Amendment to the

United States Constitution in at least the following ways:

a. Plaintiffs complained about retired Judge Ron Sabraw's property and what she (and other community members) perceived to be discriminatory enforcement of alleged code violations.

b. Plaintiffs complained to Gary West's Building Department and Defendants' City Attorney about the October 27, 2017 warrantless inspection conducted by Leonard Powell.

c. Plaintiffs complained to Gary West's Building Department and Defendants' City Attorney that Leonard Powell had exhibited harassing and discriminatory behavior towards Plaintiff Lee, and requested that he not physically be present on her property;

d. Plaintiffs complained to Gary West's Building Department and Defendant's City Attorney that the citations and violations assessed against Plaintiffs were baseless and discriminatory.

e. Plaintiffs appealed the violations assessed against Plaintiffs.

f. Plaintiffs reported to the federal Department of Justice that she was perceived she was being asked to pay bribes in order to end Defendant's campaign of punitive measures against Plaintiffs.

g. Plaintiffs complained to Gary West's Building Department and Defendant's City Attorney's that the warrant applications contained false information.

h. Plaintiffs complained about discrimination to the Defendant's City Council and Defendant's

Mayor, and asked for a hearing in front of the City Council.

i. Plaintiffs gathered signatures from members of the community who opposed discriminatory enforcement against Plaintiff.

161. Defendant repeatedly and directly retaliated against Plaintiffs for their opposition to said Defendant's discriminatory actions. This includes, but is not limited to:

a. The issuance by Building Official Gary West of NOA 2, the Notice and Order - Abate Nuisance on March 29, 2018;

b. The issuance by Building Official Gary West of the NOV on June 14, 2018, to vacate three buildings on the real property and which resulted in the red-tagging of buildings and the property itself;

c. The issuance by Building Official Gary West of the amended NOA 2 A on June 14, 2018;

d. The issuance and recording, by Building Official Gary West, of a Notice of Substandard Building/ Structure (bearing the signature of Building Official Gary West) with the County Recorder's Office of the County of Alameda on May 3, 2019;

e. The issuance of the meritless September 25, 2019 citations to Plaintiff Lee and her bookkeeper, Chau Lawson, and the subsequent threat to report them to the Franchise Tax Board when the citations went unpaid after Plaintiffs and Lawson contested the issuance; and

f. The issuance by Building Official Gary West of NOA 3 on March 11, 2021, Defendant City, by

Building Official West, issued an Amended Notice and Order to Abate Nuisance.

162. Defendant City is liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because its policymakers, including City Building Official Gary West, committed retaliation, ratified in approving his subordinates' retaliatory actions, and/or acted with deliberate indifference to his subordinates' retaliatory actions, all of which constituted retaliation against Plaintiffs. The pattern and practice of retaliation against Plaintiffs is clear, as each time Plaintiffs complained of discrimination, harassment, and retaliation, and even when Plaintiffs merely asked for further information, Defendant, through the intentional acts, ratified acts, and deliberate indifference of its policymaker Gary West, increased the punitive and retaliatory measures taken against Plaintiffs. For example:

a. On 10/27/17 and 12/28/17, Plaintiff complained about the 10/27/17 unauthorized inspection of her property to Leonard Powell and Gary West, and on or about 1/12/18, Gary West authorized Powell to demand another inspection, stating that they had already found that Plaintiff was violating multiple laws.

b. On 1/30/18, Plaintiff complained, discrimination, the unauthorized inspection, and what Plaintiff believed to be Powell's false representation that he was an attorney, to Gary West. On 2/7/18, Gary West authorized the decision to obtain a warrant for Plaintiff's property on the false basis that she was not consenting to the inspection, and on 2/9/18, conduced the inspection.

c. On 3/28/18, Plaintiff asked that Powell not be involved with the enforcement actions given his harassment. On 3/29/18, the City served Plaintiff with NOA 2.

d. On 5/21/18 Plaintiff met with Gary West, Bronwen Lacey, and other City officials and set an inspection for 5/25/18, the first day she was available on short notice, and asked that Leonard Powell not come to her property again given that Plaintiff felt he had sexually harassed her. On 5/22/18, the City cancelled the meeting and submitted a false declaration to the Alameda County Superior Court to obtain a second inspection warrant, and on 5/24/18, it inspected the property.

e. On 6/13/18, Plaintiffs' attorney complained to the Mayor and City Council about discrimination and other constitutional violations. On 6/14/18, Gary West issued and signed the NOV condemning the buildings. On 6/19/18, the City issued NOA 2A.

f. Between 6/19/18 and 6/25/18, Plaintiff demanded that Gary West put his directive regarding her religious items in writing. On 6/26/18, the City demanded yet another inspection of the property.

g. In early July 2018, Plaintiff met with Dan Shoenholtz seeking assistance in resolving her dispute with the City. Not only did he refuse to assist, but on 8/1/18, Plaintiff received notice from the SF Bay Regional Water Control Board that the City had reported her to that agency.

h. On 8/19/19 Plaintiff sought information about the City's interpretation of some ordinances. On

9/25/19, the City issued $43,000 worth of citations to Plaintiff and her bookkeeper.

i. On 10/2/19 and 10/7/19 Plaintiffs requested to meet with the City. On 10/7/19, the City instead demanded Plaintiffs pay an additional $20,000 in application fees, which was unprecedented.

j. On 11/6/19 and again on 11/11/19, Plaintiffs complained about discrimination and selective enforcement and asked for stay of the citations. On 12/12/19, and on 12/18/19, Plaintiff complained to the City about the citations. On 1/14/20, Plaintiff and her bookkeeper received notices from the City threatening to report them to the Franchise Tax Board for the unpaid citations. On 1/15/20 the City conducted another inspection of the property.

k. On 2/13/20, Plaintiff complained about the citations again and the selective enforcement. On 4/1/20, the City rejected Plaintiff's conditional use permit application.

l. On 11/6/20 and 12/17/20 Plaintiffs asked for clarification of some issues and complained about discrimination from Jagtap and the false declaration she had submitted. On 3/11/21 the City (Gary West) issued NOA 3.

m. On 3/12/21 Plaintiffs appealed NOA 3, and on 3/26/21 and 3/31/21, they complained to the City and asked for a hearing with City Council, which on 4/1/21 the City refused to do.

163. The Defendant knew of the retaliation against Plaintiff because Plaintiff repeatedly complained to the City about the City's wrongful acts and retaliation against Plaintiffs and yet nothing was done.

164. As a result of said retaliatory actions, Plaintiffs have been denied the full use and enjoyment of the structures "red tagged" by Defendant City through Building Official West, thus limiting Plaintiffs' use of the Real Property.

165. As a result of the retaliatory actions of Defendant City, Plaintiffs have and will incur monetary losses.

166. As a result of the retaliatory actions of Defendant City of Fremont, Plaintiff Lee herein has suffered and will continue to suffer severe emotional distress because: the actions of Defendant City precluded her from the free exercise of her religion; invaded her privacy; subjected her to unwanted publicity; and precluded Plaintiff Lee from the use of her property. Defendant City acted unreasonably because it knew and/or should have known that its code enforcement activities would cause emotional pain and suffering to Plaintiff Lee.

THIRD CLAIM FOR RELIEF
Violation of the Due Process Clause (Substantive Due Process) and Equal Protection Clause of the Fourteenth Amendment –
42 U.S.C. § 1983
(By Both Plaintiffs)

167. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 166 with the same force and effect as if fully pleaded at length herein.

168. The 14th Amendment of the U.S. Constitution which applies to states, municipal governments and government actors, states in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

169. Plaintiffs have a 14th Amendment substantive due process right to life, liberty, and property and are entitled to due process and equal protection of the law. Plaintiffs are entitled to due process with respect to their rights in the criminal investigation performed by the City and the ongoing code enforcement action which was initiated with the intention of depriving Plaintiffs of their liberty, livelihood, and property. Plaintiffs are also entitled to due process rights in their business interests and ownership interests in its property in the City of Fremont. As discussed above, and herein, each of Plaintiffs' 14th Amendment rights was violated.

170. Defendant violated Plaintiffs' rights y making false allegations against Plaintiffs and investigating Plaintiffs under the color of law with a malicious, bad faith and reckless investigation surrounding false allegations of fraud (on information and belief, undertaken at the direction of Gary West). Defendant also violated Plaintiffs' rights by making false allegations against Plaintiffs and investigating and prosecuting Plaintiffs under the color of law with a malicious, bad faith, and reckless investigation for alleged Building Code violations surrounding provably false conditions at Plaintiff's property.

171. Defendant intentionally, in bad faith, and recklessly used false allegations, that they knew were false, to obtain search warrants, false declarations from City officials for exaggerated Building Code and other violations, and used the code enforcement action to levy unconstitutional fines, fees, issue abatement and demolition orders in violation of their own rules

for demolition, all with the express aim of forcing Plaintiffs to demolish their property or perhaps, just give up and sell it under the pressure of Defendant's acts.

172. On information and belief, the Defendant improperly applied for sealed civil search warrants without cause knowing that such warrants were based on false allegations and did so with the express aim of misleading the court and the public concerning the state of Plaintiffs' property.

173. The City's code enforcement investigative policies and practices are malicious, reckless, and/or grossly negligent in that they permitted City officials and their agents to execute and obtain overly broad and constitutionally deficient civil search warrants that violated the constitutional rights of Plaintiffs. The City's policies and practices for code enforcement also condoned reckless investigations into allowing City officials to exaggerate and levy dozens of false and trumped-up multiple building and other code violations against Plaintiffs. The City condoned, approved, ratified and maintained procedures and practices of using code enforcement actions in a retaliatory manner against individuals and companies, and in doing so blatantly violating the constitutional rights of Plaintiffs.

174. Defendant City is liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because the City, acting through its policymakers (including but not limited to Gary West, himself committed, ratified in approving, and/or acted with deliberate indifference to his subordinates' actions described herein.

175. Defendant City is liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because the City, acting through its policy-

makers (including but not limited to Gary West) has a longstanding practice and custom of failing to ensure and thus acting with deliberate indifference as to whether code enforcement actions are performed in a lawful and nondiscriminatory manner. Defendant City is also liable pursuant to *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) because its policymakers, including City Building Official Gary West, himself committed, ratified in approving, and/or acted with deliberate indifference to his subordinates' actions, the acts set forth in detail herein.

176. Plaintiffs are informed and believe and thereon allege, that in doing the acts alleged above, Defendant knew, or in the exercise of reasonable diligence should have known, that Defendant's employees, including but not limited to Gary West, Tanu Jagtap, Leonard Powell, Wayne Morris, and Bronwen Lacey were incompetent and unfit to perform the duties for which they were employed and that an undue risk to persons such as Plaintiffs would exist because of the employment.

177. Defendant City, by and through those employees and agents who trained and/or supervised these employees, failed to exercise reasonable care when training and supervising them.

178. Plaintiffs are informed and believe and thereupon allege that Defendant had advance knowledge of Defendants' employees, including but not limited to Leonard Powell's and Tanu Jagtap's, propensity for false reporting, suppression of evidence, fabrication of allegations, and failed to adequately investigate, as they have a history of such acts, and the Defendant knew, or should have known, of such history, which made those employees unsuitable for employment with Defendant. Despite this advance knowledge, Defendant City retained Leonard Powell and Tanu

Jagtap as employees in conscious disregard of the rights and safety of others, and of Plaintiffs.

179. As a direct and proximate result of the Defendant's actions, Plaintiffs sustained significant damages.

180. As a result of the misconduct alleged herein, Defendant is liable to Plaintiffs in an amount to be determined at trial.

181. As a result of the actions of Defendant, Plaintiff Lee herein has suffered and will continue to suffer severe emotional distress. Defendant City acted unreasonably because it knew and/or should have known its actions, including but not limited to its two searches based on warrants obtained with false information, would cause severe emotional distress to Plaintiff.

FOURTH CLAIM FOR RELIEF
Declaratory Relief
Violation of RLUIPA – Substantial Burden
(By Both Plaintiffs)

182. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 181 with the same force and effect as if fully pleaded at length herein.

183. Defendant City's Municipal Ordinance Section 18.55.110 inasmuch as it purports to regulate and prescribe land uses within an open space zoning district is an imposition of a land use regulation for purposes of RLUIPA. *See* 42 U.S.C. § 2000cc(a)(1).

184. Defendant City's Municipal Ordinance Section 18.55.110 Subsection (a) and the associated use table of Section 18.55.110 on its face violates RLUIPA because it imposes a substantial burden on the reli-

gious exercise of Plaintiff Lee and Plaintiff Temple insofar as the table prohibits quasi-public uses on property generally zoned that are specifically zoned "Hill (beyond Ridgeline)."

185. Defendant City's Municipal Ordinance Section 18.55.110 Subsection (a) and the associated use table of Section 18.55.110 on its face further violates RLUIPA because no provision is made therein for quasi-public use in areas zoned "Hill (beyond Ridgeline)." This is evidenced by the fact that Defendant City has invoked Municipal Ordinance Section 18.55.110 in support of its code enforcement orders prohibiting the usage of structures on Real Property for private (i.e., non-public) religious purposes.

186. Defendant City has no compelling governmental interest in excluding all quasi-public religious uses from areas it has zoned "Open Space/Hill (beyond Ridgeline)." Even if it has such a compelling interest, it has not used the least restrictive means of achieving whatever that compelling interest would be.

187. Defendant City's Municipal Ordinance Section 18.55.110 (a) and its associated table imposes a substantial burden on the exercise of religious rights as pursuant to an implementation of a land use regulation made by Defendant City.

188. Because of Defendant City's implementation of Municipal Ordinance Section 18.55.110, Plaintiffs herein have had their right of religious exercise abridged due to the action of government in that as a result of the ordinance any usage of the property for quasi-public purposes is strictly prohibited. Regardless of the outcome of the administrative proceedings described hereinabove, Plaintiffs are precluded from any quasi-public use of the property for religious purposes and,

assuming resolution of the administrative proceedings, any use of the property for religious purposes will be limited to private observances.

189. There exists a controversy between Plaintiffs and Defendant City as to whether the failure of Defendant City's Municipal Ordinance Section 18.55.110 to allow quasi-public religious use as permissible within an area zoned as "Open Space/Hill (beyond Ridgeline)" is in violation of the RLUIPA. Plaintiffs contend that such exclusion of the religious uses from Municipal Ordinance Section 18.55.110 is an abridgement of their religious freedom while Defendant City that the prohibition of quasi-public religious usage of the property as provided by "Open Space/Hill (beyond Ridgeline)" and not an abridgement of the Plaintiffs' rights to free expression.

190. Plaintiffs are entitled to an order pursuant to RLUIPA of this Court declaring that Municipal Ordinance Section 18.55.110, its subparts and tables unenforceable to the extent quasi religious uses are not allowed in areas zoned "Open Space/Hill (beyond Ridgeline).".

191. As a result of the actions of Defendant City of Fremont, Plaintiff Lee herein has suffered and will continue to suffer severe emotional distress because the actions of Defendant have abridged her free exercise of her religion. Defendant City acted unreasonably because it knew and/or should have known prohibiting quasi-public religious usage would cause emotional pain and suffering to Plaintiff Lee.

192. As a result of the actions of Defendant City, Plaintiffs have and will incur monetary losses as a result of the application of Municipal Ordinance Section 18.55.110 to the Real Property.

FIFTH CLAIM FOR RELIEF
Declaratory Relief
California Constitution – Right to Liberty (Art. I, § 1)
(By Both Plaintiffs)

193. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 192 with the same force and effect as if fully pleaded at length herein.

194. Since 1879, the California Constitution has provided intrinsic rights and liberties to its citizens. Chief among those rights and liberties are those found in Article 1 of the California Constitution. Article 1, Sections 1 of the California Constitution provides, in pertinent part:

Article 1, Section 1:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

195. Defendant's actions described herein have proximately and legally caused tremendous financial harm not just to Plaintiffs, but to the City of Fremont, by wasting resources on Defendant's misguided and overwrought code enforcement hunting of Plaintiffs, which will continue to have deleterious effects unless and until Defendant is enjoined by this Court from continuing its campaign of terror against Plaintiffs.

196. Plaintiffs have been deprived of their safety, happiness, and privacy, and deprived of the use of their private property, on the basis of false allegations, discriminatory action, arbitrary action, and intentional

conduct constituting an abuse of power, all of which violates their California Constitutional liberty rights.

197. Plaintiffs have found it necessary to engage the services of attorneys to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

SIXTH CLAIM OF RELIEF
Declaratory Relief
California Constitution – Denial of Religious Free Exercise (Art. I, § 4)
(By Both Plaintiffs)

198. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 197 with the same force and effect as if fully pleaded at length herein.

199. Article I Section 4 of the California Constitution provides that "Free exercise and enjoyment of religion without discrimination or preference are guaranteed."

200. Defendant City of Fremont has initiated and maintained criminal investigations, code enforcement, and abatement proceedings based upon religious animus against the religious beliefs of the Plaintiffs. Said bias is evidenced by the following:

a. Building Official Gale commented to Plaintiff Lee regarding the presence of religious statues at the Real Property: "I wish the City did not know about them [referring to the Arahats, the religious statues].";

b. The false statement by the City (made by its Deputy City Attorney Bronwen Lacey) representing Gary West's Building Department's

official position that NOA 2 would remain in effect because under the Williamson Act contract, a "House of Worship is not allowed [on the real property]";

c. The City's second warrant application contained a declaration from its Building Department Code Enforcement Officer Tanu Jagtap which accused Plaintiff of fabricating her religious beliefs;

d. The City condemned the structures used for religious purposes, and ordered Plaintiff to remove specific religious objects from the buildings;

e. Gary West told Plaintiff she could only physically pray in two specific sites at the property;

f. Morris and Powell accused Plaintiff of fabricating her religious beliefs for permit purposes, and mocked, ridiculed, and harassed her when she met with them;

201. Morris and Powell told Plaintiff ""Do you think Buddha is OK with the construction you did?", "You will demolish that temple", "You are using the Buddha as a protective shield." They made these comments while they were threatening her with a "miserable" and "expensive" enforcement process and demolition and destruction of her property, including her religious structures.

202. Defendant City has camouflaged its discriminatory intent by intertwining its objections to religious usage of the real property with allegations of purported violations of building, electrical and similar codes.

203. There exists a controversy between Plaintiffs and Defendant City. The Plaintiffs contend that the code Notice and Order to Vacate, Case No. COD2018-00421 ("NV") abridged their rights of free religious

expression because it expressly prohibited use of three buildings constructed for purposes of religious use. The Defendant contends that said Notice and Order to Vacate was issued pursuant to legitimate code enforcement activity.

204. The Plaintiffs are entitled to an order of this Court declaring that the Notice and Order to Vacate, Case No. COD2018-00421 ("NV") violates their right to religious free expression to the extent it prohibits usage of the three buildings said Notice and Order purports to prohibit religious use of the three buildings at issue therein.

SEVENTH CLAIM OF RELIEF
Declaratory Relief
Substantive Due Process (Cal. Const. Art I, § 7)

205. Plaintiffs incorporate by reference all of the allegations contained in paragraphs 1 through 204 with the same force and effect as if fully pleaded at length herein.

206. Article 1, Section 7 of the California Constitution provides, in pertinent part: Article 1, Section 7:

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this

> Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

207. California's constitutional guarantee of equal protection and the Fourteenth Amendment's guarantee of equal protection are substantially equivalent and analyzed in similar fashion. *Kenneally v. Medical Board*, 27 Cal.App.4th 489 (1994).

208. In addition, California's constitutional guaranty of equal protection under Article 1 Section 7 of the California Constitution has been judicially defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. *People v. Romo*, 14 Cal.3d 189 (1975); *Gray v. Whitmore*, 17 Cal.App.3d 1 (1971).

209. Defendant's criminal and civil investigation and enforcement actions against Plaintiffs, set forth herein, violated Plaintiffs' right to substantive due process and equal protection under the California Constitution.

210. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from conducting further reckless and unlawful investigation and enforcement activities against Plaintiffs.

211. Plaintiffs have found it necessary to engage the services of attorneys to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

1. A trial by jury as to all matters of fact and monetary damages;
2. A declaration that City of Fremont Municipal Ordinance Section 18.55.110(a) and its associated table violates RLUIPA to the extent it does not permit the usage of real property zoned "Open Space/Hill beyond ridgeline" for religious purposes;
3. A declaration that City of Fremont Municipal Ordinance Section 18.55.110 violates the California Constitution;
4. An order enjoining all enforcement of City of Fremont Municipal Ordinance Section 18.55.110 (a) and its associated table to the extent they do not permit the usage of real property zoned "Open Space/Hill beyond ridgeline" for religious purposes;
5. A declaration that the prosecution of NOA 2, NOA 2A, NOA 3, and the NOV, violates RLUIPA;

6. An order enjoining all enforcement of any final order resulting from NOA 3.
7. An order requiring Defendant to remove the unproven "Notice of Substandard Building/ Structure" filed with the Alameda County Recorder's Office;
8. Compensatory damages according to proof;
9. Emotional distress damages according to Plaintiff Lee;
10. Preliminary injunctive relief;
11. Reasonable attorneys' fees as permitted by statute and the Court; and
12. Costs of Suit.

DATED: 3/25/22

LAW OFFICES OF JOSEPH L. ALIOTO AND ANGELA ALIOTO

By: /s/ Angela Alioto
Angela Alioto
Attorneys for Plaintiff