No. ____

IN THE

Supreme Court of the United States

SPIRIT OF ALOHA TEMPLE, A HAWAIʻI NONPROFIT CORPORATION, AND FREDRICK R. HONIG,

Petitioners,

v.

COUNTY OF MAUI, HAWAIʻI AND STATE OF HAWAIʻI,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a religious organization seeking to build a church prove that it is precluded from using other sites within a municipality's jurisdiction and/or that the municipality's reasons for denying a permit are arbitrary before it can establish that a zoning permit denial to use property as a church imposed a substantial burden on its religious exercise under RLUIPA, or should substantial burden be established by the totality of the circumstances?

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs-Appellants below) are Spirit of Aloha Temple and Fredrick R. Honig. Respondents (Defendants-Appellees below) are the County of Maui and the State of Hawai‘i. The Maui Planning Commission is denoted as a Defendant in the opinion of the United States Court of Appeals for the Ninth Circuit, but was dismissed from the action at the District Court level and did not participate in the appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Spirit of Aloha Temple does not have a parent corporation. No publicly held corporation owns more than 10% of its stock.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the Ninth Circuit, No. 23-3453, *Spirit of Aloha Temple, et al. v. County of Maui, et al.*, judgment entered March 28, 2025; consolidated with U.S. Court of Appeals for the Ninth Circuit, No. 23-3633, *Spirit of Aloha Temple, et al. v. County of Maui* and U.S. Court of Appeals for the Ninth Circuit, No. 23-2096, *Spirit of Aloha Temple, et al. v. County of Maui*.

United States District Court for the District of Hawaii, No. 1:14-cv-00535, *Spirit of Aloha Temple, et al. v. County of Maui*, judgment entered on October 12, 2023 as to U.S. Court of Appeals for the Ninth Circuit, Nos. 23-3453 and 23-3633 and judgment entered on March 8, 2024 as to U.S. Court of Appeals for the Ninth Circuit, No. 23-2096.[1]

[1] Ninth Circuit No. 24-2096 is the Plaintiffs-Appellants' appeal of the district court's award of costs to the Appellee County dated March 25, 2024, which included a substantive challenge to the basis and calculation of the same. In a Non-Dispositive Opinion dated March 28, 2025, the Ninth Circuit affirmed the award. App. 1a. As the costs were awarded based upon a prevailing party standard, these should be vacated should the decision of the Ninth Circuit that is the subject of this Petition be reversed. *Furman v. Cirrito*, 782 F.2d 353, 355 (2d Cir. 1986); *Exxon Valdez v. Exxon Mobil Corp*., 568 F.3d 1077, 1081 (9th Cir. 2009).

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DECISIONS BELOW

The district court's August 11, 2023 decision denying summary judgment appears at 2023 WL 5178248 and reprinted at App. 26a. The judgment dated October 12, 2023 in the district court appears at App. 124a. The Ninth Circuit's March 28, 2025 decision affirming the district court is reported at 132 F.4th 1148 and reprinted at App. 1a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 28, 2025. Lower courts had jurisdiction under 28 U.S.C. § 1331. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a) ("RLUIPA"), commonly referred to as its "Substantial Burdens" provision.

STATEMENT OF THE CASE

The Spirit of Aloha Temple ("Temple") is a religious organization that seeks to locate a place of worship on property it owns on the island of Maui. The Temple belongs to the Integral Yoga movement, a modern branch of the ancient Hindu yogic tradition brought to the United States in 1966 by the Indian Swami Satchidananda. (App. 211a ¶¶ 4-6, 9.) Fredrick R. Honig is the founder and minister of the Temple. (App. 213a ¶¶ 14-15.)

A. The Temple's Religious Beliefs and Exercise.

Petitioners believe that the "birthright of every individual is to realize the spiritual unity behind the diversity throughout Creation and to live harmoniously as members of 'one universal family.'" (App. 211a ¶ 10.) The Temple was founded by Fredrick Honig ("Honig"), who studied and lived in Integral Yoga *ashrams* and Integral Yoga Institutes from 1973 to 1992, after which he came to Maui. (App. 213a ¶¶ 14-15.) In 1977, he was ordained as a *sannyasa*, a celibate Hindu monk, and given the name Swami Swaroopanananda. (App. 212a ¶ 12.) He does not receive a salary for this work. (App. 219a ¶ 45.) He very seldom leaves the Temple, devoting all his time to its care. (App. 219a ¶ 48.) He has dedicated all his financial resources to the Temple, including even gifts he has received from family or friends, and does not own a car. (App. 219a ¶¶ 45, 48.)

B. The Property.

In 1994, Honig acquired the property at 800 Haumana Road ("the Property") (App. 210a ¶ 3) and began to create on the Property a place to teach others the practice of living in harmony with the natural world and realizing their nature in accordance with his Integral Yoga beliefs. (App. 213a-214a ¶¶ 15, 19-20; App. 81a-83a; *Spirit of Aloha Temple v. Cnty. of Maui*, 49 F.4th 1180, 1184 (9th Cir. 2022).) In January 1997, Honig's guru, Swami Satchidananda, visited and formally dedicated the Property. (App. 214a ¶ 23.) Honig has devoted his life since 1993 to the Temple Property. (App. 213a ¶¶ 15-17.)

For many years, the Property served as a place for furtherance of Petitioners' religious beliefs and ministering to the spiritual needs of those who came

to it. (App. 215a-216a, 218a ¶¶ 28, 30-31, 42.) These included holding religious services, sacred events such as baptisms and weddings, offering classes on spiritual beliefs, and holding communal meals. (App. 216a ¶ 31.) Honig has described some aspects of the Temple's religious exercise as follows:

- "[Y]oga and meditation, and group discussion and liturgy are religious practices that are vital tools to advance the transformation that is an important goal of our religious path." (App. 215a ¶ 28.)
- "We believe that living in harmony with the natural world is one of the proper goals and duties of humans and that serving and teaching those values is our religious duty. Practicing such a life along with related traditional religious practices leads us to higher states of consciousness" (App. 215a ¶ 29.)
- "A significant element of the Temple's ministry is to be a living classroom for deepening our understanding of the Spirit of Aloha." (App. 215a ¶ 30.)
- "In furtherance of these beliefs, we believe that we should engage in various religious practices, including holding customary religious services such as weekly meetings and sacred events such as baptisms and weddings, offering classes on spiritual beliefs, and holding communal meals." (App. 216a ¶ 31.)

The Property itself also has enormous religious significance to the Plaintiffs. (App. 214a-215a ¶¶ 21-27 ("The Property itself is uniquely sacred to me and the Spirit of Aloha Temple.").)

C. State and County Regulations and the Temple's Special Permit Application.

In 2012, the County informed the Temple in writing that it was not permitted to engage in religious services, ceremonies, yoga, meditation, day retreats, and religious classes and other educational events on the Property. (App. 217a ¶ 40; C.A. E.R. 257.) The County issued notices of violation to the Temple and Honig on September 27, 2012 for these activities and threatened fines of thousands of dollars a day if they did not cease all prohibited activities. (C.A. E.R. 288.) These two actions of the County substantially impeded religious gatherings at the Temple and prevented members and supporters from engaging in religious practices. (App. 217a-218a ¶¶ 40-43.)

Chapter 205 of the Hawaii Revised Statutes establishes the State's Land Use Commission, regulates land use, defines agricultural districts, and determines what uses are permitted in them. Haw. Rev. Stat. § 205-2 (2023); Haw. Rev. Stat. § 205-4.5 (2023). It delegates authority to the county planning commissions to issue special use permits for parcels fewer than fifteen acres in state agricultural and rural districts. 49 F.4th at 1187; Haw. Rev. Stat. § 205-6(a) & (c) (2023).

> Counties may grant special use permits for an "unusual and reasonable use" according to five guidelines:
>
> > (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;
> >
> > (2) The proposed use would not adversely affect surrounding property;

> (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
>
> (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
>
> (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.
>
> Haw. Code R. § 15-15-95(c) [hereinafter the "Regulation"]. Under Maui County Code § 19.30A.060.A.9, "[c]hurches and religious institutions" are permitted only with a special use permit considered under these factors.

49 F.4th at 1187. Churches and religious institutions are therefore permitted in Maui's agricultural zoning district with a special use permit as an "unusual and reasonable use" if they satisfy the guidelines listed in H.A.R. § 15-15-95(c). 49 F.4th at 1187 (citing H.A.R. 15-15-95(c)); C.A. E.R. 316 (Maui County Code (hereinafter, "M.C.C.") § 19.30A.060.A.9 (2023)). Section 19.30A.060.A.9 of the Maui County Code specifically lists "[c]hurches and religious institutions" as a special use. (C.A. E.R. 316.) The County's Code explicitly incorporates and requires review of the standards of H.A.R. § 15-15-95. (C.A. E.R. 315; M.C.C. § 19.510.070(B)(8).)

On November 21, 2012, the Plaintiffs filed an application for a State Land Use Commission Special Use Permit for their religious uses, including church services, a living classroom, and sacred programs, educational, inspirational and spiritual commitment

ceremonies (the "Application"). (C.A. E.R. 362 ¶¶ 1-2; App. 77a-78a.)

The Plaintiffs worked with the County's Planning Department for more than fourteen months to address all the matters involved in its Application, including consultation with fourteen other agencies. (C.A. E.R. 239-240; App. 8a, 40a-41a, 82a-83a.) It settled the pending notices of violations (C.A. E.R. 237), and obtained all necessary building and SMA permits. *Id.* This was detailed in a twenty-one page Report (C.A. E.R. 232) and an eight-page Recommendation to the Planning Commission. (C.A. E.R. 260.) The County's Planning Department recommended approval of the Temple's Application, with 21 conditions to address any areas of concern, and the Plaintiffs agreed to all the proposed conditions in the Recommendation. (App. 8a, 40a-41a, 82a-83a.)

Despite this recommendation of approval, the Maui County Planning Commission denied the Application and, six and a half months later, filed its Findings of Fact and Conclusions of Law and Order. (C.A. E.R. 284.)

> The Commission analyzed whether the requested land uses would be "unusual and reasonable" after considering the guidelines in Hawai'i's Code of Rules § 15-15-95(c). It concluded that the proposed uses "would adversely affect the surrounding properties," because of safety concerns surrounding Haumana Road. It also determined that the proposed uses would increase traffic and burden public agencies by requiring them to provide roads, police, and fire protection.

Spirit of Aloha Temple, 49 F.4th at 1185. "The Maui Planning Commission concluded that the application ran afoul of subsections 15-15-95(c)(2) and (c)(3)." (App. 84a.)

D. Proceedings Below.

On November 26, 2014, Petitioners filed a nine-count complaint in the district court. (C.A. E.R. 527.) These included claims brought under the Substantial Burdens, Nondiscrimination and Equal Terms provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, *et seq*.; 42 U.S.C. § 1983 (free exercise and freedom of speech clauses of the First Amendment, and the equal protection clause of the Fourteenth Amendment); the Hawaii Constitution and state law.

The litigation proceeded down a winding and tortuous path, ultimately including two trials and several appeals. In April 2018, Plaintiffs filed a motion for partial summary judgment and Defendant County filed a counter-motion for summary judgment on all claims, both of which were denied in their entirety. (C.A. E.R. 480.) The district court noted, however, that Plaintiffs' Prior Restraint claim (Count V) involved application of section 15-15-95 of the Hawaii Administrative Rules and ordered Plaintiffs to serve the Hawaii Attorney General with the Complaint and its Order. (C.A. E.R. 358 – C.A. E.R. 480; C.A. E.R. 477.) The State of Hawaii then moved to intervene, and the Parties stipulated to that intervention. The State then filed its own motion for summary judgment on Count V arguing, *inter alia*, that section 15-15-95 of the Hawaii Administrative Rules was not an impermissible prior restraint on Plaintiffs' First Amendment rights. The County joined in that motion and sought summary judgment on all claims.

Plaintiffs filed a counter-motion for partial summary judgment with respect to Count V.

On April 23, 2019, the district court granted the Defendants' motion for summary judgment on Count V, and denied Plaintiffs' counter-motion. (C.A. E.R. 358.) The district court "later granted summary judgment for the County on all remaining counts . . . concluding that the Commission's decision on least restrictive means barred Plaintiffs' claims under collateral estoppel." 49 F.4th at 1186. On September 18, 2019, after further proceedings, the Temple appealed the district court's prior restraint and collateral estoppel summary judgment rulings.

The circuit court reversed the district court's decision, holding, *inter alia*, that:

> We reverse the district court's grant of summary judgment to the defendants because Plaintiffs bring a successful facial First Amendment challenge to the County's zoning scheme. We also vacate and remand for the district court to reevaluate costs and to reconsider Plaintiffs' religious liberties claims without giving preclusive effect to the Commission's decision.

Spirit of Aloha Temple, 49 F.4th at 1184. The circuit court held that a guideline used by the Planning Commission to deny the permit was an unconstitutional prior restraint on protected First Amendment activity.

> Our precedent dictates not only that Plaintiffs' facial challenge may proceed—but also that it succeeds. The County of Maui permitting scheme "grants permitting officials an impermissible degree of discretion," and thus "fails

> to qualify as a valid time, place, and manner restriction on speech." Epona, 876 F.3d at 1222.

Id. at 1191. The circuit court explained:

> Here, the County of Maui permitting regulations allow the Commission unbridled discretion to rely only on an arbitrary guideline—whether "[t]he proposed use would not adversely affect surrounding property"—to deny a special use permit application. This use of "adversely affect" is as general, flimsy, and ephemeral as "health or welfare" or "aesthetic quality." See Desert Outdoor Advert., 103 F.3d at 818–19.

Id. at 1192.

The circuit court then remanded the case to the district court to decide "whether § 15-15-95(c)(2) is severable" or whether, given the unconstitutionality of § 15-15-95(c)(2), the entire ordinance was unconstitutional. *Spirit of Aloha Temple*, 49 F.4th at 1193 n.5, 1196.

On March 31, 2023, the district court, after ordering briefing and hearing argument on the issue of severability, held in relevant part that H.A.R. 15-15-95(c)(2) is severable from the remainder of the standard to be used in determining whether a special use permit should be granted. *Spirit of Aloha Temple v. Cnty. of Maui,* No. CV 14-00535 SOM/RLP, 2023 WL 2752790, at *12 (D. Haw. Mar. 31, 2023) and reprinted at App. 77a. It granted judgment to the State on the remainder of Count V. *Id*.

On August 11, 2023, the district court denied the Parties' motions for summary judgment on the remainder of the claims still outstanding–including Plaintiffs' claim under RLUIPA's Substantial Burdens

provision–other than granting partial summary judgment in favor of the Plaintiffs on the issue of whether the County's denial of the Plaintiffs' special use permit satisfied strict scrutiny with respect to Counts I, VI, and VIII of Plaintiffs' Complaint. (App. 26a.) The district court held:

> Plaintiffs fail on the present motion to establish that the undisputed facts demonstrate that the denial of their Special Use Permit application is a substantial burden on their exercise of religion. For that reason, their motion is denied with respect to Count I. At trial, if Plaintiffs succeed in demonstrating that the denial of the requested permit substantially burdened their exercise of religion, Plaintiffs will succeed on their RLUIPA substantial burden claim.

Spirit of Aloha Temple, 2023 WL 5178248, at 13 and reprinted at App. 26a, 55a.

Thereafter, an advisory jury trial[1] was held on Plaintiffs' remaining claims from September 27, 2023 to October 11, 2023, resulting in a verdict for the Defendant on all remaining claims. (App. 126a.) The August 11, 2023 summary judgment order was merged into the Court's final judgment, issued on October 12, 2023. (App. 124a.)

A notice of appeal was timely filed by Appellants. (C.A. E.R. 575-577.) Appellee County filed a notice of cross-appeal. The State participated in the appeals. The circuit court agreed with Plaintiffs that the issue

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[1] During that trial, the district court instructed the jury to decide the legal issue of whether the denial of the special use permit "substantially burdened" Plaintiffs' religious exercise. (App. 115a-118a.)

of whether a burden on religious exercise was substantial was a legal question, and improperly before the jury. However, the court then affirmed the ruling against Petitioners on their Substantial Burdens claim, holding that "because the error was harmless, and Plaintiffs' religious exercise was not substantially burdened as a matter of law, ..." App. 5a.

The Ninth Circuit determined that, as a matter of law, the Temple and Honig's religious exercise was not substantially burdened because "Plaintiffs have not considered other sites in the County" and, "[m]oreover, the County's reasons for denying Plaintiffs' special-use permits have been consistent and relate to safety concerns that are not arbitrary and have not 'lessened the possibility that [Plaintiffs] could find a suitable property' elsewhere." App. 18a-19a.

SUMMARY OF ARGUMENT

The circuit court's holding under RLUIPA's Substantial Burdens provision conflicts with the decisions of other circuits and of this Court.

Specifically, the circuit court held that in order to establish a substantial burden on religious exercise under RLUIPA's Substantial Burdens provision, 42 U.S.C. § 2000cc(a), a plaintiff must show that it "attempt[ed] to relocate" or "consider[] other locations" and/or (it is unclear under the circuit court's decision whether both elements must be proven or whether either one will suffice) that "the County's reasons for denying Plaintiffs' special-use permits" are "arbitrary . . . ." App. 18a-19a. The circuit court is an outlier in requiring a plaintiff to prove that there is no other location within a municipality where it can locate and/or that a municipality's zoning permit denial is arbitrary as a prerequisite to a finding of substantial

burden. Such a pre-condition for a finding of substantial burden is inconsistent with the decisions of other circuits, which adopt a totality-of-the-circumstances test. It is also at odds with the decisions of this Court in interpreting the institutionalized persons provision of RLUIPA and RLUIPA's sister statute, the Religious Freedom Restoration Act ("RFRA"), and the Free Exercise Clause, where the court looks at the actual, practical burden on the plaintiff's religious exercise as the plaintiff sincerely understands its religious needs.

First, proving that no other location is available for religious worship is a likely impossible burden for all but the most unusual situations. No other circuit imposes such a draconian requirement; several explicitly reject such an approach, and most take into account several other factors that are relevant to the determination of whether a burden on religious exercise is "substantial." In the twenty-five years since RLUIPA was enacted, not a single reported decision appears where this requirement would be met. It is also directly contrary to RLUIPA's mandate that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

Similarly inconsistent with other circuits is the Ninth Circuit's requirement that a religious institution must demonstrate that a decision was not "arbitrary." This effectively turns federal courts into super-boards of zoning appeals, an approach that other circuits have explicitly rejected.

Other circuits have instead adopted totality-of-the-circumstances approaches that look at a range of factors. While the availability of other properties and

the arbitrariness of a municipality's actions can, several of these courts held, be two factors in this analysis, they are not dispositive, but merely elements of a review of the totality of the circumstances. Moreover, the circuit court's holding is in sharp conflict with this Court's interpretation of "substantial burden" under RLUIPA's institutionalized persons provision, RFRA, and the Free Exercise Clause.

REASONS FOR GRANTING THE WRIT

I. The Circuit Court's Holding That the Temple Must Show That It Was "Precluded" from Using Other Sites in the County and/or That the County's Decision Was "Arbitrary" Before It Can Establish a Substantial Burden on Its Religious Exercise Conflicts with the Decisions of Other Circuits and This Court's Decisions.

A. RLUIPA's Substantial Burdens Provision.

Congress enacted RLUIPA in response to a "consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship." H.R. Rep. No. 106-219, at 24 (1999) (House of Representatives report on the Religious Liberty Protection Act of 1999). Land use regulation "is commonly administered through individualized processes" and "[t]he standards in individualized land use decisions are often vague, discretionary, and subjective." *Id.* Recognizing these challenges to religious communities generally and in particular to "[s]mall and unfamiliar denominations," and out of a recognition that places of worship "cannot function without a physical space adequate to their needs and consistent with their theological requirements," Congress enacted RLUIPA in 2000. 146 Cong.

Rec. S7774 (2000) (joint statement of Sens. Hatch & Kennedy).

RLUIPA's "substantial burdens provision" applies to cases affecting interstate commerce, involving programs receiving federal funding, or where "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). In such situations, a government may only "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," if it satisfies strict scrutiny review. 42 U.S.C. § 2000cc(a)(1).

B. The Ninth Circuit's Decision Conflicts with the Holdings of Other Circuits and this Court.

The Ninth Circuit held that a RLUIPA plaintiff cannot, *as a matter of law*, establish a substantial burden on its religious exercise unless it proves that it was "precluded" from using other sites within a jurisdiction and/or[2] that the County's decision was "arbitrary." App. 18a-19a. This conflicts directly with the decisions of three circuits and is in tension with the decisions of several others.

These three circuits, and others to varying degrees, have adopted a totality-of-the-circumstances approach in response to the somewhat unique nature of burdens on religion in the context of zoning denials. In a

[2] The circuit court did not state whether both conditions must be met, or whether one would suffice.

RLUIPA zoning case where a local government denies approval to use real property as a place of worship, if one focuses only on the particular circumstances of a congregation developing a particular piece of property, a zoning denial imposes an absolute bar on religious exercise in that particular location. Looked at this way, there is always a substantial burden with a final denial of approval: if the congregation disregards the government and begins to use the property as a place of worship anyway, it and its leaders surely can be fined (as the Temple and Honig were).

But, at the same time, a place of worship can always locate somewhere else—in another jurisdiction, or perhaps at a location in the same jurisdiction that is less suited for their purposes, inadequate for their religious exercise, or very expensive and thus impracticable. Yet this is an unsatisfactory answer as well. Requiring a house of worship to locate elsewhere is fundamentally inconsistent with this Court's decisions on the concept of "substantial burden." In these decisions, this Court has instructed that courts should evaluate the substantial burden on a plaintiff as the court finds it. *See, e.g., Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015) ("RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a ½–inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise."); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2389 (2020) (Alito, J., concurring, joined by Gorsuch, J.) (stating that process for evaluating substantial burden in *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682 (2014), was to look at whether "non-compliance would have substantial adverse practical consequences" and ask "would compliance cause the objecting party to violate its religious beliefs,

as it sincerely understands them?" (emphasis in original)). It is particularly inappropriate under RLUIPA to fail to analyze the actual, present impact on the plaintiff of the zoning denial in light of this precedent coupled with RLUIPA's provision that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Thus, most circuit courts have adopted a totality-of-the-circumstances test, either explicitly or in practice, applying a sensitive, multifactorial review to determine if, in reality, a plaintiff is suffering a substantial burden on its religious exercise.

While the Ninth Circuit here stated that it should consider "the totality of the circumstances," including the limited list of factors of "whether the County's reasons for denying the special use permit were arbitrary and could apply to Plaintiffs' future applications; whether Plaintiffs have ready alternatives or whether those alternatives would require "substantial uncertainty delay, or expense"; whether Plaintiffs were precluded from other locations in the county; and whether Plaintiffs imposed the burden upon themselves" (App. 16a), it did not do so. Nor did it acknowledge important factors such as the actual, tangible burdens on the Temple, which are reviewed by other Circuits. Instead, it considered only whether the Temple could locate elsewhere and whether the County's decision was arbitrary.

The circuit court ignored the facts demonstrating that the Temple had no ready alternatives, that any alternatives would require substantial uncertainty, delay and expense, and whether the Temple imposed the burden upon itself, not to mention various other

factors reviewed by other Circuits. *See* App. 219a ¶¶ 46-47 (the Temple and Honig own no other property where they can worship, and lack the resources to acquire any); App. 77a ("Plaintiffs worked with local agencies to address these concerns, and the county's planning department recommended that the Maui Planning Commission approve a second application subject to certain conditions."). The circuit court also failed to acknowledge factors held relevant to other Circuits, as discussed below and which all support Petitioners' Substantial Burdens claim. These include the actual, tangible burdens on the Temple (*see* App. 218a ¶¶ 42-43 (explaining how Temple and its members can no longer engage in religious exercise)); whether the Temple had a reasonable expectation of approval (*see supra* (Maui Planning Department recommended approval)); whether any alternative locations were quick or feasible (*see* App. 219a ¶ 46 ("Neither I nor the Temple have any resources to acquire other locations to practice our beliefs.")); and whether the denial was final (*see* App. 77a (Planning Commission issued final denial, after reconsideration)).

The First Circuit has held that, rather than adopt any bright-line test for substantial burden, courts should "identify some relevant factors and use a functional approach to the facts of a particular case." *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013). The First Circuit examined the "actual, tangible burdens" that the regulation imposed on the church, *id.* at 99, and whether the church was being targeted or being treated "arbitrarily, capriciously, or unlawfully." *Id.* at 97 (quoting *Westchester Day Sch.*, 504 F.3d at 350). *See also Signs for Jesus v. Town of Pembroke,* 977 F.3d 93, 111 (1st Cir. 2020) ("outlin[ing] factors that are helpful

in determining whether a particular regulation imposes a substantial burden").

The Second Circuit in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), applied a range of factors to conclude that a Village's denial of a permit to allow a Jewish day school to expand its facilities constituted a substantial burden on the organization's religious exercise: that the facilities were no longer adequate to attract and retain students interested in a dual religious and secular education, *id.* at 345, 349; that there were "no quick, reliable, or economically feasible alternatives," *id*. at 352; that the denial was a final denial, as opposed to a conditional denial requesting that the applicant make adjustments, *id.* at 349; that there was a "close nexus between the coerced or impeded conduct and the institution's religious exercise," *id.* at 349; and that the government decision makers acted in an "arbitrary and capricious" manner in their evaluation of the state's health, safety, and welfare interests. *Id.* at 351. The Second Circuit subsequently in *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 195-96 (2d Cir. 2014), *cert. denied*, 575 U.S. 963 (2015), clarified that that the list of criteria set forth in *Westchester Day School* was meant to be non-exhaustive and, moreover, that no single criterion (including the arbitrariness of the decision) should be considered dispositive. Rather, the Second Circuit held, the factors used in *Westchester Day School* were intended to be "some of the factors that may be considered to determine whether a substantial burden is imposed." *Id.* at 195.

In *Thai Meditation Association of Alabama*, the Eleventh Circuit laid out six criteria the district court should consider, "among others." *Thai Meditation*

Ass'n of Ala., Inc. v. City of Mobile, 980 F.3d 821, 831 (11th Cir. 2020): 1) Plaintiffs' need for new or additional space to carry out their religious activities; 2) the degree to which the City's actions "effectively deprive[ ] the plaintiffs of any viable means" to engage in their religious activities; 3) the nexus between Plaintiffs' religious activities and the City's actions alleged to have infringed them; 4) whether the City's actions were arbitrary or indicate a lack of even-handed treatment; 5) whether the City's decision was final or whether Plaintiffs had an opportunity to make modifications to address concerns; and, 6) whether the burden was properly attributable to the government or, instead, was self-imposed by unreasonable expectations or the actions of Plaintiffs. *Id.* at 831-32.

Other circuits have been less explicit in describing the substantial burden inquiry as a totality-of-the-circumstances approach, but nonetheless have employed a sensitive inquiry of multiple factors to reach their conclusions of whether a government exercise of zoning power imposes a substantial burden on religious exercise.

The Seventh Circuit in *World Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 539 (2009), held that "whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question." *Id.* Likewise, in *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898-901 (7th Cir. 2005), the court focused on the fact that the congregation was outgrowing its existing church, that while alternatives to the property for which zoning approval was denied might be found the church would face "delay, uncertainty, and expense," and that the City's prior treatment of the church

suggested that future applications could well meet the same fate. *Id.*[3]

The Sixth Circuit in *Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996, 1003-04 (6th Cir.), *cert. denied*, 584 U.S. 691 (2018), enunciated a standard that tracks the holistic approach of other circuit courts. The court examined 1) whether plaintiffs were limited in "some core function of their religious activities due to the inadequacy of their current facilities," 858 F.3d at 1006; 2) whether plaintiffs "had access to other properties" nearby, *id*. at 1005; 3) "[w]hether the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation," *id.* at 1004 (quotation marks, citation omitted); and, 4) whether the burden was self-imposed, such as if there were no "reasonable expectation of being able to use th[e] land for religious

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[3] The Seventh Circuit was one of the first circuits to set forth a substantial burden standard in *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 761 (7th Cir. 2003) ("*C.L.U.B.*"), in a case involving a *facial* challenge to Chicago's zoning laws and their impact on churches: "We therefore hold that, in the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." The court in *Sts. Constantine & Helen*, *Worldwide Outreach,* and *Petra Presbyterian* ignored the "effectively impracticable" language of *C.L.U.B.*, but did not expressly repudiate it. However, in a RLUIPA prisoner case, *Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015), the Seventh Circuit noted that the "effectively impractical" standard was inconsistent with *Hobby Lobby* and *Holt*, stating that the "seriously violates" religious beliefs standard set forth by the Supreme Court "articulate[d] a standard much easier to satisfy" than effectively impracticable.

purposes." *Id.* Applying these multiple factors, the court upheld the district court's finding of no substantial burden, since plaintiff had not shown that "any functions of its religious school were unable to be carried out" at its original property, which it leased to another school after filing suit. *Id.* at 1009. The court noted that while there were some ways in which the existing property was less than ideal, particularly in terms of the driving time for parents, this fell into the category of "mere inconvenience" rather than substantial burden. *Id.*

The Fourth Circuit "utilize[s] a two-step analysis to determine whether or not a substantial burden is imposed . . . ask[ing] (1) whether the impediment to the organization's religious practice is substantial and (2) whether the government or the religious organization is responsible for the impediment." *Canaan Christian Church v. Montgomery Cnty.,* 29 F.4th 182, 192 (4th Cir. 2022). An impediment is "usually" substantial when "use of the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional, and the organization must acquire a different property as a result." *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty.,* 915 F.3d 256, 261 (4th Cir. 2019), *as amended* (Feb. 25, 2019).

In *Marianist Province of United States v. City of Kirkwood*, 944 F.3d 996 (8th Cir. 2019), the Eighth Circuit rejected a religious school's argument that its religious exercise was substantially burdened by denial of approval to have a lighted sports field. The court held that the school "has not demonstrated that its religious exercise is substantially burdened, rather than merely inconvenienced, by its inability to use its baseball field at night." *Id.* at 1001. While the school

claimed that it used evening baseball for community outreach, it could engage in community outreach "either during the day or at alternative locations." *Id.* This is consistent with the context-specific, totality-of-the-circumstances review of actual burden.[4]

These various other factors found relevant by several other Circuits–and which would have strongly favored a finding that the burden on the Temple's religious exercise is substantial–were irrelevant to the Ninth Circuit's analysis.

II. The Circuit Court's Holding Effectively Nullifies RLUIPA.

By focusing solely on whether a church is precluded from locating anywhere else within a jurisdiction and whether the denial is "arbitrary," the Ninth Circuit has written RLUIPA's Substantial Burdens provision out of the statute or, at the very least, reduced it to only a typical record-review appeal generally available under state law. Besides violating the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," *Duncan v. Walker,* 533 U.S. 167, 174 (2001) (internal quotation marks omitted), this is also

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[4] Although The Third Circuit has no published decisions setting forth the substantial burden standard, in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 100 F. App'x 70, 77 (3d Cir. 2004), its approach was similar to that of the Ninth Circuit. There, it held that there was no likelihood of success on a substantial burden claim where the "opportunity for religious exercise was not curtailed" by the challenged government action, because the religious organization had operated in another location within the jurisdiction for many years and because it "could have operated . . . by right in other [zoning] districts," including one across the street.

contrary to the mandate that RLUIPA be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

A. Requiring a Church to Prove That No Other Location Exists Within a Jurisdiction Reduces RLUIPA to a Dead Letter.

The circuit court's holding that because "Plaintiffs have not considered other sites in the County," "the County's actions have not been significantly oppressive" and therefore "the County has not imposed a substantial burden on Plaintiffs' religious exercise" (App. 18a-19a) places an impossible burden of persuasion on churches: Prove that they cannot locate anywhere else within a jurisdiction.

In addition to going against the overwhelming trend in other circuits to look at substantial burdens through a totality-of-the-circumstances approach, as discussed in Section I above, such a severe standard has been specifically rejected by other Circuits. In *Thai Meditation Association of Alabama, Inc. v. City of Mobile,* 980 F.3d 821, 830 (11th Cir. 2020), the Eleventh Circuit held that "[w]hatever 'substantial' means, it most assuredly does not mean complete, total, or insuperable."

Similarly, in *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 96 (1st Cir. 2013), the First Circuit held that "[a] burden does not need to be disabling to be substantial . . . ."

And in *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007), the Second Circuit held that "a burden need not be found insuperable to be held substantial."

The Fourth Circuit in *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 557-58 (4th Cir. 2013), held that "government action impeding the building of that church may impose a substantial burden . . . this is so even though other suitable properties may be available, because the 'delay, uncertainty, and expense' of selling the current property and finding a new one are themselves burdensome."

The Seventh Circuit also rejected the Ninth Circuit's analysis, holding that

> [t]he Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial.

Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005). This significant conflict between the Circuits should be resolved "in favor of a broad protection of religious exercise, ..." 42 U.S.C. § 2000-3(g).

B. Requiring a Church to Prove That a Municipality's Land Use Denial Was "Arbitrary" Diminishes Federal Court Review to That of a Super-Zoning Board of Appeal.

The second basis for the Ninth Circuit's holding that Petitioners' religious exercise was not substantially burdened was that "the County's concerns about traffic and road safety are well supported in the record and

are not arbitrary." App. 17a. This reduces a court's review of a Substantial Burdens claim to nothing more than being redundant with a state law appeal. *See* App. 1a ("The state court ultimately affirmed the Commission's decision under the Hawai'i APA, concluding that 'the Commission's decision does not appear to be arbitrary, capricious, or an abuse of discretion.'").

Like other states, Hawaii provides for judicial review of zoning decisions and authorizes courts to reverse decisions if the decisions are, *inter alia*, "arbitrary." *See* Haw. Rev. Stat. Ann. § 91-14 (West) ("Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are: . . . (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.").

Further, the standard of review used in determining whether a decision is "arbitrary" is highly deferential. As the circuit court noted, it is satisfied merely by the existence of "testimony of several nearby property owners on Haumana Road, who expressed concerns about pedestrian safety" and "flooding on the road . . . ." App. 17a. However, the district court held that "the undisputed facts demonstrate that the denial of the permit application was not narrowly tailored or the least restrictive means of furthering those interests." App. 40a. Permitting municipalities to deny zoning permits for houses of worship merely because hostile neighbors raise "concerns" is contrary to the statutory text and purpose of RLUIPA.

This is especially the case where the standard employed by the permitting agency provides unbridled discretion, as the Ninth Circuit determined was the case here. Reducing RLUIPA's Substantial Burdens protection to a determination of whether the Planning Commission "arbitrarily" applied a "general, flimsy, and ephemeral" standard, 49 F.4th at 1192,[5] is hardly "construe[ing RLUIPA] in favor of a broad protection of religious exercise, to the maximum extent . . . ." 42 U.S.C. § 2000-3(g).

Reducing the federal courts' role in reviewing Substantial Burdens claims to determine whether denials are "arbitrary" is directly in conflict with the Second Circuit's admonition to avoid "the temptation . . . of a federal court to act as a super-zoning board." *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*, 88 F.4th 344, 351 (2d Cir. 2023) (citing *Schenck v. City of Hudson*, 114 F.3d 590, 594 (6th Cir. 1997)); *see Burns v. City of Des Peres*, 534 F.2d 103, 108 (8th Cir. 1976); *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 960 (1st Cir. 1972)).

This holding is also in direct conflict with the decisions of other Circuits:

> In reaching its decision, the district court improperly read our opinion in *Westchester Day School* as holding that, as a matter of law, generally applicable land use regulations may only result in a substantial burden when arbitrarily and capriciously imposed. *See Chabad II,* 853 F. Supp. 2d at 225 (citing *Westchester Day Sch.,* 504 F.3d at 350). This

[5] This is exactly the type of "standard[] in individualized land use decisions [that] [is] often vague, discretionary, and subjective." H.R. Rep. No. 106-219, at 24.

> holding would be in tension with the plain language of RLUIPA's substantial burden provision, which in certain instances regulates "burden[s that] result[ ] from a rule of general applicability"—suggesting that such burdens fall within RLUIPA's cognizance, even when imposed in the regular course. 42 U.S.C. § 2000cc(a)(2)(A), (B). Moreover, such a rule would render the substantial burden provision largely superfluous given RLUIPA's nondiscrimination and equal terms provisions, which regulate overtly discriminatory acts that are often characterized by arbitrary or unequal treatment of religious institutions. *See id.* § 2000cc(b)(1)-(2); *Bethel World Outreach Ministries v. Montgomery Cnty. Council,* 706 F.3d 548, 557 (4th Cir. 2013) ("Requiring a religious institution to show that it has been targeted on the basis of religion in order to succeed on a substantial burden claim would render the nondiscrimination provision superfluous."); *Sts. Constantine & Helen Greek Orthodox Church, Inc.,* 396 F.3d at 900 ("[T]he 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of [RLUIPA], much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination. If a land-use decision ... imposes a substantial burden on religious exercise ... and the decision maker cannot justify it, the inference arises that hostility to religion ... influenced the decision." (citations omitted)).

Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 195 (2d Cir. 2014).

The Ninth Circuit's standard, in addition to being in conflict with the decisions of other Circuits, would provide no greater protections than those already provided under state law. Once again, this renders the Substantial Burdens provision "superfluous, void, or insignificant." *Duncan,* 533 U.S. at 174, in violation of a "cardinal principle of statutory construction." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 26, 2025

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3453
D.C. No. 1:14-cv-00535-SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawai'i nonprofit corporation; FREDRICK R. HONIG,

Plaintiffs - Appellants,

v.

COUNTY OF MAUI; STATE OF HAWAI'I,

Defendants - Appellees,

and

MAUI PLANNING COMMISSION,

Defendant.

No. 23-3633
D.C. No. 1:14-cv-00535-SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawai'i nonprofit corporation; FREDRICK R. HONIG,

Plaintiffs - Appellees,

v.

COUNTY OF MAUI,

Defendant - Appellant.

No. 24-2096
D.C. No. 1:14-cv-00535-SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawai'i nonprofit corporation; FREDRICK R. HONIG,

Plaintiffs - Appellants,

v.

COUNTY OF MAUI,

Defendant - Appellee.

Appeal from the United States District Court
for the District of Hawaii
Susan O. Mollway, District Judge, Presiding

Argued and Submitted October 7, 2024
as to Nos. 23-3453, 23-3633
Submitted October 7, 2024 as to 24-2096*
Honolulu, Hawaii

Filed March 28, 2025

Before: Mary H. Murguia, Chief Judge, and
Susan P. Graber and Salvador Mendoza, Jr.,
Circuit Judges.

Opinion by Judge Mendoza

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

SUMMARY[**]

Religious Land Use and Institutionalized Persons Act of 2000

The panel affirmed the district court's judgment in favor of the County of Maui in plaintiffs' action alleging that the County's denial of a special use permit substantially burdened their religious exercise in violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

Plaintiffs applied for a special use permit for a church and related activities on land, zoned for agriculture, that they purchased on Maui. The Maui Planning Commission denied plaintiffs' application. Plaintiffs asserted that the district court erred by instructing the jury to decide whether the government substantially burdened their exercise of religion in violation of RLUIPA.

The County argued that plaintiffs waived any challenge to the substantial-burden jury instruction. The panel held that the County's waiver argument was itself waived where the County belatedly made the argument in its reply brief.

In the land-use context, RLUIPA prohibits the government from imposing a "substantial burden" on a person's or religious institution's "religious exercise" unless the burden is the least restrictive means of furthering a compelling government interest. The panel held that RLUIPA's substantial-burden inquiry was a question of law for the court to decide. Thus, it

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[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

was error for the district court to send this question to the jury. Nevertheless, the error was harmless because the jury's verdict was consistent with the required legal outcome.

The remaining issues on appeal were resolved in a concurrently filed memorandum disposition.

COUNSEL

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OPINION

MENDOZA, Circuit Judge:

Judge or jury. We often grapple with who gets to decide. The judge has authority over questions of law, while factual disputes are reserved for the jury. At times, the distinction between the two can be elusive. But we must not shy away from drawing the distinction when necessary. Ultimately, where we draw the line "varies according to the nature of the substantive law at issue." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 n.17 (1984).

Today, we must engage in line drawing once again. We are faced with an issue of first impression in our circuit: whether the "substantial burden" inquiry under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc, *et seq.*, is a question of law and thus for the court to decide, or a question of fact, properly left for the jury. Because the substantial burden inquiry involves defining the bounds of a legal principle, we conclude that it is a question of law and, therefore, that the district court erred in submitting this question to the jury. But because the error was harmless, and Plaintiffs' religious exercise was not substantially burdened as a matter of law, we affirm.

I. BACKGROUND[1]

A. Special Permit Applications

This saga began more than thirty years ago, when Plaintiff Fredrick R. Honig purchased eleven acres of land at 800 Haumana Road in Maui, Hawai'i. The land

[1] This summary of the facts draws heavily from our opinion in the prior appeal, *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180 (9th Cir. 2022).

is zoned for agricultural use, and a portion of the property is in a state conservation district subject to environmental protections. After purchasing the property, Honig did not waste any time. Without bothering to apply for the necessary permits, Honig began to build on the property, clearing trees, constructing structures, digging a well, and installing cesspools. Through Honig's nonprofit, Well Being International, he began using the property for weddings, vacation rentals, yoga classes, retreats, and other events. During this time, Honig applied for a variety of trade names—including "Maui Gay Weddings," "A Marriage Made in Heaven," and "Maui Wedding Planners"—that he used specifically for "wedding planning and services." Honig described Well Being International as "a spiritual nonprofit organization."

In 2007, Honig formed a separate nonprofit: Spirit of Aloha Temple. The following month, thirteen years after Honig purchased the land, he and Spirit of Aloha Temple ("Plaintiffs") applied to the Maui Planning Commission ("Commission") for a special use permit to allow a "[c]hurch, church operated bed and breakfast establishment, weddings, special events, day seminars, and helicopter landing pad." The application was later amended to add additional activities, such as "weekly service[s], classes, special events, day programs and weddings."

Hawai'i's zoning laws permit county planning commissions to grant special use permits for "certain unusual and reasonable uses" on agricultural land. Haw. Rev. Stat. § 205-6(a). Hawai'i Administrative Rules section 15-15-95(c) sets out five guidelines that a planning commission considers when evaluating a special use permit application:

> (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;
>
> (2) The proposed use would not adversely affect surrounding property;
>
> (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
>
> (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
>
> (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

HAR § 15-15-95(c).

The Commission denied Plaintiffs' application, noting a host of problems. Several structures on the property did not have building permits; the proposed uses did not comply with several environmental and cultural goals of the Paia-Haiku Community Plan; the land possibly contained unknown burial sites; the increased traffic on the narrow and winding Haumana Road would pose safety concerns; and the proposed uses would adversely affect surrounding property.

Still, Plaintiffs were undeterred and continued to use the land for non-agricultural purposes without the appropriate permits. As a result, the County fined Plaintiffs for conducting "commercial weddings" and "transient vacation rentals/short term rentals," and Plaintiffs agreed to pay the fines and stop this prohibited activity.

In the ensuing years, Plaintiffs worked with various agencies to address the Commission's concerns and eventually obtained the necessary building permits. In 2012, Plaintiffs filed their second application, again seeking to conduct "church activities" on the land. The Maui Planning Department recommended that the Commission approve the second application subject to twenty-one conditions, including limiting the number and size of events held on the property, requiring the use of a shuttle, and working with the Fire Department to install a driveway that emergency vehicles could access.

The Commission voted to deny the second application. Honig requested reconsideration of the denial, and the Commission rescinded the denial and conducted a hearing. Following a hearing, the Commission again denied the second application, concluding that the proposed uses "would adversely affect the surrounding properties, in conflict with [HAR § 15-15-95(c)(2)]," and "would increase traffic and burden public agencies providing roads and streets, police, and fire protection, in conflict with [HAR § 15-15-95(c)(3)]."

B. First Trial

Following the denial of the second special-permit application, Plaintiffs sued the County of Maui and the Commission, alleging violations of RLUIPA's substantial burden, nondiscrimination, and equal terms provisions; the First Amendment's prohibition on prior restraints; the Free Exercise and Equal Protection clauses under the United States Constitution and Hawai'i State Constitution; and the Hawai'i Administrative Procedure Act ("APA").

The district court declined to exercise supplemental jurisdiction over the Hawai'i APA claim and stayed the

remaining claims pending the adjudication of that claim in state court. The state court ultimately affirmed the Commission's decision under the Hawai'i APA, concluding that "the Commission's decision does not appear to be arbitrary, capricious, or an abuse of discretion."

The district court then lifted the stay and considered Plaintiffs' remaining claims. The State of Hawai'i intervened, and the district court granted the State summary judgment with respect to the First Amendment prior-restraint claim. In a separate order, the district court granted summary judgment to the County on the remaining claims that required strict scrutiny, concluding that collateral estoppel barred relitigating the Commission's finding that the permit denial was the least restrictive means of furthering a compelling governmental interest. Because RLUIPA's equal-terms claim does not require the application of strict scrutiny, *see* 42 U.S.C. § 2000cc(b)(1), that was the only claim to survive summary judgment.

The RLUIPA equal-terms claim proceeded to trial, and an advisory jury found that neither side proved by a preponderance of the evidence whether Spirit of Aloha Temple is or is not a religious assembly or institution. The jury also found that the County did not treat Spirit of Aloha Temple "on less than equal terms as compared to the way the County of Maui treated a similarly situated nonreligious assembly or institution." Accordingly, the district court entered judgment for the County. Plaintiffs did not appeal that judgment.

C. First Appeal

Plaintiffs appealed the district court's summary judgment on the First Amendment prior-restraint

claims and the claims barred by collateral estoppel. *See Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180 (9th Cir. 2022). We reversed the district court's grant of summary judgment, concluding that Plaintiffs brought a successful facial First Amendment challenge to the County's zoning scheme. *Id.* at 1192–93. Specifically, we held that HAR § 15-15-95(c)(2) was an unconstitutional prior restraint and "left for the district court whether § 15-15-95(c)(2) is severable." *Id.* at 1191, 1192 n.5. We further held that the district court erred in concluding that "the Commission's findings on strict scrutiny collaterally estop Plaintiffs' substantial-burden and nondiscrimination RLUIPA claims, Free Exercise claims, and Equal Protection claims." *Id.* at 1193. We determined that the Commission's findings do not preclude consideration of whether denial of the second permit application was the least restrictive means of furthering a compelling interest. *Id.* We sent those claims back for the district court to consider.

D. Second Trial

On remand, the district court concluded that HAR section 15-15-95(c)(2) is severable from the remainder of the provision and, therefore, entered judgment to the State on the prior restraint claim (Count V). The district court then considered the remaining claims: Count I (RLUIPA substantial burden); Count II (RLUIPA nondiscrimination); Count VI (First Amendment Free Exercise); Count VII (Fourteenth Amendment Equal Protection); Count VIII (Hawai'i State Free Exercise Clause); and Count IX (Hawai'i State Equal Protection Clause). All six claims proceeded to trial, and the jury found for the County on all counts.

In this second appeal, Plaintiffs assert that the district court erred by instructing the jury to decide

whether the government substantially burdened Plaintiffs' exercise of religion, in violation of RLUIPA.[2] Plaintiffs argue that the substantial-burden inquiry is a question of law.

II. ANALYSIS

We have jurisdiction under 28 U.S.C. § 1291. We review misstatements of the law de novo and errors in the formulation of a jury instruction for abuse of discretion. *Hunter v. County of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011). An instructional error warrants reversal if the error is not harmless. *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013).

A. Waiver

The County argues that Plaintiffs waived any challenge to the substantial-burden jury instruction. "Waiver of a jury instruction occurs when a party considers the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction." *United States v. Kaplan*, 836 F.3d 1199, 1217 (9th Cir. 2016) (internal quotation marks and citation omitted). In such cases, any alleged error is unreviewable. *Id.*; *see United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) ("If [a party] has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.").

The County asserts that Plaintiffs "expressly consented" to sending the substantial-burden issue to the jury. But, curiously, neither Plaintiffs nor the County mentioned this agreement in their initial briefing. Instead, the County belatedly made the

[2] The remaining issues on appeal are resolved in the concurrently filed memorandum disposition.

argument in its reply. Thus, "its waiver argument is itself waived." *Gallardo v. United States*, 755 F.3d 860, 865 (9th Cir. 2014); *see id.* ("Because the government failed to argue waiver in its answering brief, its waiver argument is itself waived.").

B. RLUIPA's Substantial-Burden Inquiry

Plaintiffs challenge the district court's jury instruction related to the RLUIPA substantial-burden claim.[3] After listing a variety of factors for the jury to consider, the district court instructed the jury to determine whether Plaintiffs "prove[d] by a preponderance of the evidence that the denial of their Special Use Permit application substantially burdened their religious exercise." The jury found that the County had not substantially burdened Plaintiffs' exercise of religion. Plaintiffs argue that the issue of whether their religious exercise was "substantially burdened" is a legal determination, and it was error for the district court to submit that issue to the jury.

Congress enacted RLUIPA after the Supreme Court invalidated the Religious Freedom Restoration Act ("RFRA") as it applied to the States, in *City of Boerne v. Flores*, 521 U.S. 507 (1997). RFRA provided broad protections and prohibited the government from "substantially burden[ing]" a person's religious exercise "even if the burden result[ed] from a rule of general applicability unless the government [could] demonstrate the burden '(1) [wa]s in furtherance of a compelling governmental interest; and (2) [wa]s the least restrictive means of furthering that compelling

[3] Although the jury instruction at issue applied to both the RLUIPA substantial-burden claim and the First Amendment claims, Plaintiffs limit their argument to the "substantial burden claim." Therefore, we limit our analysis to RLUIPA.

governmental interest.'" *Id.* at 515–16 (first alteration in original) (quoting 42 U.S.C. § 2000bb-1). In *City of Boerne*, the Supreme Court held that, as applied to the States and their subdivisions, RFRA was "an unconstitutional exercise of congressional power pursuant to Section Five of the Fourteenth Amendment" because it "lack[ed] . . . proportionality or congruence between the means adopted and the legitimate end to be achieved." *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006) (internal quotation marks and citation omitted).

RLUIPA "replaces the void provisions of RFRA," *Wyatt v. Terhune*, 315 F.3d 1108, 1112 (9th Cir. 2003), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), and applies only to regulations involving land use or prison conditions, *Guru Nanak*, 456 F.3d at 986; *see* 42 U.S.C. § 2000cc–1. In the land-use context, RLUIPA prohibits the government from imposing a "substantial burden" on a person's or religious institution's "religious exercise" unless the burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1).

It remains an open question in our circuit whether RLUIPA's substantial-burden inquiry is a question of law. At least three circuits have weighed in on this issue. In *Roman Catholic Bishop of Springfield v. City of Springfield*, the First Circuit cited two reasons for concluding that the substantial-burden inquiry is a legal question. 724 F.3d 78, 93 (1st Cir. 2013). First, "the corollary question of whether the government's interest is compelling is generally treated as a question of law." *Id.* Second, appellate courts are required to "conduct an independent review of the evidence" when considering challenges under the First

Amendment Free Speech Clause "in order to safeguard precious First Amendment liberties." *Id.* at 93–94 (internal quotation marks and citation omitted). And RLUIPA claims "are corollaries of First Amendment Free Exercise claims." *Id.* at 94. The Sixth Circuit came to the same conclusion, relying on the reasoning of *Roman Catholic Bishop of Springfield*. *See Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1001 (6th Cir. 2017). And finally, the Seventh Circuit has addressed the issue, although not conclusively. The Seventh Circuit "assum[ed]" without deciding that the determination is a question of fact while noting, at the time, that the Court could not "find a reported opinion that addresses the question." *World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009).

We are persuaded by the reasons cited by the First and Sixth Circuits. Of course, RLUIPA's substantial-burden inquiry often involves factual considerations, *see New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 602 (9th Cir. 2022) (explaining that "our approach to determining the presence or absence of a substantial burden is to look to the totality of the circumstances"), and material disputes of fact can be resolved appropriately by a jury, *see Morales v. Fry*, 873 F.3d 817, 826 (9th Cir. 2017) (explaining that disputed material facts can be submitted to the jury though special interrogatories but the ultimate legal question of whether a right is clearly established is "a question reserved for the court"). But because the ultimate question of whether a land use regulation substantially burdens an individual's or entity's religious exercise involves weighing many factors, considering legal concepts, and "exercis[ing] judgment about the values that animate legal principles," *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc), *abrogated in part*

on other grounds as recognized by Est. of Merchant v. Comm'r, 947 F.2d 1390, 1392–93 (9th Cir. 1991), the inquiry is best suited for the court, rather than the jury. This is especially true given that we are "[i]n the constitutional realm" and "marking out the limits of [a] standard." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018) (alteration in original) (internal quotation marks and citation omitted).

We therefore join the First and Sixth Circuits and conclude that whether a land use regulation imposes a substantial burden on a party's exercise of religion under RLUIPA is a question of law for the court to decide. Thus, it was error for the district court to send this question to the jury.

C. Substantial Burden

The district court's error in sending the substantial-burden issue to the jury is harmless "if the jury's verdict is consistent with the required legal outcome." *Ohio House, LLC v. City of Costa Mesa*, 122 F.4th 1097, 1116 (9th Cir. 2024); *see also Minneapolis & Saint Louis Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 152 (1886) ("The submission of a question of law to the jury is no ground of exception, if they decide it aright."). Therefore, we must consider whether the County's denial of Plaintiffs' special use permit substantially burdened their religious exercise as a matter of law.

RLUIPA applies "if the challenged government action involves 'individualized assessments of the proposed uses for the property involved.'" *New Harvest*, 29 F.4th at 601 (quoting 42 U.S.C.§ 2000cc(a)(2)(C)). As an initial matter, neither party disputes that the County's zoning scheme involves an individualized assessment

and, thus, that RLUIPA governs the County's actions in this case.

To establish a RLUIPA violation, Plaintiffs have the burden of demonstrating that the challenged government practice substantially burdens their exercise of religion. 42 U.S.C. § 2000cc-2(b). A land use regulation imposes a substantial burden when it is "oppressive to a significantly great extent. That is, a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (internal quotation marks and citation omitted). We consider "the totality of the circumstances," including, but not limited to, whether the County's reasons for denying the special use permit were arbitrary and could apply to Plaintiffs' future applications; whether Plaintiffs have ready alternatives or whether those alternatives would require "substantial uncertainty delay, or expense"; whether Plaintiffs were precluded from other locations in the county; and whether Plaintiffs imposed the burden upon themselves. *New Harvest*, 29 F.4th at 602. Looking at the totality of the circumstances, we conclude as a matter of law that the County did not impose a substantial burden on Plaintiffs.

Under Hawai'i law, agricultural land is limited to certain uses listed in Hawai'i Revised Statutes section 205-4.5. For uses that fall outside that list, section 205-6 allows the county planning commission to grant special use permits for "certain unusual and reasonable uses." Haw. Rev. Stat. § 205-6(a). The planning commission considers several guidelines when evaluating an application for a special use permit, such as whether the use is "contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS,

and the rules of the commission" and whether "[t]he proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection." HAR §§ 15-15-95(c)(1), (3). When the Commission denied Plaintiffs' second special-use-permit application, it noted that the proposed uses would increase traffic and burden public agencies. The Commission also noted safety concerns for drivers and pedestrians on Haumana Road.

Haumana Road is a narrow road, between eleven and eighteen feet wide at different parts. In contrast, the average rural or agricultural road is about twenty-two feet wide. Haumana Road contains no streetlights, no sidewalks, no shoulder, and no lane markings. And in certain places, two cars cannot pass each other unless one pulls off the road.

The Commission found compelling the testimony of several nearby property owners on Haumana Road, who expressed concerns about pedestrian safety. Residents testified that children regularly walk home from school on the road and that the road has several blind turns, which pose a safety issue. Other residents noted concerns about flooding on the road during storms that made the road difficult to pass, although Plaintiffs challenge the severity and frequency of such flooding.

Given the conditions of Haumana Road, the County's concerns about traffic and road safety are well supported in the record and are not arbitrary. *New Harvest*, 29 F.4th at 602. Moreover, the County's reasons for denying the permit have been consistent, and the County has not exhibited "conflicting rationalizations for repeated denials." *Id.* at 603.

It is also undisputed that Plaintiffs were not "precluded from using other sites in the [County]." *Id.* Plaintiffs did not attempt to relocate, nor is there evidence that Plaintiffs even considered other locations, despite being aware of the zoning restrictions and the remoteness of the land. In fact, Honig testified that, when he bought the land in 1994, he was looking specifically for agricultural land. After acquiring the land, he began building immediately, without the required permits. For years, Plaintiffs continued to use the property without complying with the permitting requirements.

Plaintiffs' conduct starkly contrasts that of the religious organization in *Guru Nanak*, where we found a substantial burden on the organization's religious exercise. 456 F.3d at 989–90. In that case, the religious organization, Guru Nanak, first tried to establish a temple in a residential district. *Id.* at 989. When its application was denied, the county indicated that a reason for the denial was that the potential noise and traffic would bother other residents. *Id.* Guru Nanak was therefore discouraged from "locat[ing] its temple in higher density districts." *Id.* The organization then proposed a smaller temple in an agricultural area but was still denied. *Id.* at 990. This time, the county stated "that the temple would contribute to 'leapfrog development,'" a line of reasoning that could effectively be used to deny all churches from accessing the land. *Id.* The county's denials in that case thus significantly narrowed "the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels" and made it uncertain whether the county would approve its application even if it relocated again. *Id.* at 992.

Unlike Guru Nanak, Plaintiffs have not considered other sites in the County. Instead, without a permit,

Honig immediately began developing the land after he purchased it. Plaintiffs' "wholesale failure of proof concerning available alternatives is more significant because [they] purchased [land] that [they] knew at the time was subject to unique zoning restrictions," which would limit their ability to establish a church or host large groups for religious activities. *New Harvest*, 29 F.4th at 604. Moreover, the County's reasons for denying Plaintiffs' special-use permits have been consistent and relate to safety concerns that are not arbitrary and have not "lessened the possibility that [Plaintiffs] could find a suitable property" elsewhere. *Guru Nanak*, 456 F.3d at 992. Because the County's actions have not been significantly oppressive, were not arbitrary, and have not "lessened the prospect of [Plaintiffs] being able to construct a [church] in the future," *id.*, the County has not imposed a substantial burden on Plaintiffs' religious exercise.

III. CONCLUSION

Juries serve an indispensable fact-finding function that is critical to our system of justice. But when certain factual determinations enter "the realm of a legal rule," particularly when constitutional liberties are involved, the judge rather than the jury is better suited to exercise its judgment. *Bose Corp.*, 466 U.S. at 501 n.17. Because the substantial-burden inquiry involves defining the contours of a legal principle and implicates a constitutional right, we conclude that it is a question of law for the court to decide. Despite the district court's error in sending the RLUIPA substantial-burden question to the jury, we conclude that "the jury's verdict is consistent with the required legal outcome," *Ohio House*, 122 F.4th at 1116, and therefore AFFIRM the judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-3453
D.C. No. 1:14-cv-00535-SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawai'i nonprofit corporation; FREDRICK R. HONIG,

Plaintiffs - Appellants,

v.

COUNTY OF MAUI; STATE OF HAWAI'I,

Defendants - Appellees,

and

MAUI PLANNING COMMISSION,

Defendant.

No. 23-3633
D.C. No. 1:14-cv-00535-SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawai'i nonprofit corporation; FREDRICK R. HONIG,

Plaintiffs - Appellees,

v.

COUNTY OF MAUI,

Defendant - Appellant.

No. 24-2096
D.C. No. 1:14-cv-00535-SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawai'i nonprofit corporation; FREDRICK R. HONIG,

Plaintiffs - Appellants,

v.

COUNTY OF MAUI,

Defendant - Appellee.

Appeal from the United States District Court
for the District of Hawai'i
Susan O. Mollway, Presiding

MEMORANDUM[*]

Argued and Submitted October 7, 2024 as to
Nos. 23-3453, 23-3633
Submitted October 7, 2024 as to 24-2096[**]
Honolulu, Hawai'i

Before: MURGUIA, Chief Judge, and GRABER and MENDOZA, Circuit Judges.

Fredrick Honig and his non-profit entity, Spirit of Aloha Temple, (collectively, "Plaintiffs") applied for a special use permit to conduct religious activities on land zoned for agricultural use. After the Maui Planning Commission ("Commission") denied their application, Plaintiffs sued.

[*] 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).

The facts of this case, and its complicated procedural history, are outlined in the concurrently filed opinion. This memorandum addresses the following issues: (1) the severability of HAR section 15-15-95(c)(2) from the remainder of the provision; (2) the district court's partial denial of summary judgment on Plaintiffs' federal and state Free Exercise Clause claims; (3) preclusion of Plaintiffs' argument that Spirit of Aloha Temple is a religious assembly or institution under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"); (4) the exclusion of Marilyn Niwao's expert testimony; and (5) the district court's award of costs to the County of Maui ("County").

We have jurisdiction under 28 U.S.C. § 1291 and review a district court's ruling on summary judgment de novo. *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008). We determine, "viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1065–66 (9th Cir. 2011) (internal quotation marks and citation omitted). We review for abuse of discretion both the district court's decision to exclude expert testimony, *United States v. Redlightning*, 624 F.3d 1090, 1110 (9th Cir. 2010), and the district court's award of costs, *Vazquez v. County of Kern*, 949 F.3d 1153, 1159 (9th Cir. 2020).

We dismiss Plaintiffs' appeal with respect to their Free Exercise claims. Regarding the remaining issues, we affirm.

1. Hawai‘i Administrative Rules section 15-15-95(c)(2) is severable from the remainder of the guidelines. Severability is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per

curiam). Under Hawai'i law, when a court holds that a provision of law is unconstitutional, the court must retain the remaining provisions that are "(1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with [the Legislature's] basic objectives in enacting the statute." *State v. Tran*, 378 P.3d 1014, 1020 (Haw. Ct. App. 2016) (alteration in original) (internal quotation marks and citation omitted).

Here, each remaining guideline is separate and operates independently, as the Commission may rely on any of the guidelines when making its determination. *See Neighborhood Bd. No. 24 v. State Land Use Comm'n*, 639 P.2d 1097, 1101 (Haw. 1982) (noting that it was "unnecessary" to review all five guidelines when the proposal "fail[ed] to comply with the first . . . requirement"). Moreover, the provisions of HAR Chapter 15 are intended to "be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawai'i." HAR § 15-15-01. The special-permitting scheme is meant to consider what are the local effects and whether a use will change the "essential character of the district," *Neighborhood Bd. No. 24*, 639 P.2d at 1102, and the remaining guidelines together still achieve this purpose, *see* HAR § 15-15-95(c)(1) (considering whether the proposed use would "be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission"); *id.* § 15-15-95(c)(3) (considering whether a proposed use would "unreasonably burden public agencies").

2. We dismiss Plaintiffs' appeal with respect to the district court's denial of partial summary judgment on

their Free Exercise claims. We will not review "a denial of a summary judgment motion after a full trial on the merits," unless "the district court denie[d] [the motion] on the basis of a question of law that would have negated the need for a trial." *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004). Here, the district court premised its decision on then-extant questions of fact. *Spirit of Aloha Temple v. County of Maui*, No. CV 14-00535 SOM/RLP, 2023 WL 5178248, at *16–17 (D. Haw. Aug. 11, 2023). Even assuming the district court's precise line of reasoning was legally flawed, a trial would have remained necessary because a genuine issue of material fact existed as to whether the County burdened—to any degree[1]—Plaintiffs' religious exercise.[2] *See Shawmut Bank, N.A. v. Kress Assocs.*, 33 F.3d 1477,

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[1] Plaintiffs argue that "the Supreme Court has recently made clear" that Plaintiffs need not demonstrate a "substantial burden" with respect to their Free Exercise claims. Regardless of whether this is true, Plaintiffs must, at a minimum, establish that their religious exercise was burdened. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) ("Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice . . . .").

[2] Plaintiffs sought a special use permit to conduct "church activities." The proposed activities included "[a] [l]iving [c]lassroom" with garden tours, weekly church services, Hawaiian cultural events, seminars on plant-based nutrition, and "[s]piritual commitment[] ceremonies[,] including weddings." The County provided evidence that Plaintiffs were able to engage in these practices without a special use permit. Although Plaintiffs were fined in 2012 for conducting "commercial weddings," whether those specific weddings were related to Plaintiffs' religious exercise is unclear. Viewing that evidence in the light most favorable to the County, material issues of fact existed as to what specific religious practices or activities, if any, were impinged upon.

1484 (9th Cir. 1994) (stating that we may affirm a court's denial of summary judgment "on any ground supported by the record").

3. Spirit of Aloha Temple is not precluded from asserting that it is a religious assembly or institution under RLUIPA. During the trial for the RLUIPA equal terms claim, the advisory jury found that Plaintiffs had not proved that Spirit of Aloha Temple was a religious assembly or institution, but also that the County had not proved that it was *not* a religious assembly or institution. Because the County bore the burden of proving that Spirit of Aloha Temple is not a religious assembly or institution, *see* 42 U.S.C. § 2000cc-2(b), Spirit of Aloha Temple is not precluded from asserting that it is a religious assembly or institution under RLUIPA.

4. The district court did not abuse its discretion in excluding the expert testimony of Marilyn Niwao. Whether Spirit of Aloha Temple's tax-exempt status could be revoked, given the evidence of private inurement to Honig, is irrelevant to whether Spirit of Aloha Temple is a religious assembly or institution or otherwise is exercising religious rights.

5. Lastly, the district court properly considered Plaintiffs' objections to the costs award and did not abuse its discretion in awarding costs to the County. Rule 54(d)(1) of the Federal Rules of Civil Procedure "creates a presumption in favor of awarding costs to prevailing parties" and Plaintiffs did not overcome this presumption or establish a clear reason to deny costs. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999); Fed. R. Civ. P. 54(d)(1).

AFFIRMED IN PART and DISMISSED IN PART.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 14-00535 SOM/RLP

SPIRIT OF ALOHA TEMPLE AND FREDRICK R. HONIG,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON THE ISSUE OF WHETHER THE COUNTY OF MAUI'S DENIAL OF THE SPECIAL USE PERMIT SATISFIED STRICT SCRUTINY WITH RESPECT TO COUNTS I, VI, AND VIII, BUT DENYING SUMMARY JUDGMENT ON ALL REMAINING ISSUES AND CLAIMS

I. INTRODUCTION

Before the court are dueling requests for summary judgment. This case involves claims of religious discrimination in the denial of a Special Use Permit relating to purported religious uses of agriculturally zoned land on Maui. Plaintiffs seek summary judgment on three counts–Counts I, VI, and VIII. The County of Maui, arguing that Plaintiffs Frederick R. Honig and Spirit of Aloha Temple are actually seeking a permit to conduct a commercial wedding business, has filed a counter motion for summary judgment with

respect to Counts I, VI, and VIII, as well as a separate summary judgment motion on all remaining counts (Counts I, II, VI, VII, VIII, and IX). The County says that its actions satisfy strict scrutiny such that it is not liable on any of Plaintiffs' claims.

This court disagrees with the County on the strict scrutiny issue, determining that the County's actions do not satisfy strict scrutiny in the context of Counts I, VI, and VIII. This court therefore grants summary judgment to Plaintiffs on that issue for those counts, while finding that questions of fact preclude summary judgment on other elements of Counts I, VI, and VIII, and also preclude the granting of summary judgment to the County on any matter the County moves on.

II. BACKGROUND SUMMARY.

The factual background for this case was set forth in the Ninth Circuit's Opinion of September 22, 2022. *See* 49 F.4th 1180, 1184-87 (9th Cir. 2022). That background is incorporated by reference and is summarized and supplemented only as necessary.

In 1994, Honig bought land on Maui zoned for agricultural use. Honig then developed that land without having obtained proper permits. For years, Honig and another entity that he controlled, Well Being International Inc., operated a commercial business on the property. In 2005, Honig leased the property to Well Being International. Honig was repeatedly notified that he needed to obtain permits, but he continued his unpermitted activities. *See id.*

In 2007, Honig formed Spirit of Aloha Temple, a nonprofit organization that is a branch of the Integral Yoga movement. Integral Yoga is a modern branch of the ancient Hindu yogic tradition. Although the property was leased by Honig to Well Being

International at the time, it was Spirit of Aloha Temple that applied for a Special Use Permit for a "church, church[-]operated bed and breakfast establishment, weddings, special events, day seminars, and helicopter landing pad." Those uses were not permitted on the agriculturally zoned land without a Special Use Permit. The permit application was denied in 2010. *See id.*

In December 2011, Honig leased the property to Spirit of Aloha Temple. In November 2012, Spirit of Aloha Temple submitted a second application for a Special Use Permit to build a church and hold religious events on the agriculturally zoned land, uses not allowed without a Special Use Permit. *See id.* After the second requested Special Use Permit was denied, Plaintiffs filed this action, asserting the following:

> Count I—Substantial Burden on the exercise of religion in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C § 2000cc(a);
>
> Count II—RLUIPA Nondiscrimination violation of 42 U.S.C. § 2000cc(b)(2);
>
> Count III—No claim asserted (a presumed numbering error);
>
> Count IV—Equal Terms violation of RLUIPA;
>
> Count V—-First Amendment prior restraint violation;
>
> Count VI—First Amendment free exercise violation;
>
> Count VII—-Fourteenth Amendment equal protection violation;
>
> Count VIII—-Hawaii state constitutional

> violation of free exercise of religion clause of article I, section 4; and
>
> Count IX——Hawaii state constitutional violation of equal protection clause of article I, section 5; and
>
> Count X—appeal of County agency denial of Special Use Permit.

See Complaint, ECF No. 1.

This case has a lengthy history. On January 27, 2016, the court dismissed Count X without prejudice to Plaintiffs' pursuit of their appeal of the agency decision in state court. The court stayed this case with respect to Counts I through IX pending that appeal. *See* ECF No. 109. The stay was lifted on February 13, 2017, after the state court affirmed the administrative denial of the Special Use Permit. *See* ECF Nos. 114, 116.

In July 2018, the court denied summary judgment motions filed by both parties. *See* 322 F. Supp. 3d 1051 (D. Haw. 2018). In relevant part, this court ruled that, with respect to the RLUIPA substantial burden claim asserted in Count I, a genuine issue of material fact existed as to whether the County of Maui's denial of the requested Special Use Permit imposed a substantial burden on Plaintiffs' exercise of their religion. In particular, the court ruled that there was a question of fact as to whether, when Plaintiffs obtained an interest in the land, they did or did not have a reasonable expectation that they could build a religious institution there. *See id.* at 1065. The court additionally ruled that there was a question of fact as to whether the County of Maui used the least restrictive means in denying Plaintiffs' Special Use Permit application. *See id.*

On April 23, 2019, the court granted partial summary judgment with respect to Counts I, II, IV, VI, VII, VIII, and IX, ruling that Plaintiffs were asserting only "as applied" challenges in those counts. The merits of those "as applied" challenges were left for further adjudication. *See* 384 F. Supp. 3d 1231, 1234 (D. Haw. 2019). The court also granted summary judgment against Plaintiffs with respect to Count V, rejecting Plaintiffs' contention that § 15-15-95(c) of the Hawaii Administrative Rules amounted to a prior restraint. *Id.* at 1249-55. In so ruling, this court expressly upheld the validity of § 15-15-95(c)(3). Although Plaintiffs also challenged the constitutionality of § 15-15-95(c)(2), this court declined to address that challenge because the permit denial could rest on a single subsection, such as § 15-15-95(c)(3), which the court found valid.

On June 22, 2019, the court granted summary judgment against Plaintiffs with respect to all remaining claims except for Count IV, ruling that the Maui Planning Commission's fact finding and decision were entitled to collateral estoppel effect. *See* 409 F. Supp. 3d 889 (D. Haw. 2019).

At trial in 2019, the County of Maui prevailed on the lone count remaining at the time, Count IV. *See* Verdict Form, ECF No. 392. The advisory jury[1] determined that Plaintiffs had failed to prove by a preponderance of the evidence that Spirit of Aloha Temple was a religious assembly or institution and that Defendants had similarly failed to prove by a preponderance of the evidence that Spirit of Aloha Temple was not a

[1] The jury was advisory because Count IV sought equitable relief under RLUIPA. Although only Count IV was tried, a jury had been demanded when jury-eligible claims were asserted.

religious assembly or institution. The advisory jury found that Spirit of Aloha Temple failed to show that it had been treated on less than equal terms compared to the County's treatment of a similarly situated nonreligious entity, and that, in fact, the County had shown that there was no such unequal treatment. *Id.* The court entered final judgment in favor of the County of Maui as a result.

Plaintiffs did not challenge the judgment in favor of County of Maui with respect to Count IV, but they did appeal this court's summary judgment rulings. On September 22, 2022, the Ninth Circuit reversed in part. With respect to the facial challenge to the land use ordinance asserted in Count V, the Ninth Circuit ruled that Plaintiffs succeeded on their prior restraint claim because part of the ordinance, § 15-15-95(c)(2), granted unbridled discretion to the Maui Planning Commission in allowing the commission to examine adverse effects on surrounding property. *See* 49 F.4th 1180, 1192-93 (9th Cir. 2022). This was a provision that this court had declined to address. The Ninth Circuit left it to this court to determine whether that unconstitutional section could be severed from the rest of the ordinance. *See id.* at 1192, n.5. The Ninth Circuit also ruled that this court had erred in giving collateral estoppel effect to the planning commission's decision. *Id.* at 1193-95.

On remand, this court, in light of the Ninth Circuit's ruling on the matter, ruled that § 15-15-95(c)(2) could not be applied. This court also ruled that § 15-15-95(c)(2) was severable from the rest of § 15-15-95(c) and that the Maui Planning Commission could rely on § 15-15-95(c)(3) in denying the requested Special Use Permit. Because the requested permit could be denied if any part of § 15-15-95(c) was not satisfied, the court

granted summary judgment against Plaintiffs with respect to the remainder of the prior restraint claim in Count V. 2023 WL 2752790, at *12 (D. Haw. Mar. 31, 2023). Issues raised by that grant of summary judgment are on appeal before the Ninth Circuit in the context of this court's denial of Plaintiffs' motion for preliminary injunction raising the same issues.

In light of this procedural history, Counts I, II, VI, VII, VIII, and IX remain for adjudication. Before the court is a motion for partial summary judgment filed by Plaintiffs with respect to Counts I (RLUIPA substantial burden), VI (Free Exercise Clause of First Amendment), and VIII (free exercise clause under article I, section 4, of the Hawaii constitution). Plaintiffs are not seeking partial summary judgment with respect to the discrimination claims asserted in Counts II (RLUIPA nondiscrimination), VII (Equal Protection Clause of the 14th Amendment), and IX (equal protection under the Hawaii constitution).

Also before the court is the County of Maui's motion for summary judgment with respect to all remaining counts (Counts I, II, VI, VII, VIII, and IX) and a counter motion by the County in response to Plaintiffs' motion on Counts I, VI, and VIII.

With respect to Counts I, VI, and VIII, this court rules that the denial of the requested Special Use Permit fails strict scrutiny analysis because it was neither narrowly tailored nor the least restrictive means of furthering a compelling governmental interest. This ruling addresses only one issue relevant to Counts I, VI, and VIII. As detailed later in this order, questions of fact preclude summary judgment for either party with respect to other issues raised by Counts I, VI, and VIII. With respect to Counts II, VII,

and IX, summary judgment is denied in light of factual issues.

III. SUMMARY JUDGMENT STANDARD.

This court set forth the summary judgment standard in an order filed on July 20, 2018, in this case. *See* 322 F. Supp. 3d at 1065. That standard is incorporated here by reference.

IV. ANALYSIS.

A. Strict Scrutiny Applies to All Claims Now Before This Court Except Count II.

Plaintiffs seek summary judgment in their favor with respect to Counts I, VI, and VIII, arguing that the denial of the requested permit fails to survive strict scrutiny. The County seeks summary judgment on those counts as well as on Counts II, VII, and IX.

The exact contours of judicial scrutiny of government intrusions on constitutional rights have been articulated in different terms based on the claim asserted and the facts of the case. For example, in *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 171 (2015), the Supreme Court examined content-based restrictions on speech, stating that, to survive strict scrutiny, the government must prove that the restrictions further a compelling interest that is narrowly tailored to achieve that interest. Content-based regulation of constitutionally protected speech must use the least restrictive means of furthering the articulated compelling interest. *See Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998). When government intrusion on speech is content-neutral, however, the analysis examines only whether the intrusion is narrowly tailored to serve the government's legitimate interests, but the intrusion need not be the least restrictive or

least intrusive means of doing so. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). These Supreme Court cases, all involving government intrusion on protected speech, demonstrate the need to examine the level of scrutiny with respect to each claim asserted. The court therefore begins by examining what level of judicial scrutiny is required with respect to each claim now before this court.

The three counts on which both Plaintiffs and the County move for summary judgment–Counts I, VI, and VIII—trigger strict scrutiny.

With respect to the RLUIPA substantial burden claim asserted in Count I for a violation of 42 U.S.C. § 2000cc(a)(1), Congress has placed the burden on a governmental entity to prove that a land use regulation that imposes a substantial burden on the religious exercise of a person "(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest."

In requiring strict scrutiny, the RLUIPA substantial burden claim in Count I contrasts with the RLUIPA equal terms claim asserted in Count IV under 42 U.S.C. § 2000cc(b)(1). Count IV, the claim tried to an advisory jury, did not require strict scrutiny. The Ninth Circuit says that RLUIPA calls for an examination of a "compelling governmental interest" and "least restrictive means" only with respect to a RLUIPA substantial burden claim under 42 U.S.C. § 2000cc(a)(1), such as the claim in Count I. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011). The RLUIPA equal terms claim in Count IV and the RLUIPA substantial burden claim in Count I arise under different statutory

subsections. Thus, at trial, Count IV's RLUIPA equal terms claim focused on equality of treatment. *See id.*

The court looks next at the alleged violation of the Free Exercise Clause of the First Amendment asserted in Count VI. A plaintiff bringing such a claim must show that a government entity has burdened the plaintiff's sincere religious practice. Once such a showing is made, the government may escape liability "by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421–22 (2022). In the context of a free exercise claim, the Supreme Court has also stated that a government may justify an intrusion on religious liberty "by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

Plaintiffs' free exercise claim asserted in Count VIII under the Hawaii constitution, article I, section 4, applies a similar standard. Under Hawaii law, when the government "imposes a burden upon the free exercise of religion . . . , the regulation must be justified with a compelling government interest, and the government has the burden of demonstrating that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *State v. Armitage*, 132 Haw. 36, 59, 319 P.3d 1044, 1067 (2014) (quotation marks and citation omitted).

Only the County (not Plaintiffs) moves for summary judgment on Counts II, VII, and IX. Of those three counts, Counts VII and IX trigger strict scrutiny, while Count II does not.

The RLUIPA discrimination claim asserted in Count II asserts a violation of 42 U.S.C. § 2000cc(b)(2). That provision is located in the same subsection that addresses a RLUIPA equal terms claim. Because the Ninth Circuit does not apply strict scrutiny to a RLUIPA equal terms claim, *see Centro Familiar Cristiano Buenas Nuevas*, 651 F.3d at 1172, it appears that the Ninth Circuit would not apply strict scrutiny to a RLUIPA discrimination claim. Instead, the analysis should focus on whether a land use regulation is discriminating "against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). Of course, whether a land use regulation is narrowly tailored to further a compelling governmental interest may inform any decision with respect to whether the regulation is discriminating based on the basis of religion or religious denomination.

With respect to the alleged violation of the Equal Protection Clause of the Fourteenth Amendment asserted in Count VII, a government's unequal treatment based on religion must meet strict scrutiny. That is, government classifications based on religion "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Al Saud v. Days*, 50 F.4th 705, 709–10 (9th Cir. 2022) ("The Equal Protection Clause prohibits the government from classifying people based on suspect classes, unless the classification is narrowly tailored to satisfy a compelling governmental interest (i.e., the government's action passes strict scrutiny).").

The equal protection claim under the Hawaii constitution, article I, section 5, asserted in Count IX applies a similar analysis. *See Baehr v. Lewin*, 74 Haw. 530, 580, 852 P.2d 44, 67 (1993), *abrogated on other*

grounds by Obergefell v. Hodges, 576 U.S. 644 (2015). In *Baehr*, the Hawaii Supreme Court ruled that, with respect to suspect classifications for purposes of equal protection analysis under article I, section 5, of the Hawaii constitution, strict scrutiny requires an analysis of whether a classification is justified by compelling state interests and narrowly drawn to avoid unnecessary abridgments of constitutional rights. *Id.*

Under any formulation of the strict scrutiny analysis, this court agrees with Plaintiffs that, with respect to the three counts Plaintiffs move on (Counts I, VI, and VIII), the denial of the requested Special Use Permit does not survive strict scrutiny. The denial was neither narrowly tailored nor the least restrictive means of furthering any compelling governmental interest. This court therefore grants partial summary judgment in favor of Plaintiffs limited to the strict scrutiny issue raised by those counts. As described below, however, genuine issues of fact with respect to other matters raised by Counts I, VI, and VIII preclude summary judgment in Plaintiffs' favor on the entirety of those three counts.

In opposing Plaintiffs' motion, the County of Maui repeats an earlier argument that the denial of Plaintiffs' requested Special Use permit satisfied strict scrutiny. In 2018, this court ruled that it could not "determine that, as a matter of law, the County of Maui used the least restrictive means in denying the permit application. Whether viable less restrictive means were available is yet another question of fact." 322 F.3d at 1065-66. In 2019, trial on those issues of fact was obviated by this court's determination that the Maui Planning Commission's factual and legal rulings with respect to the denial of the requested Special Use

Permit (ECF No. 513-6), including its rulings with respect to strict scrutiny, had collateral estoppel effect. *See* 409 F. Supp. 3d 889, 905 (D. Haw. 2019). The Maui Planning Commission had determined that "there were health and safety issues implicated by the likely significant increase in traffic attributable to the uses proposed by the Application" and that "inclement weather would increase the likelihood of accidents and human injuries or death." ECF No. 513-6, PageID # 12926. The Maui Planning Commission, despite having a recommendation by the Maui Planning Department (ECF No. 511-3) to the contrary, ruled "that these compelling public health and safety issues could not be adequately addressed by the implementation of any permit condition or use restriction." *Id.* In addition to ruling that the commission's findings and decision had preclusive effect, this court noted that it would not hesitate to recognize that protecting the public was a compelling governmental interest. *See* 409 F. Supp. 4th at 905.

On appeal, the Ninth Circuit ruled that this court had erred in giving collateral estoppel effect to the Maui Planning Commission's decision. 49 F.4th 1180, 1193-95 (9th Cir. 2022). While the County of Maui again seeks to have this court treat the Maui Planning Commission's factual findings as having preclusive effect, that approach would flout the Ninth Circuit's ruling. The court gives no preclusive effect to those findings. This, of course, still allows the court to consider the underlying undisputed facts.

The County of Maui has identified two compelling public safety interests that it says justify the denial of Plaintiffs' Special Use Permit application. First, the County points to the Maui Planning Commission's

identification of road safety as a compelling interest justifying the denial of the requested permit:

> The Commission finds that there is evidence of record that the proposed uses expressed in this Application should they be approved would increase vehicular traffic on Haumana Road, which is narrow, winding, one-lane in areas, and prone to flooding in inclement weather. The Commission finds that Haumana Road is regularly used by pedestrians, including children who use the road to access the bus stop at the top of the road. The commission finds that granting the Application would adversely affect the health and safety of residents who use the roadway, including endangering human life. The Commission finds that the health and safety of the residents' and public's use of Haumana Road is a compelling government interest and that there is no less restrictive means of ensuring the public's safety while granting the uses requested in the Application.

ECF No. 185-9, PageID # 3288-89.

Second, the County argues that the lack of sufficient wastewater facilities and potable water also amounts to a public health concern qualifying as a compelling interest. Water concerns were not cited by the Maui Planning Commission as a basis for the second permit denial, although the lack of wastewater facilities and potable water were raised before the commission. This court raised with the parties the issue of whether, during the present litigation, the County could seek the same result it obtained from the Maui Planning Commission but on water safety grounds not ultimately relied on by the commission. The matter not

having been thoroughly briefed or argued by the parties, the court is not in a position to rule on that issue in this order. Possibly, because the commission's findings and decision have no preclusive effect in this lawsuit, the County may add water concerns. For purposes of this order, it does not matter, as with or without water concerns, in the context of the claims that Plaintiffs seek summary judgment on, the County does not satisfy strict scrutiny.

In short, even if the court deems road safety and the lack of wastewater facilities and potable water to indeed be compelling interests identified by the County, the undisputed facts demonstrate that the denial of the permit application was not narrowly tailored or the least restrictive means of furthering those interests.

Since this court's earlier rulings, this case has gone to trial on Plaintiffs' RLUIPA equal terms claim asserted in Count IV. Thus, this court now has a different record than when it earlier denied summary judgment motions with respect to strict scrutiny. While the trial was on a different claim, the evidence at trial unequivocally demonstrated that the denial of the requested Special Use Permit was not narrowly tailored or the least restrictive means of furthering a compelling governmental interest. At trial, the Maui Planning Department's recommendation to the Maui Planning Commission was discussed at length. For example, Randall Okaneku, a licensed civil engineer with a concentration in traffic engineering, testified at trial. *See* ECF No. 436, PageID #s 137-38.[2] The court qualified Okaneku as an expert in the field of traffic engineering, including traffic safety. *Id.*, PageID # 9609.

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[2] Plaintiffs attach excerpts of this testimony as ECF No. 518-3.

Okaneku testified about the Maui Planning Department's recommendation. *See id.*, PageID #s 9703-09. In its proposed condition No. 12, the department had stated:

> That in order to reduce the amount of traffic on Haumana Road [, where Plaintiffs' property was located, Plaintiffs] . . . shall use a shuttle system (vans and limousines) to bring event guests to and from the property for all events that will have more than 25 persons in attendance. Every effort should be taken to shuttle or carpool event guests to all activities. Shuttles shall use privately owned facilities, such as hotels, for their operations such as drop-offs and pick-ups.

ECF No. 511-3, PageID # 12440. That recommendation was received as part of Plaintiffs' Exhibit 8 at trial. *See* ECF No. 435, PageID # 9286-87.

The County of Maui argues that any discussion of "reducing" traffic makes no sense because any additional people going to the property would actually increase traffic on Haumana Road. *See* ECF No. 534, PageID # 14870-71. The County misconstrues the concept of "reducing" traffic as meaning avoiding all traffic over and above existing traffic. But the Maui Planning Department was clearly looking at controlling the additional traffic that would result from Plaintiffs' proposed activities. The Maui Planning Department was considering measures to limit vehicles traveling to and from Plaintiffs' property via Haumana Road. Rather than allowing every person visiting the property to drive a private vehicle, the department suggested that guests carpool and that shuttles be used. Okaneku opined that "these mitigation measures would minimize the amount of

traffic increase on Haumana Road" caused by granting Plaintiffs' requested Special Use Permit and that these conditions were reasonable. ECF No. 437, PageID #s 9706, 9708.

In addition, Okaneku testified that he would also recommend the installation of pullouts so that a vehicle could pull over to let another vehicle driving in the opposite direction pass, as well as appropriate signs saying that cars should yield to oncoming traffic. *Id.*, PageID # 9709. Installing pullouts may well be difficult; the County points out that they would have to be installed on private property owned by Honig's neighbors. *See* ECF No. 534, PageID # 14874. Okeneku's lack of familiarity with the feasibility of his pullout suggestion goes to his credibility and familiarity with the conditions of the narrow road. But Okeneku's opinion that mitigation measures could minimize traffic and thereby reduce the danger arising from cars traveling on Haumana Road appears supported by the evidence in the record.

William Spence, the County of Maui planning director, testified at trial. *See* ECF Nos. 438, 439.[3] Spence also testified about the conditions that the Maui Planning Department was recommending with respect to the requested Special Use Permit. For example, the Maui Planning Department recommended in Condition # 7 that classes be limited to 24 attendees and to 4 sessions per week between 10 a.m. and 4 p.m. Similarly, church services were to be limited to 24 attendees once per week between 10 a.m. and 2 p.m. Church-related events such as weddings were to be limited to 40 attendees and 48 events per year, with no more than 4 in any month. Shuttles were to be used

[3] Plaintiffs attach excerpts of this testimony as ECF No. 518-6.

when events had 25 or more people. *See* ECF No. 511-3, PageID # 12438. Spence testified that these conditions would limit the activity on the property, which would, in turn, limit the volume of vehicles on Haumana Road. ECF No. 439, PageID #s 10105-06. The County's focus on the application's proposed number of attendees per month disregards the possible limitations that could be imposed as conditions of granting the Special Use Permit application. That is, the County focuses on the initial numbers of attendees proposed by the application, without truly discussing whether any conditions could be placed on those attendees to further any identified compelling interest. *See, e.g.,* ECF No. 534, PageID #s 14867-68. Spence specifically noted that the shuttle requirement would limit traffic on the road and thereby lessen traffic conflicts on it. *Id.*, PageID #s 10107, 10112. At trial, Honig testified that Plaintiffs had agreed to limit the number of attendees and to require the use of shuttles for events involving more than 25 people. *See* ECF No. 435, PageID #s 9290-93.

In addition to traffic safety concerns and conditions to reduce those concerns, Spence testified about health concerns and safety measures that could be implemented. For example, based on discussions with the Department of Health and the limitations of Plaintiffs' existing septic system, the Maui Planning Department recommended in Condition # 8 restrictions on the number of people attending events. This condition was to ensure that Plaintiffs' wastewater system remained functional such that it did not overflow and cause a health hazard. *See* ECF No. 439, PageID # 10108. Honig testified at trial that Plaintiffs had agreed to Condition # 8. *See* ECF No. 435, PageID #s 9294.

Spence also testified that, in recommended Condition # 10, the Maui Planning Department sought to limit food preparation on Plaintiffs' property. Spence testified that this condition was based on the Department of Health's concern that food might be washed with water or prepared in a kitchen that was not certified. ECF No. 439, PageID #s 10110-11. The State Department of Health, Safe Drinking Water Branch, had commented on Plaintiffs' Special Use Permit application that, with respect to catering events, caterers had to provide potable water for a hand sink and could not use water from the property given the quality of the water on the property. *See* ECF No. 183-9, PageID # 2902. This concern may have arisen because Honig appears to have "installed cesspools near drinking water wells." 49 F.4th at 1184. Additionally, the Maui Planning Department noted that the "availability of potable water on the site for event guests is highly restricted, requiring purified water from outside the property to be brought on site. Essentially no potable water for consumption by event attendees is available from the private water supply on property." ECF No. 511-3, PageID # 12410. The Planning Department's recommended Condition # 11 required Plaintiffs to test water from a well on Plaintiffs' property to make sure that it was safe to use.

To address concerns about public safety with respect to traveling on Haumana Road and the cleanliness of facilities on the property, Okaneku's and Spence's testimony and the Maui Planning Department's recommendations established that there were conditions that could have been imposed as prerequisites for the Special Use Permit that would have furthered the County's interest in public safety. Plaintiffs have indicated that they were and are "willing to comply with any reasonable conditions of approval for [their]

special use permit." Honig Decl. ¶ 44, ECF No. 511-4, PageID # 12819. Specifically, instead of denying the permit application because of concerns about the number of attendees driving on Haumana Road, the record establishes that limits on the number of attendees, carpools, and the required use of shuttles for events larger than 25 people, could control the number of people driving on the road and therefore mitigate road safety concerns. These conditions are precisely the kind of narrow tailoring required by strict scrutiny. While not having any additional drivers on the road would completely eliminate any road safety issue, the County has not established that precluding all additional drivers is the only way of furthering road safety. The Maui Planning Commission was clearly concerned with the safety of pedestrians on the road. But its conclusion that it needed to preclude any additional cars on the road was overbroad and unjustified by the record.

Similarly, the County fails to establish that precluding all attendees is the only way of furthering its concerns about the lack of wastewater facilities and potable water. To the contrary, the Maui Planning Department noted that Plaintiffs' wastewater facilities are sufficient to handle 40 people on the property for 6 hours. *See* ECF No. 511-3, PageID # 12410. Limiting the number of attendees could ensure that there would be no problem with the wastewater facilities. The Maui Planning Department also noted that potable water could be brought on site. *Id.* Thus, even though Plaintiffs may have resisted such a requirement, *see* ECF No. 183-13, PageID # 3001 (email from Honig demanding "our rights to operate as a Private Water System and as a 501c3 Church"), requiring potable water to be brought to the property until Plaintiffs demonstrated the safety of their well

water could have been a condition furthering public health concerns.

The narrowly tailored prong requires this court to "verify" that the government's action was "necessary" to achieve its identified interest. *See generally Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013) (stating, in examining an equal protection claim, "Narrow tailoring also requires a reviewing court to verify that it is 'necessary' for the university to use race to achieve the educational benefits of diversity."). Given the availability of conditions that would have furthered the County's identified interests, the County's outright denial of the permit was not narrowly tailored to advance those interests, as the outright denial of the permit was not "necessary" to achieve those interests.

Similarly, given the availability of conditions on the Special Use Permit that would have furthered the identified compelling interests, the outright denial of the Special Use Permit was not the least restrictive means of furthering those interests. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) ("The least-restrictive-means standard is exceptionally demanding," requiring the Government to demonstrate that it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases."); *see also Holt v. Hobbs*, 574 U.S. 352, 365 (2015) (stating that, with respect to the issue of the least restrictive means, "[i]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." (quotation marks and citation omitted)).

The County of Maui's mere consideration of or reference to alternatives does not satisfy the least

restrictive means requirement. *See* ECF No. 525, PageID # 14807. Instead, the uncontroverted facts before this court demonstrate that the outright denial of the requested permit was neither narrowly tailored nor the least restrictive means of furthering public safety, even assuming that public safety qualifies as a compelling government interest for purposes of the strict scrutiny analysis. Accordingly, the court grants Plaintiffs partial summary judgment on the strict scrutiny issue in the context of Counts I, VI, and VIII. The court rules that, in the context of Counts I, VI, and VIII, Plaintiffs establish that the denial of the requested Special Use Permit fails any applicable strict scrutiny analysis. The court stresses that this ruling affects only a portion of the matters Plaintiffs must prove to prevail on Counts I, VI, and VIII, as detailed later in this order.

B. Count I—Substantial Burden Under RLUIPA.

Both parties seek summary judgment with respect to Count I, which asserts that the County of Maui's imposition and implementation of land use regulations to deny Plaintiffs' requested Special Use Permit for "CHURCH ACTIVITIES" amounted to a substantial burden on Honig's and Spirit of Aloha Temple's religious exercise, in violation of 42 U.S.C. § 2000cc(a). That statutory provision states:

> (1) General rule
>
> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demon-

> strates that imposition of the burden on that person, assembly, or institution–
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C.A. § 2000cc(a).

The Ninth Circuit directs that RLUIPA substantial burden claims proceed in two sequential steps:

> First, the plaintiff must demonstrate that a government action has imposed a substantial burden on the plaintiff's religious exercise. Second, once the plaintiff has shown a substantial burden, the government must show that its action was "the least restrictive means" of "further[ing] a compelling governmental interest."

Int'l Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1066 (9th Cir. 2011); *see also New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 601 (9 Cir. 2022) (stating that only when a plaintiff proves that the denial of an application imposed a substantial burden on its religious exercise does the burden shift to the government to show that its denial was narrowly tailored to accomplish a compelling governmental interest); 42 U.S.C. § 2000cc-2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a . . . a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged

by the claim substantially burdens the plaintiff's exercise of religion.").

While the County of Maui has failed to show that the denial of the requested permit was narrowly tailored or was the least restrictive means of furthering a compelling governmental interest, that does not end the RLUIPA substantial burden inquiry. To succeed on their RLUIPA substantial burden claim, Plaintiffs must still establish that the challenged land use regulation imposed a substantial burden on their exercise of religion.[4] In adjudicating that issue, courts "examine the particular burden imposed by the implementation of the relevant zoning code on the claimant's religious exercise and determine, on the facts of each case, whether that burden is 'substantial.'" *Int'l Church of Foursquare Gospel*, 673 F.3d at 1066. "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . , not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015).

RLUIPA requires that it "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). It defines "religious exercise" as "includ[ing] any exercise of

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[4] The advisory verdict that determined that Spirit of Aloha Temple had failed to prove that it was a "religious assembly or institution" does not preclude Plaintiffs from maintaining their RLUIPA substantial burden claim, as RLUIPA prohibits "a substantial burden on the religious exercise of a person, including a religious assembly or institution." A plaintiff may be able to establish that the plaintiff is such person, even if the plaintiff is not a "religious assembly or institution."

religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

RLUIPA itself does not define "substantial burden." *Nance v. Miser*, 700 F. App'x 629, 631 (9th Cir. 2017); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir 2004). The Ninth Circuit has held:

> [A] substantial burden must place more than inconvenience on religious exercise. For a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent. That is, a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise. A substantial burden exists where the governmental authority puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.

Int'l Church of Foursquare Gospel, 673 F.3d at 1067 (quotation marks, alterations, and citations omitted); *see also New Harvest Christian Fellowship*, 29 F.4th at 602. When a religious institution has no ready alternatives, or when the alternatives require substantial delay, uncertainty, and expense, the complete denial of a permit application "might be indicative of a substantial burden." *Int'l Church of Foursquare Gospel*, 673 F.3d at 1068. In other words, a burden need not be insuperable or insurmountable to be substantial. *Id.* at 1069.

In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 981 (9th Cir. 2006), the Ninth Circuit considered a substantial burden challenge under RLUIPA, holding that the denial of a permit substantially burdened the plaintiff's religious

exercise. The plaintiff had applied for a conditional use permit to allow the construction of a temple on residential land. *Id.* at 982. The planning division recommended to the planning commission that the conditional use permit be granted with conditions. The planning commission denied the permit, citing concerns that resulting noise and traffic would interfere with the neighborhood. *Id.*

The plaintiff then acquired a different property zoned for agricultural use and sought a conditional use permit to allow the construction of a temple and assembly hall on the second property. That second property was surrounded by other agricultural land, where the plaintiff proposed to hold worship services and weddings. *Id.* The plaintiff agreed to various conditions articulated by County and state departments, including a "no development" buffer area, landscaping, and holding all ceremonies indoors. *Id.* at 983. The planning commission approved the permit, but neighboring property owners appealed. The Board of Supervisors then reversed the approval, reasoning that the property had been agricultural and should remain so, that the proposed use of the property would not promote orderly growth, and that the proposed temple would be detrimental to surrounding agricultural uses. *Id.* at 983-84.

Guru Nanak Sikh Society challenged the denial of the permit. The United States District Court for the Eastern District of California invalidated the permit denial, and the Ninth Circuit affirmed. The Ninth Circuit determined that the County of Sutter had imposed a substantial burden on Guru Nanak Sikh Society. The Ninth Circuit expressly stated that it was not deciding whether the failure of a government to provide a religious institution "with a land use

entitlement for a new facility for worship necessarily constitutes a substantial burden pursuant to RLUIPA." However, it determined that, under the circumstances presented, the County of Sutter had imposed a substantial burden given two considerations:

> (1) that the County's broad reasons given for its tandem denials could easily apply to all future applications by [the plaintiff]; and (2) that [the plaintiff] readily agreed to every mitigation measure suggested by the Planning Division, but the County, without explanation, found such cooperation insufficient.

Id. at 989.

Plaintiffs in the present case contend that the denial of the requested Special Use Permit allowing their church on agricultural land is similarly a substantial burden on their exercise of their religion, especially because they are willing to comply with all reasonable conditions imposed as a condition of that permit. Plaintiffs, however, ignore this court's previous summary judgment order on this issue. In 2018, this court ruled that, with respect to the RLUIPA substantial burden claim asserted in Count I, a genuine issue of material fact existed as to whether the County of Maui's denial of the requested Special Use Permit imposed a substantial burden on Plaintiffs' exercise of religion. In particular, this court ruled that there was a question of fact as to whether Plaintiffs obtained an interest in the land without a reasonable expectation of being allowed to build a religious institution on it. *See* 322 F. Supp. 3d at 1065:

> Courts of appeal outside the Ninth Circuit have held that a plaintiff's own actions may be relevant with respect to the substantial

burden analysis. In *Livingston Christian Schools. v. Genoa Charter Township*, 858 F.3d 996, 1004 (6th Cir. 2017), the Sixth Circuit stated:

> [W]hen a plaintiff has imposed a burden upon itself, the government cannot be liable for a RLUIPA substantial-burden violation. For example, when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that it suffered when the land-use regulations were enforced against it has been deemed an insubstantial burden.

The Fourth and Seventh Circuits have similarly ruled that, when a plaintiff obtains an interest in land without a reasonable expectation that it will be allowed to build a religious institution on the property, any burden imposed on the religious institution is self-imposed and not a substantial burden caused by a government entity. *See Andon, LLC v. City of Newport News, Va.*, 813 F.3d 510, 515 (4th Cir. 2016) (ruling that because, when the property was purchased, a church was not a permissible use and a church would have violated a setback requirement, a religious group could not have had a reasonable expectation that a variance would be granted to allow the building of a church on the property); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (the plaintiff was not substantially burdened when it purchased property in an industrial

> zone for use as a church after having been told that its special-use application would be denied).
>
> Honig purchased the land in issue here in September 1994, knowing that it was zoned for agricultural and conservation use. In 2011, after its initial Special Use Permit application was denied, Spirit of Aloha Temple entered into an agreement to lease the property from Honig. It arguably knew or should have known that it might not get a Special Use Permit for the proposed temple. Spirit of Aloha Temple may have reasonably believed that it would nevertheless receive the permit because it was amenable to any reasonable condition and it actually orally amended the permit application to have fewer events and to end most of those events during daylight hours. But whether it was reasonable for Spirit of Aloha Temple to expect that it would get the Special Use Permit under these circumstance or whether it created its own burden are questions of fact not resolvable on the present record.

Id.

The record before this court now is not materially different with respect to this issue of fact. Honig did admit at trial that, when he first leased the property to Spirit of Aloha Temple, he knew that Spirit of Aloha's first Special Use Permit application had already been denied. *See* ECF No. 438, PageID # 9964. However, that admission does not establish one way or the other whether it was reasonable for Spirit of Aloha Temple to expect that it would get the Special Use Permit or whether it created its own burden by

entering into a lease when it knew that a previous Special Use Permit application had been denied. Accordingly, Plaintiffs fail on the present motion to establish that the undisputed facts demonstrate that the denial of their Special Use Permit application is a substantial burden on their exercise of religion. For that reason, their motion is denied with respect to Count I. At trial, if Plaintiffs succeed in demonstrating that the denial of the requested permit substantially burdened their exercise of religion, Plaintiffs will succeed on their RLUIPA substantial burden claim. As discussed above, the denial of the permit application was not the least restrictive means of furthering a compelling governmental interest.

C. Count VI—Free Exercise of Religion.

Count VI, on which both sides seek summary judgment, asserts that the County of Maui deprived and is depriving Plaintiffs of their First Amendment right to freely exercise their religion, actionable under 42 U.S.C. § 1983. The Free Exercise Clause of the First Amendment, which applies to states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." It has been extended to cities enacting ordinances. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A plaintiff asserting a First Amendment free exercise of religion claim "must show that the government action in question substantially burdens the person's practice of her religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015); *Temple of 1001 Buddhas v. City of Fremont*, 588 F. Supp. 3d 1010, 1022 (N.D. Cal. 2022) ("A state actor violates the Free Exercise Clause of the First Amendment when it substantially burdens the person's practice of their

religion." (quotation marks and citation omitted)). For purposes of a free exercise of religion claim, a "substantial burden places 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." *Jones*, 791 F.3d at (alterations, quotation marks, and citation omitted).

To succeed on a free exercise of religion claim, a plaintiff has the burden of establishing 1) that the claimant's proffered belief is sincerely held, as the First Amendment does not extend to "religions" that are obviously shams and whose members are patently devoid of religious sincerity; and 2) that the claim is "rooted in religious belief, not in 'purely secular' philosophical concerns." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981); *see also Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015).

The County of Maui claims that, even if Plaintiffs meet their burden of demonstrating a free exercise of religion claim, the County has no liability because its actions pass judicial scrutiny. When a government restricts the free exercise of religion, the court must determine what level of scrutiny should be applied to such a restriction. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* A law that is not neutral or is not one of general applicability, on the other hand, must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Id.* at 531-32; *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Because the challenged

restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." (quotation marks and citation omitted)).

In 2021, the Supreme Court held that "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia, PA*, 141 S. Ct. 1868, 1877 (2021) (quotation marks, alterations, and citations omitted). *Fulton* explained, "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude—here, at the Commissioners sole discretion." *Id.* at 1879 (quotation marks, alterations, and citation omitted). The court therefore turns to examining whether the Special Use Permit application process in this case amounts to "a formal mechanism for granting exceptions" for land uses in agriculturally zoned land in Hawaii.

Section 205-2 of Hawaii Revised Statutes describes the four major land use districts in Hawaii—urban, rural, agricultural, and conservation. In relevant part, § 205-2(c) describes the types of activities and uses that are allowed on land zoned for agricultural use.

Section 205-4.5 of Hawaii Revised Statutes further lists uses permitted on land zoned for agricultural use. Sections 205-6(a) and (c) allow a county planning commission to "permit certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified," subject to protective restrictions.

To determine whether a proposed use is an "unusual and reasonable use," § 15-15-95(c) of the Hawaii Administrative Rules provides five "guidelines" for granting an exception to agriculturally zoned land restrictions:

> (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;
>
> (2) The proposed use would not adversely affect surrounding property;
>
> (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
>
> (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
>
> (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

http://luc.hawaii.gov/wp-content/uploads/2012/09/LUC-Admin-Rules_Chapter15-15_2013.pdf) (Nov. 2, 2013). As noted earlier in this order, the Ninth Circuit has recently determined that the second "adverse affect" guideline is unconstitutional. *See* 49 F.4th at 1192-93.

Under § 19.30A.060.A.9 of the Maui County Code, churches and religious institutions are expressly permitted in an agricultural district "if a special use permit, as provided in § 19.510.070[B] of this title, is obtained." https://library.municode.com/hi/county_of_maui/codes/code_of_ordinances?nodeId=TIT19ZO_ARTIICOZOPR_CH19.30AAGDI_19.30A.060SPUS. Under § 19.510.070.B.8, the Maui Planning Commission may approve such a permit by "review[ing] whether the use complies with the guidelines established in section 15-15-95 of the rules of the land use commission of the State." *Id.* (available at https://library.municode.com/hi/county_of_maui/codes/code_of_ordinances?nodeId=TIT19ZO_ARTVADEN_CH19.510APPR_19.510.070SPUSPE).

Given the individualized examination of a church's or religious institution's Special Use Permit application pursuant to § 19.30A.060.A.9 of the Maui County Code, § 15-15-95(c) of the Hawaii Administrative Rules, and § 205-6(a) and (c) of Hawaii Revised Statutes, the application of these land use regulations and statutes does not involve law of general applicability for which rational review would be applied. Instead, the individualized examination of circumstances relating to the granting of an exception for religious use of property in agriculturally zoned land, under *Fulton*, requires application of a strict scrutiny analysis. *See San Jose Christian Coll.,* 360 F.3d at 1031.

The County of Maui seeks summary judgment in its favor with respect to Count VI, arguing that it satisfies the strict scrutiny analysis required by that count. Plaintiffs, on the other hand, seek summary judgment in their favor with respect to Count VI, arguing that strict scrutiny is not satisfied. While the court agrees

that, as discussed above, strict scrutiny is not satisfied in the context of Count VI, Plaintiffs are not entitled to summary judgment with respect to the entirety of Count VI because a question of fact remains as to whether Plaintiffs were exercising religious rights that were substantially burdened.

In the deposition of the County of Maui's witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure, the County's counsel stated that "the county is not arguing in this lawsuit the Mr. Honig's—the sincerity of Mr. Honig's beliefs one way or the other." Thus, the court turns to whether Plaintiffs' claim is "rooted in religious belief, not in 'purely secular' philosophical concerns." In its counter motion for summary judgment, the County of Maui argues that it is not.[5] That is, the County claims that Plaintiffs are not operating a church based on religious beliefs, but instead are operating a commercial wedding and tourist destination business. *See Founding Church of Scientology of Washington, D. C. v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969) ("It might be possible to show that a self[-]proclaimed religion was merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions. Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal

[5] Plaintiffs argue that this counter motion is untimely as it was filed after the dispositive motions cutoff. ECF No. 523, PageID # 14688 n.1. However, counter motions are allowed pursuant to Local Rule 7.7 ("Any motion raising the same subject matter as an original motion may be filed by the responding party together with the party's opposition and may be noticed for hearing on the same date as the original motion, provided that the motions would otherwise be heard by the same judge.").

system sometimes requires it so that secular enterprises may not unjustly enjoy the immunities granted to the sacred.").

There are some facts, as noted in this court's 2018 order, tending to support the County's contention. Honig purchased the Haumana Road property in September 1994. Well Being International Inc. was incorporated in February 1993 to perform research and instruction for individual and global peace, harmony, and health. 322 F.3d at 1054. From 2002 through 2007, Honig applied for various trade names so that Well Being International could advertise for weddings or sacred unions on the property. *Id.* at 1054-55. In 2005, Honig leased the Haumana Road Property to Well Being International. *Id.* at 1055. Spirit of Aloha Temple was formed in September 2007 and sought its first Special Use Permit for the Haumana Road property in October 2007. At that time, Well Being International was still leasing the property from Honig. *Id.* By late 2015, about 550 weddings had been performed on the property. *See* 49 F.4th at 1184; ECF No. 438, PageID # 9964 (Honig testifying at trial that the first Special Use Permit application had been denied by the time he leased the property to Spirit of Aloha Temple). Additionally, in the earlier trial Plaintiffs failed to prove that Spirit of Aloha Temple was a religious assembly or institution. *See* Verdict Form, ECF No. 392, PageID # 7139.

Plaintiffs, on the other hand, argue that the County has already conceded that their claim is rooted in religious belief, pointing to the deposition testimony of the County's Rule 30(b)(6) representative. William Spence testified, "I would say that some [of Plaintiffs' proposed uses for the land we]re religious in nature" and that some, like the a commercial wedding business

and helicopter flights, were not religious in nature. ECF No. 511-3, PageID #s 12369-70. The County is not challenging the sincerity of Plaintiffs' religious beliefs, so the fact that the 2012 Special Use Permit application sought to use the property for "CHURCH ACTIVITIES," including Sunday services, tends to support Spence's notation that some of the proposed uses were religious in nature. *See* Land Use Commission Special Use Permit Application, ECF No. 183-6, PageID #s 2803-04.

With respect to Rule 30(b)(6) deponents, however, the Ninth Circuit has stated:

> "the testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes. The Rule 30(b)(6) testimony also is not binding against the organization in the sense that the testimony can be corrected, explained and supplemented, and the entity is not 'irrevocably' bound to what the fairly prepared and candid designated deponent happens to remember during the testimony."

Snapp v. United Transportation Union, 889 F.3d 1088, 1104 (9th Cir. 2018) (quoting 7 James Wm. Moore, et al., Moore's Federal Practice § 30.25[3] (3d ed. 2016)). Moreover, the Ninth Circuit says, "[A] Rule 30(b)(6) deponent's own interpretation of the facts or legal conclusions do not bind the entity." *Id.*

Even if the County were bound by Spence's statement that he "would say some of [the proposed uses] are religious in nature," that does not necessarily

mean that Plaintiffs were exercising religious rights as opposed to operating a for-profit business. And even a for-profit business might sometimes exercise religious rights. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) (recognizing that a for-profit closely held corporation may assert claims under the Religious Freedom Restoration Act of 1993).

At trial it may become clear that Plaintiffs were exercising religious rights rather than operating a purely commercial business. Plaintiffs, after all, sought the permit to hold religious services and ceremonies. But the County raises sufficient questions of fact such that summary judgment is denied with respect to the free exercise of religion claim asserted in Count VI. That is, the trial factfinder must determine whether Plaintiffs' claim is "rooted in religious belief, not in 'purely secular' philosophical concerns." *Callahan*, 658 F.2d at 683; *accord Walker*, 789 F.3d at 1138.

Plaintiffs may be exercising sincere religious beliefs (e.g., holding church services). *See* 42 U.S.C. § 2000cc-5(7)(B) ("The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."). Even if a partial motive for obtaining the Special Use Permit is to conduct a commercial business, Plaintiffs might at trial satisfy the second requirement that the claim be "rooted in religious belief, not in 'purely secular' philosophical concerns." In that event, Plaintiffs would likely meet their burden of proving their free exercise of religion claim under the First Amendment. *Jones*, 791 F.3d at 1031 ("A person asserting a free exercise claim must show that

the government action in question substantially burdens the person's practice of her religion.").

If Plaintiffs are actually exercising religious rights, then the denial of the requested Special Use Permit would likely impose a substantial burden on Plaintiffs' religious exercise, as having a place to worship is at the core of the free exercise of religion. *See Int'l Church of Foursquare Gospel*, 673 F.3d at 1070 (quoting *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1171 (C.D. Cal. 2006) ("[A] place of worship . . . is at the very core of the free exercise of religion . . . [and] [c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes."), and citing *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist.").

D. Summary Judgment is Denied With Respect to Count VIII—Free Exercise of Religion Claim Under the Hawaii Constitution.

The parties also seek summary judgment with respect to the free exercise of religion claim asserted under article I, section 4, of the Hawaii constitution, which states: "No law shall be enacted 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."

> In order to find an unconstitutional infringement on Appellants' religious practices, it is necessary to examine whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free exercise of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious practices, and whether or not the state had a compelling interest in the regulation which justified such a burden.

Dedman v. Bd. of Land & Nat. Res., 69 Haw. 255, 260, 740 P.2d 28, 32 (1987) (quotation marks, alterations, and citation omitted).

In *State v. Armitage*, 132 Haw. 36, 58-59, 319 P.3d 1044, 1066 (2014), the Hawaii Supreme Court analyzed free exercise of religion claims under the Hawaii and the federal Constitutions, applying the same standard to both. It stated that "a generally applicable law is not subject to First Amendment attack unless (1) it interferes with the Free Exercise Clause in conjunction with other constitutional protections, or (2) it creates a mechanism that calls for individualized governmental assessment of the reasons for the relevant conduct. *Id.* (quotation marks, alterations, and citation omitted). The Hawaii Supreme Court noted that, when there is an individualized assessment, "if a particular law imposes a burden upon the free exercise of religion, judicial scrutiny is triggered, the regulation must be justified with a compelling government interest, and the government has the burden of demonstrating that no alternative

forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* (quotation marks and citation omitted).

That is, when the government has burdened the free exercise of religion through an individualized assessment, a court applies strict scrutiny to any free exercise of religion claim relating to that burden. *See Doe v. Doe*, 116 Haw. 323, 335, 172 P.3d 1067, 1079 (2007) ("In order to survive strict scrutiny, the statute must be justified by a compelling state interest, and drawn sufficiently narrowly that it is the least restrictive means for accomplishing that end." (quotation marks and citation omitted)).

For the reasons set forth above with respect to the free exercise of religion claim under the First Amendment, summary judgment is denied with respect to the free exercise of religion claim asserted under article I, section 4, of the Hawaii constitution.

E. The Court Denies the County of Maui's Motion for Summary Judgment With Respect To the Discrimination Claims Asserted in Counts II, VII, and IX.

Paragraphs 152 through 157 of the Complaint assert that the County of Maui discriminated against Plaintiffs on the basis of their religion. The Complaint alleges that organized wedding services are conducted at a minimum of five botanical gardens on Maui, presumably with appropriate approvals from the County of Maui. The Complaint further alleges that § 19.30A.050.B.11 of the Maui County Code permits gatherings of many types without size limitations in agriculturally zoned land. It alleges that the County of Maui's refusal to allow Plaintiffs to worship on their Haumana Road property therefore discriminates

against Plaintiffs on the basis of their religion, as botanical gardens are allowed to conduct wedding ceremonies and nonreligious entities have no size limitation. *See* ECF No. 1, PageID #s 33 34.

This court turns to Counts II, VII, and IX, on which only the County (not Plaintiffs) seeks summary judgment. This court denies summary judgment on Counts II, VII, and IX, noting that issues of fact must be tried. Two of those counts (Counts VII and IX) implicate a strict scrutiny issue akin to the strict scrutiny issue on which this court granted summary judgment to Plaintiffs in the context of Counts I, VI, and VIII. Plaintiffs not having made any motion with respect to Counts II, VII, and IX, and the County not having established entitlement to summary judgment in any respect, the court entirely denies summary judgment on those counts, and they remain for trial.[6]

1. Count II—RLUIPA Nondiscrimination Violation of 42 U.S.C. § 2000cc(b)(2).

RLUIPA, 42 U.S.C. § 2000cc(b)(2), prohibits religious discrimination against assemblies and institutions through land use regulations. Specifically, it prohibits a government from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."

While the advisory jury from the earlier trial determined that neither Plaintiffs nor the County had proved by a preponderance of the evidence that Spirit of Aloha Temple was or was not a "religious assembly

[6] Under Rule 56(f) of the Federal Rules of Civil Procedure and Local Rule 56.1(i), a court may grant summary judgment to a nonmoving party after giving notice and a reasonable time to reply. No such notice was provided here.

or institution" in connection with a RLUIPA equal terms claim, that advisory jury did not determine whether Spirit of Aloha Temple was an "assembly or institution" that was discriminated against *based on religion*. *See* Verdict Form, ECF No. 392, PageID # 7139. An "assembly or institution" may possibly assert religious rights, even when the "assembly or institution" is not religious in nature, making it possible for a government to discriminate against that "assembly or institution" based on the assertion of those religious rights. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 719 (2014) (recognizing that a for-profit closely held corporation may assert religious rights); *cf. 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2313 (2023) (recognizing a company's First Amendment right to be free of compulsion to create content going against its owner's religious belief that a marriage must unite a man and a woman).

No law provides that an entity that is not a "religious assembly or institution" cannot be an "assembly or institution" that has been discriminated against based on religion.

In examining a RLUIPA equal terms claim, the Eleventh Circuit noted that RLUIPA does not define the terms "assembly" or "institution." The Eleventh Circuit therefore construed those terms in accordance with their ordinary and natural meanings:

> An "assembly" is "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993); or "[a] group of persons organized and united for some common purpose."

> BLACK'S LAW DICTIONARY 111 (7th ed. 1999). An institution is "an established society or corporation: an establishment or foundation esp. of a public character," WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 1171 (1993); or "[a]n established organization, esp. one of a public character...." BLACK'S LAW DICTIONARY 801 (7th ed.1999).

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230–31 (11th Cir. 2004) (alterations in *Midrash*).

In connection with the earlier trial on Count IV in this case, only Spirit of Aloha Temple, not Honig, sought to be deemed a "religious assembly or institution." *See* ECF No. 298, PageID # 6110. Similarly, because Honig is not an "assembly or institution" under the ordinary meanings of those terms, only Spirit of Aloha Temple may assert the RLUIPA discrimination claim under 42 U.S.C. § 2000cc(b)(2) asserted in Count II.

With an exception not relevant to Spirit of Aloha Temple's nondiscrimination claim under RLUIPA, RLUIPA states, "If a plaintiff produces prima facie evidence to support . . . a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim . . . ." 42 U.S.C. § 2000cc-2(b). In examining a summary judgment motion relating to 42 U.S.C. § 2000cc-2(b), the Ninth Circuit explained that, "[w]hen the moving party also bears the burden of persuasion at trial, to prevail on summary judgment it must show that the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (quotation marks and citation omitted).

The Supreme Court has referred to the "burden of persuasion" as "specifying which party loses if the evidence is balanced." *See Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 100 (2011) (stating that, historically, the term "burden of proof" encompasses "two separate burdens: the 'burden of persuasion' (specifying which party loses if the evidence is balanced), as well as the 'burden of production' (specifying which party must come forward with evidence at various stages in the litigation)"). Thus, at trial, Spirit of Aloha Temple must produce prima facie evidence of a violation of 42 U.S.C. § 2000cc(b)(2). That is, Spirit of Aloha Temple must introduce at trial sufficient evidence to survive a motion for judgment as a matter of law following the close of its case in chief. *See* F. R. Civ. P. 50(a)(1) (allowing courts to grant a motion for judgment as a matter of law when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). Spirit of Aloha Temple must show that it was treated differently from a similarly situated organization.

Additionally, because the challenged land use regulation is neutral on its face, Spirit of Aloha Temple must produce evidence of the County of Maui's "discriminatory intent," which may be inferred from circumstantial evidence. The evidence may include the events leading up to the denial of the Special Use Permit application, the context in which that decision was made, whether the decision departed from established norms, statements made by the commission and community members, reports issued by the commission, whether a discriminatory impact was foreseeable, and whether less discriminatory avenues were available. *See Calvary Chapel Bible Fellowship v. Cnty. of Riverside*, 2017 WL 6883866, at *12 (C.D. Cal. Aug. 18, 2017), *aff'd*, 948 F.3d 1172 (9th Cir. 2020) (citing

Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 198 (2d Cir. 2014) ("establishing a claim under RLUIPA's nondiscrimination provision, as with the Supreme Court's equal protection precedent, requires evidence of 'discriminatory intent'")); *see also Alive Church of the Nazarene, Inc. v. Prince William Cnty., Virginia*, 59 F.4th 92, 104 (4th Cir. 2023) ("Unlike the equal terms or substantial burden provisions of RLUIPA, the nondiscrimination provision requires evidence of discriminatory intent to establish a claim" such as the direct and circumstantial evidence discussed in *Arlington Heights v. Metro. Housing Development*, 429 U.S. 252, 266-68 (1977), which suggested courts look at the historical background, sequence of events, departures from normal procedure, and statements of decisionmakers); *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cnty., Maryland*, 915 F.3d 256, 263 (4th Cir. 2019) ("a plaintiff must demonstrate that the government decision was motivated at least in part by discriminatory intent").

If Spirit of Aloha Temple meets its prima facie burden, then the burden shifts to the County of Maui to prove by a preponderance of the evidence that a violation of 42 U.S.C. § 2000cc(b)(2) did not occur. That is, to prevail once the burden has shifted, the County of Maui must show by a preponderance of the evidence that its land use regulation did not discriminate against Spirit of Aloha Temple on the basis of religion or religious denomination.

In seeking summary judgment, the County of Maui argues that it satisfies strict scrutiny with respect to Spirit of Aloha Temple's discrimination claim under 42 U.S.C. § 2000cc(b)(2). As noted earlier in this order, it appears that the Ninth Circuit would not apply a strict scrutiny analysis to a RLUIPA discrimination

claim. Instead, the analysis focuses on whether Maui Planning Commission discriminated against Spirit of Aloha Temple on the basis of religion when the commission denied the requested Special Use Permit. Possibly, the absence of narrow tailoring or of the imposition of the least restrictive means of furthering an identified compelling interest may affect any finding at trial on whether the County of Maui had "discriminatory intent" in denying the requested Special Use Permit. For now, there are factual issues that preclude summary judgment.

2. Count VII–-Equal Protection Clause of the Fourteenth Amendment.

In Count VII, Honig and Spirit of Aloha Temple assert that the County of Maui, in violation of 42 U.S.C. § 1983, deprived them of "equal protection of the laws, as secured by the Fourteenth Amendment to the United States Constitution, by discriminating against Plaintiffs in the imposition and implementation of their land use regulations." ECF No. 1, PageID # 39. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Pursuant to the Equal Protection Clause, the government must treat all similarly situated persons alike. *Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003). "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Shooter v. Arizona*, 4 F.4th 955, 960 (9th Cir. 2021) (alterations, quotation marks, and citation omitted). "A showing that a group was singled out for unequal

treatment on the basis of religion may support a valid equal protection argument." *Alpha Delta Chi–Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (quotation marks and citation omitted).

Alternatively, Plaintiffs may assert a "class of one" equal protection claim. That is, rather than premising their equal protection claim on a classification, they may premise it on unique treatment." In order to demonstrate a violation of equal protection in a "class of one" case, a plaintiff must establish that the government intentionally, and without rational basis, treated the plaintiff differently from other similarly situated people or entities. *See N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008). In a "class of one" claim, a plaintiff asks the factfinder to infer discrimination based solely on a lack of any rational explanation for the differential treatment. *See Green Genie, Inc. v. City of Detroit, Mich.,* 63 F.4th 521, 528 (6th Cir. 2023)*; Joglo Realties, Inc. v. Seggos*, 229 F. Supp. 3d 146, 153 (E.D.N.Y. 2017).

The County of Maui contends that even if it treated Plaintiffs differently from similarly situated nonreligious entities, it cannot be liable for a federal equal protection violation because it satisfies strict scrutiny review. When conduct burdens a fundamental right or makes a distinction based on a suspect classification, the court employs strict scrutiny review. *See Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002). When conduct that is based on religious rights is in issue, a suspect classification is involved. *See Friedman v. Rogers*, 440 U.S. 1, 17 (1979). The County of Maui does not meet its burden of showing that it is entitled to summary judgment based on strict scrutiny review. It does not point to narrow tailoring that furthered any compelling governmental interest.

3. Count IX—Violation of the Equal Protection Clause of Article I, Section 5, of the Hawaii Constitution.

Count IX asserts that the County of Maui violated Honig's and Spirit of Aloha Temple's rights under the equal protection clause of the Hawaii constitution, article I, section 5, "by discriminating against Plaintiffs in the imposition and implementation of their land use regulations." ECF No. 1, PageID # 40.

Article I, section 5, of the Hawaii constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Like its federal counterpart, Hawaii's equal protection clause mandates that all similarly situated persons be treated alike. *See Tax Found. of Hawai'i v. State*, 144 Haw. 175, 205, 439 P.3d 127, 157 (2019); *Mahiai v. Suwa*, 69 Haw. 349, 360, 742 P.2d 359, 368 (1987). Accordingly, to prove a claim of discriminatory enforcement, Plaintiffs have the burden of demonstrating by a preponderance of the evidence 1) that the County of Maui has treated Plaintiffs differently from similarly situated individuals or entities (i.e., the County granted Special Use Permits to similarly situated individuals or entities but not to Plaintiffs); and 2) that the differential treatment was deliberately based on an unjustifiable standard such as religion. *See State v. Villeza*, 85 Haw. 258, 267, 942 P.2d 522, 531 (1997); *Mahiai*, 69 Haw. at 361, 742 P.2d at 368. Alternatively, it appears that the Hawaii Supreme Court would recognize a "class of one" equal protection claim when a plaintiff demonstrates that the plaintiff has been intentionally treated

differently from others similarly situated and there is no rational basis for the difference in treatment. *See DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Haw. 187, 220, 339 P.3d 685, 718 (2014) (assuming that a "class of one" theory is applicable under Hawaii law, but determining that the plaintiff had no "class of one" claim).

The County of Maui contends that even if it treated Plaintiffs differently from similarly situated nonreligious entities for purposes of an equal protection claim under the Hawaii constitution, it is not liable because it satisfies strict scrutiny review. *See Nagle v. Bd. of Educ.*, 63 Haw. 389, 392, 629 P.2d 109, 111–12 (1981) (noting that Hawaii courts apply a strict scrutiny standard "where equal protection challenges involve 'suspect' classifications or fundamental rights"). The County of Maui does not show on its motion that it satisfies strict scrutiny review. It does not establish on the present record any narrow tailoring that furthered any identified compelling governmental interest. Summary judgment on Count IX is denied.

V. CONCLUSION.

For the reasons set forth above, the court denies the motions for summary judgment filed by both parties in this case. While summary judgment is not granted on the entirety of any claim, the court grants summary judgment to Plaintiffs on one issue implicated by Counts I, VI, and VIII–that the complete denial of the permit fails strict scrutiny analysis. In addition, only Spirit of Aloha Temple, not Honig, may pursue Count II, the RLUIPA nondiscrimination claim. All other matters remain for trial. This order disposes of the motions filed as ECF Nos. 511 (Plaintiffs' motion for partial summary judgment), 513 (Defendant's concise statement in support of its motion for summary

judgment that was incorrectly filed as a motion), 514 (Defendant's motion for summary judgment), 520 (Defendant's counter motion for summary judgment), and 521 (Defendant's counter motion for summary judgment, which does not appear to add much to its other counter motion).

The parties are ordered to immediately contact the Magistrate Judge assigned to this case to schedule a settlement conference. The court is conscious that Plaintiffs have an appeal pending in the Ninth Circuit of this court's denial of Plaintiffs' request for preliminary injunctive relief, which relates to the issue of whether the unconstitutional administrative provision is severable from other provisions. This appeal is not necessarily an impediment to settlement. The parties could, for example negotiate a conditional settlement, agreeing to certain terms if the pending appeal results in an affirmance, and different terms if the result is a reversal. In any event, the parties are directed to engage in settlement discussions.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 11, 2023.

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

Spirit of Aloha Temple, et al. v. County of Maui, Civ. No. 14-00535 SOM/RLP; ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON THE ISSUE OF WHETHER THE COUNTY OF MAUI'S DENIAL OF THE SPECIAL USE PERMIT SATISFIED STRICT SCRUTINY WITH RESPECT TO COUNTS I, VI, AND VIII, BUT DENYING SUMMARY JUDGMENT ON ALL REMAINING ISSUES AND CLAIMS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 14-00535 SOM/RLP

SPIRIT OF ALOHA TEMPLE AND FREDRICK R. HONIG,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant,

and

STATE OF HAWAII,

Intervenor-Defendant

ORDER GRANTING DEFENDANT STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COUNT V AND DEFENDANT COUNTY OF MAUI'S JOINDER THEREIN; ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH RESPECT TO COUNT V

I. INTRODUCTION.

Plaintiff Fredrick R. Honig bought agriculturally zoned land on Maui and leased that land to his own entity, Plaintiff Spirit of Aloha Temple. Spirit of Aloha, among other things, conducted a commercial wedding operation on the agricultural land until the County of Maui told it to stop. Plaintiffs then applied

for a Special Use Permit to build a church and hold religious events, including weddings, uses not allowed on agricultural land without a Special Use Permit.

Hawaii Administrative Rules section 15-15-95(c) provides five guidelines for determining uses that may be allowed via a Special Use Permit. The Maui Planning Commission denied Plaintiffs' Special Use Permit application, relying on subsections 15-15-95(c)(2) and (c)(3). Specifically, the commission determined that Plaintiffs' proposed use "would adversely affect the surrounding properties" such that subsection 15-15-95(c)(2) was unsatisfied. The commission also determined that Plaintiffs' proposed use would increase traffic and burden public agencies providing roads and streets, as well as police and fire protection, such that subsection 15-15-95(c)(3) was unsatisfied.

After the requested Special Use Permit was denied, Plaintiffs filed this action, asserting federal and state claims against the Maui Planning Commission and the County of Maui. The State of Hawaii interven ed as a Defendant, as Plaintiffs were challenging the state regulatory scheme under which the Maui Planning Commission had denied Plaintiffs' Special Use Permit application. In Count V of the Complaint, a prior restraint claim, Plaintiffs contend that the standards governing their Special Use Permit application violated the First Amendment by giving county officials unbridled discretion. Plaintiffs' Complaint asserted that subsections 15-15-95(c)(1) to (c)(4) violated their constitutional rights. No challenge was asserted to subsection 15-15-95(c)(5).

In April 2019, this court ruled that Plaintiffs lacked standing to challenge subsections 15-15-

95(c)(1) and (c)(4), as the commission had not applied those subsections when denying Plaintiffs' Special Use Permit application. The court then ruled that the regulatory scheme governing Special Use Permits was constitutional and that Hawaii Administrative Rules subsection 15-15-95(c)(3) did not provide unbridled discretion to county planning agencies. This court concluded that, because subsection 15-15-95(c)(3) was not an unconstitutional prior restraint, Plaintiffs were not automatically entitled to the requested Special Use Permit even if subsection 15-15-95(c)(2) was defective.

Plaintiffs appealed. They did not challenge this court's ruling with respect to subsection 15-15-95(c)(3). On appeal, the Ninth Circuit ruled that Plaintiffs were properly asserting a facial challenge to section 15-15-95(c) and that subsection 15-15-95(c)(2) unconstitutionally provided county agencies unbridled discretion in deciding whether to issue a Special Use Permit. In remanding the case, the Ninth Circuit left it to this court to determine whether subsection 15-15-95(c)(2) was severable from the rest of section 15-15-95(c). This court rules that it is severable.

This court has already ruled that subsection 15-15-95(c)(3) is not an unconstitutional prior restraint. The Maui Planning Commission was therefore allowed to rely on subsection 15-15-95(c)(3) in denying Plaintiffs' Special Use Permit application. Plaintiffs indicated at the hearing on the present matters that they are no longer challenging the constitutionality of subsection 15-15-95(c)(3). Before this court are the State's summary judgment motion addressing what remains of Count V, and the County of Maui's joinder in that motion. Also before this

court is Plaintiffs' motion seeking injunctive relief with respect to Count V. The court grants Defendants' summary judgment motion concerning the remainder of Count V, and denies Plaintiffs' motion for preliminary injunction with respect to the remainder of Count V.

II. BACKGROUND.

The factual background for this case was set forth in the Ninth Circuit's Opinion of September 22, 2022. *See* 49 F.4th 1180, 1184-87 (9 Cir. 2022). That background is incorporated by reference and is summarized in relevant part below.

Section 205-2 of Hawaii Revised Statutes describes the four major land use districts in Hawaii--urban, rural, agricultural, and conservation. In relevant part, section 205-2(c) describes the types of activities and uses that are allowed on land zoned for agricultural use. Section 205-4.5 of Hawaii Revised Statutes further lists uses permitted on land zoned for agricultural use. Sections 205-6(a) and (c) allow a county planning commission to "permit certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified," subject to protective restrictions.

To determine whether a proposed use is an "unusual and reasonable use," section 15-15-95(c) of the Hawaii Administrative Rules sets forth five guidelines for the granting of an exception to agricultural restrictions:

> (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;

> (2) The proposed use would not adversely affect surrounding property;
>
> (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
>
> (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
>
> (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

http://luc.hawaii.gov/wp-content/uploads/2012/09/LUC-Admin-Rules_Chapter15-15_2013.pdf) (Nov. 2, 2013). There is no dispute that a Special Use Permit application may be denied if any one of those guidelines is not satisfied. *See* Depo. of William Spence at 31 (Feb. 5, 2018), ECF No. 215-18, PageID # 4649. Maui County Code § 19.30A.060.A.9 provides that "[c]hurches and religious institutions" are allowed on agriculturally zoned land that is fifteen acres or less so long as a Special Use Permit is obtained pursuant to chapter 205 of Hawaii Revised Statutes and Maui County Code § 19.30A.070.B.8, which gives the Maui Planning Commission the job of determining whether a use complies with the guidelines in section 15-15-95(c).

Honig purchased eleven acres of Maui land nearly thirty years ago. That land was and is still zoned for agricultural use. *Id.* at 1184. Plaintiffs continue to seek authorization to use the agriculturally zoned property for religious purposes, as noted by the Ninth Circuit.

> Honig developed the land without permits. He cleared and graded the land, cut roads on the property, changed the contours of coastal conservation land, and altered the route of a natural watercourse. He appears to have built illegal structures, including housing structures, and installed cesspools near drinking water wells. Although several Hawaiian archeological sites existed on the property, including an agricultural terrace, burial crypt, and irrigation ditch, Honig failed to provide the requisite monitoring plans for their preservation. Through a non-profit entity, Honig also used the property as a venue to conduct commercial weddings, vacation rentals, retreats, and events--all without the requisite permits. By late 2015, around 550 weddings were performed on the property.

49 F.4th at 1184.

Despite having been repeatedly told that his activities required appropriate permits, Honig continued to violate land use regulations. *Id.* In 2007, Honig formed Spirit of Aloha Temple and applied for a Special Use Permit for a "church, church[-]operated bed and breakfast establishment, weddings, special events, day seminars, and helicopter landing pad." *Id.* at 1185. The Maui Planning Commission denied that application, reasoning that buildings on Honig's land lacked permits, that there were problems with the helicopter pad's location, and that there were potential adverse impacts to surrounding properties. *Id.* at 1185.

Plaintiffs worked with local agencies to address these concerns, and the county's planning depart-

ment recommended that the Maui Planning Commission approve a second application subject to certain conditions. *Id.* In 2012, Plaintiffs filed their second application, seeking to hold weekly church services, as well as sacred, educational, inspirational, or spiritual programs, "including Hawaiian cultural events, and spiritual commitment ceremonies such as weddings," with limitations on the number of attendees. *Id.*

The Maui Planning Commission denied the second Special Use Permit application, but rescinded that denial when it received a letter from Plaintiffs' attorneys warning that the denial violated the Religious Land Use and Institutionalized Persons Act. *Id.* The Maui Planning Commission then conducted a hearing, before again denying the second application, making the following finding (#68):

> The Commission finds that there is evidence of record that the proposed uses expressed in this Application should they be approved would increase vehicular traffic on Haumana Road, which is narrow, winding, one-lane in areas, and prone to flooding in inclement weather. The Commission finds that Haumana Road is regularly used by pedestrians, including children who use the road to access the bus stop at the top of the road. The commission finds that granting the Application would adversely affect the health and safety of residents who use the roadway, including endangering human life. The Commission finds that the health and safety of the residents' and public's use of Haumana Road is a compelling government interest and that there is no less restrictive means of

> ensuring the public's safety while granting the uses requested in the Application.

ECF No. 185-9, PageID # 3288-89.

The Maui Planning Commission concluded that the application ran afoul of subsections 15-15-95(c)(2) and (c)(3).[1] With respect to subsection 15-15-95(c)(2), the Commission concluded that the proposed uses "would adversely affect the surrounding properties" given concerns about the safety of Haumana Road, which provided access to Plaintiffs' property. ECF No. 185-9, PageID # 3290. With respect to subsection 15-15-95(c)(3), the Maui Planning Commission concluded that the proposed uses would increase traffic and burden public agencies providing roads and streets, as well as police and fire protection. The commission stated that it had "significant concerns about the narrowness of Haumana Road and vehicle and pedestrian safety both of potential visitors to the Property and property owners along Haumana Road and the fact that the Property is at the terminus of Haumana Road and therefore traffic to the Property would negatively impact residents' safety and use of Haumana Road." *Id.*

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[1] 'The Maui Planning Commission did not specifically discuss subsection 15-15-95(c)(1)--whether the use was contrary to the objectives sought to be accomplished by chapters 205 and 205A of Hawaii Revised Statutes and the rules of the Land Use Commission. It noted that it had received no evidence with respect to subsection 15-15-95(c)(4)--whether there were unusual conditions, trends, and needs that had arisen since the State Land Use district boundaries and rules were established. It also determined that subsection 15-15-95(c)(5) supported the issuance of the permit in that "the land which the proposed use is sought is suitable for the uses allowed in the Agricultural District." ECF No. 185-9, PageID # 3291.

On November 26, 2014, Plaintiffs filed the Complaint in this matter. *See* ECF No. 1. Count V of the Complaint asserts a First Amendment prior restraint claim under 42 U.S.C. § 1983. After incorporating by reference the previous paragraphs of the Complaint, paragraph 172 of the Complaint alleges:

> The standards set forth in the County of Maui's zoning regulations governing special permits for places of worship, and the standards applied by the Commission in reviewing and denying Spirit of Aloha Temple and Frederick Honig's Special Use Permit do not provide a person of ordinary intelligence a reasonable opportunity to understand whether such land uses are permitted or prohibited and, as such, constitutes an unconstitutional prior restraint on Plaintiff's protected expression and religious exercise under the First Amendment. Such standards unconstitutionally afford the Commission unbridled discretion in its review of a Special Use Permit application for a place of worship.

ECF No. 1, PageID # 37. The Complaint's Prayer for Relief seeks (a) a declaration that the denial of Plaintiffs' Special Use Permit application is void, invalid, and unconstitutional; (b) a declaration that the standards set forth in the land use regulations and the standards governing Special Use Permit applications and the standards applied by the Maui Planning Commission are unconstitutional; (c) an order directing the Maui Planning Commission to grant Plaintiffs' Special Use Permit application; (d) an order enjoining Defendants from applying the alleged unconstitutional regulations and specifically

requiring Defendants to "approve all plans and applications submitted by the Plaintiffs . . . without delay"; (e) compensatory damages; and (f) an award of costs and attorneys' fees. *See* ECF No. 1, PageID #s 45-46.

On April 23, 2019, this court granted summary judgment in favor of Intervenor-Defendant State of Hawaii with respect to the prior restraint claim asserted in Count V, as well as Defendant County of Maui's joinder therein. *See* 348 F. Supp. 3d 1231, 1240 (D. Haw. 2019). This court ruled that Plaintiffs lacked standing to assert a facial challenge to subsections 15-15-95(c)(1) and (c)(4) and that Plaintiffs were not challenging subsection 15-15-95(c)(5). *Id.* at 1242-45. The court further ruled that neither section 15-15-95(c)'s use of the word "may" nor its reference to guidelines vested the Maui Planning Commission with unbridled discretion. *Id.* at 1245-47. The court ruled that subsection 15-15-95(c)'s lack of a time frame was not pled in the Complaint. *Id.* at 1247-48. In the part of the order relevant to the current motions, the court ruled that subsection 15-15-95(c)(3) did not give the Maui Planning Commission unbridled discretion to deny Plaintiffs' Special Use Permit application. *Id.* at 1248-55. Because subsection 15-15 95(c)(3) was not an unconstitutional prior restraint, this court ruled that Plaintiffs were not entitled to a Special Use Permit even if subsection 15-15-95(c)(2) was constitutionally infirm. *Id.* at 1253, 1255-56.

Plaintiffs argued on appeal that this court had erred in holding that section 15-15-95(c) is not an unconstitutional prior restraint on religious expression and argued that they should be granted summary judgment on that claim. *See* Appellants' Brief at 48 and 69 of 141, No. 19-16839 (Feb. 28, 2020).

Plaintiffs argued that the guidelines in section 15-15-95(c) provide unlimited discretion to the Maui Planning Commission by (1) providing no guidance as to how they should be applied (*id.* at 51 to 54 of 141); (2) allowing the denial of a Special Use Permit application even when all of the guidelines are satisfied (*id.* at 54 to 57 of 141); (3) containing provisions that are not narrow, objective, or definitive enough (*id.* at 57 to 66 of 141); and (4) lacking procedural safeguards (i.e., time limits on the issuance or denial of a permit) (*id.* at 66 to 56 o 141). Plaintiffs' third argument (that the guidelines are not sufficiently narrow, objective or definite) is relevant to the present motions.

With respect to Plaintiffs' third argument, they contended on appeal that section 15-15-95(c) "is replete with terms that provide unbridled discretion to the county Planning Commission." *Id.* at 57 of 141. Plaintiffs then argued that subsection 15-15-95(c)(1) (referring to a use "not . . . contrary to the objectives sought"), subsection 15-15-95(c)(2) (referring to a proposed use that "would not adversely affect surrounding property"), and subsection 15-15-95(c)(4) (referring to "Unusual conditions, trends, and needs [that] have arisen since the district boundaries and rules were established") were too subjective and did not sufficiently provide definite standards. *Id.* at 58 of 141.

On appeal, while focusing on subsection 15-15-95(c)(2) Plaintiffs did not specifically argue that subsection 15-15-95(c)(3) provided too much discretion with respect to determinations on whether to grant Special Use Permits. That is, Plaintiffs did not specifically challenge this court's ruling that subsection 15-15-95(c)(3) did not give the Maui Planning

Commission unbridled discretion to deny Plaintiffs' Special Use Permit application. At the hearing on the present motions, Plaintiffs clarified that they are no longer challenging the constitutionality of subsection 15-15-95(c)(3).

In the brief they filed with the Ninth Circuit, Plaintiffs spent several pages arguing that subsection 15-15-95(c)(2) provided unbridled discretion. Plaintiffs then argued that, because subsection 15-15-95(c)(2) was not severable from the rest of section 15-15-95(c), the entire regulation failed. *Id.* at 64 to 66 of 141.

On September 22, 2022, the Ninth Circuit reversed this court's grant of summary judgment to Defendants with respect to Count V. *See* 49 F.4th 1180 (9 Cir. 2022). The Ninth Circuit held that Plaintiffs could proceed with their facial prior restraint challenge to the permitting scheme governing their Special Use Permit application, then ruled that that challenge succeeded. *Id.* at 1191. The Ninth Circuit explained that subsection 15-15-95(c)(2) improperly granted county planning commissions "unbridled discretion to rely only on an arbitrary guideline—whether '[t]he proposed use would not adversely affect surrounding property'--to deny a special use permit application. This use of 'adversely affect' is as general, flimsy, and ephemeral as 'health or welfare' or 'aesthetic quality.'" *Id.* at 1192.

In ruling that subsection 15-15-95(c)(2) improperly granted county planning commissions unbridled discretion, the Ninth Circuit majority did not expressly discuss this court's determination that subsection 15-15-95(c)(3) survived Plaintiffs' prior restraint challenge. *See* 348 F. Supp. 3d at 1253-54. Nor did the Ninth Circuit expressly discuss this court's deter-

mination that, "even if subsection 15-15-95(c)(2) does run afoul of the First Amendment (something this court is expressly not ruling on), that would not give Plaintiffs an entitlement to receive the requested permit because subsection 15-15-95(c)(3) would still present an impediment to such a grant." *See* 348 F. Supp. 3d at 1255. Instead, in Footnote 5, the majority stated:

> Plaintiffs have not preserved a challenge against the other guidelines in the Code of Hawai'i Rules § 15-15-95(c), and here, we do not consider the validity of the permitting scheme as a whole. Even if the adverse effects guideline [in subsection 15-15-95(c)(2)] is unconstitutional, "a federal court should not extend its invalidation . . . further than necessary to dispose of the case before it." *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S. Ct. 2794, 86 L. Ed.2d 394 (1985). It is left for the district court whether § 15-15-95(c)(2) is severable. *See Long Beach [*Area Peace Network v. City of Long Beach*]*, 574 F.3d [1011,] 1044 (9 Cir. 2009).

49 F.4th at 1192 n.5.

The dissent stated: "When the procedural protections afforded by the permit scheme are properly accounted for, the challenged guideline sufficiently fetters governmental decisionmakers." *Id.*, 49 F.4th at 1197 (Clifton, J.). The dissent then provided the following guidance:

> Even if the "adverse effects" guideline [, H.A.R. § 15-15-95(c)(2),] affords the government with an unconstitutional degree

> of discretion, the whole permitting scheme is likely salvageable, and the plaintiffs are not necessarily entitled to the relief they seek. The other challenged guideline, H.A.R. § 15-15-95(c)(3), the "unreasonable burden" guideline, is not unconstitutional, as the district court correctly held. The impact on Plaintiffs' claims may be considered on remand.

49 F.4th at 1197–98.

III. LEGAL STANDARDS.

On January 18, 2023, Defendant State of Hawaii filed a motion requesting that summary judgment be entered as follows:

> 1. That Hawai'i Administrative Rule ("HAR") § 15-15-95(c)(2) be deemed severable from the rest of the rule (i.e., HAR § 15-15-95(c));
>
> 2. That HAR § 15-15-95(c)(3) be held to be constitutional; and
>
> 3. That judgment be entered in favor of the State as to Count V (the First Amendment Prior Restraint claim), thereby dismissing Count V from the case.

ECF No. 473, PageID # 11247.

Also on January 18, 2023, Defendant County of Maui filed a substantive joinder in the state's motion, requesting that summary judgment be granted in its favor on Count V (the prior restraint claim). *See* ECF No. 475, PageID # 11506.

On February 1, 2023, Plaintiffs filed a motion for preliminary injunction, specifically seeking an order:

> 1. Enjoining the Defendants, County of Maui and Maui Planning Commission, from appli-

> cation and enforcement of H.A.R. § 15-15-95(c) and any implementing County laws with respect to Plaintiffs; and/or
>
> 2. Alternatively, entering an Order compelling the County to issue the Plaintiffs a Special Use Permit under the conditions recommended by the County's Planning Department and accepted by the Plaintiffs.

ECF No. 482-1, PageID # 11615.

A. Summary Judgment Standard.

This court set forth the summary judgment standard in an order filed on July 20, 2018, in this case. *See* ECF 200. That standard is incorporated here by reference.

B. Preliminary Injuction Standard.

To obtain a preliminary injunction, a party must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit has noted that "[l]ikelihood of success on the merits is the most important factor." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quotations omitted). If a movant fails to meet this "threshold inquiry," this court need not consider the other factors. *Id.*

There is also a "sliding scale" variant of the *Winter* standard. *See Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021). Under this variation, a preliminary injunction may also issue when there are serious questions going to the merits and a balance of hardships that tips sharply towards

the plaintiff "'so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.'" *Id.* (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

IV. ANALYSIS.

A. The Unconstitutional Subsection 15-15-95(c)(2) Is Severable From the Rest of Section 15-15-95(c).

Given Plaintiffs' facial challenge to subsection 15-15 95(c)(2) and the Ninth Circuit's determination that it is unconstitutional, Defendants are forbidden from applying it in deciding whether to issue any Special Use Permit. The motions before this court ask for a determination as to whether subsection 15-15-95(c)(2) is severable from the other guidelines in section 15-15-95(c). If subsection 15-15-95(c)(2) is severable, then Defendants were allowed to rely on the remainder of section 15-15-95(c) in determining whether to issue a Special

Use Permit. The effect of this is that Plaintiffs would not be entitled to the requested permit because their permit application was properly denied under subsection 15-15-95(c)(3), a subsection Plaintiffs are no longer challenging as unconstitutional.

However, if subsection 15-15-95(c)(2) is not severable from the rest of section 15-15-95(c), then Defendants could not rely on any part of section 15-15-95(c) in determining whether to issue a Special Use Permit.

Severability is a matter of state law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). "Generally, only that part of an ordinance that is constitutionally in-

firm will be invalidated, leaving the rest intact." *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 821 (9th Cir. 1996). The Hawaii Supreme Court has explained that, "'if the parts are severable and if the part which remains can be enforced when standing by itself, and still carry out the intent of the legislature, it can be upheld as constitutional.'" *State v. Pacquing*, 139 Haw. 302, 319, 389 P.3d 897, 914 (2016) (quoting *Hawaiian Trust Co. v. Smith*, 31 Haw. 196, 202 (1929)); *see also Nat'l Advert. Co. v. City of Orange*, 861 F.2d 246, 250 (9th Cir. 1988) ("Whether partial invalidation is appropriate depends on the intent of the City in passing the ordinance and whether the balance of the ordinance can function independently."). When a portion of legislation is unconstitutional and the rest is not,

> [t]he ordinary rule . . . is that "where the provisions are so interdependent that one may not operate without the other, or so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other, the whole must fall; but if, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained."

Pacquing, 139 Haw. at 318, 389 P.3d at 913 (quoting *Hawaiian Trust Co.*, 31 Haw. at 202).

The court begins its analysis with a short examination of the statutory and regulatory scheme governing agricultural districts in Hawaii. Section 205-1 of Hawaii Revised Statutes establishes the Land Use

Commission, charging it with promulgating rules guiding its conduct and making it a part of the State of Hawaii Department of Business, Economic Development, and Tourism. Section 205-7 of Hawaii Revised Statutes requires Hawaii's Land Use Commission to adopt, amend, and repeal rules relating to matters within its jurisdiction pursuant to chapter 91 of Hawaii Revised Statutes, which governs administrative procedures.

Section 205-2 of Hawaii Revised Statutes establishes four major land use districts (urban, rural, agricultural, and conservation) and charges the Land Use Commission with grouping contiguous land areas into one of the four land use districts. Section 205-2(d) of Hawaii Revised Statutes describes sixteen types of land uses that fall within agricultural districts. These include, for example, cultivation of crops, farming, aquaculture, wind-generated energy, biofuel production, agricultural tourism, and geothermal resource exploration and development. Section 205-4.5(a) of Hawaii Revised Statutes expressly lists twenty-two permissible uses within agricultural districts. Section 205-4.5(b) of Hawaii Revised Statutes prohibits uses not listed in section 205-4.5(a), except as provided in sections 205-6 (Special Use Permits) and 205-8 (nonconforming uses) of the Hawaii Revised Statutes.

Section 205-6(a) allows county planning commissions such as the Maui Planning Commission to "permit certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified." It allows an owner of land to petition the local county planning commission for a Special Use Permit for "unusual and reasonable uses." Section 205-6(c) states that "county planning

commission[s] may, under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objective of this chapter," Chapter 205 of Hawaii Revised Statutes.

The Hawaii Supreme Court has explained:

> a special permit allows the owner to put his land to a use expressly permitted by ordinance or statute on proof that certain facts and conditions exist, without altering the underlying zoning classification. Its essential purpose, as explained by the state Attorney General, is to provide landowners relief in exceptional situations where the use desired would not change the essential character of the district nor be inconsistent therewith.

Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n, 64 Haw. 265, 271, 639 P.2d 1097, 1102 (1982) (citing 1963 Op. Att'y Gen. 63-37).

As noted earlier, section 15-15-95(c) of the Hawaii Administrative Rules sets forth five guidelines for the granting of an exception to agricultural restrictions. Subsection 15-15-95(c)(2) having been found unconstitutional, the resulting section reads:

> (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;
>
> ~~(2) The proposed use would not adversely affect surrounding property~~
>
> (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage

> and school improvements, and police and fire protection;
>
> (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
>
> (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

http://luc.hawaii.gov/wp-content/uploads/2012/09/LUC-Admin-Rules_ Chapter15-15_2013.pdf) (Nov. 2, 2013) (striking out text identified by the Ninth Circuit as unconstitutional).

The second guideline in section 15-15-95(c) is unenforceable as unconstitutional, given the Ninth Circuit's ruling in this case. This court now examines whether the Land Use Commission would still intend the remaining guidelines to be in effect without subsection 15-15-95(c)(2). To determine whether subsection 15-15-95(c)(2) is severable under Hawaii law, this court considers whether the remaining guidelines are complete and enforceable while carrying out their purpose. They are. The remaining provisions still provide county planning commissions with guidance as to when to grant a Special Use Permit application for an "unusual and reasonable use" of agricultural land that is not otherwise authorized.

Citing *Neighborhood Board No. 24 (Waianae Coast)*, 64 Haw. at 271, 639 P.2d at 1102, Plaintiffs argue that county planning commissions are required to examine whether a proposed change in land use would "change the essential character of the district" without being "inconsistent therewith." Plaintiffs argue that subsection 15-15-95(c)(2) is the only subsection that examines effects on a surrounding neigh-

borhood and that without it the entirety of section 15-15-95(c) is meaningless.

Plaintiffs nevertheless concede that subsection 15-15-95(c)(3) (examining whether a proposed use would "unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection") addresses local impacts. *See* ECF No. 483, PageID # 11661. Moreover, Plaintiffs' heavy reliance on the Hawaii Supreme Court's explanation of the "essential purpose" of Special Use Permits takes a narrow view without looking at the purpose of land use regulations in general. This court does not read the Hawaii Supreme Court's opinion as having invited such a narrow view.

In Title 15, chapter 15, of the Hawaii Administrative Rules, the State of Hawaii Land Use Commission promulgated rules governing its practices and procedures and stated that the chapter "shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawai`i." H.A.R. § 15-15-01. Thus, while the "essential purpose" of Special Use Permits involves an examination of a change to the "essential character of the district," that "essential purpose" is not the only purpose at issue. The regulations themselves provide a broader purpose that the remaining guidelines were intended to address.

Plaintiffs assert that the legislative history of section 205-6 of Hawaii Revised Statutes demonstrates that the legislature intended county planning commissions to focus on local interests in adjudicating Special Use Permit applications. *See* ECF

No. 483, PageID # 11660. This court therefore examines that legislative history.

In 1961, the Hawaii legislature established Hawaii's Land Use Commission, charging it with grouping contiguous land into three land classifications. The legislature allowed the State Land Use Commission to permit "certain unusual and reasonable uses other than those for which the district is classified." *See* Act 187, Secs. 2, 3, 8, Sess. Laws of Hawaii, First State Legislature (Reg. Sess. 1961); Rev. Laws of Haw. § 98H-2, -3, and -7 (1961 Supp). The legislature's purpose was "to protect and conserve through zoning the urban, agricultural, and conservation lands within all the counties . . . ." Senate Journal, Standing Committee Report 1031 re. House Bill 1279 (1961 gen. sess.). The three major land use districts were established as part of implementing a "General Plan." *Id.*

In 1963, "experience and research" caused the legislature to amend the land use laws to clarify the division of authority between the State Land Use Commission and the counties, as well to take into account the "hardship caused to land owners who wish to develop lands included in agricultural districts but where such lands are not at all suitable for agricultural uses." Act 205, Sec. 1, Sess. Laws. of Hawaii, Second State Legislature (Reg. Sess. 1963). The legislature added a rural classification as a fourth land category. Act 205, Sec. 2, Sess. Laws. of Hawaii, Second State Legislature (Reg. Sess. 1963) (amending Rev. Laws of Haw. § 98H-2). It then allowed county planning commissions (or the zoning board of appeals for Honolulu) "to permit certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is

classified." *Id.* (amending Rev. Laws of Haw. § 98H-6). The legislature provided that a county planning commission (or the zoning board of appeals for Honolulu) could, "under such protective provisions as may be deemed necessary, permit such desired use, but only when such use would promote the effectiveness and objectives of this chapter." *Id.* (amending Rev. Laws of Haw. § 98H-7).

In 1970, the legislature renumbered the Special Use Permit law, codifying it at section 205-6 of Hawaii Revised Statutes. *See* Act 136, Sec. 1, Sess. Laws of Hawaii, Fifth State Legislature (Reg. Sess. 1970). The county planning commissions were charged with permitting "certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified." *Id.*

In 1976 and again in 1978, the legislature amended section 205-6 of Hawaii Revised Statutes to change Land Use Commission procedures. *See* Act 4 (1976 Reg. Sess.) (allowing the Land Use Commission to visit and view property subject to applications and changing time requirements); Act 166 (1978 Reg. Sess.) (allowing counties to establish fees for Special Use Permit applications and changing time requirements).

In Act 221 (Reg. Sess. 1979), the legislature provided that only Special Use Permit requests involving more than fifteen acres of land that were approved by a county planning commission had to also be approved by the State Land Use Commission. Senate Standing Committee Report No. 640 (Res. Sess. 1979) (regarding House Bill 1232) explained that section 205-6 was being amended to provide "that only those Special Use Permit requests involving lands with an area greater than fifteen

acres shall be subject to the approval by the land use commission. All other Special Use Permits shall only be subject to approval by the appropriate county planning commission." The committee explained "that land use decisions whose impact is limited to a particular county should be decided by that particular county." It noted that this would result in a 75 percent decrease in Special Use Permit requests that had to be examined by the Land Use Commission, allowing it to concentrate on those applications that had "a greater impact of a statewide nature." House Standing Committee Report No. 572 (Reg. Sess. 1979) (regarding House Bill 1232) mirrored its Senate counterpart.

While section 205-6 has been amended several times since then, its current version still provides for county planning commissions to adjudicate Special Use Permit applications, except when land greater than fifteen acres is involved. *See* Haw. Rev. Stat. § 205-6(d). Nevertheless, in adjudicating Special Use Permit applications for land of fifteen acres or less, county planning commissions are not restricted to examining only local impacts. Subsection 15-15-95(c)(1), for example, directs county planning commissions to examine whether proposed uses would be "contrary to the objectives sought to be accomplished by chapters 205 and 205A . . . and the rules of the commission." It is therefore clear that Hawaii's Land Use Commission did not intend section 15-15-95(c) to limit county planning commissions to consideration of only local impacts.

The court is unpersuaded by Plaintiffs' argument that, in the absence of a severability provision, there is a presumption that Hawaii's Land Use Commission intended section 15-15-95(c) to exist only with all

five guidelines intact. Plaintiffs cite to no Hawaii law establishing such a presumption**.** While there is no Hawaii Supreme Court law on such a presumption, the Intermediate Court of Appeals for the State of Hawaii has stated:

> When a court determines that a provision of a law is unconstitutional, prior to invalidating the entirety of the law, the court must first start with a presumption that the unconstitutional enactment is severable from the remainder of the section or act. As a general rule, courts are to refrain from invalidating more of a statute than is necessary, because a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. The presumption of severability is overcome only if something in the statute's text or historical context makes it evident that: the Legislature, faced with the limitations imposed by the Constitution, would have preferred no statute at all to a statute with the invalid part excised. In conducting this inquiry, we must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with the Legislature's basic objectives in enacting the statute." The Legislature's intent serves as the basis for this severability test

State v. Tran, 138 Haw. 298, 303–04, 378 P.3d 1014, 1019–20 (Ct. App. 2016), as corrected (Sept. 9, 2016) (alterations, brackets, quotation marks, and citations omitted). Thus, the highest state court in Hawaii to have spoken on the matter has determined that

Hawaii law has a presumption of severability, the opposite of the presumption posited by Plaintiffs.

Plaintiffs are unpersuasive in citing Hawaii Administrative Rules section 16-186-105 (a severability clause) and *Russellow v. United States*, 464 U.S. 16, 23 (1983), for the proposition that the Land Use Commission's failure to have a severability clause in its regulations demonstrates the Land Use Commission's purposeful intent to omit it. *See* ECF No. 482-1, PageID # 11633. Section 16-186-105 was promulgated by a different regulatory agency than the Land Use Commission. This court cannot infer the Land Use Commission's intent from rules promulgated by a different agency.

Moreover, Hawaii has a general severability statute, section 1-23 of Hawaii Revised Statutes. That statute provides, "If any provision of Hawaii Revised Statutes, or the application thereof to any person or circumstances, is held invalid, the remainder of the Hawaii Revised Statutes, or the application of the provision to other persons or circumstances, shall not be affected thereby." Section 91-16 of Hawaii's Administrative Procedure Act (through which the Land Use Commission promulgated its rules) similarly provides, "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable." The Land Use Commission's rules are arguably applications of sections 205-1(c), 205-7, and chapter 91 of Hawaii Revised Statutes.

"[I]f, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be sustained." *Pacquing*, 139 Haw. at 318, 389 P.3d at 913 (quoting *Hawaiian Trust Co.*, 31 Haw. at 202). Subsections 15-15-95(c)(1), (3)-(5), provide guidance that any special use not be contrary to Hawaii's land use regulations while taking into account local impacts such as unreasonable burdens to public agencies providing "roads and streets, sewers, water drainage and school improvements, and police and fire protection." When subsection 15-15-95(c)(2) is stricken, the remainder of section 15-15-95(c) can clearly still be enforced and executed. That remainder is (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with the Land Use Commission's basic objectives in promulgating section 15-15-95(c). In short, striking only subsection 15-15 95(c)(2) and leaving the remainder of section 15-15-95(c) intact gives effect to the Land Use Commission's intent. *See Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kauai*, 133 Haw. 141, 163, 324 P.3d 951, 973 (2014) (noting that, when construing a statute, the court's foremost obligation is to give effect to legislative intent).

The State argues that, if this court strikes the entirety of section 15-15-95(c) because subsection 15-15-95(c)(2) is not severable, every Special Use Permit application would have to be granted until such time as new guidelines are implemented. Thus, the State argues, the Land Use Commission would unquestionably prefer to have the remainder of section 15-15-95(c) to provide guidance with respect to Special Use Permits over having no guidance whatsoever. *See* ECF No. 490, PageID # 12098. It is not clear to

this court that the chaos the State envisions would actually ensue, as amendments could possibly be adopted within a matter of months. This court nevertheless severs subsection 15-15-95(c)(2) for the reasons stated earlier in this order.

This court does, of course, recognize that Plaintiffs are bringing a facial challenge to the guidelines and that their Complaint specifically requests that this court declare the guidelines unconstitutional and enjoin their application. *See* ECF No. 1, PageID #s 45-46. Any ruling that any part of the guidelines is unconstitutional would preclude the State from applying the unconstitutional part in all future applications of section 15-15-95(c). With a facial challenge, a ruling that section 15-15-95(c) is unconstitutional would govern Defendants' conduct in the future not only as to Plaintiffs but as to others.

Under the circumstances presented here, the court rules that subsection 15-15-95(c)(2) is severable from the rest of section 15-15-95(c). There is no assertion now before this court that subsection 15-15-95(c)(3) is unconstitutional. This court's previous determination that there was no constitutional prohibition in applying subsection 15-15-95(c)(3) to Plaintiffs'

Special Use Permit application means that Plaintiffs have not to date established an entitlement to a Special Use Permit on constitutional grounds.

B. Plaintiffs Have Standing With Respect to Their Prior Restraint Claim Under Section 15-15-95(c).

Plaintiffs' Complaint seeks a declaration that the guidelines set forth in section 15-15-95(c) are unconstitutional. *See* ECF No. 1, PageID #s 45-46. The Ninth Circuit has ruled that subsection 15-15-95(c)(2)

is unconstitutional and remanded the case "for further proceedings consistent with our decision." 49 F.3d at 1196.

The State argues that, if the court determines on remand that subsection 15-15-95(c)(2) is severable from the rest of section 15-15-95(c), this court should make no declaration that subsection 15-15-95(c)(2) is unconstitutional. The State argues that, despite the unconstitutionality of subsection 15-15-95(c)(2), once this court deems subsection 15-15-95(c)(2) severable, it loses jurisdiction to issue a declaration to that effect because Plaintiffs' Special Use Permit application can still be denied based on subsection 15-15-95(c)(3). The State says that this means Plaintiffs lack standing to seek a declaration that subsection 15-15-(c)(2) is unconstitutional. See ECF No. 473, PageID #s 11274-76; *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 895 (9 Cir. 2007) (discussing the need for a plaintiff to have been eligible to get a permit "for the asking" to challenge an allegedly unconstitutional provision).

The Ninth Circuit has already ruled that Plaintiffs are asserting a facial challenge to section 15-15-95(c) and that Plaintiffs' challenge "succeeds" with respect to subsection 15-15-95(c)(2). This court's present determination on the merits that subsection 15-15-95(c)(2) is severable such that the remainder of section 15-15-95(c) remains in effect does not foreclose this court from recognizing, consistent with the Ninth Circuit's decision, that subsection 15-15-95(c)(2) is unconstitutional. Indeed, this court is certainly required to do that. To say that Plaintiffs lack standing to obtain the very declaration they won before the Ninth Circuit makes no sense. This court declines to grant the State's request that the court

dismiss Count V for lack of standing when the Ninth Circuit has already determined that Plaintiffs' facial challenge to subsection 15-15-95(c)(2) succeeds.

While this court in this order recognizes that the Maui Planning Commission was still allowed to rely on subsection 15-15-95(c)(3) in denying Plaintiffs' Special Use Permit application, that only means that the unconstitutionality of subsection 15-15-95(c)(2) does not automatically entitle Plaintiffs to the requested remedy of a permit. It would conflate the concept of standing with the separate issue of remedies to say that Plaintiffs therefore cannot obtain from this court the very declaration the Ninth Circuit gave them.

V. CONCLUSION.

Defendants may not apply the unconstitutional subsection 15-15-95(c)(2), given the Ninth Circuit's decision that Plaintiffs succeed on the portion of Count V challenging subsection 15-15-95(c)(2).

The court grants the State of Hawaii's motion for summary judgment with respect to the remainder of Count V and the County of Maui's joinder therein and denies Plaintiffs' motion for a preliminary injunction. Hawaii Administrative Rules subsection 15-15-95(c)-(2), which the Ninth Circuit has determined to be unconstitutional, is severable from the remainder of section 15-15-95(c). Subsection 15-15-95(c)(3) may therefore be applied in determining Plaintiffs' eligibility for the requested Special Use Permit. The Maui Planning Commission was allowed to rely on subsection 15-15-95(c)(3) in denying the requested permit. Accordingly, Defendants are entitled to summary judgment on the remaining portion of Court V that asks this court to award Plaintiffs the requested

Special Use Permit on the ground that section 15-15-95(c) is entirely unconstitutional. Because Defendants are entitled to summary judgment with respect to that part of Count V, Plaintiffs have no likelihood of success on that part of their claim and so are not entitled to the requested preliminary injunction.

In light of this order, Plaintiffs and the State are directed to confer as to the procedures applicable to the State's involvement or lack of involvement as this case moves forward. Either a stipulation or position papers on this point must be submitted to this court no later than May 1, 2023. Between now and that date, the State need not participate in matters in this case unless the matters directly concern the State.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 31, 2023.

[LOGO]

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

Spirit of Aloha Temple, et al. v. County of Maui, Civ. No. 14-00535 SOM/RLP; ORDER GRANTING DEFENDANT STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COUNT V AND DEFENDANT COUNTY OF MAUI'S JOINDER THEREIN; ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITH RESPECT TO COUNT V

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Nov 01, 2023, 8:31 am

Lucy H. Carrillo, Clerk of Court

Members of the Jury:

You have heard all of the evidence. You will soon hear the arguments of the attorneys. Before that, it is my duty to instruct you on the law that applies to this case.

Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. That is, you must not substitute or follow your own notion or opinion as to what the law is or ought to be. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is no respecter of persons, and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness; and

(2) the exhibits that are admitted into evidence.

In the final analysis, it is your own recollection and interpretation of the evidence that controls in the case. However, certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

During the course of a trial I occasionally make comments to the lawyers, or ask questions of a witness, or admonish a witness concerning the manner in which he or she should respond to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

Do not place any significance on the behavior or tone of voice of any person reading the deposition questions or answers.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) he reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

The rules of evidence provide that, if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify and state an opinion or opinions concerning such matters.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's knowledge, skill, experience, training, or education, the reasons given for the opinion, and all the other evidence in the case.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something that is inconsistent with the witness's present testimony or failed to say or do something that would be consistent with the present testimony had it been said or done.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

All parties are equal before the law and a corporation or municipality is entitled to the same fair and conscientious consideration by you as any party.

Under the law, a corporation and governmental entity are considered to be persons. They can only act through their employees, agents, directors, or officers. Therefore, a corporation and governmental entity are responsible for the acts of their employees, agents,

directors, and officers performed within the scope of authority.

When a party has the burden of proving a matter by a preponderance of the evidence, it means you must be persuaded by the evidence that the matter is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

You should decide the case as to each party separately. Unless otherwise stated, the instructions apply to all parties.

Not all claims asserted in the Complaint are matters that you must decide. You need only decide the matters that the Verdict Form asks you to decide.

Some claims in the Complaint in this case are not before you in this trial. One such claim is Count IV, which alleges a violation of a statute prohibiting treatment of a religious assembly or institution on less than equal terms. The court instructs you that Defendant County of Maui, with respect to accepted zoning criteria, including agricultural, conservation, and SMA matters, did not treat Plaintiff Spirit of Aloha Temple on less than equal terms as compared to the way the County of Maui treated Hale Akua Gardens and Ali`i Kula Lavender Farm.

In reviewing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") counts of Plaintiffs' Complaint, the jury should construe that statute in favor of a broad protection of religious exercise.

In Counts I, VI, and VIII of their Complaint, Plaintiffs claim that Defendant's actions have prevented them from using their property to engage in

religious exercise, in violation of RLUIPA, 42 U.S.C. § 2000cc(a), and the federal and State constitutions' protections of religious exercise.

In Count I, Plaintiffs claim that Defendant's actions have prevented them from using their property to engage in religious exercise, in violation of RLUIPA, 42 U.S.C. § 2000cc(a). RLUIPA provides, "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person."

Not all burdens are substantial under RLUIPA.

Defendant County of Maui is not contesting the sincerity of Plaintiffs' beliefs, although Defendant County of Maui is disputing whether the uses proposed in Plaintiffs' Special Use Permit application were religious in nature. Any legal person, including a nonprofit or even a for-profit corporation, may engage in religious exercise.

In Count VI, Plaintiffs assert a violation of the Free Exercise Clause of the First Amendment of the U.S. Constitution, which provides a government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

In Count VIII, Plaintiffs assert a violation of Article I, section 4, of the Hawaii constitution, which states, "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

In Count I (RLUIPA substantial burden claim), Count VI (federal constitutional free exercise claim), and Count VIII (Hawaii state constitutional free exercise claim), Plaintiffs must show that the County substantially burdened their religious exercise. You should consider the following factors in determining

whether the burden on Plaintiffs' religious exercise is substantial:

1. Whether Plaintiffs have demonstrated a genuine need to use their property to facilitate additional services or programs in their exercise of religion;
2. The extent to which the Planning Commission's decision effectively deprived Plaintiffs of any viable means by which to engage in elements of protected religious exercise;
3. Whether there is a meaningful connection between the activities described in Plaintiffs' Special Use Permit application and Plaintiffs' religious exercise;
4. Whether the County's decisionmaking process concerning Plaintiffs' application reflects any arbitrariness of the sort that might evince animus or otherwise suggests that Plaintiffs have been, are being, or will be treated unfairly;
5. Whether the County's denial of Plaintiffs' Special Use Permit application was final or whether, instead, Plaintiffs had an opportunity to submit modified applications that might have satisfied the Planning Commission's reasons for denying the requested permit; and
6. Whether the alleged burden is properly attributable to the Planning Commission (if Plaintiffs had a reasonable expectation of using the property for religious exercise) or whether the burden is instead self-imposed (if Plaintiffs had no such reasonable expectation or demonstrated an unwillingness to modify their proposal to comply with applicable zoning requirements).

For a land use decision to impose a "substantial burden," it must be oppressive to a significantly great extent on religious exercise. A "substantial burden" must place more than an inconvenience on religious exercise.

You must determine whether Plaintiffs have proven by a preponderance of the evidence that the denial of their Special Use Permit application substantially burdened their religious exercise.

For each of Counts I, VI, and VIII, only religious exercise, and not activities that are motivated solely by commercial or secular reasons, is protected by RLUIPA and the free exercise of religion clauses of the federal and state constitutions.

The use, building, or conversion of real property for the purpose of religious exercise is a religious exercise of the person or entity that uses or intends to use the property for that purpose.

Religious exercise means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. A building is used for religious exercise if it is devoted to a religious purpose. Such religious purpose need not implicate core religious practice.

Religious exercise includes the performance of physical acts engaged in for religious reasons.

Plaintiffs need not demonstrate that their entire motivation for their proposed use of the property is religious in nature. Even if a partial motive for obtaining the Special Use Permit is not religious, Plaintiffs may satisfy the requirement that the claim be rooted in religious belief, and not in purely secular philosophical or commercial concerns. Any legal

person, including a nonprofit or even a for-profit corporation, may engage in religious exercise.

Plaintiffs' own actions are relevant in determining whether a burden is considered substantial. When a plaintiff has imposed a burden upon itself, the government cannot be liable for a substantial burden violation. For example, if someone obtains an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that the person suffers when a land use regulation is enforced is not a substantial burden.

A self-imposed hardship generally will not support a substantial burden claim because the hardship was not imposed by governmental action altering a legitimate, preexisting expectation that a property could be obtained for a particular land use.

In Count II, Plaintiff Spirit of Aloha Temple asserts that the County violated the "Nondiscrimination" provision of RLUIPA, 42 U.S.C. § 2000cc(b)(2). That section prohibits a government, including a county, from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." Plaintiff Fredrick R. Honig is not a claimant on Count II.

You must determine whether a preponderance of the evidence establishes that the County did or did not discriminate against Spirit of Aloha Temple on the basis of religion or religious denomination.

With respect to Count II, you will be asked whether Plaintiff Spirit of Aloha Temple proves the following elements by a preponderance of the evidence, as well as whether Defendant County of Maui negates the

following elements by a preponderance of the evidence:

1. When the County denied the requested Special Use Permit, the County was at least in part motivated by an intent to discriminate against Plaintiff Spirit of Aloha Temple because of religion or religious denomination; and

2. The denial actually discriminated against Plaintiff Spirit of Aloha Temple on the basis of religion of religious denomination.

"Discriminatory intent" may be inferred from circumstantial evidence.

In Count VII, Plaintiffs assert a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. That clause provides that no government shall "deny to any person within its jurisdiction the equal protection of the laws."

In Count IX, Plaintiffs assert a violation of the Equal Protection Clause of the Hawaii state constitution. That clause provides that "[n]o person shall be . . . denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of . . . religion."

Plaintiffs have the burden of establishing Counts VII and IX by a preponderance of the evidence.

Count II (RLUIPA discrimination on the basis of religion claim), Count VII (federal constitutional equal protection claim), and Count IX (Hawaii state constitutional equal protection claim) assert that Defendant has intentionally discriminated on the basis of religion or religious denomination.

Discriminatory intent need not be the sole or even primary motivating factor, but it must be a motivating factor. It is not necessary for a plaintiff to show that the challenged governmental action rested solely on a discriminatory intent in order to demonstrate that the government or its officials acted with an intent to illegally discriminate.

Relevant circumstantial evidence of discriminatory motivation includes the series of events leading up to a land use decision, the context in which the decision was made, whether the decision or decision making process complied with or departed from established norms, statements made by the decision making body, reports issued by the decision making body, whether a discriminatory impact was foreseeable, and whether less discriminatory avenues were available.

A religion is a system of faith and worship that often involves, but need not involve, a belief in a supreme being and a moral or ethical code. Religious beliefs are those that stem from a person's moral, ethical, or religious beliefs about what is right or wrong and are held with the strength of traditional religious convictions.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if

the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes communications in person, in writing, by phone or electronic means, or through any internet website or social media application. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved including the parties, the witnesses or the lawyers until you have been excused as jurors. If you happen to read or hear anything touching on this case

in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial.

If any juror is exposed to any outside information, please notify the court immediately.

Upon retiring to the jury room you should first select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court. A form of verdict has been prepared for you. The judge will explain this verdict form to you before you begin your deliberations.

After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the clerk or bailiff that you are ready to return to the courtroom.

If it becomes necessary during your deliberations to communicate with the court, you may send a note through the clerk or bailiff, signed by any one or more of you. No member of the jury should ever attempt to communicate with the judge except by a signed writing. The judge will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, the judge will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to

tell anyone--including the court-how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case: CV 14-00535 SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawaii nonprofit corporation; FREDRICK R. HONIG

Plaintiffs,

v.

COUNTY OF MAUI

Defendant.

JUDGMENT IN A CIVIL CASE

[✓] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered pursuant to the Jury Verdict, the court's oral rulings on the parties' motions for judgment as a matter of law (ECF Nos. 639 & 640) entered on October 11, 2023, the "Order Granting Defendant State of Hawaii's Motion for Summary Judgment with Respect to Count V and Defendant County of Maui's Joinder Therein; Order Denying Plaintiffs' Motion for Preliminary Injunction with Respect to Count V", ECF No. 498, filed March 31, 2023, and the "Order Granting Partial Summary

Judgment in Favor of Plaintiffs on the Issue of Whether the County of Maui's Denial of the Special Use Permit Satisfied Strict Scrutiny with Respect to Counts I, VI, and VIII, But Denying Summary Judgment on All Remaining Issues and Claims", ECF No. 540, filed August 11, 2023.

October 12, 2023
Date

LUCY H. CARRILLO
Clerk

/s/ LUCY H. CARRILLO by EA
(By) Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 14-00535 SOM/RLP

SPIRIT OF ALOHA TEMPLE and FREDRICK R. HONIG,

Plaintiffs,

vs.

COUNTY OF MAUI,

Defendant.

VERDICT FORM

We the jury in the above entitled matter find (please mark appropriate blanks):

1) With respect to Count I (substantial burden on the exercise of religion claim under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc(a)), has Plaintiff Spirit of Aloha Temple proven by a preponderance of the evidence that Defendant County of Maui substantially burdened Spirit of Aloha Temple's exercise of religion?

_____	__X__
Yes	No

2) With respect to Count I (substantial burden on the exercise of religion claim under RLUIPA, 42 U.S.C. § 2000cc(a)), has Plaintiff Fredrick R. Honig, a.k.a. Swami

Swaroopananda, proven by a preponderance of the evidence that Defendant County of Maui substantially burdened his exercise of religion?

_____ __X__
Yes No

3) With respect to Counts VI and VIII (free exercise of religion claims under the United States and Hawaii Constitutions), has Plaintiff Spirit of Aloha Temple proven by a preponderance of the evidence that Defendant County of Maui substantially burdened Spirit of Aloha Temple's free exercise of religion?

_____ __X__
Yes No

4) With respect to Counts VI and VIII (free exercise of religion claims under the United States and Hawaii Constitutions), has Plaintiff Fredrick R. Honig, a.k.a. Swami Swaroopananda, proven by a preponderance of the evidence that Defendant County of Maui substantially burdened his exercise of religion?

_____ __X__
Yes No

5) With respect to Count II (RLUIPA nondiscrimination claim under 42 U.S.C. 2000cc(b)(2)), has Plaintiff Spirit of Aloha Temple proven by a preponderance of the evidence that Defendant County of Maui

discriminated against Plaintiff Spirit of Aloha Temple based on religion?

_____	__X__
Yes	No

6) With respect to Count II (RLUIPA non-discrimination claim under 42 U.S.C. 2000cc(b)(2)), has Defendant County of Maui proven by a preponderance of the evidence that it did not discriminate against Plaintiff Spirit of Aloha Temple based on religion?

__X__	_____
Yes	No

7) With respect to Counts VII and IX (equal protection claims under the United States and Hawaii Constitutions), has Plaintiff Spirit of Aloha Temple proven by a preponderance of the evidence that Defendant County of Maui discriminated against Spirit of Aloha Temple based on its religion?

_____	__X__
Yes	No

8) With respect to Counts VII and IX (equal protection claims under the United States and Hawaii Constitutions), has Plaintiff Fredrick R. Honig, a.k.a. Swami Swaroopananda, proven by a preponderance of the evidence that Defendant County of Maui discriminated against him based on his religion?

_____	__X__
Yes	No

Please have the foreperson sign and date this verdict form on the next page.

Dated: October 11, 2023.

/s/ Illegible
Foreperson

APPENDIX H

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 14-00535 SOM-WRP

SPIRIT OF ALOHA TEMPLE, *et al.*,

Plaintiffs,

vs.

COUNTY OF MAUI, *et al.*,

Defendants.

Honolulu, Hawaii

June 30, 2023

VARIOUS MOTIONS FOR SUMMARY JUDGMENT

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN OKI MOLLWAY
SENIOR UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs: ADAM G. LANG, ESQ.
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For the Defendant County of Maui:

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Official Court Reporter:

ANN B. MATSUMOTO, RPR
300 Ala Moana Boulevard, Room C-338
Honolulu, Hawaii 96850

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

[2] COURTROOM MANAGER: Civil Number 14-00535 SOM-WRP, Spirit of Aloha Temple, et al., versus County of Maui, et al.

This case has been called for a hearing on various motions for summary judgment.

Counsel, your appearances, please, for the record.

MR. LANG: Good morning, Your Honor. Adam Lang and my colleague Roman Storzer on behalf of plaintiffs.

THE COURT: Good morning.

MR. STORZER: Good morning, Your Honor.

MR. BILBERRY: Oh. Good morning, Your Honor. Deputy Corporation Counsel Brian Bilberry on behalf of the County of Maui.

THE COURT: Okay. Good morning. You can all be seated to start with.

First, I do apologize for all the scheduling changes. We were supposed to have this hearing, which was set a long time ago, on Wednesday instead of today, Friday.

But I was in trial, and I was worried that the trial might slide over into Wednesday, and I didn't want that to be a problem. So we asked for you to accommodate us and move it to today. And then I was worried I would still be in trial, even today, but I thought, well, I moved it already, and I'll take you at 8:00 o'clock and start the trial a little later. But that's okay. The trial ended. So then we moved it to a normal hour of nine o'clock. [3] But I greatly appreciate counsel being flexible with me. So thank you to both sides in that regard.

Now, I have several motions on before me, and I want to start with some questions I have. One question I have is how, if at all, the advisory jury finding that Spirit of Aloha Temple had not treated the County of Maui on less than equal terms, as compared to non-religious entities, affects certain claims. Now, some of those claims are not before me on these motions, but I do have that concern. What, if any, impact does anything – not just the less than equal terms, but we had the issue of whether, you know, there had been established that Spirit of Aloha was or was not a religious entity.

How do those things affect the remaining claims is one issue I have. And it may be that those findings don't affect the remaining claims, since they were made in the context of different counts. But, you know, I would like a discussion about that because that is something – we've briefly touched on it, I know, in prior gatherings, but that is one thing.

I also have a question about what in the record is different here in June 2023 from the record I had in 2018, when I made a ruling that there was a question of fact precluding summary judgment as to whether plaintiffs had obtained an interest in the land without

having any reasonable expectation that they would be allowed to conduct a religious institution's [4] events on that land, or put up structures for such a purpose.

So at that time I said, well, there's a question of fact as to the plaintiffs' expectations and whether they were reasonable or not, and that issue comes before me in the context of some of the matters now before me on these motions. And to the extent summary judgment is sought, what's different now on that subject from my finding a question of fact in 2018?

Okay. Let me – and I will give you a third question. Is there a dispute about whether the process of obtaining a special use permit qualifies as a formal mechanism for granting an exception to the use of land that is agriculturally zoned?

Okay, I'm going to start with those. I do have some other questions.

MR. BILBERRY: Your Honor, may I ask you to repeat that last question?

THE COURT: Yeah. Yeah.

So in case law, particularly I'm looking at this Supreme Court's decision in Fulton v. City of Philadelphia, in 2021. The Supreme Court looked at whether there was a formal mechanism set up, in that case by the City of Philadelphia, for exempting an applicant from certain requirements. And the Supreme Court expressed some concern that when there was a formal mechanism for granting exceptions, then there was concern about whether there was too much discretion, unbridled [5] discretion being given through a – this formal mechanism to officials to just kind of make it up as they went along.

And so I'm asking whether the special use permit is a formal mechanism for granting exceptions to land use restrictions when we're dealing with agricultural land.

So that's another question.

I can also – I guess it would be helpful maybe to state one other question.

In Count I there is a First Amendment violation alleged. And in the context of a First Amendment violation, I need to examine whether there were less restrictive means to address government concerns. So in this case, the government said it was concerned – that's the county – said it was concerned about the safety issues and driving conditions on Haumana Road. There were sanitation concerns raised, also, about having so many people on the land and a kind of like a sewer system that the county was concerned couldn't accommodate food preparation and other sanitation issues for a large number of people.

So if we assume that those are compelling public interests, I still need to look at whether there were less restrictive alternatives to denying the permit as a means to address those compelling public interests. And one of the questions that arose for me is the – is whether the law addresses the level of effectiveness of these less restrictive [6] means.

So all of us can sit here and say, well, instead of denying the permit, could the county have required Spirit of Aloha to do A, B, and C; and those conditions A, B, and C would have addressed the county's concerns about safe use of the road and about sanitation. How well does an alternative have to address a compelling public interest to be a less restrictive means that should have been not just

considered but in fact adopted, instead of an absolute bar on the activity, which is the result of denying the permit.

So I think we probably could all agree that any alternative to really be a serious alternative has to have more than de minimis effectiveness in addressing road safety and sanitation.

We probably can also agree that an alternative would still be a reasonable alternative if it didn't address the compelling public interests in road safety and sanitation a hundred percent the way a total ban on activity would. But where in between de minimis and a hundred percent does a reasonable less restrictive alternative lie? You know, if it addresses those concerns 50 percent, is that enough? What about 45 percent, what – you know, is 60 percent enough if 50 isn't? I don't know the answer, and I don't see it addressed in the papers. But that did occur to me.

Okay. So now I've given you lots of things to talk [7] about, and I would turn this over first to plaintiffs' counsel and you can address the questions I've previewed for you along with other arguments you may want to present on your side of these multiple motions. So I leave it to you.

MR. STORZER: Thank you, Your Honor.

I will try to go through your list. I expect the Court will have many questions in the interim, and I'm not sure how much time we have here today. And if you want me to make my entire case now –

THE COURT: Yeah. Do it now.

MR. STORZER: Okay.

THE COURT: I don't know. We don't have all day.

MR. STORZER: Okay.

THE COURT: I do have an 11:00 o'clock hearing.

MR. STORZER: Well, let me start with the Court's first question then.

THE COURT: Okay.

MR. STORZER: Which I think is a very easy response, the issue of the advisory jury's failure to find for either party on a – one element of the equal terms claim, which is not at issue here, the question of whether the Spirit of Aloha Temple is a religious institution.

First of all, I'd point out, as we did in our briefing, that the burden of persuasion is on the county to demonstrate all of the elements of any RLUIPA claim other than [8] the demonstration of a substantial burden on religious exercise under subsection (a). So it was the county's burden to prove that, and they failed to do that. The advisory jury did not find for them.

But more importantly, it's completely irrelevant. The – the temple does not have to be a, quote – it is a religious institution, but it does not have to be a religious institution to state claims under the substantial burdens provision of RLUIPA, and certainly it doesn't have anything to do with the constitutional claims.

Any person can exercise their religion, whether it's a natural person or a corporation, religious corporation, not religious corporation, even a for-profit corporation, the Supreme Court has held that. The – the – an interesting case that we came across when we were briefing this was the Anselmo versus Shasta County case, a District Court case out of California, where there was a – an entity that was not a religious

institution, that asserted both equal terms and substantial burden claims.

The Court said – held against it on the equal terms claim because it was not a religious institution but then proceeded to analyze its substantial burdens claims because whether or not it was a religious institution had nothing to do with the substantial burdens claim.

So Fredrick Honig has rights under RLUIPA. That's – [9] that's not an issue. He has his own religious exercise that has been burdened. The temple, however you want to characterize it, does engage in religious exercise, even if it's not, quote, a church, a formal church, or however the county wants to describe it. It does engage in religious exercise, and the county has admitted that it does not question its – its beliefs or the fact that they are religious in nature.

So that's – that's a red herring issue. And unless the Court has anything further on that, I wouldn't spend any more time on this, on this issue.

THE COURT: Well, you can go ahead. I may have questions.

MR. STORZER: Sure.

THE COURT: But go ahead.

MR. STORZER: The second question that the Court had I believe related to the reasonable expectation –

THE COURT: Yes.

MR. STORZER: – issue. I think that one development that is particularly relevant here is – is per the case law that has come out on this, on this issue.

There was the Fourth Circuit's decision in the Jesus Christ is the Answer Ministries versus Baltimore

County, which really looked into this question. There have been several District Court decisions on this question. And a – a – a [10] clear pattern has emerged on whether a reasonable expectation exists or does not exist. That is, if you have a use that is permitted, even if it's permitted with discretionary approval, land use approvals, and you have a good-faith belief that you can meet the conditions necessary to obtain such a permit, you do have a reasonable expectation.

On the other hand, the cases that say you do not have a reasonable expectation – and I'm talking about the Andon case out of the Fourth Circuit, the Petra Presbyterian case out of the Seventh Circuit – those cases involve situations where the use was prohibited. It's – it was not allowed. They did not meet zoning for it, and they needed some sort of variances or other kinds of approvals for a use that was not allowed.

In those cases, they did not have a reasonable expectation. Here, the use is allowed with a special use permit. Not only is it allowed, but the – all of the evidence demonstrates that they certainly had a good-faith expectation that they could have obtained a special use permit. All of the agencies did not object to the use. The planning department, which is the agency that corrals all these – makes the report and recommendation, recommended approval for it. It – by definition their expectation of obtaining a special use permit was reasonable when you have the agencies in charge of this recommending approval for the use.

Now, we know that the planning commission denied, but [11] the test can't be, well, if you're denied you didn't have a reasonable expectation. The test is more objective than that, and it concerns whether you believed that you could have met the criteria for it, which the planning director, the county's 30(b)(6)

witness, said, yes, they – they could have – they - they even disagreed, Will Spence disagreed with the planning commission's decision about approval. So they certainly had a reasonable expectation.

They don't have to prove that it's guaranteed. You know, this line of cases came out of Fourth Circuit. Fourth Circuit says that it does not have to be guaranteed approvals, but the expectation has to be reasonable and it's – and it's reasonable here.

Now, what evidence has come since 2018? Well, we had the trial and we had – the Court heard the witnesses. The Court heard Will Spence. The Court heard any lack of real reason to keep this use from this property. There are no – no evidence of any real traffic issues, no evidence of any safety issues, no evidence that any issues concerning water safety or the like could not be addressed by the reasonable conditions that were recommended by the Department of Health, by the planning department, and so on.

Nothing has come out. And the – and the county to this day has not – we believe that there's no disputed issue of material fact here. The county has not given – given us [12] any evidence, any admissible evidence that there is any what the Supreme Court has called a dire threat to public health and safety and order and so on.

The – I – I will not concede that there is a

compelling governmental interest here. It – the Supreme Court has said you don't look at a compelling governmental interest in general. Yes, sure, traffic safety might potentially be a compelling interest. Is it a compelling interest here? The Supreme Court has said you have to look at these facts, this road. The county made a big deal about saying 500 weddings or

whatever the number has been for the last 20 years here. Not one single incident. State Department of Transportation, not one reported incident. County's own police department, not one single reported incident – incident. There's no – the county has not given us any expert testimony. The county hasn't even given us the testimony of its own staff, police department, any – anybody saying that there's any real threat to public safety.

THE COURT: Okay. Let me – let me – sorry to interrupt, but I need clarity from you. Are you saying that when the county asserts an interest in road safety in the abstract that I cannot consider that a compelling public interest and instead must look at whether the county establishes that road safety is in fact a compelling issue with respect to Haumana Road, and that that is a question of fact? [13] Is that what you're arguing?

MR. STORZER: I – that – that's not what I'm arguing. That's what the Supreme Court says, that you have to look at whether there is a compelling interest with this particular use in these particular circumstances. That's the O Centro versus Gonzales (sic) case. That's Wisconsin versus Yoder. You look to see what interest exists in those particular circumstances.

And this isn't a situation here where – and then the use is the language. You don't look at generalized interests. You have to look at the specific circumstances there.

This isn't a case where there's a battle of experts or there's competing – competing evidence. This is a situation where all of the evidence is on the plaintiffs' side demonstrating there is no risk, including the

statements of the county's own officials saying there's no problem here.

Now, are there general concerns (gestures), in general, with traffic safety? Sure. But there aren't specific – there's no specific threat to traffic safety, to the public health and order in this particular case with this use on this road. And that's what the Court must look at.

THE COURT: Okay. So what you're saying is it is a factual issue whether the county has advanced compelling government interests specific to the plaintiffs' property and that although it is a factual question, the county has no [14] factual record at this point establishing compelling government interests, so you should get summary judgment on your Count I, substantial burden claim. Is that – am I correctly stating on that issue?

MR. STORZER: As well as – as Count VI and VIII as well.

THE COURT: I'm sorry?

MR. STORZER: As well as Count VI and VIII as well, the federal –

THE COURT: Yeah, okay.

MR. STORZER: – and Hawaii free exercise –

THE COURT: Okay.

MR. STORZER: – constitutional claims. Yes –

THE COURT: Okay.

MR. STORZER: – the sort of statements relied upon are solely the hearsay statements, which are not admissible here.

They have the obligation to create an issue of fact. They have the obligation, the burden of persuasion on this issue, under RLUIPA and under the federal Constitution, to demonstrate that a compelling governmental interest exists in this case, and they have not done so.

Now, even if they were to do so, then we go on to the least restrictive means part of the analysis. But we're not there yet. Yes, it's our position that they have not even met [15] the first part of the analysis that any compelling governmental interest exists.

THE COURT: Not – but to get summary judgment, you need to say that they cannot meet it at trial. Right? I mean, but there is no triable issue. You're moving for summary judgment.

MR. STORZER: Yes, and –

THE COURT: So – so they – you're saying they have no evidence on that point to present to a jury?

MR. STORZER: Well, they have not – they had the obligation to bring the evidence up here today. They don't get to wait until trial.

THE COURT: No –

MR. STORZER: But, yes.

THE COURT: No, but when you're doing this, I think you're saying – maybe I'm not understanding. I want to understand. I think you're saying that when I said no summary judgment, you have to go to trial, in 2018, you're saying – oh, no, so you're arguing there are developments in the law. But on a factual basis, you're saying the difference in the factual record today and when I denied summary judgment in 2018 is that we had a trial and there was a failure of evidence there?

MR. STORZER: No, Your Honor.

THE COURT: No? That's not what you're saying. [16] Okay, good. Help me.

MR. STORZER: The – the landscape – the legal landscape of determining what – whether something is a substantial burden on religious exercise has certainly evolved since 2018. There have been a number of cases that have looked at specifically – including in the Ninth Circuit – that have looked at what the factors are for determining whether there's a substantial burden.

This Court didn't have the benefit of those authorities in 2018, and now it does.

And every single one of those factors, save one, the county does not dispute.

We have the – the issue of whether the – the Spirit of Aloha Temple has a genuine need for this space. Again, this is not contested. Whether the regulation, the denial deprives the temple of the ability to engage in religious exercise, that has not been disputed. Whether there's a nexus between – the connection between the denial and the religious exercise, this isn't just making things a little more inconvenient or costly; this is prohibiting it outright on the property.

Whether the denial was, quote (gestures), "final" has been a factor that's been used by the Court since 2018. And again, there – the evidence completely demonstrate that there was final – the temple did everything it could. It kept going back to the county, reducing and reducing and reducing more and [17] more conditions, and the planning commission said no way, not under any circumstance.

The only factor that the county has contested in – in these proceedings, in these summary judgment motions to – currently is whether the plaintiff had a reasonable expectation of being able to use the property, and we – you know, we – that is only one factor out of several. And the case law has established that in circumstances like this the temple certainly had a reasonable expectation to do so.

So the legal landscape is a lot different today than it was five years ago. We believe that under – under those precedents there is no question that a substantial burden is demonstrated.

Now, under the temple's free exercise claim, we don't have to prove that the burden is substantial. So we go straight to strict scrutiny analysis. Even if there was some question on here, we would still be entitled to summary judgment on our free exercise claim.

THE COURT: Okay.

MR. STORZER: The third question that the Court had was whether there was any dispute as to whether the special use permit process was – and I'll use the term of art, a system of individualized assessments.

THE COURT: Yeah.

MR. STORZER: I don't think – I don't believe that [18] there has been any dispute. I believe that the county has admitted that it is such, but obviously the county can speak for itself.

There's no question that a discretionary land use – land use regulation system like this falls within that category. There's – this was not contested in briefing, so I don't believe we – we cite – made these – we cited to these. But certainly we could provide the Court with authority after authority saying that in circumstances

like this, this falls under the individualized assessment category under the free exercise clause.

THE COURT: Okay.

MR. STORZER: The fourth question raised by the Court was related to how well –

THE COURT: Right.

MR. STORZER: – conditions –

THE COURT: Whether a least restrictive alternative has to satisfy any quantum of efficacy. I mean, it can't just be, well, we can do X and that would address any problem. But if it only addresses a problem minimally –

MR. STORZER: Right.

THE COURT: – does the county still need to say, okay, okay, we'll give you a permit that imposes this less restrictive alternative. And that's why I posited that we would all agree that a de minimis addressing of a problem would [19] not be – would not qualify as an alternative that the county should be required to implement. And I also posited that it doesn't have to be a hundred percent effective in eliminating every single possible problem, because then there would be no least restrictive alternative.

And is there law saying, well, it has to be at least this good an alternative?

MR. STORZER: And – and I believe that that would be a very interesting question in a different case. And I'll explain my answer.

First of all, I think the – the answer is does the less restrictive means eliminate a dire threat to public health and safety? That's – that – that I think would be the – the logical answer.

Here in this case, the reason I say it's –

THE COURT: But then you're saying it has to be a hundred percent. If there is a problem, it has to address it a hundred percent. You said eliminate. So if assuming there is this threat to public health and safety, you said the question is whether it eliminates a dire threat. So assuming there is a dire threat – I understand that you're saying, no, they haven't established that. But assuming there is such a threat, you're saying the least restrictive alternative is only an actual issue if it eliminates the threat. Are you saying then it has to a hundred percent address it?

[20] MR. STORZER: No. And – and for purposes of – of this discussion, again, if there was competing evidence on it, this would be a relevant question, I believe. But the – it is not any threat. Obviously any – any use anywhere, any land use is going to create some threat. If you'll allow one car for one use, you put in a cemetery that one person visits every ten years, there is a threat that that car might get into a traffic accident. That's not the test. It's not a hundred percent elimination of any threat. The – however you want to characterize it, whether it is a dire threat – that's – that's the word the Supreme Court has used. There is some quantum of a threat to public health and safety that has to exist. In the prison context, for example, you know, a very real threat of – of prisoner violence, something like that may – may well qualify here.

There is nothing of that sort here. There is no evidence establishing any threat at all, much less such a serious, significant threat that would justify racial discrimination. That's – that's what we're talking about here. We're talking about a test that is the same as a law that would discriminate on the basis of race, or a viewpoint discrimination in the free speech

context. That is – that is the interest that has to be taken care of. Nothing like that exists here.

There is the – going back to RLUIPA and the [21] freedom – free exercise clause, the burden is on the county to demonstrate that all of these conditions that were recommended by all the different county and state agencies, were gathered up by the planning department, put into a report and recommendation, revised time and time again to try to get the planning commission on board, that all of these conditions that everybody agrees were sufficient, everybody except for the planning commission agreed were sufficient, the county has the obligation of proving that those rec – that those conditions were insufficient of taking care of a compelling governmental interest, a dire threat to health and public safety.

And again, the reason I say this is an easy case is because the county has provided no evidence whatsoever supporting that position. What the county has said is simply the planning commission reviewed the conditions, and the planning commission decided that the conditions were not sufficient. Therefore they – it's least restrictive means. That's it. There is nothing else.

The – to say that it's the least restrictive means because the planning commission said it's the least restrictive means would effectively nullify RLUIPA and the free exercise clause.

THE COURT: Okay. Just so I make sure I can understand your position, I asked about what makes something qualify as a least restrictive means, if I cannot tell how [22] effective it is or what the standard of effectiveness – effectiveness under the law is. And you said, well, it's interesting to discuss that, but it's not a relevant issue here because there really isn't an

underlying problem that we need to address with less restrictive conditions. Is that what you're saying?

MR. STORZER: No. No, Your Honor.

THE COURT: Okay, I –

MR. STORZER: What I'm saying, what I'm saying is it's not relevant here because the county has not produced any evidence demonstrating that there exists any dire threat to public health and safety, and the county has produced no evidence demonstrating that the conditions that were recommended by county and state agencies would not address any, quote, dire threat to public health and safety. Because the county has the burden of persuasion and because the county has not taken step one to do so, there's no need to engage in this calculus.

If it had, if it had produced, I don't know, a traffic expert, if it had brought its police chief up and said, look, we've had 17 fatal car accidents here in the last ten years, if – you know, this kind of evidence, then we would relevantly have this discussion, and we – I could argue that, you know, our experts meet their experts or, whatever, our evidence is stronger than their evidence. But we don't get to [23] that point because there is no such evidence here.

THE COURT: Okay. So you're saying – I really –

I'm sure I'm not certain about the plaintiffs' position.

You're saying the county provides no evidence of a dire threat of any kind that you need to address.

MR. STORZER: Yes.

THE COURT: Or that the county needs to address.

That's one point you are indeed arguing –

MR. STORZER: Yes.

THE COURT: – right? Yes?

MR. STORZER: Yes.

THE COURT: Okay. And then even if the county had provided evidence of a dire threat, what happens with any restriction? Even then they don't matter? I –

MR. STORZER: Even if they did demonstrate the dire threat, they have the burden of demonstrating that the recommended conditions would not address such threat.

THE COURT: Okay.

MR. STORZER: And they have not done so.

THE COURT: But I don't understand –

MR. STORZER: In other words, there were – there were, quote, concerns. Now, the standard isn't concerns, but that's the term that the county has used here. The standard is "dire threats."

There were concerns about safety on Haumana – [24] Haumana Road. What the planning department did, in discussions with various agencies, is it reduced the use, again and again and again, and required things like the use of shuttle vans, only driving during the daytime, that kind of thing, to a level that everybody was satisfied would eliminate any concern in terms of traffic.

THE COURT: When you say there's no evidence of a dire threat, you also note that, gee, we don't have any evidence of, you know, a serious accident. We don't – nobody died or got like a life-threatening injury in some auto crash on this road.

What would the county need to show a dire threat? So I take it your argument is that looking at the physical characteristics of the road, it's narrow, only one car can pass at a time there, there isn't a shoulder on the road, it's – my recollection is water could become an issue on the road sometimes.

But you're saying that these physical characteristics are not sufficient to establish a threat to public safety. What would we need – a death – would we need a certain number of accidents? What is it that would meet the burden, which the county has failed to meet?

MR. STORZER: You would need some evidence linking the existing conditions to being an actual threat to public health and safety.

[25] For example, given – given what Your Honor just said, there are shoulders. The photographs in there show shoulders. Our expert witness testified that there are many places where you can pull off, let another car pass. The evidence shows that the county has permitted similar uses on those kinds of roads. An interest is not compelling if you'll allow it to go ahead in other areas with other uses. That – that's black letter law.

The – the water, you know, we – the only testimony we have about this water – about – about the so-called water that the county is very interested in is from a witness that said: "It's not like a dangerous flash flood sort of situation. You could let your kid play in it. It runs off almost instantaneously. There's no standing water at all."

The county has taken that to say that there's flooding. Its only witness testified that there's no flooding.

It's not a dangerous situation. He had – he invited guests himself. When I asked him at trial, Did you believe when you invited people to your own parties and such, it was too treacherous for them to drive down Haumana Road? His answer, No. That doesn't satisfy strict scrutiny.

There is no evidence – there's evidence that, yes, there's rain. Sure, in Hawaii there's rain. In the agricultural area there are narrow roads. It's extremely common. Many similar uses are on narrow roads.

[26] They have the obligation of tying those conditions to a danger – a situation where there is a dire threat to public health and safety. And they haven't done that.

THE COURT: But what – I hear you. But I think what you're saying is, unless there's evidence of accidents and injuries. And you're saying the – could it ever be that just the physical structure of a road is enough so that a court could accept that there is a threat to public safety, with no history of accidents? Could –

MR. STORZER: Sure. If you have the police chief or policeman testifying, This is dangerous. Even though there haven't been any accidents on the road, given my experience, I see the big potential for accidents here.

It could bring a traffic expert to say, Given the methodologies that we as traffic engineers use in this area, we deemed this to be an unsafe road. It – there are – there's plenty – I don't have to make the county's case for it. But it had the opportunity to make its case and it hasn't done anything.

No, you don't need injuries. Although that, I think, is a very relevant piece of evidence. But, you know, when all they do is bring one neighbor up that says, Hey, it's no problem at all, I invite my own friends, I don't care, that's their case? That's not enough.

THE COURT: Okay. Okay. Now, I thank you for [27] looking at the questions I had, but I need to not restrict you to the questions I had. So if you have other matters, I mean, we had significant briefing over here (indicates).

MR. STORZER: Yes.

THE COURT: Go ahead.

MR. STORZER: Okay. I want to point out that what we have here is we have a decision that relied on – on two of the guidelines, under HAR 15-15-95. One of those guidelines has now been struck down by the Court of Appeals, so what we're left with is the – the, quote, "unreasonable burden on public agencies."

And in this case, we have the county's 30(b)(6) witness testifying that, quote, "It would not burden government agencies." In other words, the county has admitted that the only basis for the denial did not exist here. And it's not – you know, the – the question was not – with respect to the SUP denial, the question was not is there – will traffic be created by this use. That all fell within (c)(2) of the – of the HAR 15-15-95, which was struck down.

The Hawaii courts say that kind of analysis falls under – under that guideline and not the burden on public agencies outline – guideline.

The county has not provided us with any evidence that there would be any burden on government agencies. All of the evidence demonstrates otherwise.

The fire department said, [28] Yeah, we go down there. It's no problem at all. The access is not an issue. Police department had no objection.

There were no – there were no staffers. There were no agency heads. Nobody testified or provided a declaration or any evidence at all that there would be any burden on government agencies. So I think the Court needs to – to keep that in mind, what is left here in this case.

I don't need to go through all of the conditions that were imposed, all of the, quote, least restrictive means that existed, but they were significant, numerous, and substantial.

The – the use itself was limited, extremely, to very small use. The – Mr. Okaneku testified that we're talking about maybe ten vehicles a day. That – that's what we're talking about here, ten vehicles. For larger groups I believe the number was 24 or something. They would have to use shuttle vans with experienced drivers.

The county has now spent, I believe, recognizing that traffic is not really an issue here, spent a lot of ink on water safety issues, Department of Health issues. There is condition after condition here saying that under – you know, establishing that there could be no circumstance in which there would be any threat, any dire threat to public health and safety, restricting the number of people, how they can prepare food, the – the water systems and disposal systems that they have to use, the – the times of services and so on.

[29] And very significantly, there were a number of conditions that looked at the situation after the fact; that if they were not abiding by these conditions or that if there were problems being created, the SUP

could be revoked; that there was a requirement of reporting and so on.

So again, they – this – this is a textbook case of lesser – less restrictive means. There's just no way this use could be operated in a way that would create any dire threat to public health and safety because the county went through a long and tedious and iterative process to make sure that that doesn't happen.

The county also discusses, I believe, its – raises its preclusion arguments under – under a different name, you know, talking about the decision of the planning commission and the factual determinations and so on.

And I just want to point out that the Court of Appeals held outright that there was no preclusion whatsoever. It was not a judicial proceeding. There's no preclusion. The Court is not required to give any weight to the planning commission's decision in that sense.

We do – the temple does have the burden of establishing that the burden on its religious exercise is substantial under the RLUIPA substantial burdens provision.

I am prepared to address all those factors in depth, but like I said, the county has not disputed them, other than [30] the reasonable expectation.

So if the Court does not have any questions regarding the other factors, you know, why this is an actual burden on religious exercise, we would just stand on our briefs on those questions.

THE COURT: Okay.

MR. STORZER: Otherwise, unless the Court has anything further?

THE COURT: I had one thing. It's a little anticipatory, but the county has a motion seeking summary judgment on all claims, including claims that are not part of plaintiffs' summary judgment motions. So I'm looking at

Count II, which is a non-discrimination RLUIPA claim, and Counts VII and IX, which are equal protection claims, one under the federal constitution, one under Hawaii's Constitution.

And my question with respect to Counts II, VII, and IX is what, if any, impact the advisory jury verdict has on those claims. So at trial we had the claim that Spirit of Aloha had been treated on less than equal terms as compared to a non-religious entity. It appears to me that Counts II, VII, and IX implicate a concept of discrimination; and is the advisory jury finding entitled to any weight or not, with respect to Counts II, VII, and IX?

MR. STORZER: Well, there's – there's an easy answer, and there's a little bit more complex answer. The easy [31] answer –

THE COURT: Give me both of them.

MR. STORZER: The easy answer is, again, that the advisory jury did not rule – did not find one way or another. It's – and again, all elements – the county has the burden of persuasion on all elements. The county attempted to persuade the jury that the temple was not a religious institution, and the jury did not find for the county on – on that issue.

So I believe that it's – it's basically a nullity.

Even if the count – even if the jury had found in favor of the county on that issue, which it did not, it wouldn't be relevant either, because discrimination

exists - can exist whether or not you are a formal church or – or similar entity.

For example, if I'm – if I'm Jewish and I want to put up a shed on my backyard and the local zoning officer says, No, I – I'm an anti-Semite so I'm not going to let you do it, that's still religious discrimination, regardless of the fact that I'm not a formal church myself. So those types of nondiscrimination claims would still exist.

I don't think that there's any impact of the advisory jury's decisions on those issues.

THE COURT: Okay. So when you say the county has the burden, so we had discussions about burden at trial, and that resulted in a verdict form that asked the jury: Have [32] plaintiffs proved they are and – or has the county proved they are not a religious entity?

But that was a RLUIPA claim, so, okay, maybe that – so I don't know that. I remember we had a heated discussion about whether this burden shifting kind of thing actually applied at trial or not.

But that would only, if it did apply at trial, that would only go to Count II, okay? So Counts VII and IX are under a different rubric. They are constitutional claims. Why is it, you're saying, the county has a burden – 'cause you go first. You're the one with the ultimate burden at trial of proving your claims. Why does the county have the burden on the constitutional claims? It seems to me you're shifting – you made an argument about RLUIPA. Why does that apply in the constitutional context that now you brought the claim, the county has the burden.

MR. STORZER: Well, that – that's a different question, Your Honor. Now we're not talking about the

advisory jury's verdict on those, on those issues, because that –

THE COURT: Well, I am. Because you're – one of the arguments you made was the advisory jury verdict has no impact because the county failed to meet its burden. It failed to show that negative, that Spirit of Aloha was not a religious entity in the context of the less than equal treatment claim that went to trial. So you're saying the county had the [33] burden. And I'm saying if the county had a burden and it failed to meet that burden, does that matter in the context of Counts VII and IX, which are constitutional claims? And I'm having a hard time seeing then why failure to meet a purported burden applies here.

MR. STORZER: Well, you're –

THE COURT: I mean, you're opposing the summary judgment on all claims – I understand. You're not moving for summary judgment on Counts II, VII, and IX, but you are opposing the county's summary judgment motion on those claims. And one of the bases is the county had a chance to show something. It had a burden of showing, and it didn't? Is that one of the arguments?

MR. STORZER: Well, the – the county's sole basis for their motion on – on those discrimination claims is that the county meets strict scrutiny. In other words, the county does not argue that we – that the temple was not discriminated against. That's not part of their motion.

THE COURT: Okay.

MR. STORZER: The county only argues, I assume its reasoning is, if there is discrimination, we satisfy strict scrutiny because of the existence of a compelling

governmental interest and least restrictive means. That's the only discussion in their briefing, and we addressed – we've addressed that, that discussion.

[34] THE COURT: Okay.

MR. STORZER: Since we're not moving for it, I – we did not have the obligation of – of demonstrating the first part of it, which is the existence of discrimination between the temple and other religious organizations that have been favorably treated by the county. That is not part of – of the present motions.

In – hypothetically, the advisory jury's decision was based on the equal terms claim, which is – which was a claim that our religious use was treated differently and worse than in non-religious uses that were favored in – in – at the trial it was focused on the Ali'i Kula Lavender farm, which is not a religious use.

The equal protection claims, non-discrimination claims is different. It's – it's an argument that the temple was treated differently than other churches. So that was not at issue in the trial. And therefore the advisory jury's decision says nothing about those claims.

THE COURT: Okay. Let me hear from Mr. Bilberry.

MR. STORZER: Thank you, Your Honor.

MR. BILBERRY: Thank you, Your Honor.

I'm just going to address that last point first real briefly, then I'm going to go back to your questions.

I pulled up the advisory jury verdict form while we were talking, and it says: Has plaintiff Spirit of Aloha [35] Temple proved by a preponderance of the evidence that with respect to accepted zoning criteria defendant County of Maui treated plaintiff Spirit of Aloha Temple on less than equal terms as compared to the

way the County of Maui treated similarly situated non-religious assembly or institution? And the jury answered no.

And then they asked – they were asked: Has defendant County of Maui proved by a preponderance of the evidence that with respect to accepted zoning criteria it did not treat plaintiff Spirit of Aloha Temple on less than equal terms as compared to the way the County of Maui treated a similarly situated religious assembly – non-religious assembly or institution, and they answered yes.

So, I mean, I got a little confused, I'll admit, during some of this discussion. But to the extent that the assertion is being made that the county didn't meet a burden of proof of showing non-discrimination, the jury verdict form makes that assertion incorrect.

The jury concluded that by – the county showed by a preponderance of evidence that within the context of applicable zoning criteria the county proved plaintiffs were not discriminated against based on religion. It's right there on the verdict form.

With respect to this notion that, well, that doesn't cover discrimination against Spirit of Aloha Temple as compared [36] to other religious entities, there's no evidence in the record at all that there was – that they can show that there was discrimination based on this specific religion as compared to other religions because there's no evidence as to any treatment of another religious entity by the county anywhere in the record. They've never made that argument. Or they're making the argument, but they've never shown any evidence to support that argument.

This case is about discrimination with respect to land use. So it's in the context of accepted zoning

criteria. And the jury was very clear that the county proved that it did not discriminate against plaintiffs based on religion within that specific context.

THE COURT: So let me ask. You view the equal protection constitutional claims in Counts VII and IX, Count VII being a federal equal protection claim, Count IX being a state constitutional claim, you view those differently from the way opposing counsel viewed them.

As I understand it, at this hearing plaintiffs are saying, Those claims assert that other religious parties were treated better than plaintiffs here. You say, The county thinks those claims state that non-religious entities were treated better than plaintiffs? I mean, we have the complaint, so –

MR. BILBERRY: Yeah, we do, Your Honor. That is our [37] understanding of how the claims were made. I – I have heard plaintiffs' counsel in a different – on a different – at a different time and a different date assert that they were still bringing claims based on discrimination – or discrimination claims based on this religion – or alleged religion – as compared to others. And they've stated that. But they certainly haven't produced any evidence of that. There's nothing in –

THE COURT: Okay.

MR. BILBERRY: – the record that says this Catholic institution over here got X, Y, and Z and Mr. Honig's Integral Yoga religion didn't get it. There's nothing over here saying this Muslim organization got X and Y. There's just nothing. They just – they stated that's the claim, but they've done nothing to pursue any sort of facts, getting any sort of facts in the record or any sort of evidence showing a similarly situated religious

entity. There's just nothing. He hadn't pointed to it today. He hadn't pointed to it when they made that argument some time ago on some date I don't remember.

But even assuming and granting them that their claim would involve some sort of allegation that, well, Spirit of Aloha is being discriminated against because of its specific religion as compared to some other entity because it's a different religion, they haven't identified any other similarly situated religious entity within which they can make that [38] comparison.

THE COURT: So is the county's position that the advisory jury findings do apply to claims still before me?

MR. BILBERRY: Discrimination claims, yes, Your Honor, because they – the jury found that the county proved that it did not discriminate against plaintiffs based on religion.

THE COURT: Okay. Then can you ask – can you address for me my question about what's different in the record from my denial of summary judgment in 2018 on whether plaintiffs had a reasonable expectation that they would be able to use the land the way they proposed to use it when they acquired the land, that they had that expectation at acquisition? What's different? Because if nothing's different, how is it that you seek summary judgment today, when I denied it in 2018?

So if there's no greater evidentiary record today, why should I change my mind –

MR. BILBERRY: And –

THE COURT: – from having denied summary judgment in 2018?

MR. BILBERRY: And as I understand it, Your Honor, you have identified the time frame of the expectation as occurring when they acquired the land.

THE COURT: Well, hold on.

[39] MR. BILBERRY: Is that correct?

THE COURT: What did I rule?

So I'm looking at Count VI, which is a free exercise of religion claim, and the County of Maui is seeking summary judgment saying that plaintiffs cannot – hold on.

Am I in the wrong place? I might be in the wrong place. Hold on.

No, not Count VI. I'm actually looking at Count I.

At Count I, in Count I, why is it that today I can grant summary judgment when I couldn't in 2018? So the plaintiffs are arguing – well, first there's – there are developments in the law and then, as I understood it, they're saying with respect to developments that are factual, you've had – the county has had lots of opportunity to put things forward and a continued lack of evidence, ever since my 2018 summary judgment ruling, is what's different, even in the face of trial. I think that's what they're saying.

MR. BILBERRY: Yeah, I think I understand, Your Honor. And my initial question was there's an expectation that's – that has to be determined as reasonable and – and my – as I was thinking about this as Mr. Storzer and you were discussing it, that expectation has to be somehow pinpointed in time. In other words, when – when does the expectation occur in order for us to determine whether it was reasonable?

And so I think what I would say in response is, [40] first, it was pretty well demonstrated at trial, on the evidence and on the testimony, that the entity, that in fact –

THE COURT: Well –

MR. BILBERRY: Go ahead, Your Honor. I'm sorry. Oh.

THE COURT: Go ahead.

MR. BILBERRY: That the – the entity that was actually proposing to use the land at the time shortly after Mr. Honig bought it, if his reasonable expectation is going to be determined to have existed – or if his expectation is going to be determined to have existed at the time he bought the land, and that's where we're going to make the determination whether that expectation was reasonable with regard to whether he could use the land for religious purposes, I'm going to dispute that. But I'm going to point out that after he bought the property, he didn't begin using it for religious purposes. He formed a non-religious non-profit and began using the land to run a tourist destination wedding business. And this is a matter of record before we went to trial and after we went to trial.

Mr. Honig admitted that Well Being International, Inc., which was the entity that he formulated, or formed, incorporated, to actually use the land, was running a business. He – he told that to the planning commission. He told the planning commission that he spent $20,000 advertising for a business.

[41] And Your Honor may also recall during trial, there was plenty of evidence, including documentary and testimony evidence, that Well Being International,

Inc., that was leasing the land at that time and running this tourist wedding destination business, had trade names, I think three or four different trade names, including Maui Gay Weddings. There were a couple other wedding trade names for – trade names for operating a wedding business that this entity was advertising under, which were not religious. So the original entity that was leasing and operating the land, which Mr. Honig formed concurrently with buying land, was not a religious institution.

So I don't know that Mr. Honig's expectation when he bought the land and began to use it was that he would be able to operate a church. That expectation that he formulated did not occur until after Well Being International, Inc. was denied an SUP in 2007 for running its commercial operations, or running this tourist wedding destination business.

THE COURT: Okay. Well, what's different, all the things that you're –

MR. BILBERRY: Yeah, I'm getting there, Your Honor. THE COURT: Those were before me in 2018. What's different?

MR. BILBERRY: Well, this was all brought out at trial. And then what happened was, Well Being International, Inc. was denied a special use permit that he had applied for in [42] 2007, not to do religious activities but to continue this unpermitted commercial operation that was running.

THE COURT: Well Being was denied –

MR. BILBERRY: Right.

THE COURT: – before 2018.

MR. BILBERRY: And then –

THE COURT: So what happened after 2018?

MR. BILBERRY: Then Spirit of Aloha Temple was incorporated. And at trial–

THE COURT: That happened before 2018, when I made my ruling.

MR. BILBERRY: Well, I'm – I'm answering the question as to what evidence has been –

THE COURT: That's not the question.

MR. BILBERRY: Okay.

THE COURT: What's different than the evidentiary record that's developed since 2018 –

MR. BILBERRY: Yeah.

THE COURT: – when I denied summary judgment?

MR. BILBERRY: Right. Right. And what I'm talking about now and where I'm going is at trial, Mr. Honig testified that this religious – this non-profit religious entity that he formed, Spirit of Aloha Temple, in or around 2011, basically took over the assets of the previous non-religious entity and ran the same business operation. And remember, you might [43] remember, he said he took the – the wine out of the Well Being, non-religious Well Being International, Inc. bottle and just poured it into this new bottle that was Spirit of Aloha Temple.

THE COURT: Okay. You're saying, both of you are saying trial – trial testimony is the difference.

MR. BILBERRY: Yes.

THE COURT: That's what your opponent is saying too.

MR. BILBERRY: Yeah, yeah. Mr. Honig's testimony as well as our expert Marilyn Niwao, who also walked us through the indicia demonstrating that Spirit of Aloha Temple was no different in operation than Well Being International, Inc. in its non-religious business pursuit.

THE COURT: Okay.

MR. BILBERRY: She also went through the tax returns and showed how this was not a –

THE COURT: Okay. I –

MR. BILBERRY: Go ahead, Your Honor. I'm sorry.

THE COURT: I don't need a summary of –

MR. BILBERRY: Okay. Fair enough.

THE COURT: My understanding is both of you are telling me the difference in the factual record is what happened at trial.

MR. BILBERRY: Fair enough.

THE COURT: Okay. But, you know, I want to go back [44] to this Count VII and Count IX.

So Count VII, actually, I – the language of Count VII doesn't identify the people who were treated better.

It says: Defendants have deprived and continued to deprive the Spirit of Aloha Temple and Fredrick Honig of their right to equal protection of the laws, as secured by the Fourteenth Amendment to the United States Constitution, by discriminating against plaintiffs in the imposition and implementation of their land use regulations.

And it doesn't say in whose favor that discrimination has occurred.

Count IX has similar language, except it says that what the deprivation is, is the equal protection of the laws as secured by Hawaii Constitution, Article I, Section 5, by discriminating against plaintiffs in the imposition and implementation of their land use regulations.

So you understood Counts VII and IX to be referring to discrimination in favor of non-religious entities. As I understand your opponent, he is saying, no, Counts VII and IX go to discrimination in favor of other religious entities. Okay.

MR. BILBERRY: Your Honor, I – I will note as you point out, it doesn't say that. But I would offer again that even if it does say that, they have not identified any religious entities that would be arguably similarly situated [45] that are benefiting from the –

THE COURT: Okay.

MR. BILBERRY: – discrimination.

THE COURT: Okay. Now, I will note that even though you're both relying on trial testimony as adding to the record that was before me in denying summary judgment in 2018, that the recitation of the trial evidence might – even though we have a record – might not be the same. For example, you talked about 2011, Spirit of Aloha taking over. But actually, in 2007, there was a supplemental application and –

MR. BILBERRY: 2007 was the first application, Your Honor.

THE COURT: Okay.

MR. BILBERRY: The second application was 2012.

THE COURT: Well – this looks – there was an application in 2007. The project name was Spirit of

Aloha Temple. Proposed development was a church. But it was Spirit of Aloha Temple was the proposed name. In any event, but – I need a couple other things.

So are you in agreement or disagreement that the special use permit process is a formal mechanism for granting exceptions to land use restrictions in agriculturally zoned land, so this actually, if it is a formal mechanism for granting exceptions, that is – those exceptions would be based on individualized circumstances that the commissioners could [46] recognize in their discretion.

Is that your view of how the special use permit process could be characterized, or not?

MR. BILBERRY: Your Honor, I mean, I guess you could characterize it that way. I would say that – that the special use permitting process is an assessment of a proposed use, under these guidelines, upon which a determination is made based on the commission's evaluation of the proposed use under those guidelines.

THE COURT: Okay.

MR. BILBERRY: I don't think I have to characterize it as an exception to the zoning. The zoning recognizes that if a proposed special use meets these guidelines, then it's allowed. It doesn't say we're going to allow for exceptions to zoning if an applicant can meet these criteria under the planning commission's analysis.

THE COURT: Okay.

MR. BILBERRY: It says we're going to permit it. So I don't know that I would characterize it as an exception.

THE COURT: Okay.

MR. BILBERRY: It's a permissible use if you meet certain criteria.

THE COURT: Then I had asked a question about what is the quantum of effectiveness that these other conditions that would maybe be least restrictive alternatives have to meet. [47] And Mr. Storzer said as interesting a question as that might be, it isn't relevant to this case. Do you agree with that?

MR. BILBERRY: Well, Your Honor, I mean, I – I would say that it is also – I would also say that it's an interesting question. But it would be relevant to this case if plaintiffs had produced an expert who could actually testify about that, but they haven't done that.

And – but what I would say on this, other than that, is – and this is on the least restrictive – well, let me just make sure I've answered your question first.

I mean, I – to me, if there is going to be a determination as to whether something can be considered the least restrictive means based on a quantum –

THE COURT: No.

MR. BILBERRY: – as Your Honor –

THE COURT: I'm asking that.

MR. BILBERRY: Yeah, yeah, yeah.

THE COURT: So I think we all agree that if there were a big problem and there were an alternative that addressed, you know, one-tenth of one percent of the problem –

MR. BILBERRY: Right.

THE COURT: – well, that alternative might be less restrictive than denying a permit, nobody would think that would be a reasonable alternative.

At the same time, if any least restrictive [48] alternative were accepted by the Court, it would not necessarily have to eliminate every single possible problem, because if it did, if – if that were the requirement, there would never be any less restrictive alternative than denying a use. So it occurred to me that, you know, I don't know where the line –

MR. BILBERRY: Right.

THE COURT: – would be drawn. Your opponent says that is not an issue here.

MR. BILBERRY: Yeah.

THE COURT: So I'm asking if you agree with that.

MR. BILBERRY: I – I'm with you, Your Honor. I don't know where the line would be drawn.

THE COURT: No. Okay, but –

MR. BILBERRY: But I –

THE COURT: – would you agree it's a relevant issue?

MR. BILBERRY: I don't think it's relevant because if that line were to be drawn, it would have to be done by an expert. And they have not retained an expert to do that. That's why they're telling you it's not relevant here, because they don't have an expert who can show that.

THE COURT: Okay. But, you see, we're probably –

MR. BILBERRY: Well, I'll just say, Your Honor, it's not – it doesn't – you don't need to consider that here. I'll agree with them in that regard.

[49] THE COURT: That it's irrelevant. Okay –

MR. BILBERRY: Well, I wouldn't – yeah –

THE COURT: – because, you see, when you say it needs to be drawn by an expert -

MR. BILBERRY: Or it would be need to be drawn by an expert. I'm sorry.

THE COURT: It doesn't make sense to me. I'll tell you why. Okay?

I think you might need an expert to tell me whether a particular alternative met a threshold of required effectiveness. I have a hard time saying that an expert would get up in court and tell me, well, if an alternative isn't at least 85 percent effective, then it doesn't satisfy the legal definition -

MR. BILBERRY: Right.

THE COURT: – of a least restrictive alternative. I'm pretty sure that if the quantum of effectiveness is in issue, that the required quantum has to be decided as a matter of law and only whether something meets that required quantum would be subject to an expert's opinion, but not what the quantum required is. I don't see how an expert gets up and says, you know, if it meets a five percent threshold, that's good enough under the law. I think the expert could come in and say it does or does not meet a five percent threshold but not to say five percent is good enough under the law, which is [50] what you just told me you need an expert to set the threshold. That doesn't make sense to me.

MR. BILBERRY: That's not what I said, Your Honor. All I said was if you were going to have a quantum, an expert would need to say that. And I think that's what you said. And then the Court could consider that in its determination. I agree with everything –

THE COURT: No, no. If you have a quantum a court needs to set –

MR. BILBERRY: I agree.

THE COURT: – what is the quantum?

MR. BILBERRY: Your Honor, I think you just resolved the issue. I agree with you.

THE COURT: If I resolved it, what is the quantum? MR. BILBERRY: Well, I think – well, you said threshold.

THE COURT: That's the same thing.

MR. BILBERRY: Right. Right.

THE COURT: You and I are not communicating, Mr. Bilberry, right now.

Two questions: One, what quantum of effectiveness must a least restrictive alternative meet? I think that's a question of law. It may be that it's irrelevant, but if I have to answer it, I'm pretty sure that's a question of law.

Question number two: Does the proposed condition [51] meet that – that level of effectiveness, that may well be a question of fact. That may well be something you need an expert for. But starting with question number one, a question of law, what is the answer? What is the law on what quantum of effectiveness a least restrictive alternative must meet?

MR. BILBERRY: I have –

THE COURT: Because you just said I just resolved it, I did not resolve it. I am asking, well, what is the law?

MR. BILBERRY: Yeah. Fair enough.

THE COURT: What is the – what – what – how effective?

MR. BILBERRY: Okay. Your Honor, what I was saying is I think as an evidentiary matter you did lay out how that could be approached in terms of sifting through all this.

THE COURT: No, no.

MR. BILBERRY: As far as what that quantum would be, Your Honor, I don't know.

THE COURT: It's not an -

MR. BILBERRY: I don't know.

THE COURT: You said as an evidentiary factor – no. It's not my – that's why I say we're not really – and it's probably my fault.

MR. BILBERRY: Okay. Well, Your Honor, I'll tell you, I don't know what that quantum would be, and I don't – I haven't seen any law that would say what that quantum would be. [52] The plaintiffs haven't cited or cannot cite any law that would say what that quantum would be.

THE COURT: Is it relevant to this set of motions in front of me? Because if it is, why haven't I gotten any law on it?

MR. BILBERRY: Okay. Then I'm going to say it's not relevant, Your Honor.

THE COURT: Oh, then you're agreeing with him.

MR. BILBERRY: Yeah, there's no law on it. There's no law.

THE COURT: No, no. The absence of law doesn't make it relevant. And I'm not sure how you can so

confidently say there is no law if you haven't even considered it until this hearing.

MR. BILBERRY: Well, because I've – I've cited to law, Your Honor, and that is the Redeemed Christian Church of God. And it says: We have no quarrel with the county's proposition that expert testimony is not required to satisfy strict scrutiny when the matter is one of common sense.

And they said that in the context of considering least restrictive means.

So they're not talking about a quantum. They're talking about common sense.

THE COURT: Okay. So what's the quantum with common sense?

[53] MR. BILBERRY: Okay, here, Your Honor, we have a situation where, as Your Honor pointed out, there are traffic concerns, there are sanitation concerns. Your Honor may – and there are food preparation concerns.

Your Honor may – there's also concerns with the wastewater. Your Honor may require – recall that Fred Honig testified at trial that he had cesspools on the property.

Mr. Honig, we had put in the evidence, into the record, the evidence that he refused an option that was proposed by the Safe Water Drinking Branch of the Department of Public Health that allowed him to truck water in and store it on property to address the concerns related to the lack of pop – potable water on the property. And he refused that option.

He also demanded – and this is evidence that we put in the record – he had demanded of the representative from the sanitation division of the Department of

Health that he be allowed to prepare food on the property despite their concerns about the sanitation issues. And he said: I should be able to do that anyway because I'm a – it's my religious right. I should be able – he said, I should be able to serve people gathering on my property from my private contaminated water system because it's my religious right.

He was offered the – these alternatives, and he rejected them.

[54] THE COURT: Okay.

MR. BILBERRY: Here, here in a broader context, Your Honor, here you have an applicant with a history of unpermitted activity. I mean, he violated just about every permit you can think of when he developed the property, every environmental permit when he developed the property. And then he began to use the property without permits in a way in the ag zone that was not allowed. And you've got him resisting the efforts of the Department of Health to facilitate his uses.

So there were alternatives raised, and he rejected them.

Now, on the – the department's consideration of lesser restrictive means, Mr. Honig showed up with his lawyer twice. He was allowed to present a lesser intensive uses for the property, which still amounted to a lot, considering he's got no potable water on the property. There's sanitation concerns. There are concerns with the wastewater capacity. And he still wants to run a daily event, and weekly events, monthly events, bringing in 25 – up to 80 people for these events, with no public water system, contam – risks of contamination in the preparation of food, limited wastewater capacity.

So this was all considered, in addition to these alternatives that were offered to Mr. Honig to address these concerns that he expressly rejected. I think as a matter of [55] common sense that the planning commission considered these things, as lesser restrictive means, and reasonably determined it's not enough. We have to deny this permit because of what he is still wanting to do, which is bring in scores of people to – to eat and to drink and to exceed the wastewater capacity of this property. And then we get to the road conditions, I mean, they want you to consider some anecdotal remarks made by one witness but disregard the other witnesses who talk about the dangers and concerns of this road, that children play on this road, that the road is only 12 feet wide in places and cars can't pass.

Mr. Naish testified at trial that there were overturned cars that he would see on the road. So there's certainly evidence in the record, and it's evidence that was gleaned in the administrative record that was before the planning commission, which was certified and entered into the evidence in this case, as well as the additional evidence that came out at trial about the compelling interest that the government needed to consider when it assessed whether to grant this permit.

I may have gone afield from the least restrictive means question Your Honor asked but -

THE COURT: Well, okay, so I – I had – I want to get some certainty about a lot of things but I probably won't out of this hearing. But here's one.

[56] So you have made statements in your papers, and also there was the Rule 30(b)(6) witness. So I want

to confirm that there is not a challenge to the sincerity of plaintiffs' religious beliefs.

So let's start with Mr. Honig.

MR. BILBERRY: Yeah.

THE COURT: There will be no question at trial about whether Mr. Honig has a sincerely held religious belief; am I correct?

MR. BILBERRY: Your Honor – okay, yeah – given that in the abstract, we all have sincerely held beliefs, so we are not going to question Mr. Honig's sincerely held beliefs regardless of whether they're religious or not.

THE COURT: Okay. And so assuming -

MR. BILBERRY: The question, though – I'm sorry, Your Honor. Go ahead.

THE COURT: So then with respect to Spirit of Aloha, the temple, same thing: There will not be any question at trial about sincerely held beliefs?

And I guess the reason I'm questioning this is – so this is a First Amendment free exercise claim, and the plaintiffs have to show that plaintiffs hold – sincerely hold religious beliefs. They have to show that their claim is rooted in religious belief, not in purely secular philosophical concerns.

[57] So I do understand that you may be arguing that really this is a commercial matter that we're looking at and not a religious belief. But are you going to be arguing that the beliefs are not sincerely held?

MR. BILBERRY: Well, as I just indicated, Your Honor, we certainly will not be arguing that whatever beliefs Mr. Honig subjectively harbors are insincere. That's not what –

THE COURT: Okay. The same with Spirit of Aloha?

MR. BILBERRY: Spirit of Aloha is an entity, Your Honor.

THE COURT: Yeah. But –

MR. BILBERRY: And I'm not sure how it can hold religious –

THE COURT: Well, you may say that, okay?

MR. BILBERRY: Well, the question would be is it a religious –

THE COURT: Wait. So we can't –

MR. BILBERRY: It's fair enough.

THE COURT: – cross-talk, okay?

So I was about to ask you: You may well say that how can an entity have a sincerely held religious belief.

I understand your question in that regard, but it appears to me that the Supreme Court is saying, indeed, an entity may hold a religious belief.

[58] MR. BILBERRY: Fair enough. Okay.

THE COURT: I mean we have the Hobby Lobby case.

MR. BILBERRY: Okay.

THE COURT: Today we had a case about a web designer, and, actually, the caption of the case lists a web designing business. So assume with me for the moment that an entity may have a belief.

MR. BILBERRY: I will, Your Honor.

THE COURT: You are not – as I understand it from the prior statements both by you and by the 30(b)(6) witness, there is not a dispute about the sincerity of

beliefs articulated by either Mr. Honig or Spirit of Aloha and, instead, the dispute is about whether the beliefs are actually religious or secular; am I correct?

MR. BILBERRY: I would phrase it like this, Your Honor. We are certainly not going to question the sincerity of Mr. Honig's subjective beliefs. With respect to Spirit of Aloha Temple, to the extent it can be said to have beliefs, we will be questioning those because we have a jury verdict finding that plaintiffs failed to prove Spirit of Aloha Temple was a religious assembly.

THE COURT: No, no, so that's why I'm dividing –

MR. BILBERRY: Yeah.

THE COURT: – my question, okay?

MR. BILBERRY: Yeah.

[59] THE COURT: So question number one: Whatever those beliefs are, are you questioning the sincerity of the holding of those beliefs by any plaintiff?

Question number two, put aside for the moment, which is: Are those beliefs religious in nature?

Question number one goes only to the sincerity of the belief.

MR. BILBERRY: Okay.

THE COURT: Are you or are you not questioning that with respect to either Spirit of Aloha or Mr. Honig, putting aside whether those beliefs are religious or secular?

MR. BILBERRY: With respect to Mr. Honig, no. With respect to Spirit of Aloha Temple, yes.

THE COURT: Hold on.

So I actually don't see that in your papers.

MR. BILBERRY: I can elaborate really briefly, Your Honor.

THE COURT: No, no. No, no. Not elaborate. I don't need you to elaborate. Tell me where in your papers you tell me that you're questioning the sincerity of any plaintiff's belief. Give me the ECF document number and the page.

MR. BILBERRY: Your Honor, I'm not prepared to give you an ECF docket number. What we are contesting is that Spirit of Aloha Temple is not a religious institution or –

THE COURT: Yeah, I know.

[60] MR. BILBERRY: – an assembly.

THE COURT: But that goes to my second question.

MR. BILBERRY: No, no, the other piece of it, Your Honor, is that –

THE COURT: All right.

MR. BILBERRY: – there's no one that can testify as to Spirit of Aloha Temple, the sincerity of its beliefs, except Mr. Honig.

THE COURT: Yeah.

MR. BILBERRY: Right.

THE COURT: And so that's why I'm asking. Are you really questioning the sincerity of Spirit of Aloha's belief quite apart from whether that belief is religious or secular in nature?

MR. BILBERRY: Okay. I – I see, Your Honor.

THE COURT: If I deny summary judgment, I want to know what it is that's before us during trial.

MR. BILBERRY: Sure. Okay. That – that helps me better understand, Your Honor.

If we have to go to trial, we will not be – we will not be questioning the sincerity of either of the plaintiffs' –

THE COURT: Okay.

MR. BILBERRY: – subjective beliefs –

THE COURT: Okay.

[61] MR. BILBERRY: – as to the religious nature of those beliefs.

THE COURT: Okay.

MR. BILBERRY: Now, with respect to the religious nature of the activities they want to conduct, that's another thing.

THE COURT: Okay.

MR. BILBERRY: Because that then starts to come under the consideration of whether they can demonstrate they are a religious, quote, assembly or institution.

THE COURT: So that you have put forward in your papers.

MR. BILBERRY: Yeah.

THE COURT: You have argued that the plaintiffs are not operating a church based on religious beliefs. You claim they're operating a commercial business, a tourist-oriented business. That, I saw in your papers.

But, okay, you are telling me the sincerity of the beliefs will not be contested with respect to either Spirit of Aloha or Mr. Honig, only the issue of whether the beliefs in issue in this case are in fact religious in nature.

MR. BILBERRY: Well, Your Honor, I – I – I don't want to concede that. But what I would suggest is we're actually – the question in our mind is whether the activities that were being proposed under this land use, this requested [62] special use permit were religious in nature.

THE COURT: So what happens when they bring a First Amendment claim is they have to show that they have these sincerely held beliefs and that their claim that their First Amendment rights are being violated is rooted in a religious belief, not a secular philosophical concern. And so that's why I'm saying, I'm looking at the elements of a First Amendment claim. And they're claiming that their First Amendment rights are – their free exercise of religion is being violated.

And so I understand that you're arguing it's not a religion that we're really talking about. We're talking about regulating your commercial activities. I understand that that's –

MR. BILBERRY: Right.

THE COURT: – the county's position.

MR. BILBERRY: I do have a response to this.

THE COURT: But do I need to anticipate that if I deny summary judgment there will be a trial on whether the belief, religious or whatever it may be, is sincerely held?

MR. BILBERRY: Again, Your Honor, we would not be contesting that these subjectively held beliefs are not – are sincere or not. That's – we're going to concede that whatever they believe –

THE COURT: Okay.

MR. BILBERRY: – we will concede is sincere.

[63] On the First Amendment claim I haven't seen any allegation in the complaint that apart from not being able to do these assemblies, that those beliefs are somehow been burdened.

Mr. Honig claims to be a yogi. And when you read what he says about his beliefs, he says: My belief is about mastering my own mind, and whatever else yogis do, in communing with nature. There's no allegation they've been denied any of that.

What they have been denied –

THE COURT: Well –

MR. BILBERRY: – is to assemble groups of people together on this property under the auspice of it being a church. But a jury's already found that they're not a religious institution (inaudible) –

THE COURT: Okay, but, you know, if you argue that, then it will come down to the county's position that no wedding is religious. I mean, you know, you could use the same rubric you've just used to say, well, a Catholic wedding is not a religious rite either because, you know, Catholic tenets do not say Catholic priests must perform weddings.

I mean, you're kind of cherrypicking, it seems to me, and saying unless there's some religious imperative to conducting weddings, you're not going to treat weddings as religious in nature. I'm pretty sure every religious person [64] might say, what are you talking about? This is a religious ceremony that – a wedding in a church.

But you know what? I –

MR. BILBERRY: I don't think – I don't think the plaintiffs have been precluded from conducting weddings on the property. They have been precluded from putting together gatherings of people under the rubric – well, the way they had been advertising, they have been precluded from – from assembly, from putting together assemblies and gatherings of people on the property.

Mr. Honig can marry people on his property. There's nothing precluding him from having a couple come onto his property and come down to his place and be married. What they're precluded from doing is holding an enormous ceremony and a reception with a bunch of people there.

There is nothing that would preclude him from doing that.

THE COURT: Okay. I'm going to take everything under advisement at this point.

MR. BILBERRY: Your Honor, I just – I don't think I have a lot. But I just want to look at my notes to make sure I covered everything, if I may.

THE COURT: Okay.

MR. BILBERRY: And I promise to be brief if I do have anything else. (Reviews documents.)

[65] Your Honor, I just want to say quickly again, and I did touch on this, we do have an administrative record that a state court found supported – well, the state court found that there was no clear error in the evidence and that it wasn't arbitrary and capricious. In other words, a state court found that the evidence supported the planning commission's denial of this permit.

We're not asking the Court to under any doctrine of preclusion to defer to that, but – but it's there. It has some weight.

And it seems to me what the plaintiffs are asking the Court to do, jumping through the actual substance and content of that administrative record, is we want you to ignore the facts that a state court determined were sufficient to support the denial and consider these alternative facts that we're going to put in front of you.

THE COURT: I hear you. I have clearly in mind the collateral estoppel ruling of the Ninth Circuit.

MR. BILBERRY: Yeah.

THE COURT: So, okay.

MR. BILBERRY: In other words, Your Honor, in our view, the preclusion – no preclusion or not – not ruling a preclusive effect doesn't mean that the District Court can't consider or should preclude those facts of record.

And again, we're not asking the Court to make a legal [66] determination that the planning commission might have made on the record.

And I think that's it, Your Honor.

THE COURT: Okay.

MR. BILBERRY: That's all I have.

THE COURT: I – we've been going an hour and 45 minutes. I want to take this under advisement. But I think it highly likely that I may ask for very brief supplemental submissions from the parties on certain issues. So look for that. Okay. But I thank you all for your grappling with these issues.

If we have another trial, that's fine. That will be my job to preside over then. But I do think that there are

issues that the parties should look at realistically. I mean, certain things, even if I deny summary judgment and you go to trial, there are certain claims where a party could see the difficulty in prevailing, and you might want to consider settlement on both sides. So I urge you folks to look at those.

MR. BILBERRY: We are. We are in settlement negotiations.

THE COURT: Okay, Okay.

MR. BILBERRY: They're challenging, but I think both parties are committed to that.

THE COURT: Okay.

[67] MR. BILBERRY: And we're going to keep hammering away at it.

THE COURT: Okay. Thank you very much to both sides.

COURTROOM MANAGER: All rise.

Court is now adjourned.

(The proceedings concluded at 10:49 a.m., June 30, 2023.)

COURT REPORTER CERTIFICATE

I, Ann B. Matsumoto, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. Sec. 753 the foregoing is a complete, true, and correct transcript of the stenographically recorded proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, August 10, 2023.

/s/ Ann B. Matsumoto
ANN B. MATSUMOTO, RPR

APPENDIX I

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 14-00535 SOM-WRP

SPIRIT OF ALOHA TEMPLE, et al.,

Plaintiffs,

vs.

COUNTY OF MAUI, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN OKI MOLLWAY
SENIOR UNITED STATES DISTRICT COURT JUDGE

Honolulu, Hawaii

June 30, 2023

VARIOUS MOTIONS FOR SUMMARY JUDGMENT

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* * *

[60] MR. BILBERRY: – an assembly.

THE COURT: But that goes to my second question.

MR. BILBERRY: No, no, the other piece of it, Your Honor, is that –

THE COURT: All right.

MR. BILBERRY: – there's no one that can testify as to Spirit of Aloha Temple, the sincerity of its beliefs, except

Mr. Honig.

THE COURT: Yeah.

MR. BILBERRY: Right.

THE COURT: And so that's why I'm asking. Are you really questioning the sincerity of Spirit of Aloha's belief quite apart from whether that belief is religious or secular in nature?

MR. BILBERRY: Okay. I – I see, Your Honor.

THE COURT: If I deny summary judgment, I want to know what it is that's before us during trial.

MR. BILBERRY: Sure. Okay. That – that helps me better understand, Your Honor.

If we have to go to trial, we will not be – we will not be questioning the sincerity of either of the plaintiffs' –

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MR. BILBERRY: – subjective beliefs –

THE COURT: Okay.

[61] MR. BILBERRY: – as to the religious nature of those beliefs.

THE COURT: Okay.

MR. BILBERRY: Now, with respect to the religious nature of the activities they want to conduct, that's another thing.

THE COURT: Okay.

MR. BILBERRY: Because that then starts to come under the consideration of whether they can demonstrate they are a religious, quote, assembly or institution.

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MR. BILBERRY: Yeah.

THE COURT: You have argued that the plaintiffs are not operating a church based on religious beliefs. You claim they're operating a commercial business, a tourist-oriented business. That, I saw in your papers.

But, okay, you are telling me the sincerity of the beliefs will not be contested with respect to either Spirit of Aloha or Mr. Honig, only the issue of whether

the beliefs in issue in this case are in fact religious in nature.

MR. BILBERRY: Well, Your Honor, I – I – I don't want to concede that. But what I would suggest is we're actually – the question in our mind is whether the activities that were being proposed under this land use, this requested

* * *

[68] COURT REPORTER CERTIFICATE

I, Ann B. Matsumoto, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. Sec. 753 the foregoing is a complete, true, and correct transcript of the stenographically recorded proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, August 10, 2023.

/s/ Ann B. Matsumoto
ANN B. MATSUMOTO, RPR

APPENDIX J

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 14-00535 SOM-WRP

SPIRIT OF ALOHA TEMPLE, a Hawaii nonprofit corporation, and FREDRICK R. HONIG,

Plaintiffs,

vs.

COUNTY OF MAUI and MAUI PLANNING COMMISSION and STATE OF HAWAII,

Defendants.

Honolulu, Hawaii

October 11, 2023

TRANSCRIPT OF JURY TRIAL (DAY 9)
BEFORE THE HONORABLE SUSAN OKI MOLLWAY,
SENIOR UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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United States District Court
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

* * *

[4] October 11, 2023 8:18 a.m.

THE CLERK: Civil Number 14-00535-SOM-WRP, Spirit of Aloha Temple, et al., versus County of Maui, et al.

This case has been called for status conference to settle jury instructions.

Counsel, your appearances for the record, please.

MR. LANG: Good morning, Your Honor. Adam Lang and my co-counsel Roman Storzer on behalf of plaintiffs.

I'm present here with Thomas Lee, IT support, and Tyler Yadao, our paralegal.

MR. STORZER: Good morning, Your Honor.

THE COURT: Good morning. So your client will be here later at 9:00 when the jury comes in?

MR. STORZER: He's on his way up right now.

THE COURT: Oh, okay.

MR. BILBERRY: Good morning, Your Honor. Deputy Corporation Counsel Brian Bilberry on behalf of Maui County with our county paralegal, Melissa Stoppiello.

THE COURT: Okay. Counsel, don't forget to wear a mask. Do you need us to give you one?

MR. BILBERRY: Oh, no, I have it here.

THE COURT: Okay. So I thank the attorneys for spending all of the Monday holiday in chambers for an off – well, not in chambers – on the telephone while I was in [5] chambers – you can sit down – so that we could resolve the jury instructions. We did that off the record. This hearing is to put on the record what was decided in the off-the-record conference on October 9.

I did send out a summary of certain matters that were resolved in that conference. And certainly we will have specific jury instruction changes that I will put on the record, and you may put your objections on the record to certain jury instructions. So my communication that was filed on October 9 was not intended to include everything discussed at that conference.

Is there any concern that anything in my October 9 filing about the conference had any inaccuracy?

MR. LANG: No, Your Honor, not on behalf of plaintiffs.

MR. BILBERRY: No, Your Honor.

THE COURT: Okay. Then I'm going to move to talking about the jury instructions. I'll start with the Court's instructions, and then move to plaintiffs, then defendants, and then plaintiffs' supplemental, then defendant's supplemental instructions.

I will start out by saying certain instructions were added without objection, not having been submitted by either party. So I included instructions that quoted RLUIPA provisions, that quoted state and federal constitutional

* * *

[14] removes the reference to RLUIPA in the second paragraph, and modifies this second paragraph beginning with the sentence "For example."

That sentence as modified now reads: "For example, if someone obtains an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that the person suffers when a land use regulation is enforced is not a substantial burden."

An additional modification is in the paragraph beginning with the words "A self-imposed hardship." The modification is to delete the reference to RLUIPA.

And my understanding is defendants are okay with these modifications.

Plaintiffs have an objection. Plaintiffs can state their objection.

MR. STORZER: Plaintiffs object on the basis that was stated in ECF-611 that the issue of whether a burden is substantial is a question of law and one for the Court, not for the jury. And that will be the same

objection that I'll make probably to several other instructions related to the question of substantial burden.

THE COURT: Okay. Defendants' Jury Instructions No. 24, alternatively numbered County's Proposed Instruction No. 7, is refused except that the Court will instruct the jury as follows: "Not all burdens are substantial under RLUIPA."

[15] Does either side have objections to that?

MR. STORZER: No, Your Honor.

THE COURT: None from the plaintiffs.

Defense?

MR. STORZER: Other than the same objection that –

THE COURT: Yes, you're incorporating your objection to the prior instruction.

MR. STORZER: Yes.

THE COURT: Mr. Bilberry, does the County have an objection to place on the record?

MR. BILBERRY: No, Your Honor.

THE COURT: Okay. I'm moving to Jury Instruction No. 25, alternatively referred to as County's Proposed Instruction No. 8. That is withdrawn.

Also Instruction No. 26, alternatively numbered County's Proposed Instruction No. 9, is withdrawn.

Jury Instruction No. 27, alternatively called County's Proposed Instruction No. 10, has been partly withdrawn by the defendants. The remainder is refused over the defendants' objection.

The Court's position is somewhat the language in this instruction is not an accurate statement of law, and to the extent it is an accurate statement of law, that language is cumulative when the Court considers other instructions it is giving.

* * *

[19] instructions submissions that were filed on October 6.

Going to Plaintiffs' Proposed Jury Instructions, this is Document 630 in the electronic case file. That first instruction in that document, Instruction No. 1, is given as modified by agreement. As modified, it reads: "In Count I, plaintiffs claim that defendants' actions had prevented them from using their property to engage in religious exercise in violation of RLUIPA 42 U.S.C. Section 2000cc(a)." That will be given as modified by agreement.

Instruction No. 2 is given as modified by agreement over the defendants' objection regarding a nonprofit entity's exercise of religion. Plaintiffs, as I understand it, are okay with the modifications.

The first paragraph was not deleted during our telephone conference, but later I communicated to the parties that I thought it was repetitive of what ended up being on pages 29 to 30 of the final version of the instructions.

Other language has been deleted as repetitive. If you look at the final, tell me what objections defense wants to put on record.

MR. BILBERRY: Yeah, I think you stated the objection accurately, Your Honor.

THE COURT: Okay.

MR. BILBERRY: Thank you.

THE COURT: Instruction No. 3 in ECF Number 630, this [20] is in the final version on page 26 of the final instruction – set of instructions. This is – hold on. I'm looking at my notes.

I think this is given as modified with plaintiffs objecting to the modification. Let me see if I can put that on the record.

So as submitted, this instruction on substantial burden was limited to Count I, the RLUIPA substantial burden claim, and Count VIII, the state constitutional free exercise claim.

The Court has taken the position that the substantial – the requirement that plaintiff establish a substantial burden applies also to the federal free exercise claim. Plaintiff has not agreed with that.

This Court is relying heavily on a Ninth Circuit case that implicated the free exercise of religion claim under the federal Constitution. That is Jones v. Williams, 791 F.3d, 1023, specifically looking to page 1031, a Ninth Circuit case from 2015.

There is a more recent unpublished decision, Watkinson versus Alaska Department of Corrections at 2022 Westlaw 1301895, a Ninth Circuit decision from some date in May 2022, and cert was denied by the U.S. Supreme Court.

At the district court level, Judge Charles Beyer from the Northern District of California issued a decision in 2022, [21] Temple of 1001 Buddhas v. City of Fremont, 588 Federal

Supplement 3d 1010, also recognizing the applicability of the substantial burden requirement to a federal free exercise claim.

My recollection is that the plaintiffs were relying on Supreme Court cases that they said stated the burden with a free exercise claim and did not include a discussion of substantial burden. And my response was that those cases examined the application of strict scrutiny to a religious discrimination claim and did not speak to the substance of what strict scrutiny was to be applied to in the free exercise context.

So I analogized it to a two-step process: One, a plaintiff showing a burden on the plaintiffs' religious exercise, a substantial burden; and then, two, determining whether the defendant satisfied the strict scrutiny requirements or not. And I thought those were two steps, and the Supreme Court's pronouncements on step two did not eliminate the burden in step one.

But that is a general summary I've given, and I am now going to give plaintiffs an opportunity. In addition, plaintiffs have maintained that any substantial burden analysis should be done by the Court as a matter of law, although as memorialized in my filing in this case summarizing our telephone conference proceedings on October 9, without waiving [22] that argument for other purposes, plaintiffs have agreed that the matter may be tried to – the substantial burden matter may be tried to this jury, and that they will treat this jury's verdict on that substantial burden subject as binding as if they had a right to jury trial.

I may not have included everything you wanted to say. I've done my best. Mr. Storzer, go ahead.

MR. STORZER: Your Honor, I think you accurately described two of our objections.

I would like to make a further objection, and in doing so, I'm going to refer back to this was the Defendants'

Instruction No. 23, alternatively No. 6, which appears at – on page 31 now of the new instructions. And the objection is that that instruction is – it should be treated as one factor among many, which are – and it is already listed in this jury instruction as No. 6. So it's cumulative and it's inaccurate as being something that is – that is determinative of the substantial burden question.

I probably should have raised this when we were going over that, but in looking at these two together, I don't believe that the County's original proposed No. 23, alternative 6, should be included as an inaccurate statement of the law as well as being cumulative with the instruction number – plaintiffs' new Instruction No. 3, which appears on page 26 of the Court's new instructions.

[23] THE COURT: So it would help me a great deal if you looked at your copy of the final instructions which were emailed to you and tell me about what County wording you're looking at. They don't have titles, but if you can recognize the language, we could all more easily look at what you're talking about.

MR. STORZER: Again, on page 31 of the new instructions.

THE COURT: Page 31, hold on.

I see. This is the knowing that this was –

MR. STORZER: Yes.

THE COURT: – in need of a permit.

MR. STORZER: And this is redundant with what we find on page 27 under the paragraph that is numbered 6. It gets to the reasonable expectation issue and the self-imposed hardship issue, language of which is – exists on page 27 in that other instruction.

And the argument is not only procedural but also substantive that, like I said, Your Honor, this is one factor to be considered among many, and not determinative in and of itself.

We would object to the entire inclusion of – of the instruction that appears on page 31.

THE COURT: Okay. Did I not give you a chance to make that objection? I may not have. I'm sorry.

[24] MR. STORZER: I – earlier this morning I believe we went over it. I'm not sure if those were one of the ones we were going through quickly, but again on reflection –

THE COURT: You may put your object – so I understand you're putting on the record your objection to the instruction about plaintiffs' own actions being relevant in determining whether a burden is considered substantial. Okay. You have lodged an objection to that, which now appears on page 31 of the final instructions.

I don't think that what appears on the final page 31 excludes everything else. It says they're relevant in determining whether a burden is considered substantial. Instructions are always looked at as part of a whole set.

So I hear you, but I'm going to give that page 31 because I think that the reference on page 27 will be difficult for the jury to understand unless they have page 31, especially number 6. That's the first time in the instructions I talk about reasonable expectation. So I'm going to keep it, but you have your objection on the record.

MR. STORZER: Thank you, Your Honor.

THE COURT: Okay. Is there any other objection – if you look at page 26, are there other objections either side needs to put on the record?

I have considerable scribblings on the original, which was page ID Number 16012 and ECF Document Number 630, but the [25] result appears on page 26, 27, 28 of the final instructions.

So rather than read the whole thing, if the parties could look at those pages, and if you have other objections that have not so far been included in the record, please feel free to state them on the record.

MR. STORZER: No other objections, Your Honor.

THE COURT: Okay. Mr. Bilberry.

MR. BILBERRY: No other objections, Your Honor.

THE COURT: Okay. I'm now looking at, in ECF Document 630, Plaintiffs' Instruction No. 4, which is given as modified by agreement. And as modified, the final version– let me see if I can find it so you can look at it. Oh, it's by agreement, but just so we all know what we're talking about, it is on pages 37 and 38 of the final instruction.

So if my notes indicate this is given as modified by agreement, if I'm incorrect, please wave me down. Otherwise, I'm going to move to Instruction 5.

This is being modified and given in a modified version, and as modified, it appears on – I think on page 32? Hold on. Yeah, I think on page 32.

My understanding is that the plaintiffs are objecting because they think I should instruct the jury that the burden falls entirely on the County on this count. As I understand it, the County has no objection.

I have explained my reasoning in asking the jury to [26] determine whether plaintiffs meet their burden, assuming the burden is on the plaintiff – plaintiffs, or whether the County meets its burden in the event the County has the burden. It's a burden of persuasion. That's the term in the statute.

I have explained my reasoning of trying to avoid a third trial in this case in the event I am committing some error, and that explanation appears in my communication of October 9 following our telephone conference.

But I will let the plaintiffs put their objection on the record.

MR. STORZER: Your Honor, I believe that the basis for our objection was stated in our ECF Number 611, and the Court accurately describes it as being one of the burden of persuasion, which we believe on – is on the County on this claim and not on the plaintiffs, and the language of this instruction as written is confusing and prejudicial to the plaintiffs in terms of suggesting that the temple has the – has that burden. But other than that, I think that accurately states our objection.

THE COURT: Okay. I'm looking now at Instruction No. 6 in Document 630, and I think that has been modified by agreement to state as, on page 36 of the final instructions, that plaintiffs have the burden of establishing Counts VII and IX by a preponderance of the evidence. The summary of those two counts having been incorporated into newly drafted [27] instructions that quote the federal and state constitutional provisions.

I think this is given as modified by agreement, but if I'm misremembering the result, can either side let me know.

MR. STORZER: No objection, Your Honor.

MR. BILBERRY: No objection, Your Honor.

THE COURT: Okay. Now I'm turning to the County's supplemental jury instructions. Those are in ECF Number 628 in this case file, filed on October 6.

And Instruction 26, also called County's Proposed Instruction No. 9.

MR. BILBERRY: Your Honor, I can withdraw that, that proposed instruction.

THE COURT: No, no, no, some of it – doesn't it appear –

MR. BILBERRY: Well, I mean, we used some of it, but I mean I – that's why I suggest that I can withdraw it –

THE COURT: Okay, so you withdraw it.

MR. BILBERRY: – for the rest of it.

THE COURT: And then I did give the instruction that appears on page 33. I take it that the defense has no objection to this one that has the dual burden – or is there an objection by the County to what ended up as page 33?

MR. BILBERRY: No objection, Your Honor.

THE COURT: Okay. The County are – plaintiffs are [28] maintaining the same objection as to the prior instruction that we – I don't know if it's prior in order in the final instructions, but prior meaning what we just discussed?

MR. STORZER: The same – same objection, Your Honor.

THE COURT: Okay. And then jury – defense Jury Instruction No. 28, also called County's Proposed Instruction No. 11, is withdrawn.

Have I missed anything or are there other objections that I somehow failed to give you a chance to put on the record? If so, let me know and you can do so.

Anything else?

MR. STORZER: No, I don't believe so, Your Honor. THE COURT: Okay. Then there's the verdict form to look at, and we did send a verdict form to everyone.

To the extent your objections are to Count II and the dueling burden questions and the verdict form, I'm deeming your incorporations to the jury instructions with the dueling burdens are incorporated into your objection to the verdict form in that regard.

Any other objections to the verdict form from the plaintiffs?

MR. STORZER: No, Your Honor.

THE COURT: From the County?

MR. BILBERRY: I'm sorry, Your Honor. I just need a minute.

* * *

[54] respect to accepted zoning criteria, including agricultural, conservation, and SMA matters, did not treat Plaintiff Spirit of Aloha Temple on less than equal terms as compared to the way the County of Maui treated Hale Akua Gardens and Ke Ali'i (verbatim) Kula Lavender Farm.

In reviewing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) counts of plaintiffs' complaint, the jury should construe that

statute in favor of a broad protection of religious exercise.

In Counts I, VI and VIII of their complaint, plaintiffs claim that defendants' actions have prevented them from using their property to engage in religious exercise in violation of RLUIPA, 42 U.S.C. Section 2000cc(a), and the federal and state constitutions' protections of religious exercise.

In Count I, plaintiffs claim that defendants' actions have prevented them from using their property to engage in religious exercise in violation of RLUIPA, 42 U.S.C. Section 2000cc(a). RLUIPA provides, "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person."

Not all burdens are substantial under RLUIPA.

Defendant of Maui (verbatim) is not contesting the sincerity of plaintiffs' beliefs, although Defendant County of Maui is disputing whether the uses proposed in plaintiffs' [55] Special Use Permit application were religious in nature. Any legal person, including a nonprofit or even a for-profit corporation, may engage in religious exercise.

In Count VI, plaintiffs assert a violation of the free exercise clause of the First Amendment of the U.S.

Constitution, which provides "a government shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

In Count VIII, plaintiffs assert a violation of Article I, Section 4, of the Hawaii constitution, which states, "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof."

In Count I, (RLUIPA substantial burden claim), Count VI (federal constitutional free exercise claim), and Count VIII (Hawaii state constitutional free exercise claim), plaintiffs must show that the County substantially burdened their religious exercise. You should consider the following factors in determining whether the burden on plaintiffs' religious exercise is substantial:

1. Whether plaintiffs have demonstrated a genuine need to use their property to facilitate additional services or programs in their exercise of religion;

2. The extent to which the Planning Commission's decision effectively deprived plaintiffs of any viable means by which to engage in elements of protected religious exercise;

[56] 3. Whether there is a meaningful connection between the activities described in plaintiffs' Special Use Permit application and plaintiffs' religious exercise;

4. Whether the County's decision-making process concerning plaintiffs' application reflects any arbitrariness of the sort that might evince animus or otherwise suggests that plaintiffs have been, are being, or will be treated unfairly;

5. Whether the County's denial of plaintiffs' Special Use Permit application was final or whether instead plaintiffs had an opportunity to submit modified applications that might have satisfied the Planning Commission's reasons for denying the requested permit; and

6. Whether the alleged burden is properly attributable to the Planning Commission (if plaintiffs had a reasonable expectation of using the property for

religious exercise) or whether the burden is instead self-imposed (if plaintiffs had no such reasonable expectation or demonstrated an unwillingness to modify their proposal to comply with applicable zoning requirements).

For a land use decision to impose a substantial burden, it must be oppressive to a significantly great extent on religious exercise. A "substantial burden" must place more than an inconvenience on religious exercise.

You must determine whether plaintiffs have proven by a preponderance of the evidence that the denial of their Special [57] Use Permit application substantially burdened their religious exercise.

For each of Counts I, VI and VIII, only religious exercise and not activities that are motivated solely by commercial or secular reasons, is protected by RLUIPA and the free exercise of religion clauses of the federal and state constitutions.

The use, building, or conversion of real property for the purpose of religious exercise is a religious exercise of the person or entity that uses or intends to use the property for that purpose.

Religious exercise means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. A building is used for religious exercise if it is devoted to a religious purpose. Such religious purpose need not implicate core religious practice.

Religious exercise includes the performance of physical acts engaged in for religious reasons.

Plaintiffs need not demonstrate that their entire motivation for their proposed use of the property is religious in nature. Even if a partial motive for

obtaining the Special Use Permit is not religious, plaintiffs may satisfy the requirement that the claim be rooted in religious belief, and not in purely secular – there should be a comma after the word "secular." Can you write that in? I'm talking to the jurors. [58] There should be a comma after the word "secular" – and not in purely secular philosophical or commercial concerns. Any legal person, including a nonprofit or even a for-profit corporation, may engage in religious exercise.

Plaintiffs' own actions are relevant in determining whether a burden is considered substantial. When a plaintiff has imposed a burden upon itself, the government cannot be liable for a substantial burden violation. For example, if someone obtains an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that the person suffers when a land use regulation is enforced is not a substantial burden.

A self-imposed hardship generally will not support a substantial burden claim because the hardship was not imposed by governmental action altering a legitimate, preexisting expectation that a property could be obtained for a particular land use.

In Count II, Plaintiff Spirit of Aloha Temple asserts that the County violated the nondiscrimination provision of RLUIPA, 42 U.S.C. Section 2000cc(b)(2). That section prohibits a government, including a county, from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." Plaintiff Frederick R. Honig is not a claimant on Count II.

* * *

[118] COURT REPORTER'S CERTIFICATE

I, Gloria T. Bediamol, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing is a complete, true, and correct transcript from the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, November 6, 2023.

/s/ Gloria T. Bediamol
GLORIA T. BEDIAMOL. RMR, CRR, FCRR

APPENDIX K

IN THE UNITED STATES DISTRICT CIRCUIT
FOR THE DISTRICT OF HAWAII

Civil No. 14-00535 SOM-RLP (Civil Rights)

SPIRIT OF ALOHA TEMPLE, INC., a Hawaii nonprofit corporation, and FREDRICK R. HONIG,

Plaintiffs,

vs.

COUNTY OF MAUI, and MAUI PLANNING COMMISSION,

Defendants.

DECLARATION OF FREDRIC R. HONIG

Fredrick R. Honig, under penalty of perjury under the laws of the United States of America, does hereby declare and certify pursuant to 28 U.S.C. § 1746 that the following statements are true and correct:

1. I am President of Plaintiff Spirit of Aloha Temple, Inc. (the "Temple"), a Hawaii nonprofit corporation, and a Plaintiff in this action in my own name.

2. I am a licensed minister, and also the principal minister of Spirit of Aloha Temple.

3. I reside at 800 Haumana Road, Haiku, Maui, Hawaii, the property that is the subject of this action (the "Property"). I have resided there since September 8, 1994.

4. The Spirit of Aloha Temple, incorporated in 2007, is a religious organization, and leases the Property.

5. The religious faith and practices of the Temple and myself is "Integral Yoga." Integral Yoga is a spiritual path that integrates the eight branches of Yoga into a holistic approach to experiencing Unitive Consciousness.

6. Integral Yoga arose from Indian spiritualism and certain traditions today called Hinduism. It has a relationship with the Vedas, which constitute the oldest layer of Sanskrit literature and oldest scriptures of Hinduism.

7. One foundational principle of Integral Yoga is the ecumenical understanding that this same goal of Oneness can be achieved by diligently following any of the world's great religions.

8. The Spirit of Aloha Temple and I share Integral Yoga's vision as described in several works in the early part of the Twentieth Century by Sri Aurobindo, an Indian yogi and guru. It advocates a life of selfless service to God and His creation as a means of attaining the highest level of consciousness known as Unitive consciousness.

9. Integral Yoga International was established in the United States by Sri Swami Satchidananda in 1966 and is a worldwide religious organization.

10. As an adherent of Integral Yoga, I believe that the goal and the birthright of all individuals is to realize the spiritual unity behind the diversity throughout Creation and to live harmoniously as members of "one universal family." It is my religious belief that, as Sri Swami Satchidananda stated:

> The goal of Integral Yoga, and the birthright of every individual, is to realize the spiritual unity behind all the diversities in the entire creation and to live harmoniously as members of one universal family. This goal is achieved by maintaining our natural condition of a body of optimum health and strength, senses under total control, a mind well-disciplined, clear and calm, an intellect as sharp as a razor, a will as strong and pliable as steel, a heart full of unconditional love and compassion, an ego as pure as a crystal, and a life filled with Supreme Peace and Joy.

11. I believe that this goal is attained through *asanas* (yoga postures), *pranayama* (breathing practices), the chanting of holy names, self-discipline, selfless action, *mantra japa* (sacred utterances), meditation, study, and reflection.

12. After having completed four years of novitiate training, I was ordained as a Hindu *sannyasa* (a celibate monk) in July of 1977 at the age of 25 in the world's oldest monastic tradition, The Holy Order of Sannyas, and as a minister of Integral Yoga. I was given the title and name of Swami Swaroopananda.

13. I was ordained by the renowned ecumenical leader, Sri Swami Satchidananda, who was ordained in 1949 by Sri Swami Sivananda, Founder of The Divine Life Society, Rishikesh, India, and The All-World Religions Federation, a particular branch of Hinduism. Since 1993, I have been licensed as a minister of Integral Yoga in the State of Hawaii. I am also certified by The Integral Yoga Academy and by The Yoga Alliance as an instructor and teacher trainer of Integral Yoga.

14. For twenty years, starting at age 21, I lived, studied, taught and served as a monastic member of Satchidananda Ashrams and Integral Yoga Institutes.

15. For the past twenty-nine years, I have served in the foundation and development of the Spirit of Aloha Temple, Botanical Gardens and Bird Sanctuary ("The Gardens") on the north shore of Maui as a place to practice and teach others the practice of living in harmony with the natural world. We grow most of our own food and care for this sacred place.

16. The Gardens are dedicated as a living temple of the Spirit of Aloha as taught to me by our revered Kumu Puanani Mahoe (Auntie Pua). The twelve values of the Spirit of Aloha that she embodied and taught us are: Mahalo (Gratitude), Ha'aha'a (Humility), Ihi (Respect), Laulima (Simplicity), Ma'alahi (Cooperation), Pono (Honesty), Hauoli (Happiness), Aloha (Love), Kuleana (Service), Noa (Freedom), Maluhia (Peace), and Lokahi (Unity). Auntie Pua's eloquent Maui Planning Commission testimony concerning our SUP is attached as E A.

17. I believe that the Property belongs to God and I am merely a steward. The Gardens are preserved in a Trust that will in perpetuity share with the world the sacred values of the Spirit of Aloha.

18. The Spirit of Aloha Temple was incorporated to further the principles of Integral Yoga, and specifically (as stated in its Bylaws) "[t]o promote Individual and Global Health, Harmony and Well-Being through Education, Instruction, Guidance and Research."

19. Fundamental aspects of my and the Spirit of Aloha Temple's religious beliefs is that the universe is one living consciousness, that Nature is the embodiment of God and that humans should live in

harmony with it, treating the natural world as God. Such beliefs are based in Hindu tradition. These beliefs have been summarized in my book: Unified Field Theory Revealed: The Union of Consciousness & Physics.

20. The entire purpose of spending twenty-nine years developing the Spirit of Aloha Temple is embodied in the religious goal of sharing our beliefs.

21. In my Hindu religious belief, when any being lives for the well-being of the whole and dedicates his or her life to service, the actions and outcomes of that person's deeds creates an energy that is referred to as *Ojas*. It is a vibration of holiness that can be experienced by those who are open to receiving its healing energy.

22. *Ojas* is manifested in the sacred places where these people lived. We believe that the location of the Spirit of Aloha Temple has developed such spiritual significance, in part because of the spiritual activity that has taken place on the Property over the last twenty-nine years.

23. Swami Satchidananda blessed The Gardens with a formal dedication ceremony held at The Gardens in January of 1997 (available at https://www.youtube.com/watch?v=4fe6mmb9ADI).

24. Many spiritual teachers over the years have visited The Gardens and offered their programs, guidance, and blessings. The love of the couples who have been married here bless The Gardens and The Gardens as well blesses these couples with the energy they can feel and appreciate. Thus, the spiritual energy of the land is enhanced and renewed.

25. We believe that where nature is honored, where meditation is practiced, where spiritual books are read and discussed, where Yoga is practiced and taught, where non-violent nutrition is embraced, where spiritual practices are incorporated into daily life, where compassion and forgiveness reign, this spiritual energy is sustained and augmented. Thus, over the years, The Gardens have grown in holiness and in spiritual energy.

26. We believe that, although God's presence is everywhere in the universe, it concentrates its energy in sacred places where God's glory can be experienced by everyone who is open to receiving it. Sacred temples are often built at these holy sites. The Gardens are such a site.

27. The Property itself is uniquely sacred to me and the Spirit of Aloha Temple.

28. The Temple and I believe that practicing yoga and meditation, and group discussion and liturgy are religious practices that are vital tools to advance the transformation that is an important goal of our religious path.

29. We believe that living in harmony with the natural world is one of the proper goals and duties of humans and that serving and teaching those values is our religious duty. Practicing such a life along with related traditional religious practices leads us to higher states of consciousness.

30. A significant element of the Temple's ministry is to be a living classroom for deepening our understanding of the Spirit of Aloha. It also serves to honor sustainable organic horticulture and plant-based nutrition, which is in furtherance of its religious

beliefs in the harmony of life on Earth and the relationship between human beings to all life.

31. In furtherance of these beliefs, we believe that we should engage in various religious practices, including holding customary religious services such as weekly meetings and sacred events such as baptisms and weddings, offering classes on spiritual beliefs, and holding communal meals.

32. Also in furtherance of those beliefs, the Spirit of Aloha Temple maintains an 11-acre botanical garden and wildlife sanctuary at the Property. It contains many different types of plantings including tropical fruit orchards and a variety of vegetables and other edible plants that form a significant part of the plant-based nutrition of the Temple's members. We have completed the restoration of our historic Taro (Lo'i) which have been dedicated in honor of Auntie Pua. A photograph of the plaque is attached below as **E**.

33. Each of our six principal Gardens are dedicated to one pair of the 12 values of Spirit of Aloha. The Gardens are devoted to various aspects of the universal religious aspirations of humans, to aid in teaching the oneness of life and the notion that "Truth is One, Paths to Truth are Many." Photographs of these Garden plaques are attached below as **E C**.

34. The Spirit of Aloha Temple's gardens and facilities are cared for by volunteer Nature Guardians, who tend the gardens and food crops, live simple lives close to nature, and embrace the Spirit of Aloha's religious principles.

35. Within the *Sannyas* tradition, the Nature Guardian order is a branch of the Saraswati order in the lineage of Sri Swami Sivananda. Our *Sannyas* Constitution is attached below as **E D**.

36. Nature Guardians joyfully choose a holistic lifestyle that is free of drugs, alcohol, tobacco, caffeine, fish, meat, eggs, dairy, genetically modified and processed foods. We embrace organic plant based nutrition and are committed to growing more food than we consume.

37. The Spirit of Aloha Temple believes that through following and spreading our spiritual vision, we can make the world a better place and bring it into closer harmony, including making it more environmentally sustainable, healthy, peaceful and harmonious.

38. We have been constrained from engaging in this spiritual mission because of the actions of the County of Maui.

39. In 2011, I wrote to the Maui Planning Department asking for clarification on what activities were permitted on Property.

40. On April 17, 2012, the County responded by letter and told us that we were not permitted to engage in many activities on our property, including classes, demonstrations and seminars on plant-based nutrition, yoga, and meditation; day retreats; and food service in conjunction with garden activities. With respect to classes on yoga and meditation, and other topics related to our spiritual mission, the County responded:

> STATE: Classes, demonstrations, conferences, and seminars are not listed as a permitted use under HRS, Chapter 205.
>
> COUNTY: Classes, demonstrations, conferences, and seminars are not listed as a permitted

> use, an accessory use, or a special use within the County's agricultural district.
>
> It was made clear in both the Department's February 5, 2004 and June 18, 2007 letters that these are not permitted uses.

41. With respect to spiritual ceremonies, including weddings and baptisms, the County responded:

> STATE: These uses are not listed as a permitted use under HRS, Chapter 205.
>
> COUNTY: These uses are not listed as a permitted use, an accessory use, or a special use within the County's agricultural district.
>
> However, without detailed information regarding the specific event, including its size and scope, the number of guests, whether payments are required and any other information relevant to assessing the impact of the event, the Department is unable to fully respond to your request.

42. Prior to October 2012, the Temple had engaged in certain activities such as spiritual classes, religious services, and classes on plant-based nutrition, which is related to its religious beliefs. The Temple can no longer do so.

43. Because we are not allowed to conduct services or teach, numerous members and supporters do not come to the Temple, since they cannot engage in many religious activities.

44. The Temple is willing to comply with any reasonable conditions of approval for its special use permit.

45. In furtherance of my religious beliefs, I have dedicated all of my financial resources and those that I have received as gifts from family and friends to the Spirit of Aloha Temple. I have taken no salary.

46. Neither I nor the Temple have any resources to acquire other locations to practice our beliefs.

47. We have no other Property or other facilities where we can engage in religious worship, sacred programs, spiritual commitment ceremonies, classes, or other forms of our religious exercise.

48. In accord with these beliefs, I have no car and as a result of a vow to be one with this place, I almost never leave the Property, devoting myself to its care.

49. Over the period of twenty-nine years that we have owned the Property, we have had numerous groups visiting the Gardens. To my knowledge, none of the people have ever been involved in a motor vehicle accident on Haumana Road.

50. On February 4, 2018 I took the following three photographs at three various points on Door of Faith Road between the Hana Highway entrance to Door of Faith Road and the Hale Akua Center. I observed, and the photos demonstrate, that the road is quite narrow and it would not be possible for two vehicles to pass each other. Attached as **E**

E are true and correct copies of these photographs.

Dated: May 11, 2023

/s/Frederick R. Honig
Frederick R. Honig

E HI IT A

Kumu Puanani Mahoe

Maui Planning Commission Testimony on behalf of Spirit of Aloha Temple, September 28, 2010

"*Anoai ke welina me kealoha pakahi apau. Aloha ke Akua*". My name is Puanani Mahoe. I am a *kanaka maoli,* native Hawaiian *kupuna wahine*, woman elder as well as a teacher and healer of the tradition and wisdom of the culture of this *aina*, land. My *ha*, breath and *iwi*, bones come from here. I am the living, breathing and a treasured sovereign heritage, *maoli ea* of *Akua*, God and continue with the line of *koko*, blood of my *kupuna kuamu*, ancestors as well as their ambassador of *Aloha*. My *kupuna kuamu* walk ahead of me, guiding me along this journey of balance and peace. They stand behind me to support and surround me with their *mana*, power and *aloha* that is spoken and unspoken, visible and invisible. The precious *koko*, blood and life source of my *ohana*, seen and unseen identifies me as a treasured sovereign heritage with *kuleana*, responsibility of my live birth. I LIVE. I AM THAT I AM and BE. I AM HERE...

As a cultural practitioner of spirituality, my work focuses on the spiritual balance within people and how it affects their surrounding environment. It is important for people to understand and appreciate the importance of balance in respect to mind, body and spirit within their environment. "*Ua mau ke ea o ka aina I ka pono*", The life of the land is perpetuated in righteousness and this means the right-use-ness of the mind, body and spirit or, the appropriate use of mind, body and spirit. It is also important to have a place to continue with the preservation/perpetuation, cultivation and sustainability of this ancient wisdom of balance.

This should be a place where people are given the opportunity to learn and experience, live and practice and in reality, become living testimonies of the Spirit of Aloha cultivating its foundation through the practice of core values. Well, such a place exists.

The Spirit of Aloha Oceanfront Botanical Gardens offers guidance in humanity's quest to live in balance with nature. The Gardens are dedicated to the Oneness of World Religions exemplifying core values that are the foundation of the Spirit of Aloha. They also are dedicated to: sustainable horticulture and plant based nutrition; share the Science of Health through classes and forums on yoga, meditation and stress management and; to offer holistic organic weddings and life skills that support the long term success of the couple's relationship as well as family issues. In truth, the Gardens are dedicated to preserving life, of wildlife, nature and human kind. In the Garden of true Fellowship and Aloha, the flowers bloom forever. "*Kaulana na pua*", famous are the flowers, famous are the children of this land..."*Na pua o Hawaii nei*", the flowers of Hawaii, the children of Hawaii, the people and families of Hawaii...

The spirit of Aloha Oceanfront Botanical Gardens are a family of Gardens symbolizing and supporting the vision of all humanity and sentient beings to embrace Aloha as the basis for our personal, family, cultural, educational, financial, and sovereign way of life. A family has members, each with roles and responsibility. They contribute to the well-being of the whole. When a member leaves, there is a "puka", hole and the "*ohana*' is missing a piece of the whole. The family is not complete as it is missing one of its members. The same principal applies to the Gardens which is a non-profit organization dedicated to

working on the cutting edge of the 5 critical areas stated earlier. These specific areas are the mission statement of the Spirit of Aloha Oceanfront Botanical Gardens. They each make up the whole of the Botanical Gardens. Therefore, your support and approval of the Spirit of Aloha Oceanfront Botanical Gardens to continue with their work to preserve/perpetuate, cultivate and sustain in appropriateness the balance of this wonderful culture, tradition and wisdom.

May we remember to BE Aloha.
Please be good and kind to each other.
Mahalo ke Akua.

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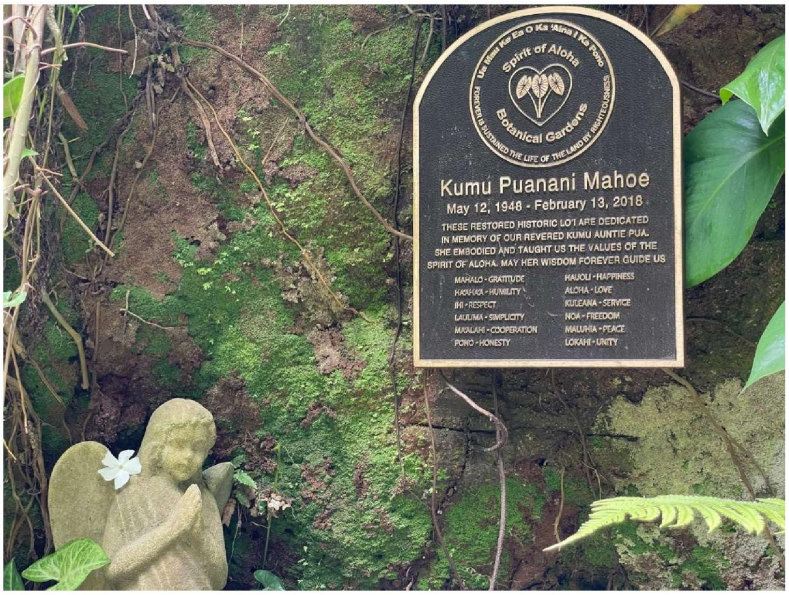
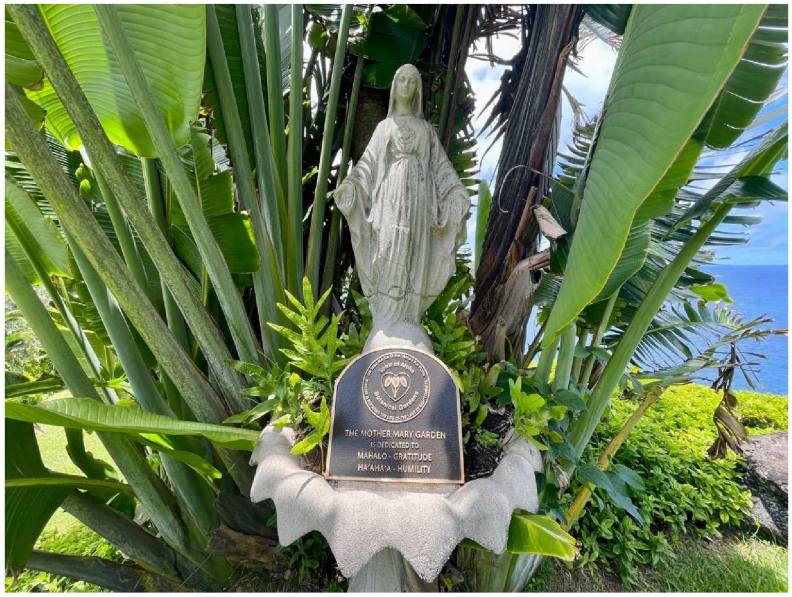

Spirit of Aloha
Botanical Gardens
Kumu Puanani Mahoe
May 12, 1948 - February 13, 2018
THESE RESTORED HISTORIC LO'I ARE DEDICATED IN MEMORY OF OUR REVERED KUMU AUNTIE PUA. SHE EMBODIED AND TAUGHT US THE VALUES OF THE SPIRIT OF ALOHA. MAY HER WISDOM FOREVER GUIDE US
MAHALO - GRATITUDE
HAUOLI - HAPPINESS
HAHAIA - HUMILITY
ALOHA - LOVE
IHI - RESPECT
KULEANA - SERVICE
LAULIMA - SIMPLICITY
NOA - FREEDOM
MAKUAHI - COOPERATION
HAUʻOLI - PEACE
PONO - HONESTY
LOKAHI - UNITY


THE MOTHER MARY GARDEN
IS DEDICATED TO
MAHALO - GRATITUDE
HA'AHA'A - HUMILITY

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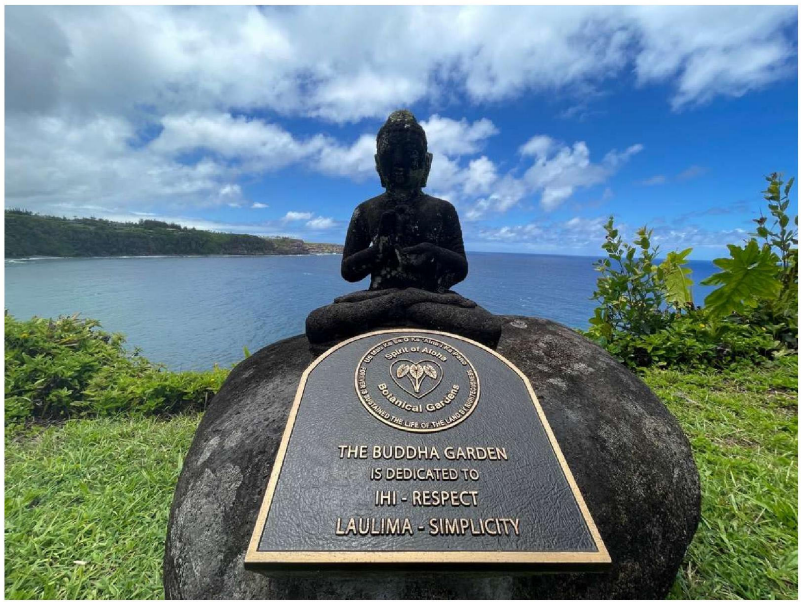
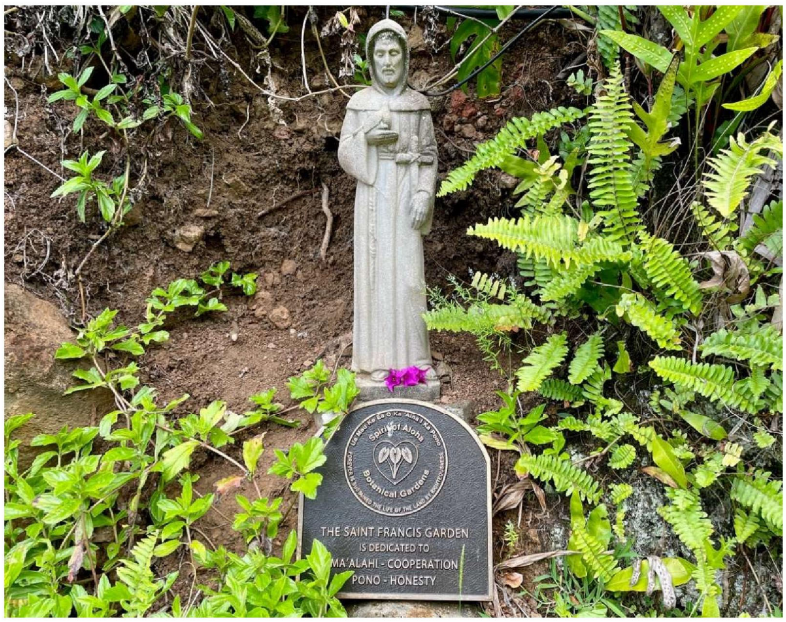
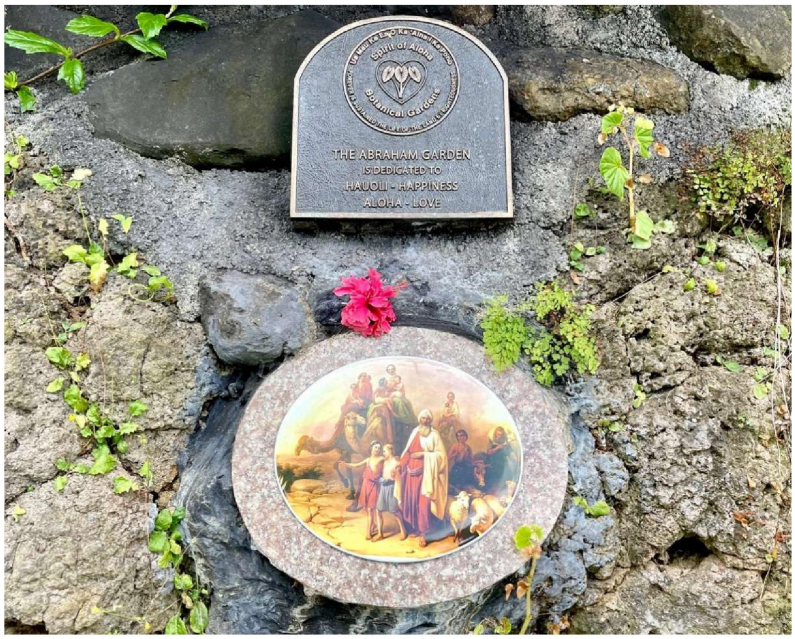
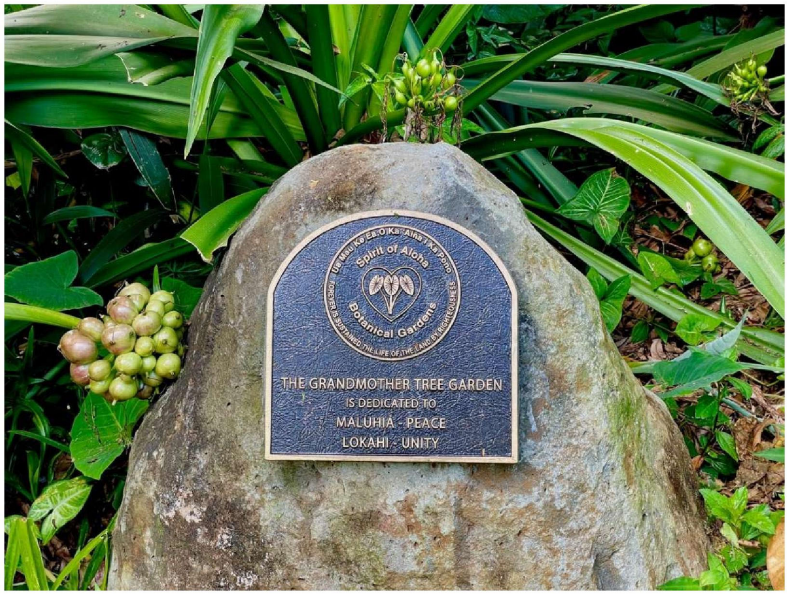

Spirit of Aloha
Botanical Gardens
THE BUDDHA GARDEN
IS DEDICATED TO
IHI - RESPECT
LAULIMA - SIMPLICITY


Spirit of Aloha
Botanical Gardens
THE SAINT FRANCIS GARDEN
IS DEDICATED TO
MA'ALAHI - COOPERATION
PONO - HONESTY


Spirit of Aloha
Botanical Gardens
THE ABRAHAM GARDEN
IS DEDICATED TO
HAUOLI - HAPPINESS
ALOHA - LOVE


Spirit of Aloha
Botanical Gardens
THE GRANDMOTHER TREE GARDEN
IS DEDICATED TO
MALUHIA - PEACE
LOKAHI - UNITY

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THE SANGHA

THE SPIRIT OF ALOHA NATURE GUARDIAN HOLISTIC ALLIANCE

Our Sannyas Constitution and Commitment to The Holy Order of Sannyas:

1) We live to serve nature and humanity.

2) We look within to the Conscience as our Guru for guidance in life.

3) Our path is the letting go of ego identification to experience Unitive Consciousness working through us.

4) We live simply and are responsible for our own finances. Whatever funds that are in our control, we use in the fulfillment of our services.

5) We integrate the eight limbs of Patanjali's Ashtanga Yoga into our daily lives.

6) We follow Brahmacharya as celibacy or as moderation in a committed supportive partnership.

7) We share the universal teaching of Sri Swami Sivananda, Sri Swami Satchidananda and their disciples. We honor all Spiritual Traditions that are dedicated to loving kindness, peace and service. We align with them in our understanding that

"Truth is One, Paths are Many."

Spirit of Aloha Nature Guardian Sannyas Initiation Vows

Recited before the Viraja Homa Fire:

The Unitive Consciousness is known by many names such as: God, Source, The Divine, The Almighty, The Creator, Brahman, Great Spirit and many more. Today, by the Grace of the Unitive Consciousness, I am embracing the Holy Order of Sannyas. I fully realize the importance and greatness of the Holy Order and in the Name of the Unitive Consciousness, I solemnly promise to dedicate all that I could call mine and ultimately myself in service to the Unitive Consciousness.

Therefore, from this moment on, myself and all that I could call mine belong to the Unitive Consciousness and my life is dedicated to being its instrument. I will perform every act as a service to The Unitive Consciousness and Its creation. I recognize this fire of Viraja Homa as a representation of The Unitive Consciousness.

I offer all my belongings in service to the Unitive Consciousness.
I offer my body in service to the Unitive Consciousness.
I offer my senses in service to the Unitive Consciousness.
I offer my emotions in service to the Unitive Consciousness.
I offer my intelligence in service to the Unitive Consciousness.
I offer my ego in service to the Unitive Consciousness.
I offer myself in service to the Unitive Consciousness.

I, Swami _____, solemnly dedicate all that could be called mine, in order to live a life of dedication and selfless service to the Unitive Consciousness and Its creation. May Divine Grace sustain this total dedication forever.

HARI OM TAT SAT

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