Nos. 23-3453 & 23-3633

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SPIRIT OF ALOHA TEMPLE AND FREDRICK R. HONIG,
Plaintiffs-Appellants,
v.
COUNTY OF MAUI ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii
Honorable Susan Oki Mollway
(No. 1:14-cv-00535-SOM-WRP)

***AMICUS CURIAE* BRIEF OF THE NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTEREST OF *AMICUS CURIAE*[1]

The Notre Dame Law School Religious Liberty Clinic promotes and defends the freedom of religion or belief for all people. It advocates for the right of all people to exercise, express, and live according to their beliefs. And it defends individuals and organizations of all faith traditions against interference with these fundamental liberties. It has represented an array of individuals and organizations in cases to defend the right to religious exercise, to preserve sacred lands from destruction, to promote the freedom to select religious ministers and shape religious doctrine, and to prevent discrimination against religious believers and institutions. The Clinic has participated in proceedings at all levels of federal and state courts, in administrative agencies, and before foreign courts and other governmental bodies around the world.

In addition to defending religious freedom wherever it is curtailed, the Religious Liberty Clinic seeks to ensure that substantial legal

[1] Counsel for all parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

protections for religious exercise—like those Congress enacted in the Religious Land Use and Institutionalized Persons Act of 2000—are faithfully interpreted and applied. It therefore seeks to ensure that these protections are meaningfully defended in cases like this.

SUMMARY OF THE ARGUMENT

To determine whether a land-use regulation unlawfully imposes a substantial burden on a plaintiff's religious exercise, courts conduct a holistic and nuanced inquiry. At bottom, that analysis asks whether and to what extent the government has impaired the plaintiff's ability to fulfill a religious need. The answer to this question must take into account a range of considerations concerning the plaintiff's religious beliefs and the options with which a regulatory scheme has left her. This Court has previously declined to adopt bright-line rules that would disrupt this comprehensive legal analysis.

The district court badly misconstrued the substantial-burden inquiry. First, the district court erred by imposing a requirement that RLUIPA does not create: that, notwithstanding the extent to which the County's actions have burdened their religious exercise, the Spirit of Aloha Temple and Fredrick Honig show that they had a "reasonable expectation" to use their property as needed. Imposing this obstacle runs directly contrary to both RLUIPA and this Court's case law. Second, the district court mistakenly sent the legal determination of substantial burden to a jury. The scope of a person's religious liberty rights—and

whether they have been "substantially burdened" within the meaning of RLUIPA—is ultimately a question of law.

This Court should correct the district court's fundamental misunderstanding, both to fix the erroneous decision below and to ensure that other courts will not repeat the same mistake.

ARGUMENT

I. The district court misapplied this Circuit's holistic approach to evaluating religious burdens imposed by land-use decisions.

RLUIPA tightly circumscribes the government's authority to "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" or institution. 42 U.S.C. § 2000cc(a)(1). Because the statute does not define "substantial burden," that term is given "its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). And, as the ordinary meaning makes clear, the substantial-burden inquiry focuses on the *effect* of the government's action on the plaintiff's religious activities. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004).

The question RLUIPA asks is the extent to which a challenged land-use decision impedes a person's ability to fulfill a certain religious need.

And the answer, of course, is context-dependent and must account for "the totality of the circumstances" of any given case. *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 602 (9th Cir. 2022). The district court, however, short-circuited that nuanced legal analysis, wrongly inserting a single dispositive factor—whether it was "reasonable for Spirit of Aloha Temple to expect" that it would receive land-use approval—notwithstanding how the denial might burden the Temple's religious exercise now. *Spirit of Aloha Temple v. County of Maui*, No. 14-00535, 2023 WL 5178248, at *13 (D. Haw. Aug. 11, 2023). As a result, the district court erected a hurdle to the Temple's claim that neither RLUIPA nor this Court recognizes.

A. The substantial-burden inquiry demands nuanced consideration of how a land-use decision impairs the fulfillment of a religious need.

In *International Church of Foursquare Gospel v. City of San Leandro*, this Court observed that the burdens imposed by land-use decisions fall along a spectrum: at one end, a mere "inconvenience on religious exercise" does not constitute a substantial burden, and at the opposite end, "[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 v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (quotations omitted). The threshold to show a substantial burden lies somewhere between: If the government imposes "a significantly great restriction or onus upon [religious] exercise," that is enough. *New Harvest Christian Fellowship*, 29 F.4th at 602 (alteration in original) (quotation omitted). Importantly, in this Circuit, the government action need not "render 'religious exercise . . . effectively impracticable' in order to qualify as a substantial burden under RLUIPA." *Int'l Church of Foursquare Gospel*, 673 F.3d at 1068–69 (quotation omitted) (noting that the Ninth Circuit has rejected the Seventh Circuit's "higher standard"). Determining where a case falls along this spectrum is the essence of substantial-burden analysis. *See New Harvest Christian Fellowship*, 29 F.4th at 602.

To assess whether a land-use decision "imposes a 'significantly great' restriction, rather than an inconvenience, on [a plaintiff's] religious exercise," this Court evaluates the extent to which the decision impedes the plaintiff's ability to fulfill its religious needs. *New Harvest Christian Fellowship*, 29 F.4th at 604 (quotation omitted). And to help perform the analysis, this Court has identified several considerations that—among

others—may be relevant. "[S]ome factors" this Court considers include whether, despite the land-use denial, the religious group has "ready alternatives" available to satisfy its religious needs or whether the government has left the group with no options free from "substantial uncertainty, delay, or expense"; whether the group has been "precluded from using other sites in the city"; and whether the government's reasons for denying the application were arbitrary or would "easily apply to future applications" by the group. *Id.* These factors are neither comprehensive nor a checklist of discrete items that must be satisfied. Rather, they work neatly together to help assess just what effect the land-use denial has had on the plaintiff's religious exercise.

As the listed factors suggest, the substantial-burden inquiry regularly involves consideration of whether the plaintiff retains non-burdensome ways to fulfill the religious need in spite of a land-use denial. The presence of easily and readily available alternatives may suggest that the government's action does not substantially burden a plaintiff's religious exercise. But, when a religious institution "has no ready alternatives, or where the alternatives require substantial delay, uncertainty, and expense, a complete denial of the [religious institution's]

application might be indicative of a substantial burden." *Int'l Church of Foursquare Gospel*, 673 F.3d at 1068 (alteration in original) (internal quotation marks omitted); *see also New Harvest Christian Fellowship*, 29 F.4th at 602. Or a court may consider whether the plaintiff still retains other ways to have its zoning application approved. *See, e.g.*, *Thai Meditation Ass'n of Ala. v. City of Mobile*, 980 F.3d 821, 832 (11th Cir. 2020). In *San Jose Christian*, for example, this Court "considered it centrally important that there was no evidence to suggest that the religious institution desired by [the plaintiff] could not be obtained merely by 'submitt[ing] a *complete* application.'" *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006) (alteration in original) (quoting *San Jose Christian*, 360 F.3d at 1035). In either case, the theory is the same: the challenged decision might not burden the plaintiff's religious exercise if it leaves other reasonable means to perform it.

The substantial-burden inquiry often turns significantly on the adequacy of these supposed alternatives. If the alternatives themselves are substantially burdensome, then their mere existence does not eliminate the burden created by the challenged decision. A proposed

alternate site, for example, cannot just be "technically available" but must meet the organization's religious needs and be ready for use without incurring substantial burdens due to distance, delay, cost, or uncertainty. *See New Harvest Christian Fellowship*, 29 F.4th at 602. Thus, "[t]he availability of alternative locations" does not preclude "a finding of substantial burden." *Id.*; *see also Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 558 (4th Cir. 2013); *Livingston Christian Schs. v. Genoa Charter Township*, 858 F.3d 996, 1005–06 (6th Cir. 2017). And a supposed "opportunity" to receive zoning approval by complying with burdensome conditions or participating in a futile reapplication process will not do. *See, e.g.*, *Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 196 (2d Cir. 2014); *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005). For example, the plaintiff need not continue to participate in a decision-making process in which "the government's reasons for denying an application were arbitrary, such that they could easily apply to future applications by the religious group." *New Harvest Christian Fellowship*,

29 F.4th at 602; *see also Guru Nanak*, 456 F.3d at 989; *Westchester*, 504 F.3d at 352–53; *Thai Meditation*, 980 F.3d at 832. There must be an actually "*reasonable* opportunity" for the plaintiff to have its application approved through further process. *Westchester*, 504 F.3d at 349 (emphasis added).

To be sure, whether an organization could have anticipated and avoided the burden imposed by a land-use denial may be relevant to this inquiry. That is because courts may be reluctant to fault the challenged decision for practical costs that result from the plaintiff's choices rather than the government's actions. *See, e.g.*, *New Harvest Christian Fellowship*, 29 F.4th at 602 (noting "that a religious group has imposed a burden upon itself" may be "relevant to but not dispositive of the substantial burden inquiry"). For instance, if a religious organization knowingly bypassed a religiously suitable and readily available property, then the plaintiff might share some responsibility for the additional burden of finding and relocating to yet another one. *See, e.g.*, *Livingston Christian Schs.*, 858 F.3d at 1011 (plaintiff leased adequate property to another group instead of using it to meet its religious needs). Or a plaintiff may share some responsibility for burdens that result from a

stubborn "unwillingness to modify its proposal in order to comply with applicable zoning requirements." *Thai Meditation*, 980 F.3d at 832. But the touchstone of the inquiry remains the burden that the government's regulatory decisions impose on the plaintiff. And where, for instance, the government's zoning scheme has left a plaintiff without any reasonable options to build, the lack of a settled expectation to do so does not undermine the claim. *See New Harvest Christian Fellowship*, 29 F.4th at 602; *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (contrasting self-imposed burden where plaintiff could have purchased suitable property with government-imposed burden where "a paucity of other land available for churches" left no choice).

As discussed below, and as Plaintiffs' brief makes clear, the district court's adoption of a strict "reasonable expectation" requirement flies in the face of this basic understanding of the relevance of supposed alternatives to the substantial-burden inquiry. Opening Br. 45–47.

B. The district court erred by requiring a plaintiff to show a "reasonable expectation" to use the property as requested.

The substantial-burden inquiry, like the relevant facts that inform it, depends on the particular circumstances of a case and the particular

claims of the parties. This Court's "totality of the circumstances" approach is premised upon and appropriately accounts for this reality. *See New Harvest Christian Fellowship*, 29 F.4th at 602. The district court, however, errantly rejected that approach by making the plaintiffs' "reasonable expectations" for the use of their property dispositive of the entire question.

Instead of employing this Court's holistic inquiry, the district court improperly narrowed in on one consideration: "whether it was reasonable for Spirit of Aloha Temple to expect that it would get the Special Use Permit." *Spirit of Aloha Temple v. County of Maui*, 322 F. Supp. 3d 1051, 1065 (D. Haw. 2018); *see also Spirit of Aloha Temple*, 2023 WL 5178248, at *13 (similar); Dist. Ct. Dkt. 643 (Jury Instructions), at 31 (stating that where "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 . . . is not a substantial burden"). The court effectively required Plaintiffs to prove they *had* a reasonable expectation of obtaining a permit in order to succeed on their RLUIPA claim. *See Spirit of Aloha Temple*, 2023 WL 5178248, at *13 (concluding that Plaintiffs failed to establish a substantial burden where the record

"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").

The district court's imposition of a "reasonable expectation" requirement cannot be squared with this Court's cases. Indeed, this Court has explicitly *declined* "to adopt two bright-line rules" that would disrupt the appropriate "substantial burden" inquiry. *New Harvest Christian Fellowship*, 29 F.4th at 602. First, this Court rejected a local municipality's argument that "the existence of feasible alternative locations for a [claimant] to conduct its worship forecloses a finding of substantial burden." *Id.* "The availability of alternative locations, although plainly relevant to the substantial-burden inquiry, *does not necessarily foreclose* a finding of substantial burden." *Id.* (emphasis added).

Second, and more importantly, this Court has already rejected the notion that a RLUIPA plaintiff must show that it had a "reasonable expectation" to use the land in the way now sought. Indeed, this Court has held that whether "a religious group has imposed a burden upon itself by acquiring a property whose use is already restricted is relevant to *but*

not dispositive of the substantial burden inquiry." *Id.* (emphasis added). As described above, the question of an organization's prior expectations is not simply a standalone inquiry. Rather, that question is relevant only to inform whether the religious burden the organization faces flows from some foreseeable fault of its own or instead from the government's regulatory choices. As this Court has observed, "a religious group [may have] no option other than to purchase a property where religious assembly is forbidden and hope that an accommodation will be made on its behalf" where a "city's zoning code" is sufficiently "restrictive." *Id.*[2]

[2] Other circuits agree that a plaintiff's "reasonable expectation" is merely one among many considerations that courts evaluate in determining whether the government has impaired her religious exercise. *See, e.g.*, *Chabad Lubavitch of Litchfield Cnty.*, 768 F.3d at 195–96 (listing reasonable expectations at time of purchase as one of several considerations to balance); *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 450 (6th Cir. 2023) (finding a substantial burden even after the zoning director emailed the organization that its permit would be denied); *Petra Presbyterian Church*, 489 F.3d at 851 (acknowledging that the church bought the property knowing its permit application would be denied but concluding the church could still make out a substantial burden if it supplied evidence that not many properties were available in other zones); *Thai Meditation Ass'n of Ala.*, 980 F.3d at 831–32 (highlighting that the only arguably necessary condition to make out a substantial burden under RLUIPA is "significant pressure which directly coerces the religious adherent to conform" and noting that "reasonable expectation" of land use is one of several relevant considerations (quotation omitted)).

Demanding that a plaintiff have the "reasonable expectation" to use its land in a way the City forbids would effectively deny any claim against such restrictive zoning codes.

In short, this Court has squarely rejected the imposition of bright-line rules that would erect defined obstacles that a plaintiff must clear to show a substantial burden under RLUIPA. And it has rejected the specific bright-line rule adopted by the district court here. As Plaintiffs have demonstrated, under the appropriate analysis, the government has substantially burdened their religious exercise. *See* Opening Br. 42–48. RLUIPA protects against that burden, regardless whether the Plaintiffs can show they ever "reasonably expected" that the County would be more accommodating of their religious needs.

II. Whether a land-use decision imposes a "substantial burden" on religious exercise is a question of law.

As described above, the question whether an individual's right to religious exercise has been substantially burdened requires careful and nuanced analysis. And the ultimate answer to that multifaceted question is one of law, not fact. The district court therefore not only badly

misconstrued the substantial-burden inquiry; it further erred by submitting the ultimate legal question to a jury.

This Court has previously treated the substantial-burden inquiry as a question of law. *See, e.g.*, *New Harvest Christian Fellowship v. City of Salinas*, 463 F. Supp. 3d 1027, 1035 (N.D. Cal. 2020) ("Whether a land use regulation imposes a substantial burden is a question of law."), *aff'd in relevant part*, 29 F.4th at 601–04 (affirming denial of summary judgment based on plaintiffs' failure to demonstrate a substantial burden); *Guru Nanak*, 456 F.3d at 987–92 (affirming district court's grant of summary judgment to plaintiffs where the government imposed a substantial burden). Other circuits have held the same. *See, e.g.*, *Livingston Christian Schs. v. Genoa Charter Township*, 858 F.3d 996, 1001 (6th Cir. 2017); *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 93 (1st Cir. 2013); *but see World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) (noting that the Seventh Circuit had not addressed the question and assuming without deciding that the question is one of fact). Of course, a jury may appropriately resolve disputed *facts* that are relevant to the considerations a court might take into account—for example, whether

alternative sites are available. *See, e.g.*, *Int'l Church of Foursquare Gospel*, 673 F.3d at 1067–70. But it is ultimately for the court to decide whether those facts show that a land-use denial has imposed "a significantly great restriction" on a person's religious freedom within the meaning of the law. *San Jose Christian*, 360 F.3d at 1034.

Indeed, the mere fact that a legal inquiry depends on the facts of a case does not mean that the ultimate inquiry *itself* is a question of fact. *See, e.g.*, *De Fontbrune v. Wofsy*, 39 F.4th 1214, 1226 (9th Cir. 2022); *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). That is a common reality in the law, and such a "bifurcation of duties is unavoidable": Juries are suited to determine facts, not complicated legal standards. *Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017); *see also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts."). Engaging in a multifaceted, nuanced legal analysis can be a difficult task even for lawyers and judges. It is all the more difficult for a lay jury. To safeguard fundamental rights like those protected by RLUIPA, the court must ensure the appropriate decisionmaker is entrusted with the contested

legal question. *See Roman Cath. Bishop of Springfield*, 724 F.3d at 93–94. Indeed, the Supreme Court has explained that in cases concerning constitutional rights the task of "marking out the limits of [a legal] standard" is typically a question of law—"even when . . . [it] primarily involves plunging into a factual record." *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018) (first alteration in original) (quotation omitted). The concern that judges—not juries—define the scope of important rights is particularly acute where, as here, the case concerns the legal right to exercise a minority religion, with which a jury is unlikely to be familiar. *Cf., e.g.*, *Munn v. Algee*, 924 F.2d 568, 575 (5th Cir. 1991) (commenting on jurors' likely favorable treatment of religious motivations that seem personally "plausible").

Moreover, courts' application of RLUIPA's "sister" statute, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, confirms that the substantial-burden inquiry is a question of law, not fact. *See Ramirez v. Collier*, 595 U.S. 411, 424 (2022) (RLUIPA and RFRA are "sister" statutes).[3] This Court has long held that the question

[3] RFRA, like RLUIPA, sharply restricts the government's ability to "substantially burden a person's exercise of religion" to only those actions

of substantial burden under RFRA "is a legal question for courts to decide." *Guam v. Guerrero*, 290 F.3d 1210, 1222 n.20 (9th Cir. 2002). Other circuits agree. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015), *vacated and remanded on other grounds sub nom. Zubik v. Burwell*, 578 U.S. 403 (2016) ("Every circuit that has addressed a RFRA challenge to the accommodation scheme at issue here has concluded that whether the government has imposed a 'substantial burden' is a legal determination.") (collecting cases); *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Hum. Servs.*, 818 F.3d 1122, 1144 (11th Cir. 2016), *vacated on other grounds*, No. 14-12696, 2016 WL 11503064 (11th Cir. May 31, 2016) ("We agree with our seven sister circuits that the question of substantial burden also presents a question of law for courts to decide." (quotation marks omitted)). Because RLUIPA "imposes the same general test as RFRA," *Hobby Lobby*, 573 U.S. at 695, it would make little sense to treat

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that survive strict scrutiny. 42 U.S.C. § 2000bb-1. As the Supreme Court has explained, RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695–96 (2014). Thus, courts regularly look to cases interpreting RFRA to guide the interpretation of RLUIPA and vice versa. *See, e.g.*, *id.* at 718, 730; *Holt v. Hobbs*, 574 U.S. 352, 362–63 (2015).

"substantial burden" as a legal determination under one statute and a factual question for the other.

Unfortunately, like the court below here, other district courts in this Circuit have missed this point and errantly treated "substantial burden" as a question of fact under RLUIPA. *See, e.g.*, *Int'l Church of Foursquare Gospel v. City of San Leandro*, 902 F. Supp. 2d 1286, 1292 (N.D. Cal. 2012). This Court should correct this mistake and once again reiterate that whether the government substantially burdens a plaintiff's religious exercise is a question of law for the court to decide.

CONCLUSION

The district court doubly erred by first imposing a dispositive factor in contravention of this Court's comprehensive approach to the substantial-burden inquiry and then sending this quintessentially legal determination to the jury. *Amicus curiae* respectfully urges the Court to correct these mistakes and reverse the decision below.[4]

Dated: March 8, 2024

Respectfully submitted,
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[4] The Notre Dame Law School Religious Liberty Clinic thanks students Sakethram Desabhotla, Jared Huber, Tess Skehan, and Timothy Steininger for their assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with Federal Rule of Appellate Procedure 29(a)(5) as it contains 3,593 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

The brief's typesize and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 14-point Century Schoolbook, a proportionally spaced font.

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Dated: March 8, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's electronic filing system. I further certify that service was accomplished on all parties via the Court's electronic filing system.

/s/ Meredith H. Kessler
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Dated: March 8, 2024