No. 07-16393

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REDWOOD CHRISTIAN SCHOOLS,

Plaintiff-Appellant,

v.

COUNTY OF ALAMEDA, ET AL.,

***Defendants-Appellees*.**

On Appeal from the United States District Court
for the Northern District of California
Case No. CV-01-4282-SC
Hon. Samuel L. Conti

BRIEF OF APPELLEES COUNTY OF ALAMEDA *et al*.

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STATEMENT OF JURISDICTION

Defendants-Appellees County of Alameda, et al., agree with Plaintiff-Appellants Redwood Christian Schools' Statement of Jurisdiction.

I. INTRODUCTION

This is an ordinary zoning case, made remarkable only by the plaintiff's strenuous attempt to portray Alameda County's zoning process as an engine of religious oppression. As a unanimous jury concluded, however, there was no oppression here. Indeed, the trial record refutes any inference of the insidious anti-religious discrimination that RLUIPA's[1] drafters intended to unmask and remedy, and that has been conspicuously present in most successful RLUIPA cases.

Redwood therefore finds itself asserting on appeal—with startling frankness—that RLUIPA carves out a religious exemption to the land-use and environmental laws that bind and protect the general public.[2] Thus, Redwood's appeal stands or falls on this Court's readiness to accept the contention that a private religious school now has a federal civil right to build its dream campus wherever it wants—including in a protected low-density area outside designated urban limits—while refusing to compromise on size and intensity of use.

Redwood is a successful independent school that boasts to accrediting agencies and potential enrollees that it successfully inculcates Christian values, offers a first-rate academic program, and—most notably—enjoys the use of excellent physical facilities at the Martin site that it has leased from the San Lorenzo School District for over a decade. The school has grown from 60 students in 1970 to over 450 today, thanks in part to the County's grant of several

[1] "RLUIPA" refers to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*

[2] Brief of Appellant Redwood Christian Schools ("Br.") 37-38.

Conditional Use Permits which have allowed Redwood to expand and improve its Martin facilities.

But Redwood's ambitious administrators want more. Redwood competes for students and tuition dollars with several other religious schools in its service area and is eager to swell its enrollment by at least 50%. Redwood believes that this will require a more attractive and much larger facility. After rejecting several properties due to cost, location, or lack of services, Redwood found what it calls its "Promised Land"—relatively cheap parcels of land for sale in the Palomares Canyon area of Castro Valley in Alameda County. This is a beautiful rural area where the neighbors keep vineyards, chickens, goats, and rabbits. Land was cheap there because the County's master zoning plan expressly seeks to preserve the area's rural character by restricting development to single-family homes on one- to five-acre lots.

It was in this quiet and serene locale that Redwood resolved to build a massive, multiple-building campus for its combined 650-student junior- and senior-high school, including 108,000 square feet of building space, two administration buildings, a 1,000-person gymnasium, a multipurpose room capable of serving lunch to 325 students at once, several tennis courts, a baseball diamond, and soccer and softball fields. All this was to be situated on 45 acres of land, only 18 acres of which were developable.

Redwood gambled that it could persuade the County's decision-makers to grant it a Conditional Use Permit ("CUP") to build its dream school on this site. This placed the County in an unenviable position. Nobody likes to say no to a

school—and if anything became clear at trial, it was that the County's principal decision-makers like and respect this school and were in no way motivated by anti-religious animus when they denied Redwood's CUP. But the County made it clear to Redwood from the outset that the proposed development was likely to be found too big and too intense for this land. Trying to avoid an outright denial, the County's Board of Supervisors held meetings and mediations, and even had a second architectural firm develop smaller, more appropriate designs that would be compatible with the neighborhood.

Redwood would have none of it. Emboldened both by its vision of a "Promised Land" and by the passage of the RLUIPA in October of 2000, Redwood stood firm on its intention to build a 650-student school. If they couldn't win through the administrative process, they resolved to win through this lawsuit.

Although Redwood likes to portray the County's CUP process as a random roll of the dice, Redwood knew early on that its project was unlikely to be approved unless scaled back dramatically. And Redwood was given every bit of due process that the size and importance of its project warranted. At three different levels of administrative review, County decision-makers applied the four specific CUP criteria set forth in the County zoning ordinance and concluded that the proposed land use was just too big and too intense for a rural residential area. After a 10-day trial, a unanimous jury agreed that this straightforward decision reflected no anti-religious animus and violated no civil rights.

Redwood now portrays itself as a school on the brink of "extinction," frustrated by capricious bureaucrats and hostile neighbors, and stymied in its

attempts to transmit its religious teachings to the next generation. But substantial trial evidence refutes every element of that story. Equally unpersuasive, in light of the extensive trial record, are Redwood's various assignations of legal error.

"Unbridled discretion." Redwood argues that the district court erred when it dismissed Redwood's so-called "unbridled discretion" claims, which assert that the four CUP criteria either don't provide decision-makers with any meaningful guidance (the "facial" version) or are routinely ignored (the "as applied" version). In either version, the argument fails. The "as applied" version is simply a claim that the County abused discretion conferred by state law—a claim that may be asserted only by means of state-law mandamus review. *See* Part V.A.1. And Redwood simply misstates the record when it argues that the district court erroneously added an "intent" element to the unbridled-discretion claims. It didn't. *See* Part V.A.2.

More fundamentally, Redwood's unbridled-discretion argument misapprehends the nature and function of CUP ordinances, which exist to inject some much-needed flexibility into the categories created by master zoning plans. The County's four CUP criteria are as loosely phrased as they need to be, but no looser than comparable CUP ordinances adopted around the nation—all of which would be doomed under Redwood's view of the law. *See* Part V.A.3.

Finally, Redwood's argument fails because it relies on inapposite cases about permitting schemes that impose prior restraints on speech or other expressive activity—not prior restraints on where you can erect a building. *See* Part V.A.4.

RLUIPA substantial burden. Redwood objects to the district court's instruction that, under RLUIPA, proving a substantial burden on religious exercise requires proof of a "tendency to coerce" individuals to act contrary to their religious beliefs. Redwood prefers other language—also given to the jury in the same instruction—that a substantial burden must be "oppressive to a significantly great extent" and must impose "a significantly great restriction on a party's exercise of religion." It is doubtful that a lay jury found these distinctions important. In any event, courts that have considered this issue endorse the "coercion" principle. *See* Part V.B.1.

Redwood reaches the heart of this matter when it complains that the district court erred by instructing the jury that "RLUIPA does not give religious organizations an exemption from land use regulations that apply to others." RLUIPA's legislative history says this expressly, and courts have taken that statement to heart when interpreting the statute. Redwood's contrary view would chew big holes in every system of land-use regulation in the nation and might render RLUIPA unconstitutional under the Establishment Clause. *See* Part V.B.2.

Redwood also argues that the district court shouldn't have let the jury decide whether the County had proven RLUIPA's strict-scrutiny defense. While the court ***could have*** decided that issue, any error was harmless, as the judge later disclosed that he would have found that the County proved the defense. *See* Part V.B.3.

RLUIPA "equal terms." Redwood argues that RLUIPA's equal-terms provision does not require the plaintiff to prove that it was treated worse than a "similarly situated" nonreligious institution or assembly. But that makes no sense,

as it would be meaningless to consider whether differently situated entities received "equal" treatment. All Circuits that have considered the matter agree. *See* Part V.C.1.

Redwood also argues that the district court erred by instructing the jury that rational-basis review applies to Redwood's equal-terms claim. But courts traditionally apply rational-basis review in constitutional challenges to land-use laws that are not facially discriminatory. If Congress meant to depart so dramatically from normal equal-protection principles in an area that could so greatly affect the balance of federal-state relations, it needed to make a plain statement of that intent. It didn't. *See* Part V.C.2.

Accordingly, for these and many other reasons discussed more fully below, this Court should affirm the jury's verdict and judgment in favor of the County of Alameda.

II. STATEMENT OF FACTS

A. Redwood has long enjoyed an excellent relationship with the San Lorenzo School District, which has leased a series of properties to Redwood at low rates.

Redwood was founded in 1970 as an independent Christian school. Children from over 130 different churches and more than 25 different Christian denominations (including Catholics) attend the school, which is not affiliated with any church.[3]

[3] 3, 4, 28, 113. Bare numbers refer to pages of the Supplemental Excerpts of Record. "ER" refers to Redwood's Excerpts.

Redwood soon moved its seventh and eighth grades to Fairmont Terrace, which it leased from the San Lorenzo School District;[4] and Redwood has been leasing one property or another from public-school districts ever since. Gus Enderlin, Redwood's former principal and its land-acquisition consultant, testified at trial that "[w]e have always maintained a good working relationship with San Lorenzo and many times they have gone beyond the legal limits of the lease to give us fair warning" before terminating a lease.[5] Enderlin added that Redwood had been "very fortunate" in bidding for San Lorenzo District properties because it often was the only bidder and therefore obtained the lease for "the minimum amount."[6] Indeed, Enderlin testified that "God has never let us down. When we needed a new facility, we received it."[7]

Redwood eventually left the Fairmont site of its own accord after becoming dissatisfied with the facility and its location.[8] While at Fairmont, Redwood bid successfully to lease space for its high school and district offices at Washington Manor in the San Leandro School District.[9] At Washington Manor, Redwood repaved the parking lots and installed a shower/locker room.[10] After three years, the District terminated the lease on six months' notice, as the lease required.[11]

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[4] 5-6.
[5] 6.
[6] 7.
[7] 83.
[8] 6.
[9] 7-8.
[10] 8-9.
[11] 8.

Redwood then bid successfully for a lease of the Dayton School, a mile away.[12] Redwood's junior- and senior-high programs remained at Dayton for nearly a decade, from 1986 to 1996.[13] The San Lorenzo School District terminated the Dayton lease on 18 months' notice;[14] but Redwood was "fortunate at that point," according to Enderlin, because the District also brought its Martin site to Redwood's attention.[15] Redwood again bid successfully, obtaining a renewable five-year lease for the Martin site that requires six months' advance notice of termination.[16]

B. Redwood boasts of the success it has achieved at the Martin site.

Twelve years later, Redwood's junior- and senior-high programs remain at Martin. Although Redwood describes itself as facing "extinction," the trial evidence showed otherwise. The San Lorenzo School District has twice renewed the Martin lease and could do so again in 2010.[17] Indeed, when the Martin lease came before the San Lorenzo School Board for renewal in 2002, the Board praised Redwood effusively. In an email that Redwood principal Bruce Johnson sent to Redwood's board, he reported that "there were a lot of kind words, and then the [school] board voted unanimously to extend our lease . . . . One board member made a point of stating that the enrollment in the district was flat and not expected

[12] 10-11.
[13] 12.
[14] 13.
[15] 10-11; 14.
[16] 477-492.
[17] 139-140; 493.

to grow in the immediate future. All board members spoke kindly about us and see [Redwood] as a major addition to San Lorenzo." Johnson added: "It is nice to be wanted."[18]

Redwood portrays itself as struggling to survive in wretched facilities; but the trial evidence revealed a school that is flourishing where it is. To be sure, when Redwood acquired the Martin lease, many classrooms were in disrepair.[19] Even so, Gus Enderlin agreed that the Martin site was "better than anything that we had had."[20] And now the Martin site has 28 functioning classrooms, some located in modular buildings imported from another site.[21] The site also features a multipurpose room big enough to accommodate the whole school, which has assembled there several times.[22]

Redwood repeatedly has asked the County to grant Conditional Use Permits to improve the Martin site, and the County has granted each application,[23] thus helping Redwood expand from 450 to 525 students.[24] Redwood's Bruce Johnson testified that, by the year 2000, the Redwood community was "overjoyed to have a home and to have a place that was functioning as well as it was . . . ."[25]

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[18] 139-141; 493.
[19] 15.
[20] 84.
[21] 16-17.
[22] 103-104; 107-112.
[23] 50-51; 55; 269-274.
[24] 148; 273; 458-459; 460-463.
[25] 142-143.

Outside the courtroom, Redwood portrays the Martin site as an asset, not a liability. For example, when an accrediting body asked Redwood what significant needs or limitations were apparent on campus, Redwood wrote: "***Wow***. Everything works so well. ***There are no apparent limitations***. The administration might wish for more space and classrooms so the enrollment can grow."[26] Redwood also told accreditors that "[t]he facilities are adequate. [Redwood Christian High School] has capped enrollment at about 450 students. This allows all programs to function well. There are faculty members who wish their space was a little larger, but that is normal."[27] And when asked to describe its "major strengths," Redwood boasted that "the educational space and the layout of the [Martin] campus feels right. The students love it. The faculty is pleased as it is better than was previously experienced . . . . ***You could not ask for a better situation***."[28]

Redwood also boasts of the academic success that its students achieve at Martin, telling accreditors that 60 to 80 percent of Redwood's graduates enroll in four-year institutions; that the test scores and success of Redwood students reflect the school's high academic standards; and that graduates report back to say how well-prepared they are for college.[29] In 2000 and 2006, two accreditation agencies gave Redwood their highest ratings.[30] And Redwood's Concept Help program for

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[26] 73; 507 (emphases added).
[27] 74; 507.
[28] 75; 508 (emphasis added).
[29] 97-102; 509-511.
[30] 105-106.

the learning disabled has been internationally recognized, winning an award in 2000-2001 as one of the most outstanding programs offered by an independent Christian school.[31] Indeed, Redwood tells prospective enrollees—and firmly believes—that the program it runs at the Martin site is "one of the finest interdenominational, independent Christian schools in America."[32]

C. Redwood finds its "Promised Land" in the Palomares Canyon area of Castro Valley, where property is cheap—and zoned rural residential.

But Redwood has larger ambitions. By mid-1997, its administrators were talking about more than doubling high-school enrollment to 950 students.[33] When the school detected community opposition to that plan, it decided to go for a 650-student school and then to try to expand that to 950 later.[34]

Fulfilling this ambition would require a much larger and more luxurious school campus. Redwood competes with several religious schools in its service area and believed that it needed better facilities to attract additional students and tuition dollars.[35] The issue was never that the Martin site prevented Redwood from inculcating its religious values or providing a first-rate education.[36] Redwood's Gus Enderlin admitted that the existing Martin site is "pretty good" and that "educationally we could do the same job in a tent."[37] The real issue is attracting

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[31] 114-115.

[32] 146-147; 450.

[33] 54; 125-129; 494-496; 504-505.

[34] 125-129.

[35] 19; 147-148.

[36] 81; 82; 97-102; 105-106; 114-115; 144; 146-147.

[37] 81.

parents who have other educational options.[38] In this lawsuit, Redwood claimed that its "religious exercise" was "substantially burdened" because the school lacks such attractions as diving facilities, a home-schooling shared facility, a campus bookstore, a nature center, and on-site housing for staff, foreign students, visiting religious organizations, friends, and family.[39]

Redwood began searching for land that would meet two basic criteria: (1) at least 10 flat, developable acres and (2) proximity to Redwood's service area.[40] Ironically, the Martin site already met these criteria,[41] but wasn't large enough to accommodate a nearly 50% increase in student enrollment—and that is what Redwood wanted.

Redwood investigated a number of sites in its service area but rejected them due to cost, location, or lack of services.[42] Eventually, however, it found what its administrators refer to as "the Promised Land"[43]—in the Palomares Canyon area of rural Castro Valley, where land could be had more cheaply. In May of 1997, Redwood purchased an 8.43-acre parcel facing Castro Valley Boulevard near Interstate 580.[44] This parcel is zoned R-1-L-B-E, which allows construction of one single-family home on a lot of at least five acres—in other words, "very low

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[38] 84-85.
[39] 130-138.
[40] 18-20.
[41] 54.
[42] 175-183.
[43] 48 & 497, 498; 86; 171.
[44] 21, 23; 116; 442.

density" use.[45] As stated in the County's zoning ordinance, R-1 districts are intended "to provide for and protect established neighborhoods of one-family dwellings" and to allow "restricted interim cultivation of the soil compatible with such low-density residential development."[46] On R-1 land, a CUP is required to build any type of private school—religious or nonreligious.[47] Additionally, the "L" in the designation means that the property lies within an "L Combining District," which modifies the R-1 designation to permit "uses of a rural nature," including keeping some farm animals.[48]

Less than a month after its initial purchase, Redwood bought another 4.17 acres south of and adjacent to the 8.43-acre parcel.[49] The 4.17-acre parcel is zoned R-1-B-4-0, which allows residential construction on one-acre lots.[50] Together, the 8.43-acre and 4.17-acre parcels comprise the 12.6-acre "Main Site" on the map attached as Tab A to this brief.[51]

Redwood filed a CUP application for the project on August 15, 1997[52] but did not complete it until the end of 1998.[53] The application proposed a combined

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[45] 247-248; 261.

[46] 449.

[47] 196.01-196.02; 247-248.

[48] 432; 261.

[49] 22; 116; 442.

[50] 261.

[51] 261. The map at Tab A is part of the draft EIR prepared by the Planning Department, was entered into evidence as Dx1001 at 444, and was shown to the jury. 260.

[52] 442.

[53] 250.

junior- and senior-high school for 650 students on a multiple-building campus with 108,000 square feet of building space, two administration buildings, a 1,000-person gymnasium, a multipurpose room capable of serving lunch to 325 students at once, several tennis courts, a baseball diamond, and soccer and softball fields.[54] The project's estimated cost was $15-20 million.[55]

After filing the application, Redwood purchased an additional 11-acre site north of the Main Site, across East Castro Valley Boulevard (approximately where the words "Valley Boulevard" appear on the map at Tab A).[56] The 11-acre northern site is zoned "A" for agriculture and has a minimum building-site requirement of 100 acres.[57] Still later, Redwood purchased an additional 32.5-acre site south of the Main Site, across Palo Verde Road.[58] This is labeled the "South Site" on the map at Tab A.[59] It is zoned R-1-L-B-E, like the original 8.43-acre parcel.[60] Most of the South Site—the portion south of the San Lorenzo Creek—is a steep wooded hillside that cannot be developed.[61]

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[54] 92-96; 414-426.

[55] 51-52; 184. Redwood never raised the necessary funds and had only about $400,000 in its building account. 53; 184.

[56] 26-27; 116; 118; 261-262.

[57] 262.

[58] 116-117; 172-174; 266-269.

[59] 266.

[60] 261-262; 444.

[61] 188-189; 190. Redwood purchased the 11-acre northern site and the 32-acre South Site to spread the project out over more acres and reduce its apparent density, thereby bolstering the chances of obtaining a CUP to build in low-density Castro Valley. 267-268. But the County's Planning Department recognized that much of the 32-acre South Site cannot be developed and that the 11-acre northern site is too remote from where most of the school's students and staff would be.

Although Redwood portrays the site as a dreary, debris-strewn wasteland buffeted by interstate noise, the jury heard otherwise. Redwood's architect, Jim Shade, testified that "the beauty of the surroundings" made it "the most exciting school site that [he] had worked on in all"[62] of the "approximately 216 different school projects" he had done.[63] Planning Commissioner Ellen Paisal testified that it's "a beautiful rural neighborhood. It's an absolutely gorgeous place. There's pasture land. There's a barn [and] somebody has a vineyard. There's chicken coops and rabbit hutches and any number of things. And it's beautiful. It's quiet."[64] Paisal, who visited the site before voting on Redwood's application, noted that a large hill shields the area from I-580's traffic noise.[65]

D. Redwood gambles that it can buy cheap rural land and then persuade the County to grant a CUP allowing a large high-school campus to be built and operated on that land.

California law requires that counties and cities adopt general plans and zoning ordinances that implement those plans.[66] The general plan is a policy statement that gives public and private decision-makers a guide to future growth and to maintaining the compatibility of land uses.[67] The Castro Valley General

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The Department's staff did not advise Redwood to buy these additional parcels, and regarded Redwood's density-reduction strategy as "a statistical . . . manipulation more than anything." 267-269.

[62] 89; 91.

[63] 88.

[64] 290.

[65] 291-292.

[66] 246; 259-260.

[67] 257-258.

Plan states that "[u]rban development outside the defined Castro Valley Area should not be permitted except where it is required to meet clearly demonstrated, compelling social, economic, and/or environmental objectives, and where no alternative locations are available."[68]

Redwood knew from the outset that the land it was buying lay outside the defined Castro Valley Area and was zoned for rural residential use.[69] It knew that it would need to obtain a CUP to build a school.[70] It also knew or should have known that two prior CUP applications for residential projects on or near the property had been withdrawn in the face of community opposition and negative recommendations by county decision-makers.[71] Yet Redwood decided to take the financial gamble that it could invest in relatively cheap rural land and then persuade the County to allow construction of a large high-school campus there. When Redwood maligns the County's CUP process as a "game of chance" or "a roll of the dice," it is really bemoaning the fact that it knowingly placed a large bet on a low-probability event—and lost.

For its gamble to pay off, Redwood knew that it would have to satisfy a number of demanding criteria.[72] As defined in § 17.54.130 of the Alameda zoning ordinances, "conditional uses" are ones that "possess characteristics which require

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[68] 451-453 at 30; 431.

[69] 32-35; 39; 123-124; 447 (defining "rural residential").

[70] 29; 124-125.

[71] 124; 432.

[72] 29; 124-125; 149.

special review and appraisal" to determine whether or not the use satisfies ***all four*** of the following factors:

1. the use is required by public need;

2. the use will be properly related to other land uses and transportation and service facilities in the vicinity;

3. the use, if permitted, will under all circumstances and conditions of this particular case, not materially affect adversely the health or safety of persons residing or working in the vicinity, or be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood.

4. the use is not contrary to the specific intent clauses or performance standards established for the District in which it is to be located.[73] This last criterion requires decision-makers to consider the goals of the Castro Valley Plan, which include "maintain[ing] the predominantly low-density residential character of the community" and "ensur[ing] that land uses are appropriate and compatible with each other."[74]

E. The MAC and the Planning Commission find that Redwood failed to meet the four CUP criteria and therefore cannot build a 650-student campus in a rural residential zone.

From the outset of the CUP process, Redwood and all participants realized that the project's size and intensity were going to make it difficult to satisfy the four CUP criteria. Redwood first met with the County's Planning Department staff in July 1997—before filing the CUP application and before purchasing the 11- and

[73] 464.

[74] 452.

32-acre parcels. Even then, the staff informed Redwood that the project's intensity made it an urban use and that "a major issue will be why the school should be located here rather than in an already urban area."[75]

After receiving the completed CUP application, the County's planning staff hired consultants to conduct noise, traffic, hydrology, and other studies.[76] Based on those studies, the staff prepared a draft Environmental Impact Report ("EIR"), which it circulated for public comment and agency review.[77] During the review period, the Planning Department accepted written and oral comments on the application and held meetings at the Castro Valley Municipal Advisory Council ("MAC") and the Planning Commission ("Commission"). It then prepared a final EIR, which it made public and presented to the MAC and to the Commission.[78]

The MAC is a seven-member volunteer board that advises the County on land-use and public-welfare issues in the district.[79] On October 30, 2000, after holding a number of public meetings and considering the draft EIR, the MAC voted 6-0 to recommend that the County deny Redwood's CUP application "because it is inconsistent with the surrounding development" and because "the

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[75] 262-265; 427-428.

[76] 249-251.

[77] 251; 161-163; 164-166; 445-446.

[78] 252. Redwood notes that an early administrative draft of the EIR suggested that the project's impacts could be mitigated; but the draft's author testified that subsequent consultations with County staff led him to change his mind (160) and that there are "always changes" between the administrative draft and the draft EIR that gets published. 166-167.

[79] 264-265.

[four] required findings for approval of a Conditional Use Permit could not be made."[80]

The decision-making process then shifted to the Commission. In a report dated November 6, 2000, the Planning Department staff had recommended that the Commission deny Redwood's CUP application.[81] The staff had considered each of the four CUP factors in light of the findings in the final EIR and had concluded as follows:

1. The first CUP factor (public need) was satisfied because "[e]ducation is a public benefit, regardless of whether it is public or private, secular or religious."[82]

2. Factor two (proper relation to existing land use and services) could not be met because the area was "one of low density, rural and agricultural residential development" and the school would concentrate a daytime population of over 700 people in an area of about 45 acres, of which about 18 acres actually would be used. This was a "significantly higher concentration than exists in the surrounding area, or that was contemplated in the Castro Valley Plan and recent zoning actions on the property."[83] The staff reached this conclusion by looking at the census definition of an urbanized area, lot sizes, and the proposed school

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[80] 265; 429.

[81] 30-31; 430.

[82] 33; 431.

[83] 33-34; 431-432.

population as compared to the surrounding community.[84] The staff also noted the lack of public sewers or public transportation to the site.[85]

3. Factor three (no material harm to persons and property in the area) could not be met because the increased noise and traffic caused by the school would be "inimical" to the interests of neighbors who had moved to the area "in the expectation of a rural, not an urban environment." The project also would eliminate two structures on the land that represented "significant historical resources."[86]

4. Factor four (compatibility with the general plan) could not be met because "the proposed school, by its nature, would not be compatible with the residential development allowed and contemplated by the L [Combining] District." The staff noted that a smaller school could be compatible with the L District, citing the example of the Palomares School, which is about 85% smaller and located on a site roughly equal in area. But the staff concluded that "[i]t does not appear from the testimony that the applicants have offered that a school that would be compatible with the area . . . would even come close to meeting their needs, and therefore that the project could be modified appropriately."[87]

The staff also analyzed the legality of its recommendation under the recently enacted RLUIPA and concluded that the County would be "within its powers to deny the application" because "the same arguments" against granting the CUP

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[84] 187.

[85] 432.

[86] 34; 432.

[87] 36; 432-433.

"can and would be made against a secular school or institution." Moreover, the County had a compelling governmental interest in "adhering to the required [CUP] findings and protecting the residents of the area"; and denying the CUP represented the "least restrictive means" of furthering that interest, given that a smaller school apparently would not meet Redwood's requirements.[88]

After considering these recommendations, the final EIR, and public comments made in writing and orally at several hearings, the Planning Commission on November 6, 2000 voted 5-1 to deny Redwood's CUP application.[89] Redwood's Bruce Johnson admitted that the Commission denied the application because the project was too intense for the area.[90]

F. Redwood decides to insist on a 650-person campus, lose its appeal to the Board of Supervisors, and then bring this lawsuit under the newly enacted RLUIPA.

Ten days later, Redwood appealed the Commission's decision to the County Board of Supervisors.[91] Redwood's initial strategy on appeal was to "overwhelm the Board" with petitions, letter-writing campaigns, and pressure from pastors.[92] But Redwood administrators acknowledged privately that the "biggest items" of contention were "traffic, noise, and size of [the] project."[93]

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[88] 150; 254-256; 433.

[89] 37-38; 151.

[90] 151.

[91] 38; 42; 253

[92] 42-43; 502-503.

[93] 44-45; 512.

Recognizing that its project could not satisfy the CUP criteria unless scaled down substantially, Redwood decided instead to exploit the newly enacted RLUIPA to get exactly what it wanted.[94] Redwood began planning for this lawsuit at an internal meeting on March 28, 2001. The meeting participants discussed the elements of a RLUIPA claim and the need to build a record for litigation (including avoidance of the words "urban" and "rural").[95]

Reflecting its RLUIPA-driven strategy, Redwood presented the Board of Supervisors on April 5, 2001 with a list of 16 purportedly "substantial burdens" that the County was placing upon Redwood.[96] At trial, however, Gus Enderlin admitted that this list did ***not*** identify substantial burdens on the exercise of religion, but rather, described Redwood's burdens in a "broader" sense, including planning and financial burdens.[97] In fact, Redwood never told the Board of Supervisors that a Christian education was not feasible at the Martin site.[98] And Enderlin further admitted that no action taken by the County ever forced Redwood to alter its religious beliefs or practices.[99]

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[94] 47-49; 497-498.

[95] 44-46; 512.

[96] These "burdens" included requiring Redwood to use County staff to prepare the EIR; costs and delays associated with the CUP process; absence of suitable alternative properties for sale; the EIR's proposal to minimize neighborhood impacts by banning weekend athletic events; the EIR's proposal that Redwood pay for traffic-mitigation measures; and the EIR's finding that the school would generate noise that would disrupt the neighborhood and alter its rural residential character. 77; 448.

[97] 79-80.

[98] 81.

[99] 78.

Still believing that compromise was possible, Alameda County Supervisor Nate Miley held two mediations between Redwood and concerned community members.[100] But the talks went nowhere because Redwood—emboldened by its interpretation of RLUIPA and by its belief that God had led it to the Promised Land—was unwilling to compromise on the school's size or location.[101]

Miley also investigated Redwood's claim that it could lose its lease at any time. He met with the Superintendent of the San Lorenzo School District and with the official in charge of the District's real-estate dealings. Although they lacked authority to amend the lease, they assured Miley that there was no imminent threat of eviction and that the district's lack of growth in student enrollment made it unlikely to reclaim Martin in the foreseeable future.[102]

The Superintendent also suggested that Redwood ask the School Board to modify the lease terms.[103] Miley believed that the combined clout of Redwood, its supporters, and his office had a good chance of influencing the School Board to amend the lease. But Redwood's principal and lawyers showed no interest. Rather, they were "steadfast in their opinion that this property had been ordained by God for them to build their school and they were very focused on that happening and nothing could . . . change their mind."[104]

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[100] 24; 120-122; 202-207.

[101] 204-207.

[102] 208-209; 217-218; 226-227.

[103] 209; 227-228; *see also* 197-199.

[104] 209-210; 227-228.

Another option in which Redwood expressed little interest was the possibility of obtaining from the San Lorenzo School District a 23-year lease on the Barrett school site. Barrett was about 3.5 times larger than Martin and its rent was correspondingly higher; but that would have cost far less than raising the millions of dollars needed to build a new school. Miley brought up the Barrett option at a mediation, but Redwood was unwilling to pursue it.[105]

Redwood's unwillingness to consider alternatives continued to the time of trial. Redwood's Bruce Johnson admitted at trial that, although he knew that the East Bay Municipal Utilities District had put a 10-acre site up for sale in Castro Valley, he hadn't investigated the property because "we are here"—apparently meaning, "we are now committed to pursuing this lawsuit."[106]

G. The Board of Supervisors unanimously denies Redwood's appeal after Redwood refuses to pursue a smaller-enrollment school.

Following the Miley mediations, the Board of Supervisors met in downtown Oakland on April 10, 2001 to decide Redwood's appeal. Supervisor Miley said he'd been unable to reach a compromise, but persuaded the Board to send the CUP application back to the planning staff to develop some smaller alternatives.[107] Miley felt that "we hadn't turned over every stone" and still hoped that Redwood could "fit a school on this particular site and not impinge upon the rights of people that are already living there so it's a win-win."[108]

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[105] 219; 226-230.

[106] 183.

[107] 56-57.

[108] 220; 231-233.

But Redwood did nothing to encourage that optimism. At no time did Redwood ever tell the County that it would be willing to settle for a smaller school. Instead, Redwood repeatedly told the County that nothing short of a 650-student school would do, and that splitting the junior- and senior-high schools was out of the question because the entire student body needed to pray together.[109]

The Board nevertheless had Redwood engage a second architecture firm, ELS, to develop alternatives.[110] By August of 2001, ELS was developing various configurations of an 80-, 225-, 450-, and 650-person school.[111] But by that time, also—still two months before the final Board vote—Redwood had firmly settled on a plan of insisting on a 650-person school, having its appeal denied, and then filing this lawsuit.[112]

At the final Board hearing on October 14, 2001, only three of the five County Supervisors were present. Supervisor Gail Steele therefore asked Redwood's attorney, Peter Smith, whether he wanted the Board to defer its decision until the other Supervisors could participate. Smith expressed willingness to proceed[113] and urged the Board to approve one—and only one—of the many alternatives that ELS analyzed and presented at the hearing: a 650-student school that ELS referred to as alternative 2.A.1.[114] The Board thought it pointless to

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[109] 64-66; 81; 119; 171; 191-194; 211-213; 214-216; 221; 231-233; 255-256; 280-283; 295.

[110] 25-26; 185-186.

[111] 58; 499-500.

[112] 59-63; 513-514.

[113] 66-67; 170; 437.

[114] 68-72; 168-169; 194-196; 438-440.

further consider alternatives that Redwood didn't want, so it voted 3-0 to deny the appeal and thus the CUP application.[115]

When one considers the overall trial record, two facts virtually leap out of the transcripts, having been repeatedly confirmed by Redwood's witnesses and by County witnesses alike.

First, Redwood never budged from its initial request for a 650-student school. Redwood was adamant that its junior- and senior-high schools be situated on one campus and that even a campus large enough to accommodate its entire current junior- and senior-high enrollment would be insufficient. It was 650 or bust, from the start.

Second, there was not a shred of evidence that the County denied the CUP based on anti-religious animus or discriminatory intent.[116] Redwood's Gus Enderlin and Bruce Johnson admitted that the issue was always the project's size and intensity of use, and that no County official ever said anything indicating any anti-religious sentiment or opposition to a Christian school.[117] County officials repeatedly went out of their way to praise Redwood's work and to emphasize that their decision was a difficult one because Redwood is such a good school.[118]

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[115] 68-71; 224-225.

[116] 40-41; 71-72; 78; 90; 150 & 433; 151; 152-155; 156-159 & 434-436; 214-215; 217-218; 235; 237; 238-239; 286; 287-289; 296.

[117] 40-41; 71-72; 123-124; 151.

[118] 41; 71-72. Redwood notes that one Supervisor admitted "bias," but that was a "bias" in favor of open space. 234.

Indeed, the jury learned that two of the three Supervisors who voted against Redwood's appeal have lectured at the school.[119]

The gravamen of Redwood's case, at trial and now on appeal, is that Redwood's religious mission excuses it from having to comply with the land-use and environmental laws that govern and protect everyone else. Redwood's attitude was revealed when the County's trial counsel probed Gus Enderlin's contention that he had told Supervisor Miley he would "think about" a smaller school if ***Miley*** came back with a specific number:

> Q. You said to Supervisor Miley if he comes back to you with some [lower enrollment] number, that you will think about it?
>
> A. Yes.
>
> Q. Had you said anything more than that? Had you said, "Hey, look. Everybody thinks the school is too big. How about if we build a 500-person school? How about if we build a 450-person school?"
>
> A. We did not do that.
>
> Q. Why not?
>
> A. Why should we?
>
> Q. Okay. Fair enough. Because this was the Promised Land, right, and you weren't about to give up on the Promised Land?
>
> A. I don't think that we should.[120]

[119] 72; 148; 236; 293-294.

[120] 76-77.

III. STATEMENT OF THE CASE

Redwood filed this action on November 16, 2001.[121] On August 15, 2002, the district court granted the County's motion to dismiss all state-law claims against the individually named defendants and all federal claims asserted against them in their individual capacities.[122]

On January 14, 2003, the district court denied Redwood's motion for summary judgment that California law violates RLUIPA's "equal terms" provision and the federal constitution by creating a procedure for exempting public schools, but not private ones, from obtaining a CUP before locating in certain zoning districts. The court concluded that public and private schools are not inherently comparable and that the discrepancies in overall treatment actually might favor Redwood.[123]

On January 7, 2005, the district court granted the County's motion for partial summary judgment dismissing Redwood's claim for administrative-mandamus review under California Code of Civil Procedure § 1094.5. The court found that the County had acted within the scope of its jurisdiction, had held fair hearings when required, and had avoided any prejudicial abuse of discretion.[124]

On August 29, 2006, the district court granted the County's motion for summary judgment dismissing Redwood's claim for violation of the "right to a

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[121] ER 2379.

[122] 558-585.

[123] ER 285-299.

[124] ER 251-266.

religious education," which it held to be duplicative of other claims.[125] The district court also dismissed Redwood's claim for violation of California Government Code § 65921 because the statute does not create a cause of action.[126] The court denied the County's summary-judgment motion in all other respects and also denied Redwood's summary-judgment motion.[127]

On September 18, 2006, the district court denied Redwood's motion for leave to file a motion for reconsideration of the court's August 29, 2006 order denying Redwood's motion for summary judgment on its "federal unbridled discretion claim." The district court reasoned that courts have only invalidated zoning ordinances on an "unbridled discretion" theory when the ordinance "on its face regulates expressive conduct."[128] The court concluded that "[t]he ordinance in this case is one of general application, making the unbridled discretion doctrine inapplicable."[129]

On January 26, 2007, the district court bifurcated the upcoming trial into liability and damages phases[130] and also ruled on a variety of motions in limine filed by both sides.[131] Among other things, the court granted the County's motion to exclude Redwood's claim that the County's zoning ordinances were facially

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[125] ER 246-247.
[126] ER 247-248.
[127] ER 248.
[128] ER 232-233.
[129] ER 232-233.
[130] ER 224.
[131] ER 225-227.

unconstitutional.[132] The court reasoned that "[a]ny entity that qualifies as a conditional use in these districts requires a CUP, regardless of its status as a religious or non-religious institution," and that there was accordingly "no basis" to assert that the County's ordinances "on their face discriminate against religious assemblies and institutions."[133]

A ten-day trial was held on the issue of liability in February 2007. At the close of Redwood's case, the district court orally granted the County's motion for judgment as a matter of law dismissing Redwood's claims for violation of the First Amendment rights to free exercise, free association, and free speech.[134] At the close of all evidence, the district court orally granted the County's motion for judgment as a matter of law dismissing Redwood's RLUIPA "unreasonable limitation" claim.[135] After receiving instructions[136] and hearing closing arguments, the jury returned a unanimous verdict for the County on Redwood's two remaining claims,[137] which alleged that the County had violated RLUIPA's "substantial burden" and "equal terms" provisions. The Court then orally denied Redwood's JMOL motion.[138]

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[132] ER 218-220.
[133] ER 218.
[134] 240-245.
[135] 297-298.
[136] 299-316; 526-557.
[137] 412; ER 41.
[138] 413.

In a subsequent written order, the district court cited three reasons for having dismissed Redwood's RLUIPA "unreasonable limitation" claim.[139]

First, Redwood had based that claim on the same theory as its "unbridled discretion" claim, which the court already had dismissed (for reasons described above). The court adhered to its previously stated view that "the County's land use laws are facially neutral and contain narrowly drawn standards for the decision-makers to use in evaluating Conditional Use Permit . . . . The County's discretion is narrowly circumscribed by the applicable zoning regulations and [by] the four criteria for granting a CUP, which set forth the various factors the Alameda County regulatory bodies use in making their decisions."[140]

Second, the court observed that it already had dismissed Redwood's state-law administrative-mandamus claim on the ground that the County had given Redwood due process of law by following the proper procedures and making appropriate findings. Those findings likewise precluded liability under Redwood's "as applied" unbridled-discretion theory.[141]

Third, the district court held that Redwood had presented "no evidence" capable of satisfying the statutory requisites of a RLUIPA "unreasonable limitation" claim—namely, that the County's regulations or actions unreasonably limited "religious assemblies, institutions, or structures ***within a jurisdiction***." 42 U.S.C. § 2000cc(b)(3)(B) (emphasis added).[142] "[T]hough Redwood was not

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[139] ER 12-22.

[140] ER 21.

[141] ER 20-21.

[142] ER 21.

permitted to build at the Palomares Canyon site, it operates a school at the Martin site, also in Alameda County. Redwood has been granted several CUPs to make improvements to the Martin Site and would be eligible for a CUP at various other sites in the County where it might choose to move in the future."[143]

On July 9, 2007, the district court denied Redwood's renewed motion for judgment as a matter of law and motion for new trial.[144] Final judgment was entered on March 8, 2007.[145] Redwood filed its notice of appeal to this Court on August 1, 2007.[146]

IV. SUMMARY OF ARGUMENT

See Introduction, Part I, above.

V. ARGUMENT

A. This Court should affirm the district court's dismissal of Redwood's "unbridled discretion" and RLUIPA "unreasonable limitations" claims.

This Court should affirm the district court's dismissal of Redwood's claims that the County violated the First Amendment and RLUIPA's "unreasonable limitation" provision because the County's criteria for granting or denying CUPs are so vague as to confer "unbridled discretion" on local decision-makers.

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[143] ER 21.

[144] ER 3-10.

[145] ER 11.

[146] ER 2415.

1. Redwood could only assert its "as applied" unbridled-discretion argument as part of its § 1094.5 claim—which the district court dismissed in a ruling that Redwood does not challenge.

Redwood's "as applied" unbridled-discretion argument asserts that County Supervisors neither know nor apply the written CUP criteria that are meant to guide their discretion.[147] That is nothing more than a claim that the Supervisors abused their discretion by failing to apply criteria set forth in state law.

That argument fails because § 1094.5 review is the only mechanism available for challenging whether the County abused the discretion conferred upon it by state law. "The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards,' . . . , nor do they 'sit as . . . super zoning board[s] or . . . zoning board[s] of appeals.'" *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (ellipses added). Accordingly, "it is not the role of the federal courts to protect landowners from merely arbitrary actions that are correctable by state remedies." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 158 (2d Cir. 2006); *see also Schenck v. City of Hudson*, 114 F.3d 590, 594 (6th Cir. 1997).

Redwood's opening brief does not argue that the County's supposedly arbitrary exercise of discretion couldn't have been remedied under § 1094.5. Yet Redwood asks this Court to remedy that deprivation under 42 U.S.C. § 1983 and the federal constitution instead. The Court should reject that request. Granting it would violate the Court's "longstanding policy, arising out of concerns of comity and finality, of respecting state court systems for review of administrative decisions." *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1038 (9th Cir. 1994).

[147] Br. 32-33.

Accordingly, this Court should affirm the district court's dismissal of the "as applied" aspect of the unbridled-discretion claim without reaching its (non-existent) merits.[148] That leaves the "facial" unbridled-discretion claim, addressed below.

2. The district court did not dismiss the unbridled-discretion claims based on failure to prove an "intent" element.

Redwood's lead argument inexplicably asserts that the district court dismissed those claims for failure to prove a non-existent "intent" element. Nonsense. The district court dismissed those claims for all the reasons summarized at Part III, above, none of which concerned "intent." This argument warrants no further discussion.

3. Redwood's attack on the County's CUP criteria ignores the need for discretion in zoning ordinances and would condemn similar ordinances adopted nationwide.

Redwood's attack on the County's criteria for granting CUPs fails to comprehend what a CUP is, or the practical purposes that a CUP serves. If this Court accepted Redwood's unbridled-discretion arguments, CUP ordinances across the nation would be threatened, local land-use officials would lose much of their discretion to deal with unique factual situations, and federal courts would be inundated with challenges to local land-use decisions.

"Legislatures are not omniscient and cannot be expected to enumerate every possible land use that might present a zoning issue." *Blue Canary Corp. v. City of*

[148] The trial record refutes any contention that the four CUP criteria were not applied here. Contrary to Redwood's suggestion (Br. 10), there is nothing wrong with a Supervisor's relying upon expert planning-staff advice to assist in determining whether CUP criteria have been met.

Milwaukee, 270 F.3d 1156, 1158 (7th Cir. 2001). Conditional-use ordinances exist because "it is impossible to deal in advance, when enacting a zoning ordinance, with all of the problems surrounding the uses that may later be proposed in a particular district." 3 Edward H. Ziegler, Jr. et al., *Rathkopf's The Law of Zoning and Planning* § 61:7 (4th ed. 2007). Thus, the purpose of a CUP scheme is "to confer a degree of flexibility in the land use regulations." *Id.* § 61:24. For zoning laws to work properly, therefore, "the master zoning restrictions or standards must be definite while the provisions pertaining to a conditional use . . . must of necessity be broad and permit an exercise of discretion." *Tustin Heights Ass'n v. Bd. of Supervisors of Orange County*, 170 Cal. App. 2d 619, 634-35 (1959).

Language in zoning ordinances across the nation confirms that conditional-use criteria must be broadly framed if they are to introduce the requisite flexibility and discretion into master zoning ordinances. Like the ordinance at issue here, other CUP ordinances typically (1) require the decision-maker to consider many broadly worded factors bearing on the compatibility of the proposed use with existing uses;[149] (2) give the decision-maker the discretion to deny a CUP even if all criteria are satisfied;[150] and (3) require that the proposed use be harmonious with the spirit of the master zoning ordinance.

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[149] *See, e.g.*,**Boston** Zoning Code, Art. 6(b); **Chicago** Zoning Ordinance §17-13-0905-A; **Detroit** Zoning Ordinance § 61-3-321; **Los Angeles** Planning and Zoning Code § 12.24(E); Code of **Miami Dade**, Chapter 33A; **New York City** Planning Code § 74-31(a); **Philadelphia** Code § 14-1803(1).

[150] This feature of the County's CUP ordinance couldn't have prejudiced Redwood, because the County found that at least three of the four criteria were ***not*** met. Moreover, a facial attack on a statute fails unless the statute is unconstitutional in all of its applications. *See United States v. Booker*, 543 U.S. 220, 275 (2005).

This last feature proved important in *Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996), where this Court upheld a special use permit ordinance that the plaintiff had challenged as unconstitutionally vague. The ordinance required the zoning commission to determine whether a proposed use "'would cause any damage, hazard, nuisance or other detriment to persons or property in the vicinity.'" *Id*. at 944 (citation omitted). This Court wrote: "Caldwell's zoning ordinance is a complicated and comprehensive plan for the ordinary regulation of development within the city. It is typical of many such city ordinances. The particular provision attacked . . . ***must be read in the context of the entire ordinance***, which is amply detailed in its criteria." *Id*. (emphasis added). Viewed in that context, the challenged SUP provision was "characteristic of zoning regulation. It is not so general as to be unintelligible to any reasonable owner of property. It is constitutional." *Id*.[151]

Here, the County's fourth CUP criterion effectively incorporates numerous features and definitions of the General Plan by stating that a conditional use must not be "contrary to the specific intent clauses or performance standards established for the District in which it is to be located."[152] This language requires the decision-maker to consider the meaning and intent of various zoning designations, such as

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Here, the County applied the statute without invoking this allegedly unconstitutional feature, and a facial attack based on that feature therefore fails.

[151] California courts likewise uphold broadly phrased CUP criteria that require harmony with an overarching zoning ordinance. *See, e.g., City and County of San Francisco v. Superior Court*, 53 Cal.2d 236, 250 (1959); *Stoddard v. Edelman*, 4 Cal. App. 3d 544, 548 (1970); *Case v. City of Los Angeles*, 218 Cal. App. 2d 36, 45 (1963); *cf. Mitcheltree v. City of Los Angeles*, 17 Cal. App. 3d 791, 797 (1971).

[152] 464.

"R-1" and "L Combining" districts, and also to consider the overall goals of the Castro Valley Plan, which include "maintain[ing] the predominantly low-density residential character of the community" and "ensur[ing] that land uses are appropriate and compatible with each other."[153] The fourth CUP criterion likewise requires the decision-maker to consider the General Plan's directive that urban development outside the defined Castro Valley Area "should not be permitted" except where required to meet "clearly demonstrated, compelling social, economic, and/or environmental objectives" and where "no alternative locations are available."[154]

Finally, any claim of vagueness or "unbridled discretion" is negated by the fact that the CUP denial resulted from an agency process that clarified the criteria employed and gave Redwood more than fair warning of what was likely to happen. "[R]egulations are not unconstitutionally vague where 'the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry.'" *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1236 (9th Cir. 1994) (citation omitted). The trial record reveals that "consultation with [county] officials resolved any ambiguity regarding the meaning of the general plan" and the CUP criteria. *Id.*; *see also Clark v. City of Los Angeles*, 650 F.2d 1033, 1039 (9th Cir. 1981) (formalized CUP procedures tend to curb excessive discretion).[155] Redwood personnel met repeatedly with County planning staff, Supervisors, and others who

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[153] 452.

[154] 453; 431.

[155] These cases refute Redwood's contention that there is something wrong about having to ask County planning staff to clarify CUP criteria. Br. 10.

made it clear, from at least mid-1997 on, that the size and intensity of the proposed use were going to present serious and possibly insurmountable impediments to approval. Redwood just didn't care to listen. Redwood's appellate theme that the process was nothing more than a random and unpredictable roll of the dice rings utterly false.

4. Redwood relies on inapposite prior-restraint cases concerning permits that directly affect speech.

Tellingly, Redwood's unbridled-discretion arguments rely exclusively on cases involving permits to engage in speech or other expressive activity, as opposed to cases involving permits to construct buildings. Redwood's cases are inapposite.

The leading unbridled-discretion case, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), involved parade permits and held that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Id*. at 150-51. The *Shuttlesworth* prior-restraint doctrine thus addresses the problem of "content-based, discriminatory enforcement"[156] by which officials may "suppress viewpoints in surreptitious ways that are difficult to detect";[157] and the doctrine typically finds application in cases involving disfavored

[156] *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 903-04 (9th Cir. 2007).

[157] *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 103 (2d Cir. 2007).

forms of speech or expressive activity, such as nude dancing,[158] union membership solicitation,[159] or gay-rights and antiwar parades.[160]

In the same vein, Redwood's two principal authorities (which it refers to as *Desert Outdoor I* and *II*[161]) are classic *Shuttlesworth* prior-restraint cases involving ordinances that directly controlled the placement and content of ***outdoor signs***. The relevance of prior-restraint doctrines to such ordinances is obvious.[162] But Redwood cites no case holding that *Shuttlesworth* should likewise apply to permits for constructing buildings and similar structures that do not "say" anything. Indeed, that contention must be wrong, as it probably would require courts to invalidate nearly every CUP ordinance in the country.

Redwood's unbridled-discretion claims therefore fail because constructing a school on private land is not First Amendment speech or expressive activity. "[L]imitations on church location"—or on religious-school location—"are 'not the regulation of belief, any more than regulating the location of the *Chicago Tribune* building is the regulation of the newspaper's First Amendment-protected product.'" *C.L.U.B.*, 342 F.3d at 766 (citation and brackets omitted). Likewise,

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[158] *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999).

[159] *See Staub v. City of Baxley*, 355 U.S. 313 (1958).

[160] *See Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312 (1993); *Dillon v. Municipal Court*, 4 Cal.3d 860, 864 (1971).

[161] *Desert Outdoor Advertising, Inc. v. Moreno Valley*, 103 F.3d 814 (9th Cir. 1996); *Desert Outdoor Advertising, Inc. v. City of Oakland*, 506 F.3d 798 (9th Cir. 2007).

[162] The doctrine also is relevant to a case about a "request to erect a monument of the Seven Aphorisms of Summum in a city park." *Summum v. Duchesne City*, 482 F.3d 1263, 1266 (10th Cir. 2007).

"the operation of a house of worship"—or the operation of a religious school—"does not equate with 'religious speech,' any more than the operation of a shoe store equates with commercial speech." *C.L.U.B. v. City of Chicago*, 157 F. Supp. 2d 903, 915 (N.D. Ill. 2001), *aff'd, C.L.U.B.*, 342 F.3d 752 (citation omitted).

Accordingly, this Court should affirm the dismissal of Redwood's unbridled-discretion arguments.

B. This Court should affirm the jury's verdict and judgment that the County did not violate RLUIPA's substantial-burden provision.

RLUIPA's "substantial burden" provision bars the government from imposing a land-use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution is (A) in furtherance of a compelling governmental interest and (B) the least restrictive means of furthering that compelling governmental interest. *See* 42 U.S.C. § 2000cc(a)(1). If the plaintiff makes out a prima facie case that the government has substantially burdened plaintiff's religious exercise, the government then has the burden of proving the compelling governmental interest/least restrictive means defense (hereinafter, "the strict-scrutiny defense"). *See* 42 U.S.C.A. § 2000cc-2(b).

Redwood contends that the district court's substantial-burden instructions misstated both party's burdens. But the instructions properly stated the law, and any error was "more probably than not harmless" and therefore does not warrant reversal. *Caballero v. City of Concord*, 956 F.2d 204, 206-07 (9th Cir. 1992).

1. The instruction's "tendency to coerce" language was correct.

Redwood objects to the instruction that "a 'substantial burden' has a tendency to coerce individuals into acting contrary to their religious beliefs," and asserts that the district court should have stopped after saying—as it did—that "[f]or a land use regulation to impose a 'substantial burden' on a party's religious exercise it must be ***oppressive to a significantly great extent***. That is, a substantial burden on religious exercise imposes a ***significantly great restriction*** on a party's exercise of religion."[163] But the instruction's "coercion" language was proper, and, in any event, couldn't have altered the outcome.

a. Courts recognize that RLUIPA codifies a coercion standard.

RLUIPA codifies a coercion standard. RLUIPA's drafters observed that the Act "does not include a definition of the term 'substantial burden'" because that term "should be interpreted by reference to Supreme Court jurisprudence" and "is not intended to be given any broader interpretation . . . ." 146 Cong. Rec. S7774, S7776 (2000) (joint statement of Sens. Hatch & Kennedy) [hereinafter, "Joint Statement"]. *Id*.

It is therefore dispositive that the Supreme Court's interpretation of the "substantial burden" concept has long incorporated notions of coercion. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the court pointedly rejected the plaintiff's contention that, under the Free Exercise Clause, "incidental effects of government programs, which may make it more difficult to

[163] ER29 (emphases added).

practice certain religions but which have no ***tendency to coerce individuals into acting contrary to their religious beliefs***, require the government to bring forward a compelling justification for its otherwise lawful actions." *Id*. at 450-51 (emphasis added).

In a key RLUIPA precedent, this Court quoted *Lyng*'s "tendency to coerce" language as support for the proposition that "'a "substantial burden" must place more than an inconvenience on religious exercise.'" *Guru Nanak Sikh Soc. v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (citation omitted). This Court then observed: "Accordingly, interpreting RLUIPA, this court has held: '[F]or a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent.'" *Guru Nanak*, 456 F.3d at 988 (citation omitted). Thus, this Court in *Guru Nanak* did exactly what Redwood says it didn't: it linked "tendency to coerce" with "more than an inconvenience" and then with "oppressive to a significantly great extent." The district court's "tendency to coerce" instruction is therefore proper under Circuit precedent.

The cases that Redwood cites to the contrary, including *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004), did not discuss, much less endorse or reject the "coercion" standard. Indeed, no court has specifically rejected the "tendency to coerce" standard, and the standard enjoys clear support in other Circuits. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226-27 (11th Cir. 2004); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007); *cf. Vision Church v. Vill. of Long*

Grove, 468 F.3d 975 (7th Cir. 2006) (speaking of "'significant pressure' . . . to 'forego religious precepts'").

Thus, the instruction's "coercion" language properly stated the law.

b. The instruction's "coercion" language was harmless.

Any error in the "coercion" language was harmless. Even if the district court had confined itself to the phrases that Redwood prefers, the jury probably would have returned the same verdict. *See Caballero*, 956 F.2d at 206-07.

Redwood's claim of prejudice assumes that a jury would have viewed the "tendency to coerce" language as erecting a much higher hurdle to liability than the "significantly great oppression or restriction" language that immediately preceded it. That seems improbable. Indeed, the challenged language could be interpreted as ***lowering*** the liability threshold because it requires only a "***tendency***" to coerce, not actual coercion. In contrast, the other phrases state that the governmental regulation "***must be***" oppressive to a significantly great extent and that a substantial burden on religious exercise "***imposes***" a significantly great restriction on a party's exercise of religion—not merely that it has a "***tendency***" to do so.

Of course, the phrases differ in that the challenged language speaks of a tendency to coerce individuals "into acting contrary to their religious beliefs," whereas the other language speaks of oppression and of restriction "on a party's exercise of religion." But this distinction collapses upon examination, because a significantly great and oppressive restriction on a citizen's religious exercise automatically forces that citizen to act contrary to his "religious belief" that he

should practice his religion according to its own precepts, not those imposed by the government.

In sum: Distinguishing between a regulation that tends to coerce individuals to act contrary to their religious beliefs and one that significantly oppresses or restricts an individual's religious exercise requires a finer-toothed comb than most people carry around. If any error occurred, it was harmless.

2. The district court correctly instructed the jury that RLUIPA does not create a zoning-law exemption for religious organizations.

We get to the crux of Redwood's RLUIPA arguments—and of the case—when addressing Redwood's objection to the instruction that "RLUIPA does not give religious organizations an exemption from land use regulations that apply to others."[164] With the same hubris that characterized its approach to the CUP process, Redwood now asserts that creating religious exemptions "is exactly what RLUIPA does"[165] and that "RLUIPA means that the County ***must make*** an exception for Redwood" because Redwood is a religious school.[166]

If RLUIPA meant what Redwood says it means, it probably would be held unconstitutional. "'A proper respect for both the Free Exercise and the Establishment Clauses compels the [government] to pursue a course of 'neutrality' toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 695 (1994) (citations omitted).

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[164] ER29 (emphasis added).

[165] Br. 37.

[166] Br. 38 (emphasis added).

Congress therefore designed RLUIPA to "fit[] within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005). Although RLUIPA alleviates "exceptional" government-created burdens on religious exercise, *id*. at 720, an accommodation struck under RLUIPA "must be measured so that it does not override other significant interests." *Id*. at 722. RLUIPA's drafters recognized as much when they included language that "[n]othing in this chapter shall be construed to affect, interpret, or in any way address . . . the 'Establishment Clause.'" 42 U.S.C.A. § 2000cc-4.

Because RLUIPA "occupies a treacherous narrow zone between the Free Exercise Clause . . . and the Establishment Clause," it must not be interpreted as going "into the constitutionally impermissible zone of entwining government with religion in a manner that prefers religion over irreligion and confers special benefits on it." *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 173, 189-90 (2d Cir. 2004). Again, RLUIPA's drafters understood this. They explained that RLUIPA "***does not provide religious institutions with immunity from land use regulation***, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." Joint Statement at S7776 (emphasis added).

RLUIPA therefore cannot and does not "advance religion," but instead, "requir[es] that states not ***discriminate*** against or among religious institutions."

Westchester Day Sch., 504 F.3d at 355-56 (emphasis added). "[N]o . . . free pass for religious land uses masquerades among the legitimate protections [that] RLUIPA affords to religious exercise." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) [hereinafter, "*CLUB*"]. Indeed, RLUIPA was enacted primarily to make it easier for religious organizations to prove that they have been discriminated against in land-use decisions. The drafters grounded their claim of remedial jurisdiction in a "massive" hearing record establishing that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently ***discriminated against*** on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." Joint Statement at S7774 (emphasis added).

Thus, Redwood is dead wrong to assert that RLUIPA requires the County to "make an exception" for it; instead, RLUIPA requires that "religious land uses" be placed "on an ***equal footing*** with nonreligious land uses." *CLUB*, 342 F.2d at 762 (emphasis added). Redwood's version of RLUIPA, in contrast, "would require [local] governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations." *Id*. at 762. The result could well be to make RLUIPA violate the First Amendment.

Accordingly, the district court's "no exemption" language was not only a correct statement of the law, but necessary to save this broadly worded statute from constitutional infirmity.[167]

[167] *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("[A]n

3. The district court handled the strict-scrutiny defense properly, and any error was harmless.

Redwood next argues that the district court erred in submitting the strict-scrutiny affirmative defense to the jury and that no reasonable juror could have found that the County used the least restrictive means. Both arguments fail.

a. This Court should reject Redwood's argument that, as a matter of law, none of the County's interests were "compelling."

Redwood argues that nearly all of the governmental interests served by zoning laws are less than compelling, as a matter of law. But Redwood displays an unwarranted disdain for a locality's interest in regulating land use.

"A government's interest in zoning is indeed compelling." *Konikov v. Orange County*, 302 F. Supp. 2d 1328, 1343 (M.D. Fla. 2003), *aff'd in part, rev'd in part and remanded*, 410 F.3d 1317 (11th Cir. 2005). Indeed, "[t]he Supreme Court has acknowledged the importance of zoning objectives, stating that segregation of residential from nonresidential neighborhoods 'will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children by reducing traffic and resulting confusion, . . . decrease noise…[and] preserve a more favorable environment in which to raise children.'" *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729, 738 (11th Cir. 1983) (citation omitted); *see also id*. at 733 (reversing district court's judgment that a city's "interest in enforcing its zoning laws did not rise to the level of a compelling state interest").

Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

The County has a compelling interest in zoning generally and in furthering the specific regulatory interests that it asserted here. For example, this Court has held that a city's interest in "preserv[ing] a coherent land use zoning plan," in "maint[aining] . . . the integrity of its zoning scheme," and in "protect[ing] . . . its residential neighborhoods" constitutes "a compelling state interest justifying [an] imposed burden upon the exercise of [a plaintiff's] religious belief." *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990). This Court also has held that there is a "compelling state interest" in restricting uses that would bring "traffic and noise problems to an otherwise quiet residential neighborhood." *Id*. at 1224; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Murphy v. Zoning Commission*, 148 F. Supp. 2d 173, 190 (D. Conn. 2001).

The law therefore posed no impediment to finding a compelling interest here.

b. Any error in giving the strict-scrutiny defense to the jury was harmless.

Any error in giving this issue to the jury was harmless for two reasons.

First, the district court has stated that it would have found, based on substantial trial evidence, that the County proved the defense.[168] Thus, Redwood would have fared no better had the court adjudicated this issue.

Second, Redwood cannot prove prejudice because it insisted on a general verdict that made it impossible to discern whether the jury ***ever reached*** the

[168] ER 6.

allegedly defective instruction. The jury was instructed to first decide whether Redwood had made out its prima facie case on the substantial-burden issue and to consider the strict-scrutiny defense only if it answered the first question affirmatively.[169] Thus, the jury may have rejected Redwood's substantial-burden claim because it found that Redwood had failed to carry its prima facie burden; or it may have rejected the claim because it found that, although Redwood had carried its burden, the County had proved its strict-scrutiny defense.

We can never know which path the jury took, because Redwood persuaded the district court to sweep away the footprints. Before trial, the County proposed a special verdict that would have disclosed the jury's path to decision,[170] while Redwood proposed a general-verdict form.[171] Redwood got what it wanted. Now, Redwood's "failure to request a special verdict as to each factual theory in the case prevents [it] from pressing [its] argument on appeal." *McCord v. Maguire*, 873 F.2d 1271, 1274, *amended*, 885 F.2d 650 (9th Cir. 1989).

Accordingly, this Court should affirm the jury's verdict and judgment for the County on Redwood's RLUIPA substantial-burden claim.

C. This Court should affirm the jury's verdict and judgment that the County did not violate RLUIPA's equal-terms provision.

RLUIPA's equal-terms provision states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."

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[169] 308-309.

[170] 519-520.

[171] 522-525.

42 U.S.C. § 2000cc(b)(1). Redwood attacks the district court's equal-terms instructions.

1. The instruction's "similarly situated" requirement was correct.

The district court instructed the jury that Redwood had to prove that the CUP denial treated Redwood on less than equal terms with a "similarly situated" nonreligious assembly or institution. Redwood argues that no "similarly situated" requirement exists and that the court's use of that language prevented the jury from properly considering evidence about the Quarry Lane school—a 200-student school that the County allowed to be built in an urban area.[172]

Redwood's contention is untenable. In the zoning context, as elsewhere, it's pointless to compare apples and oranges. Under Redwood's view of the law, local governments could incur civil liability by failing to treat a religious institution that wants to build a parochial school in the middle of a city park on "equal terms" with a nonreligious institution that wants to build a factory in an industrial zone. What could "equal terms" possibly mean in such a case?[173]

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[172] 275-279.

[173] Redwood also mentions in passing that the district court erred in holding that public schools are improper comparators to Redwood under the equal-terms provision. Redwood's four-sentence argument should be deemed abandoned because Redwood fails to present its "contentions and the reasons for them, with citations to the authorities and parts of the record on which [Redwood] relies." Fed. R. App. P. 28(a)(9)(A); *see also Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1182 (9th Cir. 2001). But if this Court does reach Redwood's public-schools argument, it should affirm the district court's rulings that, as a matter of law, public schools and private schools are not similarly situated. Public- and private-school siting decisions are governed by "sharply different provisions" of law. *Primera Iglesia*, 450 F.3d at 1311. Whereas Redwood was required to seek a CUP under the County zoning ordinance, public schools must adhere to the procedures of Title 5 of the California Code of Regulations. Under the County's zoning ordinance,

Happily, this basic logical proposition finds ample legal support. Every Court of Appeals that has opined on this issue has found a "similarly situated" requirement. For instance, the Third Circuit recently held that the equal-terms provision requires "a secular comparator that is ***similarly situated*** as to the regulatory purpose of the regulation in question . . . ." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007) (emphasis added). Under this rule, the religious plaintiff need not "point to a secular comparator that proposes the same combination of uses," but must identify a secular comparator "that is similarly situated as to the regulatory purpose of the regulation in questions." *Id*.

The Eleventh Circuit also applies a "similarly situated" analysis. In *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1297 (11th Cir. 2006), the court concluded that a "plaintiff bringing an as-applied Equal Terms challenge"—as Redwood does here—"must present evidence that a ***similarly situated*** nonreligious comparator received differential treatment under the challenged regulation." *Id*. at 1311 (emphasis in original). The Seventh Circuit concurs in *Primera*'s reasoning. *See Vision Church*, 468 F.3d at 1003. Thus, the Third, Seventh, and Eleventh Circuits all apply a "similarly situated"

Redwood sought a CUP from the Planning Commission and Board of Supervisors, while public-school siting decisions originate with the school districts. *See* Cal. Code Regs. tit. 5 § 14001 *et seq*. A public school district may invoke its power to render local zoning regulations inapplicable, but then is bound by another set of regulations and remains subject to extensive, detailed state-law requirements regarding site-selection decisions. *See* Cal. Gov. Code § 53094; *City of Santa Clara v. Santa Clara Unified Sch. Dist.*, 22 Cal. App. 3d 152, 158 (1972). Public schools are, therefore, invalid comparators under RLUIPA's Equal Terms provision.

analysis to equal-terms claims, and no other Circuits have contradicted them. Accordingly, a "similarly situated" instruction is not only proper, but indispensable.

Redwood also takes issue with the four-factor test that the district court gave the jury for determining whether assemblies or institutions are similarly situated. But each factor was supported by existing jurisprudence. The first factor—that the comparator presents similar community impacts to Redwood—was derived from *Konikov v. Orange County, Florida*, 410 F.3d 1317, 1327 (11th Cir. 2005); the second factor—that the comparator be in the same type of zoning district as Redwood—was derived from numerous cases, including *Williams Island Synagogue, Inc. v. City of Aventura*, 329 F. Supp. 2d 1319, 1326 (S.D. Fla. 2004);[174] the third factor—that the comparator must have sought the same type of zoning relief that Redwood did—was derived from *Primera Iglesia*, 450 F.3d at 1311; and the fourth factor—that the comparator must have sought to build a place in which groups or individuals dedicated to a common purpose could meet to pursue their interests—was derived from *Midrash*, 366 F.3d at 1230-31.

Thus, the district court's equal-terms instructions properly stated the law.

2. The instruction's rational-basis language was correct.

The district court instructed the jury that Redwood also must prove that "the County's reasons for treating [Redwood] worse were irrational or lacked any relationship to the County's interests in denying the CUP"—in other words,

[174] *See also Kol Ami v. Abington Twp.*, 309 F.3d 120, 137 (3d Cir. 2002); *Primera Iglesia*, 450 F.3d at 1311; *Midrash Sephardi*, 366 F.3d at 1234-35; *Konikov*, 410 F.3d at 1320, 1325-26, 1328.

rational-basis review. Redwood asserts that the district court should have had the jurors apply either strict scrutiny or strict liability.

Redwood is wrong. RLUIPA's equal-terms provision was intended to codify pre-existing equal-protection jurisprudence and make it applicable to land-use decisions. *See Ventura County Christian High Sch. v. City of San Buena Ventura*, 233 F.Supp.2d 1241, 1246 (C.D. Cal. 2002); *Freedom Baptist Church of Delaware County v. Tp. of Middletown*, 204 F.Supp.2d 857, 870 (E.D.Pa. 2002).[175] Traditional equal-protection jurisprudence applies rational-basis review to zoning laws that do not contain a suspect or quasi-suspect classification. As this Court held in *San Jose Christian College*: "If the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion." 360 F.3d at 1031. Numerous cases concur. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001); *Clark*, 650 F.2d at 1039.

Redwood's theory also fails because Congress made no "plain statement" of its intention to apply either strict liability or strict scrutiny. Under the "plain statement rule," "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do

[175] To the extent that the equal-terms provision ***also*** codifies traditional free-exercise jurisprudence, the result is the same because, "[a]s the Supreme Court noted in *Lukumi*, the Equal Protection Clause of the Fourteenth Amendment is often yoked with the Free Exercise Clause." *Freedom Baptist*, 204 F.Supp.2d at 870 (citation omitted).

so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (citations omitted). Here, the "usual constitutional balance" is achieved by applying traditional rational-basis review to equal-treatment challenges to facially neutral zoning ordinances. Applying either strict scrutiny or strict liability to all factual situations in which a religious and a nonreligious zoning-permit applicant are treated differently would represent a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens . . . ." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).[176] Indeed, applying either standard would fling open the doors of the federal courts to all sorts of zoning disputes, turning those courts into super-zoning boards of appeal. *Cf. Clubside*, 468 F.3d at 158; *Schenck*, 114 F.3d at 594. Therefore, if Congress meant to extend strict scrutiny or strict liability to RLUIPA equal-terms claims, it had to do so by means of a plain statement. It did not.

Thus, the district court properly instructed the jury to apply rational-basis review.

D. This Court should reject Redwood's attacks on the district court's "other procedural and evidentiary errors."

We briefly respond to the seven-page compendium of complaints found at the end of Redwood's brief.

[176] An even more severe disruption of the "usual constitutional balance" would ensue if the Court also accepted Redwood's contention that the equal-terms comparator need not be "similarly situated."

1. The district court properly dismissed Redwood's other constitutional claims.

Redwood argues that the court erred in dismissing Redwood's constitutional claims (other than "unbridled discretion") by granting judgment as a matter of law.[177] This Court reviews a JMOL ruling de novo while "view[ing] the evidence in the light most favorable to the non-moving party and draw[ing] every reasonable inference therefrom in the non-moving party's favor." *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000).

a. Redwood's Free Exercise claim was properly dismissed.

Redwood claimed that the CUP denial violated its First Amendment Free Exercise rights. But this claim was properly dismissed because "a free exercise violation hinges on showing that the challenged law is either not neutral or not generally applicable." *San Jose*, 360 F.3d at 1030. Redwood tries to create a false impression of non-neutrality by repeatedly stating that "***every religious schoo***l in the County must apply for a CUP."[178] In fact, ***every private*** school in the County—religious or not—must apply for a CUP to build a new school in the County. Here, the County's zoning ordinance indisputably was neutral and generally applicable and Redwood's Free Exercise claim was properly dismissed.

b. Redwood's Free Association claim was properly dismissed.

Redwood claimed that the County's denial of the CUP violated its First Amendment associational rights and RLUIPA's stricture against a land-use

[177] Br. 58-60.

[178] Br. 60; *see also* Br. 8, 18.

regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. § 2000cc-(b)(3)(B).

To prevail on a "freedom of association" claim, Redwood needed to prove that the County caused a "significant interference" with the freedom of Redwood's members to associate. *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). A land-use regulation causes this "significant interference" only if it acts as a complete ban on the right of group members to associate. *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974); *San Jose*, 360 F. 3d at 1033 ("The fact that the church's congregants cannot assemble at that precise location does not equate to a denial of assembly altogether."); *Doe v. City of Butler, Pa.*, 892 F.2d 315, 322-23 (3d Cir. 1989). Redwood therefore would have had to prove that the County's decision to deny Redwood's CUP application effectively prohibited Redwood's students, parents, and faculty from associating with each other. But the trial evidence showed that the Redwood School is not barred from assembling; it assembles every day, occasionally in one room. The district court properly dismissed Redwood's assembly claim.

c. Redwood's Free Speech claim was properly dismissed.

Redwood also claimed that the CUP denial violated First Amendment Free Speech rights. But that claim was properly dismissed because the "language of the [County's] ordinance reveals no content-based orientation" and there is no evidence that the County "enacted and/or enforced the . . . ordinance as a 'pretext for suppressing expression.'" *San Jose*, 360 F.3d at 1033. "Content-neutral

zoning ordinances . . . have long been held to be permissible restrictions on free speech." *Howard v. City of Burlingame,* 937 F.2d 1376, 1381 (9th Cir. 1991). "When the object of the law is unrelated to expression, *e.g.*, harmonious land use here, the free speech clause is not implicated, even if the law in question limits the ability to disseminate one's message." *C.L.U.B. v. City of Chicago,* 157 F. Supp. 2d at 915-16. Redwood's Free Speech claim was properly dismissed.

2. Redwood waived its evidentiary arguments.

Redwood presents a list of bullet-pointed "erroneously excluded" evidence but fails to explain why the rulings were an abuse of discretion. Redwood's only purpose for including this non-argument was to create an excuse for citing prejudicial excluded evidence in its Statement of Facts. That ***might*** have been acceptable if Redwood had been prepared to invest the time, pages, and resources necessary to argue its evidentiary points—but including a pseudo-argument as an excuse for drafting an improper Fact Statement is cynical. Accordingly, these arguments were waived. *See Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001); Fed. R. App. P. 28(a)(9).

VI. CONCLUSION

For all the reasons stated above, this Court should affirm the entire judgment.

Respectfully submitted,

Dated: February 29, 2008

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 07-16393

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the Brief of Appellees County of Alameda et al. is proportionately spaced, has a typeface of 14 points or more and contains 13,911 words.

DATED this 29th day of February, 2008.

By: _____

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees County of Alameda, et al. state that it is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that an original and sixteen (16) copies of the Brief of Appellees County of Alameda et al. and an original and five (5) copies of the Supplemental Excerpt of Records were sent, via Federal Express, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and two (2) copies of the Brief of Appellees and one (1) copy of the Supplemental Excerpt of Records were sent, via Federal Express to:

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_____
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