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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CHABAD JEWISH CENTER OF THE BIG ISLAND; RABBI LEVI GERLITZKY, Plaintiffs, v. COUNTY OF HAWAII; HAWAII COUNTY PLANNING DIRECTOR, ZENDO KERN Defendants.	Civil Action No. 1:24-cv-68-DKW-WRP **UNITED STATES' STATEMENT OF INTEREST IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF 14); CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE** **Motion Hearing** Date: April 12, 2024 Judge: The Hon. Derrick K. Watson

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UNITED STATES' STATEMENT OF INTEREST IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." The United States is responsible for enforcing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-2(f), and accordingly has an interest in how courts apply and interpret the statute. To help ensure the correct and consistent interpretation of RLUIPA, the United States has filed many statements of interest in RLUIPA cases with district courts, as well as amicus briefs with the courts of appeal.[1]

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[1] *See, e.g.*, *St. Timothy's Episcopal Church v. City of Brookings*, No. 1:22-cv-00156-CL, ECF 73 (D. Or. Nov. 21, 2023) (decision at 2024 WL 1303123 (D. Or. Mar. 27, 2024)); *Micah's Way v. City of Santa Ana*, No. 8:23-cv-00183-DOC-KES, ECF 25 (C.D. Cal. May 9, 2023) (decision at 2023 WL 4680804 (C.D. Cal. June 8, 2023)); *Christian Fellowship Centers of New York, Inc. v. Village of Canton*, No. 8:19-cv-00191-LEK-DJS, ECF 27 (N.D.N.Y. Mar. 26, 2019) (decision at 377 F. Supp. 3d 146); *Hope Lutheran Church v. City of St. Ignace*, No. 2:18-cv-0155-PLM-TLG, ECF 34 (W.D. Mich. Mar. 19, 2019); *Ramapough Mountain Indians, Inc. v. Township of Mahwah*, No. 2:18-cv-9228 (CCC) (JBC), ECF 82 (D.N.J. Mar. 18, 2019); *Congregation Etz Chaim v. City of Los Angeles*, No. CV10-1587 CAS EX, ECF 134 (C.D. Cal. Apr. 28, 2011) (decision at 2011 WL 12472550 (C.D. Cal. July 11, 2011)); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007); *Guru Nanak Sikh Soc'y of Yuba City* v. *Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

The County of Hawaii's zoning code ("Zoning Code") violates RLUIPA's equal terms provision on its face. Section § 25-5-3 of the Zoning Code requires religious assemblies in residential districts to obtain a use permit—a long and potentially costly discretionary review process including a public hearing before the County Planning Commission—while permitting comparable secular assemblies by right without such a permit. The County offers no legally permissible justification for this unequal treatment. Citing this provision of the Zoning Code, the County ordered Plaintiffs, a Chabad Jewish Center and its Rabbi, to cease holding religious services at the Rabbi's home. Because the County's Zoning Code violates RLUIPA on its face, Plaintiffs have established a likelihood of success on the merits for their RLUIPA equal terms claim.[2]

I. BACKGROUND

A. Hawaii County Zoning Code

The Zoning Code prescribes several kinds of zoning districts, such as residential, commercial, and agricultural, and what sorts of uses are allowed in each zoning district. Some uses are permitted as of right. Others, like

[2] In this Statement of Interest, the United States does not address the other elements of a preliminary injunction or the other claims for relief brought by Plaintiffs. If Defendants wish to respond to the arguments raised in this Statement of Interest, and request leave from the Court to file a sur-reply to do so, Plaintiffs' counsel has represented to the United States that they will not oppose that request, provided that the schedule for the preliminary injunction hearing remains in place.

crematoriums, houses of worship, hospitals, and golf courses, require a "use permit" to operate in certain zoning districts. Haw. Cnty. Code § 25-2-61. "Use permits" are intended to provide the County with the opportunity to pay "special attention to insure [sic] that the uses will neither unduly burden public agencies to provide public services nor cause substantial adverse impacts upon the surrounding community." *Id.* § 25-2-60.

To apply for a use permit, an applicant must submit $500 and a detailed application to the Planning Department addressing several objective and subjective factors, including that the "proposed use shall not be materially detrimental to the public welfare nor cause substantial, adverse impact to the community's character [or] to surrounding properties." *Id*. §§ 25-2-62 and 25-2-65. The Planning Commission decides use permit applications at a public hearing, and, in its discretion, can "either deny or approve the application." *Id*. §§ 25-2-63 and 25-2-64. The process can take months or longer. *Id*. §§ 25-2-63 and 25-2-64. Use permits can be appealed by "any person aggrieved by the decision" or revoked by the Planning Commission. *Id*. §§ 25-2-66 and 25-2-67.

In the residential ("RS") zoning district—where Plaintiffs reside—"churches, temples, and synagogues" and "meeting facilities" for "churches, temples, synagogues and other such institutions" require a use permit. *Id.* §§ 25-2-61(a)(3) and 25-5-3(b)(3). Secular "meeting facilities" are, however, permitted as

of right, without such a permit. *Id.* § 25-5-3(a)(9). "Meeting facilities" are defined as facilities "for nonprofit recreational, social or multi-purpose use . . . which may be for organizations operating on a membership basis for the promotion of members' mutual interests or may be primarily intended for community purposes." *Id.* § 25-1-5(b) (further listing "typical uses" as "private clubs, union halls, community centers, and student centers"). Accordingly, religious facilities require a use permit while secular meeting facilities do not.

B. The County Prohibits Plaintiffs' Chabad House.

Plaintiffs have owned and operated a "Chabad House" in Kailua Kona, Hawaii for several years. *See* Decl. of Rabbi Levi Gerlitzky ("Gerlitzky Decl."), ECF 14-2, ¶¶ 3, 8, 10, 13-14. Chabad is an Orthodox Jewish Hasidic movement that prioritizes outreach activities. *Id.* ¶ 4. Chabad rabbis focus their ministry on fostering Jewish community, which involves opening their own homes for meetings, prayers, and other community-building events. *Id*. ¶ 4. Similar to other Chabad houses, Plaintiffs host Shabbat and religious holiday celebrations that include meals at their Chabad House. *Id.* ¶¶ 27-29, 33-34. At Plaintiffs' Chabad House, guests can participate in religious life and observe Orthodox practices. *See id.* ¶¶ 23, 29, 33. And like other Chabad houses, Plaintiffs' Chabad House also serves as the residence of the Chabad Rabbi— here, Plaintiff Rabbi Levi Gerlitzky. *Id.* ¶¶ 4, 13-14 & Exh. A (ECF 14-4) (noting property tax exemption for the

property as a "parsonage—housing for clergy"). Plaintiffs' Chabad House is in a "Single-Family Residential" ("RS-10") zoning district. Feb. 1, 2023, Planning Dept. Letter at 1, ECF 14-5.

Since 2019, Plaintiffs have held Shabbat and other religious celebrations involving meals at their home. Gerlitzky Decl. ¶¶ 14, 27-34. In February 2023, however, Hawaii County's Planning Department sent a Notice of Complaint to Plaintiffs stating that "[t]he Planning Department received a complaint alleging that you are use [sic] your property as a church, temple, or synagogue without a use permit," citing Section 25-5-3(b)(3) of the Zoning Code. *Id.* ¶ 37; *see also* Feb. 1, 2023, Planning Dept. Letter at 1-2. One month later, the Planning Department sent a "Findings" letter to Plaintiffs, stating that the "Planning Director affirms that you are operating an unpermitted 'Church, Temple or Synagogue' (Chabad Jewish Center Big Island)," that Plaintiffs were violating Sections 25-4-4 and 25-5-3 of the Zoning Code and that they must "**Immediately cease and desist from operating the Chabad Jewish Center Big Island on the subject property.**" Gerlitzky Decl. ¶ 39; March 17, 2023, Planning Dept. Letter at 3, ECF 14-7 (bold in original). The letter added that the Planning Department had fined Plaintiffs $1,000 and that fines would continue to accrue at $100 per day. March 17, 2023, Planning Dept. Letter at 3.

Plaintiffs applied for a use permit with a detailed application and paid the application fee to satisfy Defendants' demands. Gerlitzky Decl. ¶¶ 43-44 & Exhs. I (ECF 14-12) & J (ECF 14-13). The County denied the application and returned the application fee, stating that Plaintiffs needed to submit "more detailed, accurate information," and to "thoroughly research the permitting requirements to convert your dwelling into the proposed use," noting that the "Use Permit is just the first step in permitting such a change of use" and that Plaintiffs may need to "upgrad[e] the facility to commercial type standards." *Id.* ¶ 45 & Exh. K (ECF 14-14). On June 1, 2023, the County began to assess daily fines. *Id.* ¶¶ 45, 49, 52 & Exh. M (ECF 14-16). The County has assessed thousands of dollars in fines against Plaintiffs. *Id.* Exhs. M & O (ECF 14-18).[3]

On February 13, 2024, after informal resolution attempts proved unsuccessful, Plaintiffs filed a seven count Complaint alleging violations of the United States and Hawaii Constitutions and RLUIPA, ECF 1, as well as a Motion for Preliminary Injunction, ECF 14.

[3] The County states in its Opposition brief that "[b]eginning on *February 29, 2024*, the Planning Department has stayed accrual of fines arising from the Notice of Violation" and that "[t]hese fines will not accrue during the pendency of Plaintiffs' Motion for a Preliminary Injunction Pursuant to Federal Rule of Civil Procedure 65." *See* Decl. of Elizabeth Gillis at ¶ 34, ECF 35-1 (emphasis added); Defs' Br. at 5, ECF 35.

II. ARGUMENT

The equal terms provision of RLUIPA prohibits governments from "impos[ing] or implement[ing] 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." 42 U.S.C. § 2000cc(b)(1). The protections of RLUIPA, including the equal terms provision, are construed broadly to protect religious exercise. 42 U.S.C. § 2000cc-3(g).

A facial equal terms RLUIPA claim—like the kind brought by Plaintiffs—challenges whether a land use regulation, *on its face*, treats religious assembly uses less favorably than secular assembly uses. *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 604-05 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 567 (2023). Facial claims require no "final decision" by the local land use authority. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012). Plaintiffs' facial equal terms claim is therefore ripe. Plaintiffs also have standing to bring their claim because the Zoning Code prevents them from engaging in religious exercise and a favorable decision from the Court would redress that harm.

As the County is a government that is "impos[ing]" its Zoning Code on a "religious assembly or institution," the only element of Plaintiffs' RLUIPA equal terms claim that is in dispute is whether the County's Zoning Code treats religious assemblies or institutions "on less than equal terms" with secular ones. *New*

Harvest, 29 F.4th at 604 (quoting *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1170-71 (9th Cir. 2011)).[4] Here, the Zoning Code undeniably treats religious use less favorably than comparable secular assembly use by requiring "churches, temples, and synagogues" to obtain a use permit while nonreligious assemblies, such as "meeting facilities," do not. Haw. Cnty. Code § 25-5-3. Courts in the Ninth Circuit—and nationwide—have consistently held that this type of express distinction between comparable religious and nonreligious use in a zoning ordinance violates RLUIPA.[5]

To establish a prima facie RLUIPA equal terms claim in the Ninth Circuit, a plaintiff must show "that the challenged regulation makes an express distinction between religious and nonreligious assemblies, regardless of whether those assemblies are similarly situated." *New Harvest*, 29 F.4th at 606 n.10 (citing

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[4] The Ninth Circuit has "identified four elements of an equal terms claim: '(1) there must be an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution,' and (4) the imposition or implementation must be 'on less than equal terms with a nonreligious assembly or institution.'" *New Harvest*, 29 F.4th at 604 (quoting *Centro Familiar*, 651 F.3d at 1170–71). The County does not appear to contest the first three elements.

[5] *See, e.g.*, *New Harvest*, 29 F.4th at 605-09; *Centro Familiar*, 651 F.3d at 1171-75; *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 272-73 (3d Cir. 2007); *Digrugillers v. City of Indianapolis*, 506 F.3d 612, 616-18 (7th Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231-35 (11th Cir. 2004); *Corp. of the Cath. Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163, 1167-71 (W.D. Wash. 2014); *Vietnamese Buddhism Study Temple In Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1174-75 (C.D. Cal. 2006).

Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 291-93 (5th Cir. 2012)). Once that showing is made, the burden shifts to the local government to establish that there is a justifiable reason for treating religious assemblies less favorably than nonreligious ones based on "an accepted zoning criterion." *New Harvest*, 29 F.4th at 607; *see also* 42 U.S.C. § 2000cc-2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of . . . [RLUIPA's equal terms provision], the government shall bear the burden of persuasion on any element of the claim."). Given the stated purpose of the RS district; the uses permitted by right; and accepted, identifiable zoning criteria in the Zoning Code, Defendants have not satisfied and cannot satisfy this burden. Thus, Plaintiffs have established a likelihood of success on the merits for their RLUIPA equal terms claim.

A. Defendants' Ripeness Arguments Are Without Merit.

Defendants argue that Plaintiffs' RLUIPA claims are not ripe because they did not appeal the notice of violation or submit a use permit application, and that therefore they have no probability of success on the merits. Defs.' Br. at 7-11. This argument fails as a matter of law. Plaintiffs' facial RLUIPA equal terms claim asserts that the zoning code, by requiring religious assembly uses to obtain a use permit, but not nonreligious assembly uses, treats religious assembly uses less favorably than secular assembly uses, *on its face*. *New Harvest,* 29 F.4th at 604-

05.[6] Facial challenges to land use statutes are not subject to the "finality" considerations set out in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *overruled in non-relevant part* by *Knick v. Township of Scott*, 588 U.S. 180 (2019); *see Yee v. City of Escondido*, 503 U.S. 519, 533–34 (1992) ("While . . . a claim that the ordinance effects a regulatory taking *as applied* to petitioners' property would be unripe for [failure to satisfy *Williamson County*], petitioners mount a *facial* challenge to the ordinance." (citation omitted)).

A facial equal terms claim under RLUIPA, therefore, does not implicate the "final decision" ripeness concerns discussed in *Williamson County. See Opulent Life*, 697 F.3d at 287 (citing *Yee*, 503 U.S. at 533-34) (holding in RLUIPA case that "*Williamson County's* final-decision rule . . . presents no barrier to our adjudicating Opulent Life's *facial* challenges to the ordinance" because "[t]he Supreme Court has held *Williamson County* to be inapplicable to facial challenges."); *Calvary Chapel Bible Fellowship v. County of Riverside*, No. CV16-259 PSG (DTBx), 2017 WL 6883866, at *6 (C.D. Cal. Aug. 18, 2017) (citing *Hacienda Valley Mobile Ests. v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir.

[6] In a facial equal terms challenge, courts "consider only the text of the zoning ordinance, not its application." *New Harvest*, 29 F. 4th at 605 (quoting *Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020)).

2003)) (holding in RLUIPA equal terms case that "[T]he final-decision rule does not present a barrier to adjudicating CCBF's causes of action, all of which assert facial challenges to the ordinances in question").[7]

B. Defendants' Standing Arguments are Likewise Without Merit.

Defendants also argue that Plaintiffs cannot show a probability of success on the merits because they lack standing to bring an Equal Terms challenge. *See* Defs.' Br. at 11-14. Specifically, and citing no authority, Defendants assert Plaintiffs lack standing to bring RLUIPA claims challenging whether religious assembly uses are treated less favorably than "meeting facilities" because Plaintiffs were not cited for violating the specific "meeting facility" clause in the Zoning Code. *See id.*

Defendants misunderstand the concept of standing and the nature of Plaintiffs' RLUIPA equal terms claim. Standing to bring a claim under RLUIPA is "governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000cc-2(a). Standing requires that Plaintiffs have been "injured in fact,"

[7] Defendants' argument that Plaintiffs must have appealed the Notice of Violation is similarly unavailing. *See* Defs.' Br. at 9-10. RLUIPA does not require exhaustion of administrative remedies as a prerequisite to bringing a claim. *See, e.g.*, *United States v. City of Walnut*, No. CV 10-6774-GW FMOX, 2011 WL 12464619, at *3 (C.D. Cal. Jan. 13, 2011) ("RLUIPA's land-use provisions contain no express requirement that administrative remedies be exhausted before a plaintiff may file suit . . . . Accordingly, RLUIPA does not require plaintiffs in land use cases to exhaust administrative remedies.").

that the injury is "fairly traceable" to the defendant's conduct, and the injury be redressable by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Each element is met here.

There is no dispute that Plaintiffs have been injured in fact. The County has ordered Plaintiffs to stop engaging in religious exercise and assessed thousands of dollars of fines against them. *See supra* Section I.B. As a result of Defendants' cease and desist order, Plaintiffs have "stopped inviting folks into [their] home in the Center's information materials" which caused their "ability to connect with other Jewish individuals and welcome them into a familial setting for Jewish celebration" to suffer. Gerlitzky Decl. ¶ 55. That is sufficient injury to confer standing. *See, e.g.*, *Calvary Chapel*, 2017 WL 6883866, at *7 (finding the plaintiff "asserts an injury in fact because it cannot use its property for religious use" (citing *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1304 (11th Cir. 2006))); *Opulent Life*, 697 F.3d at 295 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976))).[8]

[8] That the County has offered to stop assessing fines *during the pendency of this motion* does not alter Plaintiffs' injury. The County has not retracted its cease-and-desist order nor agreed to abate the thousands of dollars in fines it claims to have already assessed against Plaintiffs.

Second, Plaintiffs' injury is traceable to the conduct of Defendants. Plaintiffs' injury arises from Defendants' "findings" that Plaintiffs violated section 25-5-3 of the Zoning Code and Defendants' later efforts to shut the Chabad House down and fine them thousands of dollars. *See* March 17, 2023 Planning Dept. Letter at 3. Although not stated as much, Defendants appear to be arguing, without any legal support, that because they did not charge Plaintiffs with violating the "meeting facility" portion of section 25-5-3 of the Zoning Code, Plaintiffs cannot assert an equal terms claim based on that portion of the code. *See* Defs.' Br. at 12. This is false. RLUIPA's equal terms provision prohibits the County from treating religious assembly uses less favorably than nonreligious assembly uses. *New Harvest*, 29 F.4th at 604-06. A prima facie violation occurs when the County's Zoning Code "makes an express distinction between religious and nonreligious assemblies, regardless of whether those assemblies are similarly situated." *Id.* at 606 n.10. Plaintiffs need not demonstrate that they were subject to portions of the Zoning Code pertaining to nonreligious assembles. *Id*.[9] That the County never cited Plaintiffs for violating the nonreligious assembly portions of its Zoning Code is therefore irrelevant.

[9] Such a requirement contradicts the facts and holdings of *Centro Familiar* and *New Harvest.* In both cases, the plaintiffs alleged *facial* equal terms claims, which were sustained by the Ninth Circuit. *New Harvest*, 29 F.4th at 608; *Centro Familiar*, 651 F.3d at 1173-75. Neither plaintiff alleged that they had been subject to the zoning code sections pertaining to nonreligious assembles.

Finally, Plaintiffs' injury would be redressable by a favorable decision from the Court. If the Court found an equal terms violation, it could enjoin the County from applying the "use permit" requirements in section 25-5-3 of the Zoning Code and enjoin it from interfering with Plaintiffs' religious exercise at their residence. *See, e.g.*, *Vietnamese Buddhism Study Temple In Am. v. City of Garden Grove*, 460 F. Supp. 2d 1165, 1174-75 (C.D. Cal. 2006) (finding the City's zoning code "on its face, treats churches and religious centers on less than equal terms than it treats private clubs and other secular assemblies," granting preliminary injunction enjoining provisions of the zoning code requiring religious assemblies to obtain a conditional use permit, and ordering that Plaintiff could use its temple for religious purposes); *see also Congregation Etz Chaim v. City of Los Angeles*, No. CV10-1587 CAS EX, 2011 WL 12472550, at *9-10 (C.D. Cal. July 11, 2011) (finding "plaintiffs have sufficiently made out a prima facie case of unequal treatment" and enjoining "any enforcement actions by the City that would prevent the Congregation from continuing the use of the property"). Defendants' argument that Plaintiffs have no probability of success because they lack standing is therefore without merit.

C. On Its Face, Hawaii County's Zoning Code Violates RLUIPA Because It Treats Religious Assemblies On Less Than Equal Terms With Secular Assemblies.

Plaintiffs have established a prima facie RLUIPA equal terms violation by identifying unequal zoning requirements in the language of the Zoning Code. *Centro Familiar*, 651 F.3d at 1171 ("[T]he express distinction drawn by the ordinance establishes a prima facie case for unequal treatment."). For RS districts, "churches, temples, and synagogues" "*may* be permitted . . . *provided that a use permit* is issued," Haw. Cnty. Code § 25-5-3(b)(3) (emphasis added). But analogous secular "meeting facilities," which include "private clubs, union halls, community centers, and student centers," *see id.* § 25-1-5(b), "*shall* be permitted" in RS districts. *Id.* § 25-5-3(a)(9).[10] No use permit—subject to an application fee and lengthy and discretionary approval process—is required.

The Ninth Circuit has repeatedly found this same type of express distinction to constitute a "prima facie case of facially unequal treatment." *New Harvest*, 29 F.4th at 605. For example, in *Centro Familiar*, the Ninth Circuit found that the City of Yuma violated RLUIPA when it permitted "membership organizations," while specifically excluding "religious organizations," to operate in the City's downtown business district without a conditional use permit, but required churches

[10] "Meeting facilities" *for* churches, temples, and synagogues, however, do require a use permit. Haw. Cnty. Code § 25-2-61(a)(3).

and other religious organizations to get a permit. *Centro Familiar*, 651 F.3d at 1171 ("It is hard to see how an express exclusion of 'religious organizations' from uses permitted as of right by other 'membership organizations' could be other than 'less than equal terms' for religious organizations."). Crucially, in *Centro Familiar*, the City of Yuma's zoning code defined "membership organizations" to include "professional membership organizations, labor unions, civic associations, social associations, fraternal associations, political organizations, and others," *see Centro Familiar*, 651 F.3d at 1171 n.35, which is virtually indistinguishable from the Hawaii County Zoning Code's definition of "meeting facilities." *See* Haw. Cnty. Code § 25-1-5(b) ("meeting facilities" includes "organizations operating on a membership basis for the promotion of members' mutual interests or may be primarily intended for community purposes. Typical uses include private clubs, union halls, community centers, and student centers.").[11]

Similarly, in *New Harvest*, the Ninth Circuit found the plaintiff, a church seeking to operate on the ground floor of a building in the downtown core area of

[11] Defendants repeated citation to *Chabad of Prospect, Inc. v. Louisville Metro Board of Zoning Adjustment*, 623 F. Supp. 3d 791 (W.D. Ky. 2022), an out-of-circuit district court decision, is misplaced. Unlike the Hawaii County's Zoning Code, the Louisville zoning code prohibited *all* institutional uses—secular or religious—from residential zones, and only allowed them with a conditional use permit. *Id*. at 804. Moreover, the plaintiff in that case "argue[d] only that the ordinance is unequally applied," and did not bring a *facial* unequal terms case like Plaintiffs here. *Id*.

the City of Salinas, successfully established a prima facie equal terms violation by pointing to the City's "express distinction between '[c]lubs, lodges, and places of religious assembly, and similar assembly uses' on the one hand, and all other nonreligious assemblies, on the other hand." *New Harvest*, 29 F.4th at 605. While certain nonreligious assemblies could operate on the first floor of buildings in the downtown area as of right, religious assemblies were completely prohibited from operating at all on the first floor. *Id.* When confronted with similar factual scenarios, many other courts have ruled the same as the Ninth Circuit.[12]

Plaintiffs have thus established their prima facie case of a RLUIPA equal terms violation.

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[12] *See, e.g.*, *Opulent Life*, 697 F.3d at 293 (requirement that churches "obtain discretionary approval from the mayor and Board of Aldermen" but not nonreligious institutions like libraries, museums, and art galleries "plainly violated the Equal Terms Clause" and "were unlawful under RLUIPA."); *United States v. City of Troy*, 592 F. Supp. 3d 591, 606 (E.D. Mich. 2022) (prima facie case established because of "requirement that places of worship apply for and obtain a special permit to operate in the City's Community Facilities district" while "institutions such as fine and performing arts facilities, recreational facilities, and primary, secondary, and post-secondary schools" are "permitted by right"); *Chabad of Nova, Inc. v. City of Cooper City*, 533 F. Supp. 2d 1220, 1221-23 (S.D. Fla. 2008) (awarding judgment on the pleadings because city land use code on its face permitted "other land uses that met the definition of an ' assembly' or 'institution'" such as "places where people may gather for meetings and/or business related to trade associations or unions," but banned "religious assemblies or institutions"); *Vietnamese Buddhism Study Temple*, 460 F. Supp. 2d at 1174 ("The GGZO, on its face, treats churches and religious centers on less than equal terms than it treats private clubs and other secular assemblies. It allows private clubs to operate without a CUP in the office professional zone, while religious assemblies are banned from that zone entirely.").

D. Defendants Cannot Justify The "Less Than Equal" Treatment of Religious Assemblies.

Because Plaintiffs have established their prima facie case, the burden shifts to Defendants to rebut it by showing that preferentially treated nonreligious assemblies are "not similarly situated to a religious assembly with respect to an accepted zoning criterion." *New Harvest*, 29 F.4th at 607. In other words, Defendants must establish that there is a legitimate reason, with respect to traditionally accepted criteria in the Zoning Code, that can justify the "less-than-equal-terms . . . [and] not the fact that the institution is religious in nature." *Centro Familiar*, 651 F.3d at 1172. Defendants cannot do so because nothing in the Zoning Code can justify—or even try to explain—why religious assemblies should be made to obtain a use permit, but similar nonreligious assemblies like meeting facilities are not.

When assessing an equal terms claim under RLUIPA, courts in the Ninth Circuit, as elsewhere, look to the text of zoning codes to identify whether there is any legitimate zoning reason to treat religious uses different than secular assembly uses. *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172-73; *New Harvest*, 29 F.4th at 607. For example, in *Centro Familiar* the court considered the proffered purpose of the "Old Town Main Street" zoning district—to create an entertainment-oriented environment "with a 'mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district'"—and

assessed "accepted zoning criteria" such as "parking, vehicular traffic, and generation of tax revenue." *Centro Familiar*, 651 F.3d at 1165, 1173. The court found that the zoning code did not even address certain zoning criteria at all, like parking and traffic. *Id.* at 1173. The zoning code also permitted other uses as of right, such as other tax-exempt entities like post offices, as well as jails and prisons, that weren't in accordance with the generation of tax revenue or the overall purpose of the district. *Id.* As a result, the court found that there was no valid justification for requiring religious organizations to obtain a use permit but permit nonreligious membership organizations to operate by right. *Id.* at 1173-75.

Similarly, in *New Harvest*, the Ninth Circuit found that the City of Salinas failed to explain how a church would have a different impact than nonreligious assembly uses, like theaters, on the stated purpose of the district of encouraging a pedestrian-friendly, vibrant downtown district. *New Harvest*, 29 F.4th at 607-08. The court noted that "[l]ike many religious assemblies, including New Harvest, theatres are open only on certain days of the week and for certain portions of the day; they attract sporadic foot traffic around their opening hours; and while they have some regular patrons, they are also open to newcomers." *Id.* at 608.

As in *Centro Familiar* and *New Harvest*, the Zoning Code here impermissibly imposes a higher standard on religious assemblies—requiring them to obtain a use permit—than nonreligious ones untethered to the purpose of the

zoning district. The stated purpose of the RS single-family residential district is to "provide for lower or low and medium density residential use, for urban and suburban family life." Haw. Cnty. Code § 25-5-1. There is no zoning criteria-based reason to require that religious assemblies, but not secular meeting facilities, obtain a use permit. "Urban and suburban family life" are not harmed any more by religious assemblies than by nonreligious places of assembly like meeting facilities, which do not require a use permit. Haw. Cnty. Code § 25-5-3(a)(9); *see Corp. of the Cath. Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163, 1168-69 (W.D. Wash. 2014) (similar effects on residential zone from lighted athletic facility at a secular high school as a religious one); *Congregation Etz Chaim*, 2011 WL 12472550, at *7-9 (claim that "residential nature of the neighborhood" would be harmed by religious congregation meeting at a house "undercut by the number of sites in the R-1 zone that are used for nonresidential purposes," such as nonreligious places of assembly); *New Life Ministries v. Charter Twp. of Mt. Morris*, No. 05-cv-74339, 2006 WL 2583254, at *5 (E.D. Mich. Sept. 7, 2006) (finding private clubs, civic and fraternal organizations, lodge halls, theaters, assembly halls, and public and private educational facilities and institutions "gather and meet with similar frequency" as religious assemblies).

Indeed, engaging in religious practice is important to many families' lives, and so having a nearby place to worship is congruent with the stated purpose of the

RS district and the stated goals of the County's overall general Land Use Plan. *See* General Plan for the County of Hawaii, § 14.6.2(d) (among the goals of the "single-family residential district" is "[t]o provide single-family residential areas conveniently located to public and private services, shopping, *other community activities* and convenient access to employment centers that takes natural beauty into consideration") (emphasis added).[13]

Nor can the unequal treatment be justified by any accepted zoning criteria, like traffic, parking, or the generation of tax revenue. The type of nonreligious places of assembly permitted in RS districts are similar to religious assemblies in terms of impact on these concerns. As with churches or synagogue or other places of religious assembly, people visit nonreligious meeting halls, neighborhood parks, playgrounds, and community buildings on a sporadic or regular basis. *New Harvest*, 29 F.4th at 608. Activity is not 24/7, but more typically tied to particular events and days and times of the week. *Id*.; *see also Troy*, 592 F. Supp. 3d at 605.[14]

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[13] Available at https://www.planning.hawaiicounty.gov/home/showpublisheddocument/301643/637204664141830000 (last visited March 22, 2024).

[14] Defendants' contentions about "overnight accommodations" for meeting facilities misses the mark. *See* Defs.' Br. at 12-14. Defendants do not explain why it is relevant whether meeting facilities allow overnight accommodations. *See* Haw. Cnty. Code § 25-1-5(b). The "overnight accommodations" clause is meant to limit whether members or guests of the meeting facility can stay overnight, not whether *residents who live* there can. For example, the same "overnight accommodations" language is used in defining "adult day care home." *See id.* § 25-

There is no more "burden" on "public services" or "substantial adverse impacts on the surrounding community" from a church or synagogue than there would be from a union hall or a political club hosting meetings. *See New Harvest*, 29 F.4th at 608; *Vietnamese Buddhism Study Temple*, 460 F. Supp. 2d at 1174-75.

The Zoning Code also does not identify the generation of tax revenue as a goal for residential districts, but even if it did, the Zoning Code allows in the residential district a host of other non-tax producing uses like "community buildings . . . neighborhood parks [and] playgrounds . . . public uses and structures," *see* Haw. Cnty. Code § 25-5-3(a)(3), (11), (12), and "nonprofit recreational, social, or multipurpose use." *See id*. § 25-1-5(b) (definition of "meeting facility").[15]

1-5(b) ("'Adult day care home'" means a *private residence*, approved by the state, providing supportive and protective care, *without overnight accommodations*, to a limited number of adult disabled or aged persons." (emphasis added)). Thus, the owners of the "private residence" may sleep in their own home, while the "adult disabled or aged persons" may not. In any event, religious "meeting facilities" must obtain a use permit in the RS zoning district, *see id.* § 25-2-61(a)(3), while nonreligious "meeting facilities" need not, *id*.§ 25-5-3(a)(9), even though both are presumably subject to the same "overnight accommodations" clause. The County offers no explanation to justify this facially unequal treatment.

[15] For this same reason, Defendants' invocation of Hawaii County Code § 19-77 and reference to Plaintiffs' tax-exempt status undermines any justifiable reason to treat meeting facilities differently than religious assemblies. Section 19-77 allows a tax exemption for "property used for church purposes" *but also* for essentially any use permitted in "meeting facilities," including "labor unions," and for organizations "for charitable purposes which are of a community character building, social service, or educational nature." *Id*. § 19-77(b)(3), (b)(6), and

Furthermore, regarding parking requirements, the County *equates* nonreligious meeting facilities and religious assemblies. Haw. Cnty. Code § 25-4-51(a)(16) (addressing parking requirements for "[m]eeting facilities, including churches"). In any case, if the County was truly concerned about traffic and parking, it could have enacted "neutral restriction[s] on the size" of both nonreligious meeting facilities and religious assemblies in the Zoning Code. *See Centro Familiar*, 651 F.3d at 1173. That it did not underscores the Code's unequal treatment of religious assemblies. *Id.* at 1175. Thus, Defendants fail to carry their burden to demonstrate how permitted nonreligious assemblies are distinct from religious assemblies with respect to accepted zoning criteria in the RS district.

III. CONCLUSION

For all these reasons, the Court should find that Plaintiffs have established a likelihood of success on the merits of their RLUIPA facial equal terms claim (Count V of the Complaint).

(c)(3). That the County tax code treats religious assembly and nonreligious assembly uses the same highlights the unjustifiable unequal treatment of them in the Zoning Code.

Dated: March 29, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **UNITED STATES' STATEMENT OF INTEREST IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** complies with Local Rule 7.4(b) and contains 5,850 words, as calculated by the word processing system used to prepare this document.

Dated: March 29, 2024

/s/ Adam M. Wesolowski
ADAM M. WESOLOWSKI

CERTIFICATE OF SERVICE

I hereby certify that on the date and by the method of service noted below, a true and correct copy of this document was served by the following at their last known address:

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