

1 LAW OFFICES OF HAROLD P. SMITH
2 HAROLD P. SMITH (CSBN: 126985)
3 1901 Harrison Street, Ninth Floor
4 Oakland, California 94612
5 Telephone: (510) 273-8880
6 Facsimile: (510) 903-8881

7 THE BECKET FUND FOR RELIGIOUS LIBERTY
8 ANTHONY R. PICARELLO, JR. (Admitted *pro hac vice*)
9 DEREK L. GAUBATZ (CSBN: 208405)
10 ERIC RASSBACH (Admitted *pro hac vice*)
11 LORI HALSTEAD (Admitted *pro hac vice*)
12 1350 Connecticut Avenue, NW, Suite 605
13 Washington, D.C. 20036-1735
14 Telephone: (202) 955-0095
15 Fax: (202) 955-0090

16 LAW OFFICES OF ROGER S. GAITHER
17 ROGER S. GAITHER (CSBN: 108786)
18 MARK A. GAITHER (CSBN: 189125)
19 232 Kittery Place
20 San Ramon, CA 94583
21 Telephone: (925) 829-5577
22 Fax: (925) 829-0745

23 Attorneys for Plaintiffs

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27
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

29 REDWOOD CHRISTIAN SCHOOLS, *et al.*,

30 Plaintiffs,

31 v.

32 COUNTY OF ALAMEDA, *et al.*,

33 Defendants.

Case No. C01-4282 SC ADR

**PLAINTIFFS' MEMORANDUM
IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: July 28, 2006
Time: 10:00 a.m.
Location: Courtroom 1
Judge: Hon. Senior Judge
Samuel Conti

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1 **I. Redwood’s Ministry of Christian Formation and Religious Instruction.**

2 Redwood is a Christian, interdenominational, independent day school for boys and girls
3 in grades K-12. Johnson Decl. ¶4. Redwood’s mission is to provide children
4 a Christ-centered education which is able to equip students for daily living and eternal
5 life. It seeks to accomplish this mission by providing a fully accredited, high quality
6 Christian academic program which emphasizes excellence in a Bible-centered
7 education, rooted in a faith commitment to Jesus Christ and founded in the truth of
8 Scripture.

9 *Id.* Redwood’s philosophy of education is based on an understanding that faith and truth are,
10 and should be, integrated through a Biblical focus:

11 We believe that the Bible is central in education. It provides a unifying frame of
12 reference for every subject taught at Redwood Christian; it also gives life and power to
13 the whole curriculum. The Bible, when properly taught, is a liberating influence,
14 freeing the mind and heart for the pursuit of truth in every direction. As such, it is a
15 constant reminder that all truth, being of God, is for a purpose.

16 *Id.* ¶ 5. To ensure effective pursuit of these goals, Redwood requires all parents, students and
17 teachers to sign a statement of faith, and to belong to a church. *Id.* ¶ 13. In accepting children
18 for attendance, Redwood believes it is charged with the role of a surrogate parent to fulfill the
19 Biblical mandate of raising children in the instruction and discipline of the Lord. *Id.* ¶ 14.
20 Biblical guidance and spiritual direction are integrated into *every* aspect of life at Redwood,
21 and *every* class and activity is conducted with the goals of revealing God’s truth, nurturing the
22 students’ spiritual lives, and bringing God glory. *Id.* ¶ 16. Redwood also believes that
23 Christians are charged with spreading the Gospel. By building a Christian educational
24 community and engaging in Christ-centered fellowship and worship, Redwood seeks to spread
25 the Gospel to its students, their parents, and the broader County community. *Id.* ¶ 15.

26 **II. Redwood Spends Years Searching for a Permanent Home.**

27 For years, Redwood has sought an adequate, permanent home for its junior-senior high
28 school. *Id.* ¶ 25. It established a building fund to save toward that goal, as well as a building
committee to locate any suitable properties in Redwood’s service area of Castro Valley and
adjacent communities. *Id.* ¶¶ 25, 29. Redwood’s need for a permanent home has been
intensified by the bitter experience of being twice evicted from sites leased from the San
Lorenzo Unified School District. (“SLUSD”). *Id.* ¶ 26. The first of these evictions occurred in

1 1985 when SLUSD reclaimed for its own use the Washington Manor school campus.
2 Redwood wasn't reimbursed for the renovations it had made to that campus. *Id.* After this
3 eviction, Redwood moved its junior-senior high to another leased site, Dayton Elementary. *Id.*

4 While at Dayton, Redwood vigorously explored options for a permanent home.
5 Realtors throughout the East Bay were made aware of Redwood's need, and the building
6 committee explored any lead that arose, no matter how small. *Id.* ¶ 27. In particular, Redwood
7 investigated 25 different properties between 1988 and 1997, but all of these proved unable to
8 accommodate Redwood's junior-senior high ministry. Administrative Record, Ex-B-1 ("AR")
9 1074, Johnson Decl. ¶ 27. In the meantime, Redwood renovated the Dayton campus with its
10 own funds so that the school could continue to operate and meet minimal accreditation
11 standards. *Id.* ¶ 27.

12 In 1996, SLUSD gave Redwood notice that it would be evicted once again. SLUSD
13 wished to resume use of the campus (with capital improvements Redwood paid for) to comply
14 with a state mandate for smaller classroom sizes. *Id.* ¶ 28. Faced with the shutdown of its
15 junior-senior high ministry, Redwood pursued a two-part approach to save it. First, Redwood
16 continued its efforts to buy property in the surrounding communities it serves in Alameda
17 County, literally praying that it could finally locate a permanent facility. *Id.* ¶ 29. Second,
18 Redwood explored the interim solution of leasing another public school.

19 The old Martin elementary school in San Lorenzo, Alameda County (the "Martin Site"),
20 a 40 year-old elementary school facility in a state of disrepair, was the only vacant school
21 facility available. *Id.* ¶ 30. Moreover, SLUSD insisted, and continues to insist, on lease terms
22 under which the District could terminate Redwood Christian's lease on only 7 months' notice.¹
23 Shira 69:15-19; Johnson Decl. ¶ 50. The Martin Site lacked even the basic facilities needed for
24 a junior-senior high: its permanent facilities consist of only two buildings containing 3
25 elementary school size classrooms, administrative offices, a small library, and a small cafeteria-
26 multipurpose room built for an elementary school. *Id.* ¶ 51. However, Redwood was able to

27 ¹ The lease started in 1998 and ran until 2001, with three additional three year options
28 until 2010. Ex-A-2 ("Lease") at 2. At that time, any new lease would have to go out to bid,
with public entities given first preference. Ex-B-2 ("Shira") 33:24-34:7, 74:15-21; 77:3-10.

1 obtain some trailers for temporary classrooms. *Id.* ¶ 52. This allowed Redwood to move there
2 in 1998 as a temporary fix, while continuing its search for a permanent home.²

3 **III. Redwood Finally Finds One Property That Can Accommodate the Ministry.**

4 After years of exhaustive searching, Redwood was finally able to acquire the first (and
5 only) property available in its service area that could serve as a permanent home for its
6 ministry. Specifically, in June 1997 Redwood purchased a 12.5 acre lot at 6400 East Castro
7 Valley Boulevard. *Id.* ¶ 32, 35. Together with a nearby lot purchased in November 1997, *see*
8 Section VI *infra*, it constitutes Redwood’s 45-acre Property at the center of this lawsuit.

9 The Property is located approximately 800 feet from an Interstate 580 off-ramp. I-580
10 traffic is visible and audible from most of the Property. AR 800, 837. The BART line linking
11 Dublin/Pleasanton to Castro Valley runs near the Property, and BART trains are audible on the
12 Property. Much of the Property was formerly used by CalTrans as a staging area for the road-
13 building equipment and other materials needed to build I-580. Several concrete pads of
14 unknown use were built on the Property, and the Property was graded into three terraces. AR
15 801. Other parts of the Property were used as a dumping ground for steel drums, wrecked
16 vehicles, old tires, paint cans, and telephone poles. AR 801, 804. Several dilapidated buildings
17 and a ruined steel frame bridge also littered the site when Redwood purchased it. AR 801, 804.
18 The County examined the impact of the “conver[sion of] existing open space” to use by
19 Redwood and found that this was “a less-than significant impact.” AR 829. The County
20 admits that the Property “is currently unkempt and constitutes *poor quality open space* that is
21 not used for formal recreational or agricultural purposes” and “would function as infill
22 development in an existing area of development.” *Id.* (emphasis added).

23 Abutting the Property to the east is Palomares Elementary School, operated by the
24 Castro Valley Unified School District. AR 804. It currently enrolls 135 students. Ex-B-3.
25 Further east, down Palo Verde Road, is a property owned by Viera Trucking Company, which

26 ² Although intended as an interim solution, the County’s refusal to allow Redwood to
27 build a permanent home on the Property has forced Redwood to pour over \$1.2 million into the
28 Martin Site for refurbishing and repairs to make it even minimally functional. *Id.* ¶ 52. Even
with those expenses, the Martin Site is still inadequate for Redwood to carry out its ministry of
providing students a Christian education and Christ-centered fellowship and worship. *Id.* ¶ 53.

1 stores freight trucks there. AR 804. Further east, past Viera Trucking, is the entrance to
2 Palomares Canyon, which contains “luxury estate homes” that in many cases include riding
3 stables, swimming pools, and tennis courts. AR 804-5. Many of Redwood’s neighborhood
4 opponents live in this neighborhood. Ex-B-4 (Sorensen) 41:4-20. Most of the lots on Palo
5 Verde Road closest to the Property are under 5 acres. Ex-B-5 (“Buckley”) 106-07 & Exh. 8.
6 Just to the north and east of the Property, at the corner of East Castro Valley Boulevard and
7 Palo Verde Road, is a BART electric substation. AR 804.

8 Redwood proposes to build its junior-senior high school campus on the Property with a
9 maximum capacity of 650 students for the life of the project. The campus would include 4
10 main buildings centered around a plaza on the side of the Property nearest I-580. Johnson
11 Decl. ¶ 39. The Property would also house athletic fields, parking lots, and offices. *Id.*

12 **IV. Redwood May Not Use This (or Any Other) Property Within the County for the**
13 **Ministry Without a CUP.**

14 Religious schools like Redwood are not allowed to operate *anywhere* in the County’s
15 jurisdiction as of right. Instead, they are allowed only with a “Conditional Use Permit”
16 (“CUP”), and only in certain zones, including the one where the Property is located. The
17 County “may” grant the CUP after a “special review and appraisal” of the school

18 in order to determine whether or not the use (A) is required by the public need, (B)
19 whether the use [sic] will be properly related to other land uses and transportation and
20 service facilities in the vicinity, (C) whether or not the use [sic] if permitted will under
21 all the circumstances and conditions of the particular case, materially affect adversely
22 the health or safety of persons residing or working in the vicinity, or be materially
23 detrimental to the public welfare or injurious to property or improvements in the
24 neighborhood, and (D) whether or not the use [sic] will be contrary to the specific intent
25 clauses or performance standards established for the district, in which it is to be located.

26 Alameda Cy. Gen. Code § 17.54.130. Accordingly, on August 14, 1997, Redwood applied for
27 a CUP to operate a 650-student school on the 12.5-acre site pursuant to Section 17.54.130.

28 **V. The County Prolongs the CUP Process Before Denying the Permit in Its Entirety.**

In September 1997, at the first public hearing on the project, some neighbors of the
Property expressed opposition, claiming that the 12.5-acre site was too small. In November
1997, in part to respond to these concerns, Redwood purchased an additional 32.5 acres that

1 came on the market across the street. This purchase resulted in a total of 45 acres of property
2 on which to build the school. Johnson Decl. ¶ 37. Redwood promptly amended its CUP
3 application to include the 32.5-acre site in its plans for the Property. *Id.* ¶ 39. Redwood also
4 redesigned its proposed use of the Property to meet its ministry needs and neighbors’ ostensible
5 concerns. *Id.* Redwood spent nearly \$3 million to purchase the entire Property. *Id.* ¶ 40.

6 The County required an environmental impact report (“EIR”) to be prepared. After the
7 County dragged out the EIR process for three years, AR 731, it sent Redwood’s CUP
8 application to the Municipal Advisory Council for review, which recommended denying a
9 CUP. AR 290-291. On November 6, 2000, the County Planning Commission followed that
10 recommendation and completely denied Redwood’s CUP application to build an adequate,
11 permanent home for its school. AR 318-21.

12 Redwood immediately appealed to the Board of Supervisors. Six months later, and
13 after receiving written testimony³ and a staff report,⁴ the Board first publicly discussed what to
14 do. Rather than ruling on the appeal, the Board directed County planning staff to “come back
15 to the Board with a project that reflects a smaller school, less intensive use, that fits in to the
16 character of the existing community.” AR 562. The County then retained ELS Architecture
17 and Urban Design to create five smaller design alternatives to Redwood’s proposed project.
18 AR 5434. Although County staff supervised ELS, the County required RCS to foot the bill of
19 over \$100,000 for ELS’ work. Johnson Decl. ¶ 47. The five design alternatives were all
20 smaller (either in size, number of students, or both) than Redwood’s original proposal, and also
21 explored, at the County’s direction, whether Redwood could use another property it had
22 subsequently bought between the Property and I-580. *Id.* ¶ 48; AR 5424, 5434.

23 On October 4, 2001, the Board of Supervisors met to discuss Redwood’s CUP and the

24 _____
25 ³ One example of the letters in opposition came from Patrick and Linda Reilly, who live
26 on an estate 3.5 miles away from the Property. They stated “We pay the big bucks in property
27 taxes ...because we want to be in an agricultural area....Why should a tax exempt organization
28 be forced on people who have to pay dearly for the privilege to have the peace and quiet of a
rural environment?” Ex-B-7 (“Lai-Bitker”) at Exh. 1.

⁴ County staff prepared a report for the Board recommending denial. Notably, the staff
failed to inform the Board that the Staff thought some of the Planning Commission’s reasons
for denying the CUP were “weak.” Buckley 271:19-22 & Exh. 14.

1 smaller designs. The Board had the discretion to grant Redwood’s original project or any of
2 the smaller alternatives. Buckley 309:9-311:6. Instead, it voted (3-0) to deny Redwood’s CUP
3 application in its entirety and, in Supervisor Miley’s words, to “put this to bed.” AR 680-681.
4 The Administrative Record doesn’t show that the Supervisors voted on a resolution at that
5 meeting. But the County finally produced in August 2003 a resolution stating that the Board
6 “approved and adopted” the Planning Commission’s findings and conclusions denying
7 Redwood a CUP. AR 5339. The Resolution said nothing about the design alternatives. In
8 March 2004, in response to a Court order in this case, the County belatedly issued findings
9 purporting to explain why it rejected all the alternatives. Docket Nos. 103, 109.

10 **VI. The CUP Denial Threatens the Very Existence of Redwood’s Ministry.**

11 Because it cannot build on its Property, Redwood faces severe restrictions on its
12 ministry, and even termination of that ministry, because the lease for the Martin Site only
13 continues as long as SLUSD wants it to. First, SLUSD is under no obligation to renew the
14 lease for a final 3-year term beginning with the 2007-2008 school year. Second, even if
15 SLUSD chooses to renew the lease, it may be terminated—at SLUSD’s option—on 7 months’
16 notice. Lease at 2; Shira 69:15-19. Third, after the final 3-year term of the Martin Site lease
17 ends in 2010, the Martin Site must be put out to public bid. *Id.* at 33-34. Public entities are
18 given preference in the bidding process over non-public groups like Redwood. *Id.* at 74, 77.
19 The risk that SLUSD may evict Redwood from Martin is real: twice before it evicted Redwood
20 from its properties to comply with new state requirements, and might have to do so again. *Id.*
21 at 35, 72. A public charter school has applied to operate a 400-450 student high school within
22 SLUSD’s boundaries, and SLUSD could place it at the Martin site. *Id.* at 92-93.

23 Although parents considering sending their children to a Christian school like Redwood
24 want to know that the school will continue to exist throughout the school-age years of their
25 children, Redwood is unable to assure parents that Redwood will be around even next year, let
26 alone for graduation. Johnson Decl. ¶ 88. This uncertainty flows from the tenuous nature of
27 Redwood’s continued existence at the Martin Site combined with the County’s refusal to allow
28 Redwood a permanent home on the Property.

1 The County admits that “despite an exhaustive search, by [Redwood] and an
2 independent search by the Alameda County Planning Department, no feasible alternative sites
3 were identified within [Redwood’s] service area.” AR 736. *See also* Johnson Decl. ¶ 42; AR
4 1074-1078 (describing in detail both Redwood’s exhaustive search, and the County’s
5 independent search for available properties). Neither extensive search discovered any
6 properties in Redwood’s service area that would be “viable alternative sites” for Redwood’s
7 junior-senior high school. AR 1078. Nor have Redwood’s continued efforts to find an
8 adequate property, even after the 2001 denial, turned up any alternative. Johnson Decl. ¶ 90.
9 The County also admits that the “No-Project Alternative” of denying the CUP would force
10 Redwood to close: “[b]ecause no alternative site has been identified, this EIR assumes that the
11 school would close and the existing students would enter other local schools near their places
12 of residence.” AR 2186.

13 **VIII. Even Short of Complete Annihilation, the CUP Denial Continues to Impose**
14 **Numerous, Severe Burdens on Redwood’s Ministry.**

15 Even if the CUP denial does not ultimately destroy Redwood’s ministry, it still imposes
16 heavy burdens on virtually the full range of Redwood’s religious exercise.

17 **A. Redwood’s indefinite confinement to an inadequate space forces it to curtail**
18 **its ministry to its current students.** Corporate worship and prayer is severely limited
19 (Johnson Decl. ¶¶ 54–65); teachers are prevented from informing faith with science (*Id.* ¶¶ 17,
20 67); Redwood faces a Hobson’s choice between its academic and athletic ministries (*Id.* ¶ 66);
21 students are restricted in their ability to glorify God through arts and music (*Id.* ¶¶ 70–72);
22 there is no space for spiritual counseling and chaplaincy (*Id.* ¶¶ 75–76); the campus’
23 technology is outdated and Redwood can offer only a limited religious library (*Id.* ¶¶ 74, 77);
24 and athletic facilities are inadequate (Johnson Decl. ¶¶ 68–69, Ex-D (“Cleveland”) ¶ 7, Ex-B-8
25 (“Johnson Depo”) 120-21, 364-65, 372-73).

26 **B. Redwood cannot minister to as many students, as many parents, or the**
27 **community, as it could if it were permitted to build a school on its Property.** Redwood
28 cannot reach out to parents and the community in its service area (Johnson Depo 311:19–24,

1 348:9–349:22; Johnson Decl. ¶¶ 60–61); there is a waiting list for Redwood’s ministry to
2 special needs children (*Id.* ¶ 79); numerous athletic, musical, and arts events cannot happen at
3 all at the Martin Site, denying opportunities for evangelism. (*Id.* ¶¶ 61, 69, 73, Cleveland ¶ 7).

4 **C. Plunging enrollment due to inadequate facilities, paired with Redwood’s**
5 **inability to assure parents that it will continue to exist, create a snowball effect by**
6 **reducing tuition income and forcing staff layoffs.** Redwood K-12 enrollment has declined
7 from 1133 in September 2001 to 848 now, a drop of over 25% since the County’s November
8 2001 denial of Redwood’s CUP application. Ex A-2 (“Graph”); Johnson Decl. ¶ 82. The reason
9 for this decline is that the County denied Redwood a permanent home, and parents don’t want
10 to send their children to a school stuck with inadequate facilities, and that may not exist at all in
11 a few years. *Id.* ¶¶ 85–92. Declining enrollment has started a vicious cycle of tuition loss, less
12 financial aid for needy students, additional enrollment declines, and staff layoffs. *Id.* ¶¶ 95–98.

13 **D. Redwood has suffered “delay, uncertainty and expense” because of the**
14 **County’s denial.** *See Sts. Constantine & Helen v. City of New Berlin*, 396 F.3d 895, 900-01
15 (7th Cir. 2005). The delay of *nine years* in permission to build a permanent home for its junior-
16 senior high ministry on its own Property is devastating to any going concern in Redwood’s
17 position (Johnson Decl. ¶ 103); Redwood faces uncertainty because County ordinances require
18 it to obtain permission to use its land for its ministry *no matter where it builds* (*Id.*); Redwood
19 has also suffered damages of \$30,575,140 based on loss of tuition, construction delay, and
20 additional financing expenses, as well as expenses of approximately \$1 million to go through
21 the unconstitutional CUP process and further expenses for renovation of the Martin site that
22 should have been unnecessary. Ex-C-3 at 3; Johnson Decl. ¶ 105.

23 Each of these categories of substantial burden on religious exercise, A. through D., is
24 described in greater detail in Section II *infra*. *See also* Ex-B-9 & Johnson Decl. ¶¶55–103.

ARGUMENT

25
26 **I. The Undisputed Facts Show That the County’s Zoning Ordinance Is**
27 **Unconstitutional on Its Face and As-Applied, Because It Subjects Religious**
28 **Schools to the “Unbridled Discretion” of County Officials.**

Alameda County imposes a prior restraint on the religious expression of religious

1 schools. Both in the zoning district where Redwood’s property is located, and in every other
2 zone in the County’s jurisdiction, there is no place where religious schools (or churches) may
3 use their land for their First Amendment expression as of right. Instead, religious schools must
4 first beg the County for permission and forego their First Amendment activity while awaiting
5 the outcome of a protracted CUP process that the County itself describes as a “cra[p]-shoot”
6 where “you pay your money and you take your chances.” Ex-B-10 (“Wallace”) 88:13-17.

7 It is well established that a “CUP scheme qualifies as prior restraint because it
8 essentially requires the permittee to obtain the government’s permission or approval before
9 engaging in an act of First Amendment protected [expression.]” *Santa Fe Springs Realty v.*
10 *Westminster*, 906 F.Supp. 1341, 1363-64 (C.D.Cal. 1995). Although prior restraints are not
11 unconstitutional per se, “any system of prior restraint ... [bears] a heavy presumption against
12 its constitutional validity.” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990).

13 [A]n ordinance which...makes the peaceful enjoyment of freedoms which the
14 Constitution guarantees contingent upon the uncontrolled will of an official—as by
15 requiring a permit or license which may be granted or withheld in the discretion of such
16 official—is an unconstitutional censorship or prior restraint upon the enjoyment of
17 those freedoms.

18 *Id.* at 225-26. Accordingly, the Ninth Circuit has emphasized that “[a] law cannot condition the
19 free exercise of First Amendment rights on the unbridled discretion of government officials.”
20 *Desert Outdoor Advertising v. Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) (striking down
21 CUP ordinance that provided local government unbridled discretion to limit First Amendment
22 activity). *See also Vicary v. Corona*, 1997 WL 406768, at *5 n.6 (9th Cir. 1997) (CUP
23 “licensing procedures are invalid if the government official authorizing such permits is given
24 ‘unbridled discretion’ in deciding whether to deny or permit the expressive activity at issue”).

25 “The prime constitutional concern” in cases involving unbridled discretion “is the threat
26 that the [government], unconstrained by narrow, objective criteria, will covertly discriminate
27 against constitutionally protected speech, and then later craft ‘findings’ that more closely
28 conform to constitutional standards.” *3570 East Foothill Blvd. v. Pasadena*, 912 F.Supp. 1268,
1274 (C.D.Cal. 1996). *See also Dease v. Anaheim*, 826 F.Supp. 336, 343 (C.D.Cal. 1993)
(ordinance granting “unbridled discretion” to government decision-maker “implicitly vests the

1 power to regulate” First Amendment expression by impermissible means). Thus, “[t]he mere
2 existence of the [government’s] unfettered discretion, coupled with the power of prior
3 restraint,” can threaten First Amendment values even if such discretion and power are never
4 actually abused. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

5 In order to protect First Amendment expression from the dangers of unbridled
6 discretion, the Ninth Circuit requires that “a law subjecting the exercise of First Amendment
7 freedoms to the prior restraint of a license, without **narrow, objective, and definite** standards to
8 guide the licensing authority, is unconstitutional.” *Desert Outdoor*, 103 F.3d at 818. Other
9 courts similarly emphasize that when zoning permitting schemes limit First Amendment
10 activity, “virtually any amount of discretion beyond the merely ministerial is suspect.
11 Standards must be **precise and objective.**” *Lady J. Lingerie v. Jacksonville*, 176 F.3d 1358,
12 1362 (11th Cir. 1999). *See also Vo v. Garden Grove*, 115 Cal.App.4th 425, 434-35 (Cal. 2004)
13 (when “an ordinance or regulation requires permission of the government, such as a permit ...,
14 before engaging in protected First Amendment activity, precision of regulation must be the
15 touchstone and the standards set forth therein must be susceptible of objective measurement.”).
16 “[C]ourts have not hesitated to invalidate ordinances which give city officials excessive
17 discretion in cases involving the issuance of a conditional permit or license” to engage in First
18 Amendment expression. *C.R. Rialto v. Rialto*, 975 F.Supp. 1254, 1264 (C.D.Cal. 1997).

19 As detailed below, the CUP Ordinance at issue here lacks standards “sufficiently
20 narrow, objective, and definite so as to eliminate any possibility for content-based censorship.”
21 *Santa Fe Springs*, 906 F.Supp. at 1365. At virtually every step in its application, this
22 Ordinance confers on County officials unbridled discretion to suppress the protected First
23 Amendment expression of Redwood and other religious schools. First, all four criteria that
24 Redwood must meet even to **qualify** for the CUP are vague and malleable. Second, even if
25 those four criteria are met, County officials may **still** deny the CUP. And even where the CUP
26 is granted, County officials are unconstrained in the **conditions** they may impose. Indeed, the
27 County has admitted that the whole “CUP process is set up so that the decision-makers can
28 apply **their own understanding** of the community in reaching their discretionary decision”—a

1 subjective standard that will vary from one decision-maker to another. Buckley 114.

2 **A. The County’s Zoning Ordinance Grants the County Unbridled Discretion by**
3 **Establishing Four Malleable Criteria Even to Qualify for the CUP.**

4 None of the four standards in the County CUP Ordinance are narrow, definite, and
5 objective. Instead, the Ordinance gives County officials free rein to apply such open-ended,
6 imprecise, and subjective language as “public need,” “properly related to,” “materially affect
7 adversely,” “materially detrimental,” “public welfare,” and “injurious.” § 17.54.130. These
8 imprecise and subjective standards are either identical to or indistinguishable from language the
9 Supreme Court, the Ninth Circuit, this Court, and numerous others have struck down as vesting
10 unbridled discretion in decision-makers.

11 For example, § 17.54.130(C) assesses whether or not the use will:

12 *materially affect adversely* the health or safety of persons residing or working in the
13 *vicinity*, or be *materially detrimental* to the *public welfare* or *injurious* to property or
improvements in the *neighborhood*.

14 Instead of providing a narrow and objective standard, the open-ended language—“materially
15 affect adversely,” “materially detrimental,” and “injurious”—invites each decision-maker to
16 apply his or her own subjective criteria to determine what meets that standard. The text
17 provides no further criteria to guide this inquiry, and the County admits that there are *no*
18 “guidelines to guide the decision-makers’ discretionary decision in deciding whether the use
19 will create a materially detrimental effect.” Buckley 124-25. The County similarly admits that
20 decision-makers are allowed to “draw on their own sense of what constitutes something that is
21 injurious.” *Id.* at 133. The County also admits that, after considering the evidence in the
22 record, decision-makers are free to make a “*subjective* decision” that a “use would be injurious
23 to the property.” *Id.* at 132-33. Thus, the County admits that in “many cases [it’s] possible”
24 that officials “rely on [a] know-it-when-you-see-it approach.” *Id.* at 243.

25 The text of the CUP Ordinance similarly lacks any limits on what the amorphous terms
26 “public welfare” or “health or safety” include. Indeed, the County admits that “[t]he public
27 welfare can be benefited or harmed in *very general terms* and it’s a *very open-ended sense* of
28 the public and what is their welfare.” *Id.* at 127. The County also admits that “decision-makers

1 apply their own judgment” and “sense of what is public and what is their welfare.” *Id.*⁵ In
2 short, far from providing narrow, definite, and objective standards, § 17.54.130(C) provides no
3 limits at all to cabin the discretion of County decision-makers, who may exercise their own
4 subjective judgments in interpreting these terms and applying them to the facts of any case.⁶

5 The Ninth Circuit struck down language nearly identical to § 17.54.130(C) in *Desert*
6 *Outdoor Advertising*, 103 F.3d at 818. The ordinance in that case required a CUP before
7 erecting an off-site structure or sign anywhere in the city. Although the CUP ordinance did
8 provide some objective criteria, the Court held that other criteria granted discretion to deny a
9 permit on the basis of “ambiguous and subjective reasons.” *Id.* For example, the ordinance
10 provided that a CUP would issue only subject to findings that the structure or sign “will not
11 have a *harmful effect* upon the *health or welfare of the general public* and will not be
12 *detrimental* to the *welfare of the general public* and will not be *detrimental* to the aesthetic
13 quality of the community or the surrounding land uses.” *Id.* (emphasis added). The Court
14 held this language “contains no limits on the authority of City officials to deny a permit.” *Id.*
15 Instead, it afforded officials “unbridled discretion in determining whether a particular structure
16 or sign will be harmful to the community's health, welfare, or aesthetic quality.” *Id.* The
17 discretionary language in § 17.54.130(C) is indistinguishable from that struck down in *Desert*

18 ⁵ Compounding the problem, the terms “vicinity” and “neighborhood” are undefined, so
19 there is no limit on the geographic scope decision-makers may consider in any particular case
20 in evaluating the impact on the public welfare.

21 ⁶ An examination of the application of § 17.54.130(C) to Redwood’s application further
22 underscores the lack of narrow, definite, and objective criteria to guide the County decision-
23 makers. For example, one of the bases for the County’s finding that Redwood’s project would
24 be “detrimental to the public welfare and injurious to property,” was that the project would
25 (allegedly) “greatly increase traffic in the area in a relative sense.” However, the County
26 admits that what counts as a “great increase in traffic” can “vary from decision-maker to
27 decision-maker.” Buckley 245. “Some might think 50 percent is and some might think 5
28 percent is.” *Id.* “[N]o range” exists that the County could give applicants of what level of
traffic decision-makers would find to be “materially detrimental or injurious.” *Id.* at 250-51.
As a result there isn’t “any way” for an applicant to objectively know in advance what level of
traffic increase is so great as to cause the project not to be approved. *Id.* at 246. *See also id.* at
247 (stating that great increase in traffic levels in a relative sense affected the public welfare by
“detract[ing] from the rural feel of the area” but not explaining how an applicant could know a
decision-maker’s sense of the impact of traffic on the “rural feel.”). The County also cited the
noise resulting from Redwood’s project as a basis for a “materially detrimental” finding. But
the County admits that decisionmakers can “differ” on what noise amounts to a “significant
disturbance” and that there isn’t “any criteria to cabin [their] discretion.” *Id.* at 258-59.

1 *Outdoor*. Binding precedent thus requires that the County’s CUP ordinance be struck down.⁷

2 The invalidity of § 17.54.130(C) is sufficient alone to strike down the ordinance, but the
3 other criteria are similarly unconstitutional. Section 17.54.130(A) vests unbridled discretion in
4 County decision-makers by assessing whether the proposed use “is required by the public
5 need.” But the ordinance’s text neither defines, nor places any limit on what decision-makers
6 may consider in assessing, “public need.” The County also admits that it does not “have any
7 criteria to guide the determination by the decision-makers as to what constitutes a public need.”
8 Buckley 108. Thus, County decision-makers may apply their own subjective definition of
9 “public need,” unbounded by any narrow, definite, and objective standard. The amorphous
10 “public need” standard is prone to surreptitious abuse, and courts have routinely struck down
11 similar language.⁸ This Court should follow those decisions here.⁹

12 ⁷ In addition to this binding Ninth Circuit precedent, courts across the country routinely
13 strike down similar language in CUP ordinances. *See, e.g., Desert Outdoor Advertising v. City*
14 *of Oakland*, 2004 WL 3128029, *12-13 (N.D.Cal. April 21, 2004) (striking down CUP
15 ordinance assessing whether use is “compatible with and will not **adversely affect** the livability
16 or appropriate development of abutting properties and the surrounding neighborhood, with
17 consideration to be given to harmony in scale, bulk, coverage, and density.”); *3570 East*
18 *Foothill Blvd.*, 912 F.Supp. at 1274-75 (striking down CUP ordinance assessing whether use is
19 “**detrimental to the public health, safety, or welfare** of persons residing or working adjacent to
20 the **neighborhood** of such use.”); *Vo*, 115 Cal.App.4th at 436-37 (striking down CUP ordinance
21 assessing whether use would “**jeopardize [the] ..public health, safety, or general welfare**” or
22 “**adversely affect** the health, peace, comfort, or **welfare** of persons residing or working in the
23 surrounding area”); *Rialto*, 975 F.Supp. at 1264 & n.8 (striking down CUP ordinance assessing
24 whether use would “**be detrimental or injurious to the health, safety or general welfare of**
25 **persons residing or working in the vicinity.**”); *B & V Greene v. Albany*, 2000 WL 1876426,
26 *4-5 (N.D.N.Y. 2000) (striking down CUP ordinance assessing whether use will “have an
27 **undue adverse effect** on adjacent property, the character of the neighborhood, traffic
28 conditions, ... or other matters affecting the public health, safety, **welfare**, or convenience.”);
Dease, 826 F.Supp. at 339, 344 (striking down CUP ordinance assessing whether use is
“**detrimental to the peace, health, safety and general welfare** of the area” or “**adversely affect**
the adjoining land uses”); *Ellinois v. Austintown*, 203 F.Supp.2d 875, 882, 884 (N.D.Ohio
2002) (striking down CUP ordinance assessing whether use “will be **detrimental** to any
persons, property, or the **general welfare**”); *Lady J. Lingerie*, 176 F.3d at 1362, 1369 (striking
down CUP ordinance assessing whether use would “have an environmental impact inconsistent
with the **health, safety, or welfare** of the community” or would “have a **detrimental effect** on
the future development of contiguous properties or the general area”)(all emphases added). *See*
also Staub v. City of Baxley, 355 U.S. 313, 322 (1958) (striking down law which predicated the
issuance of a permit to engage in protected First Amendment activity upon the government
decision-makers determining its adverse “effects upon the general welfare of citizens.”).

⁸ *See, e.g., Diamond v. Taft*, 29 F.Supp.2d 633, 649-50 (E.D.Cal. 1998)(striking down
CUP ordinance assessing whether use is “essential or desirable to the public convenience or
welfare”); *T.J.’s South v. Lowell*, 895 F.Supp. 1124, 1130 (N.D.Ind. 1995)(striking down CUP
ordinance assessing whether use is “necessary for the public convenience at that location”).

1 Section 17.54.130(B) calls for consideration of whether “the use will be *properly*
2 *related* to other land uses and transportation and service facilities in the *vicinity*.” Again, this
3 fails to provide a standard that is narrow, definite, and objective, especially because of the
4 amorphous language “properly related to.” The County admits that decision-makers must
5 make a “discretionary determination” in each case to decide if a use is “properly related,” and
6 that “there are *no* guidelines that limit th[e] criteria that may be considered.” Buckley 109-110.
7 Again, officials enjoy complete discretion to form their own subjective judgment.

8 As this Court has explained, this standard confers unbridled discretion because what
9 one official sees as properly related “could differ significantly from what another official sees
10 as such.” *City of Oakland*, 2004 WL 3128029, *12-13 (striking down “compatible”
11 language).¹⁰ Similarly, other courts have struck down CUP ordinances like § 17.54.130(B) that
12 fail to provide any precise and objective criteria to guide officials in measuring and evaluating
13 the permissible affects of a proposed use on adjacent properties or public services.¹¹

14 *See also Lakewood*, 486 U.S. at 769 (striking down statute authorizing denial of permit if it “is
15 not in the public interest”); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149 (1969)
16 (striking down statute authorizing denial of permit if use threatens “the public welfare”).

17 For similar reasons, the Castro Valley Plan’s test for locating a so-called “urban
18 development” outside the defined Castro Valley urban area is also constitutionally flawed.
19 That test states that an “urban development” will only be permitted if it meets a “compelling
20 social, economic, and/or social objective.” Buckley at Exh. 2. However, the Plan doesn’t limit
21 the discretion of decision-makers in deciding what amounts to such an important objective.
22 And the County admits that there aren’t “*any* guidelines in place” to guide decision-makers in
23 determining what is a compelling social, economic, and/or social objective. Buckley 83-84.
24 Instead, the determination of whether a proposed use qualifies under this test is “an example of
25 a *gray area* left to [the] final decisionmakers.” *Id.*

26 ¹⁰ The standard is also constitutionally problematic because the term “vicinity” is left un-
27 defined, thereby placing no geographic scope on the other land uses and transportation and
28 service facilities that the decision-makers can consider in evaluating this factor. Some officials
may construe “vicinity” narrowly and limit their consideration to adjacent land uses and
facilities, while others may construe “vicinity” more broadly to encompass land uses and
facilities several miles away. This lack of precision concerning a factor that may be outcome
determinative in any particular case requires a finding of unbridled discretion.

29 ¹¹ *See, e.g., Santa Fe Springs Realty*, 906 F.Supp. at 1366 (striking down CUP ordinance
30 assessing whether use is “*adequately served* by highways or streets ... to carry the kind or
31 quantity of traffic that such use would generate”); *Lady J. Lingerie*, 176 F.3d at 1362, 1370
32 (striking down CUP ordinance assessing whether use would “*overburden* existing public
33 services and facilities”); *Rialto*, 975 F.Supp. at 1263 n.8 (striking down CUP ordinance
34 assessing whether use is “*compatible with existing land uses*” and had “*adequate access* to
35 those utilities and other services required for the proposed use”); *Franken v. Evanston*, 967
36 F.Supp. 1233, 1237 (D.Wyo. 1997) (striking down CUP ordinance assessing whether use “is
37 designed to be *compatible with surrounding land uses*”); *City of Oakland*, 2004 WL 3128029,

1 The complete open-endedness of the “properly related” standard is illustrated by its
2 application here. Redwood’s use was faulted because it would result in a “significantly higher
3 concentration” of people on its 45 acres than on the surrounding properties. AR 320; Buckley
4 180. But the ordinance doesn’t set population density as a relevant factor, or define how higher
5 density renders a use not “properly related” to existing uses. Instead, both the decision
6 whether to even consider population density, and what counts as “significantly higher,” is left
7 to the whims of County officials. The County even admits that “what counts as significantly
8 higher c[an] vary from decision-maker to decision-maker,” *id.* at 184, and that there is “no hard
9 and fast rule” as to what population density is too high. *Id.* at 118. So vague is the standard
10 that the County admits that it “can’t tell you” what the “maximum number of students that
11 would be compatible with the area.” *Id.* at 273.¹²

12 Finally, § 17.54.130(D) also fails to set forth criteria that are narrow, definite, and
13 objective, directing decision-makers to evaluate whether the proposed First Amendment
14 activity “will be *contrary to* the specific intent clauses or performance standards established for
15 the district, in which it is to be located.” The County admits “[t]here aren’t written guidelines”
16 to guide decision-makers in determining what is “contrary to the specific intent clause.”

17 at*12-13 (striking down CUP ordinance assessing whether use is “*compatible with* ... the
18 livability or appropriate development of abutting properties and the surrounding
19 neighborhood”) (all emphases added).

12 Redwood was also faulted under the “properly related” factor because public
20 transportation wasn’t available to the site. AR 320. (Notably, the school’s site is adjacent to a
21 major freeway on/off ramp and RCS planned to provide busing for many of its students.
22 Buckley at 200, 206). However, § 17.54.130(B) doesn’t specify that availability of public
23 transportation to the site is a criteria to be considered or, even if it did, under what
24 circumstances its lack of availability would render the proposed use not “properly related.”
25 Instead, both the decision whether to even consider the criteria of availability of public
26 transportation, and whether its absence renders the proposed use not “properly related,” is left
27 to the unfettered discretion of County officials. Moreover, the County admits that decision-
28 makers would differ as to whether a site would even be “well-served” by public transportation
in the first place. *Id.* at 204-05.

In addition, the County found RCS did not satisfy the “properly related” factor because
its sewer service would be provided through a special agreement (at RCS’ own expense) with
the Castro Valley Sanitary District. AR 320. Again, nowhere does § 17.54.130 specify that
providing for sewer service through a special agreement is a relevant factor to consider under
the “properly related” test, or in what circumstances such a special agreement makes the use
proper or improper. Instead, the decision of whether to consider this as a criteria and what
weight to give it is left to the unbridled discretion of County officials. And again the County
admits this is a judgment that varies among decisionmakers. Buckley 213-14.

1 Buckley 171. Worse, the County admits that there aren't "any limits on what factors decision-
2 makers can consider in deciding whether or not the use is contrary to the specific intent clauses
3 and performance standards." *Id.* This is classic unbridled discretion.¹³

4 Although the plain language of § 17.54.130 reflects enough vagueness to establish
5 unbridled discretion, the testimony of County officials closest to the CUP process confirms this
6 conclusion. The Supervisors who voted on Redwood's CUP all believe that they have
7 "complete and total discretion" in deciding on CUP applications. Ex-C-2 (Miley) 62, 64
8 ("complete and total discretion"); Ex-C-3 (Steele) 52, 57 ("complete and total discretion";
9 "do[es]n't know" if "there are any objective standards"); Ex-B-7 (Lai-Bitker) 22 ("broad
10 discretion"). The County also describes the CUP process as a "cra[p]-shoot" where "you pay
11 your money and take your chances." Wallace 88:13-17.

12 In sum, by authorizing the application of indefinite and subjective criteria, § 17.54.130
13 empowers County officials to prohibit a religious school on a covertly discriminatory basis—or
14 even because they just dislike it. These are precisely the dangers that the unbridled discretion
15 doctrine is intended to avoid: the difficulty of "effectively detecting, reviewing, and correcting
16 content-based censorship 'as applied' without standards by which to measure the censor's
17 action." *Lakewood*, 486 U.S. at 759. Because the County's CUP scheme fails to provide
18 narrow, definite, and objective standards to guide officials, it is unconstitutional, both on its
19 face and as applied to Redwood. Therefore, Redwood is entitled to appropriate relief.¹⁴

20 _____
21 ¹³ An examination of the intent clause for single-family residential districts (like the one
22 where Redwood sought to locate) only confirms the unbridled discretion conferred by this
23 language. The specific intent for such districts is to "provide for and protect established
24 neighborhoods of one-family dwellings, and to provide space in *suitable* locations for
25 additional developments of this kind, together with *appropriate* community facilities."
26 § 17.08.010 (emphasis added). However, the ordinance doesn't define "suitable" or
27 "appropriate," or what factors to consider in making such a judgment. Instead, as the County
28 admits, the decision is left completely to the discretion of County officials. Buckley 173.
Moreover, as with all of the other CUP criteria, they are allowed to exercise this discretion
without the benefit of any criteria to guide or limit their decision-making. *Id.* at 174. For these
reasons, § 17.54.130(D) also extends County decision-makers impermissible, unbridled
discretion. Ultimately, even the County admits that its application of § 17.54.130(D) to
prohibit Redwood's use was "weak." *Id.* at 271.

¹⁴ Redwood is entitled to injunctive relief enjoining the application of this invalid
ordinance and declaring that, because the CUP ordinance is invalid, religious schools are a
permitted, rather than a conditional, use in Redwood's zoning district. Redwood is also entitled

1 **B. The County’s Zoning Ordinance Grants the County Unbridled Discretion by**
2 **Allowing the County Discretion to Deny a CUP Even If the Four Malleable**
3 **Criteria Are Satisfied.**

4 Even assuming § 17.54.130’s four criteria somehow provided a narrow, definite, and
5 objective test, the CUP ordinance is still an invalid prior restraint, because it grants officials
6 unbridled discretion to deny a religious school a CUP to engage in First Amendment expression
7 *even if* all of the identified criteria in § 17.54.130 are met. Specifically, § 17.54.135 provides
8 that the Planning Commission “*may*” authorize approval of a CUP application “if the evidence
9 contained in or accompanying the application or presented at the hearing is deemed sufficient.”
10 *See also* § 17.54.140 (Board of Zoning Adjustments “*may*” authorize approval if § 17.54.130’s
11 criteria are met)(all emphases added). Likewise, § 17.54.710 provides that the Board of
12 Supervisors, in hearing an appeal from the Planning Commission, “[*m*]ay sustain, modify, or
13 overrule any order brought before it on appeal” (emphasis added). Nowhere does the ordinance
14 include mandatory language requiring either the Planning Commission or Board of Supervisors
15 to issue a CUP where an applicant satisfies the criteria specified in § 17.54.130. Instead, use of
16 the word “may” grants County officials the unfettered discretion of a Roman emperor to give a
17 “thumbs-down” to any CUP applicant for any reason (or no reason) at all.

18 Courts, including this one, have struck down similar permitting ordinances. In *Napa*
19 *Valley Publishing Co. v. Calistoga*, 225 F.Supp.2d 1176 (N.D.Cal.2002), this Court reviewed
20 an ordinance limiting First Amendment activity that provided: “upon compliance by the
21 applicant with conditions and requirements specified in this section, the [City] *may* in the
22 [City’s] discretion issue a written permit.” *Id.* at 1188 (emphasis added). Like the ordinance
23 here, the word “may” allowed officials to deny the permit despite “compliance by the applicant
24 with conditions and requirements specified.” This Court struck down the ordinance because
25 “on its face, there are no limits on the City’s discretion to grant or deny [the] permit.” *Id.*
26 Other courts similarly reject permitting regimes that use the word “may” to give government

27
28 to damages flowing from being forced to go through an invalid CUP process, and from the
 refusal to allow Redwood to build its school. Johnson Decl. ¶¶ 49, 105.

1 officials similar discretion.¹⁵ Because the County’s CUP ordinance is indistinguishable from
2 those held invalid in *Napa Publishing* and similar cases, this Court should strike it down.

3 **C. The County’s Zoning Ordinance Grants the County Unbridled Discretion by**
4 **Failing to Place Any Limits on Conditions That May Be Imposed on a CUP.**

5 The County’s CUP ordinance is also facially unconstitutional because it places *no limits*
6 on the discretion of County officials to impose conditions on CUPs issued to a religious school.
7 *See* § 17.54.170 (specifying that approval of a CUP “may be made contingent
8 upon...observance of specified conditions, including *but not limited to* the following [list of 5
9 conditions]”). *See also* Buckley 681 (“decision-makers have wide discretion in whatever
10 conditions of approval they want to put into a CUP”). Such unbridled discretion again creates
11 the opportunity for officials to impose conditions that censor the expression of religious schools
12 or covertly discriminate against certain religious institutions. Accordingly, numerous courts
13 have held that provisions that fail to cabin the discretion of officials to impose conditions on
14 permits involving First Amendment expression are unconstitutional.¹⁶ This Court should
15 follow this weight of authority, and strike down the County’s CUP ordinance.

16 ¹⁵ *See, e.g., Long Beach Lesbian and Gay Pride v. Long Beach*, 14 Cal.App.4th 312, 325
17 (Cal. 1993) (striking down parade permit ordinance providing that city official “*may* issue a
18 permit ... if it is determined that [a list of several] criteria have been met,” because “[b]y using
19 the word *may* as opposed to shall or some other imperative” the ordinance grants “unbridled
20 discretion to deny or reject a[n] ... application even if all the criteria set forth in the [ordinance]
21 have been met.”); *Dillon v. Mun. Court for Monterey-Carmel*, 4 Cal.3d 860, 870 (Cal. 1971)
22 (ordinance providing that civic demonstrations “*may* be permitted provided [a list of five
23 conditions] are met” was “a barefaced example of uncontrolled discretion” because it “contains
24 no guarantee that a permit will issue even if the application meets all of the five conditions.”);
25 *Rialto*, 975 F.Supp. at 1263 (“conditional development permit” ordinance providing that city
26 council could “affirm, reverse, or modify...or make and substitute such additional decision as it
27 *may* find warranted” granted unfettered discretion because “no provision...make[s] issuance of
28 a [permit] mandatory if all of the requirements for one are met.”)(all emphases added).

¹⁶ *See, e.g., Lakewood*, 486 U.S. at 769-70 (striking down ordinance granting mayor
unbridled discretion to attach to a permit any “term or conditions deemed necessary and
reasonable”); *Vo*, 115 Cal.App.4th at 437 (striking down CUP ordinance that gave zoning
administrator “unfettered discretion in deciding what conditions to impose when issuing a
CUP.”); *Rialto*, 975 F.Supp. at 1264 (striking down permit ordinance that gave city “excessive
discretion” to impose any “necessary and desirable” conditions to “protect the public health,
safety, and welfare”); *Dease*, 826 F.Supp. at 339 (striking down CUP ordinance extending
officials unbridled discretion to impose “such conditions as it may determine to be reasonably
necessary...to protect the public health and safety”); *Santa Fe Springs*, 906 F.Supp. at 1366
(CUP ordinance that allows a planning commission to “place any condition on the project,
without limitation, ... would undoubtedly constitute an unconstitutional prior restraint.”).

1 **II. The Undisputed Facts Show that the County’s Denial of Redwood’s CUP Application**
2 **Violates RLUIPA’s “Substantial Burdens” Provision.**

3 RLUIPA is a federal civil rights statute—passed with broad, bi-partisan support—to
4 remedy a pattern of unconstitutional restrictions on religious exercise through discretionary or
5 patently discriminatory land-use laws. By a series of nine separate hearings over a three-year
6 period, Congress determined that religious organizations “are frequently discriminated against
7 on the face of zoning codes and also in the highly individualized and discretionary processes of
8 land use regulation.” Joint Statement of Sens. Hatch & Kennedy, 146 CONG. REC. S7774 (daily
9 ed. July 27, 2000) (“Sponsors’ Statement”). Congress also found that religious organizations
10 “cannot function without *a physical space adequate to their needs* and consistent with their
11 theological requirements. The right to build, buy, or rent such a space is an indispensable
12 adjunct of the core First Amendment right to assemble for religious purposes.” *Id.* (emphasis
13 added).

14 In response to these findings, Congress carefully crafted RLUIPA § 2, the land-use
15 provisions of the Act. The various distinct provisions of § 2 are designed to reinforce existing
16 constitutional protections for religious speech, assembly, and worship. One of those
17 protections is embodied in § 2(a), which provides as follows:

18 (1) GENERAL RULE- No government shall impose or implement a land use regulation
19 in a manner that imposes a *substantial burden* on the religious exercise of a person,
20 including a religious assembly or institution, *unless the government demonstrates* that
21 imposition of the burden on that person, assembly, or institution—

22 (A) is in furtherance of a *compelling governmental interest*; and

23 (B) is the *least restrictive means* of furthering that compelling governmental interest.

24 42 U.S.C. § 2000cc(a)(1). This provision applies where the plaintiff can establish that one of
25 three possible “jurisdictional hooks” exists—the burden (a) was imposed in a program that
26 received federal funds, (b) affected interstate commerce, or (c) was imposed pursuant to a
27 system of individualized assessments. *Id.* RLUIPA also underscores that the “religious
28 exercise” not to be burdened includes “*any* exercise of religion, whether or not compelled by,
or central to, a system of religious belief,” and includes “[t]he use, building, or conversion of
real property for the purpose of religious exercise.” RLUIPA § 8(7).

1 The undisputed facts of this case show that the County violated RLUIPA § 2(a). First,
2 Redwood has satisfied at least one “jurisdictional hook” under § 2(a)(2). The County’s
3 interference with Redwood’s proposed construction activities, as well as its ongoing operations
4 as an employer and educator, unquestionably affect interstate commerce within the meaning of
5 RLUIPA § 2(a)(2)(B). Alternatively, the County’s highly discretionary, case-by-case CUP
6 application procedure represents a classic “system of individualized assessments” within the
7 meaning of RLUIPA § 2(a)(2)(C). Second, the County has burdened an activity—engaging in
8 religious instruction, formation, and worship through a religious school ministry—that is
9 clearly “religious exercise” within the meaning of the Act. RLUIPA § 8(7)(B). Third, the
10 undisputed facts show that the burden on that religious exercise is “substantial.” Courts
11 routinely consider it a “substantial” burden for the government to *completely* deny a religious
12 group a permit to assemble for religious exercise on its own land. But the burden here is even
13 more acute. By preventing Redwood from establishing an adequate, permanent home, the
14 permit denial additionally forces Redwood to continue hobbling along in a crippled state, and
15 even threatens the very existence of its ministry. Any of these circumstances would suffice
16 alone to establish that a burden is “substantial,” but in combination, the burden far exceeds the
17 required showing. Fourth and finally, under the undisputed facts, the County cannot possibly
18 satisfy its burden under strict scrutiny. The County’s asserted interests are neither
19 “compelling” as a matter of law, nor sufficiently proven as a matter of fact. The facts also
20 show that the County failed to use the “least restrictive means” available to further whatever
21 (non-compelling) interests it may have, choosing instead the means *most* restrictive of religious
22 exercise—complete denial of Redwood’s religious use.

23 As the Seventh Circuit recently explained, § 2(a) exists to “backstop[] the explicit
24 prohibition of religious discrimination in the later section of the Act, much as the disparate-
25 impact theory of employment discrimination backstops the prohibition of intentional
26 discrimination.” *Constantine*, 396 F.3d at 900. The provision protects religious organizations
27 from inherent dangers of systems where “a state delegates essentially standardless discretion to
28 nonprofessionals operating without procedural safeguards.” *Id.* Because this case represents

1 exactly what Congress targeted with RLUIPA § 2(a)—a discretionary zoning process denying
2 an adequate place to assemble for religious exercise—summary judgment should be granted.

3 **A. Redwood Has Satisfied the Jurisdictional Elements of RLUIPA § 2(a).**

4 **1. RLUIPA Applies Because the Permit Denial Affected Commerce.**

5 The undisputed facts demonstrate that the County’s CUP denial affected interstate
6 commerce. RLUIPA’s substantial burden provision applies where “the substantial burden
7 affects, or removal of that substantial burden would affect, commerce with foreign nations,
8 among the several States, or with Indian tribes.” RLUIPA § 2(a)(2)(B).¹⁷ Redwood’s
9 prohibited activities—including construction of an entire multi-million dollar campus on the
10 Property—would unquestionably affect interstate commerce. The CUP denial also affected
11 commerce by causing Redwood’s enrollment to plummet, drastically reducing tuition
12 payments.¹⁸ In fact, the County admits that Redwood’s proposed land use would “affect
13 commerce” on multiple levels, including construction, payment of tuition, employment of
14 teachers and staff, and purchase of supplies, among others. Buckley 223-4. This is just the sort
15 of commercial activity Congress intended to reach under RLUIPA.¹⁹ Other courts agree that
16 construction and ongoing educational operations satisfy RLUIPA § 2(a)(2)(B).²⁰ Section 2(a)
17 therefore applies here by this jurisdictional element.

18 **2. RLUIPA Applies Because the County Denied Redwood’s Permit Pursuant to a**
19 **System of Individualized Assessments.**

20 RLUIPA § 2(a) also applies because its “individualized assessment” jurisdictional
21 element is satisfied as a matter of law. Under that section, RLUIPA’s substantial burden

22 ¹⁷ Congress’ interstate commerce power reaches activities that “arise out of or are
23 connected with a commercial transaction, which viewed in the aggregate, substantially affect[]
interstate commerce.” *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995).

24 ¹⁸ See Johnson Decl. ¶ 82, 95 (denial led to loss of tuition); Graph (decline in enrollment
since CUP denial).

25 ¹⁹ See, e.g. 146 CONG. REC. S7775; H.R. REP. 106-219, at 28 (identifying “construction
projects” as examples of “a specific economic transaction in commerce” that land-use
regulations may impermissibly burden).

26 ²⁰ See, e.g., *Westchester Day School v. Village of Mamaroneck*, 417 F.Supp.2d 477, 541
27 (S.D.N.Y. 2006) (construction of religious school satisfied RLUIPA § 2(a)(2)(B)); *Cottonwood*
28 *Christian v. Cypress*, 218 F.Supp.2d 1203, 1221–22 (C.D.Cal. 2002) (CUP denial preventing
construction of church building affected commerce because it involved “construction workers,
construction materials, transportation vehicles and commercial financial transactions.”).

1 provision applies where “the substantial burden is imposed in the implementation of a land use
2 regulation...under which a government makes...individualized assessments of the proposed
3 uses for the property involved.” 42 U.S.C. § 2000cc(a)(2)(C). Discretionary zoning permit
4 procedures, like the County’s here, commonly impose a system of individualized assessments.
5 As Judge Posner explained, RLUIPA § 2 is designed to “backstop[.]” intentional discrimination
6 provisions in situations where “a state delegates essentially standardless discretion to
7 nonprofessionals operating without procedural safeguards.” *Constantine*, 396 F.3d at 900. For
8 that reason, legion courts have held that zoning permitting and variance procedures represent
9 systems of individualized assessments.²¹ The County has characterized its CUP process as one
10 of “case-by-case” analysis, predicated on vague and open-ended criteria left to the “discretion”
11 of County officials.²² The County even admits that the CUP process is one of “individualized
12 assessment.”²³ It is thus exactly the type of discretionary decision-making targeted by
13 Congress. The substantial burdens test therefore applies under this jurisdictional element also.

14 **B. Redwood’s Activities Are Unquestionably “Religious Exercise” Within the**
15 **Meaning of RLUIPA.**

16 Redwood’s plan to build and operate a religious school on the Property is exactly the
17 sort of religious exercise Congress intended to protect. RLUIPA § 8(7)(B) specifically defines
18 religious exercise as “[t]he use, building, or conversion of real property for the purpose of

19 ²¹ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004)
20 (finding individualized assessments where zoning “officials may use their authority to
21 individually evaluate and either approve or disapprove of churches and synagogues in
22 potentially discriminatory ways”); *DiLaura v. Ann Arbor*, 30 Fed. Appx. 501, 510 (6th Cir.
23 2002) (denial of variance was “clearly” a system of “individualized assessments”); *WDS*, 417
24 F.Supp.2d at 542 (denial of permit to build religious school based upon “subjective” criteria
25 was system of individualized assessments); *Living Water Church v. Meridian Charter Tp.*, 384
26 F.Supp.2d 1123, 1130–31 (W.D. Mich. 2005)(same); *Castle Hills First Baptist Church v.*
27 *Castle Hills*, 2004 WL 546792, at *15 (W.D. Tex. 2004) (same); *Guru Nanak Sikh Society v.*
28 *County of Sutter*, 326 F. Supp. 2d 1140, 1160 n.10 (E.D. Cal. 2003)(same); *U.S. v. Maui Cy.*,
298 F.Supp.2d 1010, 1016 (D. Haw. 2003)(same); *Freedom Baptist Church v. Middletown*, 204
F.Supp.2d 857, 868 (E.D. Pa. 2002)(“zoning ordinances must by their nature impose individual
assessment regimes. ... [L]and use regulations through zoning codes necessarily involve case-
by-case evaluations”).

²² See, e.g., Buckley Depo 206, 221-23, 233, 257-8, 372, 386-87. See also *supra* § I
(discussing unbridled discretion in CUP ordinance).

²³ Buckley 169 (admitting that CUP ordinance requires County decision-makers to
“engage in an individualized assessment”).

1 religious exercise.” It is undisputed that Redwood intends to carry out religious exercise on the
2 property: its very mission is to minister to children and families in the Castro Valley area by
3 providing them with a Christ-centered education. Johnson Decl. ¶ 4. It does so through the
4 infusion of Biblical teaching into every subject, as well as regular communal worship and
5 prayer. *Id.* ¶¶ 4–5, 14–24. Thus constructing Redwood’s permanent home on the Property is
6 undoubtedly the “use” and “building” of real property “for the purpose of religious exercise.”

7 **C. The Undisputed Facts Show That the County Has Placed a Substantial Burden on**
8 **Redwood’s Religious Exercise in Violation of RLUIPA.**

9 **1. A Substantial Burden on Religious Exercise Is One That Places a “Significantly**
10 **Great Restriction or Onus” upon It.**

11 In order to impose a substantial burden on religious exercise, the County need not
12 preclude that exercise altogether, but must instead place a non-trivial restriction upon it. As the
13 Ninth Circuit has stated, “a ‘substantial burden’ on ‘religious exercise’ must impose a
14 significantly great restriction or onus upon such exercise.” *San Jose Christian Coll. v. City of*
15 *Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). This formulation is similar to that
16 employed by other courts, which have made clear that, while mere inconvenience will not
17 suffice,²⁴ demonstrating the existence of a substantial burden “is not a particularly onerous
18 task.” *McEachin v. McGuinness*, 357 F.3d 197, 202 (2d Cir. 2004). Similarly, the Seventh
19 Circuit has held that burdens need not be “insuperable” in order to be substantial under
20 RLUIPA. *Constantine*, 396 F.3d at 900-01 (“delay, uncertainty, and expense” resulting from
21 denial of variance to permit a church to move to a new location was a substantial burden under
22 RLUIPA).

23 **2. The County Significantly Restricted Redwood’s Religious Exercise by**
24 **Completely Denying Its Application to Use Its Property for Religious Exercise.**

25 RLUIPA prohibits substantial burdens placed upon “religious exercise,” defined as
26 “[t]he use, building, or conversion of real property for the purpose of religious exercise.”
27 RLUIPA § 8(7)(B). Here, it is undisputed that the County *completely* denied Redwood’s
“religious exercise”; it didn’t just “burden” Redwood’s plan to “use, build[, [and] conver[t]”

28 ²⁴ *See Guru Nanak* at 1151 (substantial burden “must be more than an inconvenience”).

1 its Property for religious instruction, but prohibited it altogether. Completely preventing the
2 use of property for ministry is precisely what Congress sought to address with RLUIPA Section
3 2. *See* Sponsors’ Statement, *supra* (religious organizations “cannot function without a physical
4 space adequate to their needs and consistent with their theological requirements. The right to
5 build ... such a space is an indispensable adjunct of the core First Amendment right to
6 assemble for religious purposes.”)

7 A different case would be presented if Redwood had refused to go through the CUP
8 process at all, or, like the applicant in *SJCC*, failed to complete an application. But here, it is
9 undisputed that Redwood filed a complete application. *SJCC*, 360 F.3d at 1035 (no substantial
10 burden where school failed “to submit a complete application as is required of all applicants.”).
11 Similarly, it would be a harder case if the County, rather than completely denying Redwood’s
12 application, had imposed certain conditions on its use of the Property as a school. The Court
13 would then have to evaluate the conditions to see if they placed a “significantly great
14 restriction” on Redwood’s use of its property for religious exercise. But here there is no such
15 ambiguity. A prohibition of Redwood’s ability to use its property for a religious school falls
16 comfortably within the definition of a “significantly great restriction” on religious exercise.

17 The facts of this case follow the pattern of other cases where courts have found the
18 burden “substantial.” The Seventh Circuit recently held that a city “substantially” burdened
19 religious exercise by completely denying a variance that would have allowed construction of a
20 church. *Constantine*, 396 F.3d at 900-901. Judge Posner’s thoughtful opinion made clear that
21 burdens need not be “insuperable” in order to be substantial under RLUIPA:

22 The Church in our case doesn’t argue that *having to apply* for what amounts to a zoning
23 variance to be allowed to build in a residential area is a substantial burden. It complains
24 instead about having either to sell the land that it bought in New Berlin and find a
suitable alternative parcel or *be subjected to unreasonable delay by having to restart*
the permit process....

25 The burden here was substantial. *The Church could have searched around for*
26 *other parcels of land* (though a lot more effort would have been involved in such a
search than, as the City would have it, calling up some real estate agents), *or it could*
27 *have continued filing applications with the City*, but in either case there would have
been *delay, uncertainty, and expense*.

28 That the burden would not be insuperable would not make it insubstantial. The

1 plaintiff in the *Sherbert* case, whose religion forbade her to work on Saturdays, could
2 have found a job that didn't require her to work then had she kept looking rather than
3 giving up after her third application for Saturday-less work was turned down. But the
4 Supreme Court held that the fact that a longer search would probably have turned up
5 something didn't make the denial of unemployment benefits to her an insubstantial
6 burden on the exercise of her religion. *Id.*²⁵

7 Here, as in *Constantine*, Redwood went through the zoning process, but was completely
8 prohibited from developing its property for its religious ministries. Redwood could continue
9 searching around for other parcels of land, or it could continue filing applications for a CUP
10 with the County, but in either case, there will be continued delay, uncertainty, and expense.
11 Indeed, these factors are present in greater degree than in *Constantine*, as the County has
12 admitted that there is nowhere within Redwood's service area for its ministry other than the
13 Property. AR 1074-78. But even if Redwood suddenly found an alternative property, it would
14 still have to endure the entire CUP process again, because the County does not allow religious
15 schools as a permitted use *anywhere* in the County. Johnson Decl. ¶ 103. Thus it is undisputed
16 that Redwood would experience substantial *delay* (Redwood's CUP application for the
17 Property took almost 4 years, *Id.* ¶¶ 37, 48), *expense* (Redwood paid over \$500,000 in fees and
18 costs during the processing of the CUP application, *Id.* ¶ 49), and *uncertainty* (there is no
19 guarantee that the County would even approve another CUP application). See Wallace 88:13-
20 17 (describing CUP process as a "cra[p]-shoot" where you "pay your money and take your
21 chances"). These undisputed facts describe a burden that is even greater than in *Constantine*.

22 Other courts have likewise held that the complete prohibition of a CUP or variance
23 application to allow a religious institution to use, build and convert its property for the purpose
24 of ministry is a "substantial burden" under RLUIPA.²⁶ This case is no different.

25 ²⁵ Notably, the Seventh Circuit distinguished the type of challenge in *Constantine*—an as
26 applied challenge to the denial of a variance—from the facial challenge brought in *C.L.U.B. v.*
27 *Chicago*, 342 F.3d 752 (7th Cir. 2003), to the mere requirement of having to apply for a zoning
28 permit. *Constantine*, 396 F.3d at 900. Other courts have likewise held that *C.L.U.B.*'s
effectively impracticable standard, which matches the normal "no set of circumstances exists"
rigors of a facial challenge, *U.S. v. Salerno*, 481 U.S. 739, 745 (1987), has no application in as-
applied challenges to a permit denial. See, e.g., *Maui Cy.*, 298 F.Supp.2d at 1017 (*C.L.U.B.*'s
"facial challenge" standard did not apply to "an as-applied challenge" to permit denial); *Guru*
Nanak, 326 F.Supp.2d at 1153–54 (refusing to apply *C.L.U.B.* to as-applied challenge).

²⁶ See, e.g., *DiLaura*, 30 Fed.Appx. at 509 (denial of variance that prevented "gatherings
of individuals for the purposes of prayer (the activity [sought by the religious landowner]) is a
use of land constituting a religious exercise that is substantially burdened."); *Congregation Kol*

1 **3. The County Significantly Restricted Redwood’s Religious Exercise by Denying**
2 **It the Ability to Build an Adequate, Permanent Home on Its Property.**

3 **a. Without an Adequate, Permanent Home, Redwood’s Religious Exercise Is**
4 **Significantly Restricted in Numerous Concrete Ways.**

5 Additional undisputed facts further reinforce Redwood’s showing that the County’s
6 decision to prohibit Redwood’s ministry on the Property significantly restricted Redwood’s
7 religious exercise in numerous concrete and specific ways. Instead of building and using its
8 Property as an adequate, permanent home for its ministry, Redwood has been forced to limp
9 along at a temporary, inadequate location that it could lose at any time on 7 months’ notice.

10 **Restricted Corporate Worship:** The CUP denial has significantly restricted
11 Redwood’s corporate prayer and worship activities. Assembling the entire student body and
12 faculty for weekly worship services and times of corporate prayer on an as-needed basis is an
13 important component of Redwood’s religious exercise. Johnson Decl. ¶¶ 23, 54–58. But there
14 is no space at the Martin Site for a chapel (or other room) where the school may assemble for
15 worship and prayer. *Id.* ¶ 54. Instead, the School is forced, contrary to its beliefs, to splinter
16 the body and hold two separate weekly worship services. *Id.* Redwood must similarly splinter
17 the body for times of prayer (including traumatic events like 9/11 and the sudden death of a
18 teacher) *id.* ¶¶ 55–58, or forego gathering for group prayer entirely, again in contravention of
19 its beliefs. *Id.* ¶ 54; Johnson Depo 352:18–353:11, 358:21–359:13.

20 Similarly, Redwood is forced to exclude half the high school and the entire junior high
21 from the annual Senior Chapel, an important event in which the seniors lead worship and
22 minister to the younger students. Johnson Decl. ¶ 59; Johnson Depo 99:17–100:18. Redwood
23 is also significantly restricted in its ability to provide assembly space for choirs, both of its own
24 students and others, to lead in worship and minister to the student body through music.
25 Johnson Decl. ¶ 70; Johnson Depo 320:1–321:14. In addition, because some outside worship

26

Ami v. Abington Tp., 2004 WL 1837037, at *9 (E.D.Pa. 2004) (denial of variance that would
27 have allowed congregation to move from leased location to permanent home was substantial
28 burden under RLUIPA because “developing and operating a place of worship at [the
 congregation’s property] is free exercise” that was prohibited by the denial); *Cottonwood*, 218
 F. Supp. 2d at 1226 (denial of CUP that would have allowed church to move from small, pre-
 existing site to a new, permanent home on its property was substantial burden under RLUIPA);
 Elsinore Christian Ctr. v. Lake Elsinore, 291 F.Supp.2d 1083, 1089 (C.D.Cal. 2003) (same).

1 leaders and Christian musical artists can only stay for one worship service, Redwood is often
2 forced to choose between excluding some students from worship with that group or losing the
3 benefit of the outside group's ministry altogether. Johnson Decl. ¶ 54.

4 Inadequate assembly space for group worship and prayer has also significantly hindered
5 Redwood's ministry to parents and opportunities for community evangelism. In accordance
6 with its religious beliefs, Redwood would invite parents and members of the community to
7 participate in its weekly worship services, choir concerts, and other special evangelistic
8 services. But the inadequate assembly space at the Martin Site has forced Redwood to forego
9 this ministry and prevented Redwood from inviting special religious speakers and evangelists.
10 *Id.*; Johnson Depo 311:19–24; 348:9–349:22.

11 **Restricted Science Education:** Redwood believes that students will understand God
12 and His creation better through sound, scientific study. Johnson Decl. ¶ 17. But Redwood
13 lacks adequate lab space for its various science classes, and so cannot offer full chemistry and
14 biology labs. *Id.* ¶ 67; Johnson Depo 143:22–144:20. All science courses must share the same
15 lab, which restricts the number of science courses and advanced electives students may take.
16 *Id.* Because of the limited space, the lab is used only by advanced classes, so Redwood cannot
17 offer lab experiences to junior high students. Johnson Decl. ¶ 67; Johnson Depo 387:15–
18 388:12. These limitations, which would not exist had the County allowed Redwood to build a
19 permanent home with adequate science facilities on its Property, significantly restrict scientific
20 instruction and the religious lessons Redwood instills by teaching science from a Christian
21 perspective. Johnson Decl. ¶¶ 17, 67; Johnson Depo 233:22–234:20.

22 **Restricted Special Needs Program:** Redwood believes it has an obligation to care for
23 all those made in God's image, especially those with special physical or emotional needs,
24 including learning disabilities. *Id.* ¶ 79. But Redwood lacks the ability at the Martin Site to
25 keep up with demands for its special needs program, and every year must place children on a
26 waiting list or turn them away altogether. *Id.*; Johnson Depo. 51:2–17. Although Redwood's
27 mission impels it to minister to more special needs children, it cannot do so at Martin and was
28 prevented from doing so at the Property by the County. *Id.*

1 **Restricted Christian Performing Arts Ministry:** Redwood believes that the arts are a
2 means to glorify God, and that it has a special obligation to nurture those with a special gift for
3 worshipping God through music and drama. Johnson Decl. ¶¶ 20-21. But the Martin Site
4 lacks the capacity to provide dedicated space for musical or dramatic performances. *Id.* ¶¶ 70–
5 72. There is no soundproof room for practice at the Martin Site, which dramatically limits both
6 the quality and quantity of musical education. *Id.* ¶ 71.; Johnson Depo. 116:14–117:2, 370:12–
7 372:2. The same is true of speech classes. *Id.* 240:19–241:7. The theater program must share
8 space with choir rehearsals and athletic practices, constraining the students’ ability to set up
9 lighting and seating, limiting the scope of their performances and their practice time. Johnson
10 Decl. ¶ 72; Johnson Depo 395:12–398:23. All these limits, imposed by the County’s refusal to
11 allow Redwood to build a permanent home with adequate facilities for arts education, inhibits
12 that education and the ability to express faith and worship God through music and drama. *Id.*
13 235:19–236:14, 395:12–398:23.

14 **Restricted Christian Athletic Program:** Redwood considers athletic training to be a
15 vital part of its Christian mission. Johnson Decl. ¶ 22; Cleveland ¶¶13-15. It uses athletic
16 participation to teach students “life lessons” about how to handle adversity in a Godly manner,
17 and it uses athletic games and tournaments as an opportunity to demonstrate faith in action and
18 reach out to other teams. Johnson Decl. ¶ 22; Cleveland ¶¶14-15. Because Redwood uses
19 athletics to instill spiritual lessons, it requires all its athletic staff and coaches, both part-time
20 and full-time, be committed Christians who can model and teach Godly behavior to the
21 students. Cleveland ¶13. At the Martin Site, Redwood has no gym for physical education and
22 athletic practices. Johnson Decl. ¶¶ 68–69; Cleveland ¶18. Students involved in indoor (and
23 even some outdoor) sports must play *all* their games on the road. Johnson Decl. ¶¶ 68; Johnson
24 Depo 372:13–373:16. Many athletic practices must take place outdoors or offsite, leading to
25 problems in inclement weather and lost time due to transportation. Cleveland ¶12; Johnson
26 Decl. ¶ 68. Scheduling those games at more than a dozen rented locations requires a great
27 amount of time, effort and money on the part of Redwood’s staff—effort that would otherwise
28 be spent ministering to students. Cleveland ¶11. Physical education classes and athletic

1 practices must compete for time and space with musical and dramatic practices, diminishing the
2 quality and quantity of all three programs. Johnson Decl. ¶ 72; Johnson Depo 228:2–12.
3 Redwood cannot expand its program to include more sports because it has no space or facilities
4 to do so. *Id.* 120:14–121:2. The school has no space to celebrate its homecoming game or other
5 festivities, which it must hold offsite. Johnson Decl. ¶¶ 62, 68; Johnson Depo 364:12–365:2.

6 **Forced Choice Between Ministries:** The County’s rejection of the CUP has forced
7 Redwood to choose between limiting its athletic ministry or curtailing its academic ministry.
8 Johnson Decl. ¶ 66. Redwood’s athletics program is an important ministry of the school, as it
9 seeks to build character, teach teamwork, and instill other Christian values. Cleveland ¶¶13-15;
10 Johnson Decl. ¶ 22. Redwood views athletic competition as a key testing ground to see if
11 students have absorbed the Christian values Redwood seeks to instill. *Id.* But the Martin Site
12 lacks adequate space and facilities for Redwood’s 7th-12th grade athletic program. Johnson
13 Decl. ¶¶ 51, 64–68. Instead, students and staff must travel off-site for almost all of the school’s
14 athletic competition (including “home” games) and most practices. Cleveland ¶¶7-9. Because
15 of the travel time required for students and staff to reach practice and competition sites,
16 Redwood cannot offer an eight-period school day at the Martin Site. Johnson Decl. ¶ 66.
17 Thus, in order to preserve its athletics ministry, Redwood is forced to sacrifice one-class
18 period, and accompanying advanced placement classes and elective classes, which would help
19 students to develop their abilities and explore religious truth through study of additional
20 subjects. *Id.* ¶¶ 16–24, 66. However, if Redwood could locate its school on the Property, it
21 would have the facilities to offer both an athletic program and an eight-period day. *Id.* ¶ 66.

22 **Restricted Special Assemblies:** The CUP denial has significantly restricted
23 Redwood’s ability to hold various assemblies for its student body, families, and community
24 members that are integral to the School’s ministry. Johnson Decl. ¶¶ 54–65. For example,
25 Redwood believes that in order to build an effective Christian school community, it is essential
26 that administration and faculty communicate with parents about the school’s ongoing ministry
27 through Parent’s Nights. But because the facilities at the Martin Site are inadequate, Redwood
28 is forced to split its parents’ nights into several separate sessions instead of gathering together

1 as a whole, effective, Christian school community. Johnson Decl. ¶ 63. Likewise, space
2 restrictions at Martin also preclude having one awards ceremony gathering the entire student
3 body, faculty, parents and friends to honor the work of God in the life of its students. Instead,
4 Redwood must forego gathering as a community and hold multiple award ceremonies
5 throughout the year with limits on how many can attend. Johnson Decl. ¶ 64; Johnson Depo
6 336:17–23. Redwood’s annual “Back to School Night,” a special service for faculty, students
7 and families to gather for worship and prayer in preparation for the coming school year, must
8 similarly be held offsite for lack of space. Neither could the school hold a special dedication
9 service for its new principal on campus, where local pastors, administrators, faculty and
10 students gathered to pray. Johnson Decl. ¶ 65. Ironically, Redwood must also rent an outside
11 location for homecoming, which includes various ministry events. *Id.* ¶ 68. Nor can Redwood
12 hold graduation ceremonies where its students have attended school for up to seven years. *Id.* ¶
13 62; Johnson Depo 353:17–20, 364:12–365:2.

14 **Restricted Library:** Redwood’s library at the Martin Site is housed in a temporary
15 trailer with limited capacity, severely constraining the materials Redwood can offer students to
16 aid their studies. Johnson Decl. ¶ 74; Johnson Depo 268:14–269:3. For example, Redwood
17 cannot provide religious commentaries on books of the Bible or Christian biographies that aid
18 in understanding their faith. Johnson Decl. ¶ 74. Nor is there space for a Christian bookstore
19 on the Martin Site. *Id.* The librarian also lacks space to catalogue and update materials or to
20 provide specialized information to students, such as brochures and information about Christian
21 colleges. *Id.*; Johnson Depo 287:6–10.

22 **Plunging Enrollment:** The County’s refusal to allow Redwood to build an adequate,
23 permanent home for its school has damaged recruitment and caused enrollment to plummet.
24 Johnson Decl. ¶ 92. Redwood’s enrollment has declined over 25% since the County denied the
25 school’s CUP application. *Id.* ¶ 82; Graph (Ex. A-2). The parents considering Redwood as the
26 place to provide a Christian education for their children want to know that the school will still
27 be there when it is time for their children to graduate. *Id.* ¶ 86. They also want to know that
28 the school has the facilities and space needed to nurture and educate their children from a

1 Christian perspective. *Id.* For years, Redwood explained to parents that the new campus they
2 planned to build on their Property would satisfy these concerns. *Id.* ¶ 87. The school on the
3 Property would be a permanent home that could never be taken away. It wouldn't be plagued
4 with the inadequacies that hindered Redwood's religious exercise at the Martin Site, but would
5 fully accommodate Redwood's mission of providing a Christ-centered education to its students.
6 *Id.* ¶ 87–88. But when the County denied Redwood's CUP for the only available property in
7 Redwood's service area, Redwood could no longer satisfy parents' concerns.

8 Instead, Redwood is forced to tell parents that the entire junior-senior high school might
9 be shut down because even its present, inadequate Martin Site can be taken away on 7 months'
10 notice by the SLUSD. *Id.* ¶ 89. This is a real threat, because the same school district has taken
11 back two other leased properties (along with capital improvements Redwood invested in those
12 properties) from Redwood twice before.²⁷ *Id.* ¶ 96. SLUSD is presently faced with having to
13 find a property for a new 450 student public charter high school and could take back the Martin
14 site for that purpose.²⁸ *Id.* ¶ 102; Shira 91-92. Moreover, even if Redwood were able to keep
15 its current lease until 2010—which is by no means assured—there is no guarantee it could
16 obtain a new lease because numerous public entities will have first priority in the bidding.²⁹
17 Shira 74; Johnson Decl. ¶ 100.

18 Redwood must also tell parents that they are stuck with the deficiencies of the Martin
19 Site because, as even the County admitted,³⁰ there is no other property in Redwood's service
20 area to build its permanent home other than the Property. And even if another property did
21 exist, religious schools are not permitted anywhere in the County except by CUP, so Redwood

22 _____
23 ²⁷ The lease with SLUSD empowers it to take the property back for any reason, and
24 SLUSD is required by state law to provide space to new public schools, including charter
25 schools, even if that means evicting a current tenant. Shira 36:2–7, 83:16–22.

26 ²⁸ Shira 83:23–25, 84:18–22. SLUSD does not know where it can accommodate another
27 450-student high school. *Id.* When a public middle school needed space, the district simply
28 took back leased property that was being used by a private school tenant. *Id.* at 36:2–7.

²⁹ The School District also refuses to enter into long-term leases or leases that do not
include the right to cancel the lease on 7 months' notice. Johnson Decl. ¶ 50.

³⁰ Johnson Decl. ¶ 42; AR 736 (County EIR document declaring that “despite an
exhaustive search, by [Redwood] and an independent search by the Alameda County Planning
Department, no feasible alternative sites were identified within [Redwood's] service area”; AR
2186. The County continues to agree with its findings in the EIR. Buckley 301:17-302:1.

1 would have go through that expensive, protracted, arbitrary process again, and may be denied.³¹

2 Thus, although Redwood has managed to avoid extinction at the Martin Site, it has been
3 a tough sell to convince parents that they should still send their children to a school that at best,
4 suffers from numerous deficiencies that significantly restrict its religious mission, and at worst,
5 could be shut down entirely on seven months' notice with nowhere else to go.³²

6 As a result, Redwood's enrollment has plummeted since the County denied Redwood's
7 CUP in 2001. Johnson Decl. ¶ 82. Before then, Redwood was steadily adding 3–4% to its
8 student body each year and had waiting lists for admission. Johnson Decl. ¶¶ 82, 94. Since the
9 denial, it has *lost more than 25%* of its student body in four years. Graph (Ex. A-2); Johnson
10 Decl. ¶ 82.³³ This represents not just a numerical loss, and a loss of tuition income, but a lost
11 opportunity to minister to these students and their families—the school's very purpose. *Id.*
12 Declining enrollment also creates a vicious cycle. Some students have been forced to leave
13 Redwood for financial reasons. *Id.* ¶ 95. But with the loss of tuition due to declining
14 enrollment, Redwood has had less money from tuition receipts to meet the financial needs of
15 students and parents. *Id.*

16 **Restricted Ministry Staff:** Each faculty member is a valued member of Redwood's
17 Christian family, and Redwood seeks to minister to all of them to ensure that they are treated
18 with Christian love and growing in their relationship with Christ. *Id.* ¶ 98. But the plunging
19

20 ³¹ Moreover, Redwood must tell parents that any capital improvements it might make to
21 the Martin Site to lessen some of its numerous deficiencies (*e.g.*, lack of a sufficient space for
22 corporate assembly, lack of adequate science labs, insufficient library space) would be
23 completely lost if the School District reclaims the site. Following principles of Christian
24 stewardship over the limited funds entrusted to it, Redwood is unwilling to invest significant
25 sums in upgrading a temporary facility it doesn't own and that can be seized at any time.
26 Johnson Decl. ¶ 96. Redwood's donors are likewise unwilling to give money to upgrade a
27 property that they know can be taken from Redwood. *Id.*

28 ³² Redwood's latest accreditation report states the obvious in recommending that
Redwood move into permanent, adequate facilities because the uncertainty associated with the
Martin site "could be catastrophic to the junior and senior high program." Ex-A-4 at 26.

³³ The plunge in Redwood's enrollment since the 2001 CUP denial is especially
remarkable because enrollment has *increased* at Castro Valley public schools and other
Christian schools in the region, such as Valley Christian Dublin, Fremont Christian, Berean
Christian, Valley Christian San Jose, and Bishop O'Dowd. Johnson Decl. ¶ 93. Of course, the
big difference is that each of those schools has a permanent home and adequate facilities for
their ministries, whereas the County denied this to Redwood. *Id.*

1 enrollment and accompanying financial strain caused by the County's CUP denial forced
2 Redwood to lay off 13 teachers. *Id.* Firing these teachers cut off Redwood's ability to minister
3 to these teachers, and caused financial and emotional hardship to those Redwood considers
4 brothers and sisters in Christ. *Id.* Moreover, eliminating teachers further reduced the variety of
5 courses and activities Redwood could offer its students. *Id.*; Johnson Depo 52:2-6.

6 **Imminent Threat of Closure:** The County stands by its conclusion that, besides the
7 Property Redwood owns, no other site exists in Redwood's service area where Redwood could
8 build its school. AR 1074-878, 2186; Buckley 301:17-302:1. Nor is Redwood, despite years
9 of searching, aware of any available property that would meet its minimum needs. Johnson
10 Decl. ¶ 103. Thus, if Redwood loses its lease, which could happen on 7 months' notice, its
11 junior-senior high school has no place to exist. *Id.* And if Redwood loses the Martin Site
12 before a new campus is built, Redwood will simply have to close the doors of that ministry. *Id.*
13 Thus, because of the CUP denial, Redwood's ministry faces being shut down altogether.

14 **b. Myriad Courts Have Held That Denying a Religious Institution's**
15 **Application to Establish an Adequate, Permanent Home for Its Ministry**
16 **Imposes a Substantial Burden.**

17 The undisputed facts demonstrate that the County has placed a "significantly great
18 restriction and onus" on Redwood's religious exercise. The school has been denied permission
19 to exercise its religion on the Property, and without a CUP, Redwood faces extinction. Johnson
20 Decl. ¶ 103; *see also* AR 2186 (county report conceding that Redwood faces shut down if the
21 CUP is denied). At the moment, Redwood has been forced to remain in an inadequate space,
22 impeding its religious exercise by endangering and restricting numerous ministries. Courts
23 routinely find lighter burdens to be "substantial."

24 In *Westchester Day School v. Village of Mamaroneck*, 417 F.Supp.2d 477 (S.D.N.Y.
25 2006) ("WDS"), a municipality denied a religious school a CUP to renovate and expand its
26 facilities. The court held that this CUP denial substantially burdened the school's religious
27 exercise by forcing it to remain in inadequate facilities:

28 By precluding the construction of much needed facilities, defendants significantly
interfered with WDS' ability to provide an adequate and effective dual curriculum of
Judaic and general studies education, and so limited its ability to retain and attract

1 students and faculty as to imperil its continued existence.
2 *Id.* at 547. The court explained how preventing the school from rectifying the limitations of its
3 current space restricted the school’s ministry: the school lacked adequate science and computer
4 labs, lacked adequate library space, lacked adequate space for musical and artistic instruction,
5 lacked space for speech and occupational therapy and counseling, lacked adequate space for
6 recreation, lacked adequate assembly space, lacked adequate classroom space, lost educational
7 time due to travel between buildings, and faced difficulty recruiting students. *Id.* at 491–94.

8 Redwood faces identical restrictions, and then some. The County’s CUP denial
9 severely inhibited its recruiting, eroding enrollment and endangering its very existence.
10 Johnson Decl. ¶¶ 85–92. Like WDS, Redwood must operate in inadequate classroom space,
11 lacks adequate science and computer labs, lacks adequate library space, lacks adequate space
12 for musical and artistic instruction, lacks space for its special needs program and for student
13 counseling, lacks adequate space for recreation, lacks adequate assembly space, and loses
14 educational time due to travel between sites. Johnson Decl. ¶¶ 54, 66–68, 70–72, 74, 75, 78,
15 79. Indeed, the burden in this case is even more severe: while the *WDS* court found it
16 significant that the school had suffered a 17.5% decline in enrollment, 417 F.Supp.2d at 548,³⁴
17 Redwood’s enrollment has plummeted over 25%. Johnson Decl. ¶ 82; Graph. Even more
18 significant, the *WDS* school had an existing (if inadequate) permanent home. 417 F.Supp.2d at
19 485. Redwood faces the constant threat of extinction at its leased site. Johnson Decl. ¶ 103.

20 In another indistinguishable case, the court in *Living Water Church v. Charter Tp. of*
21 *Meridian*, 384 F.Supp.2d 1123 (W.D.Mich. 2005), held that denying a CUP to build a
22 permanent home for a church’s Christian school substantially burdened religious exercise.
23 That school, like Redwood, was unable to adequately “practice its religious beliefs in its current
24 [leased] location because the facilities are too small for the needs of the congregation and
25 staff.” *Id.* at 1333. Notably, space constraints did not prevent the plaintiff from carrying out
26 **any** religious activity at the site, but rather forced the school to curtail and to choose among its

27 ³⁴ The court didn’t require proof that the decline in enrollment was wholly due to the
28 permit denial, but found it sufficient that the “decline in enrollment at WDS since 2001 has
been caused, at least in part, by defendants’ actions”. *Id.* at 494.

1 ministries. *Id.* Redwood faces both problems. *See, e.g.*, Johnson Decl. ¶¶ 54, 66 (Redwood
2 forced to curtail worship assemblies and choose between a longer class day and extracurricular
3 programs). The court also found it significant that the school was “severely limited in its
4 ability to recruit” because of “the uncertainty about the future space and the current lack of
5 programming.” *Living Water*, 384 F.Supp.2d at 1133. Again, the same is true here. *See, e.g.*,
6 Johnson Decl. ¶¶ 82–95 (describing difficulty in recruiting and plunging enrollment due to the
7 combination of inadequate facilities, limited programming, and uncertainty of future existence).

8 Finally, because the city (like Alameda County) didn’t allow religious schools
9 anywhere as a permitted use as of right, the school had no guarantee of finding a suitable site
10 elsewhere and faced “delay, expense and uncertainty if it [were] required to reapply or search
11 for another site.” *Living Water* at 1134. (citing *Constantine*, 396 F.3d at 901). Redwood faces
12 identical issues—it has already suffered serious delay, perilous uncertainty and crippling
13 expense due to the permit denial, and faces more of the same if forced to restart the “crap-
14 shoot” CUP process. *See, e.g.*, Johnson Decl. ¶¶ 37, 48–49, 103 (describing delay, expense, and
15 uncertainty Redwood experienced in the CUP process and the crippling effects of uncertainty
16 on enrollment); Wallace 88:13-17 (religious schools not allowed as of right in County and
17 therefore must undergo the “crap-shoot” CUP process); AR 736 (County admits no other sites
18 available). Under these circumstances, the *Living Water* court held that the “burden imposed
19 by the denial of the SUP is not merely an inconvenience...[It] imposes a substantial burden on
20 religious exercise under RLUIPA.” *Id.* at 1134. This Court should hold the same here.

21 District courts in the Ninth Circuit have echoed the holdings of *WDS* and *Living Water*
22 that permit denials which prevent religious organizations from establishing adequate,
23 permanent homes “substantially burden” religious exercise. In *Guru Nanak*, 326 F.Supp.2d at
24 1152, the court held that a CUP denial “actually inhibit[ed]” religious exercise by preventing a
25 Sikh congregation from building a place of worship on its agriculturally zoned property. *Id.* at
26 1152–53. The Court detailed how Sikh religious practices—*e.g.*, communal prayer, religious
27 services, reading from the Holy Book, and holiday celebrations—were inhibited by denying the
28 congregation a permanent home on its property. *Id.* Here, not only are Redwood’s similar

1 existing ministries curtailed by lack of space, they face sudden death. Johnson Decl. ¶ 103.

2 Likewise, in *Cottonwood*, the court found a substantial burden where the city denied a
3 CUP to construct a new church building that would relieve the inadequacies of its existing site.
4 *Cottonwood*, 218 F.Supp.2d at 1212 (detailing restrictions on religious exercise by being forced
5 to remain at existing site, including insufficient space requiring church to splinter contrary to its
6 beliefs; to forego numerous ministries such as child and adult religious education, and to fail to
7 attract new members). In light of these restrictions, the court held that “[p]reventing a church
8 from building a worship site *fundamentally inhibits* its ability to practice its religion” in
9 violation of RLUIPA. *Id.* at 1226 (emphasis added). Likewise, the County’s decision to
10 prevent Redwood from building a school forces Redwood to hobble along at the inadequate
11 Martin Site, fundamentally inhibiting its religious exercise. *See, e.g.*, Johnson Decl. ¶¶ 53, 54,
12 82 (Martin Site restrictions include splintering school body contrary to religious beliefs;
13 inadequate space for educational ministry; and plunging enrollment).³⁵ The facts are undisputed
14 and the law is clear: the County’s burden on Redwood’s religious exercise is “substantial.”

15 **D. The Undisputed Facts Demonstrate the County Has Failed to Bear Its Burden**
16 **Under Strict Scrutiny.**

17 As the Supreme Court recently reaffirmed, “the burden [of satisfying strict scrutiny] is
18 placed squarely on the Government.” *Gonzales v. O Centro Espirita*, 126 S. Ct. 1211, 1220
19 (2006). To meet this burden, a “Government’s mere invocation” of broadly defined interests

20 ³⁵ Numerous other courts have likewise found a substantial burden where the
21 government’s denial of a zoning permit prevented a religious entity from adequately practicing
22 its religious exercise at a particular piece of property. *See, e.g.*, *Castle Hills First Baptist*
23 *Church*, 2004 WL 546792, at *9–10 (finding substantial burden where city refused to approve
24 use of existing church property to expand its religious school); *Greater Bible Way Temple v.*
25 *Jackson*, 2005 WL 3036527 (Mich. App. 2005)(finding substantial burden under RLUIPA
26 where city prohibited church from constructing ministry building for elderly and disabled);
27 *Shepherd Montessori Ctr. v. Ann Arbor*, 675 N.W.2d 271 (Mich. App. 2003)(allowing
28 substantial burden claim to go forward where township denied variance to allow plaintiff to
operate religious school); *Jesus Center v. Farmington Hills*, 544 N.W.2d 698, 703–704
(Mich.App. 1996)(finding substantial burden where city denied application to run a religious
homeless shelter on its property); *Alpine Christian Fellowship v. County Comm’rs*, 870 F.
Supp. 991, 994 (D.Colo. 1994)(finding substantial burden under Free Exercise Clause where
County denied a SUP to allow church to operate a religious school on its property); *First*
Covenant Church v. Seattle, 840 P.2d 174 (Wash. 1992)(finding substantial burden under Free
Exercise Clause where landmarking law imposed severe financial burdens upon the church and
prohibited alteration of the church building).

1 “cannot carry the day.” *Id.* at 1221. Rather, the government must demonstrate that the
2 **particular** burden on the **particular** plaintiff’s religious exercise represents the means “least
3 restrictive” of religious exercise to serve a “compelling government interest.” *Id.* at 1219–
4 1221. Here, the County has only asserted general interests, rather than whatever particular
5 interests may be served by the particular burden it has imposed on Redwood’s ministry.
6 Moreover, the County cannot meet its burden of production to show that its asserted interests
7 are even implicated in this case as a matter of fact. And even if they were, none of those
8 asserted interests qualify as “compelling” as a matter of law. Finally, the County chose the
9 means maximally restrictive of religious exercise for serving whatever interests it may have in
10 denying the CUP. Each of these problems alone defeats any attempt to satisfy strict scrutiny.

11 The Supreme Court has emphasized in the religious liberty context how few interests
12 qualify as “compelling” under strict scrutiny, describing them as “paramount interests” of “the
13 highest order.”³⁶ Courts at all levels have consistently respected this admonition in all
14 contexts.³⁷ And more specifically in the land use context, compelling interests have been
15 described as those in preventing “a clear and present, grave and immediate danger to public
16 health, peace and welfare,” such as fire safety and occupancy limits.³⁸

17 The only interest identified by the County is “[t]he States’ traditional prerogatives and
18 general authority to regulate the use of land for the health and welfare of their citizens....”
19 Defendants’ Responses to Plaintiffs’ First Set of Interrogatories 7–8. Importantly, the County
20 fails to identify how the denial of Redwood’s particular use serves this alleged interest. The
21

22 ³⁶ *Lukumi*, 508 U.S. at 546; *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“[I]n this
23 highly sensitive constitutional area, ‘only the gravest abuses, endangering paramount interests,
24 give occasion for permissible limitation [on religious exercise].’”)

25 ³⁷ See *Sherbert*, 374 U.S. at 403 (protecting public safety and order); *Nat’l Treasury*
26 *Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (avoiding disclosure of sensitive
27 governmental information); *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602, 633 (1989)
28 (railway safety); *United States v. Lee*, 455 U.S. 252, 260 (1982) (compulsory participation in
the Social Security system); *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005) (prison
security a compelling government interest under RLUIPA).

³⁸ *First Covenant Church of Seattle v. Seattle*, 840 P.2d 174, 187 (Wash. 1992); see
Antrim Faith Baptist Church v. Comm., 460 A.2d 1228, 1230 (Pa. Commw. 1983) (“[J]ust as
the state is entitled to prevent church buildings from being constructed too flimsily over the
heads of the worshippers, the state is entitled to see to it that fire-safety precautions are taken”).

1 Supreme Court has recently emphasized that this is insufficient to satisfy strict scrutiny. *O*
2 *Centro*, 126 S. Ct. at 1221. *See also Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001).
3 This interest also fails as a matter of fact, because the County conceded that it did *not* deny the
4 permit in order to serve health or safety interests: the County specifically found that
5 “[Redwood’s] use, if permitted...*will not* materially affect adversely the health or safety of
6 persons residing or working in the vicinity.” AR 320; *cf. Buckley* 232 (confirming this finding).

7 The County Resolution denying Redwood a CUP also claims “a compelling interest in
8 protecting the residents of the area by precluding development that is *inconsistent* and
9 *incompatible with* current development in and *development policies for the area*,” AR 320
10 (emphasis added), but that bald assertion cannot meet the County’s burden of production.
11 Indeed, this interest is so malleable and susceptible to discriminatory manipulation, that the
12 County bears an especially daunting evidentiary burden to show that it is genuinely implicated
13 here. *See supra* Section I (unbridled discretion). (This may explain the County’s failure to
14 identify this reason in response to Plaintiffs’ Interrogatory Requests).

15 But even if prohibiting Redwood’s use actually served the asserted interests as a matter
16 of fact, they are not “compelling” as a matter of law. The strict scrutiny test, which also tests
17 race-based classifications, should not be applied inconsistently. *Lukumi*, 508 U.S. at 546. And
18 “compatibility of land uses” is not an interest remotely sufficient to justify racial discrimination.
19 *Stuart Circle Parish v. Board of Zoning Appeals*, 946 F. Supp. 1225, 1239 (E.D. Va. 1996).³⁹

20 Finally, even if the County could satisfy the “compelling interest” part of strict scrutiny,
21 it would still fail the test, because it cannot meet “the *Government’s obligation* to prove that
22 the [less restrictive] alternative will be ineffective to achieve its goals.” *U.S. v. Playboy*, 529
23 U.S. 803, 816 (2000) (emphasis added); *see id.* at 813 (“If a less restrictive alternative would
24 serve the Government’s purpose, the [government] must use that alternative.”); *Hardman*, 297

25 _____
26 ³⁹ *Accord United Farmworkers of Fla. v. Delray Beach*, 493 F.2d 799 (5th Cir. 1974)
27 (consistency with master plan not compelling, cannot justify racial discrimination); *Living*
28 *Water*, 384 F.Supp.2d at 1134–35 (“density” is not compelling, cannot justify denying CUP for
religious school); *XXL of Ohio v. Broadview Heights*, 341 F.Supp.2d 765, 789-90 (N.D. Ohio
2004) (“aesthetics” and protection of “neighborhood character” not compelling); *Guru*, 326
F.Supp.2d at 1154 (noting defendant’s reluctance to claim “incompatibility” is compelling).

1 F.3d at 1130-31 (strict scrutiny defense fails where “record is devoid of hard evidence” and
2 “does not address the possibility of other, less restrictive means of achieving these interests.”).

3 Here, the County had available many alternative ways to serve its interests that would
4 restrict religious exercise less than would total denial of the CUP. The County has even
5 conceded that it could have allowed Redwood’s use and mitigated its impact upon the
6 surrounding area by imposing conditions.⁴⁰ (Indeed, its discretion to impose conditions is
7 virtually limitless, *see supra* Section I.C.) Moreover, the County had before it five alternative
8 proposals, *see* AR 5424-5454; Buckley 310:20–311:6, each of which was designed at the
9 County’s request and under its supervision to be smaller and better fit the County’s sense of the
10 character of the community.⁴¹ But ultimately, the County denied Redwood’s original proposal
11 and the alternatives, preferring instead the means to serve its asserted interests that is *most*
12 restrictive of religious exercise—complete denial of the use.⁴²

13 CONCLUSION

14 In sum, after nine years, it is time for the County to face judgment for crippling
15 Redwood’s religious exercise through its manipulation of an unconstitutional CUP process.
16 This Court should enter summary judgment in Redwood’s favor, on both liability and damages.

17
18 Dated: June 16, 2006

Respectfully submitted,

19
20
21 _____
22 MARK A. GAITHER
23 Law Offices of Roger S. Gaither
24 Attorneys for Plaintiffs

25 ⁴⁰ *See, e.g.*, Buckley 378: 23–25 (County may grant CUP with conditions that mitigate
26 noise impacts); *id.* at 235:21–25 (County could have imposed mitigation measures which
27 would have prevented destruction of alleged historic resource); *id.* at 245:21–246:2 (County
28 could have imposed traffic mitigation measures as a CUP condition).

⁴¹ *See* AR 562; AR 5424-5454; *see also* Buckley 311:17–20 (County made an effort to
ensure the alternatives complied with its health, safety and welfare interests).

⁴² Even if the Court somehow finds disputed fact issues on the substantial burden element
of Redwood’s claim, the Court should narrow the issues for trial and enter partial summary
judgment against the County on the legal issue of whether it can satisfy strict scrutiny.

1 **PROOF OF SERVICE**

2 I, Mark A. Gaither, declare that:

3 I am employed in the Counties of Alameda and Contra Costa, California. I am over the
4 age of eighteen years and not a party to the within entitled cause; my business address is 232
5 Kittery Place, San Ramon, CA 94583. On June 16, 2006, I served **PLAINTIFFS’**
6 **MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY**
7 **JUDGMENT** on the party listed below, addressed as follows:

7 David Skinner
8 MEYERS, NAVE, RIBACK, SILVER, et al.
9 555 12th Street, Suite 1500
10 Oakland, CA 94607

10 **By Personal Service** by delivering a sealed envelope to the addresses listed above.

11 Tamara Ulrich
12 United States Department of Justice
13 Civil Division Federal Programs Branch
14 20 Massachusetts Avenue, Room 7308
15 Post Office Box 883
16 Washington, DC 20044

Alex Tse
Assistant U.S. Attorney
450 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102

15 Derek Gaubatz
16 The Becket Fund for Religious Liberty
17 1350 Connecticut Avenue, NW, Suite 605
18 Washington, D.C. 20036-1735

Christiana Tiedemann
Office of the Attorney General
1515 Clay Street, Suite 2000
Oakland, CA 94612

19 **By first class mail** by depositing a sealed envelope in the United States Mail at San
20 Ramon, California, with postage fully paid to the addresses listed above.

21 I declare under the penalty of perjury under the laws of the United States and the State
22 of California that the foregoing is true and correct and that this declaration was executed on
23 June 16, 2006, at San Ramon, California.

24 _____
25 Mark A. Gaither