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REDWOOD CHRISTIAN SCHOOLS, *et al.*,

Plaintiffs,

v.

COUNTY OF ALAMEDA, *et al.*,

Defendants.

Case No. C01-4282 SC ADR

**PLAINTIFFS' REPLY  
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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**TABLE OF AUTHORITIES**

**Cases**

1

2

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1 **I. The County Fails to Rebut Redwood’s Showing That It Is Entitled to Summary**  
2 **Judgment on Its First Amendment “Unbridled Discretion” Claim.**

3 Redwood’s initial brief (p.12-19) demonstrated that the County’s self-described “crap-  
4 shoot” CUP process impermissibly grants County officials unbridled discretion to suppress the  
5 protected First Amendment expression of religious schools like Redwood in three separate  
6 ways. The County makes no attempt to distinguish the standardless language in its CUP  
7 ordinance from language other courts have struck down on unbridled discretion grounds.  
8 Instead, its rambling response seeks to avoid summary judgment on four theories. First, it  
9 argues that cases striking down CUP criteria for adult businesses and commercial speech are  
10 irrelevant because religious expression is entitled to *less* protection than those types of  
11 disfavored expression. Second, the County asserts that its zoning authority is subject only to  
12 deferential review. Third, it asserts that courts refuse to apply the unbridled discretion doctrine  
13 to zoning regulations limiting religious expression. And finally, it asserts that the unbridled  
14 discretion doctrine requires a showing of actual discrimination. As detailed below, all of those  
15 arguments fail. Thus, because the County *fails to identify a single disputed fact* that would  
16 preclude summary judgment for Redwood on this claim, this claim is ripe for resolution.

17 **A. The County Fails to Rebut Redwood’s Showing that the Ordinance Grants**  
18 **Unbridled Discretion by Establishing Four Malleable Criteria to Qualify for a**  
19 **CUP, Allowing Discretion to Deny a CUP Even If the Criteria Are Satisfied, and**  
20 **Failing to Place Any Limits on Conditions That May Be Imposed on a CUP.**

21 Redwood’s initial brief (12-17) demonstrated that each of the County’s four malleable  
22 criteria is either identical to or materially indistinguishable from CUP language that the  
23 Supreme Court, Ninth Circuit, and numerous others have struck down as vesting unbridled  
24 discretion in decision-makers. The County concedes this point. It makes *no* effort to  
25 distinguish the language in its CUP ordinance from the language in the many cases cited in  
26 Redwood’s brief. Nor can it distinguish the permit language restricting the religious expression  
27 of places of worship recently struck down in *Hollywood Cmty. Synagogue v. Hollywood*, 2006  
28 WL 1825004 (S.D.Fla. June 26, 2006) (“*Hollywood II*”). The County claims (p.17) that  
“numerous courts” have rejected unbridled discretion claims to CUP ordinances similar to the

1 County's, but cites only four cases. And of those four, unbridled discretion claims were neither  
2 argued nor decided in two of them.<sup>1</sup> As for the other two,<sup>2</sup> neither involved CUP ordinances or  
3 evaluated language similar to the standardless criteria in the County's CUP ordinance.<sup>3</sup>

4 Redwood has similarly demonstrated that the limitless latitude given to County  
5 decision-makers to deny CUPs—even if all vague criteria are met—is identical to CUP  
6 language that numerous others have struck down (p.18-19), and that the County's unlimited  
7 power to impose any sort of condition is yet another form of unbridled discretion (p.19).  
8 Again, the County concedes these points. It does not dispute that the Board has power to deny  
9 CUPs even if all criteria are satisfied, and to impose conditions at will on CUPs that are  
10 granted. Nor does it attempt to distinguish the many cases hold such language unconstitutional.  
11 *See also Hollywood II, supra.* Rather, it claims (p.16) that this discretion is constitutional  
12 because the conditions it may impose are limited elsewhere by the Constitution (and enforcing  
13 legislation like RLUIPA). This circular argument should be rejected.

14 **B. There Is No Basis for the County's Claim that Religious Institutions Receive *Less***  
15 **First Amendment Protection Under the Unbridled Discretion Doctrine than Adult**  
16 **Businesses and Commercial Speech.**

17 The County's primary argument is that religious institutions are excluded from the First  
18 Amendment's protections against zoning regulations that vest unbridled discretion in the  
19 government to restrict expressive activity. To put this anomalous assertion in perspective, it is  
20 necessary to recount two established legal propositions that the County doesn't dispute. First,  
21 there is no dispute that the Supreme Court has repeatedly applied the unbridled discretion

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22 <sup>1</sup> *See Christian Gospel v. San Francisco*, 896 F.2d 1221 (9<sup>th</sup> Cir. 1990) (no unbridled  
23 discretion claim raised); *Paris v. Cmty.Redev. Agcy*, 167 Cal.App.3d 489 (1985) (same).

24 <sup>2</sup> *See Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1056 (9<sup>th</sup> Cir. 2003) (rejecting  
25 vagueness challenge to term "religious"); *Grayned v. Rockford*, 408 U.S. 104 111 (1972) (noise  
26 ordinance that had received narrowing construction by state's highest court wasn't vague).

27 <sup>3</sup> Nor does the County's diversionary citation (p.18) to the Court's decision on the  
28 administrative mandamus claim rebut Redwood's showing. Whether the County's CUP criteria  
satisfied the First Amendment's unbridled discretion test was not even at issue in the  
mandamus claim. This Court specifically instructed that it would not deal with Redwood's  
constitutional claims until after the mandamus claim was decided, Dkt. 87, 116, and no  
constitutional claims were briefed or decided in resolving the mandamus claim. Moreover,  
survival of the very forgiving mandamus standard of review has no bearing on whether the  
CUP criteria satisfy the more demanding First Amendment standard.

1 doctrine to protect religious expression and activity.<sup>4</sup> Second, the County doesn't dispute that  
2 the courts repeatedly apply the unbridled discretion doctrine to CUP regulations that restrict  
3 First Amendment expression. For example, the County concedes (p.9) that the unbridled  
4 discretion doctrine properly applies to CUP regulations that prevent adult entertainment  
5 businesses from using their property to build and operate an enterprise that will engage in First  
6 Amendment expression. And it concedes that the doctrine properly applies to CUP regulations  
7 restricting commercial speech (*e.g.*, commercial billboards, operating a cyber-café).

8 But the County asserts there is some sort of previously undefined carve-out in unbridled  
9 discretion doctrine, so that it doesn't apply when a CUP ordinance restricts religious  
10 institutions' protected expression (even though the doctrine applies in other situations to protect  
11 religious expression, and applies to CUP ordinances restricting other types of First Amendment  
12 expression). The County cannot identify a single case in any jurisdiction adopting its  
13 implausible carve-out theory. To the contrary, Redwood is aware of no case that has ever even  
14 *arguably* suggested that when applied to CUP ordinances, the "unbridled discretion" doctrine  
15 only protects certain kinds of expression (*e.g.*, adult businesses, billboards, cyber-cafes) or,  
16 alternatively, specially excludes some types of expression (*e.g.*, religious expression). Rather,  
17 controlling decisions consistently hold, without qualification or exception, that *no* First  
18 Amendment activity may be subjected to an unbridled discretion regime.<sup>5</sup> And the recent  
19 decision in *Hollywood II, supra* further underscores the weakness of the County's argument.

20 Moreover, the County has it exactly backwards when it breathlessly asserts (p. 1) that it  
21 is "preposterous" to grant the First Amendment expression of religious schools and churches at  
22 *least* the same amount of protection from standardless CUP requirements that is given to adult

23 \_\_\_\_\_  
24 <sup>4</sup> See, *e.g.*, *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Saia v. New York* 334 U.S.  
558, 559 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). Even the County is  
forced to own up to this (although in a footnote). See Cy.Br. n.9 (citing *Niemotko*).

25 <sup>5</sup> See, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (zoning laws may  
26 not "make[] the peaceful enjoyment of **freedoms which the Constitution guarantees**  
contingent upon the uncontrolled will of an official"); *Desert Outdoor Advertising v. Moreno*  
27 *Valley*, 103 F.3d 814, 818 (9<sup>th</sup> Cir. 1996) ("[a] law cannot condition the free exercise of **First**  
**Amendment rights** on the unbridled discretion of government officials.") *Desert Outdoor*  
28 *Advertising v. Oakland*, 2004 WL 3128029, \*11 (N.D.Cal. 2004) ("**First Amendment**  
**freedoms**" protected by unbridled discretion doctrine). (all emphases added).

1 businesses and the commercial speech of billboards and cyber-cafes. Adult businesses and  
2 commercial speech are at the low end of First Amendment protection.<sup>6</sup> In contrast, religious  
3 expression is at the high end of constitutional protection.<sup>7</sup> This is especially true of religious  
4 schools whose core First Amendment expression involves the transmission and perpetuation of  
5 religious beliefs through doctrinal instruction, instruction on all subjects from a distinct  
6 religious viewpoint, and character formation based on religious principles. In sum, no basis  
7 exists for providing core First Amendment activity of religious schools less protection from  
8 standardless CUP criteria than that afforded strip clubs.<sup>8</sup> *Cf. Pinette*, 515 U.S. at 767 (“It will  
9 be a sad day when this Court casts piety in with pornography, and finds the First Amendment  
10 more hospitable to private expletives, than to private prayers.”).<sup>9</sup>

### 11 **C. The County’s Platitudes About Its General Authority to Regulate Zoning Do Not**

12 <sup>6</sup> *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (nude dancing “is expressive  
13 conduct,” but “it falls only within the outer ambit of the First Amendment’s protection”);  
14 *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (commercial speech receives  
“limited protection due to “its subordinate position in the scale of First Amendment values”).

15 <sup>7</sup> *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995)  
16 (“a free-speech clause without religion would be Hamlet without the prince”). *Murdock v.*  
*Pennsylvania*, 319 U.S. 105, 109 (1943) (describing the “high estate” of religious expression)

17 <sup>8</sup> The County’s attempt (p.10) to manufacture a doctrinal distinction between permits for  
18 a one-time event versus one for an on-going use of property to locate and operate a building  
19 with First Amendment activity also fails. The same argument could be made about adult  
20 business and billboards, but courts have sustained challenges to standardless CUP requirements  
21 that prevented them from using their property to locate buildings or structures on property that  
22 would house their expressive activities. The County also ignores that what is at issue here, and  
23 in similar challenges to zoning restrictions, is a conditional *use* permit. That means that  
24 building or no building, protected First Amendment expression is prohibited without a CUP.

25 <sup>9</sup> The County also asserts that adult businesses and billboards, unlike religious  
26 institutions, deserve special protection from standardless CUP requirements because they  
27 involve “sensitive” expression that could be “targeted for surreptitious discrimination.” *Cy.Br.*  
28 8. But the County doesn’t plausibly explain why religious expression would not also be subject  
to a risk of surreptitious discrimination. Indeed, the County ignores not only recent history—in  
which Congress enacted RLUIPA because of discrimination of discretionary zoning laws,  
*Rdwd. Br. 20*—but also this nation’s longer history of religious conflict. “[I]n Anglo-American  
history, at least, government suppression of speech has so commonly been directed *precisely* at  
religious speech that a free-speech clause without religion would be Hamlet without the  
prince.” *Pinette*, 515 U.S. at 761. It takes little imagination to see that standardless CUP  
criteria poses the risk of censoring disfavored religious expression for illegitimate reasons.  
And here, there was evidence that some neighborhood opposition to Redwood was driven by  
bigotry. *See, e.g., Ex-A-1* at 215 (neighbor opposing Redwood because school wouldn’t  
benefit the community, but only “upper middle-class Christian[s]”; *Ex-A-1* at 219–220  
(neighbor opposing Redwood because “[i]t will teach Christian values. That ... is not the  
public good.”) The unbridled discretion given to the County decision-makers in the CUP  
criteria poses the risk that they could act on such hostility.

1                   **Insulate It from Complying with the Unbridled Discretion Doctrine.**

2                   The County spends several pages (pp.3-7) arguing that this court should only apply  
3                   deferential scrutiny to its zoning decisions. This argument misses the point.

4                   The power of local governments to zone ... is undoubtedly broad .... But the zoning  
5                   power is not infinite and unchallengeable; it must be exercised within constitutional  
6                   limits. Accordingly, it is subject to judicial review; and [as] is most often the case, the  
7                   standard of review is determined by the nature of the right assertedly threatened or  
8                   violated rather than by the power being exercised or the specific limitation imposed.

9                   *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981) (citations omitted). In other words,  
10                  the level of scrutiny is unaffected by the mere fact that zoning laws are at issue; instead, the  
11                  level of scrutiny hinges on the type of constitutional interest affected by whatever law is at  
12                  issue, zoning or otherwise. In the unbridled discretion context, it is well-established that when  
13                  “First Amendment freedoms are at stake,” statutes must “provide a greater degree of specificity  
14                  and clarity than would be necessary under ordinary due process principles.”<sup>10</sup> For this reason,  
15                  the County’s citation (p.6) of run-of-the-mill zoning cases emphasizing the discretion the  
16                  government has where constitutionally protected rights were not involved is misplaced.<sup>11</sup>

17                  Similarly overstated is the County’s not so subtle suggestion that the sky will fall if the  
18                  Court grants Redwood’s unbridled discretion claim. But the County ignores the limited scope  
19                  of Redwood’s claim. Redwood seeks relief from only those portions of the County’s CUP  
20                  ordinance that restrict the protected expression of religious schools. Redwood doesn’t argue  
21                  that the County may not continue to apply existing CUP requirements where First Amendment  
22                  interests are not at stake. Nor is it arguing that the County can never apply a CUP process to  
23                  religious schools; one that provided narrow, objective, and definite criteria would be  
24                  permissible.<sup>12</sup> Instead, Redwood merely seeks a judgment that the “crap-shoot” CUP process is

24                  <sup>10</sup>                  *California Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9<sup>th</sup> Cir. 2001).

25                  <sup>11</sup>                  See *Van Sicklen v. Browne*, 15 Cal.App.3d 122 (1971) (service station); *Garavatti*  
26                  *v. Fairfax Planning Comm’n*, 22 Cal.App.3d 145 (1971) (grocery store); *Saad v. City of*  
27                  *Berkeley*, 24 Cal.App.4th (1994) (house). Also inapposite is *Hawkins v. Marin Cy.*, 54  
28                  Cal.App.3d 586 (1976) (upholding the *grant* of a CUP to a religious organization).

27                  <sup>12</sup>                  The County errs in asserting (p.13n.13) that RLUIPA is rendered superfluous by the  
28                  unbridled discretion doctrine. RLUIPA’s individualized assessment provision applies to all  
29                  systems of individualized assessments. In contrast, the unbridled discretion doctrine reaches  
30                  only those that, like the County’s, lack narrow, objective, and definite criteria.

1 unconstitutional when applied to suppress the protected expression of religious schools.<sup>13</sup>

2 **D. The County’s Reliance on Cases that Do Not Involve Unbridled Discretion Claims**  
3 **Fails to Rebut Redwood’s Showing on that Claim Here.**

4 The County boldly represents (p.12) to this Court that there is a “general disinclination  
5 of courts” to apply “Free Speech doctrines such as the unbridled discretion rule” to CUP  
6 requirements for religious institutions. But *none* of the cases the County cites to support this  
7 proposition even raised an unbridled discretion claim, let alone decided it adversely to a  
8 religious institution.<sup>14</sup> They thus provide no help to the County.<sup>15</sup>

9 Moreover, the recent decision in *Hollywood II, supra*, completely rejects the County’s  
10 argument that the unbridled discretion doctrine doesn’t apply to zoning laws restricting  
11 religious expression.<sup>16</sup> There, the court invalidated an ordinance that required places of  
12 worship to satisfy “vague and imprecise” zoning permitting criteria before they could engage in  
13 protected First Amendment expression. *Id.* at \*11. Like the County’s CUP criteria,  
14 Hollywood’s code relied on malleable criteria.<sup>17</sup> The court held that because “place[s] of  
15 worship are entitled to the protections” of the First Amendment, “the provision of such  
16  
17

18 <sup>13</sup> See *Lady J. Lingerie v. Jacksonville*, 176 F.3d 1358, 1362 (11<sup>th</sup> Cir. 1999)).

19 <sup>14</sup> See *Christian Gospel Church, supra* (no Free Speech claim even raised, let alone an  
20 unbridled discretion claim); *Paris, supra* (same); *Hale O Kaula v. Maui*, 229 F.Supp.2d 1056  
21 (D.Haw. 2002) (same); *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024 (9<sup>th</sup> Cir.  
22 2004) (no unbridled discretion claim); *Grace United Methodist v. Cheyenne*, 2006 WL  
23 1681321 (10<sup>th</sup> Cir. 2006) (same); *C.L.U.B. v. Chicago*, 342 F.3d 752 (7<sup>th</sup> Cir. 2003) (same);  
24 *Lighthouse Inst. v. Long Branch*, 406 F.Supp.2d 507 (D.N.J. 2006) (same); *Petra Presbyterian  
25 Church v. Northbrook*, 2003 WL 22048089 (N.D.Ill. 2003) (same).

26 <sup>15</sup> The County’s suggestion (p.12) that Redwood seeks First Amendment protection for the  
27 mere act of “erecting a wall” misunderstands Redwood’s claim. Redwood seeks a CUP not  
28 merely to build a wall, but to obtain permission to use its property to locate and operate a  
religious school for purposes of religious expression, just as proprietors of adult businesses  
seek to locate and operate adult entertainment venues for the purposes of sexual expression.

<sup>16</sup> The County doesn’t cite *Hollywood II*, but only an earlier opinion denying a motion to  
dismiss. See 2006 WL 1320044 (S.D. Fla. May 10, 2006) (“*Hollywood I*”).

<sup>17</sup> The *Hollywood* ordinance uses “vague and imprecise” terms such as “compatible,”  
“adequate,” “sufficient,” and “appropriate,” terms materially indistinguishable from the  
County’s CUP criteria language of “properly related,” “materially affect,” and “materially  
detrimental” and “appropriate.” *Hollywood II*, at \*11; Ala. Cy. Gen. Code § 17.54.130.  
Hollywood’s code also, like the County’s, provides unfettered discretion to deny a CUP even if  
the malleable criteria are met. *Hollywood II*, at \*11; Ala. Cy. Gen. Code § 17.54.135.

1 unbridled discretion to city officials is constitutionally impermissible.” *Id.*<sup>18</sup>

2 **E. The County’s Assertion that the Unbridled Discretion Doctrine Requires a**  
3 **Showing of Discriminatory Targeting Finds No Support in Precedent.**

4 Finally, the County asserts (p.14) that Redwood must also satisfy a discriminatory intent  
5 requirement by demonstrating that the County “selectively targeted” the expression of religious  
6 schools for disfavor. But courts have repeatedly made clear that the purpose of the unbridled  
7 discretion doctrine is to address claims where the application of broad, subjective, or indefinite  
8 criteria poses a *risk* of discrimination—no actual showing of discrimination is required.<sup>19</sup>  
9 Thus, it doesn’t matter whether the government intended to target certain expression for  
10 disfavor or created such a system inadvertently—in either case, the presence of unbridled  
11 discretion creates an unconstitutional risk of discrimination.<sup>20</sup>

12 Nor does the County’s citation of *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S.  
13 750, 760 (1988), provide any support for its assertion that unbridled discretion claims include a  
14 discrimination requirement. Nowhere in its discussion of the merits of the claim, does the  
15 opinion break with decades of precedent before and after *Lakewood* and hold that a plaintiff  
16 must show discrimination or selective targeting to prevail. Instead, the language cited by the  
17 County appears in a portion of the opinion identifying when to allow facial, pre-enforcement  
18 challenges. The Court explained that the normal presumption against such challenges dictated  
19 that a facially challenged law have some “nexus” to expression, such as one that is “narrowly

20 \_\_\_\_\_  
21 <sup>18</sup> Although the County seeks to distinguish *Hollywood* as a discrimination case, the court  
22 ruled in favor of the synagogue based *solely* on the vague and imprecise criteria found in the  
23 text of the city’s permitting ordinance. No showing of discrimination or targeting was required.

24 <sup>19</sup> See, e.g., *Forsyth Cy. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (unbridled  
25 discretion regime limiting First Amendment activity invalid “because such discretion has the  
26 *potential* for becoming a means of suppressing a particular point of view”); *Rosenbaum v. San*  
27 *Francisco*, 8 Fed.Appx. 687, 692 (9<sup>th</sup> Cir. 2001) (“plaintiffs *need not show actual intent to*  
28 *discriminate* ... to prove a First Amendment violation. An ordinance that affords city officials  
unbridled discretion to determine whether or not to enforce limitations on First Amendment  
activity” is sufficient); *3570 E.Foothill Blvd. v. Pasadena*, 912 F.Supp. 1268, 1274 (C.D.Cal.  
1996)(“prime constitutional concern” in cases involving unbridled discretion “is the *threat* that  
the [government], unconstrained by narrow, objective criteria, will covertly discriminate”).

<sup>20</sup> In addition, the County’s attempt to impose a discrimination requirement into an  
unbridled discretion claim ignores the fact that an entirely *separate* line of First Amendment  
doctrine—content discrimination and viewpoint discrimination cases—addresses claims where  
the government selectively targets particular expression for disfavor.

1 and specifically directed at expression or conduct associated with expression.” *Id.* at 760. This  
2 requirement merely ensures that a facial challenge only lies where the statute would be  
3 unconstitutional in every application.<sup>21</sup> Tellingly, the County is not able to muster a *single* case  
4 that takes *Lakewood*’s language discussing the contours of a facial challenge and creates a  
5 discrimination requirement that an unbridled discretion claim is permissible only if the plaintiff  
6 shows the government targeted particular expression for disfavor.<sup>22</sup>

7 **II. The County Fails to Rebut Redwood’s Showing That It Is Entitled to Summary**  
8 **Judgment on Its RLUIPA “Substantial Burden” Claim.**

9 Redwood’s opening brief presented law and undisputed facts that warrant summary  
10 judgment for Redwood, for both liability and damages, on its RLUIPA substantial burden  
11 claim: (1) Redwood has satisfied two jurisdictional elements; (2) the County’s CUP denial has  
12 burdened activities that fall within RLUIPA’s definition of “religious exercise”; (3) the burden  
13 on that “religious exercise” was “substantial” in four independently sufficient ways that, in  
14 combination, far exceed the necessary showing: (a) Redwood is not quibbling over the burden  
15 imposed by conditions on some viable form of Redwood’s proposed use, but instead the  
16 County’s complete denial of that use; (b) the CUP denial effectively prohibits some parts of  
17 Redwood’s ministry outright and hampers others, by consigning Redwood to inadequate  
18 facilities; (c) the CUP denial creates the risk of sudden institutional extinction by consigning

19 \_\_\_\_\_  
20 <sup>21</sup> The Ninth Circuit has limited its application of this language from *Lakewood* to  
21 deciding the permissibility of facial challenges. *Compare Roulette v. Seattle*, 97 F.3d 300 (9<sup>th</sup>  
22 Cir. 1996) (finding *Lakewood*’s facial challenge criteria not met by statute prohibiting sitting or  
23 lying down on city sidewalks because such conduct is not always expressive, but stating that  
24 future as-applied challenge is permissible if statute is applied to sitting or lying that is  
25 expressive); *Nordyke v. King*, 319 F.3d 1185 2003 (*Lakewood* facial challenge criteria not met  
26 by law prohibiting display of guns at county fair because such conduct is not (if ever)  
27 expressive) *with ACLU v. Las Vegas*, 333 F.3d 1092, 1107 (9<sup>th</sup> Cir. 2003) (facial unbridled  
28 discretion claim lies to law requiring permit to sell materials communicating a message).

<sup>22</sup> Here, Redwood has brought a valid facial challenge. It challenges only those portions  
of the County’s ordinance requiring a CUP for religious schools. Because its challenge is  
limited to only those provisions regulating expressive activity protected by the First  
Amendment, Redwood may bring a facial challenge. Moreover, unlike the *Lakewood* plaintiff  
that brought only a facial, pre-enforcement challenge, Redwood has a valid as-applied  
challenge to the County’s application of its CUP criteria to prevent Redwood’s protected  
expression of worship and the teaching and inculcation of religious values. Thus, whether  
facial or as-applied, the unbridled discretion afforded to the County creates an unconstitutional  
risk of discriminatory application against disfavored religious expression.

1 Redwood to a site where Redwood faces eviction on seven months' notice with nowhere else to  
2 go; (d) the CUP denial (and its foregoing effects) has caused a drop in student enrollment; (4)  
3 the County cannot meet its burden of production on strict scrutiny; and (5) the CUP denial has  
4 cost Redwood millions of dollars, far from a mere inconvenience.

5 The County responds almost exclusively by claiming, in various ways, that the  
6 County's burden on Redwood's "religious exercise" is not "substantial."<sup>23</sup> As set forth below,  
7 none of those responses generates an issue of material fact or undermines Redwood's account  
8 of the applicable law. This Court should therefore grant summary judgment to Redwood.

9 **A. The Court Should Reject the County's Attempt to Substitute the Seventh Circuit's**  
10 **"Effectively Impracticable" Standard for the Ninth Circuit's "Significantly Great**  
11 **Restriction or Onus" Standard.**

12 In one of many attempts to raise the legal bar Redwood must clear, the County claims  
13 (p.19) that *SJCC*'s "significantly great restriction or onus" standard requires a determination  
14 that "religious exercise was rendered effectively impracticable," because *SJCC* "relied on" the  
15 "effectively impracticable" standard of *CLUB*. In fact, the *SJCC* court saw fit to articulate the  
16 standard *differently* than the *CLUB* court did, rather than simply "rely on" its "effectively  
17 impracticable" standard, as *SJCC* very easily could have. And far from requiring a showing of  
18 "effectively impracticable" to satisfy its distinct standard, *SJCC* simply noted that its decision  
19 was "entirely consistent with" the *CLUB* ruling, and explained that the result on *SJCC*'s facts  
20 would have been the same under both standards. *SJCC*, 360 F.3d at 1035. Indeed, what both

21 <sup>23</sup> The County's responses (or lack thereof) to the remainder of Redwood's showing can  
22 be dispatched quickly. Because the County doesn't respond at all to Redwood's showing  
23 regarding the two jurisdictional elements, the Court should find those elements satisfied as a  
24 matter of law. Although the County baldly asserts that it disputes whether the activities  
25 burdened by the CUP denial represent "religious exercise" (pp. 38-39), the County fails to cite  
26 a single legal authority or item of evidence in support of that alleged dispute. This, too, is  
27 insufficient to ward off summary judgment. Similarly, on strict scrutiny, the County alternately  
28 identifies interests whose generality and lack of evidentiary support is fatal under *O Centro* (pp.  
37-38), and interests which, even if the evidence indicates that they really exist here, are far  
less than "compelling" as a matter of law (p.38). Indeed, the County fails to cite a single case  
to suggest that the interests identified in the administrative process qualify as "compelling."  
This cannot satisfy the County's heavy burden of production on strict scrutiny. Finally, on  
damages – an allegedly "hidden" claim that the County plainly had no trouble finding – the  
County cites expert reports that leave entire categories of damages uncontested. Dkt. 197, Ex.  
C (not addressing facts of this case), Ex. D at 2 (contesting portions of construction cost  
increase). The Court should enter summary judgment on the uncontested portion of damages.

1 cases had in common that required the same result was that the plaintiffs claimed that merely  
2 having to complete a permit application (rather than, as here, being denied a permit properly  
3 applied for) imposed a “substantial burden.” See *Constantine*, 396 F.3d at 899-900  
4 (distinguishing and narrowing *CLUB*). Thus, this Court shouldn’t apply the “effectively  
5 impracticable” test, because it is neither the law of this circuit, nor applicable to these facts.

6 **B. The County Fails to Rebut Redwood’s Showing That the Complete Denial of**  
7 **Redwood’s Proposed Use on Its Own Property Suffices Alone to Establish a**  
8 **“Substantial Burden.”**

9 **1. Redwood Does Not Seek a “Free Pass” from Zoning Requirements, or Propose**  
10 **a Rule That Would Create One.**

11 The County argues (p.23) that if the complete denial of a permit for a religious use is a  
12 “substantial burden,” then zoning officials may never deny a permit for a religious use, and  
13 RLUIPA § 2(a) would become the “free pass” that Congress did not intend. Not so. Not only  
14 must religious land uses still always go through the process, but they could still have their  
15 permits denied, in whole or in part, without a violation of § 2(a). Because this rule covers only  
16 *complete* denials, a denial of part of a use, or the imposition of conditions on use that is  
17 granted, may not be substantial burdens. And even where the denial is complete, it is still  
18 permitted if it satisfies strict scrutiny.

19 **2. The County Completely Ignores the Complete Denial Cases Other Than**  
20 ***Constantine* and Fails to Distinguish *Constantine* Adequately.**

21 Redwood’s initial brief (pp.26-27 n.26) cites several cases finding a substantial burden  
22 where the government completely denied a permit to engage in “religious exercise” within the  
23 meaning of RLUIPA. The County cannot muster any response to most of these, and focuses all  
24 of its efforts instead on *Constantine*, erroneously asserting that it is the presence of “illegitimate  
25 reasons” for denying a permit that makes the consequent burden “substantial.” But *Constantine*  
26 itself forecloses this reading, as it explains that one purpose of the substantial burden test is  
27 precisely to eliminate the need for examining the motives behind the burden. *Constantine*, 396  
28 F.3d at 900. In fact, as is uniformly the case in substantial burden cases, *Constantine* examined  
only the degree of burden on religious exercise—not the motivation behind or reason for the  
burden—in assessing whether the burden was “substantial.” *Id.* at 901. The County’s reading

1 of *Constantine* would not only confuse discrimination and substantial burden claims under Free  
2 Exercise and RLUIPA, *see Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3d Cir. 1994),  
3 but would confuse the plaintiff's showing that the burden is "substantial" at the *beginning* of  
4 the analysis, with the government's showing of reasons to justify the burden at the *end*. *See*  
5 *infra* § II.C.1.e. This reading of *Constantine* should therefore be rejected.

6 **3. It Is Undisputed That the County Completely Denied Redwood's Proposed Use.**

7 It is undisputed that the County actually denied both the original and each and every  
8 one of the five alternative proposals put before it for Redwood's use of its property as a  
9 religious school. Rdwd.Br.Ex-B-5 ("Buckley") 309–10, 348–49 (County had authority to grant  
10 CUP for Redwood's proposal or any of the alternatives); Ex-A-2 at 83 (Supervisor Steele  
11 testifying she was unwilling to allow *any* alternative presented). The mere possibility that the  
12 County might change its mind at some point in the future as to one alternative, and permit a use  
13 that would serve less than 20% of Redwood's already-depleted student body, is immaterial.

14 **C. Even If the Court Were Inclined to Require Redwood to Show More Than a  
15 Complete Denial to Establish a "Substantial Burden," Additional Undisputed Facts  
16 Satisfy Any Additional Requirement.**

17 **1. It Remains Undisputed That the Facilities at the Martin Site Are, and Will  
18 Remain, Inadequate.**

19 **a. The Fact That Redwood Can Accomplish More Than None of Its Mission at  
20 the Martin Site Does Not Establish That Its Facilities Are Adequate.**

21 Rather than confront Redwood's voluminous evidentiary showing that details how the  
22 constraints of the Martin Site significantly restrict Redwood's ministry, the County claims that  
23 it is all swept aside by Mr. Johnson's "admission" in his deposition that Redwood "has been  
24 able to fulfill its mission of providing Christ-centered education at the Martin site." Cy.Br.27.  
25 Redwood freely admits, like Mr. Johnson, that it does provide some education at Martin, that  
26 all of it is Christ-centered, and that the constraints imposed by the CUP denial, though severe,  
27 have not yet reached the point where Redwood can fulfill *none* of its mission and should  
28 therefore take steps associated with shutting down (*e.g.*, refunding tuition to current students or

1 discouraging potential ones from applying).<sup>24</sup> *Id.* But the fact that the County’s burden has not  
2 (yet) driven Redwood out of business completely—*i.e.*, the fact that Redwood remains capable  
3 of fulfilling *some fraction* of its mission—does not mean that the burden is insubstantial.  
4 *Constantine*, 396 F.3d at 900-01 (burdens need not be “insuperable” to be “substantial”).  
5 Indeed, nearly every RLUIPA burden found “substantial” involved a religious organization that  
6 could still operate under the burden. *See* Rdwd. Opp. 12–13 (collecting cases).

7 **b. The Fact That Redwood Has Been Accredited at the Martin Site Does Not**  
8 **Establish That Its Facilities Are Adequate.**

9 The County also argues (p.28) that the fact of Redwood’s accreditation at Martin creates  
10 a dispute of fact as to whether the burden of having to operate there is “substantial.” But  
11 accreditation is a very low bar, such that, for example, loss of accreditation would mean that  
12 Redwood graduates would have to fight for admission to the University of California system.  
13 Accordingly, it is entirely possible—and actually is the case—that Redwood could pass the  
14 very low accreditation standard, while being severely hindered in meeting its own standard of  
15 adequacy in fulfilling its educational mission. Ex-B (“Johnson Decl. II”) ¶ 25. Moreover, the  
16 most recent report found the Martin site “is not adequately addressing needs of the school  
17 community,” and warned that failure to move to a permanent home “could be catastrophic to  
18 the junior and senior high program.” Rdwd.Br., Ex-A-3 at 26. Thus, Redwood’s being  
19 accredited does not generate a factual dispute that might preclude summary judgment.

20 **c. The Fact That Redwood Has Improved the Martin Site, and Could Alter It**  
21 **Further, Does Not Establish That Its Facilities Are Adequate.**

22 The County strives (pp.28-29) to generate a factual dispute regarding the adequacy of

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23 24 The County hasn’t mustered any evidence (and cannot) to contest these basic facts.  
24 This explains why the County must resort to the baseless suggestion (pp.27-28) that Mr.  
25 Johnson’s declarations supporting those facts represent a sham designed to manufacture an  
26 issue of fact with respect to his prior deposition testimony. In fact, Mr. Johnson’s deposition  
27 testimony is entirely consistent with his subsequent declarations—and with the mountain of  
28 evidence Redwood provided elsewhere—to the effect that the CUP denial effectively  
prohibited vast portions of Redwood ministry, and has hampered other portions, but has not  
(yet) extinguished the ministry altogether. *See, e.g.*, Rdwd.Opp. Ex-B-3 (“AR”) 714 (Martin  
Site “less than acceptable”); Rdwd.Br. Ex-B-9; Ex-A-3 at 51–58, 99–146, Ex-A-4 at 228–87,  
Ex-A-5 at 302–98; Johnson Decl. I ¶¶ 53–103; Johnson Decl. II ¶¶ 3–11, 13–26, 30, 35. *See*  
*also* Rdwd Br. at 27–34 (consistently citing Johnson Depo. and Decl. in tandem). These still  
uncontested facts represent are sufficient for the burden of the CUP denial to be “substantial.”

1 the Martin Site by first noting the immaterial fact that the County granted all of Redwood’s  
2 prior requests for permits to improve Martin. The County later cites (p.39) the Morris report  
3 for the proposition that it is not physically impossible to engage in more construction at Martin.  
4 This too is irrelevant. The County concedes it would be impossible to get financing to make  
5 large-scale improvements there, given the nature of the lease.<sup>25</sup> Even if such improvements  
6 were possible, Redwood is currently using all the space at Martin, and can’t add new facilities  
7 without sacrificing others.<sup>26</sup> Redwood would also be left without necessary classroom and  
8 assembly space during renovations. Johnson Decl. II ¶¶ 14–15. Large-scale improvements  
9 would be further complicated and delayed by the site’s asbestos issues, which would require  
10 abatement measures. *Id.* ¶ 17. Even if it were possible to accomplish such renovations, the  
11 improvements would only make the site more attractive for SLUSD to reclaim. *Id.* ¶ 13. Thus,  
12 neither prior improvements nor the Morris report create an issue of fact on Martin’s adequacy.

13 **d. The County’s Ripeness and Exhaustion Arguments Regarding the**  
14 **Inadequacies of the Martin Site Are Legally and Factually Baseless.**

15 As Redwood explained in its Opposition Brief (p.15), the County simply overlooked the  
16 evidence that Redwood informed the County that the Martin Site was inadequate. But even if  
17 Redwood hadn’t informed the County, this defense would still fail. The County ignores that  
18 “the venerable doctrine of exhaustion of remedies” (p.2) just as venerably does not apply to  
19 federal civil rights claims. *See Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).<sup>27</sup>

20 **e. The County Fails to Distinguish Cases Finding a “Substantial Burden”**  
21 **Where a Permit Denial Consigns a Religious Use to Inadequate Facilities.**

22 The County attempts (p.35-37) to distinguish the many inadequate facilities cases on the  
23 ground that burdens were found “substantial” because they were imposed for “illegitimate  
24 reasons.” But this distinction has no basis in law. None of these cases rely on “illegitimate

25 <sup>25</sup> Rdwd. Opp. Ex-B-9 (“Morris”) at Exh. 24 (“It may also be difficult/impossible to get  
26 financing for investment in a \$3.5 million building, for example, on leased ground, where the  
27 lease provides for termination on 210-days notice and occupancy is not certain past 2010.”).

28 <sup>26</sup> Johnson Decl. II ¶ 18; Morris 288:7–25 (County expert conceding “you’re going to give  
up something to get something else” at Martin Site).

<sup>27</sup> Moreover, the *Williamson* case that the County cites for the proposition that a ripeness  
requirement applies to all “land use regulation,” only applies to takings cases in this circuit. *See  
Carpinteria Valley Farms v. Santa Barbara*, 334 F.3d. 796, 798-99 (9<sup>th</sup> Cir. 2003).

1 reasons” in their own discussions of why the burdens are “substantial,” and the County doesn’t  
2 cite any other substantial burdens case that draws this distinction. Little wonder—these are  
3 analytically distinct questions that the County would conflate, adding needless confusion to the  
4 law. Whether a burden is “substantial” depends on the degree of its impact on religious  
5 exercise, not on the reason why it was imposed. Later in the analysis, that reason may  
6 determine whether the burden is ultimately justified (*i.e.*, whether that reason serves a  
7 “compelling” interest), but not whether it is “substantial” in the first place. Indeed, if the  
8 burdens in these cases were imposed for “illegitimate reasons,” they would fail even rational  
9 basis scrutiny, and it would be irrelevant whether the burden was “substantial.”

10 **2. It Remains Undisputed That Redwood Faces the Risk of Sudden Death by**  
11 **Eviction on Seven Months’ Notice with No Other Place to Go.**

12 The County first attacks Redwood’s showing on this point by declaring it “histrionic,”  
13 but then doesn’t dispute that Redwood’s lease must be renewed every 3 years; it is subject to  
14 termination on 7 months’ notice; SLUSD has evicted Redwood twice before; that HARD and  
15 the KIPP school are considering SLUSD public school sites; and that the lease must be re-bid  
16 in three years, with public entities having first priority.<sup>28</sup> Later (pp.34-35), the County tries to  
17 back away from the conclusion in its own EIR that there are no alternative sites for Redwood.  
18 AR 1078; Buckley 301–302 (County “stand[s] by” and “agrees with all the conclusions” in the  
19 EIR). This attempt fails,<sup>29</sup> but in any event, it is the real risk—not the certainty—that Redwood  
20 will have nowhere to go if evicted that suffices to render the burden “substantial.”

21 **3. It Remains Undisputed That Redwood Has Suffered a Severe Drop in Enrollment,**

22 <sup>28</sup> Johnson Decl. I ¶¶ 50, 99–102; Rdwd. Br. Ex-B-2 at 91–92 (SLUSD has no space for  
23 450-student KIPP school). Instead, the County attacks a straw-man argument that Redwood  
24 does not make (*i.e.*, that its complaint is merely with having to operate on leased property).  
25 Cy.Br.29-30.

26 <sup>29</sup> The EIR explained that Redwood investigated more than two dozen sites, but they were  
27 either inadequate for the project, found unsafe for school use, not actually on the market,  
28 acquired by public entities with priority in the bidding process, opposed by city officials, or  
purchased for commercial development. AR 1076–1077; Johnson Decl. II ¶ 32. The site a  
Redwood supporter called “perfect” was sold for commercial development only after San  
Leandro told Redwood it wanted commercial, tax-revenue generating development on the site,  
and would oppose Redwood’s attempt to use the site. Johnson Decl. II ¶32. And the  
possibility of a Hayward USD site coming available in the future is irrelevant. *Id.* ¶27 (HUSD  
sites may never become available, were not available in 2001, and are inadequate in any case.)

1                   **and That the CUP Denial Contributed to That Drop.**

2                   The County doesn't dispute that Redwood's enrollment is down by 25% since the CUP  
3 denial. It claims the CUP denial had nothing to do with that decline. The County claims that  
4 Redwood's entire evidentiary showing on this point (Rdwd. Br. 31–33; Rdwd. Opp. 7, 10–12)  
5 is negated because none of the parents who identified reasons for leaving Redwood, and whose  
6 reasons were reported in the accreditation process, specifically mentioned the CUP denial. But  
7 other than leaving the area, which would cause a baseline level of departures every year, the  
8 reasons listed in the ACSI report for declining enrollment—financial strain and fewer parents  
9 choosing to begin their children's education at RCS—are the proximate result of the CUP  
10 denial. Johnson Decl. I ¶¶ 82–103; Johnson Decl. II ¶¶ 11. That some parents identified the  
11 effects of the CUP denial, rather than the denial itself, as the reason for leaving, doesn't  
12 undermine Redwood's showing that the CUP denial caused the dramatic enrollment plunge.

13                   **4. The County's Novel "Due Diligence" Argument Is Legally and Factually Baseless.**

14                   The County faults Redwood for failure to "investigate the suitability" of the Property  
15 for the use before buying it. Even if true, this fact is legally irrelevant, as the County doesn't  
16 cite a single case suggesting what place it might have in the RLUIPA analysis. But in any  
17 event, this claim is false—Redwood did all it could to investigate the Property's suitability.<sup>30</sup>

18                   **CONCLUSION**

19                   The Court should enter summary judgment in Redwood's favor.

20 Dated: July 7, 2006

Respectfully submitted,

21 \_\_\_\_\_  
22 MARK A. GAITHER

23 <sup>30</sup> The County's selective citation of its ordinance (p.33) omits that the Property is located  
24 in a district specifically designed to accommodate both homes *and* "community facilities."  
25 Ala. Cy. Gen. Code § 17.08.010. And because the County doesn't permit religious schools  
26 any where as of right, the zone where Redwood purchased is the best legal climate the County  
27 offers. Also, Redwood chose a site directly off the interstate and across the street from another  
28 school. Johnson Decl. I ¶¶ 32–33. Redwood went to great lengths to design a campus to fit the  
surrounding area, and to make site plan and design changes that mitigated neighbors' concerns.  
*Id.* ¶ 39. And although Redwood took care in every variable it could control, the County was  
not so careful. It concedes that there is no way to know in advance whether particular CUP  
conditions can be met, *e.g.*, Buckley 245-46 (no way to know in advance what level of traffic  
increase is too great); *id.* at 266 (same for acceptable noise levels), and that the process is a  
"crap-shoot," where "you pay your money and take your chances." Rdwd. Br. Ex-B-10 at 88.

**PROOF OF SERVICE**

I, Mark A. Gaither, declare that:

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

David Skinner  
MEYERS, NAVE, RIBACK, SILVER, et al.  
555 12<sup>th</sup> Street, Suite 1500  
Oakland, CA 94607

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

Tamara Ulrich  
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Civil Division Federal Programs Branch  
20 Massachusetts Avenue, Room 7308  
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Alex Tse  
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Washington, D.C. 20036-1735

Christiana Tiedemann  
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1515 Clay Street, Suite 2000  
Oakland, CA 94612

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

I declare under the penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this declaration was executed on July 7, 2006, at San Ramon, California.

\_\_\_\_\_  
Mark A. Gaither