No. 25-1192

In the United States Court of Appeals
For the Ninth Circuit

PASTOR MARK MILLER, AND THE BURIEN FREE METHODIST CHURCH, ALSO KNOWN AS THE OASIS HOME CHURCH,

Plaintiffs-Appellants,

v.

CITY OF BURIEN, A MUNICIPAL CORPORATION; JEFFREY D. WATSON, PLANNING REPRESENTATIVE FOR THE CITY OF BURIEN; AND JOSEPH STAPLETON, BUILDING REPRESENTATIVE FOR THE CITY OF BURIEN,

Defendants-Appellees.

Appeal from U.S. District Court for the
Western District of Washington
No. 2:24-CV-01301 BJR
Honorable Barbara J. Rothstein

BRIEF OF *AMICUS CURIAE* FIRST LIBERTY INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

Jeffrey C. Mateer
David J. Hacker
Jeremiah G. Dys
Ryan N. Gardner
Kayla A. Toney
Counsel of Record
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy, Suite 1600
Plano, TX 75075
[redacted]
Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(a), there is no parent corporation or publicly held corporation that owns 10% or more of stock of the *amicus curiae* described below.

/s/ Kayla A. Toney
Kayla A. Toney
Counsel of Record for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated exclusively to defending religious liberty for all Americans. Through pro bono legal representation of both individuals and institutions, First Liberty's clients include people of diverse religious beliefs, including individuals and institutions of the Catholic, Protestant, Islamic, Jewish, Falun Gong, and Native American faiths.

First Liberty is actively engaged in litigation in multiple states across the country where governments want to suppress, exclude, and redefine religious charitable conduct. *See, e.g., Dad's Place of Ohio v. City of Bryan*, No. 3:24-cv-00122 (N.D. Ohio 2024); *Gethsemani Baptist Church v. City of San Luis*, No. 2:24-CV-00534-GMS (D. Ariz 2024); *Grace New England v. Town of Weare*, No. 1L24-cv-00041-PB-AJ (D.N.H. 2024). The First Amendment guarantees the right of all Americans to engage in religious exercise defined by their sincere religious beliefs rather than the government's preferences. First Liberty maintains an interest in

[1] No party's counsel authored this brief in whole or in part. No party's counsel or party contributed money that was intended to fund preparing or submitting this brief. No person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* FED. R. APP. P. 29(a)(4)(E). There is no parent corporation or publicly held corporation that owns 10% or more of stock of any amicus curiae described below. *See* FED. R. APP. P. 26.1(a); 29(a)(4)(A). All parties have consented to the filing of this brief.

preserving religious liberty for religious organizations across the country who provide religiously motivated charitable services to their communities.

INTRODUCTION

For Pastor Mark Miller, Burien Free Methodist Church, and thousands of religious institutions across the Ninth Circuit, ministering to needy neighbors is at the very core of their religious exercise. The Church here takes Jesus at His word: "[f]or I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in . . . . [W]hatever you did for one of the least of these brothers and sisters of mine, you did it for me." Matthew 25:35, 40. Indeed, Jesus Himself had "no place to lay His head." Matthew 8:20. But if He lived in Burien, Washington, and the Church allowed him to sleep in its own parking lot during the freezing winter months, it would face escalating fines of more than $100,000. That violates the Free Exercise Clause.[2]

ARGUMENT

I. The First Amendment protects the Church's right to minister to the homeless.

Ministering to the homeless is a core religious exercise for the Burien Free Methodist Church, and it is also a permitted use for a "Religious Facility" under the City's zoning ordinances. The City's actions run afoul of the First Amendment by

[2] *Amicus* fully supports the Church's arguments under the Free Speech Clause and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). This brief focuses on its arguments under the Free Exercise Clause.

(1) interfering with the Church's core religious exercise and (2) disproportionately harming a denomination that believes in outreach to unhoused neighbors as a clear expression of the Church's faith and obedience to Biblical commands.

The Free Exercise Clause guarantees the right of people of faith to engage in religious exercise, including religious charitable ministries. As the Supreme Court explained over 80 years ago and reaffirmed recently, the First Amendment "embraces" both the "freedom to believe and freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly," but also "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). Thus, religiously motivated conduct enjoys "special protection" under the Free Exercise Clause. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 713-14 (1981). And any attempt by the government to determine which religiously motivated actions are sufficiently religious enough to enjoy either constitutional protection or eligibility for a government benefit like tax exemption is "obnoxious to the Constitution." *See Cantwell*, 310 U.S. at 306.

This term, the Supreme Court unanimously held in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission* that for a church or religious

organization, serving the needy is an inherently religious exercise, not a "secular" activity. 145 S. Ct. 1583 (2025). Like the Church in this case, Catholic Charities "provid[es] services to the poor and disadvantaged" and seeks to "be an effective sign of the charity of Christ." *Id.* at 1588. In the decision below, the Wisconsin Supreme Court held that organizations could only be tax exempt if they were "'primarily' religious in nature," looking at criteria such as "whether an organization participated in worship services, religious outreach, ceremony, or religious education." *Id.* at 1589. The Supreme Court unanimously rejected that approach, holding that Catholic Charities' outreach ministry—including care for the homeless—was a core religious exercise as an expression of the faith. To hold otherwise would transgress both the Free Exercise Clause and the Establishment Clause by showing a preference for denominations that focus on worship and evangelism rather than service or outreach ministry. *Id.* at 1591 ("The Establishment Clause's 'prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause…'") As Justice Sotomayor put it, writing for the unanimous Court, "[w]hen the government distinguishes among religions based on theological differences in their provision of services, it imposes a denominational preference that must satisfy the highest level of judicial scrutiny." *Id.* at 1594.

The same principle applies here. While the City of Burien's zoning regulations technically do not differentiate between religions on their face, the City's application of its regulations to the Church has resulted in denominational preferencing that triggers strict scrutiny under *Catholic Charities*. The City's regulations, BMC §19.15.001 and §19.15.005(9), expressly recognize that use of property as a "Religious Facility" is a permitted use "and includes related accessory uses." Yet the City's position is that ministering to the homeless on the Church's own property—serving as the hands and feet of Jesus according to the Gospel message—is not a "permitted use." That interpretation gives preference to those who confine their worship inside the four walls of their church building, while disfavoring denominations like Burien Free Methodist Church that step into their parking lot to follow the commands of Jesus. As alleged in the complaint and its letter to the City, the Church "holds the sincere religious belief that the provision of outdoor space for the homeless is a religious duty and 'an integral part of its religious mission." ER-40 (Compl. ¶ 43). The district court ignored this underlying issue, focusing on whether the Church had to fill out a permit application rather than grappling with whether its homeless ministry was already a permitted use as a Religious Facility. That was error, and this Court should reverse.

In two current cases, First Liberty Institute represents churches encountering similar resistance from local bureaucrats. Indeed, government officials across the

country are using various laws to suppress religious ministries providing charitable services to their communities in part based on a lack of respect as to what actions constitute protected religious exercise. This problem of government unduly limiting, or simply redefining, what constitutes religious exercise extends to food ministries as well. In the small border town of San Luis, Arizona, hunger is an ongoing problem. For over 25 years the Gethsemani Baptist Church has organized the collection and distribution of hundreds of thousands of pounds of food to more than 150 families who regularly line up for help. But last year, the city abruptly shut down the program and began issuing fines anytime the church distributed food. The city even took the extraordinary step of issuing a criminal citation against the church's pastor. The city took these actions in part based upon the nonsensical argument that the church was engaging in improper commercial operations rather than protected religious exercise. The Church is currently litigating its right to feed the hungry in federal court and could be impacted by this Court's decision. *See generally* Order, *Gethsemani Baptist Church v. City of San Luis*, No. 2:24-CV 00534-GMS (D. Ariz Nov. 22, 2024).

In *Grace New England v. Town of Weare*, No. 1L24-cv-00041-PB-AJ (D.N.H. filed Feb. 9, 2024), First Liberty represents Pastor Harold Kaloogian, who hosts a church in the largest room at his home, a renovated barn. While the Town allows many nonreligious gatherings at his home and makes other exceptions to its

zoning regulations for secular reasons, it has repeatedly tried to require Pastor Kaloogian's church to submit to a cumbersome site plan process in order to worship. The Town has threatened significant fines and legal action unless the church complies with its regulations, putting its pastor to an unconstitutional choice: cease religious exercise or face the Town's wrath, in the form of daily fines, orders to cease-and-desist, intrusive visits without warning, and court action. The church sued under state law, the Free Exercise Clause, and RLUIPA, and cross-motions for summary judgment are currently pending in district court.

A common thread runs through these cases: the government is engaging in improper line-drawing regarding what does and does not constitute religious activity. Over 80 years ago the Supreme Court condemned such inquiries by government officials when it struck down a state statute prohibiting the solicitation of money for religious purposes unless a state official first blessed the cause underlying the solicitation as being sufficiently religious. *Cantwell*, 310 U.S. at 305. The Court warned that government authority "to determine whether [a] cause is . . . a religious one" is a "censorship of religion" that threatens "its right to survive" and is a "denial of liberty protected by the First Amendment." *Id.* Unfortunately, many government officials and courts have failed to heed the Court's warning.

The Supreme Court recently reaffirmed the longstanding principle that the Free Exercise Clause protects not only religious beliefs but also the right to "live

out" those beliefs in daily life "through the performance of . . . physical acts." *Kennedy*, 597 U.S. at 524. And no government has the authority to declare what is "orthodox" when it comes to religious beliefs or how those beliefs should be expressed through physical acts. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Nor may the government engage in line drawing to determine whether a particular act motivated by religious belief is religious enough to warrant First Amendment protection. *Thomas*, 450 U.S. at 715. But that is exactly what the government has done here. Burien Free Methodist Church provides food and shelter to the needy in the name of Jesus. They take the Biblical command that "faith without works is dead" seriously. See James 2:26 (NIV). They also share the beliefs of millions of Americans that pure religion is to "look after orphans and widows in their distress" and to care for "the least of these" in their community. See James 1:27 (NIV); Matthew 25:40 (NIV).

The Church's homeless ministry is pure religious exercise protected by the First Amendment. The City transgressed when it refused to treat that ministry as a permitted use of a "Religious Facility." And the district court erred when it sidestepped this issue and faulted the Church for not submitting to an unnecessary regulatory process.

II. The City has burdened the Church's core religious exercise.

The City's conduct is a cognizable burden under the Free Exercise Clause. Unlike the substantial burden test required by RLUIPA's text, the Free Exercise Clause analysis drops any requirement of substantiality and considers instead *any* burden on religious exercise to be sufficient when that burden is imposed pursuant to a law that is not neutral and generally applicable. See *Mahmoud v. Taylor*, No. 24-297, 2025 WL 1773627, at *13 (June 27, 2025) (finding burden on religious exercise, with no mention of "substantial" burden, where parents were forced to choose between forgoing public education or risking interference with their faith); *Kennedy*, 597 U.S. at 525 ("Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation . . . by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"); *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) ("[T]he City has burdened the religious exercise of [the plaintiff] through policies that do not meet the requirement of being neutral and generally applicable."); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–47 (1993) (noting that no party questioned the sincerity of petitioners' religious beliefs and addressing the free exercise violation without considering whether the burden was substantial); *see also Kravitz v. Purcell*, 87 F.4th 111, 124 (2d Cir. 2023) ("When we are considering government policies that are not neutral and generally applicable . . .

there is no justification for requiring a plaintiff to make a threshold showing of substantial burden."). As discussed in Appellants' opening brief at pp. 48-56, the Church has proven the existence of the heightened substantial burden on its religious exercise required by RLUIPA. But at a minimum, the City's regulations and its application of those regulations to the Church burden its religious practice in a manner that is neither neutral nor generally applicable.

In *Catholic Charities*, Justice Thomas' concurrence addressed this precise issue, finding that "the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.' The exclusion of 'religious observers from otherwise available public benefits' is a cognizable free exercise burden." *Catholic Charities,* 145 S. Ct. at 1603 (quoting *Carson v. Makin*, 596 U.S. 767, 778 (2022)). For a church whose religious beliefs require serving those on the margins of society, it is unconstitutional to exclude it from benefits that other churches enjoy. In *Catholic Charities*, that was a tax exemption. Here, it is the Church's ability to minister freely on its own property without constant threat of escalating fines.

Forcing a religious assembly to stop its exercise or else face government fines is a burden on the free exercise of the individuals who would attend. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 27 (2020) (Gorsuch, J., concurring) ("Nor may we discount the burden on the faithful who have lived for months . . .

unable to attend religious services"). In *Sherbert v. Verner*, the Supreme Court acknowledged fines as an obvious free exercise problem: "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. 398, 404 (1963); *see also Wisconsin v. Yoder*, 406 U.S. 205, 208–09 (1972) (fine of $5, roughly $38 today, if parents did not comply with the compulsory attendance law at issue was burden on religious exercise). Here, the City tried to fine the Church $104,375, adding an additional $250 for every day it hosted homeless neighbors. ER-50 (Compl. ¶ 103). That is clearly a burden on the Church's religious exercise (and a substantial burden as well).

As to the district court's conclusion that the Church should have filled out a permit application to avoid fines, the Supreme Court has rejected similar arguments three times, under both the Free Exercise Clause and the RFRA context, under the "same standard" as RLUIPA. *Holt v. Hobbs*, 574 U.S. 352, 356, 358 (2015). In each case, the Court concluded that the choice itself (whether to pay a fine or submit to a government process before engaging in religious exercise) imposed a burden on religious exercise. In *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, the government urged Catholic nuns to fill out a form so other entities could provide contraceptives for their employees. 591 U.S. 657, 668 (2020). The court of appeals found no substantial burden, but the Supreme Court held that the

agency action was "arbitrary and capricious for failing to consider an important aspect of the problem," since forcing the nuns' complicity in the contraceptive scheme would violate RFRA. *Id.* at 682. The solution was not as simple as just filling out a form—the nuns would be substantially burdened by submitting to a government process that contravened their consciences. *Id.* In *Burwell v. Hobby Lobby*, the government argued that the plaintiff could avoid the substantial burden of escalating daily fines by dropping health insurance coverage altogether. The Court found it was not "a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans." 573 U.S. 682, 723 (2014). Forcing the families to make that choice constituted a burden on their religious exercise. In *Mahmoud v. Taylor*, the Supreme Court recently held that a similar choice burdened parents' religious exercise so significantly that strict scrutiny was required: "the parents will continue to be put to a choice: either risk their child's exposure to burdensome instruction, or pay substantial sums for alternative educational services. . . . [T]hat choice unconstitutionally burdens the parents' religious exercise." 2025 WL 1773627, at *24.

Here, the City has burdened the Church by putting it to a similar choice: either stop its religious exercise by evicting homeless neighbors, or face daily escalating fines, or submit to an uncertain permitting process that will likely result in either a

denial or an indefinite delay at the onset of winter—with freezing temperatures that motivated the Church's desire to serve unhoused neighbors in the first place. Indeed, the Church signed a Memorandum of Understanding with the City giving it all the information requested in the permit application and agreeing to abide by its regulations, but the City never signed the agreement, and in fact delayed until temperatures warmed and the encampment was no longer active. ER-47 (Compl. ¶¶ 80-81). As in *Mahmoud*, the Church did not need to "wait and see" whether the City denied its permit application. 2025 WL 1773627, at *20. The choice itself constituted a "burden on religious exercise" under the Free Exercise Clause. *Id.*

III. The district court ignored binding Supreme Court precedent when it found the City of Burien's actions generally applicable.

When a government entity burdens a plaintiff's sincere religious practice "pursuant to a policy that is not 'neutral' or 'generally applicable,'" the First Amendment has been violated "unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 597 U.S. at 525 (citations omitted). "Failing *either* the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Id.* at 526 (emphasis added). Both prongs are not required—failing just one is sufficient to invoke the highest standard in constitutional law.

The City's application of its zoning regulations to the Church is not generally applicable for two reasons: (1) under *Tandon v. Newsom*, the regulations permit

secular exemptions that undermine the City's interest in a similar way; and (2) under *Fulton v. City of Philadelphia,* City officials have discretion to make individualized assessments and grant exceptions to the zoning regulations.

First, a practice is not neutral and generally applicable if it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). In other words, "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" *Fulton*, 593 U.S. at 534. In its list of "Exemptions to Permit Requirement," the City treats other parking lot uses more favorably than the Church's ministry, allowing exemptions for carnivals, circuses, community festivals, Christmas tree lots, parking lot sales, and produce stands. BMC §19.75.020. But the district court explained these away, arguing that "those exemptions only apply to land use within commercially zoned property," not "land use within multi-family zoned property." ER-27. The district court sliced the comparators too thinly here—especially since both sets of regulations apply to the same context of parking lot use. Under *Tandon*, the relevant standard of comparison is the level of "risks various activities pose, not the reasons why people gather." 593 U.S. at 62. Here, the City has only asserted generic health and safety interests. "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than

those activities even when the same precautions are applied." *Id.* at 63. The City hasn't met that burden, because they haven't identified *any* actual health or safety concerns posed by the Church's three-month homeless ministry. Indeed, the encampment passed its fire inspection, and because of the Church's Code of Conduct for all residents, there were no issues with littering, illegal drug use, violence, or noise. ER-48 (Compl. ¶¶ 86-88). Besides, a nonprofit called the Burien Community Support Coalition operated the encampment to ensure compliance with the Code of Conduct. ER-48 (Compl. ¶ 85). Thus, the City failed to show why the Church's use of its own parking lot ministry would be any more impactful on public health or safety than exemptions it already allows for carnivals, circuses, and other commercial activities that draw crowds—which would likely result in more noise, litter, and general disturbance than the Church's ministry ever did.

Second, under the Supreme Court's unanimous holding in *Fulton,* "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" 593 U.S. at 533 (citation omitted). In that case, even where no exemptions had been granted, the fact that the City Commission had the "sole discretion" to make individual exemptions available triggered strict scrutiny. *Id.* at 535. So too here. The district court ignored *Fulton* and misstated the law when it concluded, "zoning laws that permit some individualized assessment for variances

remain 'generally applicable' so long as the laws are motivated by secular purposes and impact equally all landowners seeking the variances." ER-28. This conclusion contradicts widespread agreement among courts and scholars that "[l]and use regulation is among the most individualized and least generally applicable bodies of law in our legal system." *See* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 767 (1999); Sarah J. Gralen Rous, *Why Free Exercise Jurisprudence in Relation to Zoning Restrictions Remains Unsettled After* Boerne v. Flores, 52 SMU L. REV. 305, 327 (1999) ("[U]nder the reasoning of *Smith,* most, if not all, zoning legislation must be exempted from the *Smith* rule and warrants application of the compelling interest test"); *see also St. Timothy's Episcopal Church v. City of Brookings*, 726 F. Supp. 3d 1231, 1238 (D. Or. 2024) (stating that RLUIPA was passed to address "a nationwide problem: churches are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.").

By that logic, the Free Exercise Clause would only apply when laws explicitly targeted a religious belief, as in *Lukumi.* But that is just one of the many ways that the Free Exercise Clause applies. Indeed, the entire "general applicability" framework exists to ensure that laws which are neutral on their face do not burden religious exercise. A law with perfectly altruistic motivations can still burden religious exercise – and that's why *Fulton* is controlling here. What is more, Burien's

regulation adds an additional layer of discretion by improperly shifting the burden of proof to the Church to demonstrate that its ministry will "not be materially detrimental to the public welfare," and leaving it up to a city official to decide what that vague standard means. BMC §19.75.060.

Because the City has burdened the Church's religious practice based on a policy that is not generally applicable, "the focus then shifts to the defendant to show that" its actions survive scrutiny. *Kennedy*, 597 U.S. at 524. "A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. . . . Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546). Strict scrutiny is "a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Mem.).

The City cannot satisfy this demanding test. It is not enough for the government to assert compelling interests "at a high level of generality"; instead, the government must identify not only "a compelling interest in enforcing its . . . policies generally," but demonstrate 'scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.'" *Fulton*, 593 U.S. at 541 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–432 (2006)). In other words, strict scrutiny "demands a "'more focused' inquiry . . .

through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion" is burdened. *Hobby Lobby*, 573 U.S. at 726 (citation omitted). Broad health and safety interests are not enough to meet this demanding standard. *Diocese of Brooklyn*, 592 U.S. at 18 (public health during pandemic); *O Centro*, 546 U.S. at 433 (enforcing federal drug laws); *Holt*, 574 U.S. at 362 (prison safety); *Lukumi*, 508 U.S. at 543–44, 546 (prevention of animal cruelty); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267–68 (11th Cir. 2005) (traffic safety); *Tagore v. United States*, 735 F.3d 324, 330–31 (5th Cir. 2013) (protecting personnel in federal buildings); *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013) (controlling government costs).

In *Mast v. Fillmore County*, the Supreme Court found it was error to "treat[] the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." 141 S. Ct. 2430, 2432 (2021) (Gorsuch, J., concurring). The question there—and here—"'is not whether the [City] has a compelling interest in enforcing its [health and safety requirements] *generally*, but whether it has such an interest in denying an exception' from that requirement to the [Church] *specifically*." *Id.* (quoting *Fulton*, 593 U.S. at 541). In a similar case where a city refused to allow a church to meet in its own building, another federal court within the Ninth Circuit recently applied the same analysis. The city maintained that "[t]here is a 'public interest in the City's ability to

zone and control land uses, such as by implementation of its updated General Plan.'" *Anchor Stone Christian Church v. City of Santa Ana*, No. 8:25-cv-00215, 2025 WL 1086360, at *14 (C.D. Cal. Apr. 7, 2025). But the court rejected "that interest [a]s unlikely to be compelling—it is too 'broadly formulated' to be 'of the highest order.'" *Id.* (quoting *Fulton*, 593 U.S. at 541). The city's interest was also "likely too attenuated from Anchor Stone's proposed religious assembly for the City's denial of Anchor Stone's CUP application to be considered a necessary, narrowly tailored action." *Id.*; *see also Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007) (rejecting Village's argument that it had "compelling interest in enforcing zoning regulations and ensuring residents' safety through traffic regulations" because it failed to show how that interest applied "in the particular case at hand").

Here, the City has cited generic health and safety concerns without identifying any specific concerns caused by this Church's homeless ministry. The City's willingness to permit comparable secular activities without requiring a permitting process in advance proves that the City lacks a compelling interest in refusing to allow the Church an exception. The City makes much of its Temporary Use Permit form, but only three questions bear any relation to health or safety: "Is electrical power needed? Is liquor being sold? Is use of public right-of-way required?" ER-40,

ER-72. The Church truthfully answered "no" to all three questions, dissolving any legitimate concern by the City.

Even if the City's generic interests in health and safety were compelling, the City has not chosen the least restrictive means to pursue them. That "exceptionally demanding" standard requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Holt*, 574 U.S. at 364–65 (internal citation omitted). In other words, "[i]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Id.* In the public health and safety context, "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied." *Tandon*, 593 U.S. at 63.

The City could pursue its goals in at least three ways that would be less restrictive to the Church's religious exercise. First, the City could choose to exercise its discretion to treat the Church's homeless ministry as a permitted use for a "Religious Facility." Second, the City could treat the Church's ministry as a "related accessory use," which the zoning regulation allows for in its text. BMC §19.15.005(9). Third, the City could exercise its administrative discretion to simply allow the Church's ministry to proceed by waiving its alleged permitting

requirement. Indeed, until recently, the City allowed large homeless encampments on its own public property. ER-39 (Compl. ¶¶ 38-41). From a health and safety standpoint, allowing the Church to host its ministry under its strict Code of Conduct and under supervision by an experienced nonprofit organization would further the City's interest without any burden on the Church's religious exercise.

IV. The district court erred when it failed to construe the facts in the complaint as true or view the allegations in the light most favorable to the Church.

At the motion to dismiss stage, the district court must focus its inquiry on "the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). While the court stated the standard correctly, ER-12, it failed to apply this standard, did not take the Church's allegations as true, and instead blamed the Church for not filling out a temporary use permit. This Court should exercise its appellate authority, which is *de novo*, to reverse this error. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1066 (9th Cir. 2013) (en banc).

In fact, as alleged in the Complaint, ER-39 (Compl. ¶¶ 38-41), the Church began hosting the homeless around the same time that the City had just shut down a significant homeless encampment, and many unhoused community members had nowhere to go. The Church showed itself more than willing to work with the City, allowing a fire and safety inspection, sharing all the relevant information that the City's temporary use permit requested, and even entering into a Memorandum of

Understanding ("MOU") that addressed the City's purported concerns. ER-38 (Compl. ¶¶ 27-28); ER-47 (Compl. ¶¶ 80-81). However, the City never signed this MOU, leaving the Church with reasonable fear that should they ever engage in their core religious exercise of homeless ministry again, they would face the exact same fines. ER-47-48 (Compl. ¶¶ 81, 84). The fines totaled $104, 375. ER-150 (Compl. ¶ 103).

What is more, the City never identified an actual health or safety concern from the Church's three-month homeless ministry—because there were none. On the contrary, the ministry ran smoothly. The Church and the Burien Community Support Coalition ran background checks on all residents and required them to follow its Code of Conduct, which prohibited violence, possession of firearms, theft, illegal drug use, and littering, among other things, and imposed quiet hours. ER-48 (Compl. ¶¶ 87-88). Thus, any "nuisance" claim by the City was materially false because no health or safety concerns arose.

At the very least, this Court should reverse and remand to allow discovery to proceed. The district court clearly erred in its recital of the facts, adopting the City's narrative and ignoring the Church's consistent efforts to address any public safety concerns and to comply with City regulations.

CONCLUSION

The district court erred in dismissing the Church's well-pleaded complaint. This Court should reverse.

July 16, 2025

Respectfully submitted,

/s/ *Kayla A. Toney*
Jeffrey C. Mateer
David J. Hacker
Jeremiah G. Dys
Ryan Gardner
Kayla A. Toney
Counsel of Record
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy, Ste1600
Plano, TX 75075
[redacted]

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 25-1192

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FOR THE NINTH CIRCUIT

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