A22-1534

STATE OF MINNESOTA
IN COURT OF APPEALS

Amos Mast, Menno Mast, Sam Miller, and
Ammon Swartzentruber,

Appellants,

vs.

County of Fillmore, and
Minnesota Pollution Control Agency,

Respondents.

APPELLANTS' BRIEF AND ADDENDUM

LAW OFFICES OF SOUTHERN
MINNESOTA REGIONAL
LEGAL SERVICES, INC.

By: Brian N. Lipford, ID
#388760
903 West Center Street, Suite
230
Rochester MN 55902
507.292.0080
brian.lipford@smrls.org

Attorney for Appellants

Brett Corson, ID # 205990
Fillmore County Attorney
PO Box 307
Preston MN 55965
507.765.2530
bcorson@co.fillmore.mn.us

Attorney for Fillmore County

KEITH ELLISON, Attorney General,
State of Minnesota
Christina Brown, ID # 391019
Janine Kimble, ID # 392032
445 Minnesota Street, Suite 900
Saint Paul MN 55101-2127
651.757.1471
christina.brown@ag.state.mn.us

***Attorneys for Minnesota Pollution
Control Agency***

TABLE OF CONTENTS

CONTENTS OF ADDENDUM

Document **Page**

TABLE OF AUTHORITIES

Page

United States Constitution

United States Supreme Court Cases

United States Circuit Court Cases

Minnesota Constitution

Minnesota Supreme Court Cases

Minnesota Court of Appeals Cases

Federal Statutes

Minnesota Statutes

Minnesota Rules

County Ordinances

Other Authorities

STATEMENT OF THE ISSUES

I. Did the District Court properly conclude the Government has a compelling interest in denying a religious exception to these Plaintiffs under RLUIPA, the Free Exercise Clause of the Constitution of the United States, and the Minnesota Constitution, despite various other exceptions to the septic tank requirement afforded by the Government to secular activities?

The District Court ruled: The Government has proven a compelling interest in protecting the County's well water. Not all exceptions to the Government's septic tank requirement leaves appreciable damage to the Government's interest. The present water treatment regulations applied to campers, hunters, engineers, farmers, and for outhouses are distinguishable to the septic tank requirement challenged by the Appellants. Add-28–37.

Issues preserved for appeal: On remand from the Supreme Court of the United States, Appellants moved the trial court for a declaratory judgment under RLUIPA, the Free Exercise Clause of the Constitution of the United States, and the Minnesota Constitution, enjoining the government from enforcement action. The District Court ruled in favor of the government. Add-4; Plaintiffs' Brief on Remand from US Supreme Court, Index # 296 at 38.

Most apposite authorities: *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021); *Ramirez v. Collier*, 142 S. Ct. 1264 (2022); Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq* (2000); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

II. Did the District Court—on remand from the Supreme Court of the United States—properly find that the Government met its burden to show that its policy is the least religiously restrictive and burdensome means of furthering its claimed compelling interests?

The District Court ruled: The Government's septic tank requirement is the least restrictive means of ensuring that gray water is properly treated such that public health and the environment are protected. Appellants' proposed alternative, a mulch-basin gray water system, is less religiously burdensome but does not adequately serve the government's compelling interest in public health and environmental protection. The Government carried its burden by showing only that the Amish's proposed mulch basins do not satisfy the Government's interests. Add-37–45.

Issues preserved for appeal: On remand from the Supreme Court of the United States, Appellants moved the trial court for a declaratory judgment under RLUIPA, the Free Exercise Clause of the Constitution of

the United States, and the Minnesota Constitution; enjoining the government from enforcement action. The District Court ruled in favor of the government. Add-4; Plaintiffs' Brief on Remand from US Supreme Court, Index # 296 at 38.

Most apposite authorities: *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021); *Ramirez v. Collier*, 142 S. Ct. 1264 (2022); *Holt v. Hobbs*, 574 U.S. 352 (2015); Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq* (2000); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

III. Did the District Court err throughout its opinion by relying on speculation and by assuming the best about secular actors and the worst about religious actors, in violation of *Fulton*, *Ramirez*, and other longstanding precedent of the Supreme Court of the United States?

The District Court ruled: The District Court did not acknowledge or recognize it was relying on speculation when reaching its conclusions. The court's analysis focused on the credibility of witnesses and evidence presented throughout the trial. The court's judgement is supported by evidence of the public health dangers posed by untreated gray water, the karst topography of the county, the complex operation of septic systems, and the improbable functionality of the proposed mulch basin gray water treatment systems.

Issues preserved for appeal: On remand from the Supreme Court of the United States, Appellants moved the trial court for a declaratory judgment under RLUIPA, the Free Exercise Clause of the Constitution of the United States, and the Minnesota Constitution; enjoining the government from enforcement action. The District Court ruled in favor of the government. Add-4; Plaintiffs' Brief on Remand from US Supreme Court, Index # 296 at 38.

Most apposite authorities: *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021); *Ramirez v. Collier*, 142 S. Ct. 1264 (2022); Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq* (2000); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

STATEMENT OF THE CASE

As members of the Swartzentruber Old Order Amish community, appellants have religious objections to installing a full subsurface septic system to dispose of the gray water from their homes. Filmore County's sewage treatment ordinance would require appellants to install such a system. Appellants' original declaratory judgment action alleged that complying with Fillmore County's sewage treatment ordinance, as authorized and required by the Minnesota Pollution Control Agency, infringed upon and burdened appellants' right to the free exercise of their sincerely held religious beliefs under the Free Exercise clause of the United States Constitution, the Minnesota Constitution, art. I, § 16, and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*. The District Court denied Appellant's declaratory judgement action. Appellants appealed to the Supreme Court of the United States. The Supreme Court vacated the prior judgement and remanded to the Court of Appeals for further consideration in light of *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021). The Court of Appeals remanded the case to the District Court.

The District Court, however, ruled again that the Appellants' religious liberty claims are overcome by the government's compelling interest in

denying an exception to the septic tank regulation for the Appellants. Further, the District Court ruled that the Government satisfied the demands of the compelling interest test.

STATEMENT OF FACTS

Appellants are four Amish farmers residing with their families in rural Fillmore County, Minnesota. Add-2. Appellants are all members of the Swartzentruber Old Order Amish community, which is the most conservative of all the Amish groups and which has remained the most separate from modern technology. Add-19; T. 429. As they have for centuries, they do not adopt any new technology that will change their spiritual way of life. T. 438-39. For instance, instead of modern indoor toilet plumbing, Appellants use outhouses or privies to dispose of their waste. And instead of using systems that rely on septic tanks, Appellants used straight pipes to dispose of household water that originates from bathing, laundry, and kitchen activities. Add-2; T. 500-503; T. 604. This is formally referred to as "gray water," and it contains no toilet or sewage waste. Minn. R. 7080.1100, subp. 38. The disposal of gray water is at issue in this case.

The Swartzentruber Amish first took up residence in Fillmore County in 1974. T. 1856–57. Since 1974, these Amish have been disposing of their

gray water in substantially the same manner—through straight pipes. See T. 249, 364. The government has offered no evidence that in the 48 years these families have resided in the area, their method of disposing gray water has had any hand in polluting the Fillmore County water supply. T. 1416–17 (conceding that there is no connection between disease and gray water); Add-25 ("the Government has presented no evidence that Swartzentruber Amish gray water has made any Fillmore County Amish or non-Amish residents sick.").

In December 2013, Fillmore County passed an ordinance requiring every household, including Appellants, to install a "Sub-Surface Sewage Treatment System" ("SSTS") for its graywater disposal. Fillmore County, Minnesota Sub-Surface Sewage Treatment System Ordinance § 502.1(a) (Dec. 3, 2013). This ordinance was adopted as required by Minn. Stat. § 115.55 (2019), Minn. Stat. §§ 145A.05 (2019), and Minn. R., chapters 7080-7082. Before the ordinance was passed, Fillmore County officials recognized that the Swartzentruber Amish families objected to installing septic tanks on their properties, and these officials engaged in discussions with the church elders in an attempt to convince the Amish to install septic systems. Add-21, fn 5. To this end, the government ignored the Amish's objection to a septic tank of any size and instead proposed a system that would require smaller septic tanks with a prohibition on toilet waste based on the government's

assumption that Amish households use outhouses and produce a lower volume of gray water than the usual household in Fillmore County. T. 1715, 1758. This is the only attempt at compromise the government has offered to Appellants over the course of this dispute. *See generally* Add-46 ("I find that the Government has proven that a gray water system with a septic tank is the only plausible, realistic means of ensuring that Swartzentruber Amish gray water is adequately treated to eliminate that contamination threat.").

After the SSTS requirement took effect, Appellants renewed their objections, citing their concerns that installing septic systems would violate their sincerely-held religious beliefs. In May 2015, 49 members of the Swartzentruber Amish faith signed a letter to the Minnesota Pollution Control Agency informing the state of their religious objections to the septic system requirement and "asking in the name of our Lord to be exempt and forgiven from this oppression." Add-20, 51; T. 1150. Then, in August 2015, 55 members sent a second letter to the same agency asking for a response to their May letter, restating their religious objections, reminding them that "when William Penn had purchased the province of Pennsylvania in 1682 he went back to the European Countries and invited us to the land of freedom of Religion" and stating "we are again asking in the name of our Lord to be exempt and forgiven from this oppression that is being laid on us." Add-20, 53; T. 1152.

The Minnesota Pollution Control Agency responded on April 14, 2016 by filing "an administrative enforcement action against 23 Amish families in Fillmore County demanding the installation of modern septic systems"." *Mast v. Fillmore Cnty., Minnesota*, 141 S. Ct. 2430, 2431 (2021). In these actions, the government sought compliance through threats of criminal penalty, weekly community service requirements, and fines. *Id*; T. at 227, 1173. Many Amish yielded to the government's demands or left the state. T. 580–82. On April 7, 2017, Appellants sought a declaratory judgment against the County and the Minnesota Pollution Control Agency, arguing the government's septic tank ordinance, as applied to the Swartzentruber Amish, infringed upon and substantially burdened their free exercise of religion as protected by the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq., and the Minnesota Constitution, art. I, § 16. Index # 8. In its Answer and Counterclaim, the County sought an order "displacing the Amish from their homes, removing all their possessions, and declaring their homes uninhabitable" if they did not install a septic system within six months. Index # 27 at 10; *Mast v. Fillmore Cnty., Minnesota*, 141 S. Ct. 2430, 2431 (2021).

Appellants have attempted to resolve this dispute with the government by proposing an alternative system for gray water disposal: mulch-basins. T. 37–38. Prior to trial, Appellants began experimenting with mulch basins to

determine if they could find a compromise themselves through a religiously viable alternative to the SSTS requirement. T. 1018, 1105. As a result, Appellants determined that mulch basin systems were permitted by their religious faith. T. 270–71. For any water treatment to occur, a mulch basin would need to be at least three feet above the perched water table. Minn. R. 7080.2280 subd. A(2); 7080.2150, subpart 3, item C. The general soil conditions of Fillmore County allow mulch basins to meet this three-feet requirement; the Appellants' own outhouses must, and do, fulfill the same requirement. T. at 1198. Like the septic system the government insists on, mulch basins use the same soil-based treatment method to purify the wastewater:

> The gray water trickles down to the dirt floor at the bottom of the basin – the soil interface of this system – and soaks into ("infiltrates") the soil where treatment happens in the same natural, aerobic manner that it does with a septic system.

Index # 236 at 43. In response to Appellant's experiments with constructing mulch basins the government sought an order to have them destroyed and to award the government attorney's fees. Index #191 at 4.

After trial, the district court held that the government's septic system was the least restrictive means for accomplishing the compelling interest of protecting "public health and the environment." Index # 236 at 4. The Court of Appeals upheld the judgment, considering the state's general interest in

protecting human health and preventing groundwater contamination rather than applying RLUIPA's "to the person" standard. Index # 282 at 6-7. The Minnesota Supreme Court denied review on August 25, 2020. Index #282.

Appellants then filed for writ of certiorari in the United States Supreme Court, and on July 2, 2021, the Supreme Court vacated the lower courts' judgments and remanded this case for further consideration in light of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). *Mast v. Fillmore Cty., Minnesota*, 141 S. Ct. 2430 (2021). Justice Alito concurred, stating the lower court "plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act." *Id*. Justice Gorsuch also concurred, and in great detail noted that the County and lower courts "misapprehended RLUIPA's demands," "erred by treating the County's general interest in sanitation regulations as 'compelling' without reference to the specific application of those rules to this community," "fail[ed] to give due weight to exemptions other groups enjoy," "failed to give sufficient weight to rules in other jurisdictions," and "rejected th[e] [mulch basin] alternative based on certain assumptions." *Id*. at 2430–33 (Gorsuch, J. concurring).

On September 7, 2022, the state district court once again held in the government's favor. Echoing its first judgment, the district court held the government had a compelling interest in "protecting the water of southern Fillmore County from contamination by pathogen- and pollutant-carrying

wastewater discharged from Plaintiffs' and other Swartzentruber Amish homes," that the septic tank requirement is the least restrictive means of accomplishing that interest, and that the government has a compelling interest "in denying these Plaintiffs an exemption from that requirement." Add-4.

Appellants' religious beliefs: At trial, expert witness testimony was provided about how the Amish's religious faith is incorporated into every facet of daily living so that they live their lives essentially "always in church." T. 433, 438. Baptism into the Amish faith is an oath to God that one is going to "follow Christ's example, to live a scriptural life, and how you live that life is mapped out for you by the Ordnung." T. 433. The Ordnung is the Amish code of conduct which regulates all aspects of life and serves as "an unwritten map to being Amish that has evolved over time based on the traditions of generations before." T. 438–39, 522–23. The Amish are baptized as adults because Christ was baptized as an adult and because they believe children are too young to understand the meaning of this commitment. T. 434.

Failing to abide by the Ordnung can lead to excommunication, which means there will be virtually no social interaction with that individual until the person makes things right with the church by making confession and stopping the behavior. T. 445–46. At that point, the church members could

grant a pardon, which allows members to "forgive and forget" and let the person back into the community. T. 286.

When civil authority comes into conflict with the Ordnung, the Amish traditionally seek a resolution that addresses the government's concerns without violating the Amish's religious beliefs. T. 458–59. If the government's objectives cannot be achieved in a manner consistent with the Ordnung, individuals or entire communities will move from the jurisdiction. T. 290, 458, 463, 556–57. In other circumstances, conflict with the government's rules can lead to a "split" in the church. T. 442–44, 575. This division is tantamount to a "divorce," which is a sorrowful event that results in family division and restrictions on who individuals can marry within the religious community. T. 442–44, 576.

The Fillmore County Ordinance: Section 502 of the county's ordinance provides "alternative local standards" that are "intended to serve the Amish community" within several specific townships in the county, including where each of the Appellants reside. Fillmore County, Mn Sub-Surface Sewage Treatment System Ordinance § 502.1(a) (Dec. 3, 2013). The ordinance states that dwellings without "a toilet located in the home may be considered a Type IV Gray Water System" or "Amish Gray Water Systems." *Id*. These gray water systems are calculated under "a flat usage of 100 gallons per day," rather than with the actual number of gallons produced per

day by Amish homes. *Id*. The system requires three feet of unsaturated, oxygenated soil beneath the point where water leaves the treatment system and enters the soil. *Id*. These systems, which the county designates as "gray water systems," are essentially a full septic system with a prohibition on toilet waste and a slightly smaller drainfield of 100 feet. T. 1409.

However, the septic tank ordinance contains many exceptions. Gray water that is hand-carried by campers and hunters, for instance, does not have to be treated by a septic tank. Minn. Admin. Rule 7080.1500, §2. Minnesota also grants farmers a certain licensing exception, which allows them to pump waste out of septic tanks and apply it directly onto their land without a license, government supervision, soil testing, or inspection. Minn. R. 7083.0700, D; T. 1825, 2210–13. The septic tank does not itself remove any bacteria or viruses, so any potentially harmful materials remain in the tank and are then dumped onto farmland. T. 912, 2210–11. The government also allows individualized exemptions for Type V systems, which is basically any system designed and created by an engineer. Minn. R. 7080.2400. Such Type V systems are not required to have a septic tank. *Id*.

Mulch Basin Alternative: Mulch basins operate similarly to septic system. Both operate under the same basic process: first, solid organic material is removed from wastewater. A septic system has a septic tank that allows solid organic material to settle. T. 911–12, 1629, 1673.A mulch system

uses wood chips to filter out organic material. T. 668. A septic system must have these solids- referred to as septage- removed from the septic tank every three to ten years. Index # 236 at 45. A mulch system must have the solids and decomposed mulch replaced once a year. Index # 236 at 45. Then, in both systems, gray water flows to the soil, where aerobic decomposition eliminates potentially dangerous components from entering the groundwater. Index # 236 at 39, 43.

The main difference between the septic system and the mulch basin is that mulch basins do not have a 1,000-gallon tank. Add-49-50. Neither the septic tank nor the mulch basins provide treatment of the harmful components within wastewater. T. 911–12. The net result is that while wastewater in septic tanks may have less solids, it will retain over 90% of the unwanted components that it contained when it first entered the tank. T. 911–12, 1673, 2148. In both systems, gray water flows to the soil where actual treatment occurs. Index # 236 at 43.

Mulch basins are used in numerous different states and have been incorporated into the Uniform Plumbing Code ("UPC"). T. 645, 682–86, 1676, 2111, 2152. Throughout trial, Defendants never disputed that other jurisdictions approve the use of the proposed mulch basin alternative. Laura Allen testified that the proposed alternative systems would be allowed in Washington, Oregon, California, Arizona, New Mexico, Wyoming, and

Montana. T. 2111, 2152. The government's expert witness Sara Heger testified that the proposed system would be allowable in 10 states. T. 1676. The government's expert witness Brandon Montgomery testified that mulch basins have been used in some jurisdictions for decades. T. 1447. However, after remand the court relied upon a declaration filed by the Minnesota Pollution Control's attorney with her interpretation on the laws in other states to conclude that Plaintiffs' proposed alternative would not be allowed in other jurisdictions.[1]

[1] These regulations were not part of the trial record and were not submitted until after remand when the record was closed. As such, these should not have been considered by the district court. Furthermore, even if considered, they should not have been relied upon because the attorney's declaration reflects the attorney's own partisan interpretation of the regulations. E.g., The Declaration of Christina Brown claims that Massachusetts law states a graywater system *must* use a septic tank but the actual regulation reads: "Greywater systems *may* include either a septic tank or a filter" 310 Mass. Code Regs. 15.262(3).

STANDARD OF REVIEW

"When reviewing a declaratory judgment action, [appellate courts] apply the clearly erroneous standard to factual findings, and review the district court's determinations of law de novo . . .." *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 615 (Minn. 2007) (citations omitted); *see also Skyline Village Park Ass'n v. Skyline Village L.P.*, 786 N.W.2d 304, 306 (Minn. App. 2010). "[W]e review the district court's factual findings for clear error. That is, we examine the record to see if there is reasonable evidence in the record to support the court's findings. And when determining whether a finding of fact is clearly erroneous, we view the evidence in the light most favorable to the verdict. To conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotations and citations omitted).

When reviewing a mixed question of fact and law, the district court is given some discretion. "When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the district court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard." *In re Estate of Sullivan*, 868 N.W.2d 750, 754 (Minn. App. 2015) (quotation omitted). As to questions of law, there is no deference

to the district court's determination. "We review a district court's application of the law de novo." *Harlow v. State, Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). "No deference is given to a lower court on questions of law." *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). As for constitutional issues, no deference is granted. "[T]he interpretation of the constitution is a purely legal issue that we review de novo." *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018).

ARGUMENT

No one should have to choose between their home and their religion, yet that is precisely the choice the government continues to seek to impose upon the Amish Plaintiffs in this case. When the United States Supreme Court remanded this matter, it ordered the lower courts to reexamine their prior decisions in light of the Court's decision in *Fulton v. City of Philadelphia.* While the parties were briefing the matter below, the Supreme Court issued a second opinion, *Ramirez v. Collier*, that directly controls in this case. The governing law from those two cases is straightforward. It clarifies and strengthens the Supreme Court's previous holdings: (1) when the compelling interest test applies, as it does here, if the government seeks to claim its interest is a compelling one, it may not allow for exemptions that undermine that interest. *Fulton*, 141 S. Ct. 1868, 1882; (2) if the government has a compelling interest, and it "can achieve its interests in a manner that does not burden religion, it must do so." *Id*. at 1881; (3) it is "the government that must show" it has no other choice but to burden religion, not plaintiffs' burden to show there are other options. *Ramirez*, 142 S. Ct. at 1281; and (4) when analyzing these cases, courts may not rely on speculation, nor may they assume the best about secular actors and the worst about religious ones. *Id.*

at 1280; *Fulton*, 141 S. Ct. at 1882; *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021).

The district court mentioned some of these standards, but it failed to properly apply them to this case. It did not give sufficient weight to crucial exemptions that undermine Defendants' claims to having a compelling interest. It improperly shifted Defendants' burden to show there is no other option but to burden religion to the Amish and then changed the burden by requiring the Amish to show other options were available. And at every critical juncture, it violated *Fulton*, *Ramirez*, and other precedent by improperly relying on government speculation and assuming the best about secular actors and the worst about the Amish.

In doing so, it committed reversable legal error that this Court can and should correct.

I. The Compelling Interest Test (also known as Strict Scrutiny) Applies

As an initial matter, the parties do not dispute that the compelling interest test governs this matter. MPCA Brief at 14, Index #298; Fillmore County Brief at 32, Index #295. The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq., demands it, as does the Free Exercise Clause of the United States Constitution, and Article I, Section

16 of the Minnesota Constitution. *State v. Hershberger*, 444 N.W.2d 282, 283 (Minn. 1989).

The compelling interest test is "exceptionally demanding," meant to be "expansive" in its protections of religious exercise. *Holt*, 574 U.S. at 353. In RLUIPA, Congress mandated that the statute should "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc-(g). To prevail, the government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Brown v. Entm't Merchs Ass'n, U.S., 131 S. Ct. 2729,* 2738 (2011) (citations omitted). A compelling interest is more than just an important interest. In the Free Exercise context, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526. "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. . . ." *Sherbert*, 374 U.S. at 406, 83 S.Ct. 1790 (internal quotation marks and alteration omitted). The regulated conduct must "pose[ ] some substantial threat to public safety, peace[,] or order." *Id.* at 403.

Even if an interest may be compelling in a general sense, the government must prove its interest is compelling to the specific

circumstances of the case. This principle is fully applicable in the public health context. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (overturning government action taken to protect public health when government did not prove "the public health would be imperiled" if the proposed less restrictive alternative were imposed); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (requiring government to accommodate religious free exercise claims in the public health context) ("COVID-19 Cases"). In the COVID-19 cases, the government could not prevail by simply showing that closing churches would be safer than opening them with restrictions; it had to show that the difference between opening and closing would be so great as to implicate a *compelling* interest. This they failed to do. In the case before this court, the government must show more than *some* increase in risk from using alternatives to septic tanks for gray water disposal; it must show that any increase is significant enough to make its interest compelling.

Finally, "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotation marks omitted). That is: when a law allows for exceptions that undermine the law's purported interest, that interest is not compelling. *Fulton* at 1882.

II. The District Court Erred in Concluding Defendants Have a Compelling Interest Specific to These Amish.

The district court first failed when it turned a blind eye to the government not carrying its burden to show it has a compelling interest in forcing these particular Amish to use septic tanks. Despite an eight-day trial, the government called no medical or public health experts, offered no proof that disease can be spread through these Plaintiffs' gray water, and presented no evidence that the Swartzentruber Amish's traditional wastewater practices have contaminated the water supply or caused harm to anyone.

A. The District Court Erred by Relying on Speculation to Conclude That Defendants Have a Compelling Interest in Forcing These Amish to Violate Their Religion.

The *Ramirez* court clarified that the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the *particular* claimant whose sincere exercise of religion is being substantially burdened." *Ramirez v. Collier*, 142 S. Ct. at 1278 (quoting *Holt v. Hobbs*, 574 U.S. 352, 363, 135 S.Ct. 853 (2015)) (emphasis added). "RLUIPA . . . contemplates a more focused inquiry and requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular

claimant whose sincere exercise of religion is being substantially burdened." *Holt*, 574 U.S. at 362-63 (internal citations and quotations omitted). RLUIPA requires courts to "scrutinize the asserted harm of granting specific exemptions to the particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context." *Id.* (internal quotations omitted).

In other words, to burden the Amish's religion, it is not enough for Defendants to claim they need septic systems to regulate gray water; it is not enough for Defendants to claim they need septic systems to regulate gray water in Fillmore County; nor is it enough for Defendants to claim a compelling interest in septic tanks to regulate the gray water of rural residents in the county's Amish country. To enforce the law against these particular Amish, Defendants must prove they have a compelling interest in forcing each of these Amish to use septic tanks to dispose of gray water. That is what the Supreme Court has held for years and what all nine justices reaffirmed in *Ramirez* and *Fulton*. 142 S. Ct. at 1278; 141 S. Ct. at 1881 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431.

Defendants offer nothing that approaches this high bar. Instead, they offer only a very general concern and mountains of speculation, which the district court accepted. But "speculation is insufficient" in carrying their

burden. *Fulton*, 141 S. Ct. at 1882; *Mast v. Fillmore Cnty.*, 141 S. Ct. at 2433 (2021) (Gorsuch, J. concurring) (the "County must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate."). *Ramirez*, 142 S. Ct. at 1268. *Holt*, 574 U.S. at 354.

1. The District Court Relied on Speculation to Conclude These Plaintiffs' Graywater in Particular Threatens the Water Supply.

The government's asserted interest, accepted by the district court, is to "protect drinking water from harmful pathogens and pollutants." Add-19, 27. This is far too general. "The more abstract the level of inquiry, often the better the governmental interest will look. At some great height, after all, almost any state action might be said to touch on 'one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue,' and measuring a highly particularized and individual interest 'directly against one of these rarified values inevitably makes the individual interest appear the less significant.'" J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 Harv. L.Rev. 327, 330–31 (1969); *see also* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. Chi. L.Rev. 1, 53 (1989) ("[A] common pitfall [in religious liberty cases] is to consider the two sides of the balance at

different levels of generality."). *Yellowbear v. Lampert*, 741 F. 3d 48, 57 (10th Cir. 2014) (J. Gorsuch).

The district court noted that "untreated household wastewater flowing through the porous limestone bedrock can reach drinking water aquifers and wells within days of its release." *Id.* at 13. But "the whole point of strict scrutiny is to test the government's assertions, and [the Supreme Court's] precedents make plain that it has always been a demanding and rarely satisfied standard." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021). Just because some untreated water *could* reach drinking water aquifers does not mean it has or will. The government failed to prove through non-speculative evidence that this specific group of Amish have pathogens in their gray water or that granting them a religious accommodation exposes the County's drinking water to pathogens capable of infecting others.

The district court primarily relied on the government's expert testimony to conclude that the Amish produce "pathogen and pollutant-bearing gray water":

> There was actually just an extensive -- actually a lit review done by the National Academy where they estimated that we're talking about in the millions of bacteria and viruses are present in gray water . . . if there is fecal coliform, there can be all kinds of other viruses and bacteria depending upon what that home happens to be sick with at the time.

Add-23, 25. The problem with this testimony is not its accuracy; the study by the National Academy concerned gray water generally, and general gray water may in fact include viruses and bacteria. Rather, the problem is that this testimony cannot serve as evidence that *Swartzentruber Amish* gray water poses a present harm to the County's drinking water. Specifically, studies showing that gray water may contain pathogens in general do not prove that the gray water produced by these Amish is leaking into the water supply and posing a problem for the distant neighbors (and in that part of the county, all the neighbors are distant). Nor do they prove that pathogens in gray water are capable of surviving in an outdoor environment long enough to spread disease through the water supply. This is what strict scrutiny requires. *Ramirez*, 142 S. Ct. at 1278 (The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the *particular* claimant . . ." (emphasis added)). Defendants must show that the Plaintiffs' gray water, not general gray water, contains disease-carrying pathogens and is leaking into Fillmore County's water supply and spreading illness to others.

The government could not prove these important facts because it never conducted testing on the Amish's gray water to see what it contained or whether it was seeping into the water supply. Nor did it call any medical or public health experts. The closest the government got to an individualized

study is when it visited the Amish's properties and took photos. These photos were also heavily relied upon by the district court:

> Fillmore County staff who visited the Plaintiffs' farms credibly testified to and presented photographic evidence of their observations of milky, unpleasant smelling gray water they saw being emitted via 'open pipe discharge' from the residences to the ground before the Plaintiffs' installation of mulch basins;

Add-24. While mere photos and olfactory observations are relevant and admissible, they do not prove the existence of disease and pathogens or of water seeping into the water table and infecting others. This is especially true considering how other scientific studies found that gray water has never been linked to spreading illness:

> Further on in the report there is a chart that shows all of the illnesses that you could imagine gray water could potentially cause and where they were . . . none of it is linked to gray water.

T. 734. The MPCA's own expert witness acknowledged this finding of no cases where disease has been spread through gray water but stated:

> I believe that's correct, but I would also point out that the lack of evidence of documented cases doesn't mean that it's not possible, as well.

T. 1416–17. But to say that "lack of evidence doesn't mean it's not possible" is—on its face—speculation and not evidence. The compelling interest test requires proof with evidence, not speculation. *Ramirez*, 142 S. Ct. at 1268; *Fulton*, 141 S. Ct. at 1882 ("speculation is insufficient"); *Mast v. Fillmore*

Cnty., 141 S. Ct. at 2433 (2021) (Gorsuch, J. concurring) (the "County must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate."). Such speculation about the absence of evidence has never been sufficient to prove a compelling interest.

Characterizing the speculative threat of harm as a "present, substantial" one is also inconsistent with longstanding history—nearly 50 years—of Swartzentruber Amish gray water *not* spreading illness. T. 115. In these last 50 years, the government could have collected water samples to concretely prove the Amish's gray water is in fact riddled with disease and seeping into the water supply. But it didn't. Instead, Defendants offered expert testimony about non-Amish gray water, photographs of water, and speculation about the absence of evidence to prove its assertions. Add-23–25.

By taking mere speculation as proof that Swartzentruber Amish gray water is a risk to the water table, Defendants evade their burden of proof. And by accepting Defendants' substitution of facts with conjecture, the district court reveals it missed "the whole point of strict scrutiny," which is "to test the government's assertions." *S. Bay*, 141 S. Ct. at 718.

"Strict scrutiny demands more than supposition." *Mast*, 141 S. Ct. at 2433. (Gorsuch, J., concurring). In *Roman Catholic Diocese of Brooklyn*, the Supreme Court considered a challenge to an executive order limiting in-

person worship services. 141 S. Ct. 63 (2020). The Court held that combating the COVID-19 pandemic was a compelling interest but still ruled against the government because the church has operated "for months without a single outbreak" and "there [was] no evidence that the applicants [in-person services] ha[d] contributed to [the] spread [of COVID-19]." *Id*. at 66-67. In this case, there is no evidence that the Amish's gray water has spread any illness to anyone or has even touched the water supply in almost 50 years.

2. The District Court Relied on Speculation When Concluding These Amish Produce Enough Gray Water to Threaten the Water Supply.

Perhaps recognizing that the Defendants' stated interest was too general, the district court also suggested that the "gray water emitted by dozens of Swartzentruber Amish homes . . . poses a present, substantial threat to the health and safety of Amish and non-Amish residents of the County alike" because of its high volume. Add-25. But this assertion relies on speculation heaped upon speculation.

Instead of collecting actual data on the Amish's gray water output, Defendants, through the county ordinance, assumed—without any testing—that the Amish's estimated gray water flow rate is 100 gallons per day. Fillmore County, Mn Sub-Surface Sewage Treatment System Ordinance § 502.1(a) (Dec. 3, 2013). This number is considered a "flat usage" rate, so for

purposes of the government's calculations, it remains at a constant 100 regardless of how few or how many bedrooms an Amish home actually has. *Id.*; T. 1031–32. Still, the district court accepted this number, then concluded, based on a guess of how many households seek the religious exemption, that the total gray water output for the Amish is 3,000-4,000 gallons per day. Add-25.

It remains a mystery whether these numbers accurately represent how much gray water the Amish produce. The district court admitted "the number of Fillmore County Swartzentruber households seeking a religious-based exemption cannot be determined exactly." Add-20. Despite this uncertainty, the court assumed there are at least 36 objecting households. *Id.* Multiplying two speculative numbers together, 36 by 100 gallons per day, the district court surmised the total minimum water output is 3,000-4,000 gallons per day. The assumptions made to reach this total show how the district court's calculation is fraught with speculation. The numbers are suspect because the government never conducted any testing to determine the actual amount of Amish gray water output. The lack of testing by the government, who carries the burden of proving it has a compelling interest in denying the Amish an exemption, made absolutely no difference to the district court's decision-making:

> How much gray water do these households produce? The only number that appears in the record is 100 gallons per day. . . . The 100 gallons per day estimate is not based on measured monitoring of Amish household gray water flow rates.
>
> Add-21-22.

This type of "conjecture alone fails to satisfy the sort of case-by-case analysis that RLUIPA requires." *Ramirez*, 142 S. Ct. at 1268. Indeed, RLUIPA "contemplates a 'more focused' inquiry and 'requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Holt*, 574 U.S. at 363 (quoting *Burwell v. Hobby Lobby Stores*, *Inc.*, 573 U.S. 682, 726, 134 S.Ct. 2751, 2279 (2014)). Under strict scrutiny, if Defendants want to burden the Amish's religious exercise, they must (1) determine how many Amish homes seek the religious accommodation; (2) conduct testing on each of those homes to determine what their true gray water output rate is and whether or not pathogens exist; and (3) show that this volume of gray water from each of those homes actually causes it to seep into the water table and harm others. They did none of these things.

The district court contended that it can legally rely on conjecture simply because "the ballpark accuracy of th[ese] figures ha[ve] not been seriously disputed by the Plaintiffs." Add-22. But the Amish *have* tried to

dispute the numbers. When asked how many gallons per day he uses on a consistent basis, Amos Mast testified that "it would probably average about 30 gallons a day." T. 383. His estimated average is plausible, considering that he is one of the Amish households that obtains water from a completely different location and then carries it into their home in pails:

> Q: You actually take buckets to the neighbor's.
> A: No. We use a tank. We have a tank on wheels.
> Q: Oh, I see. So you haul water in a tank --
> A: Yes.
> Q: -- of some size.
> A: Yes.
> Q: From the neighbor's to your place.
> A: Yes.
> Q: Then it goes into pails, I take it.
> A: Yes.
> Q: And --
> A: Just as we need it.
> Q: Right. You take it from the -- the tank is on a wagon I take it?
> A: Yes.
> Q: You take it from the tank wagon in pails into your house or the wash house.
> A: Yes.

T. 197–98.

Even the Amish that have water piped into their homes obtain it from a central line and carry it around their home by hand to where they need it (in other words, they do not have pipes running through their homes):

> Q. But a more established house, those houses are getting water piped into the house; correct?
> A. I would say so, yes.

> Q. Kind of to a central spigot?
> A. Yeah.
> Q. To a central faucet?
> A. Central faucet or hand -- little hand pump.
> Q. Okay. And then you carry it around the house to where you need it.
> A. Yep. Yeah. It's not pressurized, it's all gravity.

T. 2183.

Since the Swartzentruber Amish carry water within the home in buckets from a central line or from a different location, it is more likely that their own estimate that they use 30 gallons per day is more accurate than the 100 gallons the Defendants and district court speculated.

It is also not practical to expect the Amish to "seriously dispute" the 100 gallons per day assumption when they practice a religion that forbids embracing technology that will disrupt their spiritual way of life. *See Mast*, 141 S. Ct. at 2430 (Gorsuch, J. concurring) ("The Swartzentruber Amish are religiously committed to living separately from the modern world. Maintaining that commitment is not easy. They grow their own food, tend their farms using pre-industrial equipment, and make their own clothes."). This is another reason the district court's error in relying on speculation is so dangerous. It seems the district court expects sophisticated flow rate testing from a group that not only has limited resources but, more importantly, does not carry the burden of proof. The County should have carried its burden and conducted testing to determine their true gray water output and provided

evidence from public health experts that this volume of gray water poses a threat to the water supply. Then, and only then, could it have proven it has a compelling interest in burdening the religious exercise of these particular Amish.

The Amish have disputed the government's speculation as best they could with the limited resources they have. But as previously explained, the burden remains with the government to conduct testing on each Amish household's gray water output. Defendants' choice to run with speculation instead of carrying their burden requires this Court to reverse the district court's judgment that Defendants have a compelling interest.

3. The District Court Also Erred in Speculating That the Amish Water Would All Get Discharged onto One Plot of Land.

In addition to the speculative methodology the district court used to reach its assumptions about the volume of water the Amish are producing, it also erred by acting as if all of the gray water generated by the Amish is discharged onto *one* parcel of land, which could substantially increase the risk of it reaching the water table. The Defendants and district court fail to recognize that whatever amount of water the Amish are discharging, they are doing it across all of their properties, each of which ranges from 10 to 80 acres in size. T. 994, 1069. The question is not whether 3,000-4,000 gallons

per day could seep into the water table if discharged onto one parcel. The question is whether the water produced by any one house could produce enough water to do so. Defendants did not even attempt to answer that question. The district court's allowing them to nevertheless claim they have a compelling interest is reversable error.

B. Exemptions to the Septic Tank Requirement Undermine the Defendants' Claims of Having a Compelling Interest.

Further evidence that the government's interest is not truly compelling is the number of exceptions they allow that undermine it. Defendants may not plausibly claim a compelling interest in denying the Amish an exception to the septic tank requirement when they have granted plenty of exceptions to it. This is yet another principle the district court failed to apply from *Fulton*: when strict scrutiny applies, a truly compelling governmental interest may "brook no departures." 141 S.Ct. at 1881. "A law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. When governments allow departures from their regulations for secular reasons, they must not deny exceptions for religious ones merely because they are religious. *Fulton*, 141 S.Ct. at 1881.; *Lukumi*, 508 U.S. at 546. Put another way, if a law already allows exceptions that undermine the

law's interest for secular actors, the government must allow exceptions for religious actors or prove a compelling reason for why not. *Id.*

The district court failed to understand this when reviewing all of the many exceptions Defendants allow to their own rules. The septic tank requirement has multiple exceptions that fatally undermine the County's alleged interest. There is an exception for hunters and campers who hand-carry gray water, Minn. Admin. Rule 7080.1500, §2; an exception for farmers, Add-31; an exception for individuals who hire an engineer to design their own systems, Add-35; a system of discretionary individualized exemptions almost identical to what was at issue in *Fulton*; and an exception for those who use outhouses. Each of these exceptions undermines the Defendants' interest to the same or greater degree as the accommodation the Amish seek, and they require the Defendants to grant a similar accommodation to the Amish.

1. The Hand-Carried Gray Water Exception Undermines the State's Claimed Interest.

The district court first rightfully acknowledged and accepted that "Minnesota allows gray water originating from hand-carried water to be disposed of . . . without use of a septic tank." Add-27, fn 11. Plainly, this operates as an exception to the septic tank requirement and undermines Defendants' claim to have a compelling interest in requiring septic tank treatment of all gray water.

Rather than recognize this, the district court immediately tried to distinguish the exception. It referenced "hunters and campers" that take advantage of it. Add-28. According to the court, these hunters and campers would be situated in "primitive campsites" and would discharge only "very small quantities of water." Add- 28–29.

Once again, the district court relied on speculation and assumptions, some of which are quite dubious. In Minnesota, there are "more than 5,000 campsites" and "thousands of miles of rugged or paved state trails and state water trails" leading to those campsites. *Camping*, MINNESOTA DEPT. OF NATURAL RESOURCES, https://www.dnr.state.mn.us/camping/index.html (last visited Dec. 18, 2022). They are hardly primitive, with "a variety of cabins, guesthouses and other lodging." *Id.* An average of 1,049,382 people camp overnight each year in Minnesota state parks alone. *State parks*, MINNESOTA DEPT. OF NATURAL RESOURCES, https://www.dnr.state.mn.us/faq/mnfacts/state_parks.html (last visited Dec. 18, 2022). In sharp juxtaposition, the district court's speculation tallies the number of Amish households objecting to the septic tank requirement at "somewhere between 36 and 148." Add-20–21.

It is also unrealistic to assume that these million campers use less water than the Amish. As explained above, the district court took as fact the "ballpark accuracy" of a 100-gallon-per-day "estimate," of the amount of gray

water the Amish produce. *Id.* at 17. Without evidence, it then assumed this 100-gallon number is much higher than gray water produced by "thousands of campers, hunters, fishermen, and owners and renters of rustic cabins [that are] exempt from the septic system mandate." *Mast v. Fillmore County*, 141 S. Ct. at 2432 (Gorsuch, J., concurring). It did this despite ample evidence that the Amish use only buckets to carry their water into their homes, and their use of water is far more similar to campers or rustic cabins than to families living in modern American homes with amenities such as toilets, showers, kitchen sinks, bathroom sinks, and dishwashers. T. 197–98; 370.

The district court's reasoning for the difference was that "water is *heavy*." Add-29. Presumably, it meant that campers would have to carry their heavy water over long distances and would therefore not take much of it. The district court assumed most of these campers would not take showers, bathe, or do laundry, assumed no campsites include water spigots or other access to water (many of them do), and ignored the "thousands of miles of rugged or paved state trails" available for use in carrying the water or the ability to "purchase a vehicle permit" and just put that heavy water in the trunk. *Camping*, MINNESOTA DEPT. OF NATURAL RESOURCES, https://www.dnr.state.mn.us/camping/index.html (last visited Dec. 18, 2022).

The district court also assumed that campers' water would be cleaner than the Amish's, fully disregarding that gray water from laundry or bathing

has substantially less bacteria and viruses than water byproducts of food preparation and meals. T. 879-880. It also ignores that campers' often travel and camp out for days with their children, where they may bathe and do laundry similarly to the Amish.

The problem with the district court's attempts to distinguish the hand-carry exemption is that it relies, once again, on forbidden speculation, which in turn caused the district court to compound its error. The Supreme Court recently emphasized that the "State cannot assume the worst when people go to worship but assume the best when people go to work." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297, (2021). In other words, Courts may not assume the worst of religious actors, while assuming the best of secular actors. The district court disregarded this rule by assuming the worst about the Amish who use the hand-carry gray water exception and the best about campers when they use it. Because the district court assumed these facts without *any* evidence of *actual* volume, this blatantly represented a forbidden value judgment against the Amish and in favor of the campers. *Fraternal Order of Police v. City of Newark*, 170 F. 3d 359 (3dCir. 1999) (J. Alito).

Once the improper assumptions and value judgements are removed, it is clear that the hand-carry exception undermines the government's interest in forcing the Amish to use septic tanks.

2. The Exception for Farmers Undermines the Defendants' Interest by Allowing Secular Actors to Burden the Interest to a Greater Degree Than Religious Actors.

The district court misunderstood and incorrectly disregarded the licensing exception for farmers to dispose of septage directly onto their own land. Minnesota farmers may apply the contents of their septic tanks directly onto their farmland. T.1834, 2210–11, 2215–16*; see* Minn. R. 7083.0700, D. ("A license is not required for . . . a farmer who pumps septage from an ISTS . . . on land that is owned or leased by the farmer."). Septage waste includes, in addition to gray water, toilet paper and feces. T. 2083. C.F.R. § 501.2. The government's interest in denying the Amish an exception from using a septic tank cannot be seriously considered compelling when the government allows septage waste to be pumped by farmers directly onto their own land. *Lukumi*, 508 U.S. at 547 ("a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."). This is a clear sign that Defendants' interest is not truly compelling.

The district court tried to distinguish the farming exception by claiming the formula federal regulations require somehow makes the application of septage waste less dangerous, in part because the formula is so daunting. Add-32. But that misses the point. The relevant issue is that Minnesota has

created an exemption that allows farmers to apply a substance much more potentially dangerous than gray water onto their own land without needing a license, with minimal requirements, and without either the County or State requiring permits or even supervising the process. See *Domestic Septage Regulatory Guidance: A Guide to the EPA 503 Rule* Add-47-48[2]; *See* also T. 1821, 1825, 2211. The district court also assumes that farmers will dispose of their septage on their land in a way that will not cause the water to seep into the water table. Add-32–33. It makes the opposite assumption about the Amish. Add-32–33. Once again, when dealing with these exceptions, the district court assumed the best about the secular actors and the worst about the religious. The Amish request only to be treated as well as their secular counterparts to dispose of a much less potentially hazardous substance on their own land.

3. The Procedure for Creating Type V Systems Is a Formal Mechanism for Exceptions That Undermines the Government's Claimed Interest Against the Amish.

Engineers are allowed to forego septic tanks by creating their own "Type V" system to treat gray water. Add-33. Allowing individual engineers to create gray water treatment systems without requiring septic tanks is a

[2] The complete document is available at: https://www.epa.gov/biosolids/domestic-septage-regulatory-guidance-guide-epa-503-rule.

formal mechanism for exceptions that directly undermines the "compelling" governmental interest against the Amish. *Fulton*, 141 S.Ct. at 1879. The district court misapplied *Fulton* by dismissing this exception because few use it. Add-33. However, *Fulton* explained that the number of exceptions granted "misapprehends the issue." *Fulton*, *Id*. It is not the number of exceptions, but the "creation of a formal mechanism for granting exceptions" that undermines the governmental interest against the Amish. *Id.* The Type V system regulations represent just such a formal mechanism because they allow approval of gray water treatment systems that do not use septic tanks. Add-36 ("The Government *can* approve a Type V system that has no septic tank"). The existence of Type V systems proves that Defendants are willing to grant exceptions to their septic tank requirement for some actors; and because they are willing to do it for engineers, they must be willing to do it for the Amish as well.

Because the allowance of the Type V system represents a system of individualized exemptions to the Defendants' septic tank requirement, it is clear the Defendants' rules may brook departures. And the ruling from *Fulton* is that if government will grant departures for secular actors, it must grant them for religious actors unless it has a compelling reason for why not. The district court failed to apply this principle.

4. The Existence of a Formal Mechanism Allowing Discretionary Exemptions Fatally Undermines the Government's Interest in Denying the Amish an Exception

Defendants' asserted compelling interests are also undercut by various provisions allowing for "individual exemptions" from their rules, separate from the Type V systems exceptions. *Fulton*, 141 S. Ct. at 1878. In *Fulton*, the city's foster-services contract contained a provision allowing city officials to make exceptions to the nondiscrimination rule at their discretion. The Court unanimously held that this provision undermined the city's assertion that denying an exception was necessary to ensure "the equal treatment of prospective foster parents and foster children." *Id.* at 1882.

Like the City in *Fulton*, Defendants have created "system[s] of individual exemptions" not only in the state's provision for Type V systems (*supra* p. 48), but also in the county's provision for variances from its SSTS ordinance in cases of "hardship or difficulty that prevents compliance with the rule." SSTS Ordinance, §504.2(a)(2) (The state recognizes such local-exception provisions by providing that "[v]ariance requests to the [state] standards" incorporated in a local ordinance "must be issued or denied by the local unit of government." Minn. R. 7080.1200, subp. 3). As in *Fulton*, the multiple provisions for individual exceptions prove Defendants simply have no compelling interest in strict adherence to their rules.

5. The Exception for Outhouses Fatally Undermines the Defendants' Governmental Interest in Regulating These Amish.

Another exception to the Defendants' asserted interest is its allowance of outhouses. The district court disregarded the outhouse exception by attempting to distinguish and minimize the dangers presented from toilet waste. Add-31. In lieu of a septic tank, outhouses have a simple earthen pit. *Id.* Public health is protected by establishing regulations requiring the pits to be a minimum 100 cubic foot capacity and have setbacks from wells, structures, and property lines. Minn. Admin. R. 7080.2150 and 7080.2280. Once the pit is full, the waste is dug out and disposed of in manure piles in the field. T. at 503.

The district court conceded that toilet waste is in fact hazardous to public health and carries the same pathogens found in gray water but at "much higher levels" than gray water. Add-30. However, despite the clear and present risk of dispersing toilet waste above ground, the court disregarded the outhouse exception when analyzing whether the County had a compelling interest in forcing the Amish to install septic tanks. Add-30. In short, the district court, once again relying on speculation, concluded that the outhouse exception does not undermine the state's interest to the same or greater degree as the Amish's requested gray water accommodations. Add-30-

–31. It reached that conclusion by assuming, without evidence, that no water seeps into an outhouse. It ignored entirely the possibility of rainwater seeping into the pits and the dispersal of the waste on fields.

If the County had a true compelling governmental interest in mandating septic tanks, then the outhouse exception for toilet waste would not be in effect. Outhouses effectively dispose of toilet waste by mandating minimum size pits, establishing setbacks from wells, and requiring proper soil conditions. Minn. R. 7080.2280. Toilet waste poses a significantly higher risk of contaminating ground water than allowing the Amish to treat their gray water through the proposed alternatives. As long as the Defendants allow toilet waste to be regulated without a septic tank, they may not claim they have a compelling interest in denying a religious accommodation from the septic tank mandate for gray water.

III. The District Court Misapplied *Fulton* and *Ramirez* to the "Least Restrictive Means" Analysis.

Even if Defendants have a compelling interest, the district court erred when it applied the "least restrictive means" prong of strict scrutiny. RLUIPA provides that government may not burden religious exercise unless it can prove a "compelling governmental interest" and that its rule "is the least

restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc–1(a). In its opinion, the district court cited a relevant paragraph from *Fulton*, but failed to apply the most important passage explaining the least restrictive means prong: "Put another way, so long as government can achieve its interests in a manner that does not burden religion, it must do so." Add-11. (quoting 141 S. Ct. at 1881).

And *Ramirez* later clarified that "it is the government that must show" its policy is the only option available. *Ramirez*, 142 S. Ct. at 1281 (quoting 42 U.S.C. § 2000cc-1(a)(2)). In that case, a prisoner on death row in Texas requested his spiritual advisor lay hands on him and pray audibly during his execution. *Id*. at 1268. The state argued there were safety concerns. *Id*. at 1280. The Plaintiff proposed various solutions. *Id*. at 1281. Both the government and the district court then argued that since the Plaintiffs' proposed alternatives would not satisfy the government's compelling interest, the Plaintiff failed to make a successful RLUIPA claim. *Id.* Eight justices disagreed. *Id.* The Supreme Court emphasized that the district court in that case erred fundamentally in placing the burden on the plaintiff to find alternatives that would meet the government's claimed interests. *Id.* "That gets things backward," they held. *Id*. When the compelling interest test governs, once plaintiffs have shown that a government policy burdens their religion, as is undisputed here, "it is the government that must show its

policy 'is the least restrictive means of furthering [a] compelling governmental interest.'" *Id.* (quoting 42 U.S.C. § 2000cc-1(a)(2)). That requirement comes from RLUIPA itself, which provides that, once a plaintiff has shown a government policy burdens his or her religious exercise, "the government shall bear the burden of persuasion on any element of the claim." 42 U.S.C. § 2000cc-2(b).

It is important to note that the Amish are not looking for an *exemption* to the septic tank ordinance; nor are they hoping to pollute the ground water. They are asking for an *accommodation* that will allow them to dispose of their gray water safely and in a way that is consistent with their religious beliefs. If Defendants wish to carry their burden, they must show through evidence, not speculation, that such an accommodation for these Amish would still result in harm to the water supply. *Holt*, 574 U.S. at 364–65 (this is an "exceptionally demanding" burden of "show[ing] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party") (quoting *Burwell v. Hobby Lobby*, 573 U.S. at 728).

Failing to recognize the importance of the *Ramirez-Fulton* standard led the district court to a serious error. It should have sought evidence showing that Defendants cannot satisfy their interests without burdening the Amish. That is what *Fulton* demands, yet the government and district court did no

such thing. If they had, the court would have implored Defendants to answer critical questions, such as: what efforts did the government make to find septic tank alternatives that would work for the Amish? What other solutions have governments found across the United States that might work to treat gray water without burdening religion? What additional regulations or proposals could have been considered by the government's experts but were not? What efforts did the government make to truly understand the Amish's objections so as to find a solution that would work for both parties?

If, after that proper analysis, the district court determined that no other alternative was viable, then it could have declared that the law allows the defendants to burden the Amish's religion. Because it failed to understand the proper standard, it never asked those questions, and they remain unanswered. This is reversible error.

A. The District Court Erred by Shifting the Burden to the Amish and Changing It.

Instead of applying the burden properly under *Fulton* and *Ramirez*, the district court started from the premise that the *Amish* needed to be the ones to propose alternative designs that would treat gray water consistent with their religious beliefs. Add-36–37 ("The Plaintiffs have presented no such design nor anything remotely resembling it. . . . [This] reasonably explain[s]

why the Plaintiffs have not received the same treatment as the handful of other Minnesotans who have brought forward engineered plans [for their alternatives]."). The Amish had done so, of course, proposing mulch basins to treat their gray water in the interest of trying to resolve the dispute. Add-49-50. But rather than credit the Amish for trying to reach a resolution, the district court reasoned that the only question it needed to answer was: "Has the Government proven that mulch basins will not work?" Add-36–37. That question reflects why the district court erred so egregiously in its analysis.

The district court opined in nine single-spaced pages why the Amish's proposed mulch basins would not properly treat gray water. Add-37–45. Along the way, the court made much of its factual findings and credibility determinations. *Id.* But none of those findings matter if the trial court misunderstood which party bears the burden of proof and what that burden is. Rather than merely analyzing the government's findings concerning the mulch basins, the district court should have sought evidence from the government that (1) no other alternative was plausible, and (2) the government invested effort in exploring other alternatives. *Holt*, 574 U.S. at 364–65 (quoting *Hobby Lobby*, 573 U.S. at 728). Instead, the court rested its conclusion on the false premise that the *Amish* were required to develop and propose every possible alternative with no effort whatsoever by the Defendants. Add-36–37. As the eight justices in *Ramirez* explained, "That

gets things backward." 142 S. Ct. 1281. And the parties are left to wonder where this case would be today if the government had put its time, money, and effort into working with the Amish to find alternatives rather than litigating this dispute for seven years to shoot down the one alternative the Amish developed on their own.

B. The District Court Should Have Found Defendants Did Not Meet Their Burden.

Had the district court properly placed the burden on the Defendants to show they had no other alternative but to burden the Amish's religion, it would have recognized how little effort Defendants put into exploring alternatives, and how far Defendants came from meeting their burden. The district court recognized the possibility for the government to grant variances to the septic tank requirement in a manner that also achieves its public safety interests. Add-36 ("The Government *can* approve a Type V system that has no septic tank.") (emphasis in original). But it never took the next logical step. The Type V system is precisely the kind of workable solution that the government should have spent its time and money pursuing. That is its burden. Instead, the government chose to focus its resources on proving why the Amish's one proposed alternative would not work.

Again, the district court allowed this, noting that the Amish did not receive Type V consideration because they "never asked for it nor did they

present anything to support it." *Id.* at 31. But Defendants were the parties responsible for finding these alternatives, not the Amish. That is the requirement from the Supreme Court, but it also makes sense for important practical reasons. Defendants are in a far better position than the Amish to identify and develop plausible alternatives that would accomplish their interest.

Fillmore County would have had the discretion to approve the Amish's proposed mulch basin system as a Type V system. T. 1396, 1454. However, typically smaller local governments have to employ an engineer to review the proposal. T. 1454–57. Rather than expecting the Amish families, who are religiously prohibited from hiring an engineer, to bring a proposal to the government, Fillmore County could have used its superior knowledge and resources to employ an engineer to design an appropriate Type V system. T. 122–23, 1104. It was error for the district court to place the burden on the Amish to pursue Type V approval, rather than observing that Fillmore County preferred to pursue years of conflict rather than hire an engineer or assist the Amish through the Type V process.

Defendants' lack of effort was not limited to Type V systems. Defendants gave no serious consideration to the mulch basin system, to steps to improve it, or to other potential alternatives. The county's zoning official, Michael Frauenkron, testified that he declined to consider various

alternatives that would avoid burdening Amish religious exercise because they were "not an approved system in Minnesota." T. 2036, 2045, 2048. Under RLUIPA, the government cannot ignore potential less restrictive alternatives to a burdensome legal rule simply because those alternatives don't fit within the rule. Neither state officials nor the courts may "'assume a plausible, less restrictive alternative would be ineffective.'" *Holt*, 574 U.S. 352 at 369 (internal citation omitted).

Yet that is what Defendants did here. They considered only the small, experimental mulch basins self-constructed by the Amish. The officials could easily have explored the sort of system design features recommended by Plaintiffs' expert witness Laura Allen to determine if implementation of such features would improve the systems' performance. T. 704; 2093–94. In her testimony, Ms. Allen outlined several recommendations that the government should have explored to distribute the water over a larger area to prevent oversaturation and pooling and to reduce maintenance frequency. Plaintiff Menno Mast affirmatively stated in his testimony that he is "willing to try" the changes that Laura Allen recommended. T. 2169.

Nor did the government consider the numerous ways it could *regulate* gray water disposal to further minimize risk. The government could have looked into implementing required standards employed in other jurisdictions using mulch basin gray water systems that would further reduce risk such

as: minimum square footages for mulch basins, limiting the volume of gray water allowed to be discharged per day, requiring gray water be discharged in a manner that minimized the potential for contact with people or domestic pets, prohibiting the ponding or surfacing of gray water (T. 793), and prohibiting hazardous materials from being disposed (T. 670). Perhaps most notably, the government could have considered establishing minimum setbacks from wells to protect drinking water. (T. 673–74). Minnesota currently uses setbacks to adequately protect wells from much more potentially dangerous hazards such as landfills, liquid manure lagoons, municipal wastewater stabilization ponds with 500 or more gallons/acres/day of leakage, and feedlots. Minnesota Admin. R. 4725.4450. This rule also establishes minimum setbacks for gray water dispersal areas. *Id*. Neither the government nor the court considered as an alternative to septic tanks the ability of the government to further regulate gray water disposal by establishing setbacks or imposing the variety of other regulations from other jurisdictions.

Yet despite the Amish community's willingness to submit to additional regulations, to improve their own proposed solution, and their affirmative efforts to find an alternative system acceptable to both parties, Defendants have never seriously considered any of these possibilities. Government officials have taken no meaningful steps to educate themselves on mulch

basin systems or gray water disposal regulations—and no steps whatsoever to explore other plausible alternatives. Fillmore County Zoning Administrator, Cristal Adkins, testified that she did not even know mulch basins were being considered until the case went to trial, illustrating the government's preference for litigation rather than cooperation. T. 1796.

Perhaps recognizing that Defendants did little to consider regulations, mulch basins, or Type V systems, the district court and Defendants made much of Fillmore County officials' attempt to work with the Amish while the county was developing the SSTS requirement. Add-21, fn 5. The court considered these efforts an attempt at compromise that met the government's burden under *Fulton* and *Ramirez*. *Id.* However, the alleged attempts at concessions in the SSTS ordinance totally failed to address the substance of the Amish's religious objections: septic tanks. To prove it has found the least restrictive alternative, the government must show that it both understood and attempted to address the reason for the Amish's strong religious objections to installing a gray water septic system. *Thomas v. Review Bd.*, 450 U.S. 707, 714–16 (1981). Here, the government failed on both counts.

In May 2015, the Amish families who were troubled by the prospect of putting in a gray water septic system, including Plaintiffs, sent a letter to the county officials that outlined their religious objections. Add-51-52. The letter made clear that these families were categorically opposed to installing septic

tanks, not because of the hardship or cost of installing such a system but because they were wary that the convenience from septic tanks would cause irreparable harm to their traditional way of life. *Id.* These families spoke in terms of avoiding temptations for their children and grandchildren to conform to worldly traditions and rejecting a technology their ancestors "never had or needed" to maintain their obedience to God. *Id.* These same families sent another letter in August of 2015 reiterating their concerns consistent with the first letter. Add-53-56. Neither letter mentioned any concern about the size of the tank, cost, logistics, effort of installation, or the hard work required to maintain the tank.

Yet it seems that in the discussions referred to by the government, the county officials focused on only those issues, rather than seeking a compromise that would address the Amish's religious concerns with installing septic tanks. Add-21, fn 5. The district court noted that County officials discussed "with elders of the church . . . to try and work with their belief system to be able to put in septic systems." *Id.* But this only highlights the government's misunderstanding of the religious objection. The Amish objected to *septic systems.* This misconception led Fillmore County to offer the option of smaller, more affordable septic tanks, a compromise akin to offering an Orthodox Jew who cannot eat pork a smaller, more affordable pork chop. *Id.*

In observing that the government had attempted to work with Plaintiffs to find a mutually agreeable solution, the district court relied almost exclusively on the testimony of Cristal Adkins who testified at trial to the county's attempt to compromise with the Amish in the drafting of the septic tank requirement. *Id.* Ms. Adkins testified to no other compromise suggested by Fillmore County regarding the SSTS requirement other than to permit the Amish to install smaller septic tanks. T. 1715, 1758. She emphasized that the basis of the government's decision to make this concession was the reduced waterflow the county believed was being produced from Amish homes. *Id.* Critically, while she indicated that she understood that Plaintiffs objected to installing the gray water septic system because "having this type of system would be conforming to the world" and "our forefathers never had this," Ms. Adkins never testified that the county attempted to address these objections. *Id.* at 1803.

On the government's own account of its efforts to find a solution, there is no mention of attempting to accommodate the substance of the Amish families' religious objections to complying with the ordinance; Ms. Adkins instead testified to disputing that the Amish's religious objections were legitimate reasons for concern in the first place. *Id.* at 1777–78 (Ms. Adkins testified that because the county's compromise gray water septic system would only permit 2-inch pipes, and indoor plumbing systems require 4-inch

pipes, the Amish families were wrong to worry that installing a gray water septic system would tempt younger generations to "cheat" by also installing indoor plumbing). Government officials have a responsibility to try to find alternatives that do not burden religion, not to challenge religious people's understanding of their own sincerely held beliefs. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715 (1981) ("We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.").

This failure to understand and address Plaintiffs' sincere religious objections led Justice Gorsuch to remark that Fillmore County has "displayed precisely the sort of bureaucratic inflexibility RLUIPA was designed to prevent." *Mast v. Fillmore County*, 141 S. Ct. at 2434 (2021) (Gorsuch, J., concurring). To satisfy the standard set forth in *Fulton* and *Ramirez* to find the least restrictive path forward, the government must make the effort to respond to the substance of Plaintiffs' religious objections. In this case, Defendants have failed to do so, and the district court erred in not recognizing that failure.

C. Even in Answering the Wrong Question, the District Court Erred.

The district court's improper shifting and distorting the burden in this case mandates reversal. The lone question the district court asked—"Has the

Government proven that mulch basins will not work?"— was the wrong question to begin with and taints its entire analysis. But even if that were the proper question, the district court still answered it incorrectly by relying on the same type of speculation and guesswork that tainted its other analysis. Add-37–38. The court's speculative reasoning allowed it to "remain convinced that the Government has carried its burden of proving that mulch basins of the kind acceptable to Plaintiffs 'will not work on these particular farms with these particular claimants.'" Add-44. In relying on speculation to reach this judgment, the district court revealed it misunderstood the proper analysis and permitted Defendants to easily dismiss Plaintiffs' claims with only minimal effort.

While RLUIPA requires courts to "respect th[e] expertise" of the expert witnesses before them, "that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Holt*, 574 U.S. at 364, 135 S. Ct. at 864. In other words, respecting an expert's opinions cannot rise to "unquestioning deference." *Id.* In concluding, from Dr. Heger's testimony, that the County's soil conditions foreclose the possibility of mulch basins, the district court both ignores the fact that the Amish's outhouses prove the opposite and exhibits unquestioning deference toward Dr. Heger's views.

The district court found Dr. Heger's testimony against mulch basins as a potential solution particularly convincing. She testified that while these systems could provide the same treatment as a septic system, "[t]he biggest problem is I think finding a system that you can put in subsurfacely that has three feet of soil treatment." T. 1669. Agreeing with her testimony, the district court held:

> The threshold obstacle to use of mulch basins in Fillmore County would be finding a location for them sufficiently above the 'perched water table.' It is undisputed that in order for any wastewater treatment to occur, there must be at least three feet of unsaturated, oxygenated soil beneath the point where water leaves the treatment system and enters the soil . . . I am [] convinced that the shallow perched water table and bedrock of Fillmore County make it difficult or impossible to find locations where mulch basins could be dug three feet above the restricted layer.

Add-39–40 (citing Dr. Heger's testimony from T. 886–87). But in relying on this expert's testimony, the district court reveals a gap in its and the Defendants' logic. Like mulch basins, outhouses also require "three feet of separation from the perched water table" beneath their outhouse pits. *See* Minn. R. 7080.2280 subd. A(2); 7080.2150, subpart 3, item C. To determine whether outhouses meet the three-feet requirement, the County conducts soil testing on the property where the outhouse is located:

> . . . we made the agreement that on privy systems, we'll go out and do a boring.

> Q: That tells you the type of soil that's present?
>
> A: Soil that's present and where they can actually – how they – if they'd get three feet of separation to the ground or if they have to raise it up with sand and kind of make a privy on top of a mound.

T. 2057. The Swartzentruber Amish use outhouses on their properties that satisfy the three-feet requirement, and the government has even collected soil samples from their properties to confirm the requirement was truly met. *See* T. at 1198. Because the Amish's outhouses already meet the same three-feet requirement that mulch basins have to meet, the district court's conclusion that this requirement is the "threshold obstacle" for using mulch basins is erroneous.

Similar to how it was hard for the Supreme Court in *Holt* "to swallow the [government's] argument" without employing "a degree of deference that is tantamount to unquestioning acceptance," here, it is equally as hard to swallow the argument that the three-feet soil requirement makes mulch basins an impossibility when the outhouse pits meet that very same requirement. That the Amish's outhouses meet the three-feet separation requirement proves Fillmore County has soil conditions that support mulch basins. The district court's oversight and speculation is inherently inconsistent with its determination that the government carried their burden of proof.

CONCLUSION

For the foregoing reasons, the Amish ask this Court to reverse the order of the district court, order the district court to issue an injunction against Defendants preventing them from enforcing the SSTS requirements as against these Amish because they violate RLUIPA, the Free Exercise Clause of the Constitution of the United States, and the Minnesota Constitution, and order the district court to issue an injunction mandating that Defendants meet their constitutional and statutory duties to work with the Amish to find an accommodation that will treat gray water but also allow the Amish to live according to their religious beliefs.

Respectfully submitted,

Date: January 3, 2023

LAW OFFICES OF SOUTHERN MINNESOTA REGIONAL LEGAL SERVICES, INC.

/s/ Brian N. Lipford
Brian N. Lipford, ID #388760
903 West Center Street, Suite 230
Rochester MN 55902
507.292.0080
brian.lipford@smrls.org

CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this Appellants' Brief conforms to the requirements of the applicable rules, is produced with a proportional 13-point font, and that the length of this document is 13,844 words. This brief was prepared using Word for Office 365.

Date: January 3, 2023

LAW OFFICES OF SOUTHERN MINNESOTA REGIONAL LEGAL SERVICES, INC.

/s/ Brian N. Lipford

Brian N. Lipford, ID #388760
903 West Center Street, Suite 230
Rochester MN 55902
507.292.0060
brian.lipford@smrls.org