STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LENAWEE

LENAWEE COUNTY HEALTH DEPARTMENT,
Plaintiff,
vs.

SAMUEL EICHER, et al.
DAVID W. SCHWARTZ, et al.
JONAS WAGLER, et al.
LOUIS GRABER, et al.
DAVID LENAGACHER[1], et al.
LEWIS LENAGACHER, et al.
JOSEPH GRABER, et al.
SAMUEL DELAGRANGE, et al.
SIMON GRABER, et al.
AMOS DELAGRANGE, et al.
ISAIAH EICHER, et al.
MELVIN DELAGRANGE, et al.
JOHN SCHWARTZ, et al.

Defendants
_____/

Hon. Michael R. Olsaver

File Nos.
19-6384-CE [S. Eicher]
19-6386-CE [D. Schwartz]
19-6387-CE [J. Wagler]
19-6389-CE [L. Graber]
19-6391-CE [D. Lenagacher]
19-6393-CE [L. Lenagacher]
19-6394-CE [L. Lenagacher]
19-6418-CE [L. Lenagacher]
19-6385-CE [J. Graber]
19-6388-CE [S. Delagrange]
19-6390-CE [S. Graber]
19-6392-CE [A. Delagrange]
19-6395-CE [I. Eicher]
19-6396-CE [M. Delagrange]
19-6397-CE [J. Schwartz]

John J. Gillooly (P41948)
GARAN LUCOW MILLER, P.C.
Counsel for Plaintiff
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207
(313) 446-5501
jgillooly@garanlucow.com

Richard W. Schulte
(Ohio Bar 0066031)*
Stephen D. Behnke
(Ohio Bar 0072805)*
Wright & Schulte, LLC
Counsel for Defendants
865 South Dixie Drive
Vandalia, OH 45377
(937) 435-7500
* *Admitted Pro Hac Vice*

Dennis Mulvihill
(Ohio Bar 0063996)*
Wright & Schulte, LLC
Counsel for Defendants
31100 Pine Tree Road
Pepper Pike, OH 44124
216-591-0133
* *Admitted Pro Hac Vice*

Philip Mayor (P81691)
Ramis J. Wadood (P85791)
Daniel S. Korobkin (P72842)
American Civil Liberties
Union Fund of Michigan
Counsel for Defendants
2966 Woodward Ave.
Detroit, Michigan 48201
(313) 578-6803

[1] The County's lawsuits spell these Defendants' last names as Lenagacher. The correct spelling of their name, which we use everywhere but the caption, is Lengacher.

John A. Shea (P37634)
Cooperating Attorney, American Civil Liberties Union Fund of Michigan
Counsel for Defendants
120 N. Fourth Ave.
Ann Arbor, MI 48104
(734) 995-4646

Jacob C. Bender (P78743)
Cooper & Bender, P.C.
Counsel for Defendants
P.O. Box 805
Adrian, MI 49221
(517) 263-7884

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

As this Court is aware, this case involves the Lenawee County Health Department's ("the County's") attempts to force Defendants ("the Amish" or "the Lenawee Amish") to strictly comply with certain provisions of the Lenawee County Environmental Health Code ("LCHC" or "the Code"), as interpreted by the County, even though doing so would violate the Amish's religious beliefs. The County's motion for summary disposition asks this Court to grant judgment on their nuisance claims and to dismiss the Amish's counterclaims and defenses, all of which are based on the Amish's constitutional and statutory rights to religious liberty. As the County fully understands and intends, its motion, if granted, would result in the wholesale expulsion of the County's entire Amish community and the seizure and destruction of their homes unless the Amish accede to the County's demand that they violate their religious beliefs.

The County's brief in support of its motion for summary disposition features a two-page fact section that does not describe, let alone cite evidence to support, a single relevant fact that might even arguably entitle it to summary disposition. Thus, the County has not met its burden of presenting a factual record to support granting summary disposition in its favor, even if the Amish's counterclaims and defenses did not stand in the way.

But of course, the Amish's defenses and counterclaims *do* stand in the way. The Amish have explained why this is so in their own motion for summary disposition—a motion which, unlike the County's, relies heavily upon the actual record in this case. The County's motion resists the Amish's defenses on three grounds, none of which has the slightest merit.

First, the County argues that the Amish's objection to relying upon third-party septage haulers is based on "secular/lifestyle choices," County MSD Br, pp 15–16, rather than sincerely held religious beliefs. This argument ignores the testimony of every Amish defendant, as well as the testimony of both the Amish's expert on Amish practices *and the County's own expert* on Amish practices. It also disregards the United States Supreme Court's own observation that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin v Yoder*, 406 US 205, 216; 92 S Ct 1526; 32 L Ed 2d 15 (1972).

Second, the County argues, without citation to any relevant record evidence, that it has met the burden it would be required to shoulder to survive strict scrutiny of its actions against the Amish. County MSD Br, p 17. In so doing, the County faults the Amish for not taking certain measures regarding the gathering and spreading of their septage that are recommended as ideal practices by an expert. But the County ignores the fact that it has said it would not grant the Amish permission to live peaceably in the County even if the Amish *were* to take such measures.

Finally, the County argues that the Amish's counterclaims and defenses under RLUIPA and the Michigan Constitution are barred because the Amish also assert counterclaims and defenses under the First Amendment to the United States Constitution. County MSD Br, p 11. This baffling argument is completely divorced from the law and common sense, and is totally unsupported by the authority the County cites—or by any other authority for that matter.

The County's motion should be denied in its entirety.

COUNTERSTATEMENT OF UNDISPUTED FACTS

The Amish incorporate the statement of facts in their brief in support of their own motion for summary disposition here by reference. See Amish MSD Br, pp 2–16. However, because the County's motion relies in large part upon (unsupported) assertions about the Amish's religious beliefs and the County's efforts (or, more precisely, its lack thereof) to accommodate the Amish, we briefly reiterate some relevant facts here.

The Old Order Amish families in Lenawee County belong to one of the most conservative sub-branches of the Amish faith, particularly when it comes to the use of modern technology. Bishop Delagrange Dep (Ex 1)[2], pp 31:24–32:22, 43:11–17; J Graber Dep (Ex 3), p 37:4–6.

With respect to the disposal of water, for grey water (i.e., run-off from household tasks), the Amish rely upon a simple plumbing system in which all water used in household basins flows through pipes via gravity into a single pipe coming out of the house and onto a filter strip, gravel field, or similar location nearby. I Eicher Dep (Ex 5), pp 9:21–11:13; Bishop Dep (Ex 1), pp 41:5–42:13; J Graber Dep (Ex 3), p 26:2–14; D Schwartz Dep (Ex 6), pp 13:24–14:5. For black water (i.e., septage), the Amish use simple privies (outhouses) as toilets. Amish Affirmations (Ex 7) ¶ 7; I Eicher Dep (Ex 5), pp 12:8–13:16; Bishop Dep (Ex 1), pp 19:1–21:4; L Lengacher Dep (Ex 4), pp 10:1–21, 19:1–20:13; J Graber Dep (Ex 3), pp 17:11–19:1, 34:3–18, 58:25–59:18; D Schwartz Dep (Ex 6), pp 9:1–11:5. They then add lime to the bucket to treat their septage, and apply it to portions of their field in the fall at harvest times, in an agriculturally sustainable way,

[2] All of the Amish's references to exhibits herein refer to the exhibits attached to the Amish's November 7 motion for summary disposition.

when the water table levels are lowest. Amish Affirmations (Ex 7) ¶ 7; Bishop Dep (Ex 1), pp 21:24–23:16.

The uncontradicted factual record shows that the Amish's septage practices are safe and are practiced elsewhere without incident, including by the Amish in neighboring Hillsdale County and (in far greater quantities) by licensed septage haulers in Lenawee County. Amish MSD Br, pp 5–13. The County cites *no evidence whatsoever* in its own motion suggesting otherwise. See County MSD Br, pp 7–8 (constituting the entirety of the County's factual recitation). The Amish's soil science expert has recommended some additional measures the Amish could take, out of an abundance of caution, to guard against any plausible risk their septage practices might pose. See Stehouwer Am Report (Ex 15), pp 3–4, 9–10. The Amish are willing to adopt those measures if requested by the County. See Amish Affirmations (Ex 7) ¶ 7; Bishop Dep (Ex 1), pp 25:6–26:6. Dr. Stehouwer further testified, however, that any risk posed by the Amish's *current* practices, without his additional recommendations, is "minimal." Stehouwer Dep (Ex 17), p 21:2–3.

Experts on Amish culture and religion for both sides have explained that the Amish's practices and views with respect to technology are not a secular matter, and are instead inextricably intertwined with their faith. The Amish relationship to technology is "engrained in their culture in the way they see themselves spiritually," and even when such matters "appear minor . . . to us, they appear major . . . to the Amish." Cates Dep (Ex 20), p 24:7–11; Louden Report (Ex 19), pp 3–4. In turn, views on technology "more than anything else separates . . . Amish factions." Cates Dep (Ex 20), p 72:8–9; see *id.*, p 37:15–17; Louden Report (Ex 19), p 6. It "weakens the Amish faith if they let secular modernity kind of creep into their communities." Cates Dep (Ex 20), p 41:3–6.

The Amish's view on technology and remaining separate from mainstream society is "a matter of faith and is firmly grounded in their understanding of Scripture, especially Romans 12:2: 'And do not be conformed to this world, but be transformed by the renewing of your mind, that you may provide what is that good and acceptable and perfect will of God.'" Louden Report (Ex 19), p 2; Cates Dep (Ex 20), p 37:9–13 ("[T]he Amish make the decision to separate from the world, to live in the Plain way that they do, and to—live without the technology that they choose to live without as a way of sacrificing to God, to—to live for Christ."). This commitment to separation from the secular world causes all Amish communities to reject connecting to electrical grids, and more conservative communities treat connecting to sewerage districts or relying on wastewater disposal services as analogous because "connecting to them would be a violation of the scripturally grounded principle of separation from the world." Louden Report (Ex 19), p 7; see Cates Dep (Ex 20), pp 80:12–81:11 ("plumbing" decisions are religious matters that vary by Amish community).

This religious commitment to separation from the mainstream is also complemented by a parallel devotion to self-reliance and self-toil—in other words, doing tasks that they are able to do themselves without outside assistance; self-toil is a "defining characteristic[] of the Amish faith." Cates Dep (Ex 20), p 42:23–25; Louden Report (Ex 19), p 7. Crucially, the Amish adherence to traditional ways of living is a *religious* commitment, not merely a cultural fixation. Louden Report (Ex 19), p 2; Cates Dep (Ex 20), p 69:1–4 ("You can't really separate Amish culture from Amish religion.").

In making determinations about what technologies are religiously permissible, it is common for Amish communities to consult with other churches who share similar standards. Louden Report (Ex 19), p 5. These groups of similar congregations are said to be in fellowship

with each other and share services and exchange ministers. *Id.* Amish communities that do not see eye to eye on such matters will often distance themselves from each other, *id.*, and disagreements can "fracture the community" and lead to "churches dividing," Cates Dep (Ex 20), p 42:2–6.

The Lenawee Amish's religious beliefs are consistent with both experts' understanding of the Amish faith. Every Amish family has either testified or affirmed that it is contrary to the religious beliefs of the Lenawee Amish to install a septic system in their home that requires outside vendors to pump out the system. Amish Affirmations (Ex 7) ¶ 3; I Eicher Dep (Ex 5), pp 18:18–19:24; Bishop Dep (Ex 1), pp 18:12–23, 29:3–30:11; L Lengacher Dep (Ex 4), pp 9:6–10, 17:19–18:3; J Graber Dep (Ex 3), pp 16:9–23, 32:8–12, 40:12–41:6, 53:12–18; D Schwartz Dep (Ex 6), p 8:18–25. The Amish are not opposed to hiring the equipment necessary for the installation of a septic *tank*, if requested by the County, so long as they are permitted to empty the tank themselves and apply the septage to their fields. The Amish explained that this is because hiring equipment to do a one-time tank installation that they may not be physically capable of doing themselves is different from hiring outsiders to haul away septage that the Amish are capable of disposing safely on their fields through self-toil. I Eicher Dep (Ex 5), pp 30:3–31:8; Bishop Dep (Ex 1), pp 26:7–28:13; see also *id.*, pp 30:19–31:23, 33:5–13. Dr. Louden opined that this distinction is "very typical of Amish religious practices." Louden Report (Ex 19), p 7.

The Lenawee Amish's beliefs about technology—just like other Amish communities'—are religiously grounded. Bishop Delagrange testified that the rejection of septic systems is based on a religious interpretation that the Biblical command to avoid the "lush of the world" does not permit the use of septic systems. Bishop Dep (Ex 1), pp 44:14–45:8. David Schwartz testified that the verse of Romans 12:2, discussed by Dr. Louden, requires rejecting the use of septic

systems. D Schwartz Dep (Ex 6), pp 7:19–8:4. Every Amish family similarly references this verse in explaining their religious objections to septic systems. Amish Affirmations (Ex 7) ¶ 3.

The Lenawee Amish's beliefs are consistent with those of similarly conservative Amish churches. Louden Report (Ex 19), p 5. If the Lenawee Amish "were to begin using . . . septic systems that required third party maintenance or hauling, we would likely be shunned by other like-minded Amish communities with whom we are currently in communion." Amish Affirmations (Ex 7) ¶ 4; see also Bishop Dep (Ex 1), p 44:8–13; see also L Lengacher Dep (Ex 4), pp 27:18–28:10; J Graber Dep (Ex 3), p 49:15–25. If any individual family installed such a system, they could be excommunicated from the community. I Eicher Dep (Ex 5), p 33:3–17.

On or around February 11, 2016, a meeting was held with County officials, Bishop Henry Delagrange, and other members of the Amish community. Hall Dep (Ex 9), p 124:6–17. The County came to that meeting with a plan for requiring the Amish to "get the Amish to comply with the health code." *Id.*, p 125:17–19. The County acknowledges that it did not come to the meeting prepared to consider whether any accommodations or variances might be necessary based on the Amish's religious concerns; in fact, just as they do in their brief requesting summary disposition, County officials did not even recognize that the Amish's objections to what the County was demanding of them were of a religious nature. *Id.*, pp 125–130.

Indeed, at every point when the County has presented any Amish family with any plan for "compliance" with the Code, the County has presented documents that would require the Amish to contract with septage haulers. *Id.*, pp 116:6–124:5 and exhibits I, J, and H thereto; see Merritt Dep (Ex 2), pp 20:17–21:22, 22:17–24:18. County officials cannot "recall" having ever offered to allow any Amish family a variance or accommodation based on their religious beliefs. Merritt Dep (Ex 2), p 19:10–20. That is despite the fact that, on or around October 14, 2020, each Amish

family applied to the County for variances from the Code, so as to gain formal permission to follow the practices described above. See Exhibit 8 (variances submitted by each Amish family). But the County has testified that it is unwilling to approve the variance applications because it will not approve of the spreading of septage on Amish land under any circumstances. Hall Dep (Ex 9), pp 208:7–209:11. The only "resolution" the County is "looking for" is "compliance with the [LCHC]." Merritt Dep (Ex 2), p 29:2–7; see also *id.*, pp 32:11–34:3 (County unwilling to accept any resolution with the Amish other than full compliance with the Code).

ARGUMENT

I. The County Has Not Established a Factual Record Sufficient to Support Its Motion for Summary Disposition.

The County's motion requests summary disposition on its nuisance claims, and yet the fact section of its brief in support of summary disposition does not cite a *single piece* of record evidence. The only source cited in the factual section of its brief is the Code. The County does not cite any evidence about the Amish's practices. It never mentions or even alludes to a shred of record evidence—because it has none—suggesting that the Amish's practices are unsafe.

This lack of any evidentiary support for the County's motion is particularly striking given that the County fought to be granted permission to inspect the Amish's properties during the discovery phase of this case. The Amish opposed that request on the grounds that they believed the County's true intent was not to gather information but to harass the Amish. Tellingly, after this Court granted the County's motion on April 29, 2022, and allowed the County to conduct home inspections, albeit at the County's expense, the County never actually sought to conduct a single inspection.

The County's brief literally never mentions the Amish's applications for variances, treating those applications with the same disregard in court as it has in bureaucratic practice. As to the

religious beliefs of the Amish, the County briefly (and misleadingly) cites the deposition testimony of the Amish's bishop, who is not a defendant, but does not once cite or discuss the testimony of a single Amish Defendant, several of whom described their religious beliefs at length during their own depositions. And the County does not once cite the deposition testimony of its own Amish practices expert—which is perhaps unsurprising given that the entirety of his testimony supports the *Amish*'s explanation of their religious beliefs rather than the County's disregard of those beliefs.

In sum, nothing in the County's motion supports granting summary disposition on its claims, even if the Amish's constitutional and statutory defenses did not provide a dispositive reason to deny the County's motion—which they do for the reasons stated below and in the Amish's own motion for summary disposition.[3]

II. The County's Arguments in Favor of Dismissing the Amish's Religious Liberties Counterclaims and Defenses Are Meritless.

The County does not appear to dispute that the Amish's First Amendment claims are subject to strict scrutiny, "the most rigorous and exacting standard of constitutional review," *Miller v Johnson*, 515 US 900, 920; 115 S Ct 2475; 132 L Ed 2d 762 (1995), so long as the Amish can demonstrate that they hold sincere religious beliefs that require them not to hire third-party septage haulers. See County MSD Br, p 17 (recognizing that a finding that the Amish have relevant religious beliefs "would require the Court to assess whether the regulation serves a compelling state interest and is narrowly tailored to further that interest"). Instead, the County argues first that

[3] In its motion itself, the County makes a passing reference to MCL 333.12771, claiming that the provision "prohibits the use of outhouses" in Michigan. County MSD ¶ 4. This argument is not repeated in the County's brief, which is perhaps because it is false. The provision prohibits the installation of "an outhouse *unless* the outhouse is kept in a sanitary condition, and constructed and maintained in a manner which will not injure or endanger the public health." MCL 333.12771(1) (emphasis added). The County does not offer a shred of evidence that the Amish's outhouses are unsanitary or endanger public health.

the Amish's beliefs about septic haulers are secular, not religious. Next, it argues that its actions survive strict scrutiny because there may be some marginal additional steps the Amish might be able to take to render their practices even safer—even though the County has never *asked them to take* these measures and has testified that it would not approve of them under any circumstances. Finally, the County offers a perplexing argument that the Amish's RLUIPA claims and defenses and their claims and defenses under the Michigan Constitution are barred because they also have federal constitutional claims. These arguments are meritless.

A. There Is No Serious Dispute of Fact that the Amish Have Sincerely Held Religious Beliefs Opposing the Hiring of Third-Party Septage Haulers.

The County's primary argument regarding the religious liberties issues is that the Amish's objections to using third-party septage haulers are a "lifestyle choice[]," County MSD Br, p 16, rather than a requirement compelled by their sincerely held religious beliefs. The County bases this argument on the Amish Bishop's testimony that he would recommend to his adherents that they install septic tanks on their properties so long as the Amish were allowed to use their own self-toil to empty the tanks and spread their septage on their field rather than relying on septage haulers. *Id.*, pp 15–16. According to the County, this religious judgment is a "distinction without a difference." *Id.*, p 16.

The County has forgotten that religious distinctions the government does not understand are *precisely* the ones most in need of protection from governmental interference. The government has no business "question[ing] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v Comm'r of Internal Revenue*, 490 US 680, 699; 109 S Ct 2136; 104 L Ed 2d 766 (1989); see *People v DeJonge*, 442 Mich 266, 282; 501 NW2d 127 (1993) ("[T]his Court must determine whether a religious belief is

sincerely held, not whether such beliefs are true or reasonable."); see also Amish MSD Br, pp 27–29.

Turning to the actual record in this case, there is no dispute of fact that the Amish's commitment to relying on their own self-toil to spread their (treated) septage—as farmers have done for millennia—instead of hiring septage haulers to haul their septage away are sincerely held *religious* beliefs. See *supra*, pp 6–8; Amish MSD Br, pp 9–13, 27–29. The County relies on Bishop Delagrange's testimony that "we don't want the modern tech to come in the lush of the world for our children to see the easy convenience" as evidence that the Amish's beliefs are secular. Bishop Dep (Ex 1), pp 25–26. In so doing, the County simply ignores the Bishop's explanation that his reference to the "lush of the world" is a Biblical reference to one of the central scriptural passages that the Amish interpret in determining what technology their religion permits them to utilize. *Id.*, pp 44:14–45:8. The County similarly ignores all of the testimony from the actual Amish Defendants that their rejection of relying on third-party septage haulers is rooted in the Bible. D Schwartz Dep (Ex 6), pp 7:19–8:4; Amish Affirmation (Ex 7) ¶ 3. The County cites *no* evidence whatsoever that would tend to show that these views are not religious.

Indeed, the County ignores its own expert's testimony that a commitment to self-toil is a "defining characteristic[] of the Amish faith," Cates Dep (Ex 20), p 42:23–25, that "[y]ou can't really separate Amish culture from Amish religion," *id.*, p 69:1–4, and that decisions such as "plumbing" matters are *precisely* the type of religious decisions Amish communities make, *id.*, pp 80:12–81:11. See also Louden Report (Ex 19), pp 2, 7.

Lacking any record evidence to support its assertions about the Amish faith, the County instead turns to the United States Supreme Court's decision in *Yoder*, 406 US 205, arguing that it drew a distinction between Amish beliefs about technology that are rooted in religion and those

that are rooted in secular considerations. County MSD Br, pp 13–15. To be sure, *Yoder* does say that the Free Exercise Clause does not protect people who have only secular objections to the use of modern technology that are not rooted in their religious beliefs. But as to the *Amish specifically*, *Yoder* is as clear as both parties' experts are in recognizing that Amish views on technology are *religious* beliefs. *Yoder* held that a defining "feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life." *Yoder*, 406 US at 210. Thus, "the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community." *Id.* at 216. The Supreme Court reiterated as much as recently as last year. See *Mast v Fillmore Co, Minn*, __ US __; 141 S Ct 2430, 2430; 210 L Ed 2d 985 (2021) (Gorsuch, J., concurring) (noting that the Amish "lead lives of faith and self-reliance that have 'not altered in fundamentals for centuries'"), quoting *Yoder*, 406 US at 216–217.

The County's arrogant dismissal of the Amish's religious beliefs as being "distinction[s] without a difference," County MSD Br, p 16, thus flies in the face not only of the record but of deeply entrenched precedent. Just as in *Mast*, the County's employees "have subjected the Amish to threats of reprisals and inspections of their homes and farms. They have attacked the sincerity of the Amish's faith. And they have displayed precisely the sort of bureaucratic inflexibility" that religious protections are "designed to prevent." *Mast*, 141 S Ct at 2433–2434. No evidence supports the County's distorted attempt to reclassify the Amish's religious beliefs as secular.

B. The County Does Not Even Come Close to Demonstrating that Its Actions Survive Strict Scrutiny.

Once a court determines that a religious liberties claim is subject to strict scrutiny, the burden shifts to the government to justify its actions, and the government must "justify an inroad

on religious liberty by showing that it is the least restrictive means of achieving some compelling governmental interest." *Thomas v Review Bd of Indiana Employment Sec Div*, 450 US 707, 718; 101 S Ct 1425; 67 L Ed 2d 624 (1981). In turn, "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Id.*, quoting *Yoder*, 406 US at 215. The Supreme Court has made clear that "*the government bears the burden* of proving both that its regulations serve a 'compelling' governmental interest—and that its regulations are 'narrowly tailored,'" as Justice Gorsuch recently emphasized in *Mast*, which, again, is an indistinguishable case involving Amish wastewater. *Mast*, 141 S Ct at 2432 (emphasis added), quoting *Fulton v City of Philadelphia*, __ US __; 141 S Ct 1868, 1881; 210 L Ed 2d 137 (2021). As described more fully in the Amish's brief in support of their motion for summary disposition, the County does not come close to satisfying this burden. Amish MSD Br, pp 31–35.

The County's brief includes a single page of argument as to why it satisfies this burden, arguing that it has an interest in protecting public health and the groundwater. See County MSD Br, p 17. But just as in *Mast*, which the County entirely ignores, "the question in this case 'is not whether the [County] has a compelling interest in enforcing its [septic system requirement] *generally*, but whether it has such an interest in denying an exception' from that requirement to the . . . Amish specifically." *Mast*, 141 S Ct at 2432, quoting *Fulton*, 141 S Ct at 1881 (alterations in *Mast*). To carry its burden, "[t]he 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. Here, that means proving that [the Amish's proposed accommodations] will not work on these *particular* farms with these *particular* claimants." *Id.* (emphasis added).

Yet the County provides no evidence whatsoever to justify its refusal to grant an exception or variance to this Amish community. It does not mention that it has ignored the Amish's

applications for variances, let alone provide a justification for having done so. It provides no evidence that the Amish's actions are dangerous. It does not even mention the fact that the Amish in neighboring Hillsdale County have engaged in similar practices for decades with no adverse impact and public health and no issues from that county's health department, and that Lenawee County was aware of this fact when it filed these lawsuits. Taylor Aff (Ex 14) ¶¶ 9, 11–13; Bishop Dep (Ex 1), pp 8:22–10:23; Hall Dep (Ex 9), pp 77:12–81:23, 83:8–17, 87:12–16. It does not even mention the fact that licensed septage haulers spread millions of gallons of lime-treated septage on similar fields annually in Lenawee County without issue, let alone explain why the Amish, who produce only a few hundred gallons per family annually, present a greater hazard. Hall Dep (Ex 9), pp 43:20–44:8, 132:22–133:13; see also Stehouwer Am Report, pp 6–7. And it does not even mention the fact that federal regulations and the laws of nearby states permit the spreading of lime-treated septage on the fields by small-hold farmers. Stehouwer Am Report (Ex 15), pp 2–3, 5 (discussing 40 CFR part 503; MN Rule 708.07700; IC 13-18-12-27). As explained in detail in the Amish's motion for summary disposition, these factors doom any claim by the County to be pursuing a compelling state interest in a narrowly tailored fashion as applied to the Amish as a matter of law. Amish MSD Br, pp 31–35.

The closest the County comes to providing *any* evidence to shoulder the burden it must carry to survive strict scrutiny is to point out that the Amish's septage expert has recommended some additional measures that the Amish might take to further mitigate any possible risk from their activities. Notwithstanding the County's attempt to shift its burden onto the Amish, the County asserts, falsely, that the Amish "have refused to implement any of these options." County MSD Br, p 17. This argument ignores both the science and the facts. As to the science, the Amish's expert testified that any risks to public health from the Amish's *current* practices is

already "minimal." Stehouwer Dep (Ex 17), p 21:2–3. As to the facts, the Amish have all affirmed that they are perfectly willing to implement each of their expert's recommendations if the County requires. Amish Affirmations (Ex 7) ¶ 7; Biship Dep (Ex 1), pp 25:6–26:6. However, the County has refused to act at all upon their variance applications and its Health Director has testified that the County will not accept *any* resolution by which the Amish spread their own septage. Hall Dep (Ex 9), pp 208:7–209:11; see also *supra*, pp 5, 8–9 (recounting the County's exclusive insistence that the Amish hire septage haulers). The County cannot seriously expect the Amish to implement expensive measures, in the midst of litigation in which the County threatens to seize and bulldoze the Amish's homes, when the County itself has indicated it would find such measures insufficient to cease its campaign against the Amish.

C. The Fact that the Amish Have First Amendment Defenses and Counterclaims Does Not Bar Their State Constitutional Claims or Their RLUIPA Claims.

Relying only upon a drive-by string citation to irrelevant authority, the County argues that the Amish's state constitutional and RLUIPA claims must be dismissed because they have also asserted rights under the First Amendment to the United States Constitution. County MSD Br, p 11. This argument is frivolous.

The entire point of Congress' enactment of RLUIPA was to "ensure greater protection for religious exercise than is available under the First Amendment." *Ramirez v Collier*, __ US __; 142 S Ct 1264, 1277; 212 L Ed 2d 262 (2022) (internal quotation marks omitted). It is simply nonsense to suggest that the assertion of a First Amendment claim could somehow prevent the assertion of a RLUIPA claim when the whole purpose of RLUIPA is to provide greater protection than the First Amendment. The only case the County cites in support of this argument, *Graham v Connor*, 490 US 386, 395; 109 S Ct 1865; 104 L Ed 2d 443 (1989), concerns Fourth Amendment claims and has nothing to do with RLUIPA, the First Amendment, or this case.

As to the Amish's Michigan constitutional claim, the County cites cases holding that there is no imputed claim for damages under the Michigan Constitution when an identical claim for damages under the United States Constitution is available. But these cases concern the availability of an implied cause of action *for damages* under the Michigan Constitution;[4] they in no way restrict a court's ability to grant *injunctive and declaratory* relief for a violation of the Michigan Constitution that may also violate the United States Constitution. See *Sharp v City of Lansing*, 464 Mich 792, 800; 629 NW 2d 873 (2001) (holding that "[i]njunctive and declaratory relief are available to restrain any acts found to violate" a provision of the Michigan Constitution, even when a damages remedy may not be available). That is even more obviously true when the Michigan Constitution is more protective of constitutional rights than the United States Constitution. See *Sitz v Dep't of Police*, 443 Mich 744, 761–762; 506 NW 2d 209 (1993) (recognizing that the federal constitution is a "floor" and that the protections offered by the Michigan Constitution can be greater). That is the case here. As explained in the Amish's brief in support of their motion for summary disposition, Amish MSD Br, pp 22–23, the Michigan Constitution requires that courts use strict scrutiny even for claims when such scrutiny is not required under the federal Constitution. The County has not cited any authority, because there *is* no authority, suggesting that a Court must dismiss an equitable claim under the Michigan Constitution merely because a litigant has asserted a similar claim under the United States Constitution.

[4] The cases cited by the County are probably bad law, even with respect to implied causes of action for damages, following *Bauserman v Unemployment Ins Agency*, __ Mich __; __ NW 2d __; 2022 WL 2965921 (2022) (Docket No. 160813). But for the reasons stated in the main text, there is no need for this Court to even consider that question here because the Amish seek only injunctive and declaratory relief.

III. The County Is Not Entitled to Summary Disposition on the Amish's Fair Housing Act Claim.

The only argument the County makes in favor of summary disposition on the Amish's Fair Housing Act (FHA) defenses and counterclaims is meritless for reasons already discussed above. The County (falsely) asserts that the Amish refuse to implement the additional measures suggested by their septage expert, and therefore have not proven that the County's actions disparately impact the Amish's housing opportunities. County MSD Br, p 19. But as already explained, the Amish are willing to comply with the measures suggested by their expert if asked to do so; it is the County who has been unwilling to offer a variance or consider any alternative that does not involve the use of third-party septage haulers. See *supra*, p 15. The County has not presented any evidence whatsoever that it would accept the suggestions put forward by Dr. Stehouwer, and its Health Director has testified that the County will not grant any variance that allows the Amish to spread their own lime-treated septage. Hall Dep (Ex 9), pp 208:7–209:11. Thus, the County has not shown that its own actions do not disparately impact the Amish's housing opportunities in the County, and it is not entitled to summary disposition on this issue. To the contrary, all record evidence supports the Amish's FHA claim. See also Amish MSD Br, pp 35–37 (explaining why the record requires summary disposition be granted to the Amish on their Fair Housing Act counterclaims and defenses).

CONCLUSION

After three years of discovery, the County is unable to cite a single record fact that suggests that the Lenawee Amish are doing anything unsafe or that there is any other barrier to accommodating their religious needs. Instead, it ignores the actual record and belittles and diminishes the seriousness of the Amish's religious beliefs, in plain contravention of the testimony

of its own expert on Amish religion. The County's motion for summary disposition should be denied, and the Amish's dueling motion should be granted.

Respectfully submitted,

/s/ Philip Mayor
Philip Mayor (P81691)
Ramis J. Wadood (P85791)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6803

Richard W. Schulte (Ohio Bar 0066031)*
Stephen D. Behnke (Ohio Bar 0072805)*
Wright & Schulte, LLC
865 South Dixie Drive
Vandalia, OH 45377
(937) 435-7500

Dennis Mulvihill (Ohio Bar 0063996)*
Wright & Schulte, LLC
31100 Pine Tree Road
Pepper Pike, OH 44124
(216) 591-0133

* *Admitted Pro Hac Vice*

John A. Shea (P37634)
Cooperating Attorney, American Civil
Liberties Union Fund of Michigan
120 N. Fourth Ave.
Ann Arbor, MI 48104
(734) 995-4646

Jacob C. Bender (P78743)
Cooper & Bender, P.C.
P.O. Box 805
Adrian, MI 49221
(517) 263-7884

Attorneys for Defendants

Dated: November 28, 2022

PROOF OF SERVICE

On November 28, 2022, I caused a copy of this brief to be served by electronic mail on John Gillooly, Attorney for Plaintiff, at jgillooly@garanlucow.com.

/s/ Stephen D. Behnke
Stephen D. Behnke