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]

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[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.

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DEFENDANTS' MOTION FOR SUMMARY DISPOSITION ON THEIR CONSTITUTIONAL AND STATUTORY DEFENSES AND COUNTERCLAIMS

By this motion, the Amish Defendants seek summary disposition on their constitutional and statutory defenses and counterclaims. In support of this motion, Defendants state as follows:

1. "In this country, neither the Amish nor anyone else should have to choose between their farms and their faith." *Mast v Fillmore Co, Minn*, __ US __; 141 S Ct 2430, 2434; 210 L Ed 2d 985 (2021) (Gorsuch, J., concurring). Yet that is *precisely* the choice that the Lenawee County Health Department[2] seeks to impose on the Amish defendants ("the Amish" or "the Lenawee Amish") in these consolidated lawsuits. To justify this result, the County relies on common law nuisance claims combined with the County's interpretation of the Lenawee County Environmental Health Code ("LCHC").

2. The Amish defendants respond with defenses and counterclaims arguing that the County's manner of enforcing the LCHC, as applied to the Amish, violates the Amish's constitutional and statutory rights to religious freedom. Those religious rights come from multiple sources, any *one* of which would suffice to render judgment in the Amish's favor: the

[2] We refer to the Lenawee County Health Department and Lenawee County, on whose behalf the Department acts, interchangeably as "the County."

First Amendment to the United States Constitution, the Michigan Constitution, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Fair Housing Act ("FHA").

3. As explained more fully in the attached brief, each of these counterclaims and defenses share key premises: (1) the Amish's farming and wastewater practices and proposed practices are religiously compelled; (2) the County has refused to accommodate the Amish's religious beliefs, even though it is aware that Amish in neighboring counties have similar practices and that commercial farmers in the County also have similar practices; and (3) the County has not shown (and cannot show) that the Amish's practices and proposed practices would harm public safety.

4. Under the First Amendment to the U.S. Constitution, as well as under the Michigan Constitution and RLUIPA, the County's actions violate the Amish's rights to religious freedom unless they can survive "strict scrutiny." Strict scrutiny is the "most rigorous and exacting standard of constitutional review" that courts ever apply when reviewing governmental actions. *Miller v Johnson*, 515 US 900, 920; 115 S Ct 2475; 132 L Ed 2d 762 (1995).

5. For the reasons described in the attached brief, the County cannot come close to satisfying this demanding degree of scrutiny and it has therefore violated the Amish's rights to freely exercise their religion by refusing to accommodate their religious beliefs.

6. Accordingly, the Amish respectfully request that this Court grant summary disposition on their defenses and counterclaims, dismiss the County's complaints, and issue a declaration and injunction (1) holding that the County has violated the Amish's constitutional and statutory rights and (2) ordering the County to accommodate the Amish's sincerely held religious beliefs in a manner consistent with the proposals the Amish have set forth in their variance applications and expert reports.

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION ON THEIR CONSTITUTIONAL AND STATUTORY DEFENSES AND COUNTERCLAIMS

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INTRODUCTION

"In this country, neither the Amish nor anyone else should have to choose between their farms and their faith." *Mast v Fillmore Co, Minn*, __ US __; 141 S Ct 2430, 2434; 210 L Ed 2d 985 (2021) (Gorsuch, J., concurring). Yet that is *precisely* the choice that the Lenawee County Health Department[4] seeks to impose on the Amish defendants ("the Amish" or "the Lenawee Amish") in these consolidated lawsuits. The County brought the lawsuits at issue here to force the Amish to choose between complying with certain specific details of the Lenawee County Health Code ("the Code" or "LCHC") that would force them to violate their religion or having their farms seized and their homes bulldozed.

As the County was well aware when it brought these lawsuits, the Lenawee Amish have religious objections to complying with a few specific aspects of the Code—at least as the Code is interpreted by the County. Specifically, rather than having their septic tanks emptied by third-party septic haulers, the Lenawee Amish have sincerely held religious beliefs, based on a commitment to self-toil and avoiding unnecessary entanglements with the modern world and technology, compelling them to process and utilize their own septage just as farmers have done for millennia. They therefore seek to continue their existing practice of disposing of their septage by treating it with lime and spreading it on their fields in a safe and agriculturally sustainable way and disposing of other wastewater into leach fields or other suitable areas of their property. Their religion also prohibits them from installing wells that would need to rely on electricity. The uncontested record shows that the Amish's practices and proposed practices are safe; consistent with federal regulations (which are also incorporated into state law in neighboring states); identical to practices allowed in next-door Hillsdale County; and pose less of a risk to public safety than

[4] We refer to the Lenawee County Health Department and Lenawee County, on whose behalf the Department acts, interchangeably as "the County."

other agricultural practices the County freely allows, including the land application of *millions* of gallons of treated human septage by corporate septage haulers.

Nonetheless, instead of working to accommodate the Amish's religious beliefs, the County seeks to evict them all from its borders. In bringing these lawsuits, the County did not even *mention* the Amish's religious concerns. As explained below, the County's refusal to accommodate the Amish, and its decision to instead initiate these lawsuits, are subject to strict scrutiny under the United States and Michigan Constitutions as well as the federal Religious Land Use and Institutional Persons Act (RLUIPA). And based on the undisputed record in this case, the County cannot come close to meeting the strict scrutiny standard. Thus, its actions violate the Amish's constitutional liberties and their rights under RLUIPA as a matter of law. Similarly, the County's actions violate the federal Fair Housing Act (FHA) by essentially barring an entire religious community from owning homes in the County. Accordingly, the County's claims should be dismissed in light of the Amish's constitutional and statutory defenses, and summary disposition should be granted in favor of the Amish on their constitutional and statutory counterclaims.

STATEMENT OF UNDISPUTED FACTS

I. The Old Order Amish Community in Lenawee County.

There are approximately a dozen Old Order Amish families in Lenawee County. Bishop Delagrange Dep, p 12:6–25 ("Exhibit 1"); Merritt Dep, p 16:16–22 ("Exhibit 2"). Old Order Amish are the more conservative branch of the Amish faith, particularly when it comes to the use of modern technology, and the Lenawee Amish are one of the most conservative sub-groups of Old Order Amish. Bishop Dep (Ex 1), pp 31:24–32:22, 43:11–17; J Graber Dep, p 37:4–6 ("Exhibit 3"). The Lenawee Amish's religious leader is Bishop Henry Delagrange. Bishop Dep (Ex 1), pp 6:22–25, 11:8–14. Prior to 2015, there were no known Amish adherents residing in the

County. Many of these Amish families migrated to Lenawee County from neighboring Hillsdale County. Bishop Dep (Ex 1), pp 7:24–8:9; L Lengacher Dep, p 5:1–4 ("Exhibit 4").

The Amish families in Lenawee County congregate for religious services in each other's homes on a rotating basis. I Eicher Dep, p 17:19–20 ("Exhibit 5"); J Graber Dep (Ex 3), p 53:19–24. They do not have a standalone religious building. I Eicher Dep (Ex 5), p 17:16–18; J Graber Dep (Ex 3), p 37:22–23.

II. The Amish Farming, Water, and Sewage Practices.

There are several farming, water, and sewage disposal practices at issue in these matters.

First, with respect to water used in the Amish homes, the Amish have wells on their property and outside their homes from which they obtain all of their water for household use. L Lengacher Dep (Ex 4), p 21:1–4; Bishop Dep (Ex 1), p 30:14–18; I Eicher Dep (Ex 5), p 8:17–24. Water is carried into the house in buckets on an as-needed basis. *Id.* The wells can be operated through manual pumping but also utilize gas-powered motors. L Lengacher Dep (Ex 4), p 21:14–20; J Graber Dep (Ex 3), pp 50:14–51:9; D Schwartz Dep, p 15:2–15 ("Exhibit 6"). Gas-powered motors have been religiously approved by elders in this and similar Amish communities for longer than the oldest members of this community can remember, as they do not require connecting to any type of grid or municipal service. L Lengacher Dep (Ex 4), pp 21:24–22:4. Notably, the Amish have not been able to obtain permits for their wells from the County, because the County will not grant the permits unless the Amish install a septic system. J Graber Dep (Ex 3), pp 14:19–15:9.

Second, with respect to the disposal of water, it is necessary to distinguish between grey water (i.e., run-off from household tasks such as bathing and the washing of dishes or clothes) and black water (human septage from defecation or urination). With respect to grey water, the Amish

utilize very little water since they do not have running water in their homes. They 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.

Third, with respect to black water, the Amish use simple privies (outhouses) as toilets. Amish Affirmations ("Exhibit 7") ¶ 7[5]; 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. The privies have a bucket under the toilet seat.[6] *Id.* The Amish regularly add lime to the bucket to treat their septage, and empty the bucket as needed into manure piles, mixing the septage with animal manure. *Id.* The combined septage is then applied to portions of their field in the fall at harvest times when the water table levels are lowest. Amish Affirmations (Ex 7) ¶ 7; Bishop Dep (Ex 1), pp 21:24–23:16. Upon applying septage to their fields, the Amish promptly plow the fields to integrate the septage with the soil. *Id.* The Amish do not apply septage to portions of their land where crops will be grown for human consumption during the next growing season. *Id.*

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).[7] The County has discretion to grant or

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[5] For religious reasons, the Amish refer to their statements under oath as affirmations rather than affidavits.

[6] Jonas Wagler's privy is situated on top of a concrete septic tank that was pre-existing when he purchased his home. He empties the tank himself and his practices otherwise mirror those described in the main text. Wagler Affirmation ¶¶ 6–7.

[7] The copies of the variances provided in Exhibit 8 are unsigned because once the variances were signed by each family, they were submitted directly to the County without being photocopied.

deny variances so long as the requested variance does not jeopardize public health. Hall Dep, pp 20:16–21:10 ("Exhibit 9"); LCHC ("Exhibit 10"), ch 1, § 1.1m. The County has acknowledged that it is unwilling to approve the variance applications because it will not approve of the spreading of septage on Amish land. Hall Dep (Ex 9), pp 208:7–209:11.

III. The Amish's Farming, Water, and Sewage Practices Are Entirely Safe and There Is No Evidence to the Contrary.

There is no evidence whatsoever that the practices described above are unsafe, and significant evidence exists that they *are* safe. Martha Hall, the Health Officer and highest ranking official of the Lenawee County Health Department at all times relevant to this lawsuit,[8] testified that the County had no evidence of any kind that the Amish's septage practices have endangered their own health or the health of any member of the community. Hall Dep (Ex 9), pp 29:13–31:1. She similarly testified that the County has no evidence that any Amish well or water source or any surface waterways were contaminated. *Id.*, pp 29:7–12, 30:21–31:1; see also J Graber Dep (Ex 3), p 55:2–6. Similarly, the County has no evidence that the Amish's grey water practices have caused any health problems or contaminated any surface waterways or groundwater supplies. Hall Dep (Ex 9), p 31:5–19.

The township supervisors of Hudson Township (Matt Smith) and Medina Township (James Craig)[9] are both similarly unaware of anything the Amish have done to endanger the health or safety of their communities in their respective townships. Smith Aff ("Exhibit 11") ¶ 8; Craig Dep, pp 32:15–33:2 ("Exhibit 12"). Tests of the wells on each Amish farm have indicated that the well water is not contaminated. See Exhibit 13 (test results); Bishop Dep (Ex 1), p 17:17–23.

[8] Hall retired in spring of 2022.

[9] James Craig's tenure as Medina Township Supervisor ended in 2020. Craig Dep (Ex 12), pp 13:23–14:3.

The Amish community in neighboring Hillsdale County follows similar practices, and there is no evidence whatsoever that they are unsafe. Martin Taylor, who served as the building inspector for Medina Township in Lenawee County until recently, has also served as a building inspector for 25 years in Hillsdale County. He is familiar with the septage practices in both communities. Taylor Aff ("Exhibit 14") ¶¶ 1, 3, 6. In his experience, many of the Hillsdale Amish, like the Lenawee Amish, do not use modern septic systems, and Hillsdale County does not withhold permits from them and has not sought to strictly enforce provisions of its county health code that might contradict the Amish's religiously required wastewater practices. *Id.* ¶¶ 9–11; see also Bishop Dep (Ex 1), pp 8:22–10:23 (describing practices in Hillsdale County); J Graber Dep (Ex 3), pp 8:19–9:4. In his 25 years inspecting Amish homes in Hillsdale County, Taylor has never heard of any kind of outbreak of contagious diseases stemming from the Amish's practices—and he would have been aware if an outbreak had occurred. Taylor Aff (Ex 14) ¶ 12. Taylor advised the Lenawee County Health Department of this information and recommended that Lenawee County follow Hillsdale's practices, but Lenawee refused. *Id.* ¶ 13.

Hall acknowledges having spoken with Hillsdale County health officials and learning that Hillsdale issues sewage permits to Old Order Amish who use privies and buckets, and does not attempt to proscribe such Amish practices. Hall Dep (Ex 9), pp 77:12–81:23, 83:8–18. Yet she did not even bother to ask Hillsdale health authorities whether these practices were consistent with Hillsdale's health code or whether Hillsdale offered variances to the Amish. *Id.*, p 85:11–23. Hall has no information that the Hillsdale Amish have ever endangered public health. *Id.*, p 87:12–16.

Defendants' septage expert, Dr. Richard Stehouwer, is an expert in soil science, including the application of human and other by-products to soils. Stehouwer Am Report ("Exhibit 15"), p 1. In his uncontradicted expert opinion, the Amish are able to land-apply their septage with

"minimal risk of endangering the health of their families or the public at large." *Id.*, p 2. Dr. Stehouwer explains that "[h]uman wastes have been applied to agricultural soils for millennia to take advantage of the plant nutrients they contain." *Id.*, p 5. He calculates that each Amish family applies approximately 300-400 gallons of septage to their multi-acre fields per year *Id.*, p 7. The spreading of treated domestic human septage on smallholder farms is specifically contemplated and approved by federal (EPA) regulations and by neighboring states such as Indiana and Minnesota. *Id.*, pp 2–3, 5 (discussing MN Rule 7083.07700, IC 13-18-12-7, and 40 CFR Part 503); see K Johnson Dep ("Exhibit 16"), p 23:7–15 (acknowledging that the County was contacted by Indiana officials who explained that septage spreading by domestic farmers was lawful in Indiana).

By contrast, licensed septage haulers in Michigan regularly apply 30,000–40,000 gallons of septage per acre to agricultural fields. Stehouwer Am Report (Ex 15), p 2. One hauler in Lenawee County alone applied between 2.1 and 2.3 million gallons of septage to their land annually between 2016–2018.[10] *Id.*, p 2 n 1; see also Hall Dep (Ex 9), pp 132:22–133:13 and exhibit L attached thereto. The County's understanding is that, like the Amish, licensed haulers treat their septage with lime prior to applying it to fields. Hall Dep (Ex 9), pp 43:20–44:8.

Measures already being taken by the Amish largely eliminate any health risks from the spreading of their septage. Lime treatment alone "eliminate[s] most potential human pathogens prior to land application." Stehouwer Am Report (Ex 15), p 6. Any remaining risk "is reduced by not applying septage to human food crops and by not harvesting any crops for at least 30 days

[10] In her deposition, Hall was asked about the potential health risk posed by the septage spread by licensed septage haulers in Lenawee County. She would not acknowledge the greater health risks posed by spreading vastly larger amounts of septage on the fields in question, but provided no explanation for this position. Hall Dep (Ex 9), pp 92:24–93:1. Hall does not appear to have taken any steps to assess whether the Amish's septage practices present any greater (or lesser) risk to Lenawee County's public health than the millions of gallons of septage spread by licensed septage haulers. *Id.*, pp 137:23–138:2.

following application"—practices again already followed by the Amish. *Id.*, p 6. Further, by applying septage to their fields only in the fall, any risk of groundwater contamination due to water table levels is also eliminated. *Id.*, p 4 n 2, p 11. The Amish practice of cycling which crops are grown in the field, and thus not raising food crops in septage-fertilized fields, constitutes "best management practices for land application of septage." *Id.*, p 11. And "while not required for lime stabilized septage," the Amish practice of immediately plowing the septage into their fields after applying it with a spreader "would further reduce any possibility of vector attraction [i.e., the propensity of waste to attract infectious agents or vermin]." *Id.*

In an abundance of caution, Dr. Stehouwer has recommended a few additional measures for the Amish to follow: measuring the amount of lime applied and the resulting pH of their septage, storing their septage in tanks and emptying them only one or two times per year, not mixing the human septage with animal manure, and choosing portions of their property with less than 6% slopes on which to apply the treated septage. *Id.*, pp 3–4, 9–10. At his deposition, Dr. Stehouwer clarified that even without following these additional recommendations, the risks posed by the Amish's current practices are "also minimal." Stehouwer Dep ("Exhibit 17"), p 21:2–3; see *id.*, pp 21:4–23:7 (further explaining his reasoning for this opinion). By following all of Dr. Stehouwer's recommendations, the Amish would, if anything, be presenting *less* of a risk to public health and safety than the licensed septage haulers in Lenawee County, who apply *vastly* more septage to their properties than the Amish do. Stehouwer Am Report (Ex 15), pp 6–7. The Amish are all willing to follow these recommended practices if asked to do so by the County. Amish Affirmations (Ex 7) ¶ 7. As noted above, the County has yet to act upon the Amish's variance requests and thus has made no such requests.

With respect to gray water, the Amish's civil engineering expert, John Norton, has opined that the Amish's current practices do "not cause any risk to health," particularly "[g]iven the[Amish's] low usage of water." Norton Rep, p 2 ("Exhibit 18"). Norton is a board-certified Environmental Engineer with decades of experience working for public health agencies operating health and environmental systems. *Id.*, p 1. To nonetheless address any hypothetical health and safety concerns the County might have, Norton has designed leach field systems that the Amish have offered to use in their variance applications, and Norton obtained and reviewed test results of the Amish's soil to establish the viability of such systems. See *id.*, pp 2–6 and appendices B, C attached thereto; see also Ex 8 (variance applications). He also created designs for privies that are safely used by Amish elsewhere, and the Lenawee Amish have offered to use those designs in their variance applications. Norton Rep (Ex 18), p 2; see also Ex 8. But as noted above, the County has yet to formally act on the variance applications and has indicated that it will not approve them. Hall Dep (Ex 9), pp 208:7–209:11.

IV. The Amish's Sincerely Held Religious Beliefs Regarding Septage and Motors.

Both parties have retained experts regarding the Amish faith, although after the County's expert, Dr. Jim Cates, was deposed, the County has indicated that it no longer intends to call him as an expert. The experts on both sides are remarkably aligned in their description of the Amish faith. Both experts agree that there is a great deal of ideological diversity amongst Amish communities, particularly with respect to their religious beliefs about the use of technology. Louden Report ("Exhibit 19"), pp 4–5; Cates Dep ("Exhibit 20"), pp 37:9–17, 65:23–66:16. Indeed, 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), pp 72:8–9; see *id.*, p 37:15–17; Louden Report (Ex 19), p 6. And 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 establishing religious views on permissible technology for any given Amish community, each community relies on an "Ordnung," literally translated as "ordinance," which functions as a code of conduct detailed what types of practices and technology are religiously sanctioned for the community. Louden Report (Ex 19), pp 4–5. Ordnungs are sometimes written down (but sometimes not) but when there is a written Ordnung it is regularly supplemented by oral orders, and that "oral tradition . . . sets out many . . . standards" relating to the "adoption or rejection of technology or 'modern conveniences." *Id.*, p 4; Cates Dep (Ex 20), p 42:7–17. "Ordnungs are generally very slow to change . . . ." Louden Report (Ex 19), p 5.

In making determinations, ultimately captured in the Ordnung, 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 they hold several religious beliefs that are relevant here. 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 or to install wells that would require the use of electric motors. 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 is different from hiring outsiders to haul away septage that the Amish are capable of disposing safely 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 Biblical verse in explaining their religious objections to septic systems. Amish Affirmations (Ex 7) ¶ 3.

The Lenawee Amish recognize that they are among the most conservative sub-groups of Old Order Amish. Bishop Dep (Ex 1), pp 31:24–32:22, 43:11–17; J Graber Dep (Ex 3), p 37:4–6. Their beliefs are consistent with those of similarly conservative Amish churches. Louden Report (Ex 19), p 5. If the Lenawee Amish were to defy their religious principles and install septic systems, they will be shunned by the other communities with whom they are in fellowship. 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; Amish Affirmations (Ex 7) ¶ 4 ("If we were to begin using electric motors or 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."). If any individual family installed such a system, they could be excommunicated from the community. I Eicher Dep (Ex 5), p 33:3–17.

The Lenawee Amish have also explained, consistent with the expert testimony from both parties, that the religious rules governing the use of technology in their community are developed in consultation with the other churches with whom they are in communion. Amish Affirmations (Ex 7) ¶ 4; I Eicher Dep (Ex 5), pp 16:8–18, 35:14–17; Bishop Dep (Ex 1), pp 6:22–7:8; L Lengacher Dep (Ex 4), pp 26:21–27:5; J Graber Dep (Ex 3), pp 12:11–21, 37:10–14. They have explained that this decision constitutes part of the community's oral Ordnung and is not written down as is "common for most decisions about an Amish community's use of technology." Amish Affirmations (Ex 7) ¶ 5; I Eicher Dep (Ex 5), pp 25:9–24; J Graber Dep (Ex 3), p 46:13–21.

In sum, all of the evidence that has been produced in this case establishes that the Lenawee Amish have sincerely held religious beliefs that prevent them from installing septic systems or using electric motors. These beliefs are more conservative than those of some other Amish communities, but consistent with similarly conservative Amish communities.

V. The County Has Failed to Accommodate the Amish's Religious Beliefs Despite Lacking Any Evidence That Amish Practices Are Unsafe.

The County alleges that the Amish are not complying with the strict letter of the Lenawee County Health Code ("LCHC" or "the Code"). The Amish have had a number of written and oral communications with officials from the County since moving to Lenawee County. The parties dispute much of the tone and content of these communications. What is undisputed, however, is that on or around February 11, 2016, a meeting was held with LCHD 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, County officials did not even accept that the Amish had religious objections to strict compliance with certain aspects of the Code, as interpreted and applied by the County. *Id.*, pp 125–130. In making that determination, County Health Officer Martha Hall did some online research about the Amish religion and attended a conference in Ohio that touched on Amish religious beliefs; but she apparently was not aware of the fact that not every religious edict in the Amish faith is written down. *Id.*, pp 36:14–39:4; 130:16–25. 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. The only "resolution" the County was "looking for" was "compliance with the [LCHC]." *Id.*, 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).

In addition to withholding permits from the Amish, the County also sought to enlist the assistance of local government officials to harass them. Martha Hall had calls with Hudson Township Supervisor Matt Smith in which she encouraged him to issue stop-build orders on Amish homes that were already completed and further urged him to revoke homestead tax exemptions the township had granted to Amish families. Smith Aff (Ex 11) ¶ 5. Smith did not believe the homestead revocation would be lawful and believed that this was an inappropriate way to deal with the Amish anyhow. *Id.*, ¶¶ 5–6. Hall told Smith that "if the Amish folks in other places can

have a pit toilet and get it pumped out, why can't these guys do that too?" *Id.*, ¶ 7. Hall "didn't seem to understand, or didn't want to understand, that not all Amish communities are the same, even if they live relatively close to each other." *Id.* As a result of the County health department's refusal to issue septic and well permits on the Amish properties, local officials in both Hudson and Medina townships could not issue building permits, a fact that Hall knew. *Id.*, ¶ 5; Taylor Aff (Ex 14) ¶¶ 4, 14–16; Craig Dep (Ex 12), p 23:4–15; see also J Graber Dep (Ex 3), p 33:7–11 (Hall told Mr. Graber he could not get permits without a septic system); D Schwartz Dep (Ex 6), p 7:7–16 (counsel for the county informing Mr. Schwartz he cannot get a building permit unless he installs a septic system).

Instead of finding a way to accommodate the Amish, on November 1, 2019, the County filed all but one[11] of the consolidated lawsuits at issue in this Court seeking to force the Amish to strictly comply with all provisions of the LCHC or else asking that the Court order that a lien be placed on their properties and that the Amish pay to have their own homes demolished. See, e.g., Compl in Case No. 19-6384, pp 9–10 ¶¶ A–F. There is no other Amish community in Lenawee County, Bishop Dep (Ex 1), p 12:1–5, so these lawsuits were filed against every single Amish family in the County. Thus, if the County prevails, it will seize and demolish the homes of every single member of an entire religious minority within its borders—or else force them to compromise their religious beliefs and be excommunicated from the other Amish churches with which they are in communion. At no point do the County's Complaints acknowledge, or even *mention*, Defendants' Amish faith or their religious concerns.

Notably, the County's decision to bring nuisance lawsuits against every Amish family in the County stands in stark contrast to its treatment of the numerous concentrated animal feed

[11] The final suit, No. 19-1648, was filed against an additional property owned by Defendant Lewis Lengacher, who was already sued in case numbers 19-6393 and 6394 with respect to two other properties he owns.

operations (CAFOs) in the County that generate massive amounts of animal waste that has contaminated county waterways. The County has never conducted any comparison of the health risks posed by the Amish's spreading of human septage versus the impact posed by millions of gallons of untreated animal septage from eight animal factories in the county, despite acknowledging that this would be "valuable information." Hall Dep (Ex 9), pp 142:15–143:7. In fact, the County has not even investigated how much animal waste may be running off into its waterways at all. *Id.*, p 143:18–22. Hall was completely unfamiliar with a major Sierra Club report documenting that Lenawee County's CAFOs are the largest single source of contamination of Lake Erie via the Maumee River. See *id.*, pp 145:1–9, 145:22–146:21, 147:4–19, and exhibit O attached thereto. The County has done nothing other than share information with other agencies to address the health impact caused by the numerous violations of health and safety laws perpetrated by these CAFOs. *Id.*, p 148:2–10. In particular, the County has not filed a nuisance lawsuit against any CAFO, even though Hall acknowledged that their violations of law could constitute nuisances. *Id.*, p 150:9–19; see also Merritt Dep (Ex 2), p 14:21–15:19 (similar). Instead, the County has singled out the Amish to be the target of nuisance lawsuits.

STANDARD OF REVIEW

In a motion for summary disposition under MCR 2.116(C)(10), the court "considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party is "entitled to judgment as a matter of law" when the "proffered evidence fails to establish a genuine issue regarding any material fact." *Id.* To resist summary disposition, the non-moving party must proffer "substantively admissible evidence demonstrating an issue of material fact; a court may not consider the mere possibility that the claim might be supported by evidence . . . trial" when evidence has not yet been produced. *Id.* at 121.

ARGUMENT

The Amish's defenses and counterclaims all allege that the County has acted unlawfully both by failing to accommodate the Amish's religious objections to strict compliance with the Code (as interpreted and applied by the County), and by bringing lawsuits that seek to force the Amish to choose between strict compliance or eviction and the destruction of their homes. To analyze these claims, this Court must first determine what type of judicial scrutiny is to be applied to the County's actions. Section I, below, explains why the County's actions are subject to strict judicial scrutiny under three different legal theories that protect religious liberties: (1) the First Amendment; (2) Article 1, § 4 of Michigan's 1963 Constitution; and (3) RLUIPA. Strict scrutiny, of course, is 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). Any *one* of these provisions would suffice to require the County's actions to be subject to this "rigorous and exacting" degree of judicial scrutiny. Here, all three apply.

Assuming this Court determines that strict scrutiny applies, Section II explains why the strict scrutiny analysis is straightforward and renders the County's actions unlawful. The uncontradicted record in this case establishes that the Amish have sincere religious beliefs that the County has refused to accommodate, and that the County has not carried its burden, as required under strict scrutiny, to prove that the accommodations sought by the Amish are unsafe or improper.

Finally, Section III explains why the County's actions also violate the Fair Housing Act.

I. The County's Refusal to Accommodate the Amish Is Subject to Strict Scrutiny for Any One of Three Reasons.

A. The County's Actions Are Subject to Strict Scrutiny Under the First Amendment Because the Code and the County Allow Individualized Exemptions and the Code Is Underinclusive In Regulating Septage Spreading.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US Const, Am I. Traditionally, courts have applied strict scrutiny when determining whether a governmental law or practice infringes on the free exercise of an adherent's religion. See *Wisconsin v Yoder*, 406 US 205; 92 S Ct 1526; 32 L Ed 15 (1972) (holding that a state requirement that all children attend school past eighth grade violated the free exercise rights of Old Order Amish); *Sherbert v Verner*, 374 US 398, 402–403; 83 S Ct 1790; 10 L Ed 2d 965 (1963). Under strict scrutiny, if a governmental act "substantially burdens" the free exercise of an adherent's sincerely held religious beliefs, then the governmental action must be supported by a "compelling state interest," and must reflect "the least restrictive means" of accomplishing that state 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 *Employment Div, Dept of Human Resources of Oregon v Smith*, 494 US 872, 880; 110 S Ct 1595; 108 L Ed 2d 876 (1990), the United States Supreme Court held for the first time that strict scrutiny does not apply to laws affecting adherents' religious liberties if the law is merely a "neutral law of general applicability" that incidentally burdens religious practices. *Smith* nonetheless made clear that strict scrutiny continues to apply under the First Amendment when the government acts pursuant to laws that "ha[ve] in place a system of individual exemptions." *Id.* at 884. In such case, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* In other words, under *Smith*, a law "is not generally applicable if it 'invite[s]' . . . 'a mechanism for individualized exemptions.'" *Fulton v City of*

Philadelphia, __ US __; 141 S Ct 1868, 1877; 210 L Ed 2d 137 (2021) (quoting *Smith*, 494 US at 884). Laws allowing such exemptions remain subject to strict scrutiny. See *id.*

Additionally, "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* Of particular relevance here, this means that a law that purports to protect public health, but which prevents churches from engaging in a certain activity while allowing secular or commercial enterprises to undertake activities that present a "similar hazard," is an underinclusive law that is not a law of general applicability—and such underinclusive laws remain subject to strict scrutiny. *Id.*, discussing *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 537; 113 S Ct 2217; 124 L Ed 2d 472 (1993).

Applying these principles in *Fulton*, the Supreme Court recently held that an anti-discrimination provision that prohibited religious foster care providers from discriminating against gay foster parents was subject to strict scrutiny because the government reserved the discretion to grant exemptions from the anti-discrimination provision. *Id.* at 1878. This was so even though the government had never actually exercised that discretion to grant exemptions: "The *creation* of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 1879 (emphasis added), quoting *Smith*, 494 US at 884.

Countless other cases similarly hold that laws that contain provisions for discretionary exemptions are subject to strict scrutiny under the First Amendment. For example, in *Roberts v Neace*, 958 F3d 409 (CA 6, 2020), Kentucky's governor sought to protect public health during the COVID-19 pandemic by, *inter alia*, requiring all organizations that were not "life-sustaining" to

close. *Id.* at 411. The order then listed life-sustaining operations that were permitted to stay open so long as they observed various protocols to protect health as far as possible. *Id.* Churches were not on the list. The Sixth Circuit held that the order violated the Free Exercise Clause by requiring churches to close because the "exemptions for secular activities pose comparable public health risks to worship services." *Id.* at 414. See also, e.g., *Blackhawk v Pennsylvania*, 381 F3d 202, 209 (CA 3, 2004) (Alito, J.) (holding that a law regulating ownership of exotic animals was subject to strict scrutiny as applied to a Native American who wanted to keep bears for religious purposes because the law provided exemptions for various wildlife management purposes); *Fraternal Order of Police Newark Lodge No 12 v City of Newark*, 170 F3d 359, 367 (CA 3, 1999) (Alito, J.) (holding that a police department ban on beards that contained an exemption for medical hardship must also allow religious exemptions). Similarly, in *Mitchell Co v Zimmerman*, 810 NW2d 1 (Iowa, 2012), the Iowa Supreme Court held that an ordinance that had the purpose of protecting municipal roads, and that did not permit vehicles with steel wheels to be used on the roads, was subject to strict scrutiny as applied to Old Order Mennonites whose religious beliefs required them to use steel wheels on their vehicles. *Id.* at 4–5, 15–16. The ordinance provided exemptions to school buses, and the county had declined to regulate other sources of road damage. Thus, the county's refusal to acknowledge religious exemptions to its ordinance was subject to strict scrutiny as applied to the Mennonites. *Id.* at 15–16; see also *id.* at 13–14 (collecting cases).

Applying these principles here, it is clear that the Lenawee County Health Code is not a neutral and generally applicable law. Thus, the County's actions are subject to strict scrutiny. Just like the laws at issue in the cases cited above, it is undisputed that the Code allows the County to grant discretionary exemptions. Chapter 1, § 1.1m of the Code provides that "[t]he Health Officer upon application may permit variations in . . . standards, or general requirements when sufficient

evidence of special factors warranting such variance in his/her opinion does exist" so long as a variance does not jeopardize the public health, safety, or welfare of county residents. Exhibit 10. The County acknowledges that it can grant or deny variances, but admits that it never offered any religious accommodation to the Amish, Hall Dep (Ex 9), pp 128–130; Merritt Dep (Ex 2), p 19:10–20; and has no intention of granting their variance applications. Hall Dep (Ex 9), pp 20:16–21:10, 208:7–209:11. That is so despite the fact that County officials are aware that Hillsdale County accommodates Amish practices identical to the ones at issue here. Hall Dep (Ex 9), pp 77:12–81:23, 83:8–17, 85:11–23; Taylor Aff (Ex 14) ¶¶ 9, 11, 13.

The discretionary nature of the Code's variance provision is more than sufficient to establish that the County's actions are subject to strict scrutiny as applied to the Amish. But even if it were not, the underinclusiveness of the County's regulatory activity towards septage-related hazards would also require strict scrutiny. The County is aware of the fact that licensed septage haulers are applying *millions of gallons* of lime-treated septage to fields in Lenawee County. Hall Dep (Ex 9), pp 43:20–44:8, 132:22–133:13 and exhibit L attached thereto. Although the proper application of treated septage is generally safe in any event, any risk from the Amish's activities is "much smaller" than this massive application of septage. Stehouwer Am Report (Ex 15), pp 6–7. Furthermore, the County has taken no action whatsoever against CAFOs which are violating various environmental laws and contaminating area waterways with animal septage. Hall Dep (Ex 9), pp 145:1–9, 145:22–146:21, 147:4–19, 150:9–19, and exhibit O attached thereto; Merritt Dep (Ex 2), pp 114:21–115:19. Because the Amish's practices present *at most* a "similar hazard," *Fulton*, 141 S Ct at 1877, as these other types of septage related hazards, the County's underinclusive enforcement of the Code against the Amish without offering a religious

accommodations is subject to strict scrutiny. *Id.*; see *Roberts*, 958 F3d at 414; *Mitchell Co*, 810 NW2d at 15–16.

B. The County's Actions Are Even More Clearly Subject to Strict Scrutiny Under the Michigan Constitution.

If anything, it is even more clear that the County's actions are subject to strict scrutiny under Michigan's 1963 Constitution. Article 1, § 4 provides that "[e]very person shall be at liberty to worship God according to the dictates of his own conscience. . . . The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." Const 1963, art 1, § 4.

As noted above, prior to *Employment Division v Smith* in 1990, the United States Supreme Court applied strict scrutiny to any governmental action that substantially burdened the free exercise of a religious adherent. See *Sherbert*, 374 US at 403. In particular, strict scrutiny was applied to laws burdening the religious liberties of Amish adherents. See *Yoder*, 406 US 205. The Michigan Supreme Court followed suit, explicitly applying *Sherbert* and *Yoder* to claims brought under Article 1, § 4. See *Sheridan Road Baptist Church v Dept of Educ*, 426 Mich 462, 475; 396 NW2d 373 (1986).

Since *Smith*, Michigan courts have continued to apply the strict scrutiny test for *all* religious liberty claims under Article 1, § 4, without inquiring whether the governmental action in question is a neutral, generally applicable law. See *Champion v Sec'y of State*, 281 Mich App 307, 314–315; 761 NW2d 747 (2008); *Reid v Kenowa Hills Pub Schs*, 261 Mich App 17, 26; 680 NW2d 62 (2004). The Court of Appeals has expressly held that "we apply the compelling state interest test (strict scrutiny) to challenges under the free exercise language in Const 1963, art 1, § 4, regardless of whether the statute at issue is generally applicable and religion-neutral." *Champion*, 281 Mich App at 314. Thus, even if this Court were to conclude that strict scrutiny was not the

correct test to apply to the Amish's defenses and counterclaims under the *United States* Constitution, there is no question it is the appropriate test under the Michigan Constitution.

C. The County's Actions Are Also Subject to Strict Scrutiny Under RLUIPA Because They Involve the County's Reliance on Land-Use Laws to Substantially Burden the Amish's Religious Practices.

In addition to the constitutional bases for evaluating the County's actions using strict scrutiny, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 USC 2000cc, also requires this Court to apply strict scrutiny. Under RLUIPA, a government entity cannot substantially burden religious exercise via a "land use regulation" unless its burdensome actions are "the least restrictive means of furthering [a] compelling governmental interest." 42 USC 2000cc(a)(1). RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." 42 USC 2000cc-5(5). See *Chabad Lubavitch of Litchfield Co, Inc v Litchfield Historic Dist Comm*, 768 F3d 183, 194 (CA 2, 2014) ("RLUIPA contemplates 'land use' as broadly encompassing [laws that regulate] the 'use or development of land'").

RLUIPA applies to the County's use of the Code to deny the Amish permits to develop and make use of their properties and homes, which also function as their houses of worship.[12] While the Code may not be labeled a "zoning or landmarking law," courts around the country have repeatedly emphasized that the *function* of regulations matters much more in a RLUIPA analysis than their *form*. See, e.g., *Redeemed Christian Church of God v Prince George's Co*, 17 F4th 497, 509 (CA 4, 2021) ("[I]t is not the label that a government puts on its regulation that determines whether RLUIPA applies, but rather how the regulation actually functions."); *Prater v City of Burnside*, 289 F3d 417, 434 (CA 6, 2002) (noting that a "zoning or landmarking law" is simply

[12] As discussed *supra*, Facts, Section I, the Amish do not hold worship at a central location or in a dedicated religious structure, but instead gather for worship services at each other's personal homes on a rotating basis.

one "that limits the manner in which a claimant may develop or use property"). To the extent there is any ambiguity whether a law is a "zoning law" or an application thereof, RLUIPA's text expressly instructs that any ambiguity be resolved in the favor of the religious adherent "to the greatest extent possible." *United States v Co of Culpeper*, 245 F Supp 3d 758, 766–767 (WD Va, 2017) (analyzing 42 USC 2000cc-3(g)); see also Defs' Supp Br In Support of Motion to File Counterclaim (filed Jan 21, 2022), pp 5–6.

Courts have consistently held that septage regulations that are intertwined with zoning or other land use decisions are subject to RLUIPA. See *Fortress Bible Church v Feiner*, 694 F3d 208 (CA 2, 2012) (holding that an environmental law was covered by RLUIPA because it was "intertwined" with zoning considerations); *Culpeper*, 245 F Supp 3d at 766–768 (holding that water and sewage laws are land use regulations under RLUIPA when they restrict the use and development of a property—even when those restrictions don't implicate a formal zoning law); see also Defs' Supp Br In Support of Motion to File Counterclaim, pp 6–9 (discussing additional cases).

The United States Supreme Court agrees. Just last year, it relied on the same principles in *Mast*, a nearly identical case to this one. In *Mast*, county officials demanded that an Amish community install modern septic systems as required by a county septage ordinance. 141 S Ct at 2431. The Fillmore County Amish argued that the county's actions violated RLUIPA and the Minnesota Constitution. After a trial and a subsequent state-court appeal holding that Fillmore County's actions survived strict scrutiny,[13] the Supreme Court issued an order vacating the state court judgment for further consideration in light of its recent decision in *Fulton*, 141 S Ct at 2430.

[13] Much like this case, strict scrutiny applied in *Mast* both under RLUIPA, as demonstrated by the Supreme Court's order, and under the applicable state constitution's religious liberty provisions. The United States Supreme Court, of course, only had jurisdiction to address the federal RLUIPA claim.

In a detailed concurring opinion, Justice Gorsuch applied strict scrutiny under RLUIPA to the facts in *Mast*. See *id.* at 2432–2434 (Gorsuch, J., concurring). Justice Alito also wrote separately to concur with the remand order. *Id.* at 2430 (Alito, J., concurring). At no point did either concurring opinion (or any justice) suggest any doubt whether Fillmore County's septage regulations, as applied to its Amish community, were land use regulations covered by RLUIPA.

Here, the Code similarly functions as the application of a land use regulation. As in the cases cited above, the Code's septage permitting process is deeply intertwined with the zoning and building permitting processes of both townships where the Amish properties are found. Together, these processes restrict the Amish from using and developing their properties in accordance with their faith. The Code, the Medina Township Building Code, and the Medina Township Zoning Ordinance all work in tandem: in order to obtain a permit to occupy, use, and develop a residential building, one must first obtain a septage permit from Plaintiff and zoning approval from Medina Township. Taylor Aff (Ex 14) ¶ 4; Craig Dep (Ex 12), pp 22:5–23:21; Medina Township Zoning Ordinance, § 15.06 ("Exhibit 21"). As Martin Taylor, the building inspector for Medina Township, explains in his affidavit, "without prior approval from [the LCHD], I cannot issue a building permit that would allow for the use or development of the land at issue in the permit application." Taylor Aff (Ex 14) ¶ 4. Former Medina Township Supervisor and Zoning Administrator James Craig confirmed this explaining "have to have [Health Department approval] before they can start construction." Craig Dep (Ex 12), p 23:14–15. Thus, the Code functions as the absolute obstacle to the lawful use and development of the Amish's land, and burdens their religious exercise and their use of their land for worship services. By refusing to accommodate the Amish or consider a variance, the County is actively preventing them from obtaining municipal approvals that allow for the use and development of land, clearly implicating RLUIPA's protections.

Furthermore, the evidence additionally shows that this intertwinement was deliberate and intended by the County. Hall was not only aware that her office's refusal to grant wastewater permits was limiting the townships' ability to grant housing and other permits to the Amish, Smith Aff (Ex 11), ¶ 5; Taylor Aff (Ex 14) ¶ 4, 14–16; Craig Dep (Ex 12), p 23:4–15; J Graber Dep (Ex 3), p 33:7–11; D Schwartz Dep (Ex 6), p 7:7–16, she in fact actively encouraged Hudson Township officials to pursue additional enforcement actions against the Amish, even though township officials did not consider such actions to be lawful. Smith Aff (Ex 11), ¶¶ 5–6.

This Court should follow the direction of the United States Supreme Court and apply RLUIPA's strict scrutiny requirement to Plaintiff's conduct.

II. The County's Refusal to Accommodate the Amish, and Its Nuisance Claims in These Lawsuits, Do Not Come Close to Surviving Strict Scrutiny.

A. Under Strict Scrutiny, Once an Adherent Demonstrates a Substantial Burden on a Sincerely Held Religious Belief, the Government Bears the Burden of Proving Its Actions Are the Least Restrictive Means of Advancing a Compelling State Interest.

Strict scrutiny in religious liberty cases first requires the religious adherent to demonstrate that they have a sincerely held religious belief. *Frazee v Ill Dep't of Employment Sec*, 489 US 829, 833; 109 S Ct 1514; 103 L Ed 2d 914 (1989). If so, the adherent must also show that the government has placed a "burden" that is "substantial" upon those beliefs. *Thomas*, 450 US at 717. A substantial burden exists whenever "the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* at 717–718.

At that point, 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." *Id.* at 718. 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 *Mast*, which, again, is an indistinguishable case involving Amish wastewater. *Mast*, 141 S Ct at 2432 (emphasis added), quoting *Fulton*, 141 S Ct at 1881.

The same standards that apply to strict scrutiny under the First Amendment apply equally to RLUIPA claims and Article 1, § 4 claims under the Michigan Constitution. See *Hobbs v Holt*, 574 US 352, 360–361 (2015); *Champion*, 281 Mich App at 315 (setting out a substantively identical test under the Michigan Constitution), quoting *McCready v Hoffius*, 459 Mich 131, 143; 586 NW2d 723 (1998).

B. The Amish Have Indisputably Demonstrated Sincerely Held Religious Beliefs Prohibiting Them From Installing Septic Systems or Using Electric Motors.

In determining whether a religious adherent has demonstrated a sincerely held religious belief, the *only* question that is properly before a court is whether the adherent actually holds the belief in question. A court does not ask if the beliefs make secular sense. "It is not within the judicial ken to question 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); *Frazee*, 489 US at 834 (holding that a religious belief can be sincere even when an adherent does not belong to any sect or religious organization); *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."). Specifically, courts must not try to "determine whether the appellee or the

Government has the proper interpretation of the Amish faith" because courts "are not arbiters of spiritual interpretation." *United States v Lee*, 455 US 252, 257; 102 S Ct 1051; 71 L Ed 2d 127 (1982).

Furthermore, all religions have different sects with different beliefs, and "[t]he protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" *Holt*, 574 US at 362, quoting *Thomas*, 450 US at 715–716; see *DeJonge*, 442 Mich at 282. And "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Thomas*, 450 US at 715–716.

Here, the evidence unambiguously shows that the Amish of Lenawee County believe that installing septic systems that require third-party outsiders to empty them, and installing any well or other technology that requires electric motors, violates their religious commitments to living simply and engaging in self-toil. Every single Amish affirmation and deposition made these points clearly. See generally, *supra*, Facts, section IV.

In turn, the testimony of the Amish is consistent with the testimony of the experts in Amish religious and cultural practices *for both sides*. Both experts agree that the Lenawee Amish's beliefs are consistent with other conservative Old Order Amish communities, and that issues such as disposal of wastewater are precisely the type of matters about which more and less conservative Amish communities have different religious beliefs. See Louden Report (Ex 19), p 7 (describing the Lenawee Amish's belief system as "very typical of Amish religious practices"); Cates Dep (Ex 20), p 42:23–25 (agreeing that self-toil is a "defining characteristic" of Amish beliefs); *id.*, pp 80:12–81:11 (recognizing that plumbing decisions are a major religious question that divides

different Amish communities). They also agree that the Amish rejection of modern technology is a religious belief, not a purely cultural matter; "You can't really separate Amish culture from Amish religion." Cates Dep (Ex 20), p 69:1–4; Louden Report (Ex 19), pp 2–3 ("The principle of Amish separation from the social mainstream is a matter of faith and is firmly grounded in their understanding of Scripture . . . ."). Both experts also recognized that such principles often are not written down but instead part of the oral *Ordnung* that guides the conduct of Amish communities. Louden Report (Ex 19), p 4; Cates Dep (Ex 20), p 42:7–16. And both experts recognized that such rules are developed by each community through religious conversations with other similar communities with whom they are in fellowship, and that a community that modernizes can face expulsion from the fellowship resulting in "churches dividing" and "fractur[ing] the community." Cates Dep (Ex 20), p 42:2–6; see Louden Report (Ex 19), p 5.

The County has failed to offer a single shred of evidence that the Amish beliefs described above are not sincerely held. In prior briefing, the County has taken issue with the fact that *other* Amish communities feel differently about septic systems or has disputed why the Amish are willing to use certain technologies but not septic systems. But as noted above, religious disputes among sects, and questions of whether a religious belief seems logical from a secular perspective, are irrelevant in religious liberty claims and outside the scope of proper judicial inquiry. See *Holt*, 574 US at 362; *Hernandez*, 490 US at 699; *Frazee*, 489 US at 834; *Thomas*, 450 US at 715. The only question before this Court is whether this Amish community's beliefs are sincere. All of the evidence in this case shows that they are.

C. Forcing the Amish Community to Choose Between Their Religious Beliefs and Having Their Homes Bulldozed Substantially Burdens Their Right to Freely Exercise Their Religion.

There can be no reasonable dispute that the County's actions here have substantially burdened the Amish. The County acknowledges it has denied the Amish permits to build homes and wells on their property because of its interpretation of the requirements of the Code, thus denying the Amish the ability to develop and live in peace on their own land. County officials acknowledge that they have never once offered the Amish a religious accommodation, and they have testified that they will not approve the variances requested by the Amish. Hall Dep (Ex 9), pp 116–124, 128–130; Merritt Dep (Ex 2), pp 19:10–20, 20:17–21:22, 22:17–24:18, 29:2–7, 32:11–34:3. Instead, the County filed these lawsuits, seeking to force the Amish to choose between complying with the Code (as interpreted and applied by the County) and being forced to have their land seized by the County and their homes destroyed. See, e.g., Compl in Case No. 19-6384, pp 9–10 ¶¶ A–F.

As noted in the introduction to this brief, if religious liberty means anything, it means that "[i]n this country, neither the Amish nor anyone else should have to choose between their farms and their faith." *Mast*, 141 S Ct at 2434. Countless religious liberty cases demonstrate that pressuring adherents to change their religious practices by withholding other types of governmental benefits also constitutes a substantial burden. See, e.g., *Thomas*, 450 US at 717–718 (denial of unemployment benefits); *Blackhawk*, 381 F3d at 212–213 (being required to pay a fee for a permit to keep an exotic animal involved in religious ceremony); *Mitchell Co*, 810 NW2d at 5 (law that would forbid Old Order Mennonites from using steel wheels on county roads, thus forcing them to choose between their beliefs and hauling their produce to market); *DeJonge*, 442 Mich at 284 (holding that religious parents could not be put to the "loathsome dilemma" of

choosing between violating their religious beliefs or gaining a state teaching certification). The substantial burden element is easily satisfied here.

D. The County Has Neither Demonstrated That Its Enforcement of the Code Satisfies a Compelling Governmental Interest, Nor That Its Actions Are Narrowly Tailored to Advancing Such an Interest, Because It Has Not Shown That Accommodating Amish Religious Practices Would Treaten Public Health or Safety.

As Justice Gorsuch recently explained in *Mast*, it is not enough to "treat[] the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community." *Mast*, 141 S Ct at 2432 (emphasis in original). "Accordingly, 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 Swartzentruber Amish specifically." *Id.*, quoting *Fulton*, 141 S Ct at 1881 (alterations in *Mast*).

Furthermore, to meet this high burden, the government must "give due weight to exemptions other groups enjoy." *Id.* Thus, with respect to septic regulations, the government must consider other contexts in which such regulations do not apply to other entities without religious motivations. See *id.* Similarly, the government must "give sufficient weight to rules in other jurisdictions," particularly when those jurisdictions allow the type of conduct that the local government seeks to prohibit. *Id.* at 2433. So when adherents propose to use wastewater practices that are acceptable in other jurisdictions, "[i]t is the government's burden to show this alternative won't work; not the Amish's to show it will." *Id.* Finally, the government cannot assume that the adherents will not comply with the steps necessary to pursue their proposed alternatives. Rather, "[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).

The County has not come close to meeting its burden of demonstrating that it has a compelling governmental interest in enforcing its septic system requirements (as it interprets those requirements) against *this* community, let alone that the means it has chosen to do so are narrowly tailored to advance that interest. To the contrary, all of the evidence in this case establishes that the Amish's practices are safe. The County has acknowledged that at the time it brought these lawsuits it had no evidence whatsoever that any of the Amish's practices were, in fact, unsafe and no evidence that their practices had contaminated any waterways or water sources. Hall Dep (Ex 9), pp 29:7–31:19; see also Smith Aff (Ex 11) ¶ 8. Furthermore, the much larger Amish population in neighboring Hillsdale County has followed similar practices *for decades* without causing any health or safety issues. Taylor Aff (Ex 14) ¶¶ 9, 11, 12; Bishop Dep (Ex 1), pp 8:22–10:23. Lenawee County health officials are aware of this fact, Taylor Aff (Ex 14) ¶ 13, Hall Dep (Ex 9), pp 77:12–81:23, 83:8–17, 87:12–16, but did not even bother to ask Hillsdale how they managed to authorize such activities from a regulatory perspective. Hall Dep (Ex 9), p 85:11–23.

Because the County bears the burden of proof that it has a compelling governmental interest in preventing this *particular* Amish community from living in accordance with their sincerely held religious beliefs, their lack of evidence that the Amish are acting unsafely should suffice to resolve this case. But as it happens, the evidence further establishes that the facts on the ground in Lenawee County *are in fact safe* and even consistent with regulations elsewhere. The Amish's septage expert provided unrebutted testimony that the Amish can apply septage with "minimal risk of endangering the health of their families or the public at large." Stewhouwer Am Report (Ex 15), p 2. Their use of lime, their practice of not spreading septage on fields that will

be used to grow food crops the following year, and their application of septage in the fall when the ground is not yet frozen and water tables are lowest, all render their practices safe. *Id.*, pp 4 n 2, 6, 11. In fact, the Amish have gone even further, agreeing that they are willing to abide by additional suggestions by Dr. Stehouwer to render their practices even more safe if the County were to request as much. Compare *id.*, pp 3–4 (additional recommendations) with Amish Affirmations (Ex 7) ¶ 7 (expressing willingness to follow such recommendations upon request by the County).

In order to establish a compelling governmental interest in regulating this particular Amish community in a manner contrary to their religious beliefs, the County has the additional burden of showing why such regulation is necessary despite the practices of other jurisdictions. See *Mast*, 141 S Ct at 2433. Here, the Amish's practices and proposed practices are consistent with federal (Environmental Protection Agency) regulations on the spreading of septage by smallholder farms and with state law in Minnesota and Indiana, both nearby states (and one a border state). Stehouwer Am Report (Ex 15), pp 2–3, 5 (discussing 40 CFR part 503; MN Rule 708.07700; IC 13-18-12-27). The County has not presented a shred of evidence to suggest why the rules prescribed by the federal government and neighboring states are somehow unsafe just across the border in Lenawee County.

Similarly, the County has not met its burden of showing why allowing the Amish to spread their own septage would be more harmful than other septage-spreading practices that are allowed to occur within its own borders. See *Mast*, 141 S Ct at 2432. The County acknowledges that licenses are granted to septage haulers in Lenawee County, and that one hauler alone spreads 2.1 to 2.3 *million gallons* of lime-treated human septage onto fields in Lenawee County. Hall Dep (Ex 9), pp 43:20–44:8, 132:22–133:13. By comparison, each Amish family spread 300-400

gallons on their fields. Stehouwer Am Report (Ex 15), p 7. The uncontradicted opinion of Dr. Stehouwer is that "the small-holder Amish farms involved in this case generate vastly smaller quantities of septage, . . . the management of that septage is vastly simpler than the commercial hauler operations." *Id.*, p 6. Therefore, "the risks associated with land application of septage by these [Amish] farmers is also much smaller and their practices can be modified to further reduce any health and environmental risk. *Id.*; see also *id.*, p 4 n 2 (documenting that the fields used by septage haulers in Lenawee County have similar soil characteristics and water tables to the fields farmed by the Amish). Thus, just as in *Mast*—where the government sought to restrict Amish septic practices that other groups such as hunters and rustic cabin owners were allowed to follow—the County here has failed to demonstrate that the Amish septic practices it seeks to prohibit are as dangerous, let alone *more* dangerous, than the ones the government allows others to follow.

Additionally, the County's targeting of the Amish septic practices through these nuisance lawsuits is inconsistent with its lackadaisical attitude towards the *actual* health hazard posed to county waterways by massive agricultural run-off from large CAFOs. In sharp contrast with its decision to sue every single Amish family in the County, despite lacking any evidence that Amish practices have *ever* harmed anyone, the County has never even investigated how much animal waste is running off of CAFO farms into its water ways, let alone taken any regulatory action whatsoever (and it certainly has not filed a nuisance lawsuit) against any CAFO. Hall Dep (Ex 9), pp 143:18–22, 148:2–10, 150:9–19; Merritt Dep (Ex 2), pp 14:21–15:19. That is so despite the fact that the Sierra Club has publicly identified Lenawee County CAFOs as the single largest source of contamination of Lake Erie via the Maumee River. Hall Dep (Ex 9), pp 145–147, and exhibit O attached thereto.

In sum, the undisputed record in this case establishes that the County has not (and *cannot*) shoulder its burden of showing a compelling need to regulate or restrict the Amish's religiously compelled septic practices. It has, in fact, failed to show the *slightest* need to do so. The Amish in next door Hillsdale County have engaged in the same practices for decades with no incidents, and both federal and state regulations in neighboring states expressly permit similar practices. Meanwhile the County ignores and allows more dangerous practices from corporate farmers who use both human and animal septage on their fields.

Finally, even if the County were to be able to demonstrate that it has a compelling governmental interest in regulating this particular community in a more rigorous fashion that the Amish have requested, the County has not presented (and cannot present) any evidence that the manner it has chosen to do so—which forces the Amish to choose between their religious beliefs and losing their homes and farms—is narrowly tailored to that compelling interest, as narrow tailoring would involve identifying the *least* intrusive means of accomplishing the governmental interest in question. For all these reasons, summary disposition should be granted to the Amish on their constitutional and RLUIPA defenses and counterclaims.

III. The County's Actions Also Violate the Fair Housing Act.

The federal Fair Housing Act ("FHA") makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of . . . religion . . . ." 42 USC 3604(a) (emphasis added). The United States Supreme Court has made clear that the italicized language means that the FHA encompasses "disparate impact" liability. *Texas Dep't of Housing & Community Affairs v Inclusive Communities Project, Inc*, 576 US 519, 545; 135 S Ct 2507; 192 L Ed 2d 514 (2015). Disparate impact prohibits not only "overt discrimination" but also "practices

that are fair in form but discriminatory in operation." *Id.* at 531, quoting *Griggs v Duke Power Co*, 401 US 424, 431; 91 S Ct 849, 28 L Ed 2d 158 (1971).

In a disparate impact claim, a court must first ask if statistics or other evidence show that a governmental policy disparately affects a protected group. *Id.* at 543. Second, the government can defend its practices by showing, for example, that it is pursuing a valid interest such as "ensuring compliance with health and safety codes." *Id.* at 544. Third, the individual(s) being denied housing can show that the government's goals are being pursued in a way that erects "artificial, arbitrary, and unnecessary barriers" to making housing opportunities available to protected groups. *Id.* at 543, quoting *Griggs*, 401 US at 431. Put another way, the individual being denied housing can prevail by showing that the government's interest "could be served by another practice that has a less discriminatory effect." *Reyes v Waples Mobile Home Park Ltd Partnership*, 903 F3d 415, 424 (CA 4, 2018), quoting *Inclusive Communities*, 576 US at 527.

Here, it is beyond dispute that the County's enforcement of its interpretation of the Code, and its refusal to grant variances to the Amish, has a disparate impact on the Lenawee Amish. If the County prevails in this litigation, it will be permitted to proceed with the seizure of every single Amish home in the county unless the Amish violate their sincerely held religious beliefs. Thus, the County's actions will effectively banish an entire religious community from its borders. By contrast, there is no evidence that any non-Amish individuals are unable to reside in the County due to the County's regulatory actions.

At the second step of the disparate impact test, it is likely that the County will argue that its actions are being taken to pursue a valid interest in protecting health and safety.

But for all of the reasons discussed at length above, the County's actions in this instance cannot survive at the third step of the disparate impact test because the County's actions erect

"artificial, arbitrary, and unnecessary barriers," *Inclusive Communities*, 576 US at 543, to the Amish who wish to reside in the County. Variances are being denied to the Amish, and the County has refused to even consider a religious accommodation that would comply with the Amish's religious beliefs despite the fact that the County lacks even a scintilla of evidence that the Amish's practices present a risk to the health and safety of the public. This demonstrates that the government's valid goal—the protection of public health and safety—could be accomplished by the simple, and less discriminatory, expedient of granting the variances the Amish have sought.

For these reasons, summary disposition is also appropriate with respect to the Amish's FHA defenses and counterclaims.

CONCLUSION

At the end of the day, this case is not that complicated. The County initiated these actions with no evidence whatsoever that the Amish were engaged in dangerous practices. After three years of litigation, they still have no such evidence. The Amish seek nothing more than for the County to respect their religious beliefs, which are harming no one. Both the United States and Michigan Constitutions demand no less, as does federal law under RLUIPA and the FHA. Thus, summary disposition should be granted on the Amish's constitutional and statutory defenses and counterclaims, and the County's claims should therefore be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

On November 7, 2022, I caused a copy of this Supplemental Brief to be served by electronic mail on John Gillooly, Attorney for Plaintiff, at jgillooly@garanlucow.com.

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