STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1534

Amos Mast, et al.,
Appellants,

vs.

County of Fillmore,
Respondent,

Minnesota Pollution Control Agency,
Respondent.

Filed July 10, 2023
Reversed and remanded
Bratvold, Judge

Fillmore County District Court
File No. 23-CV-17-351

Brian N. Lipford, Law Offices of Southern Minnesota Regional Legal Services, Inc., Rochester, Minnesota (for appellants)

Brett A. Corson, Fillmore County Attorney, Preston, Minnesota (for respondent County of Fillmore)

Keith Ellison, Attorney General, Liz Kramer, Solicitor General, Christina Brown, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Pollution Control Agency)

Bryan J. Huntington, Larkin Hoffman Daly & Lindgren, Ltd., Minneapolis, Minnesota (for amicus curiae National Committee for Amish Religious Freedom)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Bratvold, Judge.

SYLLABUS

Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5 (2018), the government has the burden to demonstrate a compelling state interest in enforcing the challenged law against the particular claimant whose sincere exercise of religion is being substantially burdened.

OPINION

BRATVOLD, Judge

Appellants Amos Mast, Menno Mast, Ammon Swartzentruber, and Sam Miller are members of the Amish community in Fillmore County. Appellants seek review of the district court's judgment denying their request for it to declare that respondents Fillmore County (the county) and the Minnesota Pollution Control Agency (the MPCA) (collectively, the government) may not enforce particular land-use regulations as to these appellants. The challenged regulations generally require appellants to use a septic tank to dispose of "gray water," which is water discharged after being used for dishwashing, laundry, bathing, and other tasks not involving toilet waste. Appellants contend that the septic-tank requirement infringes on their rights to religious exercise, in violation of the state and federal constitutions as well as federal law. All parties and the district court focus their analysis on RLUIPA, a federal law that requires strict scrutiny where, as here, the district court has determined that land-use regulations impose "a substantial burden on the religious exercise of a person." 42 U.S.C. § 2000cc(a)(1); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (applying strict scrutiny).

This is the second appeal for these parties. After a trial in 2018, the district court applied RLUIPA and concluded that the septic-tank requirement substantially burdened appellants' sincerely held religious beliefs and also concluded that the septic-tank requirement was the least restrictive means of accomplishing the government's compelling interest in protecting human health and the environment. This court affirmed, and the Minnesota Supreme Court denied review. *Mast v. County of Fillmore*, No. A19-1375, 2020 WL 3042114 (Minn. App. June 8, 2020) (*Mast I*), *rev. denied* (Minn. Aug. 25, 2020), *vacated mem.*, 141 S. Ct. 2430 (2021).

The United States Supreme Court granted appellants' petition for a writ of certiorari, vacated the judgment, and remanded without opinion, instructing us only to consider the arguments under *Fulton*, a Supreme Court opinion issued after this court's decision in *Mast I*. *Mast v. Fillmore County*, 141 S. Ct. 2430, 2430 (2021) (*Mast II*) (mem.). According to one concurring opinion, however, the lower courts "plainly misinterpreted and misapplied" RLUIPA. *Id.* (Alito, J., concurring). A second concurring opinion states that "*Fulton* makes clear" that the government and "court below misapprehended RLUIPA's demands." *Id.* at 2432 (Gorsuch, J., concurring).

We remanded to the district court. The parties argued the case based on the existing record, declining the opportunity to reopen the record. The district court concluded that the government met its burden to prove the septic-tank requirement was narrowly tailored to further a compelling state interest. Appellants filed an appeal to this court, and their brief argues that the evidence is insufficient to support the district court's conclusion that the

government has a compelling interest in requiring appellants to use septic tanks to dispose of gray water. The government urges us to affirm the district court's decision.

We agree with appellants. Where, as here, the government's land-use regulation substantially burdens a claimant's sincere exercise of religion, RLUIPA requires the government to demonstrate a compelling state interest in enforcing the challenged regulation against the particular religious claimant. *Fulton*, 141 S. Ct. at 1881 (stating that the "question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to" appellants, a Catholic foster-care-placement agency). Because the evidence the government presents does not support the district court's conclusion that the septic-tank requirement furthers a compelling state interest specific to appellants, RLUIPA precludes the government from enforcing the challenged regulations against appellants. Thus, we reverse and remand for entry of appropriate declaratory and injunctive relief.

FACTS

The following summary of facts is based on the record, which we view favorably to the district court's decision. Appellants are members of the Swartzentruber Amish community in Fillmore County. Each Amish community has its own religious rules to live a godly life and stay separate from the world; many of these rules relate to keeping separate from modern technology. While the Swartzentruber Amish use some technology, they do not own or drive automobiles, own telephones, have electric lights, or use modern flush toilets, and they supply water to their homes using a cistern.

This case stems from appellants' religious objection to using septic systems to dispose of gray water from their homes. The Swartzentruber Amish have always prohibited the use of septic systems, and for many years, they discharged gray water from their homes directly onto the ground using "straight pipes."

A septic system has three main components: a septic tank, a drain field, and oxygenated treatment soil. Gray water flows into the septic tank, which acts as a settling chamber. After heavy solids and lighter elements separate, the gray water flows into a drain field that distributes the wastewater for absorption by the oxygenated topsoil, which purifies the remaining contaminants before the wastewater enters the groundwater. The heavy solids are periodically pumped out of the tank and hauled away.

Minnesota law requires counties to adopt ordinances that comply with the MPCA's rules for subsurface sewage-treatment systems (SSTS). Minn. Stat. § 115.55, subd. 2(a) (2022). The county adopted an SSTS ordinance that incorporated the MPCA's rules in their entirety and also provided for "alternative local standards . . . intended to serve the Amish" who "do not have indoor toilet facilities, but still use water for their daily needs." Fillmore County, Minn., SSTS Ordinance § 502.1 (2013). Water for "daily needs" is also called gray water and is defined as sewage that has no toilet waste. Minn. R. 7080.1100, subp. 37 (2021). The "alternative local standard" mandates that each Amish household use a "minimum septic tank size of 1,000 gallons" to dispose of gray water based on a presumed "flat usage of 100 gallons [of water] per day." Fillmore County, Minn., SSTS Ordinance § 502.1(a).

In April 2017, appellants sought a declaratory judgment and injunction to prevent the government from enforcing the county's SSTS ordinance against them. Appellants' complaint alleged that the SSTS ordinance violated their rights under the Minnesota Constitution, the United States Constitution,[1] and RLUIPA, asserting that "septic systems . . . as required by the ordinance . . . are modern conveniences that are forbidden by their Amish religion."

The case went to trial for seven days in November and December 2018. The government challenged the sincerity of appellants' religious beliefs and asserted that its septic-system requirement did not burden or significantly burden appellants' religious beliefs. Appellants proposed mulch basins as a religiously acceptable alternative to septic tanks.[2] In the mulch-basin system, a pipe discharges gray water into a large earthen "basin" that has a "valve box" resting on top of woodchips. The solids stick to the woodchips, which provide "surge capacity" until water percolates down into the soil at the bottom of the basin. The oxygenated soil purifies the gray water in the same manner as the soil beneath a septic-system drain field. The government argued that the proposed mulch basins did not effectively treat gray water.

The district court's April 2019 findings of fact, conclusions of law, and order for judgment determined that the government's septic-system requirement "substantially

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[1] During trial, appellants withdrew their claim under the U.S. Constitution. In its April 2019 order for judgment, the district court dismissed that claim with prejudice.

[2] Upon remand, the district court found that appellants "actually built their mulch basins in the fall of 2017" and that county staff observed the mulch basins during an August 2018 inspection.

burdens [appellants'] exercise of their sincerely held religious beliefs." Still, the district court determined the septic-tank requirement is "the least restrictive means of accomplishing [the government's] compelling interest in protecting public health and the environment." For this reason, the district court denied appellants "the relief they seek under the Minnesota Constitution and RLUIPA." In June 2020, this court affirmed. *Mast I*, 2020 WL 3042114, at *6. Among other things, our opinion noted that the government "did not appeal" the district court's determination that requiring appellants to install septic systems substantially burdened their sincerely held religious beliefs. *Id.* at *3.

Appellants petitioned the Minnesota Supreme Court for further review, which was denied. The United States Supreme Court then granted appellants' petition for a writ of certiorari. The Supreme Court vacated the judgment and remanded to this court "for further consideration in light of *Fulton*." *Mast II*, 141 S. Ct. at 2430.[3] *Fulton* was released after our opinion in *Mast I*. On remand, we requested and received briefing from the parties and, in an August 2021 order, "remanded to the district court for further consideration in light

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[3] The decision of the Court provided no further substantive guidance. *Mast II*, 141 S. Ct. at 2430. But Justice Alito concurred, writing, "The lower court plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act." *Id.* (Alito, J., concurring). Justice Gorsuch also concurred because "*Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands." *Id.* at 2432 (Gorsuch, J., concurring). Justice Gorsuch's concurrence also highlighted these four issues: (1) "the County and courts below erred by treating the County's general interest in sanitation regulations as 'compelling' *without reference to the specific application of those rules to this [Amish] community*"; (2) "the County and lower courts erred by failing to give due weight to exemptions other groups enjoy"; (3) "the County and lower courts failed to give sufficient weight to rules in other jurisdictions"; and (4) "despite acknowledging that mulch basins could 'theoretically' work, the County and lower courts rejected this alternative based on certain assumptions." *Id.* at 2431-33 (emphasis added).

of *Fulton*," noting that the parties "agree that the existing factual record is adequate." *Mast v. County of Fillmore*, No. A19-1375 (Minn. App. Aug. 16, 2021) (order).

In September 2022, following a hearing, the district court issued a 46-page decision with findings of fact, conclusions of law, and an order for judgment. After an analysis of the caselaw, the district court noted that the "evidentiary record has not changed on remand" and that its "judgment as to the credibility of any witness or item of evidence" also remained unchanged.[4] The district court then stated that "the error in [its] application of strict scrutiny identified by the [United States] Supreme Court has not affected the merits of [its] determinations as to [t]he sincerely held religious beliefs of the Swartzentruber Amish upon which their objection to septic systems is based" and "that requiring the Swartzentruber Amish to install septic systems would substantially burden those beliefs."

The district court also analyzed "the issues of compelling state interest and least restrictive alternative in light of" recent Supreme Court opinions and reached two conclusions. First, the district court concluded that the government "has a compelling interest of the highest order in protecting the water of southern Fillmore County from contamination by pathogen- and pollutant-carrying [gray water] discharged from [appellants'] and other Swartzentruber Amish homes." The district court relied on evidence about the content of gray water generally, the amount of gray water produced by Amish

[4] The district court gave two examples. It stated that it was "convinced at trial" by the government's expert testimony "describing the real danger to drinking water safety posed by untreated gray water released into the karst topography of Fillmore County." Also, the district court "did not find believable or persuasive" the appellants' expert testimony that mulch basins "were a plausible means of accomplishing the needed treatment of the gray water from Swartzentruber Amish homes."

households, and the county's karst topography, which is characterized by fissures, fractures, and sinkholes in slowly dissolving limestone bedrock that permits the rapid travel of wastewater to ground and surface waters. The district court also determined that none of the regulatory "exceptions" to the septic-tank requirement undercut the government's compelling interest.

Second, the district court concluded that "there is no less religiously burdensome or less restrictive alternative to the required septic system that serves the Government's compelling interests" because "mulch basins of the kind acceptable to [appellants] will not work on these particular farms with these particular claimants." The district court therefore determined that the government's septic-system requirement satisfied strict scrutiny.

This appeal follows.

ISSUE

Did the district court err by determining that the government's septic-tank requirement as applied to appellants satisfied strict scrutiny under RLUIPA?

ANALYSIS

"When reviewing a declaratory judgment action, [appellate courts] apply the clearly erroneous standard to factual findings . . . and review the district court's determinations of law de novo." *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 615 (Minn. 2007) (citation omitted). "[F]indings are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotation omitted). The

interpretation of a statute and its constitutionality is reviewed de novo. *David v. Bartel Enters.*, 856 N.W.2d 271, 273 (Minn. 2014).

We begin with some relevant background on RLUIPA, which Congress enacted in 1993 "in the aftermath of" a Supreme Court decision about the scope of free-exercise rights under the First Amendment. *Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). RLUIPA seeks to "ensure 'greater protection for religious exercise than is available under the First Amendment.'" *Id.* (quoting *Holt v. Hobbs*, 574 U.S. 352, 357 (2015)). Under RLUIPA, the government may not "implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates that imposition of the burden" (1) furthers "a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1).

A plaintiff "bears the initial burden" to prove that a regulation "implicates his religious exercise." *Ramirez*, 142 S. Ct. at 1277 (quotation omitted). The burden on the plaintiff's religious exercise must be "substantial," and any requested accommodation "must be sincerely based on a religious belief and not some other motivation." *Id.* (quotation omitted). Once a plaintiff "makes such a showing, the burden flips and the government" must demonstrate the regulation is the least restrictive means of furthering a compelling governmental interest. *Id.* Here, the district court determined that appellants satisfied their required showing under RLUIPA, and the government has accepted that determination on appeal.

Appellants present two issues: first, whether the district court erred by determining the government carried its burden to prove a compelling state interest under RLUIPA, and second, whether the district court erred by determining the septic-tank requirement is the least restrictive means of furthering the compelling state interest under RLUIPA.[5]

A. Compelling State Interest

Appellants challenge the district court's determination that the government satisfied the compelling-interest component of RLUIPA. To meet its burden under the compelling-interest test, the government must "advance interests of the highest order." *Fulton*, 141 S. Ct. at 1881 (quotation omitted). Under RLUIPA, the government cannot "discharge its burden" to demonstrate a compelling state interest by relying on "broadly formulated interests." *Ramirez*, 142 S. Ct. at 1278 (quotation omitted). Rather, RLUIPA

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[5] Preliminarily, we address the MPCA's contention that appellants' RLUIPA claim is the "only claim remaining before this court." On remand and over the government's objection, the district court ruled on appellants' claims under the U.S. Constitution, the Minnesota Constitution, and RLUIPA. The government respondents filed a notice of related appeal challenging the district court's authority to rule on the state and federal constitutional claims.

In its brief to this court, the MPCA notes that appellants withdrew their claim under the U.S. Constitution on the first day of the 2019 trial and that the district court's order for judgment dismissed the claim with prejudice. Appellants did not seek review of that dismissal. The MPCA also notes that, following our affirmance in *Mast I*, the Minnesota Supreme Court denied review in 2020. The MPCA contends that the United States Supreme Court generally lacks jurisdiction over state constitutional claims litigated in state courts, citing *Bell v. Maryland*, 378 U.S. 226, 237 (1964). The MPCA urges that the Supreme Court "could not have heard, and thereby remanded, appellants' Minnesota Constitution claim."

We conclude that we need not decide whether the state and federal constitutional claims are before us. The parties do not suggest that the legal analysis under RLUIPA differs from that for the constitutional claims, and as the district court did with the evidence, the parties analyze the judgment solely under RLUIPA. Because the parties' arguments focus on only the RLUIPA claim, we frame our analysis in terms of RLUIPA.

"contemplates a more focused inquiry," which "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to . . . the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt*, 574 U.S. at 362-63 (quotations omitted).

The Supreme Court recently decided two cases that guide our analysis. In *Fulton*, a foster-care agency, Catholic Social Services (CSS), sued the City of Philadelphia, claiming that the city's nondiscrimination policy violated CSS's free-exercise rights under the First Amendment. 141 S. Ct. at 1874-76. After many years of referring children to CSS for foster placement, the city froze referrals until and unless CSS agreed to certify same-sex couples as foster parents, contrary to CSS's long-standing policy refusing to do so based on religious beliefs. *Id.* at 1875-76. The federal district court and court of appeals denied CSS relief, and the Supreme Court granted certiorari, reversing and remanding after determining the city's policy did not satisfy strict scrutiny. *Id.* at 1876, 1882.

The Supreme Court considered the compelling interests the city identified and then focused on the city's reliance on speculation and its adoption of "a system of exceptions" to its nondiscrimination policy. *Id.* at 1881-82. The Court first concluded that although the city's goals of "maximizing the number of foster families and minimizing liability" were "important goals," the city "fail[ed] to show" that granting an exception to its nondiscrimination policy for CSS would "put those goals at risk." *Id.* The Supreme Court held that the city's "speculation that it might be sued" if it referred children to CSS was "insufficient to satisfy strict scrutiny." *Id.* at 1882. The Court also concluded that the city's interest in "equal treatment of prospective foster parents and foster children" is "weighty,"

but the city failed to show "it has a particular interest in denying an exception to CSS while making them available to others." *Id.*

In *Ramirez*, a prisoner on death row requested that the State of Texas allow his pastor to "pray with him and lay hands on him while he is being executed." 142 S. Ct. at 1272. The state denied Ramirez's request, and Ramirez sued, alleging that the denial violated his rights under RLUIPA. *Id.* at 1268. The federal district court and court of appeals denied Ramirez any relief; the Supreme Court stayed the execution, granted certiorari, and reversed and remanded for entry of preliminary relief. *Id.* at 1272, 1284.

Applying strict scrutiny to the compelling interests raised by the state, the Supreme Court agreed that the state "has a compelling interest in preventing disruptions of any sort and maintaining solemnity and decorum in the execution chamber," crediting the state's claim that praying aloud at an execution "could be exploited to make a statement to the witnesses or officials." *Id.* at 1280. Yet, the Supreme Court determined "there is no indication in the record that [Ramirez's pastor] would cause the sorts of disruptions that [the state] fear[s]." *Id.* The Court rejected the state's arguments as "conjecture regarding what a hypothetical spiritual advisor might do." *Id.* The Supreme Court also agreed that the state presented "compelling interests" in restricting a spiritual advisor's touch in the execution chamber but concluded that a "categorical ban on religious touch is not the least restrictive means of furthering such interests." *Id.*

Here, the district court concluded that the government proved a "compelling interest in protecting the well water of Fillmore County from contamination by pollutants and pathogens carried in the wastewater of . . . Swartzentruber Amish residences." Appellants

argue that the district court's compelling-interest determination cannot be upheld under RLUIPA because the district court adopted a generalized harm that relied on speculation and the asserted compelling interest is undermined by the government allowing several exceptions to the septic-tank requirement. We discuss each challenge in turn.

1. General Harm and Speculation

First, appellants argue that the government's interest in protecting the county's water from harmful pathogens and pollutants is "far too general" because the government "failed to prove through non-speculative evidence that this specific group of Amish have pathogens in their gray water or that granting them a religious accommodation exposes the County's drinking water to pathogens capable of infecting others." Appellants challenge the district court's key findings about the gray water on appellants' farms—its harmful content, the amount of water used, the number of households objecting to the septic-tank requirement, and the amount of gray water discharged by objecting households.

a. Harmful Content of Appellants' Gray Water

The district court found that appellants' gray water contains pathogens and pollutants that pose a "substantial threat to the health and safety" of the county's residents. The district court noted that appellants' gray water "contains all of the detritus that comes off human bodies and clothing, including bacteria, viruses and other dirt and contaminants," as well as "kitchen sink water from food preparation, something that experts agree is a particularly dirty component of gray water." The district court determined that "[t]he Government's scientific witnesses testified convincingly that the gray water

from the Swartzentruber Amish households of Fillmore County is a danger to public health."

In their brief to this court, appellants contend that the district court erred, arguing the record does not include "evidence that Swartzentruber Amish gray water poses a present harm to the County's drinking water" because the government "never conducted testing on the Amish's gray water." The MPCA acknowledges the lack of testing data and argues that it "did not need to conduct water quality testing to show appellants' gray water contains viruses, bacteria, and other pathogens," instead relying on testimony from expert witness Dr. Heger. The county likewise relies on Dr. Heger's testimony about the contaminants in gray water generally.

We agree with the government that the record supports its claim that it has a compelling interest in protecting the county's water from contamination. But the Supreme Court held in *Fulton* that courts must "scrutinize" the "asserted harm of granting specific exemptions to particular religious claimants." 141 S. Ct. at 1881. The Supreme Court also held that "speculation is insufficient" to prove a compelling state interest. *Id.* at 1881-82 (quotation omitted). Thus, we consider whether the record evidence supports the district court's finding that appellants' gray water substantially threatens the health and safety of the county's residents.

The government's expert, Dr. Heger, did not testify specifically about the content of appellants' gray water. For example, the district court's 2022 order quoted Dr. Heger's testimony that a literature review "done by the National Academy . . . estimated that we're talking about in the millions of bacteria and viruses are present in gray water, and that's in

100 milliliters." The district court also quoted Dr. Heger's testimony that gray water contains "viruses and bacteria [that] can come from cleaning things in the sink" as well as from "when we shower, when we bathe, when we wash our hands," and when "we wash our clothing."

The district court cited the testimony of the county's employees who visited appellants' farms, stating that the testimony "corroborated Dr. Heger's testimony concerning [gray water's] content." The district court relied in part on testimony and photographic evidence about appellants' gray water before the installation of the mulch-basin systems. A county employee stated that he observed appellant Ammon Swartzentruber's straight-pipe system and noted "surface discharge," which was "milky" water that had an "odor to it." When asked whether this observation was of "concern," the county employee stated, "Yes," because "an open pipe discharge . . . is [an im]minent public health threat" as gray water contains "pathogens and bacteria." The county employee also noted that the discharge's odor "can show that there can be some fecal tied to it" and that "it's *sewage*." (Emphasis added.) The district court also relied on the county employee's testimony about his observations of appellants' gray water after they installed a mulch-basin system. The county employee observed that appellants' mulch basins were "back[ed]-up" and "sludge lined," which suggested they were not "functional." The county employee also described the water in the mulch basins as "murky" and "the color of *sewage*." (Emphasis added.)

Even when we view this evidence favorably to the district court's findings, the county employee's observations do not show the harmful content of appellants' particular

gray water for two reasons. First, the county employee's characterization of appellants' gray water as "sewage" does not clarify the actual content of their gray water because gray water is a type of sewage. *See* Minn. R. 7080.1100, subp. 37 (defining gray water). While the employee's observation of sludge or murky water in the mulch basins may warrant further investigation, the employee's testimony offered only speculation about the content of appellants' gray water, stating what the odor of gray water "can" show. Second, the county employee's testimony about the mulch basins being backed up and sludge lined relates to the functionality of the basins, not the content of appellants' gray water.

In short, the record contains no data on the actual content of appellants' gray water, much less data showing that appellants' gray water poses a substantial threat to public health. Because speculation cannot support a compelling state interest under RLUIPA, the district court erred by relying on generalized expert testimony and speculation by a county employee about "sludge" and "murky" water on appellants' farms. *See Fulton*, 141 S. Ct. at 1882. With no data about the content of appellants' gray water, the record evidence does not sustain the district court's conclusion that appellants' gray water poses a threat to the county's drinking water.

b. Amount of Water Used

The district court relied on a county employee's estimate that Swartzentruber Amish households use "100 gallons per day" of water; the county developed this estimate during "talks [it] had with Amish community members in 2013."[6] The district court acknowledged

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[6] We note that the county employee's 100-gallon estimate concerned "how much water do [Amish households] use," while the district court referred to the 100-gallon estimate as

that the 100-gallon estimate was "not based on measured monitoring of Amish household gray water flow rates." At the same time, the district court concluded that appellants "never presented persuasive evidence of a lower usage figure," citing appellant Amos Mast's testimony "guessing" that he uses "about 30 gallons [of water] a day."

Appellants argue that the district court "speculated" that the Amish-household water usage is "100 gallons" per day. Appellants assert that this 100-gallons-per-day number is an "assumption" by the government that is not based on "actual data" or "any testing." The MPCA contends that the 100-gallon estimate likely "underestimated" the amount of water used by the Swartzentruber Amish because they do not hand carry their water and "utilize 1000-gallon cement or plastic cisterns." The county also argues the 100-gallon estimate "grossly underestimates" the amount of water as "Amish families are generally 3 to 5 times larger than the average American household."[7]

We conclude that the record evidence about the amount of water used by the Swartzentruber Amish is based on mere speculation and does not satisfy the government's burden under RLUIPA. In *Ramirez*, the Supreme Court determined that the government's

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"how much gray water do [Amish] households *produce*." The district court appeared to assume that the Swartzentruber Amish discharge the same amount of water they use even though it seems unlikely that no water was consumed and therefore not discharged as gray water. The record contains no evidence differentiating between the amount of water used versus the amount of gray water discharged by the Swartzentruber Amish.

[7] The district court appeared to recognize the inaccuracy of the county's estimate of the Swartzentruber Amish water usage. The district court noted that a county employee testified that when it developed the 100-gallon estimate, the county did not know the Amish "had water piped into their houses." The district court found that the Swartzentruber Amish "have long had running water" and that their water "is pumped . . . to the house from an outside well using a motorized pump."

"speculation" about the disruptions a spiritual advisor might cause by praying aloud during an execution was "insufficient to satisfy [the government's] burden" and failed to satisfy "the sort of case-by-case analysis that RLUIPA requires." 142 S. Ct. at 1280 (quotation and citation omitted). Here, the government likewise relied on speculation by a county employee that "100 gallons a day was a compromise of trying to calculate . . . how many five-gallon buckets [of water] are [the Amish] carrying in a day." The record lacks evidence supporting the district court's finding that appellants used 100 gallons per day. Further, the district court's decision to adopt this estimate because *the appellants* did not prove a lower usage runs contrary to the correct analysis under RLUIPA, which imposes the burden of proof on the government. *See id.* at 1277.

c. Number of Objecting Households and Amount of Gray-Water Discharge

The district court determined that the number of Amish homes objecting to the septic-system requirement was "somewhere between 36 and 148." The district court calculated the number of objecting households based on the Swartzentruber Amish household directory and the local bishop's two 2015 letters objecting to the septic-tank requirement, which were signed by 49 and 55 Amish *individuals*, respectively. These letters predate the appellants' lawsuit and did *not* quantify *households*. The district court acknowledged that "[o]n this record the number of Fillmore County Swartzentruber households seeking a religious-based exemption cannot be determined exactly." Still, the district court used the minimum number of 36 objecting households, along with the 100-gallon estimate discussed above, and determined that the Swartzentruber Amish

households seeking an exemption produce “three to four thousand gallons” of gray water per day, which poses a “substantial threat” to public health.

Appellants’ brief to this court asserts that the government did not meet its “burden of proving it has a compelling interest in denying the Amish an exemption” to the septic-tank requirement in part because it failed to “determine how many Amish homes seek the religious accommodation,” and that “[d]espite this uncertainty,” the district court assumed there are at least 36 objecting households. The MPCA claims that the 36-household estimate is “the most conservative number of objecting homes.”

While the MPCA might be correct the district court used a “conservative” number of households, the record fails to support the MPCA’s claim. Neither of the 2015 letters shows 36 Swartzentruber Amish households sought an exemption, and only four individuals joined in appellants’ lawsuit. Thus, the record does not support the district court’s finding that 36 Swartzentruber Amish households objected to the septic-tank requirement.[8] For that reason, we also reject the district court’s compound speculation about the amount of gray water produced per day by this Amish community.

In sum, the district court relied on speculation in making key findings about the harmful content of Amish gray water, the amount of water the Amish use, the number of objecting households, and the amount of Amish gray-water discharge. The district court’s

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[8] The MPCA argues that “RLUIPA’s ‘to the person’ standard applies to appellants” only and “not the Swartzentruber community as a whole.” The MPCA cites no legal authority. Even assuming, however, that the number of objecting households only pertains to appellants, the record is still insufficient to support the district court’s finding that the government proved a compelling interest.

reliance on speculation is precisely what the Supreme Court forbids in *Fulton*. Thus, we conclude that the record evidence is insufficient to support the district court's ruling that the septic-tank requirement furthers a compelling state interest specific to these appellants.

2. Exceptions Allowed by the Government

Second, appellants argue that the government "may not plausibly claim a compelling interest in denying the Amish an exception to the septic tank requirement when they have granted plenty of exceptions to it." Appellants contend that the government's septic-system requirement is undermined by the following "exceptions" in the Minnesota Rules: (1) rule allowing hand-carried gray water to be disposed of without a septic system, Minn. R. 7080.1500, subp. 2 (2021), (2) rule allowing farmers to pump their own septic tanks and apply the contents (septage) onto their own land, Minn. R. 7083.0700(D) (2021), (3) rule allowing "type V systems" designed by an engineer to forgo a septic tank, Minn. R. 7080.2400 (2021), and (4) rule allowing toilet waste to be disposed of without a septic tank, Minn. R. 7080.2280 (2021).

The MPCA disagrees that the government requires all individuals to treat their gray water with a septic tank or obtain an exception. The MPCA contends that it requires "that all sewage, including gray water, receive adequate treatment" and that any person can choose from "a menu of options" for sewage treatment so long as "a person meets the minimum requirements of any system or disposal method." The county likewise argues that "[t]here are no individualized exceptions."

The district court addressed the four alleged exceptions identified by appellants and determined that they did not diminish the government's compelling interest. First, the

district court concluded that "[t]he hand-carried gray water provision addresses a situation incomparable in both quantity and quality to the daily gray water discharge of a large Swartzentruber Amish household" and thus does not do any "appreciable damage to the Government's public health and safety interests." Second, the district court determined that "there is nothing simple" about the application of septage on farms, and accordingly, "no evidence" shows farmers' septage application undermines the government's "safe-drinking-water objectives." Third, the district court concluded that "[n]othing in the Type V rules evidences a relaxation or compromise in the [SSTS] regulatory scheme that is inconsistent with the urgency of the Government's interest in protecting surface and groundwater from contamination by untreated wastewater." Fourth, the district court stated it was "not convinced that there is any regulatory inconsistency in allowing [appellants] to have privies for non-water toilet waste, and at the same time requiring septic systems for the gray wastewater [appellants'] households generate."

Because we determine that the record evidence does not otherwise support the district court's conclusion that a compelling state interest justifies enforcing the SSTS ordinance against these particular claimants, we need not address appellants' argument that "the government's interest is not truly compelling" because of "the number of exceptions [it] allow[s] that undermine it."[9]

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[9] Still, for the sake of completeness, we question whether the government's "menu of options" for sewage treatment is analogous to the city's exceptions to the nondiscrimination policy criticized by the Supreme Court in *Fulton*. In *Fulton*, the Supreme Court determined that the city's "creation of a system of exceptions . . . undermines the City's contention that its non-discrimination policies can brook no departures." 141 S. Ct. at 1882. "[A] law cannot be regarded as protecting an

B. Least Restrictive Means

If the government proves it has a compelling interest, then RLUIPA requires the government to show that its regulation "is the least restrictive means of furthering [its] compelling governmental interest." *Ramirez*, 142 S. Ct. at 1277 (quoting 42 U.S.C. § 2000cc-1(a), which applies the same standard to substantial burdens on the religious exercise of institutionalized persons). The least-restrictive-means standard is "exceptionally demanding and requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Holt*, 574 U.S. at 364-65 (quotation omitted).

The district court concluded that the government "has proven that a gray water system with a septic tank is the only plausible, realistic means of ensuring that Swartzentruber Amish gray water is adequately treated to eliminate . . . contamination" and that "the Government has shown that mulch basins are inadequate to the task." The district court's order thoroughly detailed Dr. Heger's testimony about the problems with mulch basins. For example, the district court cited Dr. Heger's testimony that the necessary soil conditions for mulch basins, which require "five to seven feet of unsaturated soil," are

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interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation omitted). Here, the district court's analysis of the government's "menu of options" appears not to apply the appropriate level of scrutiny under RLUIPA. For example, the district court speculated that the amount of hand-carried water discharged is "small" because "water is heavy." Further, the district court determined that the septage option for farms did not undermine the government's compelling interest, even though the district court noted that the record lacked evidence about whether "any farmer-application of septage is actually happening."

"very difficult to find." The district court stated that "Dr. Heger testified that another problem with mulch is that it does not allow effluent to effectively spread out to unsaturated soil and receive adequate soil treatment." The district court further noted that based on Dr. Heger's testimony, "the organic nature of [mulch] creates a system that is extremely and impractically labor intensive." The district court determined that mulch basins are not a plausible alternative to septic tanks "not only because of the enormous labor that would be required to keep [mulch basins] from becoming saturated and ineffective, but because of the inherent shortcomings of this mode of wastewater treatment, particularly in the karst topography/geology."

In their brief to this court, appellants argue that the government did not meet its burden to show it "had no other alternative but to burden the Amish's religion." Appellants assert the government could have "used its superior knowledge and resources to employ an engineer to design an appropriate Type V system" for appellants, "explored the sort of [mulch] system design features recommended by [appellants'] expert witness . . . to determine if implementation of such features would improve" the mulch basins, or "considered establishing minimum setbacks from wells to protect drinking water." Appellants also argue that their outhouses "meet the three-feet separation soil requirement," which "proves Fillmore County has soil conditions that support mulch basins."

The MPCA argues that the government need not "defend its regulations by demonstrating it has tried—and failed—to come up with anything less restrictive." And the county argues that "no credible evidence" shows that "mulch pits could function long term

and effectively treat the multitude of harmful contaminants found in Appellants' gray water."

Because we conclude that the record evidence does not support the district court's conclusion that a compelling state interest justifies enforcing the SSTS ordinance against these particular claimants, we need not address whether the septic-tank requirement is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc(a)(1).[10]

DECISION

Under RLUIPA, the government must demonstrate a compelling interest in enforcing a challenged land-use regulation against the particular claimants whose sincere

[10] Still, to be complete, we question the district court's conclusion that the government has satisfied its burden to prove the septic-tank requirement is the least-restrictive alternative for two reasons. First, the government presented no alternative to the use of septic tanks despite the district court's determination—which is unchallenged by the government—that the Swartzentruber Amish object to "the state mandated septic system [which] stems from their religious belief that these systems must be avoided as a way of the world, antithetical to a faith that tells them to be separate in order to live as God intends." In *Ramirez*, the Supreme Court rejected the government's assertion that allowing speech in the execution chamber was "not feasible" because the government did "not explain why" a categorical ban was necessary. 142 S. Ct. at 1279. Similarly, the government here has adopted a categorical requirement to use septic tanks despite RLUIPA requirements.

Second, the government offered expert opinion but no data on the mulch-basin system that the Swartzentruber Amish adopted in 2017. We note that the government declined the opportunity to present additional evidence particular to these appellants when this matter was remanded in 2021. Further, the district court rejected mulch basins on general grounds, such as the government requirement that three feet of unsaturated soil separate the point where the gray water leaves the treatment system and enters the soil. The district court reasoned that this requirement "make[s] it difficult or impossible to find locations where mulch basins could be dug." While we appreciate the unique environmental issues posed by the karst topography of Fillmore County, we note that the same three-foot-separation requirement applies to privies, which are routinely approved for the Swartzentruber Amish and others. *See* Minn. R. 7080.2150, .2280 (2021).

religious belief is burdened. Here, the district court determined first that appellants' sincerely held religious belief was substantially burdened by the government's septic-tank requirement. Second, the district court concluded that the government had a compelling interest. In making its compelling-interest findings, however, the district court relied on generalized evidence about the content of gray water, conjecture based on visual observations of appellants' gray water, and speculation about the quantity of water used and discharged by appellants, including the number of households objecting to the septic-tank requirement. Because the record evidence is insufficient to support the district court's conclusion that a compelling interest requires these appellants to use septic tanks, the district court erred in denying appellants any relief in their declaratory-judgment action seeking to invalidate the SSTS ordinance as applied to them. The government, therefore, may not enforce the SSTS ordinance against these appellants based on the existing record. Thus, we reverse and remand for entry of appropriate declaratory and injunctive relief, which includes preventing the government from enforcing the SSTS ordinance against appellants unless and until the government satisfies its burden under RLUIPA.

Reversed and remanded.