FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPIRIT OF ALOHA TEMPLE, a Hawai'i nonprofit corporation; FREDRICK R. HONIG, *Plaintiffs-Appellants*, v. COUNTY OF MAUI, *Defendant-Appellee*, STATE OF HAWAI'I, *Intervenor-Defendant-Appellee*, and MAUI PLANNING COMMISSION, *Defendant.*	Nos. 19-16839 20-15871 D.C. No. 1:14-cv-00535- SOM-WRP OPINION

Appeal from the United States District Court
for the District of Hawai'i
Susan O. Mollway, District Judge, Presiding

Argued and Submitted February 2, 2021
Honolulu, Hawai'i

Filed September 22, 2022

Before: Richard R. Clifton, Ryan D. Nelson, and Daniel P. Collins, Circuit Judges.

Opinion by Judge R. Nelson;
Concurrence by Judge Collins;
Partial Concurrence and Partial Dissent by Judge Clifton

SUMMARY*

First Amendment / Collateral Estoppel

In an action brought by the Spirit of Aloha Temple ("Plaintiffs") challenging the County of Maui Planning Commission's denial of its application for a special use permit to hold religious services and other events on agriculturally zoned property, the panel reversed the district court's grant of summary judgment against Plaintiffs on their facial prior restraint challenge; held that the district court improperly dismissed the remaining claims on appeal under the doctrine of collateral estoppel; vacated the district court's summary judgment on costs and the appealed religious liberties claims; and remanded to the district court for further proceedings.

Hawai'i has a complicated system of zoning regulations, including state and county rules that often overlap. For properties smaller than fifteen acres and designated as agricultural land, the regulations list uses that either are permitted or need a special use permit at the discretion of

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

county planning commissions. Haw. Rev. Stat. § 205-6(a) & (c). Under Maui County Code § 19.30A.060.A.9, "[c]hurches and religious institutions" are permitted only with a special use permit considered under five factors listed in Haw. Code R. § 15-15-95(c).

Plaintiffs facially challenged the zoning scheme as a prior restraint on their First Amendment rights. The panel held that Plaintiffs may bring a facial prior restraint challenge. Because the County's special use permitting scheme was expressly "more onerous" on conduct protected by the First Amendment, the effect on religious expression was not merely "incidental" and thus had a sufficient nexus to expression for Plaintiffs to bring a facial challenge. The panel further held that the County's permitting scheme granted permitting officials an impermissible degree of discretion, and therefore, failed to qualify as a valid time, place, and manner restriction on speech. Thus, the challenged regulation violated the First Amendment.

The panel held that the district court erred in holding that the Commission's findings on strict scrutiny collaterally estop Plaintiffs' substantial-burden and nondiscrimination Religious Land Use and Institutionalized Persons Act ("RLUIPA") claims, Free Exercise claims, and Equal Protection claims. Because Plaintiffs were not afforded a full and fair adjudication by the Commission, the Commission's findings had no preclusive effect on whether denying the second permit application was the least restrictive means of furthering public safety. Because Plaintiffs did not have an adequate opportunity to litigate the strict scrutiny standard, the Commission's decision cannot have preclusive effect on federal issues in federal court. The panel therefore vacated the district court's order in this regard and remanded for further proceedings.

The district court taxed $16,458.95 in costs against the Spirit of Aloha Temple. The County asserted that all costs were awarded on the RLUIPA equal terms claim that proceeded to a jury verdict and that any reversal on other issues would not affect the order on costs. The panel disagreed, because though Plaintiffs did not appeal the jury verdict that most costs relate to, there was no prevailing party until there was a final judgment on all claims. Because the County was not the prevailing party without a final judgment in the entire case, the panel vacated and remanded the judgment on costs to the district court.

Judge Collins concurred in the court's opinion except for Section III, as to which he concurred only in the judgment. He agreed that the district court erred in applying collateral estoppel to findings made by the Maui Planning Commission, but he reached that conclusion on grounds that followed more closely to the language of RLUIPA.

Judge Clifton concurred in part and dissented in part. He joined most of the majority opinion, although not with enthusiasm. He joined the conclusion that Plaintiffs have standing to bring a facial prior restraint challenge, but did so reluctantly because the court has stretched the nexus to expression standard too thin in cases involving allegations of unbridled discretion. He also concurred in the majority's holdings in Part III that the findings by the Maui Planning Commission on strict scrutiny did not collaterally estop Plaintiffs' claims and in Part IV vacating the award of taxable costs. He dissented as to the majority's opinion's conclusion, expressed in Part II.C, that Plaintiffs' facial challenge succeeds because the challenged guideline sufficiently fetters government decisionmakers and does not confer unbridled discretion.

COUNSEL

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OPINION

R. NELSON, Circuit Judge:

The County of Maui Planning Commission denied the Spirit of Aloha Temple's application for a special use permit to hold religious services and other events on agriculturally zoned property. Plaintiffs brought facial and as-applied First Amendment prior restraint claims, Religious Land Use and Institutionalized Persons Act (RLUIPA) claims, and claims under the state and federal Free Exercise and Equal Protection clauses. We reverse the district court's grant of summary judgment to the defendants because Plaintiffs bring a successful facial First Amendment challenge to the County's zoning scheme. We also vacate and remand for the district court to reevaluate costs and to reconsider Plaintiffs' religious liberties claims without giving preclusive effect to the Commission's decision.

I

In 1994 Fredrick Honig bought eleven acres located at 800 Haumana Road in Maui. The land is zoned for agricultural use, designated within the state agricultural and conservation district, and subject to environmental protections for coastal lands. Honig developed the land without permits. He cleared and graded the land, cut roads on the property, changed the contours of coastal conservation land, and altered the route of a natural watercourse. He appears to have built illegal structures, including housing structures, and installed cesspools near drinking water wells. Although several Hawaiian archeological sites existed on the property, including an agricultural terrace, burial crypt, and irrigation ditch, Honig failed to provide the requisite monitoring plans for their preservation. Through a nonprofit entity, Honig also used

the property as a venue to conduct commercial weddings, vacation rentals, retreats, and events—all without the requisite permits. By late 2015, around 550 weddings were performed on the property.

Honig was repeatedly put on notice that these activities required appropriate permits but continued to violate land use regulations. In 2007 Honig formed a new nonprofit, Spirit of Aloha Temple, as "a branch of the Integral Yoga movement, a modern branch of the ancient Hindu yogic tradition."[1]

That year Honig applied for a special use permit for a "church, church[-]operated bed and breakfast establishment, weddings, special events, day seminars, and helicopter landing pad." The County of Maui Planning Commission denied that permit, noting several buildings without proper permits; general problems with the helicopter pad's location; and potential adverse impacts to surrounding properties from loud music, helicopter noise, and increased traffic.

Honig and the Spirit of Aloha Temple ("Plaintiffs") worked with local agencies to address the Commission's concerns. The County Planning Department recommended that the Commission approve a second application with various conditions. In 2012 Plaintiffs filed their second application seeking to hold "weekly church service," "sacred programs, educational, inspirational, or spiritual including Hawaiian cultural events, and spiritual commitment

[1] The nonprofit's mission statement is "[t]o promote Individual and Global Health, Harmony and Well-Being through Education, Instruction, Guidance and Research. Specializing in, but not limited to, the areas of Exercise, Diet and Lifestyle Management. To undertake, carry on, and conduct activities and acquire any assets necessary to accomplish the purposes set forth above."

ceremonies such as weddings," with limitations on the number of attendees.

The Commission denied the second application, and Plaintiffs moved to reconsider. Plaintiffs' attorneys sent a letter warning that a denial of the permit, absent a compelling government interest, would create concerns under RLUIPA. The Commission rescinded its initial denial, conducted a hearing, then again denied the second application. According to its "Finding of Fact #68,"

> granting the Application would adversely affect the health and safety of residents who use the roadway, including endangering human life. The Commission finds that the health and safety of the residents' and public's use of Haumana Road is a compelling government interest and that there is no less restrictive means of ensuring the public's safety while granting the uses requested in the Application.

The Commission analyzed whether the requested land uses would be "unusual and reasonable" after considering the guidelines in Hawai'i's Code of Rules § 15-15-95(c). It concluded that the proposed uses "would adversely affect the surrounding properties," because of safety concerns surrounding Haumana Road. It also determined that the proposed uses would increase traffic and burden public agencies by requiring them to provide roads, police, and fire protection. The Commission's "Conclusion of Law #9" specifically addressed Plaintiffs' RLUIPA concerns by explaining the strict scrutiny standard and finding that outright denying the permit was the least restrictive means

of furthering the compelling public health and safety interests.[2]

Plaintiffs filed a complaint in federal district court against the County. The complaint alleged violations of RLUIPA's substantial burdens, nondiscrimination, and equal terms provisions;[3] the First Amendment's prohibition on prior restraints; state and federal Free Exercise and Equal Protection clauses; and the Hawai'i Administrative Procedure Act (APA), Haw. Rev. Stat. § 91-14. Plaintiffs sought declaratory and injunctive relief, compensatory damages (which they waived before trial), attorneys' fees, and costs.

The district court "decline[d] to exercise supplemental jurisdiction" over Plaintiffs' state claim challenging the Commission's decision. It stayed the remaining claims pending the state circuit court's determination of the state claim, essentially forcing Plaintiffs to adjudicate their APA claim in state court.

In state court, Plaintiffs appealed the permit denial, arguing that the Commission's factual findings were clear error. Plaintiffs challenged Finding of Fact #68 and Conclusion of Law #9 where the Commission found an increase in traffic and foreseeably dangerous road conditions. But they did not challenge the portion of Conclusion of Law #9 on strict scrutiny stating that RLUIPA had not been violated because the permit denial was the least

[2] The Commission noted that "[i]f any Conclusion of Law is later deemed to be a Finding of Fact, it shall be so deemed," and "[t]o the extent that any finding of fact is more properly characterized as a conclusion of law, the Commission adopts it as such."

[3] 42 U.S.C. §§ 2000cc(a)(1)(A)–(B), (b)(2), and (b)(1), respectively.

restrictive means of furthering the Commission's compelling interest. And in state court, citing *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), Plaintiffs reserved for federal adjudication all federal questions, including their First and Fourteenth Amendment and RLUIPA claims.

The state court affirmed the Commission's decision to deny the permit under the Hawai'i APA, finding no "clear error in the . . . Commission's factual findings or error in its legal conclusions" and that the denial was not "arbitrary, capricious or an abuse of discretion." The state court also found a "more than sufficient basis for the Planning Commission's denial of the Special Use Permit," stating that "[t]he Commission had more than enough evidence to be concerned about traffic and road safety" considering the "[n]umerous individuals [who] expressed concern about traffic and road safety." Plaintiffs did not appeal the state court decision.

Upon return to federal court and after discovery, Plaintiffs filed for partial judgment, and the County sought summary judgment on all claims. The district court denied both motions. As to the First Amendment prior restraint claims, the parties stipulated to allow the State to intervene. Later, the district court granted summary judgment to the State and County on the prior restraint claims and held that the remaining claims presented only as-applied challenges.

The district court later granted summary judgment for the County on all remaining counts, except one, concluding that the Commission's decision on least restrictive means barred Plaintiffs' claims under collateral estoppel. Because RLUIPA's equal terms provision lacks strict scrutiny language, the district court held that collateral estoppel did not resolve that claim. *See Centro Familiar Cristiano*

Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1171–72 (9th Cir. 2011) (unlike the substantial burden provision, RLUIPA's equal terms provision does not include key phrases like "compelling governmental interest" and "least restrictive means"). The claim went to trial, and the advisory jury found that neither side proved by a preponderance of the evidence whether the "Spirit of Aloha Temple is a religious assembly or institution." It also found that the County "proved by a preponderance of the evidence that, with respect to accepted zoning criteria, it did not treat Plaintiff Spirit of Aloha Temple on less than equal terms as compared to the way the County of Maui treated a similarly situated nonreligious assembly or institution." Relying on the advisory jury verdict, the district court entered final judgment for the County. Plaintiffs have not challenged that decision on appeal.

But Plaintiffs appealed the summary judgment orders on their prior restraint claim and the claims that the district court held barred by collateral estoppel.

II

Plaintiffs raise facial and as-applied prior restraint challenges. Plaintiffs argue that the standards in the County's zoning regulations governing special use permits for places of worship and the standards applied by the Commission in reviewing permits are an unconstitutional prior restraint. Under this circuit's precedent, we must agree that Plaintiffs have raised sufficient evidence that the zoning regulations are facially unconstitutional. We therefore reverse the district court's grant of summary judgment to the State and County. Because Plaintiffs succeed on their facial challenge, we do not address their as-applied challenge.

A

Before addressing the merits, we review Hawai‘i’s zoning regulations. Hawai‘i has a complicated system of zoning regulations, including state and county rules that often overlap. For properties smaller than fifteen acres and designated as agricultural land, the regulations list uses that either are permitted or need a special use permit at the discretion of county planning commissions. Haw. Rev. Stat. § 205-6(a) & (c). Counties may grant special use permits for an "unusual and reasonable use" according to five guidelines:

> (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;
>
> (2) The proposed use would not adversely affect surrounding property;
>
> (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
>
> (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
>
> (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

Haw. Code R. § 15-15-95(c). Under Maui County Code § 19.30A.060.A.9, "[c]hurches and religious institutions" are permitted only with a special use permit considered under these factors.

Neither the guidelines nor any other statute or regulation explains how the guidelines are to be applied. But the Director of the County Planning Department testified that the permit guidelines are "guidelines," "not criteria." *See Snapp v. United Transp. Union*, 889 F.3d 1088, 1103 (9th Cir. 2018) (generally, Federal Rule of Civil Procedure 30(b)(6) witness's deposition testimony is binding on governmental agency). He stated, "the Commission may deny on one or all of these. It's within their discretion to—to say [an application] doesn't meet these guidelines, one or all of them, that's within their purview." For instance, the Hawai'i Supreme Court has relied on just one of the similar predecessor guidelines to deny a permit. *See Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n*, 639 P.2d 1097, 1101 (Haw. 1982). Here, while acknowledging that one of the guidelines supported the application, the Commission decided that Plaintiffs had failed to satisfy the adverse effects guideline and burden on public agencies guideline.

B

We review a district court's grant of summary judgment de novo. *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596, 600 (9th Cir. 2022). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-movant, there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id.* at 600–01.

Plaintiffs facially challenge the zoning scheme as a prior restraint on First Amendment rights. Prior restraints "may have a chilling effect on protected speech because potential speakers may choose to self-censor rather than either acquire a license or risk sanction." *Epona v. County of Ventura*, 876 F.3d 1214, 1221 (9th Cir. 2017). Facial challenges, meaning that a plaintiff can challenge a law as written, are allowed for prior restraint suits since "an as-applied challenge may fail to provide sufficient protection against content-based censorship." *Id.*

Because facial challenges are generally disfavored, whether facial prior restraint challenges may proceed depends on the law being challenged. *Id.* at 1220–21. They are allowed against laws aimed at expressive conduct but disallowed against laws of general application not aimed at conduct commonly associated with expression. *See S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1135 (9th Cir. 2004). "In other words, a facial challenge is proper only if the statute by its terms seeks to regulate spoken words or patently expressive or communicative conduct, such as picketing or handbilling, or if the statute significantly restricts opportunities for expression." *Id.* (citations omitted). Thus, besides "bare minimum" standing requirements for facial challengers, *see Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 894–95 (9th Cir. 2007), the challenged regulation "must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks," *Kaahumanu v. Hawai'i*, 682 F.3d 789, 802 (9th Cir. 2012) (citation omitted).

We do not permit facial challenges to a law "with no close connection to expression [even if it] provides an official with discretion that might be used to reward or

punish speech." *Gaudiya Vaishnava Soc'y v. City & County of San Francisco*, 952 F.2d 1059, 1062–63 (9th Cir. 1990). For instance, "a law giving the mayor unbridled discretion to decide which soda vendors may place their machines on public property" does not grant the mayor direct enough power or control "over the content or viewpoint of the vendor's speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 761 (1988). Thus, a facial challenge would not be available "[e]ven if the soda vendor engages in speech" because the mayor's decision as to who can place machines does "not directly prevent that speech from occurring." *Id.* So we must ask where the law challenged here falls "along the spectrum from activity that is clearly protected by the First Amendment to activity with some expressive purpose to activity with no expressive purpose."[4] *S. Or. Barter Fair*, 372 F.3d at 1135.

On one end of the spectrum, laws of general application that are not aimed at conduct commonly associated with expression—such as laws requiring building permits—"carry with them little danger of censorship" and are thus "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Plain Dealer Publ'g*, 486 U.S. at 761. For example, no facial challenge was permitted when an ordinance "prohibit[ed] only sitting or lying on the sidewalk, neither of which is integral to, or commonly associated with, expression." *Roulette v. City of Seattle*, 97 F.3d 300, 304 (9th Cir. 1996).

[4] Plaintiffs argue that the State waived any argument about the nexus issue. But the issue is purely legal, and Plaintiffs are not prejudiced as they had a chance to address the issue via supplemental briefing. *See Pac. Bell Tel. Co. v. Cal. Pub. Utils. Comm'n*, 621 F.3d 836, 847 n.17 (9th Cir. 2010).

Likewise, an ordinance restricting food distribution did not "on its face [demonstrate] an expressive activity" sufficient to bring a facial challenge. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). And a forest closure order was best categorized as a law of general application not aimed at conduct commonly associated with expression. *United States v. Griefen*, 200 F.3d 1256, 1264–65 (9th Cir. 2000); *see also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986) (First Amendment not implicated by "enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books"); *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (minimum wage law did not target expressive conduct).

On the other end of the spectrum, laws "directed narrowly and specifically" at regulating expression or conduct commonly associated with expression—such as permitting regulations for newspaper sales boxes—may be challenged facially. *Plain Dealer Publ'g*, 486 U.S. at 760–61. Even laws that have an "economic motive" can have "more than an incidental burden on protected expression" if "directed at certain content" and "aimed at particular speakers." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Adult entertainment establishments could facially challenge a general business licensing and inspection scheme because it was "more onerous" on sexually oriented businesses than others. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (plurality). We allowed a facial challenge to a permit requirement for "commercial activities of any kind" on unencumbered Hawaiian public land, when the scheme gave permitting officials "unbridled discretion to grant, revoke, or modify permits" for weddings, which we held to be "protected expression under the First

Amendment." *Kaahumanu*, 682 F.3d at 794, 799, 802. Even where "commercial activities" did not explicitly mention expressive conduct, there was a close enough nexus because "commercial activities" significantly implicated expression. *Id.* at 802; *see Epona*, 876 F.3d at 1221.

We also permitted facial prior restraint challenges to a tattoo regulation because "tattooing is purely expressive activity," *Real v. City of Long Beach*, 852 F.3d 929, 934 (9th Cir. 2017) (citation omitted); an ordinance "govern[ing] use of the traditional public fora of public streets, sidewalks, and parks," *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1020 (9th Cir. 2009); and a prohibition on soliciting charitable sales on the street because it "regulate[d] conduct which is itself protected speech," *Gaudiya Vaishnava Soc'y*, 952 F.2d at 1062. And we allowed facial challenges to special use permitting schemes for noncommercial group use of National Forest lands, *United States v. Linick*, 195 F.3d 538, 541 (9th Cir. 1999), and to a statute regulating large gatherings, *S. Or. Barter Fair*, 372 F.3d at 1135–36, which did not "automatically" create a nexus to expression but was "broad enough to cover gatherings that are expressive, such as large-scale demonstrations or religious ceremonies," *id.*

Plaintiffs argue that they can facially challenge the County's zoning requirements because their use has a sufficient nexus to expression. To begin, Plaintiffs have standing to facially challenge the provisions that applied to them, including § 15-15-95(c). *See Get Outdoors II*, 506 F.3d at 894; *see also Epona*, 876 F.3d at 1219–20.

Next, the State argues that Plaintiffs challenged only the state scheme, *see* Haw. Code R. § 15-15-95; Haw. Rev. Stat. § 205-6, but not the specific Maui County Code § 19.30A.060.A.9. The latter is the only rule that mentions

religious activity, listing "[c]hurches and religious institutions" as an "unusual and reasonable use" that requires a special use permit. But Plaintiffs' complaint challenges "[t]he standards set forth in the County of Maui's zoning regulations governing special permits for places of worship," and the state code expressly incorporates "all of the rules of practice and procedure of the county planning commission in which the subject property is located." Haw. Code R. § 15-15-95(e).

Plaintiffs acknowledge that "a law requiring building permits is rarely effective as a means of censorship," *Plain Dealer Publ'g*, 486 U.S. at 761, but argue that, unlike a building permit, the challenged zoning scheme regulates the use of properties for expressive conduct. Our case law dictates that we agree with this distinction.

Foremost among these cases is *Epona*, which is much like this case. Both in *Epona* and here, plaintiffs challenged a permitting scheme requiring a special use permit to conduct expressive activity on agriculturally zoned properties. 876 F.3d at 1217. Even though the permitting scheme was more broadly about agriculturally zoned land, we permitted a facial prior restraint challenge because the *Epona* regulation "expressly include[d] 'weddings' as part of a list of regulated activities," just like the permitting scheme here specifically mentions religious usage. *Id.* at 1221. Because the scheme gave permitting officials unbridled discretion to grant or deny permits, we reversed the dismissal of the prior restraint challenge because the permitting scheme's regulation of commercial weddings "pose[d] a 'real and substantial threat' of censorship." *Id.* (quoting *Kaahumanu*, 682 F.3d at 802).

No one doubts that agricultural land use does not commonly have the same association with expressive

conduct as picketing, hand billing, or even commercial activity. *See Roulette*, 97 F.3d at 303; *Kaahumanu*, 682 F.3d at 802. But the County expressly requires a special use permit for religious activity, which is commonly associated with expression. *See, e.g.*, *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011). Though the permitting scheme does not regulate the specificities of religious conduct, its regulation of where religious congregants may gather makes it "broad enough" to provide a sufficient nexus to expression. *S. Or. Barter Fair*, 372 F.3d at 1135. It "target[s]" expressive conduct in the form of churches and religious institutions, moving the scheme from the "no expressive conduct" portion of the spectrum to the "some expressive purpose" portion. *Id*.

For a facial prior restraint challenge, it matters less that the scheme is meant to be generally unrelated to speech than that it specifically targets, rather than simply happens to affect, expression protected by the First Amendment. *See Sorrell*, 564 U.S. at 567; *Arcara*, 478 U.S. at 706–07; *Kaahumanu*, 682 F.3d at 800–02; *S. Or. Barter Fair*, 372 F.3d at 1135. Because the County's special use permitting scheme is expressly "more onerous" on conduct protected by the First Amendment, *see FW/PBS*, 493 U.S. at 225, the effect on religious expression is not merely "incidental" and thus has a sufficient nexus to expression for Plaintiffs to bring a facial challenge, *see Epona*, 876 F.3d at 1221; *Kaahumanu*, 682 F.3d at 808. Consistent with our precedent, Plaintiffs may bring a facial prior restraint challenge.

C

Our precedent dictates not only that Plaintiffs' facial challenge may proceed—but also that it succeeds. The County of Maui permitting scheme "grants permitting

officials an impermissible degree of discretion," and thus "fails to qualify as a valid time, place, and manner restriction on speech." *Epona*, 876 F.3d at 1222.

A law that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint." *Id.* (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969)). "While permitting guidelines need not eliminate all official discretion, they must be sufficiently specific and objective so as to effectively place some 'limits on the authority of . . . officials to deny a permit.'" *Id.* (quoting *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996)). This "totality of the factors" analysis of unbridled discretion is "context-specific." *Id.* at 1222, 1225.

For example, a sign ordinance that required signs to have no "harmful effect upon the [city's] health or welfare" and no damage to the "aesthetic quality" of neighboring areas was too "ambiguous and subjective" and placed "no limits" on official discretion. *Desert Outdoor Advert.*, 103 F.3d at 818–19 (citation omitted). A law providing "no standards for judging what is 'necessary to ensure the public safety'" was "too broad" and lacked "any constraining principle" to save it. *Doe v. Harris*, 772 F.3d 563, 580 (9th Cir. 2014) (citation omitted). And broad discretion to attach terms to a permit to "protect the public interest" was unconstitutional because permitting "can be abused in a manner that could limit the use of . . . land by parties who hold political views that are disfavored" and "render impractical" the use of land for expressive activities. *Linick*, 195 F.3d at 541–42.

On the other hand, "reasonably specific and objective" guidance that does "not leave the decision 'to the whim of the administrator'" is permissible. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 324 (2002) (citation omitted). Despite some vagueness in the term "unreasonable," conditions like whether the applicant had damaged property, the application was incomplete, and the use would present "unreasonable danger to the health or safety" of the city satisfied the First Amendment because they provided narrowly drawn guidance to officials. *Id.* at 323–24. And "a limited and objective set of criteria" requiring officials to compare "form, proportion, scale, color, materials, surface treatment, overall sign size[,] and the size and style of lettering" to other signs in the area was constitutional. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1081–83 (9th Cir. 2006) (citation omitted).

Here, the County of Maui permitting regulations allow the Commission unbridled discretion to rely only on an arbitrary guideline—whether "[t]he proposed use would not adversely affect surrounding property"—to deny a special use permit application. This use of "adversely affect" is as general, flimsy, and ephemeral as "health or welfare" or "aesthetic quality." *See Desert Outdoor Advert.*, 103 F.3d at 818–19.

Again, we find ourselves drawing comparisons to the permitting scheme in *Epona*. The unwieldy conditions in *Epona* included that a proposed use must not "impair the utility of neighboring property or uses," must be "compatible with existing and potential land uses in the general area," and be neither "obnoxious or harmful" nor "detrimental to the public interest, health, safety, convenience, or welfare." 876 F.3d at 1223 (cleaned up). We struck down the permitting scheme because it "combin[ed] . . . abstract

language" with "the lack of a requirement that permitting officials support their decision with objective evidence." *See id.* at 1224.

Likewise, the adverse effects guideline here mirrors the requirements we struck down in *Epona* and *Desert Outdoor Advertising*. The Commission need not "provide[] [any] explanation as to why . . . the use would be in violation nor what specific aspect of the given conditions would be violated." *See id.* at 1224 n.8. And unlike the "unreasonable danger to the health or safety" guideline approved in *Thomas*, 534 U.S. at 324, the "adversely affects surrounding property" guideline here does not specify an objective factor like "safety" that can cause a permit application to fail. A guideline allowing such a limitless range of subjective factors is untenable and allows unbridled discretion. An adverse effect could just as easily be causing a sinkhole or creating unsafe road conditions as it could be cutting off public access to fishing or engaging in religious activities that neighbors dislike.

We are not bound by officials' promises that they will enforce the guidelines responsibly. *Harris*, 772 F.3d at 580–81. Neither are procedural protections such as time limits, written findings, and the right to appeal able to cure a substantive constitutional violation when they lack criteria to cabin discretion. *See Epona*, 876 F.3d at 1224.

Pairing the adverse effects guideline with the other more specific guidelines cannot save it since the Commission may rely on a single guideline to deny a permit. *See Neighborhood Bd. No. 24*, 639 P.2d at 1101. Here, the Commission cited two guidelines to deny the permit application but found the other guidelines supported the application. As in *Epona*, failing to satisfy just one of the several conditions is enough to deny a permit. *See* 876 F.3d

at 1224. So in a facial challenge, arbitrary guidelines cannot hide behind more objective criteria when the latter are unnecessary to consider when denying a permit. *See id*.[5] Thus, the challenged regulation gives officials unbridled discretion to deny a permit, limits expressive conduct, and therefore violates the First Amendment.

III

The district court also erred in holding that the Commission's findings on strict scrutiny collaterally estop Plaintiffs' substantial-burden and nondiscrimination RLUIPA claims, Free Exercise claims, and Equal Protection claims. Because Plaintiffs were not afforded a full and fair adjudication by the Commission, the Commission's findings have no preclusive effect on whether denying the second permit application was the least restrictive means of furthering public safety.

A

Whether collateral estoppel bars a party's claims is a mixed question of law and fact. *Wabakken v. Cal. Dep't of Corrs. & Rehab.*, 801 F.3d 1143, 1148 (9th Cir. 2015). So we review de novo if collateral estoppel applies and for

[5] Plaintiffs have not preserved a challenge against the other guidelines in the Code of Hawai'i Rules § 15-15-95(c), and here, we do not consider the validity of the permitting scheme as a whole. Even if the adverse effects guideline is unconstitutional, "a federal court should not extend its invalidation . . . further than necessary to dispose of the case before it." *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). It is left for the district court whether § 15-15-95(c)(2) is severable. *See Long Beach*, 574 F.3d at 1044.

abuse of discretion the district court's decision giving preclusive effect. *Id.*

"The doctrine of collateral estoppel, or issue preclusion, is grounded on the premise that once an issue has been resolved in a prior proceeding, there is no further fact-finding function to be performed." *Id.* (citation and quotation marks omitted). "In issue preclusion, the only litigation barred is the *re*-litigation of an issue that has been *actually* litigated and *necessarily* decided." *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 330 (9th Cir. 1995). "As a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, redetermination of the issues may nevertheless be warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Caldeira v. County of Kauai*, 866 F.2d 1175, 1180 (9th Cir. 1989) (cleaned up).

"Federal courts must apply the collateral estoppel rules of the state that rendered the underlying judgment." *Zamarripa v. City of Mesa*, 125 F.3d 792, 793 (9th Cir. 1997). Under Hawai'i law, collateral estoppel applies when:

> (1) the fact or issue in the present action is identical to the one decided in the prior adjudication; (2) there was a final judgment on the merits in the prior adjudication; (3) the parties to the present action are the same or in privity with the parties in the prior action; and (4) the fact or issue decided in the prior action was actually litigated, finally decided, and essential to the earlier valid and final judgment.

Dannenberg v. State, 383 P.3d 1177, 1198 (Haw. 2016); *see Caldeira*, 866 F.2d at 1178–80. When, as here, the decision was from an agency, collateral estoppel applies in Hawai‘i so long as the state agency (1) acted in a judicial capacity (2) to resolve disputed issues of fact which were properly before it, (3) which the parties had an adequate opportunity to litigate. *Santos v. State*, 646 P.2d 962, 966 (Haw. 1982).

Agency proceedings have satisfied Hawai‘i's collateral estoppel fairness factors when they were judicial and adversarial, the hearing resembled a trial, and both sides were represented by counsel, filed briefs, presented oral argument, and called, examined, and cross-examined witnesses under oath. *See, e.g.*, *Bridge Aina Le‘a, LLC v. Land Use Comm'n*, 950 F.3d 610, 638–39 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 731 (2021); *Caldeira*, 866 F.2d at 1180; *Eilrich v. Remas*, 839 F.2d 630, 634 (9th Cir. 1988). *But see Mack v. S. Bay Beer Distribs.*, 798 F.2d 1279, 1283–84 (9th Cir. 1986) (inadequate opportunity to litigate before agency where there were no specific findings made and no evidence was presented on an issue), *abrogated on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

When judicial review of an agency decision is available, plaintiffs need appeal only claims that they are required to appeal to state court, such as the state APA claim here. *See Misischia v. Pirie*, 60 F.3d 626, 631 (9th Cir. 1995). Though "a losing party cannot obstruct the preclusive effect of the state administrative decision simply by foregoing her right to appeal," the proceeding still must meet the "criteria necessary to require a court of that state to give preclusive effect to the state agency's decisions." *Plaine v. McCabe*, 797 F.2d 713, 719 n.12 (9th Cir. 1986).

Finally, because we are dealing with RLUIPA claims, we note that RLUIPA should "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution." 42 U.S.C. § 2000cc-3(g). "Adjudication of a claim of a violation of [RLUIPA] in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum." *Id.* § 2000cc-2(c).

B

Here, given that we must broadly construe RLUIPA in favor of protecting religious exercise, we conclude that the strict scrutiny findings of the Commission do not have preclusive effect because the parties did not fully and fairly litigate whether denying Plaintiffs' permit would violate strict scrutiny.

The Commission first considered RLUIPA and strict scrutiny in response to a letter from Plaintiffs that mentioned only the need for a compelling government interest, but not the least restrictive means prong of strict scrutiny. In the meeting where the Commission considered strict scrutiny, Planning Department staff controlled the presentation of evidence and limited each public testifier to three minutes of speaking. Contrary to the findings of the district court, it is not apparent that witnesses could be subpoenaed or cross-examined, and witnesses did not testify under oath.

Once the Commission's counsel explained RLUIPA and strict scrutiny, the Commission moved to executive session, where the public, including Plaintiffs, were asked to leave. What was discussed in the executive session is not included in the minutes. After they returned, the commissioners focused the rest of the meeting on how many events and

people could be allowed on the property. No evidence was presented on why denying the permit was the least restrictive means.

Although Honig had a "consultant" assisting him, he was cross-examined by nine commissioners and not allowed to call witnesses or comment on the credibility of other witnesses. The proceeding was not adversarial, with the commissioners acting as hardly impartial prosecutors: one commissioner complained that Honig had not allowed him to trespass on his property to fish by the ocean. And the proceedings were so disorganized that when the Commission voted to deny the permit, Honig's consultant immediately stated, "Someone is going to have to fill us in," and asked, "What just happened[?]"

The district court stayed proceedings and directed Plaintiffs to appeal their state APA claim. The state APA claim did not require a legal conclusion on strict scrutiny; Plaintiffs' state court brief did not reference strict scrutiny or RLUIPA, and the state court did not address it. The County points to a robust discussion in the state court decision of the public safety issue as evidence that the strict scrutiny question was actually litigated. But the state court analyzed public safety for clear error when addressing the only issue raised before it, the state APA claim, and it did not discuss least restrictive means or strict scrutiny.

The district court recognized strict scrutiny was not fully litigated in the state proceedings, noting that it could not determine whether the County considered the least restrictive means based on the present record. The district court cited several less restrictive means that were brought to the Commission's attention but ignored in its analysis. This constitutes a major part of Plaintiffs' religious liberties claims that went unconsidered by the Commission.

Plaintiffs did not forgo their right to appeal the strict scrutiny findings when they appealed only the state APA claim; instead, they expressly reserved all federal questions. *See England*, 375 U.S. at 420. While an *England* reservation does not necessarily "prevent[] operation of the issue preclusion doctrine," preclusion is limited to when the same, necessary issue was fully litigated. *San Remo Hotel, LP v. San Francisco City & County*, 364 F.3d 1088, 1095 (9th Cir. 2004).[6]

In sum, strict scrutiny was not "actually litigated" before the Commission or state court. *See Dannenberg*, 383 P.3d at 1198. Because Plaintiffs did not have an "adequate opportunity" to litigate the strict scrutiny standard, *see Mack*, 798 F.2d at 1283–84, the Commission's decision cannot

[6] The district court held that because the Commission was required to consider the permit application as a "contested case," Plaintiffs received a full and fair adjudication of their religious liberties claims. *See* Haw. Rev. Stat. §§ 91-1, 91-9 to 91-13. But it is suspect whether the parties participated in a contested-case hearing. Though Plaintiffs later invoked jurisdiction for contested cases, to appeal in the state trial court, *see* Haw. Rev. Stat. § 91-14, the Commission did not abide by its own contested-case procedures which in theory ensure that applicants receive due process. For instance, contested cases do not allow for public testimony, but members of the public gave statements throughout the hearing. There was no hearing officer present, necessary for a contested case under Commission rules, or a formal intervenor to trigger contested-case procedures. And even though Plaintiffs are expected to avail themselves of the full extent of processes provided by state law, *see Dodd v. Hood River County*, 136 F.3d 1219, 1226–27 (9th Cir. 1998), nothing in the record shows Plaintiffs were afforded written notice of their rights to judicial procedures under Hawai'i Revised Statute § 91-9. Nor does the record show that had the Commission used contested-case requirements, then Plaintiffs would have received a full and fair adjudication of their religious liberties claims. Unless the other collateral estoppel factors are satisfied, a contested case is not necessarily the same as a full and fair adjudication for the purpose of preclusive effect.

have preclusive effect on federal issues in federal court. We therefore vacate the district court's order in this regard and remand for further proceedings.

IV

The district court taxed $16,458.95 in costs against the Spirit of Aloha Temple. We review a district court's costs award for abuse of discretion. *Williams v. Gaye*, 895 F.3d 1106, 1133 (9th Cir. 2018).

The County asserts that all costs were awarded on the RLUIPA equal terms claim that proceeded to a jury verdict and that any reversal on other issues would not affect the order on costs. Though Plaintiffs did not appeal the jury verdict that most costs relate to, there is no prevailing party until there is a final judgment on all claims. "Where a reviewing court reverses a district court's judgment for the prevailing party," even if it reverses only one claim and leaves a jury verdict intact on another claim, "both the underlying judgment and the taxation of costs undertaken pursuant to that judgment are reversed." *Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1996) (citation omitted). Because the County is not the prevailing party without a final judgment in the entire case, we vacate and remand the judgment on costs to the district court. *See Williams*, 895 F.3d at 1133 & n.23.

V

We reverse the district court's grant of summary judgment against Plaintiffs on their facial prior restraint challenges. Moreover, the district court improperly dismissed the remaining claims on appeal under the doctrine of collateral estoppel. We therefore vacate the district court's summary judgment order on costs and the appealed

religious liberties claims and remand to the district court for further proceedings consistent with our decision.

REVERSED AND VACATED IN PART AND REMANDED.

COLLINS, Circuit Judge, concurring in part and concurring in the judgment:

I concur in the court's opinion except for Section III, as to which I concur only in the judgment. I agree that the district court erred in applying collateral estoppel to the findings made by the Maui County Planning Commission, but I reach that conclusion on grounds that hew more closely to the language of RLUIPA.

The relevant substantive rule, under RLUIPA, provides as follows: "No *government* shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the *government* demonstrates that imposition of the burden on that person, assembly, or institution" can survive the strict scrutiny standard set forth in the statute. 42 U.S.C. § 2000cc(a)(1) (emphasis added). Applying this standard requires one to first identify who the "government" is for purposes of the challenged "land use regulation," and here that is unmistakably the Maui County Planning Commission. By the plain terms of RLUIPA, then, the Commission itself is the entity that RLUIPA restricts, and it is the Commission that must carry RLUIPA's demanding burden. 42 U.S.C. § 2000cc(a)(1).

Because RLUIPA classifies the Commission as the regulated entity, the Commission cannot simultaneously sit as the adjudicative body that determines, in a judicial capacity, the lawfulness of its own conduct. Were we to treat it as properly acting in such a capacity, and as supplying a preclusive adjudication of whether the RLUIPA standard was met (by the Commission itself), that would violate RLUIPA's specific instruction that "[a]djudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum." 42 U.S.C. § 2000cc-2(c). Having the Commission sit in judgment of its own compliance with RLUIPA is not a "full and fair adjudication" of the Commission's compliance with RLUIPA. Under this view of the matter, it is entirely irrelevant whether Hawaii law does or does not treat contested-case proceedings as adjudicatory in nature, and it is likewise irrelevant what the Commission's adjudicatory jurisdiction is under Hawaii law. Under RLUIPA, the Commission is the regulated entity, and under RLUIPA, it cannot sit in final adjudicatory judgment of its own cause.

The fact that the Commission's decision was reviewed by a Hawaii circuit court does not alter this analysis. Plaintiffs asserted an *England* reservation in their state court appeal, *see England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964), they never subsequently forfeited that reservation (e.g., by conduct inconsistent with it), and the state court did not purport to vitiate or override the *England* reservation. Nor did the state court purport to resolve those federal issues in its opinion. Accordingly, the district court erred in holding that the Commission's findings concerning the RLUIPA issues were entitled to collateral estoppel effect.

I therefore concur in the judgment on the collateral estoppel issue, and I concur in the court's opinion except as to Section III.

CLIFTON, Circuit Judge, concurring in part and dissenting in part:

I join most of the majority opinion, although not with enthusiasm. I join the conclusion that Plaintiffs have standing to bring a facial prior restraint challenge, discussed in Part II.B of the majority opinion, because I agree that our court's precedent compels the conclusion that the "adverse effects" guideline under Hawai'i Administrative Rules (H.A.R.) § 15-15-95(c)(2) bears a sufficiently close nexus to expression to sustain a facial challenge to the discretion conferred on decisionmakers. I do so reluctantly, however, because in my view, described below, this court has stretched the nexus to expression standard too thin in cases involving allegations of unbridled discretion. I also concur with the majority's holdings in Part III that the findings by the Maui Planning Commission on strict scrutiny did not collaterally estop Plaintiffs' claims[1] and in Part IV vacating the award of taxable costs.

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[1] The majority opinion does not discuss the significance, if any, of the findings of the advisory jury, including the finding noted in the majority opinion, at 11, that neither side proved by a preponderance of the evidence whether Plaintiff "Spirit of Aloha Temple is a religious assembly or institution." Plaintiffs have not challenged the advisory jury verdict or the judgment subsequently entered by the district court based on that verdict. If Spirit of Aloha Temple is not a religious assembly or institution, then the claims premised on it being a religious institution would appear to lack foundation. The same may be true if the challenged

I dissent as to the majority opinion's conclusion, expressed in Part II.C, that Plaintiffs' facial challenge succeeds. When the procedural protections afforded by the permit scheme are properly accounted for, the challenged guideline sufficiently fetters government decisionmakers. The scheme adequately safeguards against the harms that justify facial attacks to discretionary restraints on speech because even if the standard is somewhat loose, it is not unduly so when coupled with the robust procedures the scheme imposes to prevent government abuse.

Even if the "adverse effects" guideline affords the government with an unconstitutional degree of discretion, the whole permitting scheme is likely salvageable, and the plaintiffs are not necessarily entitled to the relief they seek. The other challenged guideline, H.A.R. § 15-15-95(c)(3), the "unreasonable burden" guideline, is not unconstitutional, as the district court correctly held. The impact on Plaintiffs' claims may be considered on remand.

I. Nexus to Expression Requirement for a Facial Challenge

A facial challenge may be brought when a regulation "allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755 (1988). However, such challenges are bounded by the principle that "[t]he law must have a close enough nexus to expression, or to conduct commonly associated with

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activities of the individual Plaintiff are not religious in nature. The discussion in Part III of the majority opinion, in which I concur, concerns only the collateral estoppel effect, or lack thereof, of findings by the Maui Planning Commission. Other issues may be taken up on remand.

expression, to pose a real and substantial threat of the identified censorship risks." *Id.* at 759.

The connection to expressive activity in this case appears to me not meaningfully distinguishable from that considered in *Epona v. County of Ventura*, 876 F.3d 1214 (9th Cir. 2017). There, "the regulation at issue [] expressly include[d] 'weddings' as part of a list of regulated activities" requiring a special permit in an agricultural zone, satisfying the nexus requirement. *Id.* at 1221. Here, the Maui County Code's explicit reference to "churches" as a land use requiring a special permit in an agricultural zone does the same. Maui County Code § 19.30A.060.A.9.

Nonetheless, I write separately to expound on two problems I see with our court's nexus to expression cases. First, a facial challenge to a permitting scheme on the basis of unbridled discretion appears to require some *lesser* nexus to expression than other kinds of facial prior restraint challenges, but I see no principled reason why that should be so. Second, our cases fail to explain how, exactly, the nexus requirement is lowered.

First, our cases seem to alter the "nexus to expression" analysis where the plaintiff alleges unbridled discretion. In *Kaahumanu v. Hawaii*, 682 F.3d 789 (2012), we concluded that the Hawai'i regulation imposing a permit requirement for commercial activities on public beaches did not have a nexus to expression: "The breadth and generality of [the state agency's] regulation of commercial activity, combined with [the state agency's] failure to regulate in any manner who may officiate at a wedding, who may attend the wedding, what may be worn at a wedding, and what words may be spoken at a wedding, convince us that a facial challenge is not available." 682 F.3d at 801. Yet we permitted a facial challenge "to the regulations that give [the

state agency] discretion to grant and revoke permits, and to amend their terms and conditions." *Id.* at 802. We acknowledged that "a close enough nexus to expression" was still required, but we "conclude[d] that the grant of discretion to [the agency] to administer the permitting scheme has a sufficient nexus to protected expression to satisfy this requirement" without any further explanation. *Id.* (citation omitted). The *Kaahumanu* court shed no light on why the same scheme bore a sufficiently close relationship to expression to sustain a facial attack on the grant of discretion but *not* on the substance of the permit requirement itself.

Epona relied on *Kaahumanu* to hold that a sufficiently close nexus to expression existed, but provided no further clarity:

> The County argues that Appellants may not bring a facial challenge to the [permit] scheme because the [zoning ordinance] does not directly regulate marriage ceremonies or their content. The County supports its argument by reference to *Kaahumanu* . . . .
>
> Two points are relevant. First, unlike the regulation at issue in *Kaahumanu*, which applied broadly to every commercial activity on state beaches, the regulation at issue here expressly includes "weddings" as part of a list of regulated activities and treats other commercial activities (most notably commercial filming) differently. Second, and more significantly, we did permit a facial challenge to the licensing scheme in *Kaahumanu* to the extent that the scheme

> gave permitting officials unbridled discretion to grant or revoke permits. True, we require that the grant of discretion present a sufficient nexus to protected expression so as to pose a "real and substantial threat" of censorship. But, where the activity to be permitted or not per the exercise of official discretion is a commercial wedding, this nexus requirement is satisfied.

Epona, 876 F.3d at 1221 (citations and footnote omitted). Again, *Epona* fails to explain why the mention of weddings suffices to connect an ordinance to expression for purposes of a challenge to the degree of discretion afforded but not otherwise.

Courts allow facial challenges, which are usually disfavored, to prior restraints of expressive activity because:

> First, the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Second, the absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power.

Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1019–20 (9th Cir. 2009) (ellipsis in original) (quoting *City of Lakewood*, 485 U.S. at 757–58).

If a law bears too attenuated a relationship to expression, then the degree of discretion afforded to a government

decisionmaker's discretion does not matter, at least for First Amendment purposes. For instance, the *Kaahamanu* court, 682 F.3d at 801, concluded that "[t]he regulations imposing restrictions on commercial weddings" resembled the ordinance at issue in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006), and therefore could not be challenged facially. In *Food Not Bombs*, we held an ordinance "concerning distribution of food in public parks" failed to bear a sufficiently close nexus with expression to sustain a facial challenge. 450 F.3d at 1032. Santa Monica could have given full discretion to a government decisionmaker to decide whether food could be distributed in a public park, and such a law would not facially run afoul of the First Amendment. *City of Lakewood*, 485 U.S. at 761 (facial challenge unavailable to soda vendor, even if he engages in speech, to hypothetical law giving mayor unbridled expression to place soda machines). The lack of connection between expression and the distribution of food renders the regulation of food distribution "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* A person aggrieved by the exercise of discretion who suspects that the decisionmaker discriminated against them for their speech is not out of luck—such a plaintiff can bring an as-applied challenge. *Food Not Bombs*, 450 F.3d at 1032 ("Whether food distribution can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge, should one be brought.").

But *Kaahumanu* nonetheless sustained a facial challenge to the discretion afforded to a decisionmaker with the authority to revoke permits for commercial weddings while holding a facial challenge was unavailable for other regulations to commercial weddings—exactly the same

expressive nexus. As a result, our cases have gone in a confusing direction. It is also a misguided direction, because we have extended facial prior restraint challenges to areas beyond where censorship is a realistic threat.

Second, if the nexus to expression analysis is different based on the kind of facial challenge brought, our cases are murky, at best, as to how the analysis differs. Neither *Epona* nor *Kaahumanu* explained why the regulation of weddings was sufficiently tethered to expression to sustain a facial challenge to the extent of the decisionmaker's discretion to revoke a permit, but not to challenge the time, place, and manner restrictions in the permit requirement itself. *Kaahumanu*, 682 F.3d at 804, 805–06 (limiting review of the power to grant permits "as applied to beach weddings" but facially reviewing the discretion reserved to revoke a permit). *Epona* distinguished *Kaahumanu* on the basis that the regulation at issue in *Epona* "expressly includes 'weddings' as part of a list of regulated activities" while in the same breath noting that *Kaahumanu* controlled on the unbridled discretion question. 876 F.3d at 1221. Again, I fail to see the difference in the closeness of the nexus, but our cases indicate there must be one.

Here, this case involves a common zoning scheme regulating what kinds of activities are suitable for certain kinds of land, far from a prototypical prior restraint where a speaker must seek an advance license before speaking. *See City of Lakewood*, 486 U.S. at 761 ("[A] law requiring building permits is rarely effective as a means of censorship."). The regulations and ordinances provide that land zoned for agricultural use may only be used for certain purposes consistent with that designation, but other kinds of activities may be allowed by getting a permit. To me, that those activities sometimes involve speech is a most tenuous

connection to expression, "too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* There is no "real and substantial threat" that the government will censor expressive activities through the zoning of agricultural land. *Id.* at 759.

The regulations constrain "where religious congregants may gather," as characterized by the majority opinion, at 19, only in an attenuated sense because generally speaking, religious congregants ordinarily must gather somewhere else, outside the area zoned for agriculture. In this sense, a conditional use permitting scheme that includes expressive activities amongst those sometimes-permitted activities arguably "furthers, rather than constricts, free speech" by providing more opportunities for expressive activities where otherwise (constitutionally[2]) prohibited. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002). "Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but . . . this abuse must be dealt with if and when a pattern of unlawful favoritism appears. . . ." *Id.*

I am not writing on a blank slate, however, and I agree with my colleagues that the nexus requirement is satisfied here based on *Epona*. However, in my view, our cases have expanded the concept of a "nexus to expression" beyond recognition or logic. The scheme here neither "by its terms seeks to regulate spoken words or patently expressive or

[2] It is well-established that a content-neutral zoning law confining expressive activities to certain areas is generally constitutionally valid "so long as it furthers a substantial governmental interest and does not unreasonably limit alternative avenues of communication." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986)).

communicative conduct, such as picketing or handbilling," nor "significantly restricts opportunities for expression." *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1135 (9th Cir. 2004) (citations omitted). Our binding precedents have no doubt expanded that framework, but it is my view that the more appropriate kind of challenge for plaintiffs, like the plaintiffs in in this case, who believe the permitting process was used to censor *them*, is as-applied.

II. Discretion Here Is Sufficiently Constrained

I part ways from my colleagues and the conclusion stated in Part II.C of the majority opinion regarding the guideline's curb on discretion. In my view, the guideline "contain[s] adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas*, 534 U.S. at 323. I do not agree that Plaintiffs' facial challenge should succeed.

I am guided by the Supreme Court's decision in *Thomas*. In that case, the Court considered whether Chicago's permit scheme for large-scale events in public parks gave "licensing official[s] [] unduly broad discretion in determining whether to grant or deny a permit." *Id.*

> We think not. As we have described, the Park District may deny a permit only for one or more of the reasons set forth in the ordinance. It may deny, for example, when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and place; *when the intended use would*

> *present an unreasonable danger to the health or safety of park users or Park District employees*; or when the applicant has violated the terms of a prior permit.

Id. at 324 (citation omitted) (emphasis added).

We are principally focused in this case on two of the five guidelines set forth in H.A.R. § 15-15-95(c).[3] That provision

[3] H.A.R. § 15-15-95(c) provides:

> (c) Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. The following guidelines are established in determining an "unusual and reasonable use":
>
> > (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, [Hawai'i Revised Statutes], and the rules of the [county planning] commission;
> >
> > (2) The proposed use would not adversely affect surrounding property;
> >
> > (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
> >
> > (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
> >
> > (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

opens by making clear that land zoned as agricultural, like the land at issue in this case, can be approved for other activities based on the application of guidelines expressed in the subsections that follow. It bears repeating that, as noted above at 39, that approach "furthers, rather than constricts, free speech." *Thomas*, 534 U.S. at 325.

The two guidelines relied upon by the Maui Planning Commission in denying Plaintiffs' application were subsections (2) and (3):

> (2) The proposed use would not adversely affect surrounding property;
>
> (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;

The majority opinion rests entirely on subsection (2) and does not consider the denial based on subsection (3), with implications I note below, at 46–47. It can be argued that the term "adversely affect" in H.A.R. § 15-15-95(c)(2), standing alone, could be more concrete, but it does not appear to me to be markedly more flexible or impose fewer constraints on decisionmakers than the "unreasonable danger to [] health or safety" standard that *Thomas* held was sufficiently "narrowly drawn, reasonable and definite." 534 U.S. at 324 (citation omitted).

Perhaps more importantly, the inquiry does not end there. The *Thomas* court thought that the "unreasonable danger" condition sufficiently "guide[d] the licensor's determination" *in combination with the rest of the scheme*. *Id.* (citation omitted). Beyond the substance of the

regulations, *Thomas* considered in the calculus all the procedural protections that ensured the permitting process would not be abused:

> Moreover, the Park District must process applications within 28 days, and must clearly explain its reasons for any denial. These grounds are reasonably specific and objective, and do not leave the decision to the whim of the administrator. . . . And they are enforceable on review—first by appeal to the General Superintendent of the Park District, and then by writ of common-law certiorari in the Illinois courts, which provides essentially the same type of review as that provided by the Illinois administrative procedure act.

Id. (quotation marks and citations omitted).

This court has also consistently recognized that procedural protections help cabin discretion. "[R]equiring officials to state the reasons for a license denial provides an important check on official discretion by 'facilitat[ing] effective review of the official's determination' and 'ensur[ing] that the determination . . . is properly limited in scope.'" *Epona*, 876 F.3d at 1224 (alterations in original) (quoting *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression and Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 801 (9th Cir. 2008)).

As a result, the scope of the procedural safeguards must weigh on whether an alleged prior restraint sufficiently constrains discretion within constitutional limits. *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996) ("Moreover, City officials can deny a permit without offering any evidence to support the

conclusion that a particular structure or sign is detrimental to the community."); *Long Beach*, 574 F.3d at 1028–29 (reasoning that the government decisionmaker's discretion was cabined in part because the ordinance "require[d] the City Manager to consult with the City Attorney and to provide to an applicant a written explanation for a decision that imposes conditions on the permit" or "allow[ed], in the alternative, a direct appeal of a permitting decision to either the City Council or state court"). In *Epona*, for instance, we considered the ordinance's mandate that the decisionmaker support a permit denial with factual findings, but because the degree of specificity required of those findings was unclear, and "[i]n light of . . . the existence of multiple conditions that . . . are not definite and specific," the scheme conferred too much discretion. 876 F.3d at 1225.

The majority brushes off the procedural protections in the challenged scheme here because they cannot "cure a substantive constitutional violation." Majority op. at 22. But this framing misunderstands the role of process in the inquiry. Our cases—including *Epona*—instruct us to review *both* the substance of the standards *and* the procedural protections baked into the challenged schemes, and neither is separable from the other. "Neither the provision of specific guidelines nor a requirement of specific factual findings is 'necessarily determinative of whether a statute confers excess discretion.'" *Id.* (quoting *Seattle Affiliate*, 550 F.3d at 798–99). "Rather, we look to the totality of the factors to assess whether an ordinance 'contains adequate safeguards to protect against official abuse.'" *Id.* (quoting *Seattle Affiliate*, 550 F.3d at 799).

This makes sense, because a less objective—but not boundless—standard when coupled with rigorous protections can both prevent the harm of self-censorship and

help weed out legitimate denials of permits from the "illegitimate abuse of censorial power." *Long Beach*, 574 F.3d at 1020 (quoting *City of Lakewood*, 486 U.S. at 758). A speaker who knows he will get a fair shake is less likely to self-censor, and a government official tasked with applying a less definite standard is effectively prevented from censorial decision-making by the requirement that their reasons be expressly stated or the availability to an appeal to a higher authority. Absolute precision of language is impossible, and we must not "insist[] upon a degree of rigidity that is found in few legal arrangements," when the scheme as a whole serves the purposes undergirding facial attacks. *Id.* at 1030 (quoting *Thomas*, 534 U.S. at 325).

The State of Hawai'i's answering brief details the many procedural protections afforded a permit applicant. The Hawai'i Administrative Procedure Act applies to county commissions. Hawai'i Revised Statutes (H.R.S.) § 91-1. By dint of state statute, the Maui County Charter, and Maui Planning Commission rules, the Commission must make a decision within set deadlines that vary in length depending on whether a contested case hearing is held. *See* H.R.S. § 91-13.5. Formal intervention triggers a contested case hearing per Commission rules, and a contested case hearing is sometimes required as a matter of state constitutional law in any event. *See In re Hawai'i Elec. Light Co., Inc. (HELCO)*, 445 P.3d 673, 685 (Haw. 2019). The parties in this case indeed participated in a full contested case hearing.[4] Statute,

[4] Although what is and is not a contested case hearing can sometimes be difficult to discern under Hawai'i state law, the agency proceedings must have been a contested case hearing here because a contested case hearing is a prerequisite to the state court's jurisdiction. *See HELCO*, 445 P.3d at 685. In any event, what in fact happened in this case is ultimately neither here nor there for purposes of a facial, rather than as-applied, challenge. *See S. Or. Barter Fair*, 372 F.3d at 1139 ("Should

ordinance, and rules require written findings when the decision is adverse to the applicant, whether the proceeding is a contested case hearing or not. HRS § 91-12. Aggrieved parties in a contested case may appeal to the state circuit court, as happened here. H.R.S. § 91-14. And the Hawai‘i Supreme Court has interpreted agency adjudications to trigger procedural safeguards as a matter of due process under the state constitution. *See, e.g.*, *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 363 P.3d 224, 237 (Haw. 2015). There are, in short, a range of procedural protections that ensure that a permit applicant receives a fair decision on their application. These protections distinguish this case from *Epona*, where the lack of clarity surrounding the required procedures in combination with *multiple* vague guidelines rendered the scheme unconstitutional. 876 F.3d at 1224–25.

The "adverse effects" guideline may be "somewhat elastic and require reasonable discretion to be exercised by the permitting authority," but it is buttressed by strong procedural protections to prevent misuse. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1084 (9th Cir. 2006). The scheme affords government decisionmakers discretion within constitutional bounds. I respectfully dissent from the majority opinion's conclusion to the contrary.

III. Not All Guidelines Are Unconstitutional

Even if the adverse effects guideline, viewed alone, is unconstitutional, the majority opinion leaves unclear how much of H.A.R. § 15-15-95, if any, survives. "[A] federal court should not extend its invalidation of a statute further

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abuse [of the processes that the court held to withstand a facial challenge] occur, it may be remedied adequately through as-applied challenges.").

than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). The district court analyzed the other relevant guideline, the "unreasonable burden" guideline, § 15-15-95(c)(3), and, in my view, did so correctly, concluding it did not grant an impermissible degree of discretion to the Commission.

It is left for the district court to consider in the first instance whether § 15-15-95(c)(2) is severable from the rest of the statute. *See* Majority op. at 23 n.5; *Long Beach*, 574 F.3d at 1044 (remanding to the district court to consider severability where "some features [of the challenged ordinance] are constitutional and [] others are unconstitutional"). Plaintiffs, like the majority opinion, have focused only on subsection (2) and have not persuaded me that subsection (3) or the other subjections should not remain standing. If only the "adverse effects" guideline need be excised from the scheme, the denial of Plaintiffs' application by the Commission could still be supported by its application of the "unreasonable burden" guideline.

IV. Conclusion

I reluctantly concur that Plaintiffs may bring a facial challenge because the nexus to expression requirement has, based on our precedents, been met. I respectfully dissent, however, as to whether the guidelines at issue here confer unbridled discretion.

Even if the "adverse effects" guideline is deemed unconstitutional for providing too much discretion, as the majority opinion concludes, that does not mean the whole system for evaluating applications for conditional use permits must fall. Nor does it mean that the denial of Plaintiffs' application by the Commission was not properly based on its conclusion that granting the application "would

increase traffic and burden public agencies providing roads and streets, police, and fire protection, in conflict with [subsection (3)]," the "unreasonable burden" guideline. These are among the questions that may be considered on remand.