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JURISDICTIONAL STATEMENT

On May 28, 2008, Centro Familiar Cristiano Buenas Nuevas ("Centro Familiar") and Pastor Jorge Orozco (collectively, "Plaintiffs") brought suit in the United States District Court for the District of Arizona against the City of Yuma, Arizona (the "City"), alleging claims for declaratory and injunctive relief and damages. Those claims arose out of the City's denial of a Conditional Use Permit for certain property located on Main Street in Yuma's Old Town Historic District. The City denied a Conditional Use Permit because Plaintiffs' proposed use of the property as a church would be incompatible with and would adversely impact upon the Management Plan for the congressionally-created Yuma Crossing National Heritage Area, which encompasses the Old Town Historic District. (District Court Docket Sheet ("Doc.") 1; Excerpts of Record ("ER") 550; Supplemental Excerpts of Record ("SER") 1 (Exhibit A to Doc. 1); Doc. 23 (ER 501).)

Plaintiffs' claims were based on the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-1 through 2000cc-5, as well as the United States Constitution and A.R.S. § 41-1493.01. The District Court had federal question jurisdiction over Plaintiffs' federal claims under 28 U.S.C. § 1331 and had supplemental jurisdiction over Plaintiffs' state law claim under 28 U.S.C. § 1367. The District Court entered final judgment against Plaintiffs on all of their claims for relief on January 30, 2009. (Doc. 68 (ER 33).)

Plaintiffs' notice of appeal, filed on February 27, 2009, was timely under FRAP 4(a)(1)(A). (Doc. 70 (ER 34).) This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The City demonstrated at trial that it was not targeting religious organizations because of their religious motivations, and it did not pursue its interests only against religious organizations. Rather, the City proved it was guided by the neutral desire to redevelop the Old Town District in general, and Main Street in particular as a tourism, entertainment, and retail area. Therefore, land uses that posed particularly acute and obvious threats to that goal if left unregulated, irrespective of their secular or religious motivation, were allowed only on condition of obtaining a Conditional Use Permit. Given this evidence, did the District Court correctly rule that Plaintiffs' claims under the Equal Terms provision of RLUIPA failed?

2. Plaintiffs did not even allege that the property at issue has some religious significance such that Plaintiffs could bring a claim under the First Amendment's Free Exercise Clause. Given that omission, and the fact that the City's Zoning Code is facially neutral and generally applicable, did the District Court correctly rule that Plaintiffs' claims under the Free Exercise Clause failed?

STATEMENT OF THE CASE

Nature Of The Case

In the District Court, Plaintiffs asserted a host of federal statutory and constitutional claims, as well as a claim under A.R.S. § 41-1493.01, all arising out of the City's denial of a Conditional Use Permit for Plaintiffs' newly-acquired property. Plaintiffs proposed to use that property, which is located on Main Street in Yuma's Old Town District, a part of the Yuma Crossing National Heritage Area, as a church. (Doc. 1 (ER 550); SER 1 (Exhibit A to Doc. 1).) Plaintiffs sought declaratory and injunctive relief and damages. (Doc. 1 (ER 550).) The City denied any liability to Plaintiffs on the basis that granting a Conditional Use Permit would have been antithetical to approved plans for redevelopment of the Old Town District for a variety of reasons and thus, under the case law, denial of the permit did not run afoul of the statutes or constitutional precepts relied upon by Plaintiffs. (Doc. 23 (ER 501).)

Course Of Proceedings

After the parties agreed to consolidate Plaintiffs' motion for a preliminary injunction with the trial on the merits under Rule 65(a)(2), Fed. R. Civ. P., the District Court conducted a bench trial on October 1, 2008. (Doc. 57 (ER 472); Doc. 61 (ER 37).)

Disposition Below

The District Court issued its Findings of Fact, Conclusions of Law, and Order on January 30, 2009. (Doc. 67 (ER 1).) The District Court denied Plaintiffs' motion for preliminary injunction, ruled against Plaintiffs on all of their claims, and ordered that judgment be entered against Plaintiffs and in favor of the City. (Doc. 67 (ER 1).) Final judgment in accordance with the District Court's Order was entered that same day. (Doc. 68 (ER 33).)

The Appeal

On appeal, Plaintiffs challenge only the District Court's rulings concerning first, the Equal Terms provision of RLUIPA, 42 U.S.C. §§ 2000cc(b)(1), and second, the Free Exercise Clause of the First Amendment. *See* Opening Brief. All of their other claims are therefore deemed abandoned. *See Knevelbaard Dairies v. Kraft Foods, Inc*., 232 F.3d 979, 984 (9th Cir. 2000) (where plaintiff/appellant does not raise on appeal district court's dismissal of claims, those claims are deemed abandoned); FRAP 28(a)(9)(A) (requiring that the appellant's brief contain "appellant's contentions and the reasons for them").

STATEMENT OF FACTS[1]

The City Of Yuma And Its Redevelopment Efforts

The City of Yuma lies in the southwestern corner of the State of Arizona, near the confluence of the Colorado River and the Gila River. Since the mid-1990s, the City has been redeveloping its historic downtown and riverfront areas. The City began by producing a document entitled "Historic Downtown Yuma: Imagine a 2020 Vision," which envisioned revitalizing Main Street and the riverfront with activity generating uses and attractions. Throughout the 1990s, significant public investments were made to increase tourism and visitation in those areas, such as creating the Yuma Crossing State Historic Park, clearing uses that did not generate visitation, and restoring historic sites on Main Street, such as the San Carlos Hotel.

[1] The Statement of Facts is taken from the District Court's Findings of Fact, which were, in turn, largely based on facts stipulated to by the parties. *See* ER 2-ER 10; Doc. 38; Doc. 43. On appeal, Plaintiffs have not challenged any of the District Court's factual findings. Any issues concerning the Findings of Fact have thus been waived and may not be resurrected in a Reply Brief. *See* Fed. R. App. P. 28(a)(9)(A) ("The appellant's brief must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009) ("[b]ecause this argument was not raised clearly and distinctly in the opening brief, it has been waived"); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("[w]e review only issues which are argued specifically and distinctly in a party's opening brief"); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) (declining to reach issue raised for the first time in the reply brief).

In 2000, the United States Congress created the Yuma Crossing National Heritage Area ("YCNHA"), a 22 square mile area along the Colorado River that includes the City's riverfront, historic downtown, and surrounding historic neighborhoods. The express purpose of the YCNHA is to promote development of those areas. The YCNHA is a private non-profit corporation whose executive director is paid by the City. Working from the City's 2020 Vision, and in consultation with the local community, the YCNHA Management Plan (the "Management Plan") was created and approved locally and by the Secretary of the Interior of the United States in July of 2002. The Management Plan includes seven districts, including the Downtown Riverfront and Main Street. The Downtown Riverfront area will include a new Arizona Welcome Center, which is financed with $ 4 million in state investment. It also includes Gateway Park, which was financed with $ 4.4 million in public investment, and a $ 30 million hotel conference center.

Yuma's Main Street, Which Is Part Of The Old Town District

The City's Main Street terminates near Gateway Park. The Management Plan seeks to integrate the Main Street area with Gateway Park by attracting "private investment in new residential housing, office development, entertainment, and in-fill development." (Trial Ex. 28 at 12 (SER 30).) To this end, the City assisted in the creation of Main Street Cinemas with a $ 250,000 loan, invested $ 6

million in the renovation of the Art Center and Theater, and sold land at a discounted price to promote a mixed-use commercial and residential development called "Shopkeepers." Additionally, Main Street had been closed to vehicular traffic for many years. Closure of the street enabled the City to hold large festivals in the area but decreased visitation to adjacent businesses. The Management Plan proposed to reopen Main Street as a "convertible street," accessible to vehicular traffic at most times, but able to be closed for festivals and other large events. That proposal came to fruition in early 2007, just before the Church submitted its application for a Conditional Use Permit ("CUP"), when Main Street was reopened with $ 3.8 million in public investment. Such public and private investments, along with the planning documentation, demonstrate that the City has a bona fide, unique, and long-term redevelopment plan for Main Street.

Yuma's Regulation Of Land Uses Within The Old Town District

Main Street encompasses three city blocks from 1st Street to Giss Parkway in downtown Yuma. It is part of the Old Town District, which is defined by Yuma City Code § 154-185. As explained in the Code:

> The Old Town (OT) District is intended to be a retail, business, and government center with a special emphasis on tourism and historic preservation, due to the unique qualities present in the Old Town (OT) District that set it apart from all other districts in the city. In this district, commercial establishments are intended to serve the residents of the city, as well as visitors to the area. The priority of this district is to establish and support a

> mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district.

The Code permits a variety of uses as a matter of right within the Old Town District, including "Membership organizations (except religious organizations (SIC 86))." Yuma City Code § 154-187. The abbreviation "SIC" refers to the Standard Industrial Classification Manual, a publication of the United States Office of Management and Budget that is used to classify establishments for statistical purposes. Notably, SIC 8661 defines "Religious Organizations" to include far more than churches:

> Establishments of religious organizations operated for worship, religious training or study, government or administration of an organized religion, or for promotion of religious activities. Other establishments maintained by religious organizations, such as educational institutions, hospitals, publishing houses, reading rooms social services, and secondhand stores, are classified according to their primary activity. Also included in this industry are religious groups which reach the public through radio or television media.

(Doc. 38 at p.7.)

The Code also permits certain uses upon the granting of a CUP, including drive-through facilities, gasoline service stations, educational services, job training and vocational rehabilitation services, religious organizations, outdoor sales, and utility installations. Yuma City Code § 154-188. Religious organizations are allowed as a matter of right in Transitional Districts, Limited Commercial

Districts, General Commercial Districts, and Planned Shopping Center Districts, which comprise 3.7 square miles of the City.

Within the Old Town District, but not on Main Street, are a Masonic Temple, a Fraternal Order of Eagles, and a Christian Science Church and Reading Room. The Masonic Temple and the Eagles' existence in downtown predated the creation of the Old Town District. Some of the uses currently on Main Street are Main Street Cinemas, the Yuma Art Center and Historic Yuma Theatre, Golden Roadrunners Dance Hall, Americana Personalized Fitness Center, Dawn's Dance School, and the Yuma Community Theater Company. The City has never approved a CUP for any religious organization, educational service, or job training or vocational rehabilitation service to locate on or near Main Street.

Plaintiffs' Search For Property To Purchase

Pastor Jorge Orozco directed Martin Lara, the Church's administrator, to locate a property for the Church for the first time in 1999. However, because the Church did not have sufficient funds, Mr. Lara did not actually start identifying potential properties until 2003. Mr. Lara identified two potential buildings in September of 2003 and March of 2004. He attended pre-development meetings for both buildings with the City's Department of Community Development. Neither building was in downtown Yuma. Mr. Lara and Pastor Orozco ultimately decided not to buy either building.

Sometime in 2004 the Church began leasing its current location, which is half of a 19,000 square-foot former movie theater at 3142 Arizona Avenue in Yuma. The building is not located in downtown Yuma. For various reasons, including the Church's belief that its half of the building is too small and cannot accommodate activities essential to its faith, such as corporate worship, public baptism, religious instruction classes including Sunday school and Bible study, and general education instruction, the Church decided to continue its search for a property to purchase. In 2005, the Church made a down payment on land outside of the City limits and made plans to build a 6,000 square-foot church with a seating capacity for 250 to 300 people. At that time, the Church believed that a building of that size would adequately meet its present needs. (Trial Tr. at 135 (ER 171).) The Church did not ultimately complete that transaction because the builder raised the price above what the Church was able to pay. Much later, in January 2007, Mr. Lara identified a 4,500 square-foot property at 2879 S. Ave. 4E and attended a pre-development meeting with the City. Again, the property was not located in downtown Yuma. The City informed the Church that it would need to obtain a special permit from a nearby military installation because the building fell within a sound contour. The parking area also required improvements. The Church decided not to purchase the property.

The Church next contacted a realtor, John Abarca, to help them locate a suitable property. Mr. Lara requested Mr. Abarca to locate a facility that could eventually accommodate a 400-person congregation (although at the time of trial, the Church had 250 members, of which 200 regularly attend its services). Mr. Abarca decided that a 10,000 to 12,000 square-foot building would be ideal. He used the City's regulations to determine that the Church would need 100 parking spaces.

Mr. Abarca conducted a countywide search for properties that had a large open area that could be used as a sanctuary. Although there are over 9,000 acres of undeveloped land within the City, he did not search for undeveloped land upon which the Church could build a new building. He also did not conduct an exhaustive search for buildings that would meet the needs of the Church's current congregation.[2] (Trial Tr. at 63 (ER 99).)

Mr. Abarca identified nine properties for sale that might fit the Church's needs. Mr. Abarca did not present all nine of those options to Mr. Lara, however, due to the Church's budget for acquiring a property, which was approximately $ 1 million (including any necessary remodeling).

[2] A 200-member congregation would need only 50 parking spaces and a minimum of 1,400 to 1,500 square feet for seating, plus additional space for ancillary uses.

Additionally, Mr. Lara had asked Mr. Abarca to concentrate on properties on Main Street in downtown Yuma because the City's parking requirements do not apply to buildings there. Although the Church believes that ministering to the downtown area is part of its religious mission, the fact is that from 1999 until 2007 the Church had never looked for property in downtown Yuma or on Main Street. What motivated the Church to begin to look at properties on Main Street was learning that the City's usual parking requirements do not apply there. (Trial Tr. at 54, 107 (ER 90, 143).) There was no particular religious reason that the Church needed to locate in the downtown area. Ultimately, Mr. Abarca presented only three buildings to Mr. Lara. All three were on or adjacent to Main Street. (Trial Tr. at 55, 108 (ER 91, 144).)

Of the three properties that Mr. Abarca did present, Mr. Lara rejected two because they were too expensive. The remaining property, which is the focus of this litigation, is located at 354 S. Main St. (the "Property"). It is a 17,466 square-foot building that used to be a J.C. Penny department store from 1952 to 1976. From 1977 to 1993, the building was used by garment manufacturers as a warehouse and factory. Since 1993, the Property has been vacant except for limited temporary uses. The City declined to support the Yuma Reading Council, United Way, Parents Anonymous, and Big Brothers Big Sisters when those

organizations offered to purchase and renovate 354 S. Main St. for use in their community work. (Trial Ex. 3 at 58 (ER 371).)

The Church Purchases The Property *Before* Applying For A CUP

The Church contracted to purchase 354 S. Main St. on February 13, 2007. The Property was in foreclosure and available at a bargain price, so the Church felt pressure to move on the deal quickly. Only after contracting to purchase the Property, on February 20, 2007, did the Church attend a pre-development meeting with the City. Due to their concern about the rushed timetable of the purchase, the Church was particularly careful at the meeting to ask whether there were any potential problems with operating a church at the property. City staff informed the Church that a CUP was required for religious assemblies to operate in the Old Town District, of which Main Street is a part. The Church understood at that time that the power to grant or deny a CUP lies exclusively with the City Planning and Zoning Commission (the "Commission") and the Yuma City Council. The Church also understood that they would have to attend a hearing before the Commission. City staff informed the Church that a neighborhood meeting for public comments had to take place before the hearing. It is common practice for a prospective buyer of real property either to obtain a necessary CUP before closing the purchase or to provide in the contract that obtaining such a CUP is a condition of the buyer's obligation to close the purchase. But because the Property was in foreclosure and

the owner was not willing to wait any longer, on March 5, 2007, the Church consciously chose to close on the purchase before applying for the necessary CUP. (Trial Tr. at 65-72, 127 (ER 101-108, 163); Trial Ex. 4 at 15-16 (ER 433-434).)

The CUP Application And Neighborhood Meeting

Shortly after Main Street was reopened as a convertible street, on March 30, 2007, the Church submitted its CUP application. In the application, the Church represented that it is a 200-member congregation with services or activities on a daily basis. The proposed activities included church services, music and dance lessons, counseling, summer Bible camps, GED classes, English classes, and computer classes. The majority of the activities the Church proposed were to take place after 4:00 p.m. The Church also stated its desire to participate in community events on Main Street.

The neighborhood meeting was held on May 30, 2007. Many neighbors expressed concerns about the Church, including that the Church would detract from the retail focus of Main Street and would not have to pay taxes for the upkeep of public areas, such as parking areas, along Main Street, and that the State of Arizona would prohibit future liquor licenses for properties within 300 feet of the Church. In response, the Church raised the possibility of making a payment in lieu of taxes for upkeep of the common areas on Main Street and running a coffee shop out of the front of its building.

The City's Community Planning Staff Report Recommends Denial

The City's Community Planning staff prepared a Staff Report for the Commission recommending denial of the CUP. *See generally* ER 313-ER 417. As grounds for the recommendation, the report stated that the Church's proposed use "does not implement the purpose statement (Section 154-185) of the Zoning Ordinance . . . nor does it conform to the Historic Yuma Downtown Plan 2020 (which is the basis for the entire Riverfront and Heritage Area Redevelopment effort) . . . and is in conflict with the City's long-term goal of Main Street as a cultural, retail, recreation, and entertainment hub for the north end of the City."

The staff observed that granting the CUP would have some positive effect, including "the possibility of investment and rehabilitation of a deteriorated and long-vacant building in the Old Town District, more people coming to the downtown area during off-hours, [and] the aesthetic improvement to Main Street resulting from the restoration of the building." According to the staff, however, granting the CUP for the Church would have been inconsistent with prior City Council actions, which had sought to redevelop and revitalize Main Street with a complementary mix of retail, restaurant, and entertainment uses. The staff referred to the YCNHA Management Plan, which established the goal of "revitalization of the Downtown and Riverfront into a 24/7 downtown neighborhood involving retail, residential, office and entertainment . . . to feature Downtown and the

Riverfront as a tourist destination." The report included a list of the many public investments that had been made in the Main Street and riverfront areas to that end.

The staff found the CUP application particularly problematic because the Church desired to locate on Main Street. The report noted differences between the Old Town District in general and Main Street in specific. First, the Old Town District encompasses more than Main Street. There are presently churches in the Old Town District, but they are not on the commercial strip of Main Street. Second, there are unique aspects of Main Street not seen elsewhere in the Old Town District. These aspects include: no on-site parking required of any business; historic commercial uses and buildings between 1st Street and Giss Parkway; a concentration of entertainment venues; significant financial investment by the City of Yuma in the streets and revitalization of buildings; a pedestrian friendly environment; and numerous street fair events throughout the year.

Additionally, the staff members observed that allowing the Church to locate on Main Street would limit additional liquor licensing along the street. The staff referenced A.R.S. § 4-207, which restricts most liquor licensing within 300 feet of schools and churches. Because of that state statute, granting the Church the CUP would have foreclosed new liquor licenses for bars, breweries, wine bars, clubs, liquor stores, and all other retail purveyors of alcohol, other than restaurants and hotels, for slightly more than one-third of Main Street's total area (one block out of

three blocks). The staff members were concerned that granting the CUP could harm property values in that area and would lead to the loss of a retail and entertainment direction for Main Street.

Based upon all of these considerations, the report concluded that granting the CUP would be "detrimental, or injurious, to the value of property in the vicinity, or the general welfare of the city" and recommended denial of the CUP. Alternatively, if the Commission voted to grant the CUP, the staff recommended that the Church pay a fee in lieu of taxes for maintenance of common facilities on Main Street, as had been suggested at the neighborhood meeting.

The staff would not have looked with the same disfavor on an application for the Church to locate elsewhere in the Old Town District.

The Commission And City Council Concurred With The Denial

The hearing before the Commission took place on July 9, 2007. The staff elaborated on the points discussed above and representatives of the Church spoke in favor of granting the CUP. After all public comments had been taken, the commissioners unanimously voted to deny the CUP application. On December 5, 2007, the Yuma City Council declined to revisit the Commission's decision.

SUMMARY OF ARGUMENT

For well over a decade, much effort and money (both public and private) has been devoted to the redevelopment of the unique Main Street area in the Old Town

Historic District of Yuma, a part of the congressionally-created Yuma Crossing National Heritage Area. The goal for Main Street is to create a lively pedestrian-oriented district by providing retail, restaurant, and cultural and entertainment venues that will attract tourists, shoppers, restaurant, and bar patrons. As the District Court found, "[s]uch public and private investments, along with the planning documentation, demonstrate that the City has a bona fide, unique, and long-term redevelopment plan for Main Street." (ER 3.)

The Yuma Zoning Code is carefully crafted to implement that plan. Under the Code, religious organizations (as well as various other uses, including schools) can only locate in the Old Town Historic District upon the granting of a CUP. At least two factors drive this requirement. First, religious organizations frequently use a single facility not only for purposes of assembly but also for various accessary uses that would trigger the Zoning Code's CUP requirement if pursued independently. Second, the State of Arizona restricts the issuance of liquor licenses within 300 feet of religious organizations, *see* A.R.S. § 4-207, thereby compromising the ability of new bars, breweries, wine bars, clubs, liquor stores, and most other retail purveyors of alcohol to locate on Main Street.

The CUP requirement thus enables the City to (1) assess and mitigate the impact that accessary uses might have on surrounding land uses and (2) ensure that the mix of uses able to locate on Main Street is not altered in a manner inconsistent

with (and potentially fatal to) the City's redevelopment plan.

The Equal Terms provision of RLUIPA is not offended by the City's Zoning Code, either on its face or as applied, because the Code does not treat religious assemblies or institutions less well than secular assemblies or institutions *that are similarly situated as to the regulatory purpose*. *See Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007). The CUP requirement and the denial of Plaintiffs' CUP application were not motivated by any anti-religious animus but rather were grounded on the City's legitimate concerns about the land use impacts of a church and the adverse consequences that locating a church on Main Street would have for the City's redevelopment plan. This is shown by the fact that schools, which similarly trigger Arizona's liquor license restrictions, must also have a CUP to locate in the Old Town District.

Plaintiffs' Free Exercise claim is equally ill-founded. Because Plaintiffs do not challenge on appeal the finding that there is no particular religious reason the Church must locate on Main Street, they cannot state a claim. Moreover, the Zoning Code is a neutral law of general applicability that passes review under the rational basis standard.

Plaintiffs are not exempt from the zoning laws, either under RLUIPA or the Free Exercise Clause. And nothing in RLUIPA or the First Amendment requires the City to allow a church to locate on Main Street when such a use would damage

the City's attempt to create a vibrant, lively pedestrian-oriented district in the Main Street area of the Old Town Historic District.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the District Court's factual findings under the clearly erroneous standard. "Factual findings are clearly erroneous 'if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009). That standard is irrelevant here, however, because Plaintiffs have not challenged any of the District Court's findings. *See* footnote 1, *supra*.

As for the District Court's legal conclusions and statutory interpretations, those are reviewed *de novo*. *See, e.g.*, *Ileto v. Glock, Inc*., 565 F.3d 1126, 1131 (9th Cir. 2009). This Court may affirm the judgment below on any basis supported by the record, including a basis different than that relied upon by the District Court. *See, e.g., Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 633 (9th Cir. 2008) ("'[w]e may affirm the district court on any basis supported by the record'"); *Atel Fin. Corp. v. Quaker Coal Co*., 321 F.3d 924, 925 (9th Cir. 2003) (affirming, on a different ground, judgment entered after bench trial).

II. NEITHER RLUIPA NOR THE CONSTITUTION IMMUNIZES PLAINTIFFS FROM REASONABLE ZONING REGULATIONS

Plaintiffs' claims must be viewed in the larger context of municipalities' acknowledged power to regulate land use within their borders. Since at least the Supreme Court's historic decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Court upheld a city's power to adopt a comprehensive municipal zoning ordinance, it has been recognized that regulation of land use is "a function traditionally performed by local governments." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994). Neither RLUIPA nor the Free Exercise Clause should be read to abrogate that power. But, that is the erroneous notion upon which Plaintiffs' appeal depends.

As a review of the case law demonstrates, the sweeping interpretation of RLUIPA's Equal Terms provision that Plaintiffs advance here is antithetical to both First Amendment and RLUIPA jurisprudence. Thus, as the Tenth Circuit has recognized, a church has neither a "constitutional right to be free from reasonable zoning regulations" nor a "constitutional right to build its house of worship where it pleases." *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824-25 (10th Cir. 1988). Similarly, the Seventh Circuit strongly disagreed with the interpretation of RLUIPA advanced by several churches that would "require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright

exemption from land-use regulations. Unfortunately for [the churches], no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) (emphasis added).

Affirming these same principles, the Third Circuit, in the seminal RLUIPA case of *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253, 268 (3d Cir. 2007), squarely rejected a "reading of the statute [that] would lead to the conclusion that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed."[3]

The "no free pass" conclusion is fully consonant with the Joint Statement of the two chief Senate sponsors of RLUIPA, Senators Kennedy and Hatch, who

[3] Recent lower court decisions also reflect these precepts. For example, in *Elijah Group, Inc., v. City of Leon Valley, Texas*, 2009 WL 3247996 *12 (W.D. Tex. Oct. 2, 2009), the court admonished that "the facts show that this case arises from the Church's desire to use a particular piece of property for a non-conforming use. No law requires the City to change its master plan just because the Church is a church." Similarly, in *International Church of the Foursquare Gospel v. City of San Leandro*, 632 F. Supp. 2d 925, 942 (N.D. Cal. 2008), the court explained that "RLUIPA does not require cities to grant churches preferential rights over other property owners, or to protect churches from the reality that the marketplace might dictate that certain facilities are not available to those who desire them," citing *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1027-28 (9th Cir. 2004). The *International Church* court further remarked that nothing in the legislative history of RLUIPA indicated "the intent of Congress that the legislation abrogate all local zoning regulations that distinguish between private or nonprofit assemblies and institutions, and commercial or for-profit gatherings of multiple persons." *International Church of the Foursquare Gospel*, 632 F. Supp. 2d at 947.

opined that RLUIPA "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination and unfair delay." (146 Cong. Rec. S. 7774, 7776 (2000).)

In sum, Plaintiffs have no statutory or constitutional exemption from the zoning laws. Thus, the City's denial of a CUP that would have allowed the Property to be converted to a use that would undermine the City's attempt to create a vibrant, lively pedestrian-oriented district in the Main Street area of the Old Town Historic District should be upheld. Nothing in RLUIPA or the Free Exercise Clause requires otherwise.

III. PLAINTIFFS' EQUAL TERMS CLAIMS UNDER RLUIPA FAIL

Plaintiffs' claims brought under the Equal Terms provision of RLUIPA fail for two reasons. First, Section 154-187 the City's Zoning Code does *not* treat religious assemblies on less than equal terms with secular assemblies *that would cause an equivalent negative impact on the City's regulatory goals*. Second, if Plaintiffs were to locate their church in the Old Town Historic District, state law would prohibit the issuance of liquor licenses within 300 feet of its premises. Thus, if the City could not issue liquor licenses throughout that area, the City would be prevented from creating the vibrant, lively, pedestrian-oriented

downtown where restaurants, clubs, bars, retail, and entertainment facilities synergize, which is what the YCNHA Management Plan and the Zoning Code both envision.

A. The Basic Principles Of The Equal Terms Provision Of RLUIPA

RLUIPA's Equal Terms provision is simply stated:

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1). Plaintiffs' primary challenge on this appeal is that the City's Zoning Code facially violates that provision. In addition, Plaintiffs contend that the City's actual denial of the CUP violated RLUIPA's Equal Terms provision.

Certain general principles govern the application of the Equal Terms provision, as the District Court recognized. One of those principles is that "[t]he mere fact that the City's zoning code identifies religious organizations as a distinct type of use does not impair its facial neutrality." (ER 17.)[4] This conclusion flows from the fact that there can be legitimate reasons for a zoning code to identify

[4] Citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) ("Merely the mention of a church or synagogue in a zoning code does not destroy a zoning code's neutrality . . . ."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."). (ER 17.)

religious organizations as a distinct type of land use. Here, the legitimate reason that Yuma Zoning Code § 154-187 distinguishes between "religious organizations" and "membership organizations" is based upon the SIC's treatment of religious organizations as a subset of the broader category of membership organizations. As noted above, SIC 8661 defines "Religious Organizations" to include far more than churches. The Zoning Code's recognition of that distinction "does not by itself suggest that it treats religious and nonreligious assemblies and institutions on less than equal terms." (ER 17.) As the District Court correctly concluded, "[a] zoning ordinance does not violate the equal terms provision, even if it permits some secular assemblies or institutions and excludes religious assemblies or institutions, so long as there is a neutral and generally applicable principle for doing so." (ER 22-23.)

It is also well to keep in mind that "RLUIPA's Equal Terms provision requires equal treatment, not special treatment." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1313 (11th Cir. 2006).

Another principle is that RLUIPA's Equal Terms provision "codifies the Supreme Court's Free Exercise Clause jurisprudence regarding neutral laws of general applicability." (ER 17.) *See Lighthouse*, 510 F.3d at 264 ("[i]t is undisputed that, when drafting the Equal Terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause") (citing

146 Cong. Rec. S7774 (July 27, 2000) (Senate Sponsors' statement)); *Midrash*, 366 F.3d at 1232 ("RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of precedent").[5] That said, it is important to note that "Congress only codified Free Exercise principles in the equal terms provision; it did not change or exceed them." (ER 21.)[6]

Finally, the Supreme Court's Free Exercise decisions teach that "[a] law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *San Jose Christian College*, 360 F.3d at 1031, quoting *Lukumi*, 508 U.S. at 533; *see also Lighthouse*, 510 F.3d at 275 ("The Plan is clearly neutral, there is no evidence that it was developed with the aim of infringing on religious practices, and, unlike the ordinances examined in *Lukumi* which allowed animal killing for a number of secular reasons but not as part as a religious ritual, it does not reveal a value judgment that religious reasons for assembling are less important than secular reasons.") (citing *Lukumi*, 508 U.S. at 537-38). Thus, "[t]he relevant question is whether the local government pursued its aims evenhandedly, generally

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5 *See Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

6 Citing *Lighthouse*, 510 F.3d at 264; *Midrash*, 366 F.3d at 1232.

allowing the kinds of uses that would further the legislative goals and prohibiting the uses that would interfere with them." *Lighthouse*, 510 F.3d at 275-76.

Applying these principles to the evidence adduced at trial, the District Court correctly concluded that "the zoning code does not violate RLUIPA on its face," the City's decision to deny the CUP application "had nothing to do with the Church's religious motivation, but rather concentrated on its land use impacts and the consequences to the redevelopment plan," and "the City's actions bear a rational relationship to its objectives for Main Street." (ER 27-28, 30.)

B. The Zoning Code Is Neutral And Generally Applicable And Does Not Violate The Equal Terms Provision On Its Face Because It Treats Religious Assemblies Equally With Secular Assemblies That Are Similarly Situated *As To The Regulatory Purpose*

Plaintiffs contend that Section 154-188 of its Zoning Code, which governs land use in the City's Old Town Historic District, treats religious assemblies on less than equal terms to nonreligious assemblies. That is, because the City permits certain uses as a matter of right in the Old Town Historic District, but requires religious organizations to apply for a CUP, Plaintiffs argue that the City's Zoning Code facially violates the Equal Terms provision of RLUIPA.[7] Plaintiffs' assumptions and analysis are wrong.

[7] Although much of the analysis of the facial validity of the City's Zoning Code involves a discussion of Plaintiffs' particular facts, the same would be true for any religious organization that applied for a CUP to operate in the Old Town Historic District.

Plaintiffs' attempt to establish an Equal Terms claim requires comparing membership-based lodging, motion picture theaters, amusement and recreation services, and membership organizations with religious organizations such as Centro Familiar. These purported comparisons, however, misapprehend the applicable RLUIPA standard. As the Third Circuit has held, under RLUIPA's Equal Terms provision it is insufficient to merely "identify *any* nonreligious assembly or institution that enjoys better terms under [the City's] land-use regulation." *Lighthouse*, 510 F.3d at 264 (emphasis in original). Rather, to prevail on this claim, Plaintiffs must show that the City's Zoning Code treats religious assemblies on less than equal terms to *similarly situated* nonreligious assemblies. The *Lighthouse* Court explained that "the relevant analysis under the Equal Terms provision of RLUIPA must take into account the challenged regulations' objectives: a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*." 510 F.3d at 266 (underlining added; italics in original).

In other words, Plaintiffs must show that the City's Zoning Code treats them "on less than equal terms with nonreligious assemblies or institutions that are no less harmful *to the governmental objectives in enacting the regulation*."

Lighthouse, 510 F.3d at 269 (emphasis added).[8] Thus, under the Equal Terms provision of RLUIPA, the proper inquiry is whether, *in light of the purpose and rationale of the relevant zoning ordinance*, a governmental entity has treated a religious institution in a manner unequal to similarly situated entities. *Id*.

The flaw in Plaintiffs' case is that they cannot show that the Zoning Code treats them any differently than a nonreligious comparator that has an equivalent negative impact on the aims of Section 154-185. An appreciation of the Management Plan for the YCNHA and the City's stated purpose in enacting the relevant portions of the Zoning Code is thus critical to any analysis of Plaintiffs' claims. Not surprisingly, Plaintiffs choose not to examine either, preferring to look

[8] Just as in *Lighthouse*, Plaintiffs' reading of the Equal Terms provision would require that "if a zoning regulation allows a secular assembly, all religious assemblies must be permitted." 510 F.3d at 268. The Third Circuit criticized this interpretation as leading to the absurd result that "if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members--or, to take examples from the Free Exercise caselaw, it must permit a religious assembly with rituals involving sacrificial killings of animals or the participation of wild bears--to locate in the same neighborhood regardless of the impact such a religious entity might have on the envisioned character of the area." *Id*. Plaintiffs here suggest that the "book club" problem could be cured by putting a membership limit in the ordinance. That is no solution. Whatever number were chosen would be subject to court challenge. Moreover, what happens when the organization grows and exceeds the limit? Is it "grandfathered" in? Most fundamentally, where does the Constitution give Congress the power to micro-manage the City's land use planning decisions in such an intrusive fashion? (Unfortunately, not even Plaintiffs can suggest a cure for the problem of religious rituals involving sacrificial killings of animals or the participation of wild bears.)

only at two sections of the Zoning Code (§ 154-187 (Principal Permitted Uses") and § 154-188 (Conditional Uses)) in isolation, devoid of any context.

The significance of considering this regulatory context, *i.e.*, the government's objectives in enacting the zoning regulation, is evident from the *Lighthouse* case. There, a religious organization filed an action alleging that a New Jersey city's zoning ordinance and redevelopment plan prevented it from locating in a certain downtown area, known as "the Broadway Corridor," in violation of RLUIPA and the First Amendment's Free Exercise Clause. Just as in this case, the city in *Lighthouse* allowed nonreligious assemblies such as theaters, cinemas, performance art venues, restaurants, bars and clubs, culinary schools, and dance studios, but not any non-listed uses, including churches and synagogues, in the Broadway Corridor. The Third Circuit framed the issue as "whether the exclusion of churches and religious assemblies from the Broadway Corridor treated the churches on less than equal terms with nonreligious assemblies or institutions *whose presence would cause no lesser harm to the redevelopment and revitalization of the Corridor*." 510 F.3d at 270 (emphasis added).

In concluding that no RLUIPA (or Free Exercise) violation occurred with respect to the redevelopment plan, the *Lighthouse* Court observed that, similar to this case, the city's goal was to "achieve redevelopment of an underdeveloped and underutilized segment of the City" in a hope that the Broadway Corridor would

become a core "sustainable retail 'main' street" that would anchor a "vibrant" and "vital" downtown residential community. 510 F.3d at 270. The Third Circuit agreed with the city that churches were not similarly situated to the other allowed assemblies with respect to the aims of the city's plan "where, by operation of a state statute [prohibiting the issuance of liquor licenses in the vicinity of churches], churches would fetter Long Branch's ability to allow establishments with liquor licenses into the Broadway Corridor." *Id*.

Just as in *Lighthouse*, the City of Yuma similarly intends for the Old Town Historic District "to be a retail, business, and government center with a special emphasis on tourism and historic preservation, due to [its] unique qualities . . . that set it apart from all other districts in the city." Yuma Zoning Code § 154-185. The City envisions "commercial establishments [that] are intended to serve the residents of the city, as well as visitors to the area," and the City's stated priority is to "establish and support a mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district." *Id*. As the Staff Report to the Commission observed, "[t]here are [other] unique aspects of Main Street not seen elsewhere in the Old Town District." (SER 4 (Ex. A to Compl. at p.3).)

> These aspects include: no on-site parking required for any business; historic commercial uses and buildings between 1st Street and Giss parkway; a concentration of entertainment venues; significant financial investment by

> the City of Yuma in the streets and revitalization of buildings, a pedestrian-friendly shopping environment; and numerous street fair events throughout the year.

(SER 4 (Ex. A to Compl. at p.3).)

Moreover, the current businesses located on Main Street have a goal "to attract tourists, shoppers, restaurant and bar patrons by providing unique retail, restaurant, and cultural/entertainment venues." Indeed, "[m]any buildings on Main Street have historically been in retail and entertainment uses for close to 100 years." (SER 4-5 (Ex. A to Compl. at pp. 3-4).)

In addition, the Yuma Crossing National Heritage Area, which has been tasked with revitalization of the Riverfront and Downtown, has been working toward creating a "'24/7' environment that will draw people into the downtown during the work day, in the evenings, and on the weekends" and has focused on, among other things, "the expansion of entertainment as a feature (movie theaters, art center, bars, and restaurants), and increased office and retail development." (SER 5 (Ex. A to Compl. at p. 4).) To this end, there has been substantial *public* investment in development, to the tune of approximately $20 million, for projects to, for example, "clear antiquated structures and 'low-yield' uses which do not generate visitation and replace them with hotel, conference centers, restaurants, bars, offices, [and] nightclubs," as well as to support the opening of parks, theaters, art centers, tourism hubs, and other initiatives that support the City's goal "of

revitalization of the Downtown and Riverfront into a 24/7 downtown neighborhood involving retail, residential, office and entertainment . . . to feature Downtown and the Riverfront as a tourist destination." (SER 5-6 (Ex. A to Compl. at pp. 4-5).) Similarly, substantial *private* investments "have also been made with the expectation that the Main Street goal continues to be pursued and realized by the City." (SER 6 (Ex. A to Compl. at p. 5).) The evidence at trial demonstrated that the City's goal to "ensure a lively pedestrian-oriented district" is not only real and verified, it is also well on the way to being effectuated.

Moreover, just as in *Lighthouse*, Arizona state law prohibits the sale of alcohol within 300 feet of churches and schools. A.R.S. § 4-207. Thus, just as in *Lighthouse*, "[i]t would be very difficult for [the City] to create the kind of entertainment area envisaged by [Section 154-185] — one full of restaurants, bars, and clubs — if sizeable areas of the [Old Town Historic District] were not available for the issuance of liquor licenses." 510 F.3d at 270-71.

The District Court, after considering the applicable standards and precepts governing Equal Terms and Free Exercise claims, as well as the evidence of the Management Plan for the YCNHA and the City's "decade-long effort to revitalize and redevelop Main Street into a tourist, entertainment, and retail center for the City," concluded that, just as had the *Lighthouse* Court with respect to that city's development plan, the City's Zoning Code does not violate RLUIPA on its face.

(ER 23-27.) In particular, the District Court agreed that "[r]eligious organizations frequently use a single facility for purposes of assembly and for various accessary uses" and that therefore "[r]equiring a CUP from religious organizations enables the City to assess and mitigate the impact that such kinds of accessary uses might have on surrounding uses, irrespective of their religious motivation." (ER 24-25.) *See also* SIC 8661's broad definition of "Religious Organizations."

The District Court further agreed that because of Arizona's statutory prohibition on the issuance of liquor licenses within 300 feet of religious organizations, "[a]llowing religious organizations to locate on Main Street as a matter of right would derail that plan [to redevelop Main Street]." (ER 25.) Further, as the District Court recognized, "[n]otably, schools trigger the same restrictions on liquor licensing as do churches, A.R.S. § 4-207, and so they also must obtain a CUP to locate in the Old Town District." (ER 27.)

In sum, the District Court concluded that there was no facial violation of the Equal Terms provision where: (1) "There is no indication that the City has gerrymandered the ordinance to exclude religious organizations"; (2) "Although the zoning law permits other kinds of membership organizations in the Old Town District as a matter of right, the City has shown that it considers secular reasons for assembling no more valuable than religious reasons. Secular membership

organizations do not trigger restrictions on alcohol licensing.";[9] and (3) "The City was not targeting religious organizations because of their religious motivations, and it did not pursue its interests only against religious organizations. Rather, it was guided by the neutral desire to redevelop the Old Town District in general, and Main Street in particular as a tourism, entertainment, and retail area. Uses that posed particularly acute and obvious threats to that goal if left unregulated, irrespective of their secular or religious motivation, were allowed only on condition of obtaining a CUP." (ER 26-27) (emphasis added).

C. Denying A CUP Did Not Violate Plaintiffs' Rights

As shown in Section III.B, *supra*, the Yuma Zoning Code does not, as Plaintiffs contend, violate the Equal Terms provision on its face. Neither is the Equal Terms provision (or the Free Exercise Clause) violated when the CUP requirement is applied to Plaintiffs. *See* ER 27-28.

As the District Court found based upon the evidence adduced at trial, the actual conditions on Main Street and the City's consideration of the CUP application show that the City was guided by neutral and generally applicable principles such that the denial of the CUP was consistent with the Free Exercise Clause. The secular assemblies and institutions that exist on Main Street include a movie theater, an art center and theater, a dance hall and studio, and a fitness

[9] The propriety of considering Arizona's statutory restriction on liquor licenses near churches is discussed in Section III.E, *infra*.

center, all of which "fit the City's goal of creating a tourism, entertainment, and retail corridor." (ER 28.) Not only has the City *not* approved CUP applications from other churches, educational services, or job training services to locate on or near Main Street, but the City declined to support the Yuma Reading Council, United Way, Parents Anonymous, and Big Brothers Big Sisters when those organizations offered to purchase and renovate the very same Main Street building Plaintiffs now own[10] for use in their community work. (ER 28.)

Although a Christian Science Church does operate in the Old Town District, that organization is not located on or near Main Street, which is the special focus of the City's redevelopment efforts. As for the two secular membership organizations in the Old Town District that are most analogous to the Church, the Fraternal Order of Eagles and The Masonic Temple, neither is on Main Street and both predate the creation of the Old Town District. (ER 28.)

The District Court, after duly considering the evidence of the Staff Report and the transcript of the hearing before the Commission, concluded that "there can be no doubt that the dispositive factor in the denial of the CUP was the negative effect that allowing a church on Main Street would have on the long-term redevelopment plan." (ER 28.) That is, "[t]he inability to site complementary entertainment uses on one-third of a major tourism, entertainment, and retail center

[10] *But see* Section V, *infra*, questioning whether Plaintiffs actually still own the Property.

for the City [due to the alcohol prohibition imposed by A.R.S. § 4-207] and the potential harm to adjacent property values outweighed the positive impacts brought by the Church." (ER 28.) There was no Equal Terms violation where the denial of the CUP "had nothing to do with the Church's religious motivation, but rather concentrated on its land use impacts and the consequences to the redevelopment plan."[11] (ER 28.)

D. The City's Actions Pass Rational Basis Review

Because the City's Zoning Code represents a neutral and generally applicable principle, under the Free Exercise principles codified in RLUIPA the City's actions are subject to rational basis review. *San Jose Christian College*, 360 F.3d at 1031. Under rational basis review, "[a] statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not that basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (internal citations and quotation marks omitted). The regulation must be reasonable and not arbitrary and it must bear "a rational relationship to a [permissible] state objective." *Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). *See also Campanelli v.*

[11] For example, a proposal to locate a school on Main Street would have also met with the denial of a CUP because a school would trigger the same prohibition on the sale of alcohol and thus would have a deleterious effect on the city's redevelopment plan.

Allstate Life Ins. Co., 322 F.3d 1086, 1100 (9th Cir. 2003) (regulations will be upheld if they are rationally related to a legitimate governmental purpose).

As the District Court correctly held, the Zoning Code's CUP requirement for religious organizations and the City's denial of a CUP pass rational basis review because they bear a rational relationship to the City's redevelopment goals for Main Street. Allowing Plaintiffs to locate a church on Main Street would have prevented most new liquor licensing for one-third of Main Street's total area, thereby altering the mix of uses on a significant portion of Main Street in a manner inconsistent with the City's plan.[12] (ER 29-30.) The rational basis test requires no more.

E. The City Duly Considered The Deleterious Effect On The Plan Of The Liquor Licensing Restriction Mandated By A.R.S. § 4-207

Based upon a Seventh Circuit case, *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007), Plaintiffs argue that the City should not have been permitted to consider the effects of A.R.S. § 4-207, which prohibits the sale of alcohol within 300 feet of churches and schools, in adopting or implementing its Zoning Code. According to the *Digrugilliers* Court, it is impermissible for a city to rely on such a statute, which supposedly grants

[12] Moreover, the City could not have considered the supposed "lively character" of the Church's congregation or its professed willingness to participate in activities on Main Street without running afoul of the Free Exercise Clause by discriminating between religious uses based on their "accommodating character." (ER 29-30.)

churches "special privileges," as the premise for excluding churches "from otherwise suitable districts." *Id*. at 615. The answer to *Digrugilliers* is *Lighthouse*, for there the Third Circuit expressly found the Seventh Circuit's logic unpersuasive and refused to "so easily dismiss" the liquor-licensing statute where, as here, it "was enacted many years ago – not to discriminate against churches, but to favor them." 510 F.3d at 271 n.15. Moreover, the *Digrugilliers* Court never considered that such statutes regulating the sale of liquor were passed by the States in the exercise of their powers under the Twenty-first Amendment.[13] As discussed in Section III.F, *infra*, these are broad powers that are not to be taken lightly and disregarding the States' liquor regulation powers, as the Seventh Circuit did so cavalierly in *Digrugilliers*, could bring RLUIPA into conflict with the Twenty-first Amendment.

Further, Arizona courts recognize that the statutes governing the sale of alcohol that are found in Title 4, A.R.S., were passed by the Legislature "to protect the welfare, health, peace, temperance, and safety of all citizens by providing for

[13] *Digrugilliers* also differs from the instant situation because in the Seventh Circuit case there was no evidence of any overall development plan, such as the Management Plan for the YCNHA, that guided the City of Indianapolis' zoning ordinance. Nor was there any evidence in *Digrugilliers* that allowing the property at issue to be used as a church would pose a particularly acute and obvious threat to any legitimate goal of the City of Indianapolis. In contrast, here the evidence showed that the City of Yuma's goal of redeveloping the Old Town Historic District in general, and Main Street in particular, as a tourism, entertainment, and retail area, would have been jeopardized by granting Plaintiffs a CUP. (ER 9-10.)

the strict regulation and control of alcohol." *Carrillo v. El Mirage Roadhouse, Inc.*, 793 P.2d 121, 127 (Ariz. Ct. App. 1990) (emphasis added), citing *Mendelsohn v. Superior Court*, 261 P.2d 983, 988 (Ariz. 1953). Because these statutes were passed to protect "all of the citizens," the notion that the Church should be permitted to unilaterally "waive" the protection of A.R.S. § 4-207 and therefore remove from the zoning/CUP equation consideration of the ability of merchants on Main Street to sell alcohol must be rejected. Nothing in the language of the statute would permit such a waiver. By its very terms, the statute is mandatory and self-executing: "A retailer's license shall not be issued for any premises which are . . . within three hundred horizontal feet of a church [or] . . . a public or private school building." A.R.S. § 4-207 (emphasis added).

That such a waiver would *not* be allowed under current Arizona law is further shown by the fact that a bill to amend A.R.S. § 4-207 to include such a waiver provision was introduced in the Arizona House of Representatives in 2009, the Forty-ninth Legislature, First Regular Session, but failed to pass. *See* H.B. 2302 (SER 37, 39).[14] Moreover, at trial Plaintiffs' counsel contended that Plaintiffs did not agree to waive the protection of the statute because "they just

[14] This Court can take judicial notice of this bill under Rule 201 of the Federal Rules of Evidence. *See, e.g., United States v. Martinez-Fuerte*, 514 F.2d 308, 319 n.15 (9th Cir. 1975) (taking judicial notice of a bill that was passed by the U.S. House of Representatives but never acted upon by the Senate), *rev'd on other grounds*, 428 U.S. 543 (1976).

didn't feel they had the authority to make that concession." (ER 295.) It is too late in the day to argue in favor of waiver now. Yet another problem with the "waiver" theory is that, given Arizona's liberal standing rules, which do *not* require Article III-type standing to bring a lawsuit in state court,[15] if the Church did waive the statute the City could well be subjected to suits from other Yuma citizens demanding that the City enforce A.R.S. § 4-207 and not issue liquor licenses within 300 feet of the Church. Thus, because both legal and practical problems plague the so-called "waiver" solution advanced by Plaintiffs and their adherents, there is no legitimate basis for denying the City the ability to consider the deleterious effect on the Plan of the liquor licensing restrictions mandated by A.R.S. § 4-207.

F. The District Court's Ruling Avoids Constitutional Infirmities

In enacting RLUIPA, Congress intended to implement the Free Exercise Clause of the First Amendment while not violating the Establishment Clause. Specifically, RLUIPA states that it should not "be construed to affect, interpret, or

[15] *See Armory Park Neighborhood Ass'n v. Episcopal Community Serv.*, 712 P.2d 914, 919 (Ariz. 1985) ("We have previously determined that the question of standing in Arizona is not a constitutional mandate since we have no counterpart to the 'case or controversy' requirement of the federal constitution. In addressing the question of standing, therefore, we are confronted only with questions of prudential or judicial restraint.") (citation omitted).

in any way address…the Establishment Clause." (42 U.S.C. § 2000cc - 4.)[16] As the Supreme Court has held, a statute violates the Establishment Clause if (1) it has no secular legislative purpose, (2) its primary effect advances (or inhibits) religion; or (3) it fosters excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Moreover, if a statute constitutes "sponsorship, financial support, [or] active involvement of the sovereign in religious activity," it also violates the Establishment Clause. *Id*. at 612.

If the Equal Terms provision of RLUIPA were construed as Plaintiffs advocate, however, *i.e*., in a manner that would virtually immunize religious assemblies from land use regulations, the statute would likely violate the Establishment Clause. *Lemon*, *supra*. In addition, such a broad interpretation of the Equal Terms language could also lead to the conclusion that in enacting RLUIPA Congress had exceeded its powers under Section Five of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 107 (1997) (holding Religious Freedom Restoration Act of 1993 unconstitutional on this basis). Moreover, if the Court were to hold that RLUIPA prohibited the City from considering Arizona's statutory prohibition on the sale of alcohol within 300 feet of churches and

[16] To avoid this result, Senators Kennedy and Hatch stated in their Joint Statement that RLUIPA was intended to "enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable," but not protect religious liberty in a manner that "violate[s] the Establishment Clause." (146 Cong. Rec. at S.7776.)

schools[17] when making zoning decisions, that could set up a constitutional conflict between Congress' power to legislate in furtherance of the Free Exercise Clause and the States' power to legislate under the Twenty-first Amendment. Notably, the latter provides States with near-complete discretion regarding the regulation of alcohol. *See, e.g.*, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *State Board v. Young's Market Co.*, 299 U.S. 59, 64 (1936). Indeed, as the Supreme Court has recognized, "[t]he police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-first Amendment." *Wisconsin v. Constantineau*, 400 U.S. 433, 435 (1971). RLUIPA should not be interpreted so as to trammel on the States' power to regulate the sale of alcoholic beverages.

By rejecting Plaintiffs' sweeping interpretation of the Equal Terms provision, the District Court wisely followed "[t]he canon of constitutional avoidance." *Gonzalez v. Carhart*, 550 U.S. 124, 153 (2007). For over 100 years, the "'elementary rule [has been] that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.*, quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988), quoting *Hooper v. California*, 155 U.S. 648, 657 (1895). *See also* ER 20.

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[17] *See* A.R.S. § 4-207 and Section III.D, *supra.*

This Court should similarly adopt a construction of RLUIPA that preserves the statute's constitutionality rather than rendering it subject to attack on several constitutional fronts.

IV. PLAINTIFFS' FREE EXERCISE CLAIM UNDER THE FIRST AMENDMENT FAILED FOR TWO INDEPENDENT REASONS

Both in the District Court[18] and on appeal, Plaintiffs pay scant attention to their Free Exercise claim, thus tacitly recognizing its weakness. The record shows that Plaintiffs' Free Exercise claim is plagued by two flaws, either of which dooms the claim. First, the District Court found, as a matter of fact, that the Property at issue here has no religious significance. Thus, as a matter of law, Plaintiffs cannot prevail on their Free Exercise claim because they have demonstrated no burden at all. Second, even if the Property did have some religious significance (which it does not), the City's Zoning Code is a neutral law of general applicability that only incidentally burdens Plaintiffs' free exercise rights. Thus, it is only subject to rational basis review, a test that the Zoning Code easily passes.

A. The Property Has No Particular Religious Significance

"When a religious plaintiff makes a Free Exercise challenge to a zoning regulation, it must explain in what way the inability to locate in the specific area affects its religious exercise." *Lighthouse*, 510 F.3d at 274. In that case, the Third Circuit considered — and rejected — the exact argument Plaintiffs assert here,

[18] *See* Doc. 3 at p. 13.

namely that a city's denial of a permit to allow a religious institution to use *a particular parcel of land* violates the Free Exercise Clause. In concluding that it did not, the Third Circuit first held that, "unlike RLUIPA, which explicitly defines as religious exercise: 'The use, building, or conversion of real property for the purpose of religious exercise,' the Free Exercise Clause does not define land use as a religious exercise." *Id*. at 273 (emphasis added). The *Lighthouse* Court then observed that several other circuits had already held that, "when the plaintiff does not show that locating its premises in a particular location is important in some way to its religion and the area from which plaintiff's building is excluded is not large, there is no constitutionally cognizable burden on free exercise." *Id*. (emphasis added).

For example, in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006), the Court held that a church's inability to open a day care center in a particular district did not constitute "more than an incidental burden on religious conduct." *See also Messiah Baptist Church,* 859 F.2d at 824-25 (Tenth Circuit held that making the church's exercise of religion more expensive by compelling it to build elsewhere in the county was merely an incidental — not substantial — effect on the church's free exercise of religion). In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306-07 (6th Cir. 1983), the Sixth Circuit held that because the

requested construction of a building for worship had no ritualistic significance, the zoning ordinance that prohibited its erection in a residential district did not impose a substantial burden on the exercise of religion.

This Circuit has also indicated that a plaintiff must demonstrate some religious significance to a particular building in order to prevail on a Free Exercise claim of the sort Plaintiffs advance here. In *Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990), the Court held that a governmental entity imposed no substantial burden on a religious institution that claimed home worship was part of the tenets of its religion. Not only was it undisputed that the church, prior to applying for a permit for church use in a residential area, had worshipped in the banquet room of a hotel, but the ordinance did not prohibit worship in all homes, only in the particular home wished by the church. "Most significantly, the Church has made no showing of why it is important for the Church to worship in this particular home." *Id*. at 1224. *Cf. San Jose Christian College*, 360 F.3d at 1032 ("Admittedly, the PUD ordinance and the City's enforcement thereof render College unable to provide education and/or to worship at *the Property*. But the fact that the church's congregants cannot assemble at that precise location does not equate to a denial of assembly altogether." (Emphasis in original)).

Just as in *Lighthouse*, Plaintiffs here provided no evidence that the inability to locate at the Property or within the Old Town Historic District would negatively affect their ability to practice their religion. On the contrary, the District Court found as a matter of fact that "[t]here was no particular religious reason that the Church needed to located in the downtown area." (ER 6.) *See also* ER 14 ("But to be clear, as a matter of fact, there is no particular religious reason that the Church must locate along Main Street in general or specifically at 354 W. Main St. It can fulfill its mission from property located elsewhere.") Plaintiffs have not challenged those factual findings before this Court. It follows that Plaintiffs' Free Exercise claim was fatally flawed as a matter of law and cannot be revived on appeal.

B. The Zoning Code Is A Neutral Law Of General Applicability That Passes The Relevant Test —Rational Basis, *Not* Strict Scrutiny

Because Plaintiffs do not dispute on appeal the factual finding that "[t]here was no particular religious reason that the Church needed to located in the downtown area" (ER 6), this Court need not consider Plaintiffs' Free Exercise claim any further. Even if the Court chooses to do so, however, the claim must fail because, as explained in the discussion of RLUIPA's Equal Terms provision (*see* Section III.B, *supra*), the City's Zoning Code is a neutral law of general applicability. The Zoning Code is therefore subject to review under the rational basis standard, *not* strict scrutiny, as Plaintiffs contend. For the reasons discussed

in Section III.D, the District Court correctly concluded that the Zoning Code passes muster under the rational basis test, and Plaintiffs do not argue otherwise on appeal. Judgment was properly entered for the City on Plaintiffs' Free Exercise claim.[19]

V. PLAINTIFFS' CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF MAY BE MOOT AT THE TIME THIS APPEAL IS HEARD

For the reasons discussed above, Plaintiffs' claims under both the Equal Terms provision of RLUIPA and the Free Exercise Clause fail, requiring affirmance of the judgment. *If*, however, this Court were to disagree with the District Court's Order and find some merit in either of Plaintiffs' remaining claims,

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[19] Moreover, the City's Zoning Code and its denial of a CUP would pass even the strict scrutiny test because the City *does* have a compelling interest in promoting the economic redevelopment of the Old Town Historic District and in effectuating Arizona's statutory prohibition (enacted under the State's powers granted by the Twenty-first Amendment) on the sale of alcohol near churches and schools. Given the City's history of sustained and diligent efforts to redevelop the Old Town Historic District and to protect its character and nature (*see* SER 7 (Ex. A to Compl. at p. 6)), these qualify as compelling interests and distinguish the City's redevelopment efforts from those rejected as insufficient in the two cases relied upon by Plaintiffs. *See Cottonwood Christian Center v Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Grace Church of North County v. City of San Diego*, 555 F. Supp. 2d 1126 (S.D. Cal. 2008). Moreover, contrary to Plaintiffs' contention, such efforts have been found to be compelling. In *Lighthouse*, the district court held that the city's redevelopment plan would survive even strict scrutiny under RLUIPA because the city "had a compelling interest in promoting the economic development of the downtown; a church, with the attendant alcohol restrictions, would thwart that goal." 510 F.3d at 260. The Third Circuit affirmed the district court's ruling as to the redevelopment plan, albeit on a different basis.

the Court should not order any declaratory or injunctive relief because it may be moot.

As shown in Plaintiffs' counsel's letter filed with the Clerk of this Court on September 22, 2009, the question has been raised as to whether the Church still owns the Property because the Church — as it candidly admits —is in arrears in its payments. If, at the time this appeal is decided, the lender has foreclosed and the Church does not own the Property, Plaintiffs' requests for injunctive and declaratory relief[20] will be rendered moot. *See, e.g., Bumpus v. Clark*, 702 F.2d 826, 827 (9th Cir. 1983) (case ordered dismissed where claims for declaratory and injunctive relief concerning future closing of nursing home were rendered moot by closing of nursing home while appeal was pending); *Cohen v. Township of Cheltenham*, 174 F. Supp. 2d 307, 311 n.1, 316 (E.D. Pa. 2001) ("Plaintiffs originally sought injunctive relief compelling defendants to grant plaintiffs' requested zoning variance so they could sell their property to Safe Haven. Because plaintiffs no longer own their home, their claim for injunctive relief is rendered moot.").

[20] Plaintiffs requested (1) a declaratory judgment that the City's Zoning Code, and the application of the Zoning Code to the Property, is "void, invalid and unconstitutional both on its face and as applied," (2) an injunction restraining the City from enforcing its Zoning Code to prohibit Plaintiffs from operating the Property as a church or from otherwise preventing such operation, or alternatively, (3) an injunction requiring the City to issue Plaintiffs a CUP. (ER 568.)

As this Court has recognized, federal courts lack jurisdiction over moot claims. Thus, "[w]e have no article III jurisdiction over cases in which the district court has lost the power to grant relief if the appellate court were to reverse the judgment." *Bumpus*, *supra*. *See also Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2007) ("we lack jurisdiction to hear moot claims"). For this reason, *if* the Court were to conclude that some type of injunctive relief may possibly be appropriate, then this Court should direct the District Court on remand to hold an evidentiary hearing to inquire into the ownership of the Property to enable the District Court to determine the mootness *vel non* of Plaintiffs' non-monetary requests for relief. *Cf. Cellular 101, Inc. v. Channel Commc'ns, Inc.*, 539 F.3d 1150, 1154 (9th Cir. 2008) ("[t]he Supreme Court has held that all counsel have a duty 'to bring to the federal tribunal's attention, without delay, facts that may raise a question of mootness'") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997)).

CONCLUSION

This Court should decline Plaintiffs' invitation to expand the scope of RLUIPA in fashion that is not only unjustified by its terms or legislative history, but that would both impede municipalities' ability to carry out their land use planning responsibilities and call the statute's constitutionality into serious question. The judgment of the District Court should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of October, 2009.

SNELL & WILMER L.L.P.

/s/Ronald W. Messerly

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee the City of Yuma states that it is aware of no related cases pending in this Court.

CERTIFICATE OF SERVICE

The undersigned, counsel for Appellee, hereby certifies that on this 23rd day of October, 2009, I electronically filed the foregoing APPELLEE'S ANSWERING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

All counsel for Appellants are registered CM/ECF users and will be served by the appellate CM/ECF system.

Counsel for *amicus curiae* the United States are not registered CM/ECF users. Therefore, two copies of the Answering Brief were sent via FedEx, next business day delivery, addressed to:

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

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October 23, 2009 /s/ Martha E. Gibbs

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