APPEAL NO. 09-15422

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTRO FAMILIAR CRISTIANO BUENAS NUEVAS; AND JORGE OROZCO, PASTOR,

Plaintiffs-Appellants,

v.

THE CITY OF YUMA,

Defendant-Appellee.

Appeal from the United States District court for the District of Arizona
Civil Case No. CV08-00996-PHX-NVW (Judge Wake)

OPENING BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Centro Familiar Cristiano Buenas Nuevas, is a non-profit religious corporation in the State of Arizona. Centro Familiar does not have a parent corporation and is not publicly held.

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STATEMENT OF JURISDICTION

The district court exercised jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights jurisdiction), as Plaintiffs commenced this action below pursuant to 42 U.S.C. § 1983. On January 30, 2009, the district court entered judgment against Plaintiffs and in favor of Defendant (ER at 1, Memorandum Opinion and Order; ER at 2, Judgment.) On February 27, 2009, Plaintiffs-Appellants timely filed a notice of appeal, (ER at 34-36, Notice of Appeal), and docketing statement. Jurisdiction in this Court arises under 28 U.S.C. § 1291, as this appeal results from a final decision of the district court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The City of Yuma's zoning code allows nonreligious membership organizations in a certain zoning district as of right, but explicitly requires religious membership organizations to obtain a conditional use permit to locate in that same district. The City enforced this facially-discriminatory code against Appellants' religious assembly, and denied its application for a conditional use permit. The district court ruled that, despite its explicit reference to religion, the zoning code was facially neutral and generally applicable. It held that the less than equal treatment to which the code subjected religious assemblies was justified by the City's regulatory purpose of controlling accessory uses and promoting

entertainment, and that such disparate treatment, therefore, was neither a violation of the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) nor a violation of the Free Exercise Clause. Were the Court's rulings erroneous?

STATEMENT OF THE CASE

On May 28, 2008, Plaintiffs-Appellants Centro Familiar Cristiano Buenas Nuevas Church, an Arizona nonprofit religious corporation, and its pastor, Jorge Orozco (collectively, "Centro" or the "Church"), filed a complaint for damages (ER at 550) and a motion for preliminary injunction against the City of Yuma, Arizona. In the complaint and motion, the Church petitioned the district court to temporarily enjoin the City from enforcing its zoning code to prevent the Church from using its property for religious assembly in violation of the Church's constitutional and statutory religious freedom rights.

On June 24, 2008, the motion for preliminary injunction was consolidated with a trial on the merits. Briefs from the parties were filed on August 29, 2008. The trial was held on October 1, 2008, and on January 30, 2009, the district court issued a memorandum opinion and order denying the Church's claims for a preliminary and permanent injunction and damages and entered judgment against the Church and in favor of the City. (ER at 1; 33.) The Church timely appealed the district court's final order on February 27, 2009. (ER at 34.)

STATEMENT OF FACTS

Centro Familiar is a church with approximately 250 members, nearly 200 of whom regularly attend worship services conducted in the English and Spanish languages. (ER at 553-54.) The Church was meeting in a former movie theater outside of downtown Yuma. (ER at 118.) It shared this theater with another church which limited the times and manner in which it could use the building. (ER at 120.) The Church was renting this space only on a month-to-month basis. (ER at 119.) It currently is renting other space pending the outcome of this case.

The Church first began looking for its own property back in 2001. (ER at 476.) It was looking for a facility that could eventually accommodate a 400-person congregation to accommodate its members and visitors for worship activities. (ER at 121-22; 135-36.) The Church had investigated a number of possibilities, none of which were found to be well suited to the Church's needs. (ER at 136-141.) In 2007, the Church began focusing its search in downtown Yuma after being referred there by the City. (ER at 142.) In February 2007, it ultimately decided to enter into a purchase contract for a downtown property at 354 S. Main Street. (ER at 556; 331.)

The zoning district in which that property is located is identified in Section 154-185 of the Yuma City Code as the "Old Town District." According to this section, 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." (ER at 574.)

Permission to locate in the Old Town District is governed by Yuma City Code Sections 154-187 and 154-188. Code Section 154-187 permits "[m]embership organizations (except religious organizations)" to locate in the Old Town District as of right. (ER at 576.) In addition, that section permits a number of other nonreligious assemblies—including membership-based lodges, motion-picture theaters, and amusement and recreation services (including auditoriums, performing-arts centers, and physical-fitness facilities)—to locate as of right. (ER at 574-76.) Under these sections, nonreligious assemblies have located in the Old Town District, such as, the Golden Road Runners Dance Hall; Main Street Cinemas; the Yuma Historic Theater; the Fraternal Order of Eagles; and a Masonic temple. (ER at 480-81.) Separately, Code Section 154-188 restricts religious assemblies in the Old Town District to use by conditional use permit (CUP). (ER at 578.)

In addition to its codified ordinances, the City has drafted certain redevelopment plans for particular parts of the City. Beginning in the mid-1990s, the City produced a document entitled "Historic Downtown Yuma: Imagine a 2020 Vision." (ER at 462-64.) In 2000, this plan was integrated into the federal plan for the Yuma Crossing National Heritage Area. The plans include the historical

preservation of the buildings in the area, and the maintenance of historical uses, but do not prescribe specific uses that should be implemented. Neither plan mentions the need or desire for new bars or liquor stores, or mentions that churches are undesirable in the area. And, neither plan is incorporated into the Yuma City Code.

On March 30, the Church submitted an application for a CUP, in order to carry out its religious work and activities at its Main Street property. (ER at 559; 315.) After a neighborhood meeting in which some neighbors expressed concern about detraction from retail focus, exemption from taxes, and prohibitions on liquor licenses, the Church offered to pay a fee in lieu of taxes and to operate a coffee shop on the premises. (ER at 485.) Following the meeting, City Planner Bob Blevins indicated that he would be recommending approval of the Church's application. (ER at 485.) Nevertheless, Blevin's Staff Report to the City's Community Planning Commission recommended denying the CUP, claiming that the Church's proposed use did not "implement the purpose statement (Section 154-185) of the Zoning Ordinance," did not "conform to the Historic Yuma Downtown Plan 2020," and was "in conflict with the City's long-term goal of Main Street as a cultural, retail, recreational, and entertainment hub for the north end of the City." (ER at 315; 488.)

The City appeared especially concerned with the Church's desire to locate on Main Street, which the City claimed was distinct from the rest of the Old Town District. In particular, it was worried that, under an Arizona statute that restricts some liquor licensing within 300 feet of churches (A.R.S. § 4-207), the location of a church at 354 S. Main Street would prohibit the issuance of new liquor licenses to bars and liquor stores for one block out of the three blocks on Main Street. (ER at 488; 28.) The Staff Report therefore opined that granting the CUP could "lessen the desirability of such properties close to the church for future liquor stores or bars." (ER at 318.)

At a hearing before the Planning and Zoning Commission on July 9, 2007, the Commissioners unanimously voted to deny the CUP application. (ER at 488.) The Yuma City Council approved the Commission's decision, which prompted this lawsuit. (*Id*.)

SUMMARY OF ARGUMENT

Yuma City Code expressly distinguishes between religious and nonreligious membership organizations, subjecting them to unequal treatment on that basis alone. In addition, Yuma has permitted similar nonreligious assemblies, such as a performing arts theater, a multiplex movie house, dance halls and other membership organizations to locate in the district as of right. Nevertheless, the district court erroneously held that such favorable treatment of nonreligious

assemblies could be justified on the basis of a generally applicable regulatory purpose. Under RLUIPA and Free Exercise jurisprudence, however, a generally applicable principle cannot justify inequitable treatment of religious assemblies. By holding otherwise, the court committed reversible error.

ARGUMENT

I. Standard of Review

The Court should review the district court's factual findings for clear error and its conclusions of law *de novo*. *Prete v. Bradbury*, 438 F.3d 949, 960-61 (9th Cir. 2006).

II. Yuma's zoning code facially treats religious assemblies on less than equal terms with nonreligious assemblies.

A zoning code violates the Equal Terms provision of RLUIPA if it: 1) treats a religious assembly or institution 2) that is subject to a zoning code 3) on less than equal terms with 4) a nonreligious assembly or institution. 42 U.S.C. § 2000cc(b)(1). Despite the holding of the district court, discussed below, if a zoning code meets these four elements, no alleged regulatory purpose can save it from violating the Equal Terms provision.

At the outset, the district court properly recognized three distinct types of Equal Terms violations:

> (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless "gerrymandered" to place a burden solely on religious, as

> opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions.

(ER at 16-17, citing *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006).) It is the first type of violation that the Church is claiming in this case.

There is no question as to the Church's status as an assembly or as to its being subject to a zoning ordinance. The Church's building is located on Main Street in the "Old Town" zoning district. Desiring to operate a church in that district, the Church is subject to Yuma City Code Sections 154-187 and 154-188, which list the permitted (*i.e.*, as of right) uses and the conditional uses in the Old Town District. It is noteworthy that, because Main Street is not recognized as a distinct zone in the code, it is not relevant for purposes of analyzing the code's comparative treatment of religious and nonreligious assemblies under the Equal Terms provision.

Sections 154-187 and 154-188 facially differentiate between religious and nonreligious assemblies or institutions. Section 154-187 (XX) allows nonreligious assemblies to locate in the Old Town District as of right, while expressly prohibiting religious assemblies from locating there as of right. Instead, Section 154-188 (F) requires religious assemblies to apply for and obtain a conditional use permit in order to locate in the Old Town District. These sections treat religious

assemblies, like the Church here, on less than equal terms than nonreligious assemblies in violation of the Equal Terms provision. Religious organizations are permitted to locate in the district, if at all, only upon obtaining a conditional use permit, which the City in its discretion may choose not to grant. Several nonreligious uses, however, are not required to apply for such a permit but, instead, are permitted as of right. Such uses include membership-based lodging, motion-picture theaters, auditoriums, and, most notably, membership organizations. Although the district court acknowledged that each of these uses constitutes an "assembly" according to the plain meaning of that term, (ER at 23), the facial violation inherent in the City's code is most evident in its treatment of membership organizations.

Indeed, under Yuma's code, "religious organizations" are explicitly classified as a species of membership organizations. This fact was not lost on the district court, which noted, "[t]he reason that Yuma City Code § 154-187 distinguishes between 'religious organizations' and 'membership organizations' is because under the SIC religious organizations are a subset of the broader category of membership organizations." (ER at 17.) Yuma's zoning code distinguishes certain membership organizations from the rest on the basis of their religious nature, and on that basis alone.

Under the code, if a membership organization is nonreligious, it is permitted as of right with no questions asked. But if it is religious, it must obtain a conditional use permit, which the City may grant or deny at its discretion. According to the very language of the code, then, the sole determinative factor in whether a membership organization has to obtain special permission, instead of receiving more favorable treatment as a permitted use, is whether or not it is religious. In other words, the only difference between membership organizations permitted as of right and membership organizations required to obtain conditional use permits is that the latter are religious and the former are not.

In asserting that "[t]he 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," the court ignored that RLUIPA, by its own terms, placed religious assemblies on equal footing with nonreligious assemblies. (ER 17.) Under RLUIPA, a religious organization is not a "subset of the broader category of membership organizations." (ER at 17.)

> For purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence. *Rather, the relevant "natural perimeter" for comparison is the category of "assemblies and institutions" as set forth by RLUIPA.* In other words, the question is whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions.

Konikov v. Orange County, Fla., 410 F.3d 1317, 1324 (11th Cir. 2005) (citations omitted) (emphasis added).

Because the only difference under the code between membership organizations permitted as of right and membership organizations required to obtain conditional use permits is that the latter are religious and the former are not, the City's zoning code facially violates the Equal Terms provision of RLUIPA. Indeed, it would be difficult to imagine a clearer instance of religious assemblies being treated on less than equal terms than nonreligious assemblies. If the City's code is not a violation of the Equal Terms provision, it would seem no code ever could be.

III. The district court erred by imposing an additional element foreign to the text of the Equal Terms provision.

The district court attempted to neutralize the City's blatant mistreatment of the Church, and religious assemblies as a class, by pointing out that "there can be legitimate reasons for a zoning code to identify religious organizations as a distinct type of land use," and that the "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 at 17.) These unremarkable observations overlook the obvious point: Yuma's code does much more than merely identify or recognize religious membership organizations as distinct; it treats them on less than equal terms on the basis of that distinction alone.

Nevertheless, the district court held that Yuma's code did not violate the Equal Terms provision. In reaching this conclusion, the district court applied a test first set forth in *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007). In that case, the Third Circuit invented an additional element for an Equal Terms claim: in order for disparate treatment of religious and nonreligious assemblies to constitute a violation of the Equal Terms provision, a religious assembly or institution must show that it is treated "less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose.*" *Id.* at 266.

Following *Lighthouse*, the district court adopted this new element to the Equal Terms test. It attempted to justify its imposition of this extra element by asserting that it was mandated by Free Exercise principles and that failure to include such an element would result in an "absurd" reading of the Equal Terms provision. (ER at 19.)

But these assertions are erroneous. Properly applied, the Equal Terms provision does not require a Free Exercise analysis, nor does a proper application of the provision lead to the absurdity suggested by the district court. To the contrary, the imposition of this additional element, if taken to its logical end (as this case exemplifies), results in the total nullification of the Equal Terms provision of RLUIPA.

A. The Equal Terms provision is not a mere codification of Free Exercise jurisprudence and, even if it were, requiring similar situation with respect to regulatory purpose for facially discriminatory laws is contrary to that jurisprudence.

The district court held that a zoning code, even one which clearly treats religious and nonreligious assemblies on less than equal terms, does not violate the Equal Terms provision if such disparate treatment can be justified on the basis of a generally applicable regulatory purpose.

The court's argument for this remarkable proposition is rather complex. The court first asserted that a zoning code can't violate the Equal Terms provision unless it also violates the Free Exercise Clause. (ER at 29, 30.) The court further stated that no disparate treatment for which there is a rational basis will run afoul the Free Exercise Clause if such treatment can be justified by a neutral and generally applicable principle. (ER at 29.) Finally, the court asserted that if disparate treatment is the result of a neutral and generally applicable regulatory purpose, then the zoning code itself is both neutral and generally applicable. (ER at 21.) Based on these conclusions, the court ultimately held that, even if a zoning code clearly subjects religious assemblies to less than equal treatment, a generally applicable regulatory purpose for such disparate treatment will prevent the code from violating either the Equal Terms provision or the Free Exercise Clause.

The court's analysis is laden with several serious errors. First, there is the erroneous implication that a zoning code will not violate the Equal Terms

provision unless it also violates the Free Exercise Clause. This notion is based on the erroneous assumption, held also by *Lighthouse*, that the standards under the Equal Terms provision of RLUIPA go no further in protecting religion than do the standards of Free Exercise jurisprudence. *See Lighthouse*, 510 F.3d at 264 ("It 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, 2007) (Senate Sponsors' statement)); ER at 21 (it is "beyond dispute that Congress only codified free exercise principles in the equal terms provision; it did not change or exceed them."). Aside from the fact that interpreting the Free Exercise Clause and the Equal Terms provision in precisely the same manner would render the latter superfluous (a point well made by the dissenting judge in *Lighthouse*, 510 F.3d at 288), the district court itself even pointed out, rather ironically, that Congress had codified Free Exercise principles "for greater visibility and easier enforceability" and that it did so in order "to simplify a religious assembly or institution's burden to prove a prima facie case of a Free Exercise Clause violation." (ER at 20, citing 146 Cong. Rec. at S7775.) In other words, by the court's own admission, an Equal Terms violation should be easier and simpler to prove than a violation of the Free Exercise Clause. It was, therefore, erroneous for the district court to limit its analysis of an Equal Terms violation to the principles of Free Exercise jurisprudence.

Second, however, and more importantly, the relationship of Equal Terms and Free Exercise jurisprudence is largely academic in this case, for Yuma's Code equally violates them both. On its face, the code treats religious assemblies less favorably than it treats nonreligious assemblies, and religion is explicitly identified as the sole basis for the differential treatment. The district court's failure to recognize this as not only an Equal Terms violation, but also as a Free Exercise violation, was based primarily on its misreading of the Free Exercise principles set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). According to the district court, *Lukumi* stands for the proposition that, even if disparate treatment of religious and nonreligious assemblies has been demonstrated, the government may rebut the presumption of discrimination "by showing that any disparate treatment of a religious and a nonreligious assembly or institution stems from a neutral and generally applicable principle." (ER at 21.)

It is true, as the court held, that under *Lukumi* burdens upon religion need only have a rational basis if they are the product of an ordinance that is both neutral and generally applicable. But it is not true, as the court also held, that a generally applicable principle can confer neutrality and general applicability upon an ordinance that lacks facial neutrality.

Under *Lukumi*, neutrality and general applicability are distinct requirements, measured by distinct standards. Indeed, in that case, the Supreme Court turned to

analyze the general applicability of the ordinance only after it found that the ordinance did "not discriminate on its face," *i.e.*, it was facially neutral. *Lukumi*, 508 U.S. at 533. Thus, although neutrality and general applicability are related, and although "failure to satisfy one requirement is a likely indication that the other has not been satisfied," the two requirements are distinct and must both be established to defeat a claim against an ordinance that burdens religious exercise. *Id.* at 531. This distinction—between neutrality and general applicability—has been recognized by this Court in its recent interpretations of *Lukumi*. *See Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009), and *Stormans, Inc. v. Selecky*, Nos. 07-36039, 07-36040, 2009 WL 1941550, at *16 (9th Cir. July 8, 2009).

Had the district court followed this test, its conclusion undoubtedly would have been different. According to *Lukumi*, the court should have started (and, as we shall see, ended) its analysis with the text of the zoning code, "for the *minimum* requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." 508 U.S. at 533 (emphasis added). In other words, the very first place a court must look to determine the neutrality of an ordinance is the language of the ordinance itself. If the language distinguishes between different types of conduct by making reference to a religious practice, and

if the terms lack any nonreligious meaning discernible from the context, it is also the last place the court needs to look; the ordinance discriminates on its face and is conclusively presumed to have as its object the suppression of religious conduct. Such an ordinance, according to *Lukumi*, fails the very "minimum requirement of neutrality." *Id.*

By confusing the requirements of neutrality and general applicability, the district court took a test designed to analyze a zoning code that, in the court's own words, "subtly or covertly departs from requirements of neutrality and general applicability," (ER at 22) and applied it to a code which departs from the requirement of neutrality, not subtly or covertly, but about as blatantly and overtly as can be imagined. Indeed, as has already been discussed, Yuma's zoning code explicitly (*i.e.*, on its face) distinguishes between types of membership organizations solely on the basis of certain of them being classified by the City as "religious." This is a term for which, to say the least, a nonreligious meaning is not readily available. This alone, according to *Lukumi*, is conclusive proof that the code has a discriminatory object, and thus that it fails even the minimum requirement of neutrality under the Free Exercise Clause. Therefore, Yuma's zoning code cannot be neutral. Neither, therefore, can it be neutral *and* generally applicable, as *Lukumi* would require. Consequently, even if *Lukumi* did represent the limits of the Equal Terms jurisprudence (which it doesn't), Yuma's zoning

code would still constitute an Equal Terms violation because the code fails the requirement of neutrality and because it is subject under the statute to strict liability. And if the code fails strict scrutiny (which it does), it also violates the Free Exercise Clause.

B. There is no absurdity in the plain reading of the Equal Terms provision.

The district court also argued that requiring comparators to be "similarly situated with respect to regulatory purpose" was necessary to avoid a reading of the Equal Terms provision which would lead to an "absurd" result. According to the court, the Church's reading of the provision would require that "if a zoning regulation allows *a* secular assembly, *all* religious assemblies must be permitted." (ER at 18, quoting *Lighthouse*, 510 F.3d at 268.) Such a reading, the court said, would imply that a "zoning law that excluded all but a single assembly or institution would fail such a test, despite treating religious assemblies and institutions on equal terms with the overwhelming majority of secular assemblies and institutions." (ER at 19.)

To illustrate the alleged absurdity of the Church's reading, the court cited the Third Circuit's response to the plaintiff's arguments in *Lighthouse*. In that case, the Third Circuit interpreted the plaintiff's reading of the Equal Terms provision to imply that if a town allowed a "local, ten-member book club to meet in the senior

center," it would also be required to "permit a large church with a thousand members." (ER at 18, quoting *Lighthouse*, 510 F.3d at 268.)

Appealing to the principle that a plain reading which leads to an absurd result must be ignored, the district court claimed the "extremity of the [Church's] interpretation [to be] self-evident." (ER at 19.) It concluded that such an absurdity could only be avoided by requiring comparators to be similarly situated with respect to a regulatory purpose.

The district court's criticisms of the Church's reading, however, and the example it selected to illustrate those criticisms, betray a fundamental misunderstanding of what the Church is arguing, and an even more fundamental misunderstanding of what the plain meaning of the Equal Terms provision actually requires.

The court was correct that a plain reading of the provision does require religious assemblies to be treated on equal terms, not just with some, nor even with the "overwhelming majority," of nonreligious assemblies (ER at 19), but with *all* nonreligious assemblies. But the court was quite mistaken in its belief that such a reading would mandate the permission of *every* religious assembly whenever *any* nonreligious assembly is allowed.

The absurdity, for instance, of a ten-member book club mandating the permission of a thousand-member megachurch is easily avoidable by the

institution of a religiously-neutral size restriction. There is nothing in the Equal Terms provision that would forbid this (or a multitude of other land-use restrictions) from being imposed, so long as the restriction was not expressed in religious language or imposed primarily or exclusively upon religious assemblies. Yuma's facially discriminatory zoning code, however, suffers from both of these infirmities.

Whatever the plaintiff's argument in *Lighthouse* might have been, no absurd interpretation of the Equal Terms provision has been advanced by the Church in this case, nor is the district court's caricature even consistent with a plain reading of the text. The district court's mimicry of the Third Circuit's criticism, therefore, seemingly served no other purpose than to act as a straw man for the court to easily knock down. Under the appropriate reading, this invented absurdity has no basis, and, therefore, cannot serve as any justification for modifying the statutory test.

C. As demonstrated by the ease with which the district court dismissed the Church's Equal Terms claim, the extra-textual standard imposed by the district court is really no standard at all, and results in the nullification of the Equal Terms provision.

If, as *Lighthouse* and the district court have held, cities can justify less than equal treatment of religious and nonreligious assemblies merely by stating some regulatory purpose for such unequal treatment, it would be almost impossible to establish a violation of the Equal Terms provision. Indeed, the ease with which a similar situation requirement allows the provision to be circumvented is well

exemplified in the present case.

To begin with, if religious and nonreligious assemblies are required to be "similarly situated as to the regulatory purpose," municipalities can easily avoid the requirements of the Equal Terms provision merely by identifying certain land-use characteristics that they deem to be unique to churches, and then granting churches certain rights based on those characteristics—rights which would be adverse (allegedly) to municipal planning goals. By simply not granting those same rights to nonreligious assemblies, municipalities could then declare that religious assemblies are no longer similarly situated with nonreligious assemblies and, therefore, are not entitled to equal treatment.

In this case, for example, the district court speculated that if religious organizations were permitted in the Old Town District as of right (as are their secular counterparts), they might be eligible to establish certain accessory uses under the Code, and that churches would be more likely to do so. (ER 27.) The unregulated authority to establish such uses, so goes the argument, is contrary to one of the City's regulatory purposes for the District—controlling accessory uses "to avoid conflicts with surrounding uses" (ER at 24)—and because there is no such concern with nonreligious organizations, the two are not similarly situated. Consequently, the City is free from the restraint of the Equal Terms provision.

Whether the Code actually allows churches to establish such unidentified accessory uses as a matter of right and, conversely, whether it denies that right to nonreligious organizations, is far from clear. Nevertheless, the court based its opinion on the mere possibility that such "might" be the case. (ER at 25.) But even if religious organizations would enjoy the right to establish certain accessory uses under the Code and nonreligious assemblies would not, the point is that the right to establish these uses would be granted, or denied, by the Code itself. Thus, the alleged lack of similar situation (as to the regulatory purpose of controlling accessory uses) is largely a condition of the City's own creation, which could be included for no other justifiable reason than to allow the City to discriminate against churches.

Similarly, the court pointed to an Arizona law that precludes the issuance of liquor licenses to establishments within 300 feet of churches (see A.R.S. § 4-207) and, based on that law, concluded that the location of a church in the Old Town District might interfere with the City's plans to foster economic development by promoting a vibrant nightlife on Main Street. Because the location of nonreligious assemblies does not trigger the buffer requirement, the court found that religious and nonreligious assemblies were not similarly situated as to the City's regulatory purpose of "revitaliz[ing] and redevelop[ing] Main Street into a tourist, entertainment, and retail center for the City." (ER at 25.)

The court attempted to justify its holding by comparing the Code's treatment of churches to its treatment of schools, both of which uses the Code subjects to conditional use permits. The court claimed that schools, like churches, presented the possibility of accessory uses, and also triggered the liquor license buffer requirement. Therefore, the court found that the purposes asserted by the City (the need to control such accessory uses and to promote alcohol sales)—even though no such purposes are actually expressed in the Code itself—were the reasons for the City's disparate treatment of churches. Based on this finding, the court easily concluded that these were generally applicable regulatory purposes that justified the lack of neutrality that appeared on the face of the Code. On this basis, the district court found that the Code did not violate the Equal Terms provision.

This is not the first time a municipality has offered such arguments in defense of an Equal Terms claim. Indeed, in a case that was decided before *Lighthouse*, the City of Indianapolis made nearly identical arguments in defense of a similar zoning restriction that excluded churches but allowed nonreligious assemblies in a particular zoning district. *See Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007). In that case, Judge Posner, writing for a unanimous panel of the Seventh Circuit, exposed the illogic of using statutory rights as the basis for excluding religious assemblies:

> [A] City may not, by defining religious use so expansively as to bestow on churches in districts in which it allows them to operate

> more rights than identical secular users of land have, justify excluding churches from districts in which, were it not for those superadded rights, the exclusion would be discriminatory …. Otherwise the City could exclude churches from districts zoned residential by ordaining that a residential use of land does not include the grazing of sheep but a religious use does, and therefore [RLUIPA] does not require the City to permit churches in residential zones, as to do so would give churches more rights than the other users of land in those zones have. Such an approach—in effect defining "religious assembly or institution" as a church plus a sheep farm—would be bootstrapping.

Id. at 615.

Thus it was that, before *Lighthouse*, the Equal Terms provision was actually given effect, and less than equal treatment of religious assemblies was not allowed to be justified on any basis, let alone on an artificial distinction created by granting rights to churches but withholding them from nonreligious assemblies. But under this new, alternative reading of the Equal Terms provision, first announced in *Lighthouse* and now followed here by the district court, unequal treatment of religious assemblies—even that expressed in explicitly religious language on the very face of the zoning code—is easily justified, liability is easily avoided, and RLUIPA's equal terms provision is, ultimately, rendered a dead letter.

Moreover, one of the defects of *Lighthouse*, which allows blatant treatment on less than unequal terms to be justified by such flimsy rationale, is the decision's failure to put any limits on the "regulatory purpose" that can be asserted as an excuse for disparate treatment. Nowhere does *Lighthouse* state any standard that this "regulatory purpose" itself must meet. Indeed, such a purpose could

conceivably be anything a city could dream up (perhaps the mere desire to increase tax revenues or to promote alcohol sales), and it would still justify disparate treatment. Thus, the new standard, being void of any discernible limitation or means of scrutiny, is really no standard at all, and would forever immunize municipalities from the reach of the Equal Terms provision.

Furthermore, as the present case makes evident, this regulatory purpose need not even be expressed in the ordinance itself. Indeed, under *Lighthouse*, and especially under the district court's holding, a city's alleged regulatory purpose can be fabricated *post hoc*. The supposed "generally applicable principles" used by the court in this case, for example (controlling accessory uses and promoting nightlife), were not evident in the language of the City's zoning code, but were simply inserted therein by the court's own eisegesis.

According to the district court's application of the *Lighthouse* test, then, the Equal Terms provision would mean little more than that cities cannot discriminate against religious assemblies unless they can think up a good (or even a bad) regulatory purpose for doing so. They need not worry that such purpose will be subjected to any scrutiny, and they need not even worry that they have failed to express it in the code. As long as the city (or the court) can eventually come up with some purpose with which religious assemblies would be incompatible,

municipalities can go on treating them on less than equal terms with nonreligious assemblies.

Thus, the similar situation requirement, as set forth in *Lighthouse*, and especially in the district court's decision, is so flexible that it would make an Equal Terms violation just about impossible to prove, no matter how blatant the disparate treatment and no matter how insincere the justification offered for it. In other words, imposing similar situation with respect to regulatory purpose upon the Equal Terms provision would result in the total nullification of the provision. This novel element cannot rationally be considered an acceptable part of the test.

IV. The City is strictly liable for a violation of the Equal Terms provision, and under Free Exercise jurisprudence, the City's code does not survive strict scrutiny.

With respect to the violation of the Equal Terms provision, as the structure of RLUIPA makes evident, ordinances that treat religious assemblies on less than Equal Terms are subject, not to strict scrutiny, but to strict liability. Congress chose to include a strict scrutiny requirement under the Substantial Burden provision, section 2(a), but chose to omit such a requirement from the Equal Terms provision in section 2(b). *See Lighthouse*, 510 F.3d at 269. With respect to the Equal Terms violation, therefore, there is no governmental interest that can justify the City's facially inequitable code; no such interest need even be considered. The code, on its face, subjects religious membership organizations to less than equal

treatment than nonreligious membership organizations. It cannot, therefore, survive the statutory test.

Concerning the Church's Free Exercise claim, because the district court erroneously found that Yuma's zoning code was neutral and of general applicability, it subjected the code only to a rational basis review and held that the City's desire to control accessory uses and promote an entertainment district justified the unequal treatment of religious membership organizations. But since the code is neither neutral nor generally applicable, the court failed to employ the appropriate level of scrutiny for the Church's constitutional claim.

Under Free Exercise, a law that lacks either neutrality or general applicability is subject to strict scrutiny. As the district court rightly said, "In [*Lukumi*], the Supreme Court declared that a 'law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.'" (ER at 18, quoting *Lukumi*, 508 U.S. at 546.) And as *Lukumi* also said, "A law that targets religious conduct for distinctive treatment … will survive strict scrutiny only in rare cases." 508 U.S. at 546.

Under strict scrutiny, the City is required to provide a compelling governmental interest for its discriminatory treatment of religious assemblies. The interests provided by the City at trial—loss of property revenue generation, and ability to control the placement of liquor licenses under the Twenty First

Amendment—are not compelling. Indeed, no court has ever recognized either interest as compelling, and courts have explicitly rejected revenue generation as an interest. *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).

Even if the City were able to show that the desire to limit accessory uses or to promote a robust nightlife were compelling governmental interests, that is, interests of the highest order, the City's zoning code is not drawn in narrow terms to accomplish those interests. As was the case in *Lukumi*, "those interests could be achieved by narrower ordinances." 508 U.S. at 546. For example, the City could amend its code to allow all membership organizations as of right, and at the same time could require special permits for any membership organization (without reference to religion) that desires to implement an accessory use. The City has not done this, and thus the code violates the Church's right to free exercise. *See id.* "The absence of narrow tailoring suffices to establish the invalidity of the ordinances." *Id.*

CONCLUSION

Yuma's ordinance makes a clear distinction between religious and non-religious membership organizations, and then subjects the two to unequal treatment on that basis alone. There is no generally applicable regulatory purpose, nor any

alleged absurdity in the plain reading of the Equal Terms provision, nor any level of scrutiny that can save that ordinance from violating the principles of Free Exercise and the Equal Terms provision. Upon acknowledging that Yuma's code facially distinguishes between religious and nonreligious membership organizations and required conditional approval only for the former, the district court should have found the code to be in violation of both the Free Exercise Clause and the Equal Terms provision. Its failure to do so constitutes reversible error.

Accordingly, the Church requests that the Court reverse the district court's decision and remand to the district court with instructions to enter judgment in favor of the Church on the Church's claims for declaratory and injunctive relief and damages, and to conduct further proceedings to determine the amount of additional damages that the Church has suffered since the trial.

Dated: July 29, 2009.

Respectfully submitted,

s/Byron J. Babione
Byron J. Babione
ALLIANCE DEFENSE FUND
Attorney for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to 9th Circuit Rule 28-2.6, Appellants certify that there are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,824 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman.

Dated: July 29, 2009.

s/Byron J. Babione
Byron J. Babione
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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I further certify that some of the participants in the case are not registered CM/ECF users. I have emailed the foregoing document to the following non-CM/ECF participants:

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The undersigned also certifies that four copies of Appellants' Excerpts of Record were this day sent via UPS next day air to:

Clerk of Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

and one copy of Appellants' Excerpts of Record was this day served via UPS ground upon:

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s/Byron J. Babione
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ADDENDUM

YUMA CITY CODE
YUMA, ARIZONA

Contains 2008 S-34, current through
Ordinance O2008-11, adopted 3-19-08

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Title 15: Land Usage

Chapter

Chapter 154: Zoning

Old Town District (OT)

§ 154-185 Purpose.

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.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95)

§ 154-186 Applicability.

The Old Town (OT) District shall be applicable to those historic downtown business and government centers and surrounding support uses established in the early history of the city.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95)

§ 154-187 Principal Permitted Uses.

The following uses as defined in the Standard Industrial Classification Manual (1987), (Executive Office of the President, Office of Management and Budget), or in § 154-004 of this chapter shall be permitted as a matter of right in the Old Town (OT) District:

(A) Local and suburban passenger transportation (SIC 411).

(B) Taxicabs (SIC 412) and horse drawn carriages and other nonmotorized conveyances.

(C) Intercity and rural bus transportation (SIC 413).

(D) Bus charter service (SIC 414).

(E) Terminal and service facilities for motor vehicle passenger transportation (SIC 417).

(F) United States Postal Service (SIC 431).

(G) Arrangement of passenger transportation (including travel agencies and tour operators) (SIC 472).

(H) Water supply (SIC 494).

(I) Paint, glass, and wallpaper stores (SIC 523).

(J) General merchandise stores (SIC 53).

(K) Food stores (SIC 54).

(L) Apparel and accessory stores (SIC 56).

(M) Home furniture, furnishings, and equipment stores (SIC 57).

(N) Eating and drinking places (including outdoor dining) (SIC 58).

(O) Miscellaneous retail (SIC 59, except fuel dealers - SIC 598 shall not be permitted).

(P) Depository institutions (SIC 60).

(Q) Nondepository credit institutions (SIC 61).

(R) Security and commodity brokers, dealers, exchanges, and services (SIC 62).

(S) Insurance carriers (SIC 63).

(T) Insurance agents, brokers, and service (SIC 64).

(U) Real estate (SIC 65).

(V) Holding and other investment offices (SIC 67).

(W) Hotels and motels (including bed and breakfast inns and conference facilities) (SIC 701).

(X) Rooming and boarding houses (SIC 702).

(Y) Membership based lodging (SIC 704).

(Z) Laundry, cleaning, and garment services (SIC 721; excluding industrial launderers SIC 7218).

(AA) Photographic studios, portrait (SIC 722).

(BB) Beauty shops (SIC 723).

(CC) Barber shops (SIC 724).

(DD) Shoe repair shops and shoe shine parlors (SIC 725).

(EE) Tax return preparation services (SIC 7291).

(FF) Miscellaneous personal services (SIC 7299).

(GG) Advertising agencies (SIC 7311).

(HH) Consumer credit reporting agencies, mercantile reporting agencies, and adjustment and collection agencies (SIC 732).

(II) Mailing, reproduction, commercial art and photography, and stenographic services (SIC 733).

(JJ) Personnel supply services (SIC 736).

(KK) Computer programming, data processing, and other computer related services (SIC 737).

(LL) Passenger car rental (SIC 7514).

(MM) Automobile parking (temporary) (SIC 7521).

(NN) Motion picture theaters (except drive-in) (SIC 7832).

(OO) Video tape rental (SIC 784).

(PP) Amusement and recreation services (including auditoriums, performing arts centers, and physical fitness facilities) (SIC 79).

(QQ) Medical and dental offices (SIC 801 - 804).

(RR) Legal services (SIC 81).

(SS) Individual and family social services (SIC 8322).

(TT) Child day care services (SIC 835).

(UU) Residential care (SIC 836).

(VV) Social services (not elsewhere classified) (SIC 839).

(WW) Museums, art galleries, and botanical and zoological gardens (SIC 84).

(XX) Membership organizations (except religious organizations (SIC 86)).

(YY) Engineering, accounting, research, management, and related services (including architects, designers, landscape architects, and urban planners) (SIC 87).

(ZZ) Public administration (SIC 91 - 97).

(AAA) Single-family dwellings.

(BBB) Duplex dwellings.

(CCC) Multiple-family dwellings.

(DDD) Planned unit developments.

(EEE) Artist's and crafters studios and lofts.

(FFF) Itinerant uses.

(GGG) Correction centers.

(HHH) Visitor's centers.

(III) Other uses as approved by the Zoning Administrator consistent with the purpose of the Old Town (OT) District.

(JJJ) Wall-mounted (see § 154-441) and concealed/disguised (see § 154-442) personal wireless communication facilities are permitted as an accessory use for legally established non-residential uses only.

(KKK) A roof-mounted (see § 154-440) personal wireless communication facility is permitted on a commercial building, or a mixed-use building which is primarily non-residential (75% of the use is non-residential).

(LLL) The following permitted uses are allowed in combination with and may be contained in the same unit as a residential use as a live/work space:

(1) (V) Holding and other investment offices (SIC 67).

(2) (AA) Photographic studio, portrait (SIC 722).

(3) (EE) Tax return preparation services (SIC 7291).

(4) (II) Commercial art and photography, and stenographic services listed under SIC 733 (Mailing and reproduction services under this SIC are not included).

(5) (KK) Computer programming, data processing, and other computer related services (SIC 737).

(6) (RR) Legal services (SIC 81).

(7) (YY) Engineering, accounting, research, management, and related services (including architects, designers, landscape architects and urban planners) (SIC 87).

(8) (EEE) Artist's and crafter's studios and lofts.

All other principal permitted uses within the Old Town District not listed above may be contained within the same building as residential units (see live/work building) within the Old Town District but must have separate entrances and be independent from the residential use. Required parking spaces are determined by the gross square footage attributed to each use as further defined in this section and §§ 154-395 through 154-403.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95; Ord. O2000-35, passed 6-21-00; Ord. O2002-09, passed 2-20-02; Ord. O2004-52, passed 8-4-04)

§ 154-188 Conditional Uses.

The following uses shall only be permitted upon the granting of a conditional use permit and compliance with all conditions as required therein:

(A) Drive-through facilities.

(B) Gasoline service stations (SIC 554).

(C) Carwashes (SIC 7542).

(D) Educational services (SIC 82).

(E) Job training and vocational rehabilitation services (SIC 833).

(F) Religious organizations (SIC 8661).

(G) Outdoor sales (except outdoor eating and drinking places and itinerant uses which are principal permitted uses).

(H) Utility installations.

(I) Other uses as approved by the Zoning Administrator which further the purpose of the Old Town (OT) District.

('80 Code, App. A, § 95) (Ord. 583, passed 9-16-52; Ord. O95-073, passed 10-18-95)

Historic District Overlay (H)

§ 154-280 Purpose and Intent.

The purpose and intent of this subchapter is to promote the educational, cultural, economic and general welfare of the community and to ensure the harmonious growth and development of the municipality by encouraging the preservation of historic places and structures through the designation of sites and districts of historical significance. It is not intended that the designation of a site or a district as historic should modify uses permitted in existing zones, but rather than the designation of an historic site or an historic district be superimposed over existing zones to encourage the retention of early structures and objects in active use and in substantially their historic appearance, setting and placement. It is intended that the renovation of an historic site shall preserve its distinguishing historic qualities or character and that new structures erected within an historic district or the renovation of an existing structure within an historic district shall harmonize with the general character or ambiance of existing structures in the district in order to preserve the architectural heritage of the district and to promote the historical significance of the site or district among residents and visitors to the community.

('80 Code, App. A, § 114) (Ord. 583, passed 9-16-52; Ord. 2125, passed 5-4-83)

Conditional Use Permits

§ 154-495 Purpose.

The purpose for the conditional use permit procedure is to allow approval of uses which are deemed to possess location, use, building, or traffic characteristics of such unique, and special, form as to make impractical, or undesirable, their automatic inclusion as permitted uses in certain districts. The Planning and Zoning Commission shall have the authority to grant approval for conditional uses, under the procedures herein stated. In granting a conditional use permit; certain safeguards may be required, and certain conditions established to accomplish to following:

(A) To protect the public health, safety, convenience, and general welfare; and

(B) To assure that the purposes of the zoning code shall be maintained with respect to the particular conditional use on the particular requested site; and

(C) To consider the location, use, building, traffic characteristics, and environmental impact(s) of the proposed use; and

(D) To consider existing and potential uses with the general area in which the requested conditional use is proposed.

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. O95-090, passed 12-20-95)

Planning and Zoning Commission

§ 154-501 Planning and Zoning Commission Action.

(A) The Planning and Zoning Commission shall have the authority to hear and decide applications for conditional use permits. However, when specified by the zoning code that the City Council shall have the final authority to decide applications for conditional use permits, the decision of the Planning and Zoning Commission shall be advisory to the City Council.

(B) In order to approve an application for a conditional use permit, the Planning and Zoning Commission shall make a finding that each of the following questions can be answered affirmatively:

(1) Is the Planning and Zoning Commission, or the City Council, authorized under the zoning code to grant the conditional use permit described in the application?

(2) Will the establishment, maintenance, and/or operation of the requested conditional use, under the circumstances of the particular case, not be detrimental to the health, safety; peace, morals, comfort, or general welfare of persons residing, or working, in the vicinity or such proposed use, or be detrimental, or injurious, to the value of property in the vicinity, or to the general welfare of the city?

(3) Are the provisions for ingress, egress, and traffic circulation, and adjacent public streets adequate to meet the needs of the requested conditional use?

(4) Are the provisions for building(s) and parking facility setbacks adequate to provide a transition from, and protection to, existing and contemplated residential development?

(5) Are the height and bulk of the proposed buildings, and structures, compatible with the general character of development in the vicinity of the requested conditional use?

(6) Have provisions been made to attenuate noise levels and provide for adequate site, and security lighting?

(7) Has the site plan for the proposed conditional use, including, but not limited to landscaping, fencing, and screen walls and/or planting, CPTED strategies (Crime Prevention Through Environmental Design), and anti-graffiti strategies been adequately provided to achieve compatibility with adjoining areas?

('80 Code, App. A, § 215) (Ord. 583, passed 9-16-52; Ord. O95-090, passed 12-20-95)

Effective: September 22, 2000

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons
➡ **§ 2000cc. Protection of land use as religious exercise**

(a) Substantial burdens

(1) General rule

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--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

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.

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(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

CREDIT(S)

(Pub.L. 106-274, § 2, Sept. 22, 2000, 114 Stat. 803.)

Current through P.L. 111-40 approved 7-1-09

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ALLIANCE DEFENSE FUND
Defending Our First Liberty

July 7, 2009

Ron Messerly
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Re: *Centro Familiar Cristiano Buenas Nuevas, et al. v. City of Yuma*
Case No. 09-15422

Dear Mr. Messerly,

Per our email communications yesterday, I made a request to the clerk of the Ninth Circuit Court of Appeals to allow an extension on the time for filing the Appellants' opening brief. The clerk granted Appellants' request for a 14 day extension. Appellants' opening brief is now due on July 29, 2009, Appellee's answering brief is due on August 28, 2009, and Appellants' reply brief is due 14 days after the answering brief is served.

Sincerely,

Byron J. Babione
Senior Legal Counsel

cc: Deborah Sheasby
David Langdon

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