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)

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

At the heart of this appeal is the proper test for a RLUIPA Equal Terms claim. If the Court applies the test set forth plainly in the text, the Church will win; if it approves the extra-textual approach taken by the district court, the City will win. It is that simple.

To be sure, the text of the Equal Terms provision is unambiguous: it prohibits municipalities from implementing land use restrictions that treat religious "assembl[ies]" on "less than equal terms" with nonreligious "assembl[ies]." 42 U.S.C. 2000cc(b)(1). The purpose behind the statute is equally unambiguous: it was designed to put an end to the "widespread discrimination" against churches in local zoning laws by preventing cities from using economic development, aesthetics, traffic concerns, or any other excuses as a justification for treating religious assemblies less favorably than their secular assembly counterparts. See, *e.g.*, 146 Cong. Rec. S7774, S7775 (2000) (joint statement of Sen. Hatch and Sen. Kennedy); H.R. Rep. No. 219, 106th Cong., 1st Sess. 18 (1999).

But the efforts of Congress to provide broad protection for religious exercise[1] through the Equal Terms provision have not been well received by municipalities seeking to raise tax revenue and promote economic development. And so those municipalities have managed to convince some courts to weaken the

[1] See 42 U.S.C. 2000cc-3(g) (requiring RLUIPA to be construed in favor of "a broad protection of religious exercise.")

protection of the statute by going beyond its plain text and including an additional element to the test: a requirement that the religious and nonreligious assemblies be "similarly situated" with respect to the purpose of the zoning regulation. Through this judicial rewriting of the Equal Terms provision, municipalities can easily circumvent the statute—and the congressional intent behind it—merely by asserting some "regulatory purpose" for the unequal treatment of religious assemblies, such as raising tax revenue or promoting economic development.

Unsurprisingly, this radical departure from the plain language of the statute has prompted disagreement among the courts. Indeed, there is currently a split in the circuits on whether the Equal Terms provision should contain this "similarly situated" requirement. On the one side is the Eleventh Circuit, which has applied the unambiguous text (based on the plain meaning of "assembly") and has consistently refused to graft such a requirement onto an Equal Terms claim. *See, e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). On the other side is the Third Circuit, which requires that religious and nonreligious assemblies be "similarly situated as to the regulatory purpose of the regulation in question." *Lighthouse Institute for Evangelism v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007). And somewhere in the middle is the Seventh Circuit, which until recently had sided with the Eleventh Circuit, but is now divided on the issue. See *Vision Church v. Village of Long Grove*, 468 F.3d

973, 1002-03 (7th Cir. 2006) (following Eleventh Circuit in rejecting a "similarly situated" requirement); and *Digrugilliers v. City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007) (same); but see *River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F.3d 364 (7th Cir. 2009) (adopting Third Circuit's "similarly situated" test).[2]

It is the choice between these two conflicting approaches—one giving effect to Congress's intent to protect religious exercise and the other permitting municipalities to thwart that intent by simply asserting some regulatory purpose—that is now before this Court to decide.

DISCUSSION

A.

The City of Yuma's zoning code expressly allows nonreligious assemblies to locate as of right in the Old Town zoning district, but prohibits religious assemblies (absent special permission from the City). Upon being denied a conditional use permit to locate in the district, the Church challenged the City's code under the Equal Terms provision of RLUIPA.[3]

[2] The Plaintiff's Petition for Rehearing En Banc is pending before the Seventh Circuit.

[3] The Church also challenged the code under other sections of RLUIPA and under the First and Fourteenth Amendments. Although the Church addressed its Free Exercise claim in its Opening Brief, the Church focuses solely on its Equal Terms claim in this Brief.

The district court acknowledged that, on its face, the City's code differentiated between assemblies solely on the basis of whether the assembly was "religious" or not, and had thus treated religious assemblies on less-than-equal terms with nonreligious assemblies. (ER at 23.) But rather than follow the plain-text approach of the Eleventh and Seventh Circuits and rule in favor of the Church, the district court instead followed the approach invented by the Third Circuit in *Lighthouse* and added an extra element to the test. Thus, instead of limiting the comparison to whether the land uses were both "assemblies," as the text plainly requires, the court expanded the scope of the comparison, requiring the uses to be not just "assemblies," but assemblies that are "similarly situated as to the regulatory purpose." (ER at 18.)

Needless to say, having added this extra element to the test (and having modified it slightly to allow for *post hoc* regulatory purposes), the court had no difficulty concluding that the various "regulatory purposes" which it assisted the City in discovering (the desire to control accessory uses and to promote liquor sales) satisfied its version of the impotent *Lighthouse* test. (ER at 25-27.) Despite its acknowledgement that the City's code facially treated religious assemblies on less than equal terms with nonreligious assemblies, the court found, on the basis of these purposes, that the code did not violate the Equal Terms provision.

In its opening brief, the Church critically analyzed the district court's test, which the court had borrowed almost entirely from the Third Circuit. It argued that the district court should not have adopted that court's extra-textual approach, but should instead have applied the plain-text approach, following the lead of the Eleventh and Seventh Circuits. (Opening Br. 23-24.) Under the latter approach, the Church established that the City's code unquestionably violates the Equal Terms provision, which contains no "similarly situated" requirement. (*Id*. at 10-11.)

Instead of offering substantive answers to the Church's arguments against the test adopted by the district court, the City spent the vast majority of its brief explaining why, under that test, the Church could not prevail. (City's Br. 27-37.) Indeed, for the most part, the City simply repeated the district court's arguments (which merely repeated the Third Circuit's arguments). It argued that churches were not exempt from zoning ordinances (*id*. at 21-23) (an utterly unremarkable proposition, which the Church does not dispute) and that, because of the accessory use and liquor buffer issues, religious assemblies and nonreligious assemblies were not similarly situated (*id*. at 27-37, 38-41). And so on.

Why any of that is relevant, though, the City does not say. Ultimately, the City's repetition of the district court's reasons why, under its modified version of the *Lighthouse* test, the Church's Equal Terms claim fails is of no assistance to this Court in deciding the underlying issue before it. Indeed, the Church acknowledges

that it is unlikely to prevail under the *Lighthouse* test (and even more so under the district court's version of it). That's the whole point. *No* church is likely to prevail under either test because, for all of the reasons the Church has already stated, the tests render the Equal Terms provision essentially meaningless.[4] (Opening Br. 26.) In that respect, then, most of the City's brief is inapposite to the question before the Court.

B.

The question that is before the Court is not the outcome of this case under the district court's test, but whether the district court's test is the proper test. The Church has argued that it is not; the City has merely assumed that it is. The Church's arguments against the test—that it interprets the Equal Terms provision in a manner contrary to the statute's text, history, and purpose—remain largely unanswered. Those arguments are briefly summarized below, followed by the Church's reply to the City's constitutional avoidance argument.

[4] It should be pointed out that the City's code differentiates not just between membership organizations and *churches*, but between membership organizations and religious organizations of *every* kind, including those (like religious book clubs) which, without dispute, would carry no accessory uses and no liquor restrictions. The code, therefore, plainly differentiates even between religious and nonreligious assemblies with precisely the same impact on the City's regulatory goals.

1. The plain language of the Equal Terms provision does not allow for a similarly situated requirement.

Neither the district court nor the City has argued for its interpretation of the Equal Terms provision based on the statutory text. Nor can they, for the statute makes no mention of a "similarly situated with respect to regulatory purpose" requirement. Indeed, as both the Eleventh and Seventh Circuits have held, under the plain language of the statute, the only question to be asked when comparing the treatment of religious and nonreligious land uses is whether both are "assemblies or institutions."

> 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) (emphasis added) (citations omitted); see also *Vision Church*, 468 F.3d at 1002-03 (same).

When a statute's language is plain, as the language in this statute is, the sole function of the courts is to enforce it according to its terms. *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 953 (9th Cir. 2009). The plain language of the Equal Terms statute does not mention, much less require, that the assemblies being compared must be "similarly situated with respect to the regulatory purpose." The

plain language simply requires that they both be "assemblies." That should be the end of the matter.

2. Enforcing the plain language of the Equal Terms provision does not produce absurd results.

Recognizing that the plain language of the Equal Terms provision does not support a similarly situated requirement, the City (repeating the district court) has argued that the application of the plain text would lead to absurd results. (City's Br. 29 n.8; ER at 19.) According to the City, if it allowed "a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members ... [or] a religious assembly with rituals involving sacrificial killings of animals or the participation of wild bears." (City's Br. 29 n.8 (quoting *Lighthouse*, 510 F.3d at 268).)

But as the Church explained in its opening brief (at 19-20), this "parade of horribles" justification (as the *Lighthouse* dissent called it) is wholly unpersuasive. As Judge Jordan pointed out, the alleged absurdity, for instance, of a ten-member book club mandating the permission of a thousand-member megachurch, or the presence of a Christian church also mandating allowance of a bear-killing cult, is easily avoidable by the institution of religiously-neutral restrictions on size or animal killing. See *Lighthouse* at 287; see also *Digrugilliers* at 615 ("Whatever restrictions the City imposes on other users of land in [its commercial district] it can impose on the [church] without violating the 'equal terms' provision.").

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. A city can place a maximum size limit on all assembly buildings in the district. It can cap the number of people permitted to occupy assembly buildings. It can impose parking requirements. It can limit the size or type of buildings permitted on certain types of roads to reduce traffic. And it can limit the keeping and killing of live animals.

In other words, as far as the Equal Terms provision is concerned, the City's authority to regulate land use is unlimited, as long as it places the same restrictions on *all* assemblies, religious and nonreligious alike. See *Vision Church,* 468 F.3d at 993-94 (upholding maximum square footage restriction applied equally to secular and religious users). Under the appropriate reading of the provision (and notwithstanding the "lions and tigers and bears, oh my! shock value" of the straw-man hypotheticals offered up by the City, *Lighthouse,* 510 F.3d at 286-87), this invented absurdity has no basis and cannot serve as any justification for modifying the statutory test.

3. Applying the plain language of the Equal Terms provision is consistent with its purpose.

Unable to justify the similarly situated requirement on the basis of the text of the statute or absurd results, the district court asserted that such a requirement was

necessitated by Free Exercise principles which, according to the court, Congress intended the Equal Terms provision to codify. (ER at 17.) But the court did not explain how the codification of *free exercise* principles could mandate the inclusion of a "similarly situated" requirement, which is a component of *equal protection* jurisprudence. See *Vision Church*, 468 F.3d at 1002-03 (holding that Equal Terms test does not include a "similarly situated" requirement "as in our familiar equal protection jurisprudence"). As Judge Jordan noted in *Lighthouse*, "No one has cited, and I am not aware of, any Supreme Court case holding that parties must demonstrate that they are 'similarly situated' to someone else to establish a violation of the Free Exercise Clause." 510 F.3d at 293 (Jordan, J., dissenting).

Moreover, interpreting RLUIPA as merely codifying free exercise standards renders the entire statute superfluous. "Viewing a RLUIPA claim as the precise equivalent of a Free Exercise claim renders the statute superfluous. Congress chose to define a violation under section 2(b)(1) not in terms of an ordinance's lack of neutrality and general applicability but rather in terms of equality of treatment.…" *Id*. at 288 (Jordan, J., dissenting). This Court has repeatedly urged courts to "avoid whenever possible statutory interpretations that result in superfluous language." *United States v. Novak*, 476 F.3d 1041, 1048 (9th Cir. 2007). The more reasonable interpretation is that Congress meant what it said, and that "RLUIPA offers greater

protection to religious exercise than the First Amendment offers." *Smith v. Allen*, 502 F.3d 1255, 1264 n.5 (11th Cir. 2007).

Finally, as the Church has argued at length in its opening brief, adopting the "similarly situated" test nullifies the Equal Terms provision. Under this test, municipalities are free to discriminate against religious assemblies as openly as they want, so long as they can point to some regulatory purpose for doing so. Thus, the new standard, by rendering an Equal Terms violation almost impossible to prove, forever immunizes municipalities from the reach of the provision.[5]

This nullification of the Equal Terms provision occasioned by the judicially-imposed rewriting of the statute should come as no surprise. Indeed, far from being an unforeseen result of the *Lighthouse* test, the drastic consequences were announced by Judge Jordan in his prophetic dissent in that very case, wherein he predicted that "[i]f a 'similarly situated' requirement is read into the statute, local governments will have a ready tool for rendering RLUIPA section 2(b)(1) practically meaningless." *Lighthouse,* 510 F.3d at 293.

Wherever the *Lighthouse* test has been adopted, the Equal Terms provision has been transformed from a powerful source of protection for religious assemblies into a dead letter. If the district court's decision in this case is allowed to stand, it will undoubtedly suffer the same fate in this Circuit.

[5] See Sarah Keeton Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 Duke L.J. 1071, 1103 (2009).

4. Applying the plain language of the Equal Terms provision does not trigger the canon of constitutional avoidance.

In a final desperate effort, the City contends that the district court's departure from the plain text of the Equal Terms provision was necessary to comply with the "canon of constitutional avoidance" (which the district court mentioned one time in its 32-page opinion, in a footnote (ER at 20 n.3)). The City asserts, in particular, that adding a "similarly situated" test is necessary to keep the Equal Terms provision from running afoul of the Establishment Clause and the Twenty-first Amendment. (City's Br. 41, 43.)

But this argument does not justify the district court's adoption of the *Lighthouse* test, for two reasons. First and foremost, the City has not challenged the constitutionality of the Equal Terms provision in this litigation, and thus cannot raise the issue on appeal. See *Travelers Property Cas. Co. of America v. Conocophillips Co.*, 546 F.3d 1142, 1146 (9th Cir. 2008).

Second, the canon of constitutional avoidance is not even remotely applicable here. As stated in its original formulation, the constitutional avoidance doctrine applies when "the constitutionality of a statute is assailed" and when that statute is "reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid." *U.S. ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909). The provision here (which, to reiterate, has not been challenged as unconstitutional) is reasonably susceptible to

only one interpretation, and that interpretation is perfectly constitutional. See *Lighthouse*, 510 F.3d at 288 (Jordan, J., dissenting). The plain reading of the provision does not, as the City has argued, violate the Establishment Clause or immunize churches from zoning regulations. See *id*. The Church is not asking that religious assemblies be treated better than nonreligious assemblies or that they be exempt from zoning regulations, but merely that zoning regulations not categorically subject religious assemblies to less than equal treatment.

The same can be said with respect to the states' right to control liquor sales under the Twenty-first Amendment. The only limit the Equal Terms provision could conceivably place upon such a right is that it not be used by local governments as a pretext to subject religious assemblies to less than equal treatment ("bootstrapping," as Judge Posner called it in a similar context in *Digrugilliers*, 506 F.3d at 615). Certainly local governments are not free from the restraints of the Equal Terms provision simply because the state (which is also subject to the Equal Terms provision) is authorized to regulate liquor. Indeed, on the City's theory, the Equal Terms provision would also violate the states' authority to tax property, to prohibit discrimination in employment, or just about any other right a state may have under the Tenth Amendment.

For these reasons, the constitutional avoidance canon is no grounds for redrafting the Equal terms provision as the Third Circuit and the district court have done.

CONCLUSION

For all the foregoing reasons, the Church respectfully asks this Court to lend the weight of its decision to the appropriate side of this circuit split: to accept the approach set forth by the Eleventh Circuit, an approach based upon the language of the provision and consonant with the purpose of Congress to protect religious assemblies against economically-motivated discrimination, and to reject the approach set forth by the Third Circuit, an approach foreign to the text of the statute, derived from a misapplication of Free Exercise principles, and completely subversive of congressional intent.

Dated: November 30, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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