No. 20-16159

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEW HARVEST CHRISTIAN FELLOWSHIP, Plaintiff/Appellant, vs. CITY OF SALINAS, Defendant/Appellee.	No. 20-16159 U.S. District Court No. 5:19-cv-00334

BRIEF OF *AMICI CURIAE* THE CALIFORNIA LEAGUE OF CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEE AND IN SUPPORT OF AFFIRMANCE

On Appeal from the United States District Court
for the Northern District of California

The Honorable Susan Van Keulen

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INTRODUCTION

The power to effectively regulate land uses is crucial to cities and counties throughout the State of California, as well as throughout the country. Local governments rely on their discretionary police power to address local conditions, for example by enacting zoning controls to revitalize downtown areas and eliminate blight. This case has significant implications for local governments' land use regulatory powers: an overly broad interpretation of the Religious Land Use and Institutionalized Persons Act (RLUIPA) would hamstring cities' and counties' ability to exercise their police power to protect the public's health, safety and welfare.

Advocating for an unprecedented expansion of RLUIPA, Appellant challenges the City of Salinas's denial of a zoning amendment and conditional use permit to allow Appellant's proposed private assembly use in a three-block area of downtown Salinas. However, the proposed use is inconsistent with the City's widely accepted zoning objectives, feasible alternatives to the proposed site exist, and Appellant purchased the property knowing its proposed use was prohibited there. Claiming the City treated its proposed religious assembly use on less than equal terms than other assembly uses, Appellant seeks to be regulated like restaurants and movie theaters, ignoring the fact that its proposed private assembly use has different land use impacts than the public-oriented, pedestrian-friendly uses

it claims are comparable, and that its proposed use would undermine the City's objective of creating a vibrant entertainment and tourism-oriented district in downtown Salinas.

Appellant also asserts that by denying the zoning amendment and conditional use application, the City has imposed a substantial burden on Appellant's exercise of religion. Appellant contends it is entitled to an exemption from local zoning laws for its preferred site although it chose to purchase a building where its desired use is restricted and refused to consider feasible alternatives.

Appellant fails to establish a RLUIPA violation. The City has treated Appellant identically to comparable private assembly uses, and therefore Appellant has suffered no unequal treatment compared to any similarly situated secular use. Nor has the City imposed a substantial burden on Appellant by denying its request for special treatment, where Appellant has many available alternatives.

Therefore, this Court should affirm the district court's grant of the City's motion for summary judgment and denial of Appellant's motion for summary judgment. To hold otherwise would stretch RLUIPA beyond its boundaries and drastically undermine cities' and counties' police power to regulate land uses to safeguard their local residents' health, safety and welfare.

BACKGROUND

The City's Zoning Code establishes a Downtown Core Area that encompasses three blocks of Main Street, running north to south, as well as several blocks to the east and west of Main Street. Section 37-40.310 of the Zoning Code specifically restricts private assembly uses on the ground floor in buildings facing the three-block stretch of Main Street within the Downtown Core Area ("Main Street Restricted Area"):

> Sec. 37-40.310. – Use Classifications.
>
> …
>
> (2) Assembly and Similar Uses. Clubs, lodges, places of religious assembly, and similar assembly uses shall only be permitted above the ground floor of buildings facing Main Street within the downtown core area.

ER 300.

Appellant's current location at 357 Main Street is within the Main Street Restricted Area. It has a glass storefront covered with banners and blinds that remain closed most of the time. ER 558-559, 606-609. Appellant moved to this location before the Main Street Restricted Area was created and therefore has been operating as a nonconforming use. The conditional use permit for this site required that Appellant "maintain an open, pedestrian-oriented store front (consisting of a reading room, library, retail space or office use) with the window blinds to be kept open during the day from 8:00 am to 6:00 pm Monday through Saturday." ER

586. Appellant initially maintained a reading room at the front of the building but eventually eliminated this pedestrian-oriented space. ER 568.

The Beverly Building across the street at 344 Main Street, where Appellant proposes to relocate, is also within the Main Street Restricted Area. It has a 50-foot wide glass storefront, approximately twice the width of the surrounding retail establishments, and occupies a prominent place in the heart of the Downtown Core Area. ER 265; Request for Judicial Notice ("RJN") and Wong Dec. Ex. A.

ARGUMENT

I. The City of Salinas Has Broad Police Power to Enact Zoning Regulations.

Land use regulations are inherently a local concern. *DeVita v. Cnty. Of Napa*, 9 Cal. 4th 763, 782 (1995). The City of Salinas ("City"), like all cities and counties, has broad authority to enact zoning controls to protect the public health, safety and welfare, pursuant to its police power. *See Berman v. Parker*, 348 U.S. 26, 32-33 (1954). As Justice William O. Douglas stated, "The concept of the public welfare is broad and inclusive." *Id.* at 33. A land use regulation is valid unless its provisions are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). "As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible." *Calif.*

Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435, 455 (2015). In California, the police power is set forth in the California Constitution, which states, "A city or county may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7.

As the Supreme Court has long recognized, "[t]he police power is one of the least limitable of governmental powers." *Queenside Hills Realty Co., Inc. v. Saxl*, 328 U.S. 80, 83 (1946). "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Vill. of Euclid*, 272 U.S. at 388*; accord Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 146 (1976) ("It is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good.") (citing *Queenside Hills*, 328 U.S. at 82-83). Thus, courts give broad deference to a city's or county's zoning laws as an exercise of police power. *See Dodd v. Hood River Cnty.*, 136 F.3d 1219, 1230 (9th Cir. 1998) (while federal courts adjudicate claims that local zoning decisions violate federal law, they "were not created to be the 'Grand Mufti' of local zoning boards, nor do they sit as super zoning board[s] or [] zoning board[s] of appeals") (citations omitted).

The Court should review Appellant's RLUIPA claims against this backdrop of longstanding deference to local land use decisions. Although RLUIPA limits a

local government's ability to deny a land use permit under certain circumstances, it does not exempt religious institutions from land use regulations. *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 736 (6th Cir. 2007) (RLUIPA does not immunize construction plan from zoning ordinance simply because institution undertaking construction pursues a religious mission); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 268 (3d Cir. 2007) (RLUIPA does not give religious institutions a "free pass" from land use regulations); *C.L. for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) (same); *see* 146 Cong. Rec. S7774-01, S7776 (2000) (joint statement of RLUIPA lead co-sponsors Sens. Orrin Hatch and Edward Kennedy) (RLUIPA does not immunize religious institutions from land use regulations). This Court has recognized that RLUIPA contemplates deference to local police power to regulate land use, through its articulations of the equal terms and substantial burden doctrines, as discussed below. Therefore, the Court should refrain from undermining cities' and counties' broad police power through an overly expansive interpretation of RLUIPA.

II. Appellant Has Not Established a Violation of the Equal Terms Provision.

The equal terms provision of RLUIPA prohibits a government from "impos[ing] or implement[ing] 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-2(b)(1). To prove an equal terms violation, Appellant must demonstrate that it has been "treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria." *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011).

No such unequal treatment has occurred here. In arguing it has been treated unequally, Appellant ignores standard urban planning principles that differentiate between private assemblies, like religious assemblies, private lodges, clubs on the one hand, and public-oriented uses like theaters, on the other. In denying Appellant's application, the City applied established zoning criteria used by cities and counties across California, and indeed across the country, that recognize the different impacts of these various land uses.

A. Private Assembly Uses and Public-Oriented Uses Are Distinguishable Based on Accepted Zoning Criteria.

Zoning to promote vibrant, pedestrian-friendly streets, and to encourage tourism and economic development, is crucial to cities' and counties' ability to serve the public, heath, safety and welfare. This Court in *Centro Familiar* recognized the importance of local zoning power, holding that a city or county may regulate land use by religious institutions so long as the distinction rests on a legitimate regulatory purpose, specifically the use of accepted zoning criteria. *Centro Familiar,* 651 F.3d at 1172. Zoning that promotes pedestrian-friendly

streets and entertainment and tourism districts is a common urban planning strategy to revitalize struggling downtown areas and encourage economic development. *See, e.g., River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 368-69 (7th Cir. 2010) (zoning may have goal of creating a "Street of Fun"); *Victory Center v. City of Kelso*, 2012 WL 1133643, at *16 (W.D. Wash. 2012); *see also A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 787 (9th Cir. 2006) (noting Las Vegas' effort to revitalize its downtown by creating a pedestrian-friendly zone); ER 200-201; RJN and Wong Dec. Ex. B (finding that increased walkability is tied to higher economic value).

In particular, urban planners widely recognize the importance of encouraging ground floor uses that generate activity (commonly known as "active uses") to increase pedestrian volume and create a vibrant neighborhood. *See Jane Jacobs's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. Envtl. Aff. L. Rev. 547, 560 (2001) ("New Urbanist zoning may also require mandatory shopfronts along the sidewalks in designated retail frontage locations."); RJN and Wong Dec. Ex. C at 12 ("The design and use of the ground floor is key to whether a building either enhances or degrades the pedestrian environment. Active, generous ground floors that work for people-centric uses [including but not limited to retail] support comfortable and engaging streets. Blank walls, parking garages, reflective glass and driveways leave pedestrians feeling unwelcome or even unsafe.

Too much of that, and most people will avoid walking."). Urban planners also recognize that to create a pedestrian-friendly environment, a city must zone to encourage storefronts with transparent windows. RJN and Wong Dec. Ex. C at 18 ("The urban street environment is more inviting to pedestrians when they are able to see activity and goods inside a building. A street where there are no windows or where all the shades are pulled is boring, feels unsafe and discourages people from wanting to walk there.").

As the City's Community Development Director testified, active uses that draw a large amount of activity and provide "eyes on the street" prevent crime and increase pedestrian safety. ER 442-443. A building that does not generate much activity, like a church that is closed most of the time, leads to "dead space" that affects safety along that stretch of the street and is "detrimental to the welfare of the city," as well as to economic development. *Id.*

Appellant asks the Court to ignore these widely established and accepted zoning criteria and to simply assume all "assembly" uses are equivalent, regardless of whether they encourage pedestrian activity, public safety, economic development or tourism. But doing so would undermine decades of local zoning policy and severely hamper local efforts to revitalize downtown neighborhoods and eliminate blight.

B. Appellant's Claim of a Facial Violation of the Equal Terms Provision Fails.

Appellant fails to establish a facial violation of RLUIPA's equal terms provision. Appellant argues that because Section 37-40.310 regulates religious assembly uses on the ground floor facing Main Street, and some other assembly uses are not subject to this restriction, the provision treats religious assemblies unequally. Appellant's Opening Brief ("AOB") at 25.

1. Appellant's Assembly Use Is Not Comparable to All Other Assembly Uses Under RLUIPA.

Appellant incorrectly contends that all assembly uses are comparable under RLUIPA, ignoring this Court's holding that an equal terms violation exists only if uses that are "similarly situated with respect to an accepted zoning criteria" are treated unequally. *Centro Familiar*, 651 F.3d at 1173. On its face, Section 37-40.310 does not treat religious assemblies differently from similarly situated secular assemblies. To the contrary, the provision regulates similarly situated religious and secular private assemblies identically – both are prohibited on the ground floor of buildings facing Main Street within the Downtown Core Area.

Appellant's reliance on *Centro Familiar* is unpersuasive, because Appellant disregards crucial distinctions between that case and this one. In *Centro Familiar*, the City of Yuma's code required that "religious organizations," but not other membership organizations, obtain a conditional use permit to operate in a three-block stretch of Yuma's Main Street. A separate section of the city code also

required that schools obtain a conditional use permit to operate in the same three-block area. The city denied the plaintiff, a church, a conditional use permit to operate in this area, on the grounds that the church use would prevent issuance of a liquor license within 300 feet of the church under state law, and the church use therefore would be inconsistent with the city's efforts to create an entertainment district in those three blocks.

The *Centro Familiar* Court held that no accepted zoning criteria justified requiring religious organizations, but not secular membership organizations, to obtain a conditional use permit. It held that the justification for denying the conditional use permit in that case—that a church would inhibit the issuance of liquor licenses—was inadequate for three reasons. First, although secular schools were subject to the same conditional use requirement, there was no evidence schools were treated similarly due to their effect on liquor licenses, and the conditional use requirement for schools appeared in a different section of the code. Therefore, similar regulation of a secular use did not vitiate the claim of unequal treatment. Second, the Court found the conditional use requirement for religious organizations overbroad because it applied not only to churches but also other religious organizations that would not bar the issuance of liquor licenses, such as church offices. Third, the Court noted that many of the uses permitted as of right in the area, including jails and prisons, "have the same practical effect as a church

of blighting a potential block of bars and nightclubs," but are not required to seek conditional use permits. *Id*. at 1174.

None of those infirmities is present here. Private assembly uses, including "[c]lubs, lodges, places of religious assembly, and similar assembly uses," are all equally subject to the ground floor restrictions of Section 37-40.310, and all of these uses fail to satisfy the same accepted zoning criteria: they discourage a vibrant, pedestrian-oriented area and an entertainment and tourism district. In addition, Section 37-40.310, unlike the restriction at issue in *Centro Familiar*, focuses specifically on certain assembly uses, rather than religious organizations generally, so it is not overbroad. Last, Appellant has identified no permitted uses in the three-block area that are inconsistent with the City's accepted zoning criteria of a vibrant, pedestrian-friendly street and entertainment and tourist-oriented uses. Contrary to Appellant's assertion, Commercial Office, Public/Semipublic and Residential High Density uses are not allowed in the Main Street Restricted Area. ER 344.

Ignoring extensive evidence in the record that private assembly uses and public-oriented active uses are distinguishable based on accepted zoning criteria, Appellant erroneously asserts that because the California Building Code classifies both religious and non-religious assemblies as "assemblies," Section 37-40.310

treats similarly situated uses unequally. This argument fails for at least two reasons.

First, the California Building Code is not a zoning law and does not constitute a commonly accepted zoning criterion. The purpose of the Building Code is to regulate the physical characteristics of buildings, not to regulate uses. *See* Cal. Building Code § 1.1.2 (2019) ("The purpose of this code is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, access to persons with disabilities, sanitation, adequate lighting and ventilation and energy conservation; safety to life and property from fire and other hazards attributed to the built environment; and to provide safety to fire fighters and emergency responders during emergency operations."); ER 201; *Immanuel Baptist Church v. City of Chicago*, 283 F. Supp. 3d 670, 680 (N.D. Ill. 2017). Thus, the Building Code's definition of "assembly" is irrelevant to the equal terms analysis.

Second, the *Centro Familiar* test, by relying on "accepted zoning criteria," necessarily defers to local governments, which develop those criteria. Local land use regulations regularly distinguish between different types of assembly uses, and in enacting Section 37-40.310, the City did just that: it adopted the widely accepted urban planning principle that, unlike restaurants and theaters, private assembly uses discourage pedestrian-friendly areas and are inconsistent with an

entertainment and tourism district. ER 200 ("In the city planning field, it is well known that private assembly-type uses—such as clubs, lodges, union halls, and places of religious worship—detract from a city's efforts to promote a vibrant, pedestrian-friendly downtown."). Thus, private and public assembly uses are not similarly situated with respected to these accepted zoning criteria. By asking the Court to reject the distinction between private and public assembly uses, Appellant seeks to eviscerate the "accepted zoning criteria" test and override local governments' discretion to regulate land uses based on their impacts.

For these reasons, under *Centro Familiar,* private assemblies – religious or secular – are not similarly situated to public assembly uses with respect to accepted zoning criteria. Therefore, Section 37-40.310's regulatory treatment of religious assembly uses as a type of private assembly is valid under RLUIPA.

2. Live Entertainment Accessory Uses Are Not Secular Comparators to Religious Assembly Principal Uses

Appellant tries to fabricate a RLUIPA violation by arguing that religious assemblies as *principal* uses are treated unequally compared to certain live entertainment uses that are allowed as *accessory* uses in the Downtown Core Area. ER 301. With this argument, Appellant asks this Court to disregard a basic tenet of land use law on which virtually every city and county relies, ignoring the realities of local land use impacts. The Court should decline this invitation.

"Accessory uses are structures or activities that are subordinate in area, extent, and purpose to the principal use; contribute to the comfort, convenience, or necessity of the principal use; and are located on the same lot and in the same zoning district as the principal use…. An accessory …[use] by definition must be associated with a principal use and cannot be established on a property without a principal use." Adam U. Lindgren et al., *California Land Use Practice (Cal CEB)* §4.46 (2020). Because an accessory use is only incidental to the principal land use on a site, the primary land use impact generally derives from the principal use, not the accessory use. The fact that RLUIPA does not specify different analyses for principal and accessory uses is irrelevant. As this Court has held, the relevant test is whether a proposed religious use has been treated equally to a *similarly situated* secular use with respect to accepted zoning criteria. Accessory and principal uses are by their very nature not similarly situated.

"Under the equal terms provision, analysis should focus on what 'equal' means in the context." *Centro Familiar*, 651 F.3d at 1172. Section 37-40.310 allows certain live entertainment uses that are accessory to a restaurant, art gallery, music studio, food and beverage establishment, or similar use. ER 301. It does not allow live entertainment as a principal use. In this context, Appellant's proposed private assembly principal use is not similarly situated to a live entertainment accessory use. Therefore, Appellant's argument fails.

Furthermore, Appellant provides no authority for its argument that, despite its facially neutral language, Salinas's Zoning Code is a content-based regulation. The only support Appellant offers for this argument is that religious assembly uses are enumerated separately from the six types of allowed accessory live entertainment uses in Zoning Code Sections 37-40.310(a)(2) and (3). AOB at 23-24. Appellant mischaracterizes this code section, essentially arguing that religious assembly uses are allowed only where specifically authorized on the face of the ordinance.

First, the fact that the zoning controls in subsection (a)(2) for private assembly uses, including both religious and secular assemblies, are listed in a separate subsection from the zoning controls for live entertainment uses does not constitute a content-based regulation. The face of the ordinance, as well as the record evidence, make clear that the common characteristic of these assembly uses is their private or quasi-private nature, which does not support an active, pedestrian-friendly environment or an entertainment and tourist district. Moreover, the City itself interprets Section 37-40.310(a)(3) to allow both religious and secular live entertainment accessory uses. Appellee's Answering Brief ("AAB") at 38. In fact, the City has made clear that Appellant can satisfy the ground floor use requirements of Section 37-40.310(a)(1) by using the front of the building for a religious active use. ER 683. This Court should defer to the City's interpretation

of its own local zoning law. *See Morgan v. Fed. Bureau of Alcohol, Tobacco & Firearms*, 509 F.3d 273, 276 (6th Cir. 2007) (federal courts should consider locality's interpretation of its own law in construing law's meaning); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1232 (11th Cir. 2006) ("we consider the City's own authoritative construction of the ordinance, including its implementation and interpretation and defer to that construction so long as its interpretation is based on a permissible construction") (citation and internal quotation marks omitted); *accord Berkeley Hills Watershed Coalition v. City of Berkeley*, 31 Cal. App. 5th 880, 896 (2019) (court deference to local agency's interpretation of local law is appropriate, especially where text of law is entwined with issues of fact, policy and discretion, and city is familiar with rationale for the ordinance, is responsible for its implementation, and has special knowledge about the "practical implications" of possible interpretations).

Second, even without deference to the City's interpretation of its law, the most reasonable reading of Section 37-40.310, subsections (a)(2) and (3) is that both subsections apply to both religious and secular uses. Subsection (a)(2) on its face applies to private assembly principal uses, both religious and secular, all of which share the characteristic of being membership organizations that have limited appeal to the general public and do not support a pedestrian-oriented neighborhood or an entertainment and tourism district. ER 200. Subsection (a)(3) on its face

permits certain live entertainment uses, without distinguishing between religious and secular uses, that are accessory to certain principal uses, and these principal uses attract members of the public and promote neighborhood activity.

C. Appellant's Claim of an As-Applied Equal Terms Violation Fails.

Furthermore, Appellant fails to demonstrate an as-applied equal terms violation. Appellant has identified no secular comparator that has been treated differently than Appellant. As the undisputed evidence shows, the Salinas Planning Commission and City Council, in reviewing Appellant's application for a zoning amendment and conditional use permit, applied the commonly accepted zoning criteria of creating "activity centers" to provide "opportunities for commercial uses that emphasize retail and service activities that promote compact development that is intended to be pedestrian-oriented," and promoting the downtown as an "entertainment and tourism district[]". ER 328-330.

Using those criteria, both the Planning Commission and City Council found that Appellant's proposed code amendment to allow religious assembly uses on the ground floor in the Main Street Restricted Area "would adversely affect the welfare of the surrounding neighborhood" and would be "detrimental to public health, safety and welfare of the area." ER 329. They reasoned that the proposed use would not create a pedestrian-friendly environment, nor would it support an entertainment and tourism district on Main Street. *Id.* In addition, the City's

Community Development Director testified that Appellant's proposed use of the Beverly Building, which would have administrative space at the front of the building, would not include a pedestrian-oriented use, and would lack transparent windows, resulting in dead space along the sidewalk, which would detract from the desired pedestrian activity, vibrancy and crime prevention. ER 444-445.

Despite this undisputed evidence, Appellant argues that the El Rey Theater, Maya Cinema, Fox Theater and Ariel Theatre are secular comparators to Appellant's proposed use, although these theaters have very different land use impacts. Appellant contends that the fact the City allows these establishments to operate, while denying Appellant's rezoning and conditional use application, constitutes an equal terms violation. This argument fails for several reasons.

First, as discussed above, Appellant erroneously relies on the California Building Code to argue that theaters are secular comparators to Appellant's proposed use because all are "assemblies" under the Building Code. This argument is unfounded. *See supra*, Sec. II.B.1., at 14.

Second, case law and the undisputed evidence demonstrate that theaters and other entertainment venues are not similarly situated to private assembly uses, including churches, with respect to the zoning criteria of vibrant, active pedestrian-oriented districts and uses that support entertainment and tourism. As the City's expert witness testified,

> movie theaters, nightclubs, restaurants, bars, and other entertainment venues, when compared to private assembly uses, tend to attract far greater numbers of pedestrians to a city's downtown, [ ] encouraging increased commercial activity and a vibrant downtown atmosphere. This is largely due to the fact that entertainment uses are generally open more days of the week and hours of the day, including evenings and weekends, are freely open to the general public, attract far greater number of people into a downtown area, and generate interest among city residents, residents from nearby communities, and tourists to a far greater extent than do private clubs or churches.

ER 200. Courts that have considered the issue agree. *See Riverside Church v. City of St. Michael*, 205 F. Supp. 3d 1014, 1036 (D. Minn. 2016) (theaters are not secular comparators to religious assembly uses pursuant to zoning criteria such as providing land for business and retail uses, generating taxable revenue and shopping opportunities, and regulating traffic). As the *Riverside Church* court noted, "Churches typically have one service, or perhaps two or three services back to back, which would lead to high levels of traffic at the beginning and end of each service. Movie theaters, on the other hand, generally have multiple screenings with staggered start times, resulting in a more even traffic flow." *Id.* Although these findings relate to traffic flow, the same reasoning applies to pedestrian flow. Churches generate pedestrian traffic, if at all, within an extremely limited time frame, while theaters encourage a more continuous flow of pedestrians throughout the week.

The theaters that Appellant identifies are not similarly situated to Appellant's proposed use. These theaters are entertainment uses that attract

members of the general public at various times of day and days of the week, keeping the area active and vibrant. For example, as Appellant concedes, the Fox Theater hosts a wide range of events that attract different attendees, including weddings, quinceaneras, music concerts, comedy shows, business conferences and banquets. AOB at 11; ER 481. And the Ariel Theater holds various school events, rehearsals and other activities during the week, in addition to weekend performances. ER 440; AOB at 11 n.1. In contrast, Appellant's church is open for just a handful of hours each week: services are held on Sunday mornings, and additional services and ministries occur on Tuesday and Friday evenings. ER 552, 555, 559. Otherwise, the church is mainly closed, although the pastor may work in his office at times, with the blinds drawn. *Id.*; ER 141-142.

As the evidence demonstrates, private assembly uses, including religious assemblies, secular clubs and similar uses, are not secular comparators to theaters. Appellant's argument, if accepted by this Court, would undermine local governments' ability to distinguish between land uses that have very different impacts on pedestrian activity, neighborhood vibrancy, and promotion of tourism and entertainment.

Third, even if the Court were to find that these uses are similarly situated to Appellant's proposed use under the City's current Zoning Code, such a finding would not prove that the City treated Appellant unequally by denying its

application. A land use application is reviewed for compliance with the code provisions in effect at the time. To the extent the theaters and cinemas were approved under prior versions of the zoning code, they may remain as nonconforming uses, which by law generally retain their vested land use entitlements regardless of subsequent changes in the law, as long as the use is maintained. See ER 440 (Community Development Director testifying that the Ariel Theater may not have been subject to the legal requirements that now apply to its site due to subsequent code amendments); *Hansen Brothers Enters., Inc. v. Bd. of Supervisors*, 12 Cal. 4th 533, 540 n.1(1996) ("A legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter. The use of the land, not its ownership, at the time the use becomes nonconforming determines the right to continue the use.") (citing cases).

Because the City properly distinguished between private assembly uses and public-oriented uses like theaters on the basis of commonly accepted zoning criteria, the Ariel, Fox, and El Rey Theaters and the Maya Cinema are not "secular comparators" under *Centro Familiar.*

III. Denial of the Rezoning and Conditional Use Applications Did Not Impose a Substantial Burden on Appellant.

Appellant's substantial burden claim also fails. RLUIPA states,

> (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.

42 U.S.C. § 2000cc(a)(1). To constitute a substantial burden, a land use regulation must "be oppressive to a significantly great extent" and "impose a significantly great restriction or onus" upon the exercise of religion. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). A substantial burden must be "more than an inconvenience on religious exercise." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). Appellant's unsupported interpretation of the substantial burden test would effectively relieve plaintiffs from demonstrating a burden, disrupting the balance that RLUIPA strikes between protecting religious exercise and respecting local governments' land use regulatory powers.

A. Holding Services on the Second Floor of the Beverly Building Is Not a Substantial Burden.

Appellant argues that the denial of a zoning amendment to allow religious assembly uses on the ground floor in the Main Street Restricted Area and a conditional use permit for that use, constitute a substantial burden on its exercise of

religion.[1] However, Appellant, who bears the burden of proving a *prima facie* case of substantial burden, fails to demonstrate that the denial resulted in more than a mere inconvenience. *See* 42 U.S.C. § 2000cc-2(b); *Int'l Church of Foursquare Gospel v. City of San Leandro,* 673 F.3d 1059, 1067 (9th Cir. 2011) (stating burden of proof); *Midrash Sephardi*, 366 F.3d at 1227 (mere inconvenience is not a substantial burden).

The City's denial does not bar Appellant from using the Beverly Building for its worship services or various ministries. To the contrary, pursuant to Section 37-40.310, Appellant could hold its services on the second floor of the building, which is almost as large as the first floor. ER 184. Appellant's pastor testified that the second floor is large enough for worship services. ER 419. He testified that the acoustics on the second floor are less desirable due to the lower ceiling, and that therefore using the second floor for worship services, which include music, would not be "convenient." ER 419, 682-683, 728. Appellant has presented no evidence supporting its claim that the acoustics on the second floor are inadequate, aside from its pastor's unsupported assertion. Thus, Appellant has not shown that using the second floor would "be oppressive to a significantly great extent" or

[1] Appellant suggests that its current site's space limitations constitute a substantial burden. But the current conditions under which Appellant operates are not relevant to whether the zoning amendment and permit denial impose a substantial burden because these pre-existing conditions were not imposed by the City.

"impose a significantly great restriction or onus" upon the exercise of religion. *San Jose Christian Coll.,* 360 F.3d at 1034. Because Appellant has not met its burden of proof, its claim fails.

B. Appellant Has Feasible Alternatives to Using the Entire Ground Floor of the Beverly Building for Religious Assembly.

Even if a proposed religious use is not possible at a site due to a permit denial, an applicant does not suffer a substantial burden on its exercise of religion if there are feasible alternative locations for the religious assembly use. *Mesquite Grove Chapel v. DeBonis*, 633 F. App'x 906, 908 (9th Cir. 2015) ("The primary burdens presented here—relocating or submitting a modified application—were not substantial, especially because Mesquite presented no evidence that other sites are unsuitable."); *Victory Center,* 2012 WL 1133643, at *4 ("The City of Kelso's zoning regulations do not impose a substantial burden on the Victory Center's religious exercise because the Victory Center is free to locate its facility anywhere outside the CTC's four-block subarea dedicated to pedestrian retail activity."); *Hillcrest Christian Sch. v. City of Los Angeles*, 2007 WL 4662042, at *5 (C.D. Cal. July 12, 2007) (ruling that denial of a conditional use permit to allow plaintiff to expand did not constitute a substantial burden; record did not suggest plaintiff could not successfully build on another parcel or present a scaled back project).

This rule appropriately preserves cities' and counties' ability to zone to suit local needs: where a city or county permits a given use in some areas but not

others, a substantial burden claim cannot succeed simply because a plaintiff wishes to locate its proposed religious use in a restricted area. Only where a religious institution "has no ready alternatives, or where the alternatives require substantial delay, uncertainty and expense," might a complete denial of a religious institution's application constitute a substantial burden. *Foursquare Gospel*, 673 F.3d at 1068.

Appellant represented to the City that, as of the year 2000, it was actively searching for a new building. ER 687, 705. Yet, by its own pastor's account, it has only cursorily considered two properties since then, most recently in 2012 or 2013. ER 563-566. This evidence demonstrates that Appellant has not made a serious effort to find feasible alternatives to the Beverly Building.

In contrast, the City introduced evidence that at least nine suitable properties in Appellant's price range were available for purchase between 2012 and 2018. ER 656, 664-655. Appellant does not try to refute this evidence, nor does it contend that buying one of these properties would result in undue delay, uncertainty or expense. Instead, it contends that only properties available "at the time of submitting a land use application or the filing of the case" are relevant to determining whether feasible alternatives exist, citing *Foursquare Gospel*. AOB 33-34. But *Foursquare Gospel* says nothing about the proper time frame for identifying feasible alternatives. Furthermore, Appellant's own expert witness has

identified a 14,700 square foot church nine miles from downtown Salinas currently for sale within Appellant's price range, but Appellant asserts that property is not a feasible alternative because Appellant "does not want" it. ER 470; AOB at 34. Appellant offered no evidence that buying this property would cause undue delay, uncertainty, or expense. Appellant's position amounts to a claim that it suffers a substantial burden if it is denied the unrestricted use of any property it wishes to occupy. But because RLUIPA does not exempt Appellant from zoning ordinances, this argument fails. *See Lighthouse Inst.*, 510 F.3d at 268; *C.L. for Urban Believers*, 342 F.3d at 762; *Living Water Church*, 258 F. App'x at 736.

Moreover, the City has presented evidence, which Appellant does not dispute, that the City offered another feasible alternative: it proposed to allow Appellant to use the ground floor for religious assemblies as long as the Main Street frontage was used for a pedestrian-oriented use such as a café or bookstore. ER 682-683. Appellant rejected this proposal, although it would allow ample space for the congregation to assemble on the ground floor while satisfying the City's regulatory purpose of creating a pedestrian-friendly environment. ER 684. Appellant has made no effort to show this proposal would result in undue delay, uncertainty or expense.

Thus, Appellant fails to establish that, due to a lack of feasible alternatives, the City's denial of its application is "oppressive to a significantly great extent" or

"impose[s] a significantly great restriction or onus" upon the exercise of religion. *San Jose Christian Coll.,* 360 F.3d at 1034. This conclusion supports the intent of RLUIPA not to provide a "free pass" to religious organizations, and preserves cities' and counties' ability to enact zoning controls that best serve their communities' needs.

C. Appellant Cannot Demonstrate a Substantial Burden Because Its Alleged Burden Is Self-Imposed.

As discussed in Appellee's Answering Brief, three sister circuits have held that where a plaintiff imposes a burden on itself by purchasing a property that does not allow its proposed use, it cannot establish a substantial burden violation under RLUIPA. *See* AAB at 51-54. This rule is legally well-founded and strikes the correct balance between plaintiffs' rights under RLUIPA and cities' and counties' strong interest in exercising their police power, enshrined in the California Constitution, to regulate land uses within their own jurisdictions.

Cities and counties need discretion to calibrate land use regulations to address local conditions that impact the community's health, safety and welfare. If a plaintiff could purchase a property that is zoned to prohibit its desired use, and could then invalidate the zoning controls by invoking RLUIPA, a religious institution would be able to immunize itself from zoning controls at will, regardless of local needs. This is neither the intent nor purpose of RLUIPA. *See Andon, LLC v. City of Newport News, Va.*, 813 F.3d 510, 516 (4th Cir. 2016) (where plaintiff

leased property knowing its proposed use did not comply with zoning law, court held plaintiff was not substantially burdened by city's denial of its application for a variance from the law; to hold otherwise would be to "grant[] an automatic exemption to religious organizations from generally applicable land use regulations."); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) ("Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind. This is not the purpose or intent of RLUIPA."). Such an interpretation of RLUIPA "would usurp the role of local governments in zoning matters…and impermissibly would favor religious uses over secular uses," to the detriment of the residents of cities and counties throughout California and this Circuit. *Andon*, 813 F.3d at 516.

To prevent such usurpation and to safeguard local governments' ability to regulate land uses to benefit the public's health, safety, and welfare, this Court should reject Appellant's unwarranted attempt to expand the substantial burden doctrine beyond what RLUIPA intended.

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CONCLUSION

For these reasons, the Court should affirm the district court's judgment.

Dated: November 24, 2020

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
VICTORIA WONG
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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