17-11820

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

GERALD GAGLIARDI and KATHLEEN MACDOUGALL,

Plaintiffs-Appellants,

—v.—

THE CITY OF BOCA RATON FLORIDA,

Defendant-Appellee,

CHABAD OF EAST BOCA, INC., and TJCV LAND TRUST,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR INTERVENOR-APPELLEE CHABAD OF EAST BOCA, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, Intervenor-Appellee hereby certifies that the following is a complete list of the trial judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case on appeal.

1. Abbott, Daniel Lawrence, Weiss Serota Helfman Cole Bierman & Popok
2. Ahnell, Leif, City of Boca Raton
3. Ahdout, Zimra Payvand, Kirkland & Ellis LLP
4. Blomberg, Daniel Howard, Becket Fund for Religious Liberty
5. Chabad of East Boca, Inc.
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18. MacDougall, Kathleen A.
19. Marra, Honorable Kenneth A.
20. Marshall, Lawrence C., Kirkland & Ellis, LLP
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22. Raymond, Mark F., Broad and Cassel, LLP
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Dated: July 28, 2017

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STATEMENT REGARDING ORAL ARGUMENT

Intervenor-Appellant Chabad of East Boca, Inc. (the "Chabad"), does not believe that oral argument is necessary.[1] There are no novel or complex issues in this appeal and the case is an appropriate one to consider on submission. If the Court does, however, schedule the case for argument as Appellants have requested, then Chabad requests that it be allowed to participate.

[1] The TJCV Land Trust has instructed counsel that it does not wish to participate in this appeal or to be a party to this case at all. This brief is on behalf of the Chabad of East Boca, Inc. only.

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INTRODUCTION

This suit does not belong in federal court as a matter of substance or subject matter jurisdiction. In substance, this suit is properly classified as a zoning dispute that belongs in state court. Appellants Gerald Gagliardi and Kathleen MacDougall take issue with a religious center that Appellee the Chabad of East Boca had plans to build near Appellants' property. Instead of challenging those plans in state court—the mechanism for which is provided by Florida law, *see Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198–99 (Fla. 2003)—Appellants have levied claims against Appellee the City of Boca Raton (the "City") in an effort to paint their zoning suit with a constitutional varnish. In particular, Appellants have asserted claims against the City for (1) approving site plans submitted by the Chabad; and (2) passing ordinance No. 5040—compelled by the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*—to afford houses of worship equal treatment to other places of public assembly through all of Boca Raton. But this Court has rejected similar efforts made in the past, recognizing that federal courts do not sit in review of "quarrels over zoning decisions." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1389 (11th Cir. 1993) (citation omitted).

This case does not belong in federal court for two independent jurisdictional reasons. First, as a threshold and dispositive matter, this suit is now moot.

Appellants' alleged injuries are tied to the Chabad's "ambitious plan" for construction. *See* Amended Complaint, Dkt. 46 ¶ 35 ("Am. Compl."). The Chabad's site plans, however, have been invalidated by a state court in a different proceeding. *See Royal Palm Real Estate v. City of Boca Raton*, No. 2015-CA-009676 (Fla. 15th Cir. Ct. June 6, 2016), *cert. denied sub nom. TJCV Land Trust v. Royal Palm Real Estate Holdings, LLC*, No. 4D16-2276 (Fla. 4th DCA Nov. 15, 2016). Because the site plans Appellants challenge are no longer operative—and indeed the Chabad has no site plans at all—this suit no longer has a "live" controversy. Moreover, the City has recently amended its zoning code, categorically to prohibit the kind of structure of which Appellants complaint. *See* Boca Raton, Florida, Code of Ordinances, § 28-780 ("The city council may approve additional height only if it is not injurious to surrounding property and is in accord with the spirit purpose of this chapter. Notwithstanding the foregoing, buildings, structures, or parts thereof, on sites that are both adjacent to East Palmetto Park Road and east of the Atlantic Intracoastal Waterway are not eligible for the additional height and are limited to a height not exceeding 30 feet.").

Second, as the District Court correctly held, Appellants do not have standing. After the District Court dismissed Appellants' initial complaint because they lacked standing, Appellants manufactured new wholly outlandish and conclusory claims of injury in their amended complaint. For instance, Appellants

alleged that they will have diminished access to emergency vehicles when a flood "inevitably" befalls their neighborhood and they unilaterally predict increased congestion that will force them to take alternative routes around their neighborhood. In addition, Appellants make the highly offensive contention that the Chabad is "out of character of the neighborhood" and will accordingly alter the neighborhood's "beach-oriented, casual and relaxed . . . atmosphere." Am. Compl. ¶¶ 29, 59, 72, 94. These invented injuries are conclusory, speculative, and generalized and therefore do not constitute cognizable injury in fact.

In the alternative, this Court may affirm the District Court's dismissal because Appellants have failed to state a claim on which relief may be granted. Both RLUIPA and the Free Exercise Clause mandate equal treatment for houses of worship. The City's decision to comply with that mandate does not violate the Establishment Clause.

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the United States District Court for the Southern District of Florida (Marra, J.). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered a final judgment on March 28, 2017, in favor of Appellees. Appellants timely filed a notice of appeal.

ISSUES

1. Whether this suit is now moot?
2. Whether the District Court correctly determined that Appellants lack standing?
3. Whether, in the alternative, Appellants have failed to state a claim on which relief may be granted?

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Appellee Chabad of East Boca is a local affiliate of Chabad-Lubavitch, a nonprofit religious organization that ministers to the needs of the Jewish community. *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1385 (11th Cir. 1993).[2] In 2007, the Chabad sought to acquire property for the purpose of building a synagogue to conduct religious worship and education. Am. Compl. ¶¶ 15–16. The Chabad explored building in the residential area of Boca Raton known as the "Golden Triangle," which, at the time, was zoned for single family residences. *Id.* ¶ 15–17. And while the "majority of places of worship" in Boca Raton were "located in single-family zoning districts," "places of worship" were constructed only as conditional uses, not as permitted uses. *Id.* ¶¶ 17, 19.

In late 2007, the City proposed Ordinance No. 5014 to the City Council, which would have (1) added "places of worship" to the definition of "places of

[2] As required in evaluating a decision granting a Rule 12(b) motion to dismiss, the statement of facts is based on the Appellants' Amended Complaint and the relevant documents, laws, bills, and resolutions that its relies on. *See Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007) (courts may consider the content of documents that are referred to in the complaint, identified as central to the suit, and which were attached to the motion to dismiss); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277, 1280 (11th Cir. 1999) (citing Fed. R. Evid. 201 and stating that courts may take judicial notice of "matters of public record in ruling[s] on motions to dismiss"). The Chabad's description of the allegations is not an admission of the pleadings' truth or completeness.

public assembly" in order to "protect religious freedom," Text of Ordinance No. 5014, Dkt. 48-1 at 3–4, and (2) made "places of worship" a permitted use in all single-family residential districts, *id.* ¶ 19. The City received legal advice stating that federal law "justified" the ordinance. Am. Compl. ¶ 41. Indeed, this Court had made it clear that such a change was required by RLUIPA. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004) (finding that federal law bans "differential treatment" of "secular assemblies" and "religious assemblies"). In January 2008, after some "extremely contentious" groups seeking to prohibit "any and all" religious activities by the Chabad in the Golden Triangle opposed it, Ordinance No. 5014 failed. Am. Compl. ¶ 20. Some of this opposition was based on anti-Semitism. *Id.* ¶ 18.

So in May 2008, the City proposed a different resolution: Ordinance No. 5040. *Id.* ¶¶ 43, 47. This new ordinance avoided the Golden Triangle controversy by continuing to allow "places of worship" only as conditional uses in single-family residential districts. *Id.* ¶ 47. But, like the previous proposed ordinance, Ordinance No. 5040 created a standard of "consistent treatment" for houses of worship and other public assemblies by simply and cleanly amending the definition of "places of public assembly" to include "places of worship." Ordinance No. 5040, Dkt. 48-2 at 1, 3.

Following four public hearings on Ordinance No. 5040 held between July 2008 and September 2008, Am. Compl. ¶ 48; *see also* Fla. Stat. 166.041(3) (requiring two hearings before adopting the ordinance), the City Council unanimously adopted the ordinance. Am. Compl. ¶ 48.

As a result, the Chabad agreed not to build in a residential neighborhood and instead to build at 770 Palmetto Park Road. *Id.* ¶ 22–23. That location was in a B-1 zoning district, which, at that time, permitted places of public assembly—but not houses of worship. *Id.* The Chabad subsequently applied to the City to build at 770 Palmetto Park Road (the "Property"), which was owned by the TJCV Land Trust (the "Trust"). *Id.* ¶¶ 30, 51. The Property is located in a B-1 district where—unlike the Golden Triangle area's exclusively residential land use—land is used in a variety of ways, including for public assembly, commercial, and residential uses, in both "low-rise buildings" such as "residen[ces], restaurants, and stores" and larger buildings, such as "condominiums and high-rise buildings[.]" *Id.* ¶ 37. The previous use of 770 Palmetto Park Road was commercial: a 6,700 square-foot French restaurant. *Id.* ¶ 39.

The Chabad's application described a two-story religious center that would include a meeting area, religious museum area, parking structure, social hall, children's playroom, kitchen, and bookstore. *Id.* ¶ 51. As part of the application, the Chabad sought permission to construct a building with a height of 40 feet 8

inches. *Id.* ¶ 52. At the time, the City codes allowed for buildings in B-1 districts to reach heights between 30 and 50 feet "upon consideration of the planning and zoning board and recommendation to the city council." Boca Raton, Florida, Code of Ordinances, § 28-780. The application also requested a technical deviation for the religious center's proposed parking facilities. Am. Compl. ¶ 55.

The City's Planning and Zoning Board conducted a public hearing and approved the application and the technical deviation on May 7, 2015. *Id.* ¶ 57. The Planning and Zoning Board granted the requested variances on May 27, 2015. *Id.* ¶ 58.

Appellants and other residents of Boca Raton appealed the decision of the Planning and Zoning Board to the City Council. The City Council considered Appellants' appeal on July 28, 2015, and voted unanimously to affirm the Board and approve the site plan and technical deviation. Text of Resolution 79-2015, Dkt. 23-2.

Instead of seeking relief from the City's approvals in state court as provided for by Florida law, *Miami-Dade Cty.*, 863 So. 2d at 198–99 (noting that "[a]fter a zoning board rules on an application for a special zoning exception, the parties may twice seek review in the court system," including review as a matter of right as to "whether procedural due process is accorded"), Appellants filed this federal suit in February 2016. *See* Complaint, Dkt. 1 ("Compl."). They challenge two of

the City's actions: (1) its passage of Ordinance No. 5040, which allowed houses of worship to receive equal treatment under the zoning code as other places of public assembly; and (2) its review and approval of the Chabad's application to construct a house of worship. Am. Compl. ¶¶ 41–48, 51–62. Appellants argued that these actions amounted to religious discrimination against them as Christians, in violation of the Establishment Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, and the No-Aid Clause of the Florida Constitution. *Id.* ¶ 38. Appellants asked the District Court to issue an order declaring that the City violated the U.S. and Florida Constitutions, enjoining the City from permitting the Chabad to build at 770 Palmetto Park Road, and granting compensatory and punitive damages. *Id*.

Appellants alleged that Appellant Gagliardi lives 100 yards from the Chabad's proposed synagogue, and that Appellant MacDougall lives 300 yards away. Am. Compl. ¶¶ 9-10. This portion of Boca Raton occupies a barrier island and is accessible from the mainland via three bridges within several miles of each other. *Id.* ¶¶ 24–25, 31–32, 37. The site of the proposed religious center is approximately 400 feet from one of those bridges, the Palmetto Park Road Intracoastal Waterway Bridge. *Id.* ¶ 30.

Appellants describe the area surrounding their homes and the proposed synagogue as the "Seaside Village," a "paradise" that they share with "beach lovers, cyclists, walkers, swimmers and surfers." *Id.* ¶¶ 9, 29. Appellants allege that this "beach-oriented, casual and relaxed . . . atmosphere" would suffer "injury created by the religious operation of the CHABAD," which is "out of character of the neighborhood." *Id.* ¶¶ 29, 59, 72, 94.

Appellants' initial complaint was devoid of allegations of injury. Instead, Appellants repeatedly stated that "[t]he denial of constitutional rights is irreparable injury *per se*." Compl. ¶ 18, 49, 81. After Appellants' initial complaint was properly dismissed because they lacked standing, Appellants submitted an amended complaint that portends that Appellants would suffer other "physical and metaphysical" injuries if the synagogue were built: "inevitable" flooding, increased traffic and commute time, decreased parking and emergency vehicle access, and "alter[ed] . . . vehicular and pedestrian access to their residences . . . to avoid the injury created by the Chabad's religious complex." Am. Compl. ¶¶ 27, 35–38, 72. Appellants further assert that they have been injured as taxpayers of Boca Raton because the City has expended resources in the form of salaries of City employees who reviewed and approved Chabad's proposed religious center. *Id.* ¶ 98.[3]

[3] Appellants have, unsurprisingly, abandoned this theory of standing on appeal.

In addition to the federal suit, two suits concerning this property were brought in state court. First, in a suit initiated by different individuals, a state court—acting on an issue unrelated to the instant suit—invalidated the City resolution approving the Chabad's site plan. Dkts. 41, 65 (citing *Royal Palm Real Estate*, No. 2015-CA-009676, *cert. denied sub nom. TJCV Land Trust*, No. 4D16-2276). Contrary to Appellants' contention, there is no appeal pending from that ruling, which is now final. The Chabad's plans have, correspondingly, been invalidated. Second, while Appellants' lawsuit was pending, a dispute arose over whether the Trust would convey 770 Palmetto Park Road to the Chabad. *Chabad of East Boca, Inc. v. Harvey Schneider*, No. 502017-CA-001787 (Fla. 15th Cir. Ct.). That dispute has not yet been resolved.

II. Procedural History

Appellants filed their initial complaint against the City on February 8, 2016. Compl. The Chabad promptly moved to intervene with the consent of all parties, which the District Court granted on February 23, 2016. Dkts. 13, 14. The Chabad and the City each then moved to dismiss Appellants' complaint on several grounds, including that Appellants lacked standing and that they failed to state a claim on the merits. Dkts. 21, 23.

On July 21, 2016, the District Court (Marra, J.) dismissed the complaint, concluding that Appellants did not have Article III standing because they failed to

show an injury in fact. Dkt. 43 at 8, 10. The dismissal was without prejudice, granting Appellants "one additional opportunity to plead a proper basis for standing." *Id.* at 11.

Three weeks later, on August 12, 2016, Appellants filed an amended complaint (the "FAC") that raised entirely new contentions regarding standing to support their unchanged legal claims. For the first time, they alleged that if the proposed synagogue is built, it would "produce more traffic and parking issues," "burden access to the mainland where fire and emergency services are located," "alter property values," and impose "noneconomic damages" by forcing Appellants to find "more convoluted and lengthier exits" from their neighborhood to "avoid the injury created by the Chabad's religious complex." Am. Compl. ¶¶ 35, 72. They also alleged that the "atmosphere" of the area would suffer "injury created by the religious operation of the CHABAD." *Id.* ¶ 94.

The City and the Chabad again moved to dismiss the amended complaint for lack of standing and on the merits. Dkts. 48–49. On March 28, 2017, the District Court dismissed the amended complaint under Federal Rule of Civil Procedure 12(b)(1), concluding that Appellants lacked standing. Dkt. 76.[4]

[4] Appellants incorrectly assert that the District Court's decision "did not address constitutional standing" for claims other than the Establishment Clause claim. Appellants Br. 26. Appellants allege, in the main, the same injuries for each of their constitutional claims. When the District Court found that these alleged

The District Court first held that Appellants failed to meet Article III's injury-in-fact requirement and, in particular, a "concrete and particularized constitutional injury[.]" *Id.* at 10. "Far from the particularized and concrete injury required to confer standing," the District Court stated, "Plaintiffs have simply reasserted, again and again, a list of conjectural injuries to the whole of the area surrounding the proposed Chabad site, and potentially beyond." *Id.* Indeed, the District Court found those alleged injuries are "wholly conjectural in nature," "represent[ing] only a potential, hypothetical outcome that *may* result from building the Chabad[.]" *Id.* at 11–12 (emphasis added). This was even more so, the District Court determined, because the Chabad had not even been built yet. *Id.* at 12.

The District Court found that Appellants' assertion that the Chabad's construction would "alter property values," Am. Compl. ¶ 35, is "wholly conclusory." Dkt. 76 at 11, n.3. "Plaintiffs," the District Court stated, "specify no further in the amended complaint how property values will be altered by building the Chabad on the Property." *Id.*

The District Court then proceeded to prudential standing as an alternative basis for dismissal. The District Court noted that Appellants failed to allege that

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injuries were not cognizable injuries in fact under Article III, that holding applied to every claim for which Appellants asserted those injuries.

"they have been subject to unwelcome religious exercises[,]" or that "they have been forced to assume special burdens to avoid religious exercise," or that their own religious practices were impacted by the City's zoning decision. *Id.* at 14. Indeed, because plaintiffs failed to allege "any injury concerning religious activity—beyond noting that a party to the challenged zoning decision is a religious organization"—the District Court determined their injuries were not in the Establishment Clause's zone of interest. *Id.* Instead, "such injuries bear the clear hallmarks of a zoning dispute that incidentally involves a religious organization rather than a dispute about Government support of religious activity." *Id.* Similarly, the District Court determined that Appellants' alleged injuries fall outside the zones of interests of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment and thus dismissed those claims, in the alternative, on prudential standing grounds.

Finally, the District Court dismissed Appellants' theory that they had "taxpayer standing." *Id.* at 16. Because Appellants "fail[ed] to identify an allegedly illegal use of taxpayer money," the District Court held they were foreclosed from asserting taxpayer standing. *Id.* at 16.[5]

Appellants filed their notice of appeal on April 20, 2017. Dkt. 78.

[5] As noted previously, Appellants have not appealed on this point.

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of this case. As a threshold matter, this dispute is now moot. Appellants alleged injuries—principally, harms caused by increased traffic and difficulty accessing emergency vehicles—are tied to the Chabad's "ambitious plan" for construction and a height modification that was granted by the City. *See* Am. Compl. ¶ 35. The Chabad's site plans, however, have been invalidated by a state court in a different proceeding. *See Royal Palm Real Estate*, No. 2015-CA-009676, *cert. denied sub nom. TJCV Land Trust*, No. 4D16-2276. Because the site plans Appellants challenge are no longer operative, this suit is moot. And, further, the City has amended its zoning ordinances categorically to prohibit the sort of height modification that Appellants challenge. Boca Raton, Florida, Code of Ordinances, § 28-780.

In the alternative, and also at the threshold, Appellants do not have standing. Appellants portend a parade of imagined injuries—diminished safety because of "impediments to emergency vehicles and services"; "increased flooding risks"; traffic intrusion; impediments to ingress and egress; some unspecified effect on the "character" of the neighborhood; and burdens created to avoid the "physical and metaphysical" impact of the Chabad Am. Compl. ¶ 72—that are far too generalized and far too speculative to constitute "injury in fact" under Article III.

If this Court were to disagree and determine that exercise of jurisdiction were proper, then it should affirm the District Court's dismissal on the alternative ground that Appellants' complaint fails to state a claim on which relief can be granted. This Court has made clear that complying with RLUIPA's mandate to ensure equal treatment for houses of worship does not violate the Establishment Clause. *See Midrash Sephardi, Inc.*, 366 F.3d at 1231.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's dismissal under Federal Rule of Civil Procedure 12(b)(1). *See Eng. Contractors Ass'n of S. Fla. Inc. v. Met. Dade Cty.*, 122 F.3d 895, 903 (11th Cir. 1997) ("As with all jurisdictional issues, this Court reviews standing *de novo*."). And while the Court must accept as true well pleaded factual allegations in the complaint, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).[6]

[6] Appellants have waived their Equal Protection, Due Process, and No-Aid Clause claims, by failing substantively to brief them. *See United States v. Gupta*, 463 F.3d 1182, 1195 (11th Cir. 2006) (deeming party to have waived an issue mentioned in its opening brief when party failed to offer substantive arguments in support); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("[F]ailure to make arguments and cite authorities in support of an issue waives it."). While the Chabad addresses these waived claims out of an abundance of caution, this Court need not and should not consider them.

This Court may, moreover, "affirm a judgment based on any grounds supported by the record." *Akanthos Capital Mgmt., LLC v. Atlanticus Holdings Corp.*, 734 F.3d 1269, 1271 (11th Cir. 2013). Therefore, this Court may affirm on Rule 12(b)(6) grounds.

II. Appellants Claims Of Injury Are Moot.

Most of Appellants' claimed injuries stem from the approval of a specific site plan involving height and parking modifications. During the pendency of this litigation, however, that site plan was permanently invalidated in state court, mooting Appellants' claims.

"Federal courts operate under a continuing obligation to inquire into the existence of subject matter jurisdiction whenever it may be lacking." *RES-GA Cobblestone, LLC v. Blake Constr. & Devel., LLC.*, 718 F.3d 1308, 1313 (11th Cir. 2013); *see Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013) ("We have repeatedly held that an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." (internal quotation marks and citations omitted)).[7] Article III of the U.S. Constitution limits federal courts' subject matter jurisdiction to actual "Cases" and "Controversies." Where there is no longer a live legally cognizable issue, "[a] case becomes moot—and

[7] This Court may affirm the dismissal on either standing or mootness grounds, as each goes to the Court's jurisdiction to hear the case. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999).

therefore no longer a 'Case' or 'Controversy' for purposes of Article III." *Already, LLC,* 568 U.S. at 91. "This is so '[n]o matter how vehemently the parties continue to dispute' the issues that animated the litigation." *RES-GA Cobblestone*, 718 F.3d at 1314 (quoting *Already, LLC*, 568 U.S. at 91 (modification in original)). An appeal becomes moot "when the issues presented are no longer 'live'" due to a "change in factual circumstances." *BankWest, Inc. v. Baker*, 446 F.3d 1358, 1363–64 (11th Cir. 2006).

Appellants' claims of injury arising from the size of the Chabad's facility as embodied in the site plans are moot. In particular, they claim that, because of its size, the currently non-existent building will impact traffic in various ways, increase flooding, and "alter the beach-oriented, relaxed, and low-intensity character" of the neighborhood. Appellants' Br. 17.

Throughout the FAC, Appellants attribute all of their supposed injuries to the Chabad's site plans and the City's decision to grant the Chabad certain variances. *See* Am. Compl. ¶ 27 ("The project as imposed by the CITY has zero green space needed to absorb rain water, flooding is therefore inevitable [as] even the slightest of storms can cause problems for surrounding homeowners."); *Id.* ¶ 35 ("The CHABAD's ambitious plan will produce more traffic and parking issues . . . and will burden access to the mainland where fire and emergency services are located, alter property values, and impose noneconomic damages on Plaintiffs by forcing

them to find more convoluted and lengthier exists from Por La Mar and Riveria and increased impediments for emergency vehicles to get to . . . [the] neighborhoods in the event of personal emergencies or the flooding that is increasing a problem for the barrier island . . . .").

Because the Chabad's former site plans have been invalidated by final state court action, however, Appellants' claims of injury are now moot. As Appellants acknowledge in their opening brief, another set of individuals successfully brought an action relating to the Property in State court. *See* Appellants Br. 4; *see also* Dkts. 41, 65 (citing *Royal Palm Real Estate*, No. 2015-CA-009676, *cert. denied sub nom. TJCV Land Trust, LLC*, No. 4D16-2276). The Chabad has accordingly abandoned the previous site plans, as it was required to by law. Because Appellants' claim to injuries are tied to the old site plans, they are no longer cognizable, and are therefore moot. *BankWest, Inc.*, 446 F.3d at 1364 (holding where the challenged action that "formed the heart of" the appeal has been abandoned, the appeal is moot).

Indeed, there are no operative site plans at all. At this stage, any attempt by Appellants to claim that flooding or congestion will be inevitable based on the size of the project would be entirely baseless (and also unripe). It is possible that the Chabad will submit another site plan for approval, the City will approve the plan,

and Appellants will challenge that approval. But their challenge would be to a different plan than the one before this Court.

What is more, on February 28, 2017, the City adopted an ordinance—that applies specifically to the short stretch of East Palmetto Park Road by the Chabad's proposed building site—categorically prohibiting any buildings above 30 feet. Boca Raton, Florida, Code of Ordinances, § 28-780 ("The city council may approve additional height only if it is not injurious to surrounding property and is in accord with the spirit purpose of this chapter. Notwithstanding the foregoing, buildings, structures, or parts thereof, on sites that are both adjacent to East Palmetto Park Road and east of the Atlantic Intracoastal Waterway are not eligible for the additional height and are limited to a height not exceeding 30 feet."); *see also* Text of Ordinance 5384, https://forms.ci.boca-raton.fl.us/weblink/DocView.aspx?id=2001786&page=1&searchid=a84c1ab7-0a49-48a3-a9da-beb35c0c5acf&cr=1 (amending § 28-780 to adopt the quoted language). Any of Appellants' objections to the height variance will, accordingly, not arise in the future.

Some of Appellants' other claims here are rooted in the method by which the City approved the Chabad's plans, purportedly doing so in a manner that violated Due Process and Equal Protection. Appellants cannot assert that the City's procedure for approving non-existent new plans would violate their constitutional

rights, because they do not claim that the City's procedures *per se* are unconstitutional, but rather they claim that the City's alleged failure to have followed their procedures in this case is unconstitutional. Thus the claims and injuries arising from the approved plans are moot. *See BankWest, Inc.*, 446 F.3d at 1367 (holding where challenged program was permanently abandoned, possibility of different future program was not sufficient to avoid mootness and requiring parties to challenge future plan in a future action).[8]

Once Appellants' claims of injury that purportedly arise from the size of the Chabad's invalided site plans are dismissed as moot, it is evident that Appellants' remaining claim is nothing more than a generalized grievance. Appellants have no special relationship with the additional action about which they complain—namely, the City's passage of Ordinance No. 5040. They have no claim that the existence of this ordinance injures them absent an approved site plan. Indeed, their complaint is the very paradigm of a generalized grievance, challenging the *passage*

[8] The capable-of-repetition-but-evading-review exception to mootness has no place here. That exception applies only where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Here, Appellants alleged injuries arise from the specific approval of the Chabad's building. But that particular injury is not capable of repetition because it has been permanently invalidated, and any future site plan will necessarily be a different plan which may not provoke similar concerns. And there will be more than ample time to lodge any challenge if and when the issue ever becomes ripe.

of an ordinance with no effect on them. *See, e.g.*, *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 600 (2007) (holding as too generalized the theory that federal taxpayers have standing to challenge how Treasury funds are spent). And Appellants' injuries cannot arise from Ordinance No. 5040's equal treatment of religious and non-religious places of public assembly alone, because a permitted assembly of 100 people on the property for secular purposes is not meaningfully different than a permitted religious assembly of 100 people on the property.

III. The District Court Correctly Held That Appellants Lack Standing.

Federal jurisdiction is constrained by Article III's case-or-controversy requirement, central to which is the doctrine of standing. *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1339 (11th Cir. 2017). The "irreducible constitutional minimum" of standing consists of three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quotation marks and citations omitted). The plaintiff bears the burden to allege clearly facts demonstrating each element of standing. *Id.* "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or

hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

A. Appellants Fail To Allege A Cognizable Injury.

Appellants fail to allege a cognizable injury. Instead, Appellants repeatedly declare that an injury can be "economic" or "noneconomic." Appellants Br. at 13, 14. But insisting that noneconomic injuries are sufficient for standing—and of course they are—does not a cognizable injury make. Appellants assert a grab bag of nebulous harms that they assume will befall the Por La Mar area. It is clear, however, that "[t]hreadbare recitals . . . , supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And Appellants' assumptions are conclusory in the very way *Iqbal* rejects and Appellants do not plead, let alone plead with sufficient specificity, the basis for their assumptions.[9]

[9] Appellants plead, in the main, the same injuries for their Establishment Clause, Equal Protection Clause, and Due Process Clause claims. Appellants plead one additional injury—that is not cognizable—for their Procedural Due Process claim. Notably, Appellants allege no injuries with respect to Appellants' claim for violation of the Florida Constitution. That claim must accordingly be dismissed. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[A] plaintiff must demonstrate standing for each claim he seeks to press[.]" (internal quotation marks omitted)).

1. The common injuries Appellants allege with respect to their Establishment Clause, Equal Protection Clause, and Due Process Clause claims are not cognizable injuries in fact.

With respect to their Establishment Clause, Equal Protection, and Due Process claims, Appellants allege a series of overlapping injuries, none of which is cognizable. In addition to alleging—with no basis whatsoever—that the construction of the Chabad will diminish property values, Appellants assert they will suffer diminished safety because of "impediments to emergency vehicles and services, which are located on the mainland"; "increased flooding risks"; traffic intrusion; impediments to ingress and egress; some unspecified effect on the "character" of the neighborhood; and "the special burden of altering the vehicular and pedestrian access to their residences on a regular and daily basis to avoid the injury[10] created by the CHABAD's religious complex and the physical and metaphysical impact of avoiding the complex by the need to utilize other, significantly less convenient public roadways." Am. Compl. ¶¶ 72, 81.

These sorts of alleged injuries are far too speculative to constitute injury in fact. Indeed, one reason this Court has repeatedly "stress[ed] that federal courts do not sit as zoning boards of review" is that zoning often involves the sort of entirely

[10] In framing their "special burden" injury, Appellants assume some other "injury" that they do not specify in the FAC. That is, they allege that they will alter vehicular and pedestrian access to their residences "to avoid the *injury* created by" the Chabad's complex without specifying what *that* injury is. Am. Compl. ¶ 72, 81.

speculative and hypothetical predictions that Appellants press here. *Corn*, 997 F.2d at 1389 (noting further that courts "should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions"); *see Maverick Enters. v. Frings.*, 456 F. App'x 870, 872 (11th Cir. 2012) (same); *see also Buena Vista E. Historic Neighborhood Ass'n v. City of Miami*, No. 07-20192, 2008 WL 1848389, at *5 (S.D. Fla. Apr. 22, 2008) (holding as "speculative or conjectural" the alleged injuries of "loss of property value . . . aesthetic intrusion, increased traffic congestion 'causing delays to residents, increase of danger to homes, and delays in emergency response time'"). These matters are appropriately reviewed in the process designed for zoning challenges in state court—a process of which Appellants chose not to avail themselves.

When an individual seeks to invoke a federal court's jurisdiction on a theory of future harm—as Appellants have attempted here—that injury must be "certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013) (citations omitted). Federal courts must make efforts to "reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan*, 504 U.S. at 564 n.2. Here, Appellants have alleged only possible and conjectural future injuries, which are not cognizable. *See Clapper*, 133 S.Ct. at 1147.

Appellants' parade of imagined and concocted injuries are too speculative to meet the constitutional threshold. Construction has not yet begun on the Chabad; it does not even have operative site plans.[11] And the City Council is no longer authorized to grant the sort of modification to which Appellants object. Boca Raton, Florida, Code of Ordinances, § 28-780. The only thing known about the Chabad at this juncture is that it intends to build a house of worship on the Property. Yet Appellants make the unsubstantiated assertions that because the Chabad has intentions eventually to build on some property across the street without any idea of its nature or scope, property values will diminish, traffic will be disrupted, and flooding is inevitable. These conclusory allegations of possible injury fail to meet the hornbook requirement that an injury be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

Even considering the now defunct site plans, however, the FAC is devoid of particularized allegations suggesting that once the religious center is built, it will necessarily—instead of only possibly—cause the injuries that Appellants speculate.

[11] The fact that these claims are now moot, *see supra* Part II, highlights just how speculative Appellants' allegations of injury are. The Chabad has sought to construct a house of worship on the Property for nine years and is at ground zero: it does not even have site plans. After nine years, the Chabad was forced to go back to the drawing board and create new site plans.

Particularly in light of the implausibility of Appellants' claimed injuries, Appellants have failed to plead sufficient factual support. *See Iqbal*, 556 U.S. at 679 (recognizing that determining plausibility is "a context-specific task"). Appellants have not, for example, pleaded the results of a property assessment survey, introduced a civil engineer's analysis, or specified even a single incident of flooding in the Por La Mar neighborhood caused by land use.

The Supreme Court has made crystal clear that "allegations of *possible future injury*[,]" like those in the instant suit, "are not sufficient." *Clapper*, 133 S.Ct. at 1147 (emphasis added); *see Lujan*, 504 U.S. at 564 n.2 ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art[icle] III." (internal quotation marks omitted)). Here, Appellants have stretched the imminence requirement "beyond the breaking point," "alleg[ing] only an injury at some indefinite future time." *Lujan*, 504 U.S. at 564 n.2.

Appellants' injuries are also too generalized to constitute injury in fact. Injuries "must affect the plaintiff in a personal and individual way" that is different from injury suffered by the community at large. *Arizona Christian Sch. Tuition*

Org. v. Winn, 563 U.S. 125, 134 (2011) (quoting *Lujan*, 504 U.S. 560 n.1). A plaintiff must allege more than "the generalized interest of all citizens in constitutional governance." *Schlesinger v. Reservists Comm.*, 418 U.S. 208, 217 (1974). Appellants' objections to Ordinance No. 5040 are no more than a "generalized interest" in compliance with their view of the Establishment Clause. Their remaining complaints about traffic, flooding, and property values are pleaded at a high level of generality. Appellants identify no quantifiable impacts specific to their own properties, only generalized grievances that would apply to any member of the community at large—or even anyone who visited and drove its streets or walked its sidewalks. *See* Am. Compl. ¶¶ 24–27, 30–37. Likewise, injuries based on offensive notions of "neighborhood character" turn standing doctrine on its head by asserting that one suffers injury in fact merely by living near individuals that one would prefer not to live near.

2. Appellants fail to allege an "injury in fact" under the offended observer doctrine for their Establishment Clause claim.

Appellants desperately and incorrectly attempt to shoehorn their purported zoning injuries into the offended observer doctrine. *See* Appellants Br. 13–15. That doctrine directs that where an individual alters her behavior in order to avoid a religious display on state property that offends the individual's religious (or nonreligious) inclination, that behavioral modification can constitute a cognizable injury that confers standing on the individual. *See Glassroth v. Moore*, 335 F.3d

1282, 1288 (11th Cir. 2003). Appellants fail to identify even a single case, however, where the offended observer doctrine was used to prevent a private religious group from building a house of worship on private land or a single case that had any relation to a zoning decision. That is no surprise because the offended observer doctrine is inapplicable here for two principal reasons.

First, all of the offended observer cases Appellants cite concern a religious display on public property. *See ACLU of Georgia v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1983) (cross in a public park); *Glassroth*, 335 F.3d at 1287 (religious display in the rotunda of a public courthouse); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (religious term on official city stationary).[12] Critically, the public has certain rights of access associated with public property; accordingly, when an individual changes her behavior to avoid the property to which she has a right of—or even a duty to—access, this Court has found that the *change* constitutes injury. *See Rabun*, 698 F.2d at 1103 ("[P]laintiffs allege that they have been injured in fact because they

[12] Appellants also cite *Lee v. Weisman*, 505 U.S. 577 (1992), which is not an offended observer case. Even there, however, the challenged conduct—inviting members of the clergy to give invocations and benedictions—occurred at a *public* high school during a *public* graduation ceremony. *Id.* at 584. And in *Lynch v. Donnelly*, 465 U.S. 668 (1984)—the concurrence to which Appellants cite, *see* Appellants Br. 18—the Court held that the city's funding of a display on land owned by a nonprofit that contained a nativity scene did *not* violate the Establishment Clause, *Lynch*, 465 U.S. at 685.

have been deprived of their beneficial right of use and enjoyment of a state park. The cross is situated on public land to which all residents of Georgia have a right of access."); *Glassroth*, 335 F.3d at 1288 ("The three plaintiffs are practicing attorneys in the Alabama courts. As a result of their professional obligations, each of them has entered, and will in the future have to enter, the Judicial Building. . . . Because of the monument, two of the plaintiffs have chosen to visit the Judicial Building less often and enjoy the rotunda less when they are there."). Appellants have no corresponding legal right vis-à-vis the character of private property involved in the instant dispute. Were Appellants to prevail on their distorted and overbroad theory of offended observer standing, being offended by a nativity scene on a neighbor's lawn or a mezuzah on a neighbor's doorpost would give individuals standing in federal court. This is hardly the type of injury that the offended observer doctrine aims to address.

Appellants cannot identify a single court that has applied offended observer standing to restrict private religious conduct for good reason: restricting private religious conduct because it is religious would be unconstitutional religious status discrimination. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' . . . based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)). Federal

courts cannot recognize such allegations as injuries or lend their power to vindicate them. *Trinity Lutheran*, 137 S. Ct. at 2024 n.4 (governmental action "targeting religious beliefs as such is never permissible" (quoting *Lukumi*, 508 U.S. at 533)). Thus, any of the Appellants' claimed injuries or arguments that turn solely on the "religious operation" of the Chabad are flatly noncognizable. Am. Compl. ¶ 94.

Second, Appellants have not even pleaded that they are offended observers. They do not claim that there is a *religious display* that has *caused* Appellants (or will cause Appellants) to change their behavior. For instance, they allege that they may be forced to modify their behavior when a flood "inevitably" befalls their neighborhood, or when emergency vehicles arrive, or when they try to navigate nearby traffic and parking. But there is no nexus between these supposed future changes of behavior and some offense they take at observing a religious display. Even in the FAC's most abstract allegation, Appellants are crystal clear that their change in behavior will be caused by logistical difficulty, not religious discomfort. *See* Am. Compl. ¶ 72 ("Plaintiffs will assume the special burden of altering the vehicular and pedestrian access to their residences on a regular and daily basis to avoid the injury created by the CHABAD's religious complex and the physical and metaphysical impact of avoiding the complex *by the need to utilize other, significantly less convenient public roadways*." (emphasis added)).

In other words, Appellants are neither "offended" nor are they "observers" of a religious display. They assert vague "metaphysical injuries" caused, not by being forced to observe a religious display, but instead by being forced to take an alternate route because of traffic. This is far from plaintiffs' experience in *Rabun*, 698 F.2d at 1103, and *Glassroth*, 335 F.3d at 1285. Unlike plaintiffs in those cases, Appellants assert no change in behavior bearing any relationship to a religious display or practice, but rather a supposed future change in behavior arising from logistical inconvenience.

3. Appellants fail to allege a concrete "injury in fact" for their Due Process claim.

With respect to their waived due process claim, Appellants cite only the additional pure procedural harm of the City's alleged failure to follow its procedures. In particular, the FAC alleges "Plaintiffs were also injured by the fact that the CITY abandoned its procedural requirements for one applicant." Am. Compl. ¶ 94. Without a separate concrete injury, "bare procedural violation[s]," like the one Appellants assert with respect to their due process claim, do not satisfy Article III's injury-in-fact requirement. *Spokeo, Inc.*, 136 S.Ct. at 1549; *see Nicklaw v. CitiMortgage, Inc.*, 855 F3d 1265, 1271 (11th Cir. 2017) (applying *Spokeo* to conclude that bare allegation of procedural harm does not constitute injury in fact).

B. Appellants' Purported Injuries Do Not Share A Nexus With Their Constitutional Claims For Relief.

Appellants' purported injuries do not share a nexus with the constitutional harms that Appellants allege. Appellants' alleged injuries principally arise from the City's approval of the Chabad's religious center. Even there, however, it is not the alleged religious favoritism—the approval of a religious center *per se*—that caused the alleged injury, but only the purportedly "unlawful variances" concerning building height and parking accommodations. Am. Compl. ¶ 49. Appellants have not advanced any claim that the building of a Chabad religious center without height and parking variances would cause any of their supposed injuries. And a local variance is not a claim of constitutional dimension. *See Greenbriar Vill. v. Mountain Brook*, 345 F.3d 1258, 1262 (11th Cir. 2003) ("[Z]oning decisions, as a general rule, will not usually be found by a federal court to implicate constitutional guarantees."); *Corn*, 997 F.2d at 1389 ("[F]ederal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions." (citation omitted)).

Generally, for "Establishment Clause claims based on non-economic harms," an "actual injury occurs if the plaintiff is subjected to unwelcome religious statements and is directly affected by the laws and practices against which his or her complaints are directed." *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1279 (11th Cir. 2008) (internal quotation marks and alteration omitted). Appellants have

alleged no injury of that sort because the City has made no "religious statements" endorsing any religious practice. Rather, Appellants have alleged injury stemming only from local zoning decisions about parking facilities and building height rather than any constitutional violation. Appellants "fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error," other than the psychological consequence—here, even assuming Appellants' supposed "metaphysical" impact of the Chabad, Am. Compl. ¶ 72—was "produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art[icle] III, even though disagreement is phrased in constitutional terms." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State.*, 454 U.S. 464, 485–86 (1982); *see Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1526 (11th Cir. 1993) (recognizing that, to fall within the zone of interest, the question is "whether the substantive constitutional . . . provision confers rights intended . . . to be enforceable under the remedial statute"). Here, the alleged injuries about which Appellants complain have no nexus to the Constitution. In other words, Appellants attempt to conjure up facts to create an Establishment Clause-based loophole to the rule that federal courts do not sit as zoning boards of review. Such a loophole must be rejected.

IV. Appellants Fail To State A Claim On Which Relief Can Be Granted.

If this Court were to conclude that Appellants claims are not moot and that Appellants do have standing to bring, then the Court should affirm the District Court on the alternative ground that Appellants have failed to state a claim on which relief can be granted. This Court "may affirm a judgment based on any grounds supported by the record." *Akanthos Capital Mgmt., LLC*, 734 F.3d at 1271; *see Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1241 (11th Cir. 2003) (affirming "on grounds other than those on which [the district court] relied" because "although the district court erred by finding that appellants lack standing to advance their equal protection challenge . . . [,] the challenge is unavailing on its merits"); *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203 (11th Cir. 2012) (same). This issue was fully briefed below.

A. Appellants Have Failed To State A Claim That The City Established A State Religion By Passing An Ordinance Allowing All Houses Of Worship To Be Built On Equal Terms With Other Places Of Public Assembly And By Approving The Chabad's Site Plan.

In Counts I and IV, Appellants claim the City violated the Establishment Clause of the U.S. Constitution and the No-Aid Provision of the Florida Constitution by adopting Ordinance No. 5040 and approving the Chabad's site plan. Am. Compl. ¶¶ 62, 100.

As an initial matter, "the Establishment Clause must be interpreted by reference to historical practices and understandings," and where "history shows

that the specific practice is permitted," it is "not necessary to define the precise boundary of the Establishment Clause." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal citations omitted). Here, the specific practices in question are (1) a neutral governmental ordinance allowing equal access for all public assemblies, including private houses of worship to build on private land; and (2) government action that allowed the Chabad to take advantage of established variance procedures available to all other builders for the approval of their site plans. Such neutrality towards houses of worship is not forbidden by the Establishment Clause. Indeed, it is the clause's "clearest command." *Larson v. Valente*, 456 U.S. 228, 244 (1982). And it has been so since the nation's founding: "From the beginning, this nation's conception of religious liberty included, at a minimum, the equal treatment of all religious faiths." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.) (noting that, at the time of the First Amendment's drafting, 10 of 12 state constitutions "required equal religious treatment"). Allowing a minority religion equal rights to build a single house of worship on private land has never been understood to constitute an establishment of religion. Nor can it be here.

Even if the Court were to go further and evaluate the Appellants' claims under the *Lemon* test, government action is consistent with the Establishment Clause if it (1) has a valid secular purpose, (2) has a primary effect of neither

advancing nor inhibiting religion, and (3) does not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

Ordinance No. 5040 satisfies these criteria. Its purpose is "to establish a consistent treatment for places of worship and places of public assembly." This is not only legally *permissible*, it is also legally *compelled* by federal law, most directly by RLUIPA, 42 U.S.C. § 2000cc, *et seq*. That statute provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). Interpreting that provision, this Court in *Midrash Sephardi*, 366 F.3d at 1231, invalidated a zoning ordinance that "permit[ted] private clubs and other secular assemblies," but "exclude[d] religious assemblies" from a town's business district. Such "differential treatment," this Court said, "constitutes a violation of § (b)(1) of RLUIPA." *Id*. Indeed, the Court recognized that this result was compelled by the Free Exercise Clause. *See id.* at 1235. Prior to Ordinance No. 5040's passage, the City of Boca Raton imposed impermissible differential treatment between B-1 zoning districts by allowing "places of public assembly" but prohibiting "places of worship." By rectifying this problem, the City was acting with a valid secular purpose. *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (the Establishment Clause permits government to "alleviat[e] exceptional government-created burdens on private

religious exercise"); *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000) (upholding zoning accommodation for religious schools).

Ordinance No. 5040's neutral treatment complies also with the other *Lemon* test factors. Its primary effect is neither to inhibit nor to advance religion. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995) ("[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."). And Ordinance No. 5040 does not foster government entanglement with religion. Indeed, precisely the opposite is true: prior to Ordinance No. 5040's passage, the City discriminated against places of public assembly designed for worship, as compared to assemblies designed for other reasons. After Ordinance No. 5040's passage, the City no longer has to grapple with these distinctions.[13]

For similar reasons, Appellants fail to state a claim that the City violated the Establishment Clause or No-Aid Provision when it approved the technical

[13] Appellants' claim that the City violated the Florida Constitution's "No-Aid" provision also must be dismissed. Challenges under the Florida Constitution are governed by the *Lemon* test, plus a "fourth consideration"—namely, "[t]he statute must not authorize the use of public moneys, directly or indirectly, in aid of any sectarian institution." *Rice v. State*, 754 So. 2d 881, 883 (Fla. 5th DCA 2000). Appellants fail to state a claim on Count IV because the *Lemon* test factors are not met and Appellants do not allege that Ordinance No. 5040 authorizes the use of tax revenues in aid of the Chabad.

deviation for parking pursuant to Code of Ordinances § 23-190(k) and the height permit pursuant to § 28-780. Like Ordinance No. 5040, those provisions treat the Chabad equally to other entities. Indeed, the supposed height modification to the Chabad was within the margin recognized by law; at the time, the City permitted height variances of up to 50 feet. *See* City of Boca Raton, Code of Ordinances, § 28-780. Appellants' theory—prohibiting the City from approving the Chabad's request for zoning variances—would itself violate the Free Exercise Clause by setting up a two-tiered system in which zoning approvals for houses of worship—*and only houses of worship*—would be subject to additional, secondary challenges under the Establishment Clause. *See Trinity Lutheran*, 137 S. Ct. at 2025 (discriminating against a church "solely because it is a church" is "odious to our Constitution . . . and cannot stand."); *accord Lukumi*, 508 U.S. at 532 (1993) (rejecting an "attempt to disfavor their religion").

Accepting Appellants' arguments would also undermine RLUIPA. Instead of RLUIPA's guarantee of equal treatment, houses of worship would be subject to a special disability that could—as it has here—tie up a religious building project for years in federal court. And it would return the law to the *status quo ante*, when "neighborhood residents" were able to rely on "such vague . . . reasons as traffic [and] aesthetics" to accomplish in federal litigation what RLUIPA was meant to stop in local zoning decisions: preventing the construction of "black churches and

Jewish shuls and synagogues" in places where other public assemblies are allowed. 146 Cong. Rec. S7774-01, S7774-75 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

B. Appellants Fail To State An Equal Protection Claim.

In Count II, Appellants allege that the City's actions created "a special privilege for the religion of Chabad" in violation of Appellants' right to equal protection. Am. Compl. ¶ 43. To plead an Equal Protection Claim, a plaintiff may challenge "governmental classifications that affect some groups of citizens differently than others," in which case plaintiffs "generally allege that they have been arbitrarily classified as members of an identifiable group." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601 (2008) (internal quotation marks omitted). Here, Appellants do not allege that they are part of an identifiable group that has been subject to discrimination, or even that they have been singled out for different treatment. Instead, Appellants conclusorily assert "[o]n information and belief, the CITY has not provided the same privileges to a secular developer seeking to place a similarly intense project in Seaside Village." Am. Compl. ¶ 78. Appellants offer no factual allegations that *anyone*—let alone Appellants themselves—actually made a similar proposal and was subject to discriminatory treatment. *See Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006) (determining that in the zoning context, an equal protection claim must

identify a development that is "*prima facie* identical in all relevant respects," and "develop[ers asking] different variances cannot be considered similarly situated"). They have accordingly failed to make out a claim for an Equal Protection violation.

C. Appellants Fail To State A Procedural Due Process Claim (Count III).

In Count III, Appellants allege that the City violated their right to procedural due process by approving the Chabad's application even though it allegedly did not meet legal criteria under the City Code. Am. Compl. ¶ 89–94. To state a procedural due-process claim under § 1983, a plaintiff must allege (1) the deprivation of a constitutionally-protected liberty or property interest, (2) state action, and (3) "constitutionally inadequate process." *Foxy Lady, Inc. v. City of Atlanta*, 347 F.3d 1232, 1236 (11th Cir. 2003). Appellants' procedural due-process claims fail for two independent reasons.

First, Appellants have not alleged facts showing that they were deprived of an interest protected by the Due Process Clause. They instead state only that "Plaintiffs' Fourteenth Amendment due process rights and protected liberty interests were violated." Am. Compl. ¶ 93. But that is the sort of "threadbare recita[l] of a cause of action's elements, supported by mere conclusory statements" that is not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 663.

Second, to the extent Appellants complain that the City Council failed to follow the mandates in the City Code of Ordinances, they fail to allege that they were denied sufficient process. In addition to the numerous public hearings relating to Ordinance No. 5040 and the Chabad's application, *see* Am. Compl. ¶¶ 41, 47–48, 57–58, Florida law allows Appellants the opportunity to remedy any violation of their procedural due process rights by challenging the City Council's decision in Florida state courts, *see Miami-Dade Cty.*, 863 So. 2d at 198–99 (noting that "[a]fter a zoning board rules on an application for a special zoning exception, the parties may twice seek review in the court system," including review as a matter of right as to "whether procedural due process is accorded"). As this Court has aptly noted, "the process a state provides is not only that employed by the board, agency, or other governmental entity whose action is in question, but also includes the remedial process state courts would provide if asked." *Horton v. Bd. of Cty. Comm'rs of Glagler Cty.*, 202 F.3d 1297, 1300 (11th Cir. 2000).

CONCLUSION

For the foregoing reasons, Appellee the Chabad of East Boca respectfully requests this Court affirm the District Court.

Respectfully submitted,

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July 28, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

Dated: July 28, 2017

/s/ *Jay P. Lefkowitz*
Jay P. Lefkowitz P.C.

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Jay P. Lefkowitz, P.C.