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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael Salman, et al.,
Plaintiffs,
v.
Phoenix, City of, et al.,
Defendants.

No. CV-12-01219-PHX-JAT
ORDER

Pending before the Court is Plaintiffs’ Motion for Leave to File Third Amended Complaint (“TAC”). (Doc. 84). The Court now rules on the motion.¹

I. Background

The Court has now had several opportunities to address the factual and procedural background of this case. For context, the Court will set forth in full the background from its July 14, 2015, Order dismissing Plaintiffs’ First Amended Complaint, (“FAC”), (Doc. 73), as well as a synopsis of subsequent activity.

In 2006, Plaintiffs moved into their current address and began holding weekly bible study meetings in their home. Plaintiff Michael Salman has been an ordained minister since 1996, and as such, he believes that he is

¹ Plaintiffs requested oral argument for this motion. (Doc. 84 at 1). The Court will deny this request, as both parties have submitted memoranda discussing the law and facts in support of their positions and oral argument will not aide the Court’s decisional process. *See e.g., Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998); *Lake at Las Vegas Investors Group, Inc. v. Pacific. Dev. Malibu Corp.*, 933 F.2d 724, 729 (9th Cir. 1991). Moreover, Plaintiffs will be permitted to re-file a motion for leave to file an amended complaint that remedies the TAC’s flaws by Tuesday, February 16, 2016.

1 called to be hospitable and to make himself available to his friends and
2 family for studies and religious teaching.

3 In 2007, Plaintiffs' neighbors began to complain to Defendant City
4 of Phoenix about Plaintiffs' bible studies. As a result, the City sent
5 Plaintiffs several letters informing them that they are not permitted to use
6 their house as a church, citing the City's building code. Plaintiffs met with
7 representative of the City to discuss the problem, but were unable to come
8 to an agreement about Plaintiffs' religious use of their property.

9 In 2009, Plaintiffs built a 2000 square foot game room in their back
10 yard and began holding their bible studies there. Upon the completion of
11 this addition, attendance at Plaintiffs' bible study rose from about fifteen to
12 about thirty-five. Eventually the City prosecuted Mr. Salman for violating
13 the building code, and Mr. Salman was convicted after a trial at the Phoenix
14 Municipal Court. The Maricopa County Superior Court, sitting as an
15 appellate court, upheld the conviction.

16

17 This is not the first time Plaintiff has sought relief from the City's
18 actions. On April 4, 2011, Plaintiffs filed a Complaint in this Court, which
19 was assigned to Judge Martone. (No. CV 11-646-PHX-FJM). Among other
20 requests for relief, in that case Plaintiff sought a Temporary Restraining
21 Order ("TRO") enjoining Defendants from implementing and enforcing the
22 Codes and Ordinances against Plaintiffs to prohibit private worship, bible
23 studies, and placement of a reader board with religious messages at their
24 residence and from prosecuting, sentencing, arresting, or incarcerating
25 Plaintiffs. (*See* CV 11-646-PHX-FJM, Doc. 2). In that Motion, Plaintiffs
26 specifically referred to Michael Salman's conviction and sentence to serve
27 sixty days in jail, three years of probation, \$12,000 in fines, and the
28 prohibition against Plaintiff Michael Salman hosting more than twelve
people at his residence at a time. (*Id.*). At the time of that Motion,
Plaintiffs' appeal of that sentence was pending before the Arizona Court of
Appeals. (*Id.*).

19 After Judge Martone denied their Motion for Temporary Restraining
20 Order (*see* CV 11-646-PHX-FJM[,] [Doc. 5]), Plaintiffs filed an amended
21 Complaint (CV 11-646-PHX-FJM, Doc. 6) and an Amended Motion for
22 Temporary Restraining Order (CV 11-646-PHX-FJM, Doc. 7), asserting
23 the same essential theories and requests for relief asserted in their original
24 Complaint and Motion for Temporary Restraining Order. Judge Martone
25 denied Plaintiffs' Amended Motion for Temporary Restraining Order. (CV
26 11-646-PHX-FJM, Doc 10).

27 Defendants moved to dismiss the remainder of Plaintiffs' Amended
28 Complaint under *Younger v. Harris*, 401 U.S. 37 (1971) and *Heck v.*
Humphrey, 512 U.S. 477 (1994) and Judge Martone granted that Motion to
Dismiss on *Younger* and *Heck* grounds in a detailed and reasoned opinion.
See Salman v. City of Phoenix, No. CV 11-00646-PHX-FJM, [2011 U.S.
Dist. LEXIS 122387] (D. Ariz. Oct. 21, 2011).

27 Less than a year after Judge Martone dismissed the case, Plaintiffs
28 filed the current action. (Doc. 1). Plaintiffs' original Complaint requested
(1) a Declaratory Judgment declaring that Defendants' implementation of
the Code on privately held religious meetings violates the First and

1 Fourteenth Amendments of the U.S. Constitution and the Arizona Free
2 Exercise of Religion Act; (2) a permanent injunction enjoining Defendant
3 from enforcing the Code on privately held religious gatherings; (3) a
4 preliminary injunction enjoining the City of Phoenix from enforcing the
5 Code on privately held religious gatherings; and (4) compensatory and
6 punitive damages.

7 Plaintiffs also moved for the issuance of a preliminary injunction
8 (Doc. 5) and TRO (Doc 4) enjoining Defendants from implementing the
9 code on private religious gatherings and bible studies and restraining the
10 execution of Mr. Salman's sentence. The Court denied these requests and
11 dismissed the case for several reasons. First, the Court found that Plaintiffs'
12 § 1983 claims were barred by *Heck* and the doctrine of collateral estoppel.
13 (Doc. 36 at 8–9). Second, the Court concluded that under the *Rooker-*
14 *Feldman* doctrine, it lacked subject matter jurisdiction to consider
15 Plaintiffs' remaining claims because doing so would "necessarily depend
16 on this Court reaching opposite findings on the issues discussed in the
17 Maricopa Superior Court's Order." (Doc. 36 at 12).

18 Plaintiffs appealed the Court's dismissal of the case to the United
19 States Court of Appeals for the Ninth Circuit, which reversed and
20 remanded. (Doc. 49-1). Importantly, as the Ninth Circuit's mandate pointed
21 out, Plaintiffs did not appeal and the Ninth Circuit did not review the
22 Court's dismissal of Plaintiffs' § 1983 damages claims on *Heck* and
23 collateral estoppel grounds. (*Id.* at 2). Rather, the only issue the Ninth
24 Circuit reviewed was whether "under the *Rooker-Feldman* doctrine . . . [the
25 Court] lacked subject matter jurisdiction over [Plaintiffs'] request for an
26 order enjoining the City from implementing or enforcing Section 303 of the
27 2006 Phoenix Building Code on private religious gatherings and bible
28 studies and over their other remaining claims." (Doc. 49-1 at 2). On that
issue, the Ninth Circuit held that the Court does, in fact, have subject matter
jurisdiction over Plaintiffs' non-§ 1983 claims because *Rooker-Feldman*
does not strip jurisdiction when "a federal plaintiff presents some
independent claim, albeit one that denies a legal conclusion that a state
court has reached in a case to which he was a party." (*Id.* (quoting *Exxon*
Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005)).

Plaintiffs then amended their Complaint in a way that, in their own
words, "does not differ much from the Original Complaint other than it
focuses and clarifies the core issue, which is the Defendants['] application
of a 'Code' intended for public use against private religious gatherings,
specifically the Plaintiffs." (Doc. 64 at 2). The Amended Complaint
requests relief similar to that requested in the Original Complaint.
Specifically, the Amended Complaint requests: (1) a declaratory judgment
declaring that enforcement of the Code against those who hold private
religious meetings on their property violates the First and Fourteenth
Amendments to the United States Constitution and the Arizona Free
Exercise of Religion Act ("FERA"); (2) a permanent injunction enjoining
Defendants from enforcing the "Code" against land owners holding private
religious meetings and from "treating private religious gathering[s] and
assemblies on less than equal terms as non-religious gatherings and
assemblies"; and (4) compensatory and punitive damages. (Doc. 56 at 21–
22).

Defendants moved to dismiss the Amended Complaint under Federal
Rule of Civil Procedure 12(b)(6).

1 (Doc. 73 at 1–2).

2 The Court granted Defendant’s² motion, finding that Plaintiffs’ 42 U.S.C. § 1983
3 (2012) claims remained barred by *Heck* and collateral estoppel by way of Judge
4 Martone’s order in *Salman*, 2011 U.S. Dist. LEXIS 122387, at *11-*12. Further,
5 Plaintiffs failed to “state a claim under [the Religious Land Use and Institutionalized
6 Persons Act (“RLUIPA”)] because [they] did not specify which substantive sections of
7 the [Phoenix Building] Code were being enforced against Plaintiffs,” and therefore it was
8 “impossible to tell whether RLUIPA applies or whether the Code imposes substantial
9 burdens on Plaintiffs’ free exercise.” (Doc. 81 at 6; Doc. 73 at 11-12). Having found that
10 Plaintiffs failed to state a federal claim that was plausible on its face, the Court declined
11 to exercise supplemental jurisdiction over Plaintiffs’ state law claims³ in the interest of
12 judicial “economy, convenience and fairness to the parties, and comity,” and dismissed
13 the case. (Doc. 81 at 8; Doc. 73 at 13).

14 Plaintiffs responded by seeking leave to file a Second Amended Complaint
15 (“SAC”), (Doc. 75), and again brought claims pursuant to 42 U.S.C. § 1983, RLUIPA, 42
16 U.S.C. § 2000cc, et seq., and state law claims under FERA, 41A.R.S § 41-1493, et seq..
17 (Doc. 81 at 5). On August 27, 2015, the Court concluded that granting Plaintiffs leave to
18 file the SAC “would be futile,” and denied the motion. (Doc. 81 at 8). The Court found
19 that even though Plaintiffs’ proposed SAC removed all reference to Mr. Salman’s
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21 ² As of April 1, 2015, the City of Phoenix was the only remaining defendant in this
22 matter. (See Doc. 58 (minute entry in which this Court dismissed all fictitious defendants
23 from the suit)). Plaintiffs’ TAC names, in addition to the City of Phoenix, numerous
24 fictitious defendants. (Doc. 85 at 1). “Generally, the Federal Rules of Civil Procedure do
25 not permit the use of Doe defendants.” *Ivan v. Wells Fargo Bank, N.A.*, 12-CV-1065-
26 PHX-JAT, 2012 U.S. Dist. LEXIS 105817, at *6 (D. Ariz. July 30, 2012)(citing Fed. R.
27 Civ. P. 10(a); *Craig v. U.S.*, 413 F.2d 854, 856 (9th Cir. 1969)). Plaintiffs have offered no
28 persuasive reason to depart from the general disfavor towards the pleading of fictitious
defendants in federal court. The Court will therefore utilize the singular shorthand of
“Defendant” to refer to the City of Phoenix throughout this Order, reflecting its status as
the only properly pleaded defendant in this matter.

³ The Court read Plaintiffs’ FAC to include both claims under FERA and the
Arizona Constitution. (Doc. 73 at 12). Plaintiffs’ SAC included multiple claims under
FERA. (Doc. 81 at 7-8). Plaintiffs’ TAC pleaded a FERA claim in both count one and
count two. (Doc. 85 at 19, 20).

1 convictions, his criminal convictions are “matters of public record and not subject to
2 reasonable dispute,” (*id.* at 5-6), and “the Court need not ignore them when determining
3 whether Plaintiffs have stated a claim under § 1983.” (*Id.* at 6 (citation omitted)). Thus,
4 Plaintiffs’ § 1983 claims were barred by *Heck*, 512 U.S. at 487, and Plaintiffs’ § 1983
5 damages claim was barred by collateral estoppel.⁴ (Doc. 81 at 6). With respect to
6 Plaintiffs’ RLUIPA claim, Plaintiffs failed to remedy the FAC’s flaws, as the SAC did
7 not “specify which substantive sections of the [City of Phoenix Building] Code were
8 being enforced against Plaintiffs,” and the “few allegations in the SAC that hint[ed] at the
9 substantive provisions in the Code largely indicate[d] that those provisions are not zoning
10 or landmarking laws,” as they appeared to “regulate construction, safety, and traffic.” (*Id.*
11 at 6-7). With no viable federal claims pleaded in the SAC, the Court again declined to
12 exercise supplemental jurisdiction over Plaintiffs’ state law FERA claims. (*Id.* at 7
13 (citation omitted)). Although Plaintiffs’ proposed SAC was futile, the Court could not
14 conclude that no amendment could cure the proposed Complaint’s defect, and withheld
15 entering judgment at that time, permitting Plaintiffs to file another motion for leave to
16 amend. (Doc. 81 at 8). Plaintiffs timely moved for leave to file a TAC. (Doc. 84).

17 In the intervening months, Plaintiffs filed a Motion for Preliminary Injunction,
18 (Doc. 90), which has been fully briefed, a motion for Temporary Restraining Order,
19 (Doc. 91), which the Court denied in a December 21, 2015, Order, (Doc. 92), and a
20 motion for reconsideration, (Doc. 93), that was denied. (Doc. 95). Having set forth the
21 pertinent factual and procedural background, the Court now turns to the motion.

22 23 **II. Legal Standard**

24 The Court should freely give leave to amend “when justice so requires.” Fed. R.

25 ⁴ The SAC also included a claim for “prospective relief under § 1983 in the form
26 of various injunctions and declaratory judgments.” (Doc. 73 at 6). The Court found that
27 Plaintiffs’ requested relief, although prospective in nature, nonetheless asked the Court to
28 “declare unconstitutional the very statute (or its application to the plaintiff) under which
[Michael Salman] was convicted in state court,” which is “no different than a request that
a federal court invalidate the conviction itself.” (*Id.* at 9).

1 Civ. P. 15(a). “In exercising its discretion[,] . . . ‘a court must be guided by the
2 underlying purpose of Rule 15—to facilitate decision on the merits rather than on the
3 pleadings or technicalities.’” *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987)
4 (citation omitted). “Thus, ‘Rule 15’s policy of favoring amendments to pleadings should
5 be applied with extreme liberality.’” *Id.* (citations omitted); *accord Morongo Band of*
6 *Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (stating that leave to amend
7 is generally allowed with “extraordinary liberality”). “This liberality . . . is not dependent
8 on whether the amendment will add causes of action or parties.” *DCD Programs, LTD.*
9 *v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

10 The extremely liberal policy in favor of amendments, however, is subject to some
11 limitations. Motions to amend need not be granted when the district court determines that
12 there has been a showing of (1) undue delay, (2) bad faith or dilatory motive on the part
13 of the movant, (3) prejudice to the opposing party, (4) futility of amendment, or (5)
14 repeated failure to cure deficiencies by amendments previously allowed. *Schmidt v. PNC*
15 *Bank, NM*, 591 Fed. Appx. 642, 643 (9th Cir. 2015) (quoting *Foman v. Davis*, 371 U.S.
16 178, 182 (1962)). Thus, the Court need not allow a proposed amended complaint that
17 suffers from the same defects that caused the original complaint to be dismissed. *See*
18 *Canatella v. Jamison*, 9 F.3d 1550 (9th Cir. 1993) (emphasis in original) (“Indeed, the
19 *second* amended complaint proposed by Canatella included the same vague, general and
20 conclusory allegations of concerted state action as did the first amended complaint. The
21 district court did not abuse its discretion in denying leave to amend.”); *McGlinchy v.*
22 *Shell Chem. Co.*, 845 F.2d 802, 818 (9th Cir. 1988) (“The deficiencies in the AFA
23 complaint are not cured by new facts or allegations presented by appellants in the
24 proposed Second Amended Complaint. Accordingly, the district court did not abuse its
25 discretion in denying leave to amend by means of the Second Amended Complaint.”).
26 However, in some circumstances, a litigant’s right to amend their complaint under Rule
27 15(a) survives even the dismissal of the complaint. *United Bhd. of Carpenters & Joiners*
28 *of Am. v. Bldg. & Constr. Trades Dep’t*, 770 F.3d 834, 845 (9th Cir. 2014) (other

1 citations omitted) (citing *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc)).

3 **III. Discussion**

4 Plaintiffs assert that the proposed TAC will “bring resolution to the questions of
5 law and allow justice to be served,” and that it “clarif[ies] the violations of the Defendant
6 against the Plaintiffs and include[s] information that Plaintiffs did not have until after
7 discovery, information that is important and vital to the allegations” (Doc. 84 at 1).
8 The TAC brings claims under three statutes, (1) 42 U.S.C. § 1983, (2) RLUIPA, 42
9 U.S.C. § 2000cc, et seq., (3) FERA, 41 A.R.S § 41-1493, et seq., as well as (4) a
10 constitutional challenge to the Phoenix Building Code itself. The Court will address each
11 claim separately.

13 **A. 42 U.S.C. § 1983**

14 The Court acknowledges that it is treading over familiar ground in its discussion
15 of Plaintiffs’ § 1983 claims. This is intentional. The Court seeks to clearly impress upon
16 Plaintiffs the fatal flaw in their § 1983 claims that has been present in each iteration of
17 the Complaint. On October 20, 2011, Judge Martone dismissed Plaintiffs’ claim for §
18 1983 damages, finding that the Complaint asked the Court to order an “award of damages
19 based on a finding that the ordinances under which plaintiffs were convicted were
20 unconstitutional,” which would render Plaintiff Michael Salman’s criminal convictions
21 invalid. *Salman*, 2011 U.S. Dist. LEXIS 122387, at *11-*12. Such an action is barred
22 under *Heck*, 512 U.S. at 486-87. *Id.* Because Plaintiffs failed to show the Court that Mr.
23 Salman’s convictions had been “expunged or otherwise reversed,” the § 1983 claim for
24 damages was dismissed. *Id.* at *12.

25 Plaintiffs then filed a new suit in this Court seeking, among other claims,
26 injunctive relief and damages pursuant to § 1983. The Court dismissed the Complaint,
27 finding that “[t]he only factual difference in the case currently before the Court and the
28 case that was before Judge Martone is that Plaintiff’s appeal [of his criminal conviction]

1 has now concluded,” which “does nothing to effect the *Heck* bar to Plaintiffs’ claims.”
2 (Doc. 36 at 9). Although Plaintiffs argued “that their new Complaint raise[d] issues that
3 did not occur until after Judge Martone’s prior Order,” the Complaint still sought to
4 “have the Court enjoin the conviction of Michael Salman based on essentially the same
5 claims made in both complaints and were seeking the same relief before Judge Martone.”
6 (*Id.* at 10). Thus, Plaintiffs’ § 1983 claim was premature under *Heck* and barred by
7 collateral estoppel. (*Id.* at 12).

8 Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit, but
9 did not raise the issue of the § 1983 damages claim and the effect of *Heck* and collateral
10 estoppel. (Doc. 73 at 3; Doc. 49-1 at 1-2). The Ninth Circuit’s mandate had no impact on
11 this aspect of the Court’s Order. Therefore, when the Court considered Plaintiffs’ FAC
12 after remand, the Court reaffirmed its conclusion that Plaintiffs’ § 1983 damages claim
13 was barred by *Heck* and collateral estoppel. However, the FAC also sought injunctive
14 relief under § 1983. Analyzing the issue for the first time, the Court found that Plaintiffs’
15 claim still sought to have the Court “declare unconstitutional the very statute (or its
16 application to the plaintiff) under which [Michael Salman] was convicted in state court,”
17 which is “no different than a request that a federal court invalidate the conviction itself.”
18 (Doc. 73 at 9). Thus, Plaintiffs’ request “that the court make a finding that would
19 necessarily imply the invalidity of [Michael Salman’s] conviction” was barred by *Heck*,
20 512 U.S. at 486-87, and Plaintiffs’ § 1983 prospective relief claim was dismissed.

21 Plaintiffs then sought leave to file the SAC, which contained “additional details
22 not found in the FAC regarding the conflict that g[a]ve rise to this litigation” and
23 “delete[d] all mention of Mr. Salman’s convictions.” (Doc. 81 at 5). Despite these
24 alterations, Plaintiffs’ proposed SAC was futile. Mr. Salman’s “convictions are []
25 ‘matters of public record’ that are not ‘subject to reasonable dispute,’” and the Court may
26 consider them. (*Id.* at 5-6 (citation omitted)). Plaintiffs’ § 1983 claims remained barred
27 by *Heck*, *Lee v. City of Los Angeles*, 250 F.3d 500, 504 (9th Cir. 1986), and collateral
28 estoppel.

1 Undeterred, Plaintiffs have proffered a TAC. Substantively, little distinguishes the
2 TAC from the SAC, which failed to remedy the defects of the Complaint and FAC.
3 Outside of minor additions and alterations, the TAC substantially mirrors the SAC.
4 Plaintiffs did, however, incorporate two substantive revisions: (1) a facial constitutional
5 challenge to the Phoenix Building Code; and (2) facts showing that in August 2015,
6 Plaintiffs contacted Defendant and requested a “formal interpretation” from Defendant to
7 determine the permissible uses for Plaintiffs’ property and whether Plaintiffs were
8 permitted to increase the size of their weekly bible studies to 20 – 40 people.⁵ (Doc. 84-1
9 at 15). Neither of these revisions alters the Court’s analysis with respect to Plaintiffs’ §
10 1983 claims.

11 The Court again finds that Plaintiffs’ § 1983 claims are barred by *Heck*, 512 U.S.
12 at 486-87.⁶ Plaintiffs’ TAC seeks injunctive relief and damages for government conduct
13 centering on Defendant’s promulgation and application of the Phoenix Building Code.
14 “Plaintiff Michael Salman was . . . convicted of sixty-seven building and zoning code
15 violations in 2010 by the Phoenix Municipal Court,” *Salman*, 2011 U.S. Dist. LEXIS
16 122387, at *3, i.e., for violating the municipal code that Plaintiffs allege is
17 unconstitutional. The Court cannot grant Plaintiffs’ requested relief under § 1983 without
18 making a finding that certain provisions of “the Code” (although the Court is unaware as
19 to which) are unconstitutional, which would invalidate Mr. Salman’s conviction. The
20 Court may not do this. *Heck*, 512 U.S. at 486-87. The fact that Plaintiffs’ SAC and TAC
21 make no reference to Mr. Salman’s criminal convictions is immaterial. They are “matters
22 of public record” and the Court will consider “them when determining whether Plaintiffs
23 have stated a claim under § 1983.” (Doc. 81 at 5-6 (quoting *Lee*, 250 F.3d at 689)).

24 Plaintiffs’ TAC does not remedy this flaw, which is present in each iteration of the
25 Complaint. Plaintiffs have yet to show this Court that Mr. Salman’s criminal convictions

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27 ⁵ Defendant responded to Plaintiffs by letter and refused to answer their questions,
citing “pending appeals.” (Doc. 84-1 at 16).

28 ⁶ The Court also finds that Plaintiffs’ § 1983 claim for damages remains barred by
collateral estoppel. *See Salman*, 2011 U.S. Dist. LEXIS 122387, at *3, *11-*12.

1 for violating the Phoenix Building Code—the basis for Plaintiffs’ § 1983 claims—have
2 been “expunged or otherwise reversed.” *Salman*, 2011 U.S. Dist. LEXIS 122387, at *12.
3 It follows that granting Plaintiffs’ motion for leave to file the proposed TAC is futile.⁷
4

5 **B. RLUIPA**

6 The Court has explained that “RLUIPA applies solely to ‘land use regulations.’”
7 (Doc. 73 at 11 (quoting *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d
8 978, 994 (9th Cir. 2006)). The statute defines “land use regulation” as “a zoning or
9 landmarking law, or the application of such a law, that limits or restricts a claimant’s use
10 or development of land.” (Doc. 73 at 11 (quoting 42 U.S.C. § 2000cc-5(5)). In prior
11 iterations of the Complaint, Plaintiffs “ma[de] many references to ‘the Code,’” but only
12 specifically reference[d] one section: § 303.” (Doc. 73 at 11). The Court explained that §
13 303 of the Phoenix Building Code is “a definitional section, categorizing and labeling
14 various types of building occupancy and use” and that “it is impossible” for the Court to
15 determine “whether the complained-of sections of the code, which has hundreds of
16 subsections, constitute ‘land use regulations.’” (*Id.* at 12). Plaintiffs’ FAC failed for this
17 reason.

18 Plaintiffs attempted to bolster the proposed SAC with additional factual pleadings.
19 Although the SAC included “details . . . regarding the conflict that gave rise to this
20 litigation,” (Doc. 81 at 5), the Court found that the SAC failed to remedy the flaws
21 contained in the FAC. (*Id.* at 6). Plaintiffs’ SAC once again only cited to § 303, “which
22 categorizes building occupancy and use but imposes no substantive duties.” (*Id.*).
23 Moreover, the “substantive provisions in the Code” that Plaintiffs “hint[ed] at” suggested
24 that “those provisions are not zoning and landmarking laws,” and thus are not the basis
25 for a RLUIPA claim. (*Id.* (citation omitted). Succinctly, Plaintiffs’ SAC suffered from
26 “precisely the same deficiencies identified by the Court in its order dismissing the FAC.”

27
28 ⁷ Mrs. Salman makes no argument that she should be able to individually
challenge the Phoenix Code under § 1983 or that she has any threat of enforcement
pending against her individually.

1 (*Id.* at 7).

2 Having considered Plaintiffs' TAC, the Court concludes that it, too, suffers from
3 the same deficiencies as the SAC, and that "allowing the proposed amendments to
4 Plaintiffs' RLUIPA claims would be futile." (Doc. 81 at 7). Plaintiffs' TAC does
5 reference a second Phoenix code provision. Specifically, the TAC refers to the Phoenix
6 Building Construction Code § 110.1, entitled "use and occupancy." (Doc. 84-1 at 4 n.3).
7 But this provision simply mandates that "[n]o building or structure shall be used or
8 occupied, and no change in the existing occupancy classification of a building or
9 structure . . . shall be made until the building official has issued a Certificate of
10 Occupancy." (*Id.*). The provision does nothing to suggest that it is a "zoning or
11 landmarking law" that imposes substantive duties. (Doc. 73 at 11; Doc. 81 at 5). It simply
12 establishes that a Certificate of Occupancy is a prerequisite for use or occupation, or a
13 change in classification for some group of structures. This provision seems to "impose[]
14 certain requirements before certain gatherings may take place (akin to a building or fire
15 code)." (Doc. 73 at 12). In sum, nothing indicates that § 110.1 is a "land use regulation"
16 governed by RLUIPA. Beyond the inclusion of § 110.1, Plaintiffs' TAC fails for the
17 same reasons as the FAC and the SAC. § 303 of the Phoenix Building Code is merely
18 "definitional" and "imposes no substantive duties," and the "few allegations that give
19 some information about the Code sections at issue indicate that they are not 'land use
20 regulations' governed by RLUIPA." (Doc. 81 at 7).

21 The Court finds that the TAC's proposed amendments to Plaintiffs' RLUIPA
22 claims are futile.

23 **C. The Constitutional Infirmity of the Phoenix Building Code**

24 As noted *supra*, the TAC contains new language challenging the constitutionality
25 of the Phoenix Building Code. Specifically, Plaintiffs ask this Court to declare the "A
26 Code" and "other zoning, construction codes, etc.," unconstitutional, (Doc. 84-1 at 23),
27 arguing that "[t]he Defendant[']s codes and interpretations of the codes do not allow a
28 person of normal intelligence to know what is permitted and what is not." (Doc. 84-1 at

1 23). Basically, Plaintiffs allege that the “codes and application of the codes are
2 unconstitutionally broad and vague.” (Doc. 84-1 at 23). The Court finds that this
3 language amounts to a separate claim that provisions of the Phoenix Building Code are
4 constitutionally infirm on vagueness grounds. *See Boag v. MacDougall*, 454 U.S. 364,
5 365 (1982) (per curiam) (noting that federal courts should liberally construe the “inartful
6 pleading” of pro se litigants); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986)
7 (noting that courts in this Circuit should hold “pro se pleadings to a less stringent
8 standard than formal pleadings prepared by lawyers”).

9 Having reviewed Plaintiffs’ TAC, the Court finds that it would be futile to permit
10 Plaintiffs to add this claim. Plaintiffs have failed to assert which provisions of the Code
11 they believe are unconstitutional. Plaintiffs only cite to two local “code” sections:
12 Phoenix Building Code § 303.1 and Phoenix Construction Code § 110.1. (Doc. 84-1 at 4
13 n.2, 3). As the Court discussed previously, § 303 is a “definitional section, categorizing
14 and labeling various types of building occupancy and use” and “imposes no duties or
15 penalties.” (Doc. 73 at 11-12). § 110 of the Phoenix Building Construction Code simply
16 states that “[n]o building or structure shall be used or occupied, and no change in the
17 existing occupancy classification . . . shall be made until the building official has issued a
18 Certificate of Occupancy.” Plaintiffs’ TAC offers nothing to indicate how these specific
19 Code provisions—or which other provisions Plaintiffs mean to assert—are
20 constitutionally infirm. Federal Rule of Civil Procedure 8 mandates that a complaint
21 “contain sufficient factual matter . . . accepted as true . . . stat[ing] a claim to relief that is
22 ‘plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The TAC’s
23 allegations are wholly conclusory, and fail to meet Rule 8’s standard. It follows that the
24 proposed amendment is futile.

25 26 **D. FERA**

27 In its July 14, 2015, Order, the Court dismissed both of Plaintiffs’ federal claims,
28 and declined to exercise supplemental jurisdiction over Plaintiffs’ FERA claim in the

1 interests of judicial “economy, convenience and fairness to the parties, and comity.”⁸
 2 (Doc. 73 at 13 (quoting *Trustees of Constr. Indus. & Laborers Health & Welfare Trust v.*
 3 *Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 925 (9th Cir. 2003)).

4 In its August 27, 2015, Order denying Plaintiffs’ motion for leave to file the SAC,
 5 the Court reaffirmed its decision not to exercise supplemental jurisdiction over Plaintiffs’
 6 state-law claims, as the SAC “failed to cure the deficiencies in their federal claims,” and
 7 “those claims remain dismissed.” (Doc. 81 at 8). “Thus, even if the Court allowed
 8 Plaintiffs’ amendments to their FERA claims, the Court would decline to exercise
 9 supplemental jurisdiction over those claims for the same reasons the Court declined to
 10 exercise supplemental jurisdiction over the FAC.” (*Id.*).

11 The Court has found that Plaintiffs’ proposed TAC fails to plead a viable federal
 12 claim. Thus, even if the proposed FERA amendments were permitted, the Court would
 13 decline to exercise supplemental jurisdiction over Plaintiffs’ state-law claims,⁹ and the
 14 proposed FERA amendments are futile.

15 Having reviewed the proposed TAC, the Court concludes that the proposed
 16 amendments to each of Plaintiffs’ four substantive claims are futile. Accordingly, the
 17 Court will deny Plaintiffs’ motion for leave to file an amended complaint.

18 19 **IV. Future Motion to Amend**

20 Although the Court concludes that granting Plaintiffs’ pending motion for leave to
 21 file an amended complaint would be futile—again—the Court cannot conclude that no
 22 possible amendments could cure the Complaints’ defects. Therefore, the Court will not
 23 enter judgment at this time. But if Plaintiffs fail to file a motion to amend by February 16,

24
25 ⁸ The Court also found that “Plaintiffs’ FERA claims are likely also barred by
 26 collateral estoppel, given that the Maricopa Superior Court decision upholding Mr.
 27 Salman’s conviction specifically addressed that issue.” (Doc. 73 at 13 n.6 (citing Doc.
 28 22-1at 5)).

⁹ The Court notes, again, that it is “not even clear that the [T]AC alleges violations
 of FERA. Counts I and II of the [T]AC each mention FERA in the heading, but allege
 only RLUIPA violations in the numbered allegations.” (Doc. 81 at 8 n.2; Doc 84-1 at ¶¶
 112-129).

1 2016, the Clerk of the Court shall enter judgment in favor of Defendant.

2 The Court emphasizes that Plaintiffs' "repeated failure to cure deficiencies by
3 amendments previously allowed" is grounds for denying future leave to amend. *Schmidt*,
4 591 Fed. Appx. At 643 (quoting *Foman*, 371 U.S. at 182). This will be Plaintiffs' final
5 opportunity to amend the Complaint to attempt to cure the deficiencies identified herein.
6 In other words, if Plaintiffs fail to state a claim in a proposed fifth version of the
7 Complaint, the Court will deem that to be Plaintiffs' inability to state a claim and will not
8 permit further opportunities to amend.

9 10 **V. Plaintiffs' Motion for Preliminary Injunction**

11 Pending separately in this case is a Motion for Preliminary Injunction, (Doc. 90),
12 filed by Plaintiffs' on December 7, 2015. Plaintiffs ask this Court to enjoin Defendant¹⁰
13 from "treating private religious gatherings and assemblies at a residence on less than
14 equal terms as non-religious gatherings and assemblies at a residence until this matter is
15 finally determined." (*Id.* at 11). The motion has been fully briefed.

16 The Court concludes that in light of the fact that Plaintiffs have thus far failed to—
17 and may never—lodge an actionable complaint against Defendant, a preliminary
18 injunction is not appropriate at this time. The Court will deny Plaintiffs' Motion for
19 Preliminary Injunction, (Doc, 90), without prejudice, and with invitation to re-file when
20 (or if) Plaintiffs are given leave to file an amended complaint.

21 22 **VI. Conclusion**

23 For the aforementioned reasons,

24 **IT IS ORDERED** that Plaintiffs' Motion for Leave to File Third Amended
25 Complaint, (Doc. 84), is **DENIED**.

26 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Preliminary Injunction,
27

28 ¹⁰ The Court notes that Plaintiffs' motion contains a number of improperly pleaded
fictitious defendants, which the Court will not consider. *See supra*, note 2. Plaintiffs seek
a preliminary injunction against one properly pleaded defendant—the City of Phoenix.

1 (Doc. 90), is **DENIED**, without prejudice.

2 **IT IS FURTHER ORDERED** that if Plaintiffs fail to file another motion to
3 amend by Tuesday, February 16, 2016, the Clerk of the Court shall enter judgment in
4 favor of Defendant and dismiss this case with prejudice.

5 Dated this 26th day of January, 2016.

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James A. Teilborg
Senior United States District Judge