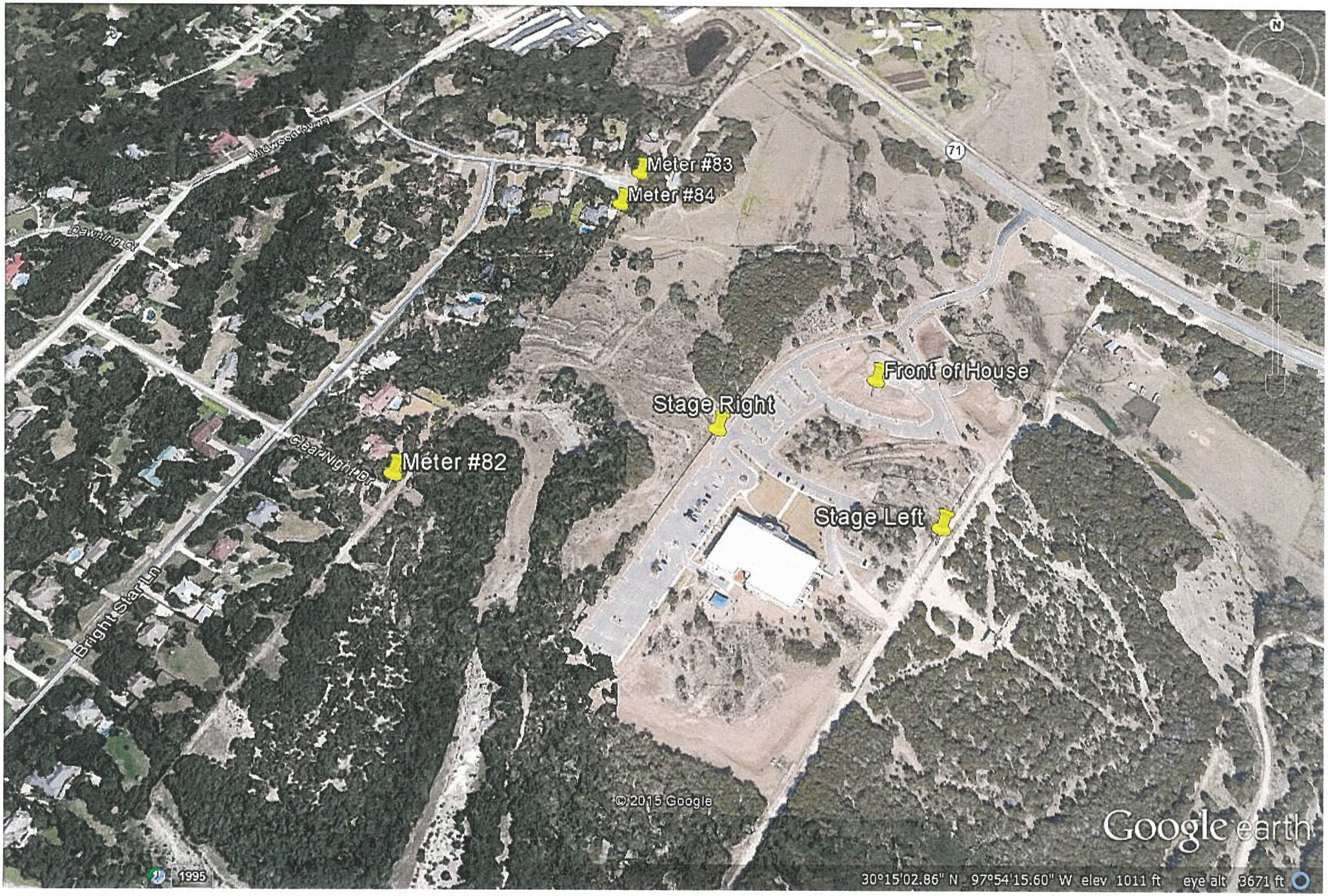

Meter #83
Meter #84
Front of House
Stage Right
Meter #82
Stage Left
Dawning Cir
Clear Night Dr
Bright Star Ln
71
©2015 Google
Google earth
1995
30°15'02.86" N 97°54'15.60" W elev 1011 ft eye alt 3671 ft

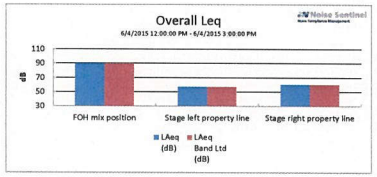
Front of House
Stage Right
Stage Left
Bright Star Ln
Clear Night Dr
Covered Bridge Dr
71
© 2015 Google
Google earth
1995
30°14'53.72" N 97°54'07.97" W elev 984 ft eye alt 4687 ft

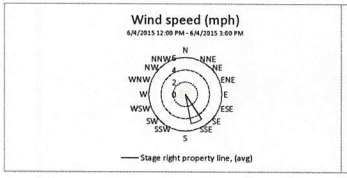
Meter #83
Meter #84
Stage Right
Front of House
Meter #82
Stage Left
71
No Impact
No Impact
No Impact
Covered Bridge Dr
Foggy Mountain Dr
Red Willow Dr
Smokey Hill Rd
Sage Mountain Dr
Roaring Springs Dr
Mowinkle Dr
Glaxton Dr
Bright Star Dr
© 2015 Google
Google earth
1995
30°14'49.10" N 97°53'57.93" W elev 943 ft eye alt 5903 ft

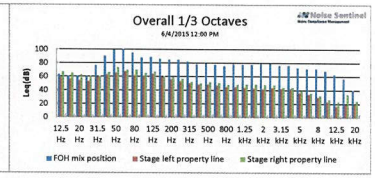
Long Period

Life Austin Church testing 6-4-15 (6/4/2015 12:00 PM - 6/4/2015 3:00 PM)

Brüel & Kjær

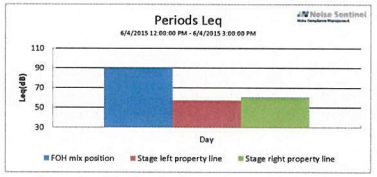


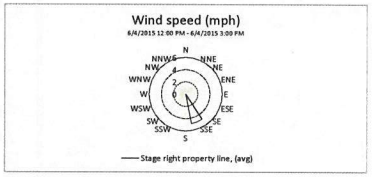




Overall Data

Location	Start Time	End Time	Activity	L_{Aeq} (dB)	L_{Ceq} (dB)	L_{Ceq}-L_{Aeq} (dB)	L_{eq} (Octave Band Spectra)	12.5 Hz	16 Hz	20 Hz	25 Hz	31.5 Hz	40 Hz	50 Hz	63 Hz	80 Hz	100 Hz	125 Hz	160 Hz	200 Hz	250 Hz	315 Hz	400 Hz	500 Hz	630 Hz	800 Hz	1 kHz	1.25 kHz	1.6 kHz	2 kHz	2.5 kHz	3.15 kHz	4 kHz	5 kHz	6.3 kHz	8 kHz	10 kHz	12.5 kHz	16 kHz	20 kHz	L_{eq} (Octave Band Spectra)	16 Hz	31.5 Hz	63 Hz	125 Hz	250 Hz	500 Hz	1 kHz	2 kHz	4 kHz	8 kHz	16 kHz	L_{Aeq} Band Ltd (dB)	Average Wind Speed (mph)	Average Wind Direction
FOH mix position	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	89.9	103.6	13.6		63.3	61.1	61.2	61.2	76.9	90.6	99.0	100.9	95.2	88.2	89.2	86.1	85.2	85.1	82.3	78.4	79.7	78.3	76.0	78.4	78.2	78.2	79.1	79.7	76.5	76.6	73.6	72.0	72.0	68.6	63.3	57.3	40.3		66.7	90.8	103.7	92.8	89.2	83.6	82.5	83.8	80.6	75.9	64.3	90.0	4.9	SSE
Stage left property line	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	57.5	72.6	15.1		59.2	56.8	54.4	53.7	59.9	63.5	65.9	68.1	62.0	61.7	64.3	59.9	56.7	53.7	50.8	48.6	48.8	47.5	44.9	45.1	44.2	43.0	42.0	43.9	42.6	42.5	36.9	34.4	30.4	23.6	17.1	19.6	19.4		62.0	65.4	70.8	67.1	59.2	53.1	49.5	47.8	46.1	36.1	23.6	57.6	4.9	SSE
Stage right property line	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	60.8	77.2	16.3		67.4	65.4	63.2	61.0	60.5	66.2	73.6	70.3	70.1	65.5	67.1	60.6	58.9	56.9	52.3	50.3	52.2	50.6	48.5	48.5	48.6	48.7	48.3	47.7	44.1	44.0	39.8	36.1	32.1	26.8	23.2	34.3	24.4		70.4	68.1	76.4	69.9	61.6	55.9	53.3	53.0	47.8	37.9	35.0	60.9	4.9	SSE

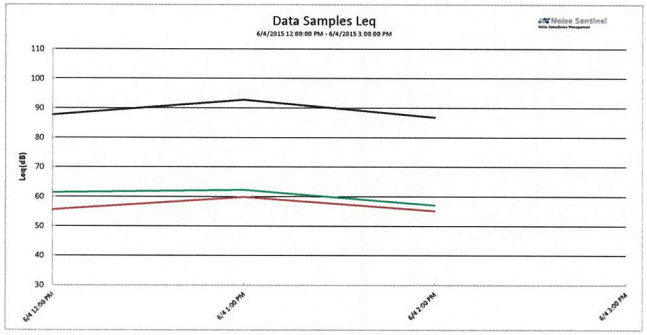


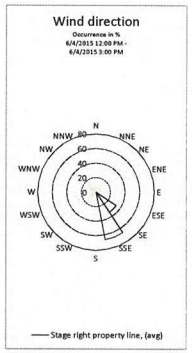


Periods Data

Location	Start Time	End Time	Activity	L_{Aeq} (dB)	L_{Ceq} (dB)	L_{Ceq}-L_{Aeq} (dB)	L_{eq} (Octave Band Spectra)	12.5 Hz	16 Hz	20 Hz	25 Hz	31.5 Hz	40 Hz	50 Hz	63 Hz	80 Hz	100 Hz	125 Hz	160 Hz	200 Hz	250 Hz	315 Hz	400 Hz	500 Hz	630 Hz	800 Hz	1 kHz	1.25 kHz	1.6 kHz	2 kHz	2.5 kHz	3.15 kHz	4 kHz	5 kHz	6.3 kHz	8 kHz	10 kHz	12.5 kHz	16 kHz	20 kHz	L_{eq} (Octave Band Spectra)	16 Hz	31.5 Hz	63 Hz	125 Hz	250 Hz	500 Hz	1 kHz	2 kHz	4 kHz	8 kHz	16 kHz	L_{Aeq} Band Ltd (dB)	Average Wind Speed (mph)	Average Wind Direction
FOH mix position (Day)	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	89.9	103.6	13.6		63.3	61.1	61.2	61.2	76.9	90.6	99.0	100.9	95.2	88.2	89.2	86.1	85.2	85.1	82.3	78.4	79.7	78.3	76.0	78.4	78.2	78.2	79.1	79.7	76.5	76.6	73.6	72.0	72.0	68.6	63.3	57.3	40.3		66.7	90.8	103.7	92.8	89.2	83.6	82.5	83.8	80.6	75.9	64.3	90.0	4.9	SSE
Stage left property line (Day	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	57.5	72.6	15.1		59.2	56.8	54.4	53.7	59.9	63.5	65.9	68.1	62.0	61.7	64.3	59.9	56.7	53.7	50.8	48.6	48.8	47.5	44.9	45.1	44.2	43.0	42.0	43.9	42.6	42.5	36.9	34.4	30.4	23.6	17.1	19.6	19.4		62.0	65.4	70.8	67.1	59.2	53.1	49.5	47.8	46.1	36.1	23.6	57.6	4.9	SSE
Stage right property line (D	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	60.8	77.2	16.3		67.4	65.4	63.2	61.0	60.5	66.2	73.6	70.3	70.1	65.5	67.1	60.6	58.9	56.9	52.3	50.3	52.2	50.6	48.5	48.5	48.6	48.7	48.3	47.7	44.1	44.0	39.8	36.1	32.1	26.8	23.2	34.3	24.4		70.4	68.1	76.4	69.9	61.6	55.9	53.3	53.0	47.8	37.9	35.0	60.9	4.9	SSE

FOH mix position
Stage left property
Stage right





Data Samples - Resolution 1 hour

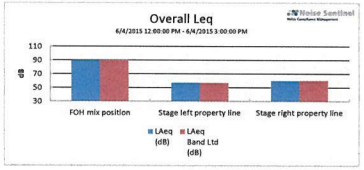
Location	Start Time	End Time	Activity	L_{Aeq} (dB)	L_{Ceq} (dB)	L_{Ceq}-L_{Aeq} (dB)	L_{eq} (Octave Band Spectra)	12.5 Hz	16 Hz	20 Hz	25 Hz	31.5 Hz	40 Hz	50 Hz	63 Hz	80 Hz	100 Hz	125 Hz	160 Hz	200 Hz	250 Hz	315 Hz	400 Hz	500 Hz	630 Hz	800 Hz	1 kHz	1.25 kHz	1.6 kHz	2 kHz	2.5 kHz	3.15 kHz	4 kHz	5 kHz	6.3 kHz	8 kHz	10 kHz	12.5 kHz	16 kHz	20 kHz	L_{eq} (Octave Band Spectra)	16 Hz	31.5 Hz	63 Hz	125 Hz	250 Hz	500 Hz	1 kHz	2 kHz	4 kHz	8 kHz	16 kHz	L_{Aeq} Band Ltd (dB)	Average Wind Speed (mph)	Average Wind Direction
FOH mix position	6/4 12:00:00 PM	6/4 1:00:00 PM	98%	87.7	101.5	13.9		63.1	60.9	59.6	57.9	68.9	84.8	95.7	100.0	90.6	86.7	87.3	82.9	83.3	82.4	80.2	75.8	76.5	76.9	74.5	77.3	76.9	77.1	76.0	75.6	74.0	74.2	70.4	68.6	68.8	66.0	59.8	52.4	35.5		66.2	84.9	101.7	90.8	86.9	81.2	81.2	81.0	78.0	72.7	60.5	87.6	4.4	SSE
FOH mix position	6/4 1:00:00 PM	6/4 2:00:00 PM	100%	92.8	106.4	13.7		63.4	61.3	62.8	63.7	80.4	93.9	102.0	103.5	98.4	90.8	91.8	88.8	87.7	87.9	85.1	81.2	82.6	80.8	78.6	81.0	80.8	80.7	82.1	82.8	79.4	79.6	76.6	75.1	75.2	71.7	66.3	60.4	43.4		67.4	94.1	106.5	95.4	91.8	86.4	85.1	86.7	83.5	79.0	67.3	92.8	4.8	SSE
FOH mix position	6/4 2:00:00 PM	6/4 3:00:00 PM	100%	86.9	100.2	13.3		63.3	61.1	60.4	59.8	75.0	88.3	96.2	96.1	93.0	84.8	86.4	84.3	83.1	82.4	79.2	75.6	77.2	75.3	72.8	74.6	74.6	74.2	76.2	77.1	73.3	73.3	70.6	68.8	68.8	65.2	60.5	55.2	38.1		66.6	88.5	100.1	90.1	86.7	80.9	78.8	80.8	77.3	72.7	61.6	86.9	5.5	SE
Stage left property line	6/4 12:00:00 PM	6/4 1:00:00 PM	98%	55.7	70.9	15.2		58.5	56.0	53.9	52.3	53.7	58.9	63.9	67.9	58.6	59.9	61.6	57.3	55.1	51.3	49.0	47.1	46.7	45.7	42.8	43.9	42.8	41.5	39.2	40.1	40.5	43.0	37.5	33.6	30.0	24.0	17.7	19.9	19.5		61.3	60.7	69.7	64.7	57.3	51.3	47.9	45.2	45.7	35.5	23.9	55.6	4.4	SSE
Stage left property line	6/4 1:00:00 PM	6/4 2:00:00 PM	100%	60.0	75.1	15.1		59.1	57.0	54.6	54.6	63.0	66.5	68.5	70.4	64.4	64.0	67.2	62.4	59.0	56.4	53.3	50.9	51.3	49.7	46.9	47.2	46.4	45.4	44.9	47.1	45.4	44.3	38.2	36.7	32.7	25.3	17.4	19.2	19.3		62.1	68.3	73.2	69.8	61.6	55.4	51.6	50.7	48.3	38.4	23.5	60.1	4.8	SSE
Stage left property line	6/4 2:00:00 PM	6/4 3:00:00 PM	100%	55.2	70.0	14.9		60.0	57.3	54.6	54.0	58.3	62.0	63.3	63.8	61.0	59.6	61.7	58.0	54.6	51.3	48.2	46.5	46.8	45.8	43.8	43.3	41.9	40.3	39.1	41.0	39.7	38.4	34.0	31.5	26.0	20.0	16.1	19.8	19.4		62.6	64.0	67.6	64.8	56.9	51.1	47.8	45.0	42.7	32.8	23.5	55.3	5.5	SE
Stage right property line	6/4 12:00:00 PM	6/4 1:00:00 PM	98%	61.5	74.5	13.1		64.2	61.5	58.8	56.5	55.9	61.9	67.3	70.1	61.9	66.3	65.8	62.3	60.3	58.3	55.2	52.5	51.9	52.7	49.6	50.1	50.7	49.2	48.2	46.7	45.0	44.7	39.5	37.8	34.6	29.9	26.7	38.8	28.0		66.8	63.7	72.4	69.9	63.2	57.2	54.9	52.9	48.4	39.9	39.4	61.5	4.4	SSE
Stage right property line	6/4 1:00:00 PM	6/4 2:00:00 PM	100%	62.4	79.8	17.5		67.8	65.7	63.4	61.1	60.8	69.0	76.9	72.5	73.4	67.0	69.4	61.1	59.6	57.9	51.2	50.3	54.3	51.0	49.7	49.3	48.8	50.4	50.3	50.1	45.6	45.6	41.8	37.1	32.0	25.6	21.0	25.2	20.3		70.8	70.2	79.5	71.7	62.2	57.0	54.0	55.0	49.4	38.5	27.5	62.5	4.8	SSE
Stage right property line	6/4 2:00:00 PM	6/4 3:00:00 PM	100%	57.1	75.1	17.9		69.0	67.1	65.2	63.2	62.4	64.6	71.5	66.4	68.4	61.4	64.7	56.8	55.4	52.9	46.1	45.2	48.8	45.7	44.8	44.1	43.6	44.6	44.4	44.4	40.2	39.7	36.2	31.0	25.8	19.2	16.4	19.3	19.8		72.2	68.3	74.1	66.8	57.7	51.7	49.0	49.2	43.8	32.3	23.5	57.2	5.5	SE

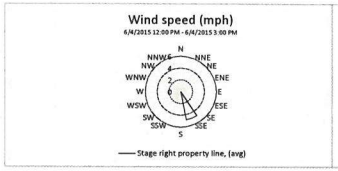
Please Note! Weather data shown in gray colour are copied from the master weather station.

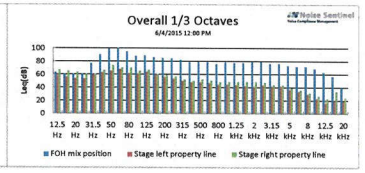
Short Period

Life Austin Church testing 6-4-15 (6/4/2015 12:00 PM - 6/4/2015 3:00 PM)

Brüel & Kjær

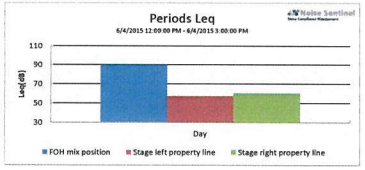


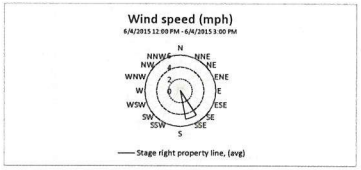




Overall Data

Location	Start Time	End Time	Activity	L_{Band}	L_{eq}	L_{eq}/L_{Band}	L_{eq}	12.5	16	20	25	31.5	40	50	63	80	100	125	160	200	250	315	400	500	630	800	1	1.25	1.6	2	2.5	3.15	4	5	6.3	8	10	12.5	16	20	L_{eq}	16	31.5	63	125	250	500	1	2	4	8	16	L_{Band} Ltd	L_{peak}	Average Wind Speed	Average Wind Direction
FOH mix position	6/4 12:00:00 PM	6/4 3:00:00 PM	74%	90.1	104.1	14.0		63.3	61.1	61.2	61.2	76.9	90.6	99.0	100.8	95.2	88.2	89.2	86.1	85.2	85.1	82.3	78.4	79.7	78.3	76.0	78.4	78.2	78.1	79.1	79.7	76.5	76.6	73.6	72.0	72.0	68.6	63.3	57.2	40.3		66.7	90.8	103.7	92.8	89.2	83.6	82.4	83.8	80.5	75.9	64.3	90.0	124.3	4.9	SSE
Stage left property line	6/4 12:00:00 PM	6/4 3:00:00 PM	74%	57.7	73.0	15.3		59.2	56.8	54.4	53.7	59.9	63.5	65.9	68.1	62.0	61.7	64.3	59.9	56.7	53.7	50.8	48.6	48.8	47.5	44.9	45.1	44.2	43.0	42.0	43.9	42.6	42.5	36.9	34.4	30.4	23.6	17.1	19.6	19.4		62.0	65.4	70.8	67.1	59.2	53.1	49.5	47.8	46.1	36.1	23.6	57.6	100.9	4.9	SSE
Stage right property line	6/4 12:00:00 PM	6/4 3:00:00 PM	74%	60.4	77.5	17.1		67.4	65.4	63.2	61.0	60.5	66.2	73.6	70.3	70.1	65.5	67.1	60.6	58.9	56.9	52.3	50.2	52.2	50.6	48.5	48.5	48.6	48.7	48.2	47.7	44.1	43.9	39.7	36.1	32.0	26.8	23.2	34.3	24.5		70.4	68.1	76.4	69.9	61.6	55.9	53.3	53.0	47.8	37.9	35.0	60.9	107.3	4.9	SSE

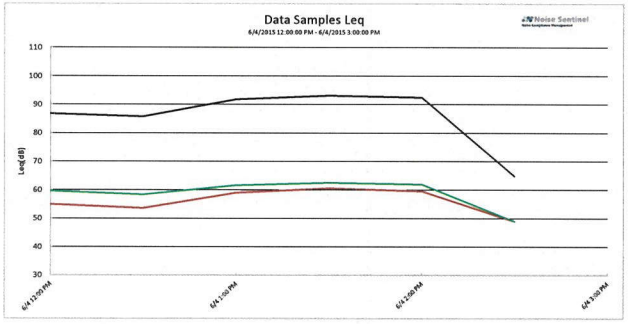


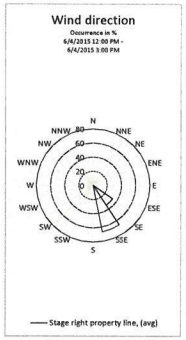


Periods Data

Location	Start Time	End Time	Activity	L_{Band}	L_{eq}	L_{eq}/L_{Band}	L_{eq}	12.5	16	20	25	31.5	40	50	63	80	100	125	160	200	250	315	400	500	630	800	1	1.25	1.6	2	2.5	3.15	4	5	6.3	8	10	12.5	16	20	L_{eq}	16	31.5	63	125	250	500	1	2	4	8	16	L_{Band} Ltd	L_{peak}	Average Wind Speed	Average Wind Direction
FOH mix position (Day)	6/4 12:00:00 PM	6/4 3:00:00 PM	74%	90.1	104.1	14.0		63.3	61.1	61.2	61.2	76.9	90.6	99.0	100.8	95.2	88.2	89.2	86.1	85.2	85.1	82.3	78.4	79.7	78.3	76.0	78.4	78.2	78.1	79.1	79.7	76.5	76.6	73.6	72.0	72.0	68.6	63.3	57.2	40.3		66.7	90.8	103.7	92.8	89.2	83.6	82.4	83.8	80.5	75.9	64.3	90.0	124.3	4.9	SSE
Stage left property line (Da	6/4 12:00:00 PM	6/4 3:00:00 PM	74%	57.7	73.0	15.3		59.2	56.8	54.4	53.7	59.9	63.5	65.9	68.1	62.0	61.7	64.3	59.9	56.7	53.7	50.8	48.6	48.8	47.5	44.9	45.1	44.2	43.0	42.0	43.9	42.6	42.5	36.9	34.4	30.4	23.6	17.1	19.6	19.4		62.0	65.4	70.8	67.1	59.2	53.1	49.5	47.8	46.1	36.1	23.6	57.6	100.9	4.9	SSE
Stage right property line (D	6/4 12:00:00 PM	6/4 3:00:00 PM	74%	60.4	77.5	17.1		67.4	65.4	63.2	61.0	60.5	66.2	73.6	70.3	70.1	65.5	67.1	60.6	58.9	56.9	52.3	50.2	52.2	50.6	48.5	48.5	48.6	48.7	48.2	47.7	44.1	43.9	39.7	36.1	32.0	26.8	23.2	34.3	24.5		70.4	68.1	76.4	69.9	61.6	55.9	53.3	53.0	47.8	37.9	35.0	60.9	107.3	4.9	SSE

FOH mix position
Stage left property
Stage right





Data Samples - Resolution

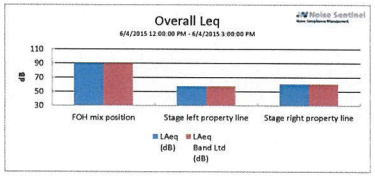
Location	Start Time	End Time	Activity	L_{Band}	L_{eq}	L_{eq}/L_{Band}	L_{eq}	12.5	16	20	25	31.5	40	50	63	80	100	125	160	200	250	315	400	500	630	800	1	1.25	1.6	2	2.5	3.15	4	5	6.3	8	10	12.5	16	20	L_{eq}	16	31.5	63	125	250	500	1	2	4	8	16	L_{Band} Ltd	L_{peak}	Average Wind Speed	Average Wind Direction
FOH mix position	6/4 12:00:00 PM	6/4 12:30:00 PM	72%	86.8	100.9	14.1		63.5	61.3	59.5	57.4	68.8	81.8	92.2	96.1	86.5	83.9	83.5	78.8	79.1	79.1	77.6	72.9	71.8	72.5	70.2	72.8	71.9	72.3	72.4	72.4	70.6	70.0	66.7	64.9	64.8	61.7	55.6	48.2	32.1		66.5	82.0	97.9	87.4	83.4	77.2	76.5	77.1	74.1	68.8	56.4	83.5	123.3	4.5	SSE
Stage left property line	6/4 12:00:00 PM	6/4 12:30:00 PM	72%	55.0	70.2	15.2		58.8	56.1	53.6	51.6	53.4	57.6	60.4	64.4	56.5	57.2	57.3	53.5	51.5	48.7	46.5	44.3	43.8	42.9	40.6	41.0	39.1	37.2	35.8	36.6	37.0	43.5	38.9	32.1	27.5	21.5	17.3	20.3	19.7		61.4	59.7	66.3	61.1	54.1	48.5	45.1	41.3	45.4	33.7	24.0	52.8	91.9	4.5	SSE
Stage right property line	6/4 12:00:00 PM	6/4 12:30:00 PM	72%	59.6	74.1	14.5		64.0	61.5	58.7	56.4	55.5	59.2	62.8	67.0	59.1	63.8	61.9	58.6	55.1	54.4	51.3	47.8	44.3	43.1	43.5	46.3	44.2	43.7	41.8	43.0	41.3	41.3	36.0	34.2	30.9	26.2	25.4	41.3	29.8		66.7	62.1	68.9	66.7	58.6	50.3	49.6	47.7	44.9	36.3	41.7	56.6	94.7	4.5	SSE

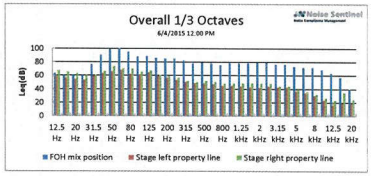
Please Note! Weather data shown in gray colour are copied from the master weather station.

Logged Data

Life Austin Church testing 6-4-15 (6/4/2015 12:00 PM - 6/4/2015 3:00 PM)

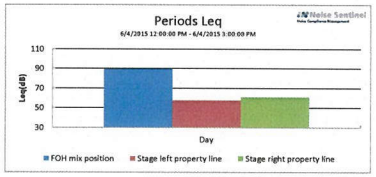
Brüel & Kjær





Overall Data

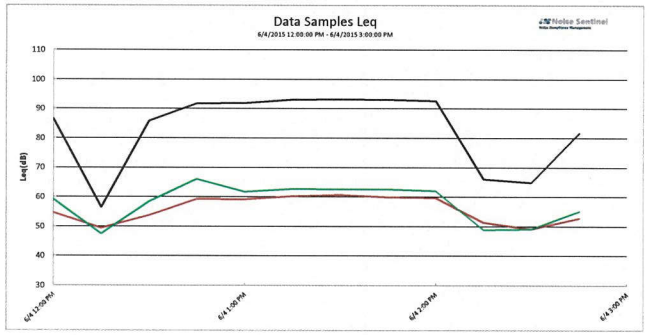
Location	Start Time	End Time	Activity	L_{Aeq} (dB)	L_{Feq} (dB)	L_{Feq}-L_{Aeq} (dB)	L_{eq} % octave Band Spectra	12.5 Hz	16 Hz	20 Hz	25 Hz	31.5 Hz	40 Hz	50 Hz	63 Hz	80 Hz	100 Hz	125 Hz	160 Hz	200 Hz	250 Hz	315 Hz	400 Hz	500 Hz	630 Hz	800 Hz	1 kHz	1.25 kHz	1.6 kHz	2 kHz	2.5 kHz	3.15 kHz	4 kHz	5 kHz	6.3 kHz	8 kHz	10 kHz	12.5 kHz	16 kHz	20 kHz	L_{eq} octave Band Spectra	16 Hz	31.5 Hz	63 Hz	125 Hz	250 Hz	500 Hz	1 kHz	2 kHz	4 kHz	8 kHz	16 kHz	L_{Aeq} Band Ltd (dB)	L_{Fpeak} (dB)
FOH mix position	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	89.9	103.6	13.6		63.3	61.1	61.2	61.2	77.0	90.6	99.0	100.9	95.2	88.2	89.2	86.1	85.2	85.1	82.3	78.4	79.7	78.3	76.0	78.4	78.2	78.2	79.1	79.7	76.5	76.6	73.6	72.0	72.0	68.6	63.3	57.3	40.3		66.8	90.8	103.7	92.8	89.2	83.6	82.5	83.8	80.6	75.9	64.3	90.0	124.3
Stage left property line	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	57.5	72.6	15.1		59.2	56.8	54.4	53.7	59.9	63.5	65.9	68.1	62.0	61.7	64.3	59.9	56.7	53.7	50.8	48.6	48.8	47.5	44.9	45.1	44.2	43.0	42.0	43.9	42.6	42.5	36.9	34.4	30.4	23.6	17.1	19.6	19.4		62.0	65.4	70.8	67.1	59.2	53.1	49.5	47.8	46.1	36.1	23.6	57.6	100.9
Stage right property line	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	60.8	77.2	16.3		67.4	65.4	63.2	61.0	60.5	66.2	73.6	70.3	70.1	65.5	67.1	60.6	58.9	56.9	52.3	50.3	52.2	50.6	48.5	48.5	48.6	48.7	48.2	47.7	44.1	44.0	39.7	36.1	32.1	26.8	23.3	34.4	24.5		70.4	68.1	76.4	69.9	61.6	55.9	53.3	53.0	47.8	37.9	35.2	60.9	107.3



Periods Data

Location	Start Time	End Time	Activity	L_{Aeq} (dB)	L_{Feq} (dB)	L_{Feq}-L_{Aeq} (dB)	L_{eq} % octave Band Spectra	12.5 Hz	16 Hz	20 Hz	25 Hz	31.5 Hz	40 Hz	50 Hz	63 Hz	80 Hz	100 Hz	125 Hz	160 Hz	200 Hz	250 Hz	315 Hz	400 Hz	500 Hz	630 Hz	800 Hz	1 kHz	1.25 kHz	1.6 kHz	2 kHz	2.5 kHz	3.15 kHz	4 kHz	5 kHz	6.3 kHz	8 kHz	10 kHz	12.5 kHz	16 kHz	20 kHz	L_{eq} octave Band Spectra	16 Hz	31.5 Hz	63 Hz	125 Hz	250 Hz	500 Hz	1 kHz	2 kHz	4 kHz	8 kHz	16 kHz	L_{Aeq} Band Ltd (dB)	L_{Fpeak} (dB)
FOH mix position (Day)	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	89.9	103.6	13.6		63.3	61.1	61.2	61.2	77.0	90.6	99.0	100.9	95.2	88.2	89.2	86.1	85.2	85.1	82.3	78.4	79.7	78.3	76.0	78.4	78.2	78.2	79.1	79.7	76.5	76.6	73.6	72.0	72.0	68.6	63.3	57.3	40.3		66.8	90.8	103.7	92.8	89.2	83.6	82.5	83.8	80.6	75.9	64.3	90.0	124.3
Stage left property line (Da	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	57.5	72.6	15.1		59.2	56.8	54.4	53.7	59.9	63.5	65.9	68.1	62.0	61.7	64.3	59.9	56.7	53.7	50.8	48.6	48.8	47.5	44.9	45.1	44.2	43.0	42.0	43.9	42.6	42.5	36.9	34.4	30.4	23.6	17.1	19.6	19.4		62.0	65.4	70.8	67.1	59.2	53.1	49.5	47.8	46.1	36.1	23.6	57.6	100.9
Stage right property line (D	6/4 12:00:00 PM	6/4 3:00:00 PM	99%	60.8	77.2	16.3		67.4	65.4	63.2	61.0	60.5	66.2	73.6	70.3	70.1	65.5	67.1	60.6	58.9	56.9	52.3	50.3	52.2	50.6	48.5	48.5	48.6	48.7	48.2	47.7	44.1	44.0	39.7	36.1	32.1	26.8	23.3	34.4	24.5		70.4	68.1	76.4	69.9	61.6	55.9	53.3	53.0	47.8	37.9	35.2	60.9	107.3

FOH mix position
Stage left property
Stage right



Data Samples - Resolution 15 minutes

Location	Start Time	End Time	Activity	L_{Aeq} (dB)	L_{Feq} (dB)	L_{Feq}-L_{Aeq} (dB)	L_{eq} % octave Band Spectra	12.5 Hz	16 Hz	20 Hz	25 Hz	31.5 Hz	40 Hz	50 Hz	63 Hz	80 Hz	100 Hz	125 Hz	160 Hz	200 Hz	250 Hz	315 Hz	400 Hz	500 Hz	630 Hz	800 Hz	1 kHz	1.25 kHz	1.6 kHz	2 kHz	2.5 kHz	3.15 kHz	4 kHz	5 kHz	6.3 kHz	8 kHz	10 kHz	12.5 kHz	16 kHz	20 kHz	L_{eq} octave Band Spectra	16 Hz	31.5 Hz	63 Hz	125 Hz	250 Hz	500 Hz	1 kHz	2 kHz	4 kHz	8 kHz	16 kHz	L_{Aeq} Band Ltd (dB)	L_{Fpeak} (dB)	Wind Speed (mph)	Wind Direction (°)
FOH mix position	6/4 12:00:00 PM	6/4 12:15:00 PM	93%	86.5	100.6	14.1		64.2	62.1	60.8	59.3	71.9	84.9	95.4	99.3	89.7	87.1	86.7	82.0	82.2	82.2	80.8	76.0	75.0	75.7	73.3	76.0	75.1	75.5	75.5	75.6	73.7	73.1	69.8	68.0	68.0	64.9	58.8	51.4	35.1		67.4	85.1	101.1	90.5	86.6	80.3	79.7	80.3	77.3	72.0	59.5	86.5	123.3	0.0	0.0
FOH mix position	6/4 12:15:00 PM	6/4 12:30:00 PM	100%	56.4	64.2	7.8		62.8	60.3	58.0	54.4	53.0	52.9	52.6	51.3	52.0	52.7	50.1	49.9	49.5	51.6	49.5	50.2	51.2	51.0	47.8	44.4	43.8	44.8	40.7	39.5	38.0	38.9	37.6	36.5	31.9	27.9	25.7	24.1	19.8		65.6	58.3	56.8	55.9	55.1	55.6	50.5	47.1	42.9	38.2	28.6	56.4	91.0	0.0	0.0
FOH mix position	6/4 12:30:00 PM	6/4 12:45:00 PM	100%	85.7	100.1	14.3		63.7	61.6	60.3	58.3	68.2	85.0	94.2	98.5	90.2	84.3	85.1	81.1	81.9	81.2	78.4	74.6	75.3	74.8	73.1	74.5	74.8	75.2	73.9	73.9	71.8	71.9	68.3	67.0	67.1	64.4	58.2	50.6	34.3		66.9	85.1	100.3	88.6	85.5	79.7	79.0	79.2	75.7	71.1	58.9	85.8	119.2	0.0	0.0
FOH mix position	6/4 12:45:00 PM	6/4 1:00:00 PM	100%	91.6	105.3	13.7		61.4	59.1	58.8	58.5	69.9	87.6	99.5	103.9	94.1	90.4	91.4	87.0	87.2	86.0	83.6	79.3	80.6	81.1	78.4	81.6	81.2	81.3	79.9	79.2	78.0	78.4	74.4	72.4	72.7	70.0	63.8	56.4	39.2		64.7	87.6	105.6	94.7	90.6	85.1	85.4	85.0	82.0	76.6	64.5	91.7	124.3	0.0	0.0
FOH mix position	6/4 1:00:00 PM	6/4 1:15:00 PM	100%	91.8	107.3	15.6		64.0	62.0	62.0	62.1	76.2	91.6	102.1	106.0	96.5	91.5	92.1	85.8	85.3	84.4	83.4	78.8	80.5	79.2	76.8	80.4	80.6	81.3	80.6	80.6	78.6	79.3	75.9	74.7	75.1	72.2	66.3	59.4	42.0		67.5	91.7	107.8	95.3	89.2	84.3	84.4	85.6	82.9	78.9	67.1	91.8	123.5	0.0	0.0
FOH mix position	6/4 1:15:00 PM	6/4 1:30:00 PM	100%	93.0	106.0	13.0		60.6	58.5	62.3	63.9	81.2	94.4	101.9	102.2	98.8	90.4	91.6	89.4	88.2	88.4	85.5	81.8	83.0	81.3	79.0	81.3	80.9	80.5	82.6	83.4	79.6	79.7	76.8	75.2	75.3	71.5	66.4	60.7	43.9		65.5	94.6	106.0	95.3	92.3	86.9	85.3	87.1	83.7	79.1	67.5	93.1	122.4	0.0	0.0
FOH mix position	6/4 1:30:00 PM	6/4 1:45:00 PM	100%	93.1	106.1	13.0		65.5	63.7	64.2	64.5	81.2	94.5	102.0	102.2	98.9	90.6	91.7	89.4	88.2	88.8	85.5	81.7	83.3	81.4	79.1	81.2	80.8	80.6	82.5	83.4	79.7	79.7	76.8	75.2	75.2	71.5	66.5	60.8	43.9		69.3	94.7	106.0	95.4	92.5	87.0	85.2	87.1	83.7	79.1	67.5	93.1	122.0	0.0	0.0
FOH mix position	6/4 1:45:00 PM	6/4 2:00:00 PM	100%	93.0	106.1	13.1		61.8	59.2	62.4	63.9	81.2	94.5	102.0	102.3	98.8	90.6	91.7	89.5	88.3	88.7	85.5	81.8	83.1	81.1	79.0	81.2	81.0	80.6	82.4	83.2	79.6	79.6	76.9	75.3	75.1	71.3	66.2	60.5	43.5		66.1	94.7	106.1	95.5	92.5	86.8	85.3	87.0	83.6	79.0	67.2	93.0	122.2	0.0	0.0
FOH mix position	6/4 2:00:00 PM	6/4 2:15:00 PM	100%	92.5	105.5	13.0		62.8	60.5	62.5	63.6	80.6	93.9	101.4	101.7	98.4	89.8	91.0	88.9	87.7	87.9	84.9	81.2	83.0	81.1	78.6	80.4	80.3	79.9	82.1	83.0	79.1	79.0	76.2	74.5	74.5	70.8	65.7	60.0	43.0		66.8	94.1	105.5	94.8	91.8	86.6	84.6	86.6	83.1	78.4	66.8	92.5	122.0	0.0	0.0
FOH mix position	6/4 2:15:00 PM	6/4 2:30:00 PM	100%	66.0	75.2	9.2		63.0	61.0	58.7	56.1	55.4	57.0	65.5	65.4	72.4	66.9	56.5	58.5	55.9	56.9	57.8	54.5	54.8	58.6	54.7	54.6	55.4	56.4	53.8	54.0	54.8	51.7	49.1	47.6	44.8	41.6	39.4	37.5	30.0		66.0	61.0	73.8	67.8	61.7	61.2	59.7	57.3	50.1	41.8	66.1	95.4	0.0	0.0
FOH mix position	6/4 2:30:00 PM	6/4 2:45:00 PM	100%	64.8	73.2	8.4		63.4	61.1	59.8	56.6	60.6	60.0	64.9	62.3	68.5	66.0	57.0	57.6	56.6	56.7	53.7	53.7	54.0	58.8	54.0	53.3	54.2	54.9	52.6	52.0	51.5	51.0	48.2	46.8	43.8	40.9	39.4	37.1	28.3		66.5	64.2	70.8	67.1	60.6	61.0	58.6	58.1	55.2	49.2	41.6	64.8	93.6	0.0	0.0

FOH mix position	6/4 2:45:00 PM	6/4 3:00:00 PM	100%	81.7	97.7	15.9	64.1	61.6	59.7	58.2	71.0	84.4	94.4	91.5	90.8	83.9	86.9	84.8	83.7	79.1	73.1	71.2	69.9	66.9	65.2	67.0	69.6	68.2	66.9	67.3	66.5	67.3	66.5	63.5	62.0	60.5	58.4	54.6	36.3	67.0	84.6	97.3	90.2	85.2	74.4	72.4	72.2	71.6	66.9	60.0	81.8	122.9	0.0	0.0
Stage left property line	6/4 12:00:00 PM	6/4 12:15:00 PM	93%	54.7	69.9	15.2	59.0	56.5	53.9	51.9	54.4	59.4	63.2	67.2	58.1	59.3	60.1	56.0	54.3	51.4	49.3	46.8	45.9	44.6	41.4	42.8	41.1	39.6	38.2	39.1	39.6	44.1	38.7	34.4	29.8	21.6	15.5	19.7	19.2	61.7	61.1	69.0	63.6	56.9	50.7	46.6	43.8	46.3	35.8	23.2	54.7	91.9	0.0	0.0
Stage left property line	6/4 12:15:00 PM	6/4 12:30:00 PM	100%	49.4	62.4	12.9	58.6	55.7	53.3	51.4	52.1	54.9	52.7	55.9	54.2	53.2	49.8	47.5	43.4	41.2	39.2	38.7	39.8	40.2	39.6	38.4	35.5	31.9	30.7	31.0	31.1	42.7	39.1	27.6	23.4	21.4	18.4	20.8	20.1	61.2	57.8	59.2	55.6	46.4	44.4	42.9	36.0	44.5	29.7	24.7	49.5	85.5	0.0	0.0
Stage left property line	6/4 12:30:00 PM	6/4 12:45:00 PM	100%	53.7	69.3	15.6	57.9	55.8	54.0	52.7	53.7	59.1	62.2	66.1	58.8	58.2	59.4	55.1	53.0	49.9	47.3	45.8	45.6	45.0	42.7	42.4	41.2	39.4	36.6	37.2	37.1	36.4	29.8	27.8	24.6	19.7	14.3	19.0	19.2	61.0	60.9	68.1	62.7	55.4	50.2	46.9	42.7	40.2	29.9	22.8	53.8	87.4	0.0	0.0
Stage left property line	6/4 12:45:00 PM	6/4 1:00:00 PM	100%	59.2	74.5	15.3	58.4	55.8	54.3	53.2	54.4	60.4	67.7	71.7	60.9	63.5	65.7	61.3	59.1	54.7	52.4	50.4	50.1	48.8	45.3	47.3	46.6	45.7	43.2	44.1	44.7	44.9	38.0	37.2	34.1	28.0	20.1	19.8	19.4	61.3	62.0	73.4	68.6	61.1	54.6	51.3	49.2	48.2	39.2	24.5	59.3	100.9	0.0	0.0
Stage left property line	6/4 1:00:00 PM	6/4 1:15:00 PM	100%	59.1	75.7	16.6	60.2	58.4	55.4	54.5	56.4	63.7	69.5	73.2	62.5	64.1	66.5	60.2	56.5	53.9	52.2	50.3	49.6	49.2	47.0	47.1	46.5	45.4	43.5	45.0	44.2	43.7	37.0	34.4	31.9	25.1	16.7	18.8	19.2	63.2	64.9	75.0	69.1	59.4	54.5	51.6	49.5	47.4	36.7	23.1	59.2	94.2	0.0	0.0
Stage left property line	6/4 1:15:00 PM	6/4 1:30:00 PM	100%	60.2	74.7	14.5	57.3	55.6	53.2	53.9	57.5	67.0	68.0	68.9	64.8	63.8	67.3	63.0	59.6	56.9	53.5	50.9	51.5	49.8	47.0	47.2	46.4	45.5	45.2	47.6	46.1	44.5	37.6	37.8	32.6	24.5	17.7	19.6	19.5	60.5	67.6	72.4	69.9	62.1	55.6	51.6	51.0	48.7	39.1	23.8	60.3	91.0	0.0	0.0
Stage left property line	6/4 1:30:00 PM	6/4 1:45:00 PM	100%	60.6	75.3	14.7	59.3	57.2	55.2	55.5	67.9	67.2	68.4	68.9	65.2	64.2	67.4	63.2	59.9	57.2	54.1	51.8	52.3	50.6	47.1	47.9	47.0	45.9	45.8	47.9	45.8	44.6	38.3	36.0	33.4	26.0	17.1	19.2	19.3	62.3	70.7	72.6	70.1	62.5	56.4	52.1	51.4	48.6	38.2	23.4	60.7	91.6	0.0	0.0
Stage left property line	6/4 1:45:00 PM	6/4 2:00:00 PM	100%	59.8	74.6	14.8	59.1	56.4	54.0	54.2	59.5	67.1	68.0	68.6	64.7	63.9	67.3	62.8	59.4	56.7	53.1	50.3	51.2	49.2	46.5	46.6	45.8	44.9	44.8	47.1	45.1	44.2	39.6	37.7	32.9	25.4	17.8	19.2	19.3	61.8	68.0	72.2	69.9	61.9	55.1	51.1	50.5	48.3	39.1	23.6	60.0	91.4	0.0	0.0
Stage left property line	6/4 2:00:00 PM	6/4 2:15:00 PM	100%	59.6	74.2	14.6	58.0	56.1	54.1	54.4	57.8	66.5	67.7	68.4	64.2	63.3	66.4	62.3	59.1	56.2	53.2	50.9	51.1	49.6	46.7	47.0	46.0	44.9	44.4	46.6	44.6	43.3	38.5	34.7	31.3	24.8	19.2	21.0	19.7	61.2	67.3	71.9	69.2	61.6	55.3	51.4	50.2	47.6	36.6	24.8	59.7	95.2	0.0	0.0
Stage left property line	6/4 2:15:00 PM	6/4 2:30:00 PM	100%	51.4	65.4	14.1	58.7	55.6	53.8	53.4	54.9	56.4	58.5	58.4	58.3	58.0	53.1	48.0	44.2	42.0	40.6	42.2	44.0	44.7	43.9	41.8	40.0	36.9	33.3	30.5	37.6	35.8	31.6	32.8	16.2	11.5	14.0	19.6	19.3	61.3	59.8	63.2	59.5	47.3	48.5	47.0	39.1	40.4	33.0	23.1	51.4	84.9	0.0	0.0
Stage left property line	6/4 2:30:00 PM	6/4 2:45:00 PM	100%	49.0	65.5	16.5	61.4	59.0	55.6	54.4	58.9	57.2	56.9	58.5	59.3	54.2	50.8	48.8	44.7	41.2	41.7	41.3	42.0	41.7	40.9	39.7	37.3	34.7	30.6	28.7	31.1	29.2	26.3	25.9	20.9	17.4	14.3	19.5	19.4	64.0	62.0	63.1	56.6	47.6	46.4	44.3	36.9	34.1	27.5	23.1	49.1	85.5	0.0	0.0
Stage left property line	6/4 2:45:00 PM	6/4 3:00:00 PM	100%	52.8	68.6	15.8	60.8	57.6	54.8	53.6	60.2	59.2	61.4	60.8	59.4	57.8	60.6	58.4	54.7	49.7	43.9	43.8	43.0	42.5	41.2	40.1	38.5	35.6	32.2	32.9	32.3	32.2	30.2	26.0	19.2	14.9	14.6	18.9	19.3	63.2	63.2	65.4	63.9	56.2	47.9	44.9	38.6	36.4	27.1	22.8	52.9	93.0	0.0	0.0
Stage right property line	6/4 12:00:00 PM	6/4 12:15:00 PM	93%	59.3	73.8	14.5	64.3	61.7	58.9	56.9	56.1	61.7	65.8	70.0	61.8	66.8	65.0	61.7	58.1	57.4	54.3	50.7	46.9	45.4	45.8	49.1	46.9	46.6	44.8	46.1	44.1	43.5	38.5	35.1	33.8	29.0	28.1	44.5	32.7	66.9	63.8	71.9	69.8	61.7	53.0	52.3	50.7	47.4	38.1	44.8	59.3	94.7	0.0	0.0
Stage right property line	6/4 12:15:00 PM	6/4 12:30:00 PM	100%	47.4	63.0	15.5	63.7	61.2	58.5	55.8	54.9	53.2	52.0	52.8	51.8	50.0	46.9	44.2	41.9	40.3	39.5	39.0	38.3	38.1	38.7	38.3	36.3	33.1	30.6	30.1	32.9	37.2	30.5	33.1	22.2	18.1	18.8	20.9	20.2	66.4	59.5	57.0	52.4	45.4	43.3	42.7	36.3	39.2	33.6	24.8	47.5	89.1	0.0	0.0
Stage right property line	6/4 12:30:00 PM	6/4 12:45:00 PM	100%	58.3	72.6	14.3	64.1	61.3	58.5	55.9	55.1	62.1	64.0	68.6	60.7	63.7	63.9	60.6	58.0	57.1	53.1	48.7	46.6	44.6	44.9	47.1	45.9	46.4	44.1	44.4	42.1	42.3	38.1	37.1	32.9	27.1	20.9	22.0	20.3	66.7	63.7	70.4	67.7	61.3	51.7	50.8	49.8	46.0	38.8	25.9	58.5	91.4	0.0	0.0
Stage right property line	6/4 12:45:00 PM	6/4 1:00:00 PM	100%	66.0	78.3	12.3	64.5	61.9	59.4	57.1	57.0	64.5	71.8	73.7	65.3	69.9	69.7	66.1	64.7	62.1	59.3	57.1	57.1	58.2	54.5	54.3	55.7	53.8	53.1	50.7	49.1	48.6	43.2	41.3	38.4	34.1	30.1	35.4	27.2	67.2	65.8	76.2	73.7	67.3	62.3	59.7	57.5	52.4	43.6	37.0	66.0	107.3	0.0	0.0
Stage right property line	6/4 1:00:00 PM	6/4 1:15:00 PM	100%	61.7	79.7	17.9	66.7	64.7	62.2	59.8	59.3	68.3	76.9	74.3	70.8	67.3	69.3	59.5	57.6	54.8	51.2	50.6	52.0	51.3	50.0	49.1	49.4	50.5	48.8	48.0	45.0	45.7	41.3	36.9	32.9	28.3	25.1	25.0	20.6	69.7	69.3	79.5	71.7	60.0	56.1	54.3	54.0	49.1	38.7	28.8	61.8	97.1	0.0	0.0
Stage right property line	6/4 1:15:00 PM	6/4 1:30:00 PM	100%	62.6	79.9	17.3	67.1	65.2	63.0	60.8	59.0	69.3	77.0	71.7	74.2	66.9	69.6	61.6	60.0	58.2	50.9	50.2	54.8	50.8	49.6	49.2	48.7	50.5	50.8	50.8	45.8	45.7	42.1	36.8	31.8	24.2	17.5	29.2	21.1	70.2	70.2	79.6	71.9	62.5	57.2	54.0	55.5	49.6	38.2	30.1	62.7	96.2	0.0	0.0
Stage right property line	6/4 1:30:00 PM	6/4 1:45:00 PM	100%	62.6	79.9	17.4	67.4	64.9	62.9	61.0	63.2	69.3	77.0	71.8	74.2	66.9	69.5	61.4	60.0	58.7	51.5	50.2	54.6	50.9	49.9	49.6	48.6	50.2	50.5	50.4	45.9	45.5	42.0	36.6	31.5	23.6	16.0	18.7	19.7	70.2	70.7	79.6	71.8	62.8	57.2	54.2	55.2	49.5	37.9	23.2	62.7	95.6	0.0	0.0
Stage right property line	6/4 1:45:00 PM	6/4 2:00:00 PM	100%	62.5	79.7	17.2	69.4	67.3	65.0	62.3	60.3	69.1	76.8	71.4	73.8	66.9	69.0	61.6	60.2	58.7	51.3	50.1	55.1	51.0	49.2	49.3	48.4	50.4	50.9	50.6	45.6	45.4	41.9	37.8	31.6	24.6	19.3	19.8	19.8	72.4	70.4	79.3	71.6	62.9	57.4	53.7	55.4	49.4	38.9	24.4	62.6	97.4	0.0	0.0
Stage right property line	6/4 2:00:00 PM	6/4 2:15:00 PM	100%	62.0	79.7	17.7	69.5	67.8	65.7	63.6	61.6	69.0	76.8	71.5	73.9	66.0	68.8	60.9	59.8	58.0	50.5	49.6	54.1	50.2	49.2	48.5	48.0	49.8	49.9	50.0	45.5	45.1	41.4	36.0	30.9	23.1	16.1	18.8	19.7	72.7	70.7	79.3	71.1	62.3	56.6	53.4	54.7	49.1	37.4	23.2	62.1	95.7	0.0	0.0
Stage right property line	6/4 2:15:00 PM	6/4 2:30:00 PM	100%	48.8	68.2	19.4	69.3	67.4	65.4	63.2	60.8	58.7	57.4	56.6	56.2	53.9	49.7	46.0	43.5	41.4	39.7	39.7	40.8	41.4	40.7	39.9	38.1	35.6	32.8	33.0	32.5	30.8	28.5	24.9	18.8	16.8	18.1	20.4	20.1	72.4	66.1	61.5	55.8	46.6	45.5	44.5	38.8	35.7	26.3	24.4	48.9	89.7	0.0	0.0
Stage right property line	6/4 2:30:00 PM	6/4 2:45:00 PM	100%	49.0	68.3	19.3	68.8	66.9	65.0	63.1	62.5	59.4	57.6	57.6	56.7	53.2	51.7	48.8	46.4	47.1	42.9	39.9	40.4	40.3	39.8	39.2	37.7	35.9	33.4	32.4	31.6	29.5	24.9	20.8	16.0	13.2	14.2	18.6	19.7	71.9	66.7	62.1	56.4	50.6	45.0	43.7	39.0	34.2	22.6	22.8	49.1	90.7	0.0	0.0
Stage right property line	6/4 2:45:00 PM	6/4 3:00:00 PM	100%	55.1	73.3	18.2	68.3	66.5	64.8	62.8	64.1	62.8	68.9	63.9	64.0	60.4	65.8	57.6	55.6	49.6	43.8	43.7	43.6	42.9	42.3	41.5	42.2	40.9	38.1	36.8	35.2	34.5	32.6	27.5	22.5	18.1	16.2	19.1	19.8	71.5	68.1	71.0	67.4	56.8	48.2	46.8	43.7	39.0	29.0	23.4	55.2	95.7	0.0	0.0

Please Note! The values shown in gray colour are calculated with a limited number of input values as the input values measured during a calibration check are left out of the calculation.

Alert Data

Life Austin Church testing 6-4-15 (6/4/2015 12:00 PM - 6/4/2015 3:00 PM)

Brüel & Kjær

Alert Log

Location	Start Time	End Time	Title	Message	Activity	Threshold	Value	Unit	Severity	Sounds	Comments

EXHIBIT G

DECLARATION OF JOHN CAPEZZUTI

My name is John Capezzuti. I am over 21 years of age, am of sound mind, and am fully competent to make the statements contained in this Declaration. Each of the statements below is within my personal knowledge and is true and correct to the best of my knowledge.

1. I serve as the Business Pastor at LifeAustin Church ("the Church"). The primary use of the Church's Outdoor Worship Center ("the Amphitheater") is for religious assembly purposes.

2. The Church has invested several hundred thousand dollars into hosting and putting on events as part of our ministry, and the costs of these events exceed any cash inflows to the Church from the events. The Church has not hosted, and will not host, any commercial for-profit events at the Amphitheater.

3. The Church keeps accurate records of the direct and indirect costs of hosting the events at the Amphitheater, as well as the cash inflows derived from each event. Indirect costs include items such as debt service, proration of utilities, proration of landscaping cost, personnel, and equipment maintenance.

4. Based on the partial accounting of the 16 events we have hosted to date, the Church's direct costs have exceeded all inflow associated with each event in all but two instances, with an average loss per event of roughly $7,000. In one case where costs did not exceed inflow, the artists donated some of their time, and therefore the Church did not have to pay a fee to the Christian artist who participated in our worship. In the other case, an individual chose to host his night of worship at our facility, again eliminating the need for the Church to pay an artist fee.

5. If all indirect costs were included in these calculations, all of the events that the Church has hosted would have lost money. For example, considering only debt service on the Amphitheater, the average cost per event to the Church is more than $20,000.

6. The Church is not financially benefiting from the existence of the Amphitheater, nor does it intend too. This is a ministry for the Church and, as with any ministry, there are costs associated. Through this ministry, we have already had over 200 people give their lives to Christ at events we have hosted at the Amphitheater. This is the reason our Church exists, and we pray these trends continue.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

Executed on the 23 day of November, 2015.

John Capezzuti

EXHIBIT H

Questioned
As of: November 23, 2015 9:01 AM EST

Barr v. City of Sinton

Supreme Court of Texas

March 22, 2007, Argued; June 19, 2009, Opinion Delivered

NO. 06-0074

Reporter
295 S.W.3d 287; 2009 Tex. LEXIS 396; 52 Tex. Sup. J. 871

PASTOR RICK BARR AND PHILEMON HOMES, INC., PETITIONERS, v. CITY OF SINTON, RESPONDENT

Prior History: [**1] ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.
Barr v. City of Sinton, 2005 Tex. App. LEXIS 9847 (Tex. App. Corpus Christi, Nov. 23, 2005)

Core Terms

ordinance, ministry, religious, Church, exercise of religion, zoning, burdened, zoning ordinance, compelling interest, City's, cases, halfway house, regulation, purposes, free exercise of religion, compelling governmental interest, facilities, least restrictive, religious belief, residents, worship, courts, residential area, city limits, court of appeals, zoning law, statutes, argues, governmental interest, strict scrutiny

Case Summary

Procedural Posture

Petitioners, a city resident and a corporation, challenged a decision from the Court of Appeals for the Thirteenth District of Texas, which affirmed a trial court's decision that respondent city had not violated the Texas Religious Freedom Restoration Act (TRFRA).

Overview

The resident, as part of a religious ministry, offered men recently released from prison free housing and religious instruction in two homes that he owned. In response, the city passed Sinton, Tex., Ordinance 1999-02. The trial court found no violation of the TRFRA, and the court of appeals affirmed. This appeal followed. In reversing, the supreme court determined that the TRFRA's express terms required strict scrutiny of the zoning ordinance at issue in this case, pursuant to *Tex. Civ. Prac. & Rem. Code Ann. § 110.002(a)*. Further, none of the arguments advanced by the city or the court of appeals supported the assertion that zoning ordinances were exempt from the TRFRA. Next, the resident's ministry was substantially motivated by sincere religious belief for purposes of the TRFRA. The TRFRA required a case-by-case fact specific inquiry regarding whether there was a substantial burden of the resident's religious exercise, and that showing was made in this case since the ministry was effectively ended by the ordinance. The city failed to establish a compelling interest in this case, and it did not show that the least restrictive means were used to further its interest.

Outcome

The decision was reversed, and the case was remanded to the trial court for further proceedings.

LexisNexis® Headnotes

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN1 The Texas Religious Freedom Restoration Act (TRFRA) provides that a government agency may not substantially burden a person's free exercise of religion unless it demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Tex. Civ. Prac. & Rem. Code Ann. § 110.003(a)-(b)*. The TRFRA does not immunize religious conduct from government regulation; it requires the government to tread carefully and lightly when its actions substantially burden religious exercise.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN2 See Tex. Civ. Prac. & Rem. Code Ann. § 110.005(a)-(b).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN3 Under the Free Exercise Clause of the First Amendment, U.S. Const. amend. I, neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN4 See U.S. Const. amend. I.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN5 In enacting the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. §§ 2000bb to 2000bb-4, Congress found that laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise, § 2000bb(a)(2). and that governments should not substantially burden religious exercise without compelling justification. § 2000bb(a)(3) The purpose of RFRA, Congress has declared, is to restore the compelling interest test as set forth in Sherbert and Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government. § 2000bb(b). Thus, government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest. § 2000bb-1(a) to (b).

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Public Health & Welfare Law > Social Services > Institutionalized Individuals > Advocacy & Protection

HN6 Congress has amended the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C.S. §§ 2000bb to 2000bb-4, to limit its application to the governments of the United States, its territories and possessions, and the District of Columbia and Puerto Rico. But at the same time, Congress enacted the Religious Exercise in Land Use and by Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C.S. §§ 2000cc to 2000cc-5, which applied the RFRA standard to land use regulation. 42 U.S.C.S. § 2000cc(a)(1). The RLUIPA applies not only to the federal government but to state and local governments when the activity is federally funded or affects interstate commerce. §§ 2000cc(b), -2(g), -5(4).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Public Health & Welfare Law > Social Services > Institutionalized Individuals > Advocacy & Protection

Real Property Law > Zoning > Constitutional Limits

HN7 See 42 U.S.C.S. § 2000cc(a)(1).

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN8 Smith's construction of the Free Exercise Clause in U.S. Const. amend. I does not preclude a state from requiring strict scrutiny of infringements on religious freedom, either by statute or under the state constitution, and many states have done just that, Texas among them. The Texas Legislature enacted Texas Religious Freedom Restoration Act in 1999, which like Religious Freedom Restoration Act of 1993, 42 U.S.C.S. §§ 2000bb to 2000bb-4, provides that government may not substantially burden a person's free exercise of religion unless it demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that interest. Tex. Civ. Prac. & Rem. Code Ann. § 110.003(a)-(b). The Act states that the protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States. Tex. Civ. Prac. & Rem. Code Ann. § 110.009(b).

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of

Religion

Real Property Law > Zoning > Constitutional Limits

Real Property Law > Zoning > Ordinances

HN9 The ease of relocation goes to whether the burden of a zoning ordinance on a person's free exercise of religion is substantial, not to whether zoning ordinances are categorically exempt from Texas Religious Freedom Restoration Act (TRFRA). It is possible for zoning laws not to substantially burden free religious exercise. The opposite is also possible. Zoning laws cannot be used to exclude churches from all residential districts in some circumstances. The TRFRA's express terms, which require strict scrutiny of "any ordinance, rule, order, decision, practice, or other exercise of governmental authority. *Tex. Civ. Prac. & Rem. Code Ann. § 110.002(a)*. Zoning ordinances easily fall into this group.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Real Property Law > Zoning > Ordinances

HN10 See *Tex. Civ. Prac. & Rem. Code Ann. § 110.010*.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN11 *Tex. Civ. Prac. & Rem. Code Ann. § 110.010* preserves the authority municipalities had under "the law" interpreted by the federal courts pre-Smith. The only restriction on the governing law is that it come from pre-Smith federal case law.

Real Property Law > Zoning > Constitutional Limits

HN12 The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it must be exercised within constitutional limits.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Real Property Law > Zoning > Constitutional Limits

HN13 As is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of First Amendment, *U.S. Const. amend. I*, rights. A court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment, *U.S. Const. amend. I*: a municipality may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment, *U.S. Const. amend. I*, freedoms. Precision of regulation must be the touchstone.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN14 The free exercise of religion is entitled to no less protection than adult entertainment.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Real Property Law > Zoning > Constitutional Limits

HN15 It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation. There is no reason to require strict scrutiny of unemployment compensation laws but not zoning laws.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Real Property Law > Zoning > Constitutional Limits

HN16 There is a general standard for evaluating the impact of a government provision on the exercise of religion and this test is appropriate for analyzing a challenge to zoning laws. This test involves examining the following three factors: (1) the magnitude of the

statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

Real Property Law > Zoning > Constitutional Limits

HN17 Although determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. While courts depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN18 The Texas Religious Freedom Restoration Act defines "free exercise of religion" as an act or refusal to act that is substantially motivated by sincere religious belief, adding that in determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief. *Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1)*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Evidence > Inferences & Presumptions > Presumptions

HN19 It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN20 Under Smith, the *Free Exercise Clause of U.S. Const. amend. I* does not require strict scrutiny for religious activity affected by neutral laws of general application, but the Texas Religious Freedom Restoration Act imposes the requirement by statute.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Governments > Legislation > Interpretation

HN21 Absent any special meaning, courts use ordinary meanings in common parlance. "Substantial" is defined as material, not seeming or imaginary, real, true, being of moment, and important. Thus defined, "substantial" has two basic components: real vs. merely perceived, and significant vs. trivial. These limitations leave a broad range of things covered.

Governments > Legislation > Interpretation

HN22 *Tex. Gov't Code Ann. § 312.002* states that words shall be given their ordinary meaning, except when a word is connected with and used with reference to a particular trade or subject matter or is used as a word of art.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN23 To determine whether a person's free exercise of religion has been substantially burdened, some courts have focused on the burden on the person's religious beliefs rather than the burden on his conduct. Under what have been referred to as the compulsion and centrality tests, the issue is whether the person's conduct that is being burdened is compelled by or central to his religion. The problems with these approaches are the same as those in determining whether conduct is religious. It may require a court to do what it cannot do: assess the demands of religion on its

adherents and the importance of particular conduct to the religion. And it is inconsistent with the statutory directive that religious conduct be determined without regard for whether the actor's motivation is a central part or central requirement of the person's sincere religious belief. *Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1)*. These problems are avoided if the focus is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression. The burden must be measured, of course, from the person's perspective, not from the government's.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Public Health & Welfare Law > Social Services > Institutionalized Individuals > Advocacy & Protection

HN24 The United States Court of Appeals for the Fifth Circuit, after surveying decisions by other courts, recently held that under the Religious Exercise in Land Use and by Institutionalized Persons Act of 2000, *42 U.S.C.S. §§ 2000cc to 2000cc-5*, that a government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. The Texas Religious Freedom Restoration Act, like its federal cousins, requires a case-by-case, fact-specific inquiry.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN25 One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN26 Size of a place alone is not determinative of a violation of free exercise rights.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN27 A burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN28 Nothing in the Texas Religious Freedom Restoration Act suggests that being cited or charged with a crime is necessary for a burden to be substantial.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Forums

HN29 A city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere. the availability of other sites outside city limits does not permit a city to forbid the exercise of a constitutionally protected right within its limits. One is not to have the exercise of his liberty of expression and his freedom of religion in appropriate places abridged on the plea that it may be exercised in some other place.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Real Property Law > Zoning > Constitutional Limits

HN30 The existence and degree of a zoning restriction's burden on religious exercise are practical matters to be determined based on the specific circumstances of a particular case. A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN31 To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. The government may regulate such conduct in furtherance of a compelling interest.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Real Property Law > Zoning > Constitutional Limits

HN32 Although the government's interest in the public welfare in general, and in preserving a common character of land areas and use in particular, is certainly legitimate when properly motivated and appropriately directed, the assertion that zoning ordinances are per se superior to fundamental, constitutional rights, such as the free exercise of religion, must fairly be regarded as indefensible.

Civil Rights Law > Protection of Rights > General Overview

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Public Health & Welfare Law > Social Services > Institutionalized Individuals > Advocacy & Protection

HN33 The United States Supreme Court has held in Smith, not that the government's interest in neutral laws of general application is always compelling when compared to the people's interest in fundamental rights, but only that the United States Constitution does not require the two interests to be balanced every time they conflict. The Religious Freedom Restoration Act of 1993, *42 U.S.C.S. §§ 2000bb to 2000bb-4*, the Religious Exercise in Land Use and by Institutionalized Persons Act of 2000, *42 U.S.C.S. §§ 2000cc to 2000cc-5*, and the Texas Religious Freedom Restoration Act, as well as laws enacted other states, now require that balance by statute when government action substantially burdens the free exercise of religion. The government's interest is compelling when the balance weighs in its favor -- that is, when the government's interest justifies the substantial burden on religious exercise. Because religious exercise is a fundamental right, that justification can be found only in interests of the highest order, only to avoid the gravest abuses, endangering paramount interests.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

HN34 The Religious Freedom Restoration Act of 1993 (RFRA), *42 U.S.C.S. §§ 2000bb to 2000bb-4*, requires the government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person -- the particular claimant whose sincere exercise of religion is being substantially burdened. To satisfy this requirement, courts must look beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants. The RFRA requires that courts should strike sensible balances, pursuant to a compelling interest test that requires the government to address the particular practice at issue.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Real Property Law > Zoning > Constitutional Limits

HN35 The compelling interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Evidence > Burdens of Proof > Allocation

HN36 Although the Texas Religious Freedom Restoration Act places the burden of proving a substantial burden on the claimant, it places the burden of proving a compelling state interest on the government.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN37 The State is free to impose whatever restrictions it chooses on itself and local governments; those governments have no free exercise rights of their own. The State's interest in restricting halfway houses run by or for itself or local governments when no fundamental right is implicated does not suddenly become compelling when free religious exercise is substantially burdened.

Civil Rights Law > Protection of Rights > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN38 The Texas Religious Freedom Restoration Act requires that even when the government acts in furtherance of a compelling interest, it must show that it

used the least restrictive means of furthering that interest.

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For Philemon Homes, Inc., PETITIONER: Mr. Hiram S. Sasser III, Liberty Legal Institute, Plano, TX.

For City of Sinton, RESPONDENT: Mr. Carlos Villareal, Hermansen, McKibben, Woolsey & Villareal, L.L.P., Corpus Christi, TX; Mr. James F. McKibben Jr.; Mr. Brian Charles Miller, Hermansen, McKibben, Woolsey & Villareal, L.L.P., Corpus Christi, TX.

For Prison Fellowship, AMICUS CURIAE: Ms. Allyson Newton Ho, Morgan, Lewis & Bockius LLP, Houston, TX.

For The American Center for Law and Justice, AMICUS CURIAE: Mr. Jay alan Sekulow, Mr. Erick M. Zimmerman, American Center for Law & Justice, Virginia Beach, VA.

For Anti-Defamation League, AMICUS CURIAE: Ms. Loren Jacobson, Waters & Kraus, LLP, Dallas, TX.

For Laycock, Mr. Douglas, AMICUS CURIAE; Mr. Douglas Laycock, University of Michigan Law School, Ann Arbor, MI.

Judges: JUSTICE HECHT delivered the opinion of the Court.

Opinion by: Nathan L. Hecht

Opinion

[*289] ***HN1*** The *Texas Religious Freedom Restoration Act* (TRFRA) provides that "a government agency may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that interest." [1] TRFRA does not immunize religious conduct from government regulation; it requires the government to tread carefully and lightly when its actions substantially burden religious exercise.

In this case, a city resident, as part of a religious ministry, offered men recently released from prison free housing and religious instruction in two homes he owned. In response, the city passed a zoning ordinance that not only precluded the use of the homes for that purpose but effectively banned the ministry from the city. The trial court found that the city had not violated TRFRA, and the court of appeals **[*290]** affirmed. [2] We reverse and remand to the trial **[**2]** court for further proceedings.

I

In 1998, Pastor Richard Wayne Barr began a religious halfway house ministry through Philemon Restoration Homes, Inc., a nonprofit corporation he directed. The purpose of the ministry was to offer housing, biblical instruction, and counseling to low-level offenders released from prison on probation or parole in transition back into the community. For the most part, men accepted by the ministry had been convicted of drug-related crimes; the ministry would not accept men convicted of violent crimes or sex offenses. In application forms for would-be residents, Philemon described its function as "[c]reating bridges to enable the Christian inmate to go from prison to the local church through Biblical discipleship". Applicants were asked to respond in writing to several pages of questions inquiring about such things as family background, drug usage, mental health, and religious faith. Applicants were also required to sign a "statement of faith" in basic Christian beliefs [3] and to agree to a

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[1] *TEX. CIV. PRAC. & REM. CODE § 110.003(a)-(b)*.

[2] *S.W.3d , 2005 Tex. App. LEXIS 9847 (Tex. App.--Corpus Christi-Edinburg 2005)*.

[3] The "statement of faith" provided: "We believe the Bible to be the inspired, infallible, and authoritative Word of God. We believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit. We believe in the Deity of our Lord Jesus Christ, in His virgin birth, His sinless life, His atoning death on the cross, and His bodily resurrection from the grave. We believe that Jesus Christ ascended to the right hand of the Father, now rules as Head of His Body, the Church, and will personally return in power and glory. We believe that man in his natural state is lost and thus alienated from God, and that salvation through personal faith in the

long list of behavioral rules characterized as "biblical guidelines for Christian living". [4] The guidelines emphasized **[**3]** to prospective residents that Philemon was "a biblical ministry, NOT a social service agency". Each morning began with group prayer and Bible study.

Barr lived and operated his ministry in the City of Sinton, a **[**5]** town 2.2 square miles in size with a population of 5,676 (2000 census), the county seat of San Patricio County, not far from Corpus Christi. Barr owned two homes besides his residence, both of them within a block of the church he attended, Grace Christian Fellowship, which appears to have been supportive of Barr's ministry. Barr housed and taught Philemon residents in those homes, which together could hold up to **[*291]** sixteen men at one time. Though the men were unsupervised, neither Barr nor the city manager was aware of any complaint of disturbance. Barr's commitment to the ministry was personal; he himself is an ex-con.

When Barr began his ministry, the City imposed no zoning or other restrictions on his use of the homes. In January 1999, Barr discussed his ministry with Sinton's mayor, city manager, and police chief, and a few weeks later he presented his ministry before the city council. In response to questions whether Philemon was in compliance with state law, Barr researched the matter and concluded that it was. [5] In April, the city council held a public hearing at which a large number of people expressed both opposition to as well as support of Barr's ministry. A few days later, **[**6]** the city council passed Ordinance 1999-02, which added to the City Code a section that provided as follows:

> A correctional or rehabilitation facility may not be located in the City of Sinton within 1000 feet of a residential area, a primary or secondary school, property designated as a public park or public recreation area by any governmental authority, or a church, synagogue, or other place of worship.
>
> For the purposes of this section distance is measured along the shortest straight line between the nearest property line of the correctional or rehabilitation facility and the nearest property line of the residential area, school, park, recreation area, or place of worship, as appropriate.
>
> For the purposes of this section "Correctional or rehabilitation facility" means a residential facility that is not operated by the federal government, the state of Texas, nor San Patricio County, and that is operated for the purpose of housing persons who have been convicted of misdemeanors or felonies or children found to have engaged in delinquent conduct, regardless of whether the persons are housed
>
> > (i) while serving a sentence of confinement following conviction of an offense;
> >
> > (ii) as a condition **[**7]** of probation, parole, or mandatory supervision; or
> >
> > (iii) within one (1) year after having been released from confinement in any penal institution.
> >
> > For the purposes of this section "residential area" means
> >
> > (i) any area designated as a residential zoning

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person and work of Jesus Christ is essential. We believe in the present ministry of the Holy Spirit, by whose indwelling a Christian is made spiritually alive and enabled to live a godly life. We believe in the resurrection of both the saved and the lost, they who are saved into the resurrection of life, and they who are lost unto the resurrection of damnation. We believe in **[**4]** the spiritual unity of believers in Christ. I understand that my signature indicates my agreement with the above statement of faith."

[4] The guidelines included: "Substance abuse of any nature is not permitted in Philemon Restoration Homes. A violation in or outside of the home is cause for termination of your residency. . . . Smoking anywhere is not allowed. . . . Possession of weapons of any nature will terminate your residency. . . . Be respectful of the property of other residents. . . . Attend and be on time for all family and biblical discipleship meetings . . . . Gambling or playing the lottery is not allowed. . . . Fights, threats, or aggressive behavior is not allowed . . . . Do not engage in illicit sexual activity anywhere nor in sexual activity within the house. . . . Borrowing or lending money is not allowed between residents or between residents and staff. . . . Being truthful about everything during your stay at Philemon Restoration Homes is expected. . . . In consideration of others, keep noise levels down and activities to a minimum after 11:00 p.m. . . . You are here because the Lord placed you here. . . ."

[5] Specifically, the questions concerned chapter 244 of the Local Government Code, relating to the location of correctional or rehabilitation facilities, and chapter 509 of the Texas Government Code, relating to the operation of community corrections facilities. Both chapters apply to facilities operated by the government or under government contract. *TEX. LOC. GOV'T CODE § 244.001(1)(A)*; *TEX. GOV'T CODE § 509.001(1)*. Barr and Philemon have never operated under government contract.

district by this ordinance, and

(ii) any area in which the principal permitted land use by this ordinance is for private residences.

The City Council finds the requirements of this section are reasonably necessary to preserve the public safety, morals, and general welfare.

As the city manager later confirmed, Ordinance 1999-02 targeted Barr and Philemon. [6] The halfway houses they operated **[*292]** were unquestionably within 1,000 feet of a church; indeed, they were across the **[**8]** street from the Grace Fellowship Church, which was helping to support the ministry. But the ordinance was broader, and was intended to be. Because Sinton is small, it would be difficult for a halfway house to be located anywhere within the city limits. The city manager later testified:

Q. Is there any property within the city limits of Sinton that you are aware of that would qualify not being 1000 feet from any church, school, park -- right-- or residential area?

A. I have not checked it out, but it would probably be minimal locations.

Q. In other words, probably pretty close to nonexistent?

A. Possibly.

Q. Would that be a fair statement?

A. A fair statement.

There was no evidence that any specific site within the city was available. [7]

Despite the ordinance, Barr continued to conduct his ministry as he had before. Though violations were punishable by a civil fine of $ 500 per day, neither Barr nor Philemon was ever cited. By the summer of 2000, Barr had taken in fifteen men altogether. Then in October 2000, the Sinton police chief complained to the Texas Board of Pardons and Paroles that Barr and Philemon were housing parolees in violation of a city ordinance, and for awhile parole officials refused to approve the arrangement. Philemon residents went to live **[**10]** with members of the Grace Fellowship Church.

In June 2001, Barr's attorney notified the City by letter that Barr claimed Ordinance 1999-02 violated TRFRA. [8]

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[6] At trial, Jackie Knox, the city manager at the time Ordinance 1999-02 was passed, testified as follows:

"Q. Was this ordinance written in response to activities of the home that Mr. Barr and Philemon operates?

"A. That was probably one of the agents of doing this, yes, sir.

"Q. That was the purpose of the ordinance?

"A. Probably so.

"Q. I'm sorry?

"A. For an establishment like that, yes.

"Q. Was there any other establishment to your knowledge --

"A. No, sir.

"Q. -- **[**9]** being targeted?

"A. No, sir.

"Q. So this one was specifically targeted?

"A. For that type of establishment, yes."

[7] The city manager testified briefly about a facility located outside the City:

"Q. You were asked a question about the detention facilities in the city. Is there some type of facility that is very near the city limits that is used by other state agencies for --

"A. Yes, sir, the restitution center there on 77 Business.

"Q. How far is that from the city limits?

"A. It's just outside the city limits.

"Q. Did the city also have public hearings on that?

"A. That I have no idea. I think that was prior to any knowledge I would have of that. That was before my time."

[8] The attorney's letter to the City referred to the ordinance as 156.026, the number of the section that Ordinance 1999-02 added to the City Code. Although the trial court found that "[p]laintiffs failed to give notice as required by the Religious Freedom Act", the City does not argue that here. *See TEX. CIV. PRAC. & REM. CODE § 110.006(a)* ("A person may not bring an action to assert a claim under this **[**11]** chapter unless, 60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested: (1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority; (2) of the particular act or refusal to act that is burdened; and (3) of the manner in which the exercise of governmental authority burdens the act or refusal to act.").

The City did not respond, and in August, Barr and Philemon sued the City under TRFRA, seeking injunctive relief, a declaratory judgment, monetary damages, and **[*293]** attorney fees. [9] In October, state officials withdrew objections to Philemon's halfway house operation, and parolees were again permitted to stay in the homes. But after the trial court denied Barr and Philemon's request for a temporary injunction in January 2002, [10] the Texas Board of Pardons and Paroles for the second time stopped approving parolees to live in Barr's homes and had the residents removed. Since then, Barr and Philemon have been unable to continue their ministry.

The parties agreed to a bifurcated trial to the bench, reserving the issues of damages and attorney fees pending the court's ruling on whether Ordinance 1999-02 violated the TRFRA. In November 2003, the court rendered judgment for the City. The court found that Barr and Philemon had operated "a correctional or rehabilitation facility" in violation of Ordinance 1999-02's 1,000-foot restriction, and that the ordinance did not violate TRFRA in any respect: that is, the ordinance did not substantially burden Barr's and Philemon's free exercise of religion, it was in furtherance of a compelling governmental interest, and it was the least restrictive means of furthering that interest. [11] Given the court's ruling, the issues of damages **[**13]** and attorney fees were never reached.

The court of appeals affirmed, concluding that Ordinance 1999-02 does not violate TRFRA because

> there is nothing in the ordinance that precludes [Barr] from providing his religious ministry to parolees and probationers, from providing instruction, counsel, and helpful assistance in other facilities in Sinton, or from housing these persons outside the City and providing his religious ministry to them there.
>
> * * *
>
> Moreover, Texas courts have long applied zoning ordinances to church-operated schools and colleges, supporting the **[**14]** conclusion that zoning ordinances do not substantially burden such auxiliary religious operations. [12]

[*294] We granted Barr and Philemon's petition for review. [13] Because petitioners' arguments are identical, we refer to petitioners collectively as "Barr". [14]

II

In 1997, the United States Supreme Court in *City of Boerne v. Flores* [15] recounted its 1990 decision in *Employment Division, Department of Human Resources v. Smith* [16] and Congress's reaction to it. *Smith* had held that ***HN3*** under the *Free Exercise Clause of the First*

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[9] *See* ***HN2*** *TEX. CIV. PRAC. & REM. CODE § 110.005(a)-(b)* ("(a) Any person, other than a government agency, who successfully asserts a claim or defense under this chapter is entitled to recover: (1) declaratory relief under Chapter 37; (2) injunctive relief to prevent the threatened violation or continued violation; (3) compensatory damages for pecuniary and nonpecuniary losses; and (4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action. (b) Compensatory damages awarded under Subsection (a)(3) may not exceed $ 10,000 for each entire, distinct controversy, without regard to the number of members or other persons within a religious group who claim injury as a result of the government agency's **[**12]** exercise of governmental authority. A claimant is not entitled to recover exemplary damages under this chapter.").

[10] On interlocutory appeal, the court of appeals affirmed the trial court's order. *Barr v. City of Sinton, No. 13-02-079-CV, 2003 Tex. App. LEXIS 2311, 2003 WL 1340689 (Tex. App.--Corpus Christi Mar. 20, 2003)* (op. on reh'g). We dismissed the petition for review for want of jurisdiction. *Barr v. City of Sinton, 46 Tex. Sup. Ct. J. 1062 (Aug. 28, 2003)*.

[11] The trial court also found that Barr and Philemon's "facility" violated the 1,000-foot restriction imposed on certain correctional or rehabilitation facilities under *section 244.003 of the Texas Local Government Code*, and the minimum standards for certain community correction facilities under *section 509.006(c) of the Texas Government Code*. Both statutes apply only to facilities operated by the government or under contract with the government. *TEX. LOC. GOV'T CODE § 244.003*; *TEX. GOV'T CODE § 509.001*. Although the trial court found that Barr and Philemon operated under contract with the government, there is no evidence they did.

[12] *S.W.3d , , 2005 Tex. App. LEXIS 9847(Tex. App.--Corpus Christi-Edinburg 2005)*.

[13] *50 Tex. Sup. Ct. J. 218 (Tex. Dec. 15, 2006)*.

[14] We have received amicus briefs from the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, Representative Scott Hochberg, and Prison Fellowship, all in support of petitioners.

[15] *521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)*.

[16] *494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*.

Amendment, [17] "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." [18] Specifically, the Court held that a generally applicable Oregon statute criminalizing the use of peyote did not violate the Free Exercise rights of members of the Native American **[**15]** Church who ingested the drug for sacramental purposes. [19] *City of Boerne* explained that in *Smith*, the Court had "declined to apply the balancing test set forth in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest." [20] *Sherbert* had held that under the Free Exercise Clause, a member of the Seventh-day Adventist Church who refused to work on Saturday, the Sabbath Day of her faith, could not be denied unemployment benefits because she was not "available for work" as required by generally applicable state law. [21] *Smith* also distinguished another case involving a generally applicable law, *Wisconsin v. Yoder*, [22] in which the Court "invalidated Wisconsin's mandatory school-attendance law as applied to Amish parents who refused on religious grounds to send their children to school. That case implicated not only the right to free religious exercise but also the right of parents to control their children's education." [23]

Four Members of the Court in *Smith* contended that the majority's decision "dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty." [24] They were not alone in that view. The Court in *City of Boerne* acknowledged that "[m]any criticized the Court's reasoning [in *Smith*]," and this disagreement resulted **[*295]** in the passage of RFRA" [25] -- the Religious Freedom Restoration Act of 1993. [26] While Congress could not, of course, alter Smith's reading of the First Amendment, it could provide more protection by statute. ***HN5*** In enacting RFRA, Congress found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise", [27] and that "governments should not substantially burden religious exercise without compelling justification". [28] The purpose of RFRA, Congress declared, was "to restore the compelling **[**17]** interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government." [29] Thus, RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless it] demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." [30]

As originally enacted, RFRA applied to the States as well as the federal government, [31] but *City of Boerne* held that in extending RFRA to the States, **[**18]** Congress exceeded its enforcement authority under Section 5 of the Fourteenth Amendment. [32] In response, ***HN6*** Congress amended RFRA to limit its application to the governments of the United States, its territories and possessions, and the District of Columbia

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[17] U.S. CONST. amend. I (***HN4*** "Congress shall make no law **[**16]** respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[18] City of Boerne, 521 U.S. at 514.

[19] Id. at 513.

[20] Id.

[21] 374 U.S. 398, 399-402, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

[22] 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

[23] City of Boerne, 521 U.S. at 514.

[24] Smith v. Employment Div., Dep't of Human Res., 494 U.S. 872, 891, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (O'Connor, J., concurring in the judgment).

[25] City of Boerne, 521 U.S. at 515.

[26] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

[27] Id. § 2000bb(a)(2).

[28] Id. § 2000bb(a)(3).

[29] Id. § 2000bb(b).

[30] Id. § 2000bb-1(a) to (b).

[31] §§ 5(1), 6(a), 107 Stat. at 1489.

[32] 521 U.S. 507, 532-534, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997); see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) ("As originally enacted, RFRA applied to States as well as the Federal Government. In [*City of Boerne*], we held the application to States to be beyond Congress' legislative authority under § 5 of the 14th Amendment.").

and Puerto Rico. [33] But at the same time, Congress enacted the Religious Exercise in Land Use and by Institutionalized Persons Act of 2000 (RLUIPA), [34] which applied the RFRA standard to land use regulation. [35] RLUIPA applies not only to the federal government but to state and local governments **[*296]** when the activity is federally funded or affects interstate commerce. [36]

States also reacted to *Smith*. ***HN8*** *Smith's* construction of the *Free Exercise Clause* does not preclude a state from requiring strict scrutiny of infringements on religious freedom, either by statute or under the state constitution, [37] and many states have done just that, Texas among them. [38] The Texas Legislature enacted TRFRA in 1999, [39] which like RFRA provides in part, that government "may **[**20]** not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and ... is the least restrictive means of furthering that interest." [40] The Act states that "[t]he protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States." [41]

Because TRFRA, RFRA, and RLUIPA were **[**21]** all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute. [42]

III

At the outset, the City argues, and the court of appeals concluded, that TRFRA's strict scrutiny does not apply to zoning ordinances. The court of appeals reasoned simply that nothing prevented Barr from relocating elsewhere in the City or moving outside. [43] But ***HN9***

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[33] Religious Land Use and Institutionalized Person Act of 2000, Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000) (codified at *42 U.S.C. § 2000bb-2(1) to (2) (2006)*); *see also* *Cutter v. Wilkinson, 544 U.S. 709, 715 n.2, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005)* **[**19]** ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. This Court, however, has not had occasion to rule on the matter." (citations omitted)).

[34] §§ 2-6, 8, 114 Stat. at 803-807 (codified at *42 U.S.C. §§ 2000cc to 2000cc-5*).

[35] *42 U.S.C.§ 2000cc(a)(1)* (***HN7*** "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution -- (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.").

[36] *Id. §§ 2000cc(b), -2(g), -5(4)*.

[37] Although this Court applied *Smith in HEB Ministries, Inc. v. Texas Higher Education Coordinating Board, 235 S.W.3d 627 (Tex. 2007)*, we found it unnecessary to decide in that case whether to construe *article I, section 6 of the Texas Constitution* as *Smith* construed the federal *Free Exercise Clause*. We have not addressed that issue and do not do so here.

[38] *See* WILLIAM W. BASSETT, RELIGIOUS ORGANIZATIONS AND THE LAW § 2:54 (2008) (listing 13 states that have adopted statutes and 17 in which courts have adopted a stricter standard than *Smith*).

[39] Act of May 30, 1999, 76th Leg., R.S., ch. 399, 1999 Tex. Gen. Laws 2511.

[40] *TEX. CIV. PRAC. & REM. CODE § 110.003(a)-(b)*.

[41] *Id. § 110.009(b)*.

[42] *See, e.g., R.R. Street & Co. Inc. v. Pilgrim Enters., Inc., 166 S.W.3d 232, 241 (Tex. 2005)* (stating that construction of the Texas Solid Waste Disposal Act would be guided by federal cases construing its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act); *Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 476 (Tex. 2001)* (stating that because the purposes of the Texas Commission on Human Rights Act and Title VII of the federal Civil Rights Act of 1964 are similar, federal case law is instructive in applying the state statute); *City of Garland v. Dallas Morning News, 22 S.W.3d 351, 360-361 (Tex. 2000)* (plurality opinion) (stating that the federal Freedom of Information Act is instructive in construing the Texas Public Information Act); *National Tank Co. v. Brotherton, 851 S.W.2d 193, 202 (Tex. 1993)* (stating that because the work product doctrine is similar in Texas and federal courts, federal **[**22]** case law is instructive).

[43] *S.W.3d at , 2005 Tex. App. LEXIS 9847, *17* ("Assuming **[**23]** without determining that Pastor Barr's ministry is substantially motivated by sincere religious belief, we nonetheless conclude that while the ordinance precludes Pastor Barr from operating a correctional or rehabilitation facility within 1000 feet of residential areas, schools, parks, recreation areas, and places of worship, which may include most of the City, there is nothing in the ordinance that precludes him from providing his religious ministry to parolees and probationers, from providing instruction, counsel, and

ease of relocation **[*297]** goes to whether the burden of a zoning ordinance on a person's free exercise of religion is substantial, not to whether zoning ordinances are categorically exempt from TRFRA. The court of appeals added that zoning laws have long been applied to religious education facilities. [44] But that generalization shows only that it is possible for zoning laws not to substantially burden free religious exercise. The opposite is also possible. This Court, for example, has held that zoning laws cannot be used to exclude churches from all residential districts in some circumstances. [45] In any event, not only is the court of appeals' analysis flawed, it is contradicted by TRFRA's express terms, which require strict scrutiny of "*any* ordinance, rule, order, decision, practice, or other exercise of governmental authority." [46] Zoning ordinances easily fall into this group.

Unlike the court of appeals, the City relies on TRFRA's text, specifically, the first sentence of section 110.010, which states: ***HN10*** "Notwithstanding any other provision of this chapter, a municipality has no less authority to adopt or apply laws and regulations concerning zoning, land use planning, traffic management, urban nuisance, or historic preservation than the authority of the municipality that existed under the law as interpreted by the federal courts before April 17, 1990" -- the date the Supreme Court issued its decision in *Smith*. ***HN11*** The statute thus **[**25]** preserves the authority municipalities had under "the law" interpreted by the federal courts *pre-Smith*. The only restriction on the governing law is that it come from *pre-Smith* federal case law. Guidance may be drawn from cases involving constitutional limits on zoning and land-use ordinances as well as from cases applying the *Free Exercise Clause*, or even the *First Amendment* generally, in other contexts. For example, *Sherbert* involved unemployment laws, and *Yoder* involved compulsory school attendance laws; both involved the *Free Exercise Clause*, while *Yoder* also involved parental rights; but each demonstrates the balancing of interests that *Smith* eschewed and that the statutes enacted in response -- RFRA, TRFRA, and RLUIPA -- all require.

The City argues first that the impact of zoning on the free exercise of religion is never subject to strict scrutiny. The Supreme Court has clearly refuted this argument. In *Schad v. Borough of Mount Ephraim*, the Supreme Court wrote:

> ***HN12*** The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning **[**26]** power is not infinite and unchallengeable; it must **[*298]** be exercised within constitutional limits. . . .
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> ***HN13*** [A] s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of First Amendment rights. . . . [T]he Court must not only assess the substantiality of the governmental interests asserted but also determine whether those interests could be served by means that would be less intrusive on activity protected by the *First Amendment*: [a municipality] may serve its

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helpful assistance in other facilities in Sinton, or from housing these persons outside the City and providing his religious ministry to them there." (footnote omitted)).

[44] *Id. at , 2005 Tex. App. LEXIS 9847 at *19* ("Moreover, Texas courts have long applied zoning ordinances to church-operated schools and colleges, supporting the conclusion that zoning ordinances do not substantially burden such auxiliary religious operations." (citing *Fountain Gate Ministries, Inc., v. City of Plano, 654 S.W.2d 841, 844 (Tex. App.--Dallas 1983, writ ref'd n.r.e.)*, and *Heard v. City of Dallas, 456 S.W.2d 440, 444 (Tex. App.--Dallas 1970, writ ref'd n.r.e.)))*.

[45] *See City of Sherman v. Simms, 143 Tex. 115, 183 S.W.2d 415, 416-417 (Tex. 1944)* **[**24]** ("[T]he power to establish zones is a police power and its exercise cannot be extended beyond the accomplishment of purposes rightly within the scope of that power. To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right. An ordinance fraught with that danger will not be enforced.").

[46] *TEX. CIV. PRAC. & REM. CODE § 110.002(a)* (emphasis added).

> legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily **[**27]** interfering with First Amendment freedoms. . . . Precision of regulation must be the touchstone. [47]

Schad held that a borough could not use zoning laws to prohibit all live entertainment, including live adult entertainment, within its borders. [48] Surely ***HN14*** the free exercise of religion is entitled to no less protection than adult entertainment.

In *Sherbert*, the Supreme Court held that denying unemployment benefits to someone because she would not work on Saturday, a religious day for her, was a "substantial infringement" of her rights that could be justified only by "some compelling state interest". [49] ***HN15*** "It is basic", the Court wrote, "that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation'". [50] There is no reason to require strict scrutiny of unemployment compensation laws but not zoning laws.

The City argues **[**28]** more narrowly that *pre-Smith* federal cases specifically involving conflicts between zoning ordinances and the *Free Exercise Clause* do not require strict scrutiny when a zoning ordinance is facially neutral with respect to religion and impacts free exercise only in its across-the-board application, even if the impact is substantial. The City cites five cases, each of which involved the application of zoning laws to places of worship: *Christian Gospel Church, Inc. v. City and County of San Francisco;* [51] Messiah Baptist Church v. County of Jefferson; [52] Islamic Center of Mississippi, Inc. v. City of Starkville; [53] Grosz v. City of Miami Beach; [54] and Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of **[*299]** Lakewood. [55] Islamic Center appears to have applied a standard similar to that required by TRFRA, stating that zoning laws that infringe upon First Amendment rights "must be narrowly drawn in furtherance of a substantial government interest" [56] that could not be served "by a means less burdensome to the exercise of religion." [57] Although far less clear, *Grosz* referred to a "principle that has emerged in free exercise doctrine, the 'least restrictive means test,'" [58] and "[a]nother **[**29]** principle" that "a showing of 'compelling state interest' on the government side will justify inroads on religious liberty." [59] Two other cases, *Christian Gospel Church* [60] and *Lakewood Jehovah's Witnesses*, [61] required that the government have a "compelling interest" in zoning restrictions that impact free religious exercise. In *Messiah Baptist Church*, the court found that zoning regulations had no significant impact on the free exercise of religion and therefore did not state a

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[47] *452 U.S. 61, 68-70, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981)* (citations, footnotes, and internal quotation marks and brackets omitted).

[48] *Id. at 65*.

[49] *374 U.S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)*.

[50] *Id.* (quoting *Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 89 L. Ed. 430 (1945))*.

[51] *896 F.2d 1221 (9th Cir. 1990)*.

[52] *859 F.2d 820 (10th Cir. 1988)*.

[53] *840 F.2d 293 (5th Cir. 1988)*.

[54] *721 F.2d 729 (11th Cir. 1983)*.

[55] *699 F.2d 303 (6th Cir. 1983)*.

[56] *Islamic Ctr., 840 F.2d at 299*.

[57] *Id. at 300*.

[58] *Grosz, 721 F.2d at 734*.

[59] *Id. at 737* (citing *Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)*; *Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)*; and *Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972))*.

[60] *Christian Gospel Church, Inc., v. City & County of San Francisco, 896 F.2d 1221, 1223-1224 (9th Cir. 1990)* ("We **[**30]** have articulated ***HN16*** a general standard for evaluating the impact of a government provision on the exercise of religion and we find that this test is appropriate for analyzing a challenge to zoning laws. This test involves examining the following three factors: (1) the magnitude of the statute's impact upon the exercise of the religious belief; (2) the existence of a compelling state interest justifying the imposed burden upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.").

[61] *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 305 (6th Cir. 1983)* ("If the ordinance does infringe the Congregation's first amendment right, the City must justify the ordinance by a compelling governmental interest.").

standard. [62] In sum, four of the five cases the City cites contradict its contention that *pre-Smith* federal cases did not strictly scrutinize zoning ordinances that impact free religious exercise.

None of the arguments made by the City or the court of appeals supports the assertion that zoning ordinances are exempt from TRFRA. Accordingly, we turn to the Act's application in this case.

IV

Applying TRFRA to this case raises four questions, each succeeding question contingent on an affirmative **[**31]** answer to the one preceding:

. Does the City's Ordinance 1999-02 burden Barr's "free exercise of religion" as defined by TRFRA?

. Is the burden substantial?

. Does the ordinance further a compelling governmental interest?

. Is the ordinance the least restrictive means of furthering that interest?

We consider these questions in the order presented. While we must accept the trial court's fact findings supported by the evidence, the ultimate answers determine the legal rights protected by the Act and are thus matters of law. [63]

[*300] A

The City argues that **[**32]** Barr's free exercise of religion is not involved because a halfway house need not be a religious operation. But the fact that a halfway house *can be* secular does not mean that it *cannot be* religious. ***HN18*** TRFRA defines "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief", adding that "[i]n determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief." [64] Not only is such a determination unnecessary, it is impossible for the judiciary. As the Supreme Court stated in a part of *Smith* unaffected by RFRA:

> ***HN19*** It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" **[**33]** to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner, 490 U.S. [680,] 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 [1989]*. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. [65]

We agree.

The trial court appears to have been troubled that an operation which can be and often is conducted for purely secular purposes could be entitled to increased protection from government regulation if conducted for religious reasons. But TRFRA guarantees such protection. Just as a Bible study group and a book club are not treated the same, neither are a halfway house operated for religious purposes **[**34]** and one that is not.***HN20*** Under *Smith*, the *Free Exercise Clause* does not require strict scrutiny for religious activity affected by

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[62] *859 F.2d 820, 824-825 (10th Cir. 1988)*.

[63] *See, e.g., Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 932-933 (Tex. 1998)* (***HN17*** "Although determining whether a property regulation is unconstitutional requires the consideration of a number of factual issues, the ultimate question of whether a zoning ordinance constitutes a compensable taking or violates due process or equal protection is a question of law, not a question of fact. . . . While we depend on the district court to resolve disputed facts regarding the extent of the governmental intrusion on the property, the ultimate determination of whether the facts are sufficient to constitute a taking is a question of law." (citations omitted)).

[64] *Tex. Civ. Prac. & Rem. Code § 110.001(a)(1)*.

[65] *Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886-887, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)* (citation omitted).

neutral laws of general application, [66] but TRFRA imposes the requirement by statute.

[*301] The City does not dispute that the purpose of Barr's ministry was to provide convicts a biblically supported transition to civic life. Applicants were required to sign a statement of faith, agree to abide by stated biblical principles, and commit as a group to daily prayer and Bible study. They were specifically told that the Barr's halfway house was "a biblical ministry, NOT a social service agency". Barr considered the halfway house a religious ministry, and it appears to have been supported by his church. The record easily establishes that Barr's ministry was "substantially motivated by sincere religious **[**35]** belief" for purposes of the TRFRA.

B

TRFRA does not elaborate on what it means to "substantially burden" the right to free religious exercise, and that particular phrase is not used elsewhere in Texas statutes, unlike the words "substantial" and "substantially", which are used thousands of times. So far as we have been able to find, however, they are never defined. The same phrase is used in RFRA and RLUIPA, but it is not defined in those statutes, either. ***HN21*** Absent any special meaning, we use ordinary meanings in common parlance. [67] *Webster's Third New International Dictionary* defines "substantial" in part as "material", "not seeming or imaginary", "real", "true", "being of moment", "important". [68] Thus defined, "substantial" has two basic components: real vs. merely perceived, and significant vs. trivial. These limitations leave a broad range of things covered.

HN23 To determine whether a person's free exercise of religion has **[**36]** been substantially burdened, some courts have focused on the burden on the person's religious beliefs rather than the burden on his conduct. Under what have been referred to as the compulsion and centrality tests, the issue is whether the person's conduct that is being burdened is compelled by or central to his religion. [69] The problems with these approaches are the same as those in determining whether conduct is religious. It may require a court to do what it cannot do: assess the demands of religion on its adherents and the importance of particular conduct to the religion. And it is inconsistent with the statutory directive that religious conduct be determined without regard for whether the actor's motivation is "a central part or central requirement of the person's sincere religious belief." [70] These problems are avoided if the focus is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression. The burden must be measured, of course, from the person's perspective, not from the government's. Thus, ***HN24*** the United States Court of Appeals for the Fifth Circuit, after surveying decisions by other courts, recently held that under **[**37]** RLUIPA, "a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." [71] Amici curiae suggest **[*302]** the following: "A person's religious exercise has been substantially burdened under the Texas RFRA when his ability to express adherence to his faith through a particular religiously-motivated act has been meaningfully curtailed or he has otherwise been truly pressured significantly to modify his conduct." [72] Like the Fifth Circuit, however, "we make no effort to craft a bright-line rule" or one that will apply in every context. [73] TRFRA, like its federal cousins, "requires a case-by-case, fact-specific inquiry". [74]

Ordinance **[**38]** 1999-02 prohibited Barr from operating his halfway house ministry in the two homes he owned adjacent his supporting church, and the city manager

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[66] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)* ("In *Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)*, this Court held that the *Free Exercise Clause of the First Amendment* does not prohibit governments from burdening religious practices through generally applicable laws.").

[67] ***HN22*** *TEX. GOV'T CODE § 312.002* (stating that "words shall be given their ordinary meaning" except when "a word is connected with and used with reference to a particular trade or subject matter or is used as a word of art").

[68] WEBSTER'S THIRD NEW INT'L DICTIONARY 2280 (1961).

[69] *See Coronel v. Paul, 316 F. Supp. 2d 868, 876-880 (D. Ariz. 2004)* (discussing cases and commentaries).

[70] *TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1)*.

[71] *Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004)*.

[72] Brief of the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, and Representative Scott Hochberg as Amici Curiae Supporting Petitioners at 3.

[73] *Adkins, 393 F.3d at 571*.

[74] *Id.*

testified that it was "a fair statement" that alternate locations were "probably . . . minimal" and "possibly" "pretty close to nonexistent". The court of appeals stated that "there is nothing in the ordinance that precludes Barr from providing his religious ministry to parolees and probationers, from providing instruction, counsel, and helpful assistance in other facilities in Sinton, or from housing these persons outside the City and providing his religious ministry to them there." [75] But there is no evidence of any alternate location in the City of Sinton where the ordinance would have allowed Barr's ministry to operate, or of possible locations outside the city. Moreover, while evidence of alternatives is certainly relevant to the issue whether zoning restrictions substantially burden free religious exercise, evidence of *some* possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden. [76] In a related context, the Supreme Court has observed that ***HN25*** "one is not to have the exercise **[**39]** of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." [77] As a practical matter, the ordinance ended Barr's ministry, as the City Council surely knew it would. [78] We therefore have no hesitation in concluding that Ordinance 1999-02 substantially burdened Barr's ministry. The trial court's unexplained finding to the contrary has no support in the evidence.

The City argues that its zoning restrictions on locating Barr's ministry inside city limits could not have been a substantial burden because the City is so small that excluding the ministry from inside the city limits was inconsequential. But ***HN26*** size alone is not determinative. The *Schad* case involved the Borough of Mount Ephraim, [79] a municipality about half the size of Sinton in area, with roughly the same population at the times relevant to that case and this one. [80] The Supreme **[**40]** Court did not consider the small size of the municipality to be **[*303]** important and specifically rejected the argument that the adult entertainment business at issue could simply move elsewhere. [81] Moreover, as we have noted, there is no evidence regarding alternative locations for Barr's ministry.

The City also argues that Barr could have continued his ministry as long as each person he desired to help either owned his own home or was a guest in another's home. The City points out that the residents in Barr's homes eventually moved in with members of Barr's church. But of course, that occurred as the ministry came to an end. There is no evidence that Barr could have continued his ministry one-on-one to probationers and parolees scattered out in different homes. In any event, ***HN27*** a burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else.

The City argues that Barr's ministry was not substantially burdened because he was never cited or charged **[**41]** with a crime, but ***HN28*** nothing in TRFRA suggests that either is necessary for a burden to be substantial. The City contends that no requirement imposed on the operation of a correctional institution can substantially burden religious exercise, pointing to statutes passed with TRFRA that create a rebuttable presumption that such requirements meet strict scrutiny. [82] But the presumption those statutes create is

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[75] S.W.3d at , 2005 Tex. App. LEXIS 9847, *18.

[76] Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005) (holding that requiring church to relocate, while not an insuperable burden, was substantial).

[77] Schneider v. New Jersey, 308 U.S. 147, 163, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

[78] See *supra* note 6.

[79] Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981).

[80] See Borough of Mount Ephraim, New Jersey, http://www.mountephraim-nj/statistics.html (last visited June 12, 2009).

[81] Schad, 452 U.S. at 76-77.

[82] TEX. GOV'T CODE § 76.018 ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a correctional facility operated by or under a contract with a community supervision and corrections department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted."); *id.* § 493.024 ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a jail or other correctional **[**42]** facility operated by or under a contract with the department is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted."); TEX. HUM. RES. CODE § 61.097 ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a juvenile detention facility or other correctional facility operated by or under a contract with the commission, a county, or a juvenile probation department is

rebuttable, and in any event, they do not apply to Barr's halfway houses because Barr did not operate under contract with the government.

The City argues that its position finds support in the five *pre-Smith* federal cases it cites regarding the impact of zoning laws on the location of worship facilities. While four of the cases found no substantial burden on religious practice, they are readily distinguished. In two of the cases, relatively small groups in large cities -- in *Grosz*, an orthodox Jewish group of usually ten to twenty people in Miami Beach, [83] and in *Christian Gospel Church* a group of **[*304]** about fifty people in San Francisco [84] -- sought to meet in homes in areas zoned residential, asserting that home-worship was important to their religious beliefs. In *Grosz*, churches were permitted by zoning in half the city, including an area just four blocks from the home sought to be used. [85] In *Christian Gospel Church*, the group had been meeting in a hotel banquet room, and there were areas throughout the city, including residential areas, where churches might meet. [86] Two other cases involved larger groups who sought to build facilities. In *Lakewood*, a Jehovah's Witness congregation that had been meeting in a commercial area wanted to relocate to a residential area. [87] Although zoning in only about ten percent **[**44]** of the city permitted churches, the court concluded that the congregation could easily find a location in those areas or purchase a church building in a residential area. [88] In *Messiah Baptist Church*, a church bought 80 acres in an area zoned for agricultural use, intending to construct a 12,000-square-foot facility, including a worship area, administrative office, and a gymnasium, along with a 151-car parking lot and an amphitheater for drive-in worshipers. [89] The court concluded that the church's religious practice was not unduly burdened merely because it was denied such use of land that was inexpensive and attractive. [90]

The fifth case, *Islamic Center*, held that the use of zoning restrictions to exclude Muslims **[**45]** at Mississippi State University from worshiping in a home in a residential area in Starkville, Mississippi, violated the *Free Exercise Clause*. [91] The court concluded that the zoning restrictions were impermissibly burdensome because they "force[d] Muslims to worship in the least acceptable parts of the City or in the county outside the City's boundaries". [92] The court rejected the city's argument that the Muslims could simply go elsewhere:

> And ***HN29*** a city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere. By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.
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> * * *
>
> As the Supreme Court observed in *Schad*, the availability of other sites outside city limits does not permit a city to forbid the exercise of a constitutionally protected right within its limits. "[One] is not to have the exercise of his liberty of expression [and, we add, his freedom of religion] in appropriate places abridged on the plea that it may be exercised in some other place." [93]

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presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may be rebutted."); *TEX. LOC. GOV'T CODE § 361.101* ("For purposes of Chapter 110, Civil Practice and Remedies Code, an ordinance, rule, order, decision, or practice that applies to a person in the custody of a municipal or county jail or other correctional facility operated by or under a contract with a county or municipality is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest. The presumption may **[**43]** be rebutted.")

[83] *Grosz v. City of Miami Beach, 721 F.2d 729, 731 (11th Cir. 1983)*.

[84] *Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221, 1222-1223 (9th Cir. 1990)*.

[85] *Grosz, 721 F.2d at 739*.

[86] *Christian Gospel Church, 896 F.2d at 1224*.

[87] *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 304-305 (6th Cir. 1983)*.

[88] *Id. at 307*.

[89] *Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 821 (10th Cir. 1988)*.

[90] *Id. at 824-825*.

[91] *Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 294 (5th Cir. 1988)*.

[92] *Id. at 298*.

[93] *Id. at 299, 300* (brackets in original, footnotes omitted, quoting *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981)* (quoting *Schneider v. New Jersey, 308 U.S. 147, 163, 60 S. Ct. 146, 84*

[*305] Although the zoning ordinance did **[**46]** not foreclose all locations, the court determined "relatively impecunious Muslim students" were left with "no practical alternatives for establishing a mosque in the city limits." [94]

The City argues that the decision in *Islamic Center* was based on the use of zoning to discriminate against a particular religion, something that it did not do in the present case. The City of Starkville had permitted a large number of Christian churches in the same area from which the Muslim mosque was prohibited; [95] indeed, a Pentecostal church met right next door to the Muslims' property. [96] But these facts were pertinent to the city's justification of the zoning ordinance, not to whether ordinance substantially burdened the Muslim group. As the court stated: "The City's approval of applications for zoning exceptions by other churches suggests that it did not treat all applicants alike. This undermines **[**47]** the City's contention that the Board denied a zoning exception to the Muslims solely for the purposes of traffic control and public safety." [97] Irrespective of the city's possible motivation, the burden on the Muslims' use of their property for religious purposes was substantial.

All five of the cases on which the City relies illustrate that ***HN30*** the existence and degree of a zoning restriction's **[**48]** burden on religious exercise are practical matters to be determined based on the specific circumstances of a particular case. A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted. The City notes that no one in the present case was prohibited from attending church, but religious exercise is not so confined. The cases support our conclusion that Ordinance 1999-02 substantially burdened Barr's religious exercise.

C

HN31 "To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct." [98] The government may regulate such conduct in furtherance of a compelling interest.

Consistent with its contention that TRFRA does not apply to zoning, the City asserts in its brief: "Zoning itself is a compelling state interest." That position, as we have already discussed, has been rejected by this Court and by the Supreme Court. [99] ***HN32*** Although the government's interest in the public welfare in general, and in preserving **[**49]** a common character of land areas and use in particular, is certainly legitimate when properly motivated and **[*306]** appropriately directed, the assertion that zoning ordinances are per se superior to fundamental, constitutional rights, such as the free exercise of religion, must fairly be regarded as indefensible.

HN33 The Supreme Court held in Smith, not that the government's interest in neutral laws of general application is always compelling when compared to the people's interest in fundamental rights, but only that the United States Constitution does not require the two interests to be balanced every time they conflict. RFRA, RLUIPA, and TRFRA, as well as laws enacted other states, now require that balance by statute when government action substantially burdens the free exercise of religion. The government's interest is compelling when the balance weighs in its favor -- that is, when the government's interest justifies the substantial burden on religious exercise. Because religious exercise is a fundamental right, that justification can be found only in "interests of the highest order", [100] to quote the Supreme Court in Yoder, and to quote Sherbert, only to avoid "'the gravest

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L. Ed. 155 (1939))).

[94] Id. at 302.

[95] Id. at 294 ("While the city ordinance restricts the use of any property in this type of residential area or in the City's commercial district as a church, 25 churches, all Christian, are located in similarly regulated areas. Sixteen of these churches occupied their present sites before the ordinance became effective, and nine moved in thereafter with the benefit of an exception. Only the Islamic Center has ever been denied an exception.").

[96] Id. at 296 ("Next door to the Islamic Center is an impressive brick two-story building, graced by stately white columns and a broad veranda, once occupied as a fraternity house. This is now Maranatha House, a residence and worship center for a Pentecostal Christian denomination. Five more churches lie within a quarter mile of these two religious centers.").

[97] Id. at 302.

[98] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 894, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (O'Connor, J., concurring in the judgment).

[99] *See supra* Part III.

[100] Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

[50]** abuses, endangering paramount interest[s]'". [101] Thus, in *Yoder*, the state's interest in children attending the first two years of high school was not sufficiently compelling to justify the substantial burden on the Amish people's religious conviction that children be taught at home. [102] And in *Sherbert*, the state's interest in a uniform unemployment compensation system and the reduced possibility of fraudulent claims was not compelling enough to deny benefits to a claimant who had refused to work on Saturday because of her religious beliefs. [103]

The Supreme Court recently explained in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* that ***HN34*** "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' -- the particular claimant whose sincere exercise of religion is being substantially burdened." [104] To satisfy this requirement, the Supreme Court stated, courts must "look[] beyond broadly **[**51]** formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." [105] Acknowledging that there is "no cause to pretend that the task ... is an easy one", [106] the Court held that RFRA requires that "courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." [107]

In this regard, there is no basis for distinguishing RFRA from TRFRA; the same requirement verbatim is in both. The Sinton City Council's recitation in Ordinance 1999-02 -- that "the requirements of this section are reasonably necessary to preserve the public safety, morals, and general welfare" -- is the kind of "broadly formulated interest[]" that does not satisfy the scrutiny mandated by TRFRA. Likewise, the trial court's brief finding -- that "[t]he ordinance was in furtherance of **[*307]** a compelling government interest" -- falls short of the required scrutiny. As Professor Douglas Laycock has observed regarding TRFRA and state RFRAs generally: ***HN35*** "the compelling **[**52]** interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling." [108]

HN36 Although TRFRA places the burden of proving a substantial burden on the claimant, it places the burden of proving a compelling state interest on the government. The City argues that its compelling interest in Ordinance 1999-02 is established by statutes providing that correctional facility regulations presumptively meet strict scrutiny. As we have already explained, however, these statutes are inapplicable. [109]

The City also asserts that Ordinance 1999-02 serves a compelling interest in advancing safety, preventing nuisance, and protecting children. But there is no evidence to support the City's assertion with respect to "the particular practice at issue" -- Barr's ministry. In fact, the only evidence is **[**53]** to the contrary: Barr testified that he admitted only nonviolent offenders to his program, and no aspect of his operation ever presented a safety problem, a nuisance, or a threat to children. He and the city manager both testified that they were not aware of any complaints of disturbance. The City cites no studies or experiences with halfway houses to support its professed concerns. The City was not, of course, required to wait until disturbances occurred, possibly causing significant harm, before taking measures to prevent them, but neither could it assert a compelling interest in practically excluding a religious ministry from operating within the city limits based on nothing more than speculation.

The City argues that the restrictions in Ordinance 1999-02 are similar to those imposed by state law on facilities run by or under contract with the government. [110] But ***HN37*** the State is free to impose whatever restrictions it chooses on itself and local governments; [111] those

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[101] *Sherbert v. Verner, 374 U.S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)* (quoting *Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 89 L. Ed. 430 (1945))*.

[102] *Yoder, 406 U.S. at 228-229*.

[103] *Sherbert, 374 U.S. at 407*.

[104] *546 U.S. 418, 430-431, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)*.

[105] *Id. at 431*.

[106] *Id. at 439*.

[107] *Id.*

[108] Douglas Laycock, *State RFRAs and Land Use Regulation*, *32 U.C. DAVIS L. REV. 755, 784 (1999)*.

[109] *See supra* note 82 and accompanying text.

[110] *See supra* note 11.

[111] *See Ysursa v. Pocatello Educ. Ass'n, U.S. , , 129 S. Ct. 1093, 172 L. Ed. 2d 770 (2009)* ("'Political subdivisions of

governments have no Free Exercise rights of their own. The State's interest in restricting halfway houses run by or for itself or local governments when no fundamental right is implicated does not suddenly become compelling **[**54]** when free religious exercise is substantially burdened. Moreover, the City's argument is undercut by the fact that it made no effort to enforce Ordinance 1999-02 for over a year after it was adopted. An interest that need not be enforced against the very thing it is adopted to prevent can hardly be considered compelling.

None of the four federal cases decided before *Smith* upholding the application of zoning laws to worship facilities supports the City's arguments regarding compelling interest. Because those cases found no substantial burden on religious exercise, the government's interest was not required to be compelling. In the fifth case, *Islamic [*308] Center*, the court held that the city's failure to produce evidence of a compelling interest in denying permission for a Muslim mosque in a residential area was fatal to the application of the zoning ordinance. The City's cases do not support its position.

In addressing **[**55]** the cases on which the City relies, we should not be read to suggest that worship facilities and halfway houses are no different, or that the balancing of interests required by strict scrutiny is the same, regardless of the nature of the religious conduct. TRFRA's requirement of an assessment of the burden "to the person" necessitates taking into account the individual circumstances. We have focused on the five cases the City cites because of its reliance on them, but as we have noted, the applicable principles must also be drawn from other contexts.

The City's failure to establish a compelling interest in this case in no way suggests that the government never has a compelling interest in zoning for religious use of property or in regulating halfway houses operated for religious purposes. [112] TRFRA guarantees a process, not a result. The City's principal position in this case has been that it is exempt from TRFRA. We do not hold that the City could not have satisfied TRFRA; we hold only that it failed to do so.

D

Finally, ***HN38*** TRFRA requires that even when the government acts in furtherance of a compelling interest, it must show that it used the least restrictive means of furthering that interest. The City has made no effort to show that it complied with this requirement. Ordinance 1999-02 is very broad. If as the city manager testified, locations in the City of Sinton more than 1,000 feet from a residential area, school, park, recreational area, or church are "pretty close to nonexistent", the ordinance effectively prohibits any private "residential facility . . . operated for the purpose of housing persons . . . convicted of misdemeanors . . . within one . . . year after having been released from confinement in any penal institution" inside the city limits. Read literally, this would prohibit a Sinton resident from leasing a room to someone within a year of his having been jailed for twice driving with an invalid license. [113] Such restrictions are certainly not the least restrictive means of insuring that religiously operated halfway houses do **[**57]** not jeopardize children's safety and residents' wellbeing.

V

We conclude, based on the record before us, that Ordinance 1999-02, as applied to Barr's ministry, violates TRFRA. Accordingly, we reverse the judgment of the court of appeals. Because the trial court did not reach the issues of appropriate injunctive relief, actual damages, and attorney fees, we remand the case to the trial court for further proceedings in accordance with this opinion.

Nathan L. Hecht Justice

Opinion delivered: June 19, 2009

States -- counties, cities, or whatever -- never were and never have been considered as sovereign entities.'" (quoting *Reynolds v. Sims, 377 U.S. 533, 575, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964)))*.

[112] *See* *Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981)* (stating that it "may very well be true" that "if there were countywide zoning, it would be quite legal to allow **[**56]** live entertainment in only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim").

[113] A second conviction for driving with an invalid license is a Class B misdemeanor. *TEX. TRANSP. CODE § 521.457(f)*. The maximum punishment for a Class B misdemeanor is a $ 2,000 fine and 180 days' imprisonment. *TEX. PENAL CODE § 12.22*.

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EXHIBIT I

Positive
As of: November 23, 2015 9:03 AM EST

Merced v. Kasson

United States Court of Appeals for the Fifth Circuit

July 31, 2009, Filed

No. 08-10358 Cons w/ 08-10506

Reporter
577 F.3d 578; 2009 U.S. App. LEXIS 17027

JOSE MERCED, President Templo Yoruba Omo Orisha Texas, Inc., Plaintiff-Appellant v. KURT KASSON; MIKE COLLINS; BOB FREEMAN; CITY OF EULESS, Defendants-Appellees. JOSE MERCED, President Templo Yoruba Omo Orisha Texas, Inc., Plaintiff-Appellee v. CITY OF EULESS, Defendant-Appellant.

Prior History: [**1] Appeals from the United States District Court for the Northern District of Texas.
Merced v. City of Euless, 2008 U.S. Dist. LEXIS 33913 (N.D. Tex., Apr. 23, 2008)
Merced v. City of Euless, 2008 U.S. Dist. LEXIS 3685 (N.D. Tex., Jan. 17, 2008)

Core Terms

animals, ordinances, sacrifices, religious, killing, disposal, religion, district court, religious practice, city's, priest, ceremonies, orishas, free exercise of religion, substantial burden, no evidence, goats, regulations, burdened, religious belief, ban, least restrictive, four-legged, initiate, turtles, sheep, compelling governmental interest, free exercise, slaughter, prison's

Case Summary

Procedural Posture

Plaintiff priest sued defendant city under the Texas Religious Freedom and Restoration Act (TRFRA), seeking a permanent injunction to prohibit the city from enforcing ordinances that allegedly burdened his religious practices by barring certain animal sacrifices. After a bench trial, the U.S. District Court for the Northern District of Texas granted summary judgment for the city, but denied its request for attorneys' fees. The parties appealed.

Overview

Taken together, six of the city's ordinances prevented the sacrifice of certain animals. This ban prevented the priest from performing certain ceremonies essential to his religion. Simply because the priest was able to perform some religious ceremonies did not mean the city's ordinances did not burden his other religious practices pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1) of TRFRA. Accordingly, under Tex. Civ. Prac. & Rem. Code Ann. § 110.003 of TRFRA, the ordinances substantially burdened the priest's free exercise of religion without advancing a compelling governmental interest using the least restrictive means. Thus, the priest was entitled to an injunction under TRFRA preventing the city for enforcing its ordinances that burdened his religious practice of sacrificing animals, Tex. Civ. Prac. & Rem. Code § 110.005(a)(2). Given the appellate court's resolution of the priest's TRFRA claim on the merits, the case was not only nonfrivolous, it was meritorious and prevailing. Accordingly, the city was not a prevailing party on the TRFRA claim, and it was not entitled to attorneys' fees under 42 U.S.C.S. § 1988.

Outcome

The summary judgment for the city on the priest's TRFRA claim was reversed, and the matter was remanded to the district court. The district court's denial of attorneys' fees to the city was affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN1 The Texas Religious Freedom and Restoration Act (TRFRA), Tex. Civ. Prac. & Rem. Code Ann. ch. 110, prevents the state and local Texas governments from substantially burdening a person's free exercise of religion unless the government can demonstrate that doing so furthers a compelling governmental interest in the least restrictive manner.

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

HN2 A federal court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.

Constitutional Law > ... > Case or Controversy > Constitutional Questions > Necessity of Determination

HN3 It is not the habit of a federal court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN4 Under the Texas Religious Freedom and Restoration Act, while an appellate court must accept a trial court's fact findings supported by the evidence, the ultimate answers determine the legal rights protected by the Act and are thus matters of law.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN5 A district court's legal conclusions at a bench trial are reviewed de novo and its findings of fact are reviewed for clear error.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Evidence > Burdens of Proof > Allocation

HN6 See *Tex. Civ. Prac. & Rem. Code Ann. § 110.003*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Governments > Local Governments > Ordinances & Regulations

HN7 A court determines whether a city's ordinance violated the Texas Religious Freedom and Restoration Act after applying a four-part test: (1) whether the government's regulations burden a plaintiff's free exercise of religion; (2) whether the burden is substantial; (3) whether the regulations further a compelling governmental interest; and (4) whether the regulations are the least restrictive means of furthering that interest.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN8 The Texas Religious Freedom and Restoration Act defines "free exercise of religion" as an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief. *Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1)*.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Civil Rights Law > Protection of Rights > Prisoner Rights > Freedom of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Governments > Legislation > Interpretation

Public Health & Welfare Law > Social Services > Institutionalized Individuals > Advocacy & Protection

HN9 According to the Texas Supreme Court, a burden under Texas Religious Freedom and Restoration Act is substantial if it is real vs. merely perceived, and significant vs. trivial. The inquiry is case-by-case and fact-specific. Federal case law interpreting Texas Religious Freedom and Restoration Act and the Religious Land Use and Institutionalized Persons Act is relevant.

Civil Rights Law > Protection of Rights > Prisoner Rights > Freedom of Religion

Public Health & Welfare Law > Social Services > Institutionalized Individuals > Advocacy & Protection

HN10 In the context of the Religious Land Use and Institutionalized Persons Act, the United States Court of Appeals for the Fifth Circuit uses the following definition of "substantial burden": A government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. The effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs; or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, nontrivial benefit, and, on the other hand, following his religious beliefs.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN11 At a minimum, the government's ban of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion. A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Governments > Courts > Authority to Adjudicate

HN12 It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN13 The relevant inquiry is not whether governmental regulations substantially burden a person's religious free exercise broadly defined, but whether the regulations substantially burden a specific religious practice. *Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1)*

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN14 A burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Governments > Legislation > Statutory Remedies & Rights

HN15 The Texas Religious Freedom and Restoration Act applies to any rule, order, decision, practice, or other exercise of governmental authority. *Tex. Civ. Prac. & Rem. Code Ann. § 110.002(a)*. This broad language does not permit a court to read an exception into the statute for generally applicable laws that incidentally burden religious conduct.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Evidence > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Allocation

HN16 The Texas Religious Freedom and Restoration Act places on the Government the burden of proving that the burden it created both advances a compelling interest and is the least restrictive means of doing so. *Tex. Civ. Prac. & Rem. Code Ann. § 110.003(b)*. Federal decisions interpreting the *Free Exercise Clause* are relevant to this inquiry. *Tex. Civ. Prac. & Rem. Code Ann. § 110.001(b)*. These cases have described a compelling governmental interest using phrases such as of the highest order and paramount.

Civil Rights Law > Protection of Rights > Religious Freedom > Religious Freedom Restoration Act

Evidence > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Allocation

HN17 The Religious Freedom Restoration Act requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person--the particular claimant whose sincere exercise of religion is being substantially burdened. The Government cannot rely upon general statements of its interests, but must tailor them to the specific issue at hand: the courts look beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. The courts' task of balancing the interests is difficult, but the goal is to strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular

practice at issue.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Meat Inspections

HN18 Texas law exempts from meat inspection requirements the slaughter and consumption of meat for the personal use of the livestock's owner, his family, and his non-paying guests. *Tex. Health & Safety Code Ann. § 433.006(a)*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Evidence > Burdens of Proof > General Overview

HN19 Where the government restricts only conduct protected by the *First Amendment* and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Judicial Discretion

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Prevailing Parties

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Statutory Attorney Fee Awards

HN20 *42 U.S.C.S. § 1988* allows district courts, in their discretion, to award fees to a prevailing party for actions brought under, among others, *42 U.S.C.S. § 1983*, the Religious Land Use and Institutionalized Persons Act, and Religious Freedom Restoration Act. *42 U.S.C.S. § 1988(b)*.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Prevailing Parties

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Statutory Attorney Fee Awards

HN21 While prevailing plaintiff's are usually entitled to attorneys' fees, prevailing defendants cannot recover *42 U.S.C.S. § 1988* fees without demonstrating that the plaintiff's underlying claim was frivolous, unreasonable or groundless.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Appellate Review

HN22 An appellate court reviews a district court's decision to award attorneys' fees under *42 U.S.C.S. § 1988* for an abuse of discretion.

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For CITY OF EULESS, Defendant - Appellant (08-10506): William Michael McKamie, Bradford Eugene Bullock, Law Offices of William M. McKamie, P.C., San Antonio, TX.

Judges: Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

Opinion by: JENNIFER W. ELROD

Opinion

[*581] JENNIFER W. ELROD, Circuit Judge:

HN1 The Texas Religious Freedom and Restoration Act (TRFRA), Tex. Civ. Prac. & Rem. Code ch. 110, prevents the state and local Texas governments from substantially burdening a person's free exercise of religion unless **[**2]** the government can demonstrate that doing so furthers a compelling governmental interest in the least restrictive manner. In this case, we must decide if the city of Euless, Texas, may practically

forbid the keeping--even for brief periods--and slaughter of four-legged animals within its borders, a ban that prevents practitioners of the Santeria faith from performing ceremonies essential to their religion. We hold that, under TRFRA, the Euless ordinances at issue substantially burden plaintiff's free exercise of religion without advancing a compelling governmental interest using the least restrictive means.

[*582] Jose Merced is a Santeria Oba Oriate, or priest, and is a native of Puerto Rico who moved to Euless in 1990. [1] In 2006, the city informed Merced that he could not legally perform certain animal sacrifices essential to Santeria religious practice, though he had done so for the previous sixteen years without incident. He sued the city, seeking a permanent injunction that prohibited Euless from enforcing its ordinances that burdened his religious practice. The district court entered judgement for the city following a bench trial, but denied its request for attorney fees. We reverse **[**3]** the former and affirm the latter.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Santeria Religion [2]

Modern-day Santeria originated in Cuba and is a fusion of western African tribal religion and some elements of Roman Catholicism. Its practice centers around spirits called orishas, which are divine representatives of Olodumare, the supreme deity. Santeria rituals seek to engage these orishas, honor them, and encourage their involvement in the material world. Doing so requires the use of life energy, or ashe, the highest concentration of which is found in animal blood. Thus many Santeria rituals involve the sacrifice of live animals to transfer ashe to the orishas. Although animal sacrifices are used to celebrate a range of events, including birth, marriage, and death, the most complex ceremony takes place when a new priest is initiated. This ceremony, at which a new shrine is **[**4]** consecrated, generally involves a sacrifice of five to seven four-legged animals (lambs or goats), a turtle, a duck, ten to fourteen chickens, five to seven guinea hens, and ten to fourteen doves in addition to other elements (songs, drum music, and the offering of other objects). The animals are usually cooked and eaten after these sacrifices.

Santeria ceremonies are highly dependent on the will of the orisha to which they are directed. Home shrines, which are symbols or physical manifestations of the orishas, are integral to Santeria, and ceremonies and sacrifices usually take place in the home of the officiating priest, although occasionally they may take place in a temple or at the home shrine of another priest. The orishas determine where sacrifices are to be conducted, and the priests divine the orishas' will by a complex divination process. There are more than 250,000 practitioners of Santeria in the world, but only two Santeria temples, neither of which is in the continental United States. [3] Thus, home sacrifice is not only the norm, but a crucial aspect of Santeria, without which Santeria would effectively cease to exist.

B. Merced's Religious Practices [4]

In 1990, Merced moved to Euless and began to conduct ritual sacrifices. From 1990 to 2006, Merced performed the sacrifices without any interference from Euless, initiating, on average, one new priest a year. The sacrifices take place in a room attached to Merced's garage, which is isolated **[*583]** from the rest of the house. Merced purchases the animals from local markets and has them delivered to his house close to the time of the ceremony, usually about 15 minutes beforehand. There is no evidence that he had kept a four-legged animal in his home before sacrificing it for more than four hours. He keeps the animals caged outside until he kills them. Merced slits the carotid arteries of the animals to kill them humanely, and the blood is collected and offered to the orishas. The paper or plastic mats on which the sacrifices are performed are wrapped and thrown away. The edible portions **[**6]** of the animals are generally cooked and eaten (and some portions, like the intestines, are cooked but not eaten), and any remains are double-bagged and placed either in the trash or in a dumpster owned by another Santeria practitioner. No one had ever become sick during one of Merced's ceremonies, which generally last for several days (such that participants would presumably be in a position to observe if

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[1] He is also the president of Templo Yoruba Omo Orisha Texas, Inc., a Santeria religious organization.

[2] This section summarizes the testimony of Merced's expert, who described the tenets of faith and the practices of the Santeria religion. The district court found the expert's testimony credible, and the city agreed.

[3] Merced testified that Templo Yoruba Omo Orisha hopes **[**5]** eventually to build a temple, where certain ceremonies may take place if and as the orishas allow, but has no concrete plans to do so currently. Merced does not know where the temple will be located.

[4] Except as noted in the text and below, see infra n.9, these facts are undisputed.

someone did become ill). [5]

On September 4, 2004, Merced was holding a ceremony at his home. The police received an anonymous call from a neighbor and went to Merced's house to stop the ceremony. Once there, the police called two animal control officers, who allowed Merced to finish the ceremony. In May 2006, the police received another anonymous call stating that several goats were about to be killed. Merced was, in fact, hosting a birthday celebration for which no sacrifices were planned. When the officers arrived they told Merced not to conduct any sacrifices because they were likely illegal in Euless. Merced asked how he could obtain a permit for the sacrifices and was told to contact a supervisor. **[**7]** A few weeks later, Merced and another priest went to a permits office attempting to obtain a permit. They were told by two different employees that no such permit existed because animal slaughter was strictly prohibited. Merced ceased performing the sacrifices illegal in Euless (although he continued to perform Santeria rituals that are not prohibited).

Merced has delayed initiating an aspiring priest because the ceremony must be performed in his home and he cannot perform it legally. Merced is willing to comply with any disposal or health standards that Euless might create, but the city denied the availability of a permit or exception for sacrificing four-legged animals, and intends to prosecute Merced if he attempts any further sacrifices of four-legged animals.

On December 22, 2006, Merced filed a complaint against Euless and several city officials alleging violations of *42 U.S.C. § 1983*, the Religious Land Use and Institutionalized Persons Act (RLUIPA), *42 U.S.C. § 2000cc*, the *First*, *Fifth*, and *Fourteenth Amendments*, and TRFRA. The district court dismissed the suit as to the individual defendants because they had been sued in their personal capacities. In December, 2007, the district **[**8]** court dismissed the RLUIPA claim because no zoning laws were at issue. The parties conducted discovery and proceeded to trial.

C. Euless's Ordinances and Trial Testimony

Before trial, the parties stipulated that six Euless ordinances prevented the sacrifice of four-legged animals:

Sec. 10-3. Slaughtering animals.

It shall be unlawful to slaughter or to maintain any property for the purpose of slaughtering any animal in the city.

Sec. 10-5. Exceptions and exemptions not required to be negated.

[*584] In any complaint and in any action or proceedings brought for the enforcement of any provision of this chapter, it shall not be necessary to negate any exception, excuse, provision or exemption, which burden shall be upon the defendant.

Sec. 10-9. Penalty for violations of chapter.

Any person violating the terms and provisions of this chapter shall be deemed guilty of a misdemeanor and shall be punished as provided in section 1-12 of this Code. Each day that such violations continues shall be a separate offense. This penalty shall be cumulative of all other remedies. No fine imposed hereunder shall be less than $ 25.00.

Sec. 10-65. Animal care.

If the following shall occur, the animal may be impounded and **[**9]** the owner shall be guilty of a violation of this chapter:

. . . .

(2) A person shall beat, cruelly ill treat, torment abuse, overload, overwork or otherwise harm an animal or cause, instigate or permit any dog fight, cock fight, bullfight or other combat between animals or between animals and humans.

. . . .

(4) A person shall willfully wound, trap, maim or cripple by any method any animal, bird or fowl. It shall also be unlawful for a person to kill any animal, bird or fowl, except domesticated fowl considered as general tablefare such as chicken or turkey, within the city.

Sec. 10-68. Restriction on number of dogs, cats or other animals, or combination, to be kept in residential premises. It shall be unlawful to keep or harbor more than four dogs, cats or other animals, or combination of animals, beyond the normal weaning age on any premises, except as permitted in section 10-104.

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[5] The city admitted in the pretrial order that it did not have any evidence to the contrary.

> Sec. 10-104. Restrictions on size and locations of area for keeping livestock.
>
> It shall be unlawful to keep and maintain any mule, donkey, mare, horse, colt, bull, cow, calf, sheep, goat, cattle or other livestock at a distance closer than 100 feet from any building located on adjoining property that is used for **[**10]** human habitation or within an enclosed area of less than one-half acre (21,780 square feet) per animal. All such livestock shall be kept within enclosed areas, and a fence of sufficient strength to contain such animals shall be provided to maintain the 100-foot separation required hereby. All premises upon which such livestock are kept or maintained shall be brought into compliance with the terms of this section.

Taken together, these ordinances forbid the keeping of any more than four animals at a time, and even then only certain kinds of animals are permitted. Four-legged animals such as those typically used in Santeria ceremonies (sheep and goats) are expressly disallowed to be kept--even for a brief period--or killed. [6] Such animals **[*585]** could be kept if the keeper has a sufficiently large piece of property to meet the requirements of § 10-104. [7]

Euless's ordinances make exceptions to these general rules, however, both on their face and in practice. Section 10-65 allows domesticated fowl to be killed, and also allows the use of rodent control materials. See Euless Ord. § 10-65(8). Another ordinance allows designated city employees to kill rabid or vicious animals. Euless Ord. § 10-4. In practice, the city does not enforce these ordinances against homeowners who kill rats, mice, or snakes, nor against veterinarians who put down **[**12]** large animals. [8] The enforcement of these ordinances is complaint-driven, and Euless was unaware of any violations prior to the complaints against Merced, who, for his part, was unaware that he was violating the law before he spoke with city officials in 2006.

At trial, the city called two experts to testify, the first of which, an attorney, described the governmental purposes behind the Euless ordinances. Merced objected to this testimony, but the district court allowed it on the understanding that the expert would not merely state the law. The purpose of the prohibition on keeping livestock, according to the city's expert, is to protect the public's health and safety, primarily by eliminating the unpleasant concomitants of live animal care (e.g., runoff of urine and feces, flies, smells, noise, possible disease transmission). The expert also opined on the health ramifications of post-slaughter disposal, noting that carcasses attract bugs and vermin. He further stated that keeping various kinds of animals together in tight quarters leads to interspecies conflicts, which **[**13]** could lead to injury, indicating that the humane treatment of the animals is another governmental purpose.

Euless's second expert, whose expertise was public health, testified that disposing of numerous animal remains involves contact between humans and blood, which can create a breeding ground for disease. Also, he stated that enteric diseases, such as salmonella and typhoid, can result from concentrations of animal waste, and that disposal of animal remains in bodies of water is unlawful, encourages flies to breed, and causes odor and sanitation problems. [9] Yet Euless permits the butchering and disposal of large animals, like deer, if

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[6] Turtles clearly fall within the prohibition on killing, but it is not entirely clear that they could not lawfully be kept in Euless. The city suggests in its brief that the possession of turtles is prohibited, but the portion of the record it cites as support is testimony that turtles cannot be traded interstate, but says nothing about possession **[**11]** (other than prohibiting them in daycare facilities). Euless does not cite any authority for a ban on turtle possession, and Merced suggests the sale and possession of turtles is allowed with some limitation. See *31 Tex. Admin. Code § 65.331* (permitting possession and sale of certain kinds of turtles); *21 C.F.R. § 1240.62* (forbidding the sale of turtles with a carapace length of less than four inches).

[7] Merced's property is described in the record as a single family residence of 3,500 square feet on a wedge-shaped lot with a long driveway. The record is silent on the size of the lot. Neither party suggests that it is large enough to meet the one-half acre per animal requirement nor the 100-foot setback.

[8] At oral argument, Euless stated that veterinarians are limited to non-residential areas by the city's zoning laws.

[9] The parties also prepared summaries of deposition testimony for other witnesses that were admitted as evidence. The thrust of the city's summaries is that Santeria sacrifices can be performed anywhere. One witness's summary, to which Merced objected as misconstruing the deposition, stated that animal carcasses from Merced's sacrifices found their way into a local wooded area or pond. The **[**14]** city stipulated, however--and the district court found--that it did not have any evidence that Merced unlawfully disposed of animal remains. Further, the district court credited Merced's expert, who testified that sacrifices occur where the orishas instruct, which is usually the home of the officiating priest, but could be a temple or the home of another priest.

they are dead when brought into the city. Restaurants sometimes dispose of organic waste in dumpsters, which, per the city's expert, presents the same health concerns.

The focus on disposal of the animals' remains appears to be something of a red herring. The relevant city ordinance, § 10-70 (requiring the lawful disposal of a dead animal within twenty-four hours of **[*586]** discovery), is not on the agreed list of ordinances that prevents Merced's sacrifices. Nor can the city legitimately object to the disposal of sacrificial animals when it permits the disposal of hunted animals. Further, Merced has expressed willingness to comply with the city's laws in that regard, and there is no evidence that he has unlawfully or unsanitarily disposed of anything. So long as he lawfully disposes of the dead animals within twenty-four hours, he has not violated the ordinance's plain terms. [10]

D. The District Court's Decision

The district court adopted the parties' stipulated facts, and found that the city ordinances did not burden Merced's free exercise of religion. [11] Specifically, the court stated:

> Well, you know, this is a difficult question because if [Merced] had received the communication that said he ought to [sacrifice in his house], and refrain from doing it because of the ordinances of the city, I think I would have to say I'm persuaded that the answer to that part is yes [i.e., the ordinances burden Merced's free exercise of religion], but I haven't heard that.
>
> I don't know that I can say from a preponderance of the evidence, which is the burden that I have to apply, that the enforcement of the ordinances in question against the plaintiff burdens the free exercise of his religion. I can't do that.

In short, the **[**16]** district court concluded that the ordinances did not burden Merced's religious practice because he had not testified the orishas told him to sacrifice in his house. The court later concluded that the ordinances furthered a compelling governmental interest and were the least restrictive means of advancing them. The district court did not issue a written opinion, but entered judgment in favor of Euless and awarded costs against Merced. It denied Euless's motion for attorney fees, which the city requested under *42 U.S.C. § 1988* as the prevailing party. Merced timely filed an appeal from the judgment, and Euless timely filed an appeal from the denial of attorney fees. These appeals were consolidated in this court.

II. DISCUSSION

Merced raises constitutional claims under the *First* and *Fourteenth Amendments*, claiming this case is "on all fours" with the Supreme Court's well-known decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)*. While this case shares many similarities with Lukumi, **[**17]** we begin by analyzing Merced's statutory claim under TRFRA, which, if successful, obviates the need to discuss the constitutional questions. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513, 174 L. Ed. 2d 140 (2009)* ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." (quoting *Escambia County v. McMillan, 466 U.S. 48, 51, 104 S. Ct. 1577, [*587] 80 L. Ed. 2d 36 (1984)*); *Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936)* (Brandeis, J., concurring) (***HN2*** "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *Burton v. United States, 196 U.S. 283, 295, 25 S. Ct. 243, 49 L. Ed. 482 (1905)* (***HN3*** "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").

HN4 Under TRFRA, "[w]hile we must accept the trial court's fact findings supported by the evidence, the ultimate answers determine the legal rights protected by the Act and are thus matters of law." *Barr v. City of Sinton, 295 S.W.3d 287, 2009 Tex. LEXIS 396, 2009 WL 1712798, at *8 (Tex. June 19, 2009)*. **[**18]** ***HN5*** "A district court's legal conclusions at a bench trial are

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[10] Euless cites a laundry list of Texas statutes and administrative regulations pertaining to the transportation, inspection, **[**15]** and permitting of livestock and fowl in Texas. None of these citations, however, with the possible exception of *30 Texas Administrative Code § 335.25*, directly bears on the issue of a lay person lawfully disposing of the remains of healthy animals. The other disposal provisions cited by the city pertain to diseased animals. E.g., *4 Tex. Admin. Code § 59.12*.

[11] While the district court couched these statements as findings of fact, the conclusions regarding the elements of a TRFRA claim are, as noted below, reviewed as matters of law.

reviewed de novo and its findings of fact are reviewed for clear error." Adkins v. Kaspar, 393 F.3d 559, 563 (5th Cir. 2004).

The history of state religious freedom acts is, by now, well known. Before 1990, the United States Supreme Court interpreted the Free Exercise Clause of the First Amendment to protect religious practices substantially burdened by governmental regulation unless they furthered a compelling state interest. See City of Boerne v. Flores, 521 U.S. 507, 513-14, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997); Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). In 1990, the Court in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), exempted from this balancing test neutral laws of general applicability, such that Oregon's criminal laws could proscribe a Native American's religious use of peyote without violating the First Amendment. [12]

Congress directly responded to Smith by enacting the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-2000bb-4), which restored the Sherbert balancing test by requiring any governmental regulation that substantially burdened the free exercise of religion to employ the least restrictive means of advancing a compelling governmental interest. Flores, 521 U.S. at 512-16. The Supreme Court struck RFRA down as applied to the states, however, because it exceeded Congress's enforcement power under section 5 of the Fourteenth Amendment. Id. at 532-34. Texas, among other states, likewise responded to Smith by enacting TRFRA, which provides the same protections to religious free exercise envisioned by the framers of its federal counterpart, RFRA. Barr, 2009 Tex. LEXIS 396, 2009 WL 1712798 at *5. With this understanding, we turn to the text of TRFRA.

Texas Civil Practice and Remedies Code § 110.003 provides:

> (a) ***HN6*** Subject to Subsection (b), **[**20]** a government agency may not substantially burden a person's free exercise of religion.
>
> (b) Subsection (a) does not apply if the government agency demonstrates that the application of the burden to the person:
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that interest.

The Supreme Court of Texas recently applied TRFRA for the first time in Barr v. City of Sinton. 2009 Tex. LEXIS 396, 2009 WL 1712798. **[*588]** In Barr, a local pastor set up a religious halfway house to help non-violent offenders reenter society; applicants were required to sign a statement of faith indicating belief in basic Christian doctrines, and to agree to a list of rules described as "biblical guidelines for Christian living." 2009 Tex. LEXIS 396, [WL] at *1. The city then passed a zoning ordinance effectively banning halfway houses from Sinton, and the pastor sued. 2009 Tex. LEXIS 396, [WL] at *2. ***HN7*** The court concluded that Sinton's ordinance violated TRFRA after applying a four-part test: (1) whether the government's regulations burden the plaintiff's free exercise of religion; (2) whether the burden is substantial; (3) whether the regulations further a compelling governmental interest; and (4) whether the regulations are **[**21]** the least restrictive means of furthering that interest. 2009 Tex. LEXIS 396, [WL] at *8. We apply the same approach to the application of TRFRA.

A. Free Exercise of Religion

HN8 TRFRA defines "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). As discussed in Barr, the focus of this initial prong is on plaintiff's free exercise of religion; that is, whether plaintiff's sincere religious beliefs motivate his conduct. 2009 Tex. LEXIS 396, 2009 WL 1712798 at *8-9. For **[**22]** example, if Merced wanted to keep and kill goats and sheep because he could thereby ensure the quality of the meat he consumed, such a purpose, while meritorious, is non-religious in motivation and lies beyond TRFRA's reach. Euless does not dispute that Merced's sincere religious beliefs motived his conduct; his killings were, as described by his expert, sacrifices and not mere slaughter.

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[12] A neutral law of general applicability must still pass the strict scrutiny test if more than one constitutional right is implicated. E.g., Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) **[**19]** (combining the right to free exercise of religion with parents' fundamental right to raise their children as they choose).

B. Substantial Burden

We next consider whether Euless's ordinances substantially burden Merced's sincere religious practices. ***HN9*** According to the Texas Supreme Court, a burden under TRFRA is substantial if it is "real vs. merely perceived, and significant vs. trivial." Barr, 2009 Tex. LEXIS 396, 2009 WL 1712798 at *9. [13] The inquiry is case-by-case and fact-specific. Id.; cf. Adkins, 393 F.3d at 571 (applying RLUIPA). Federal case law interpreting RFRA and RLUIPA is relevant. Barr, 2009 Tex. LEXIS 396, 2009 WL 1712798 at *5.

In Sherbert v. Verner, the case setting the standard TRFRA seeks to restore, a member of the Seventh-day Adventist Church was terminated by her employer for not working on Saturday, and applied for unemployment benefits as provided by South Carolina law. 374 U.S. at 399-400. The state denied benefits because she was able to work and refused to do so, a refusal that lacked, in the state's opinion, good cause. Id. at 400-01. The Supreme Court found this restriction burdened plaintiff's religious free exercise:

> **[*589]** Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning **[**24]** one of the precepts of her religion in order to accept work, on the other hand.

Id. at 404. Similarly, in Wisconsin v. Yoder, the Court found that the state's compulsory education law burdened Amish parents' religious practices: "The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218; see also Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-18, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981) ("[Where a state] denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

Our decisions interpreting RFRA and RLUIPA likewise provide guidance. In Diaz v. Collins, for example, we held under RFRA that a prison's grooming regulations substantially burdened a Native American's religious practice by preventing him **[**25]** from wearing long hair as required by his religion. 114 F.3d 69, 72-73 (5th Cir. 1997); accord Longoria v. Dretke, 507 F.3d 898, 903 (5th Cir. 2007) (holding that a prisoner who alleged that he was punished per the prison's rules for refusing to cut his hair, which he wore long according to his religious tradition, stated a claim under RLUIPA based on the substantial burden to his religious free exercise). We declined to find a substantial burden, however, when the prison's regulations prevented the inmate from carrying sacred items (a headband and a medicine pouch) for approximately two hours each day when he was not in his cell. Diaz, 114 F.3d at 72.

We reached a similar result in Mayfield v. Texas Department of Criminal Justice, in which prison officials severely limited the ability of practitioners of the Odinist/Asatru faith to meet as a group because a security-trained, religious volunteer was unavailable to conduct the meetings. 529 F.3d 599, 602 (5th Cir. 2008). We held, based on the summary judgment record, that a finder of fact could conclude that the prison's policy imposed a substantial burden on the plaintiff's religious free exercise. Id. at 614-15 (distinguishing Adkins **[**26]** v. Kaspar on the grounds that the plaintiff there had the ability to gather in a group at least once a month, a frequency not present in Mayfield; because the policy may not have been uniformly implemented as in Adkins; and because the Mayfield plaintiff did not have the same access to alternative means of worship as the plaintiff in Adkins).

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[13] ***HN10*** In the context of RLUIPA, this circuit uses the following definition of "substantial burden":

> [A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. . . . [T]he **[**23]** effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.

Adkins, 393 F.3d at 570.

[14] The prison also prohibited **[*590]** the plaintiff from possessing runestones (small tiles made from various materials with characters of the ancient rune alphabet carved on them), which are essential to the Odinist faith. Id. at 602. Here, too, we held that the plaintiff presented evidence from which a finder of fact could conclude that the prison's policies substantially burdened his religious exercise. Id. at 615-16; see also Sossamon v. Lone Star State of Tex., 560 F.3d 316, 333-34 (5th Cir. 2009) (finding genuine issues of material fact precluding summary judgment on the "substantial burden" question under RLUIPA when prison officials denied use of a chapel for religious services, but allowed its use for secular functions); Baranowski v. Hart, 486 F.3d 112, 125 (5th Cir. 2007) (holding that a prison's policy of not providing kosher foods "may be **[**27]** deemed to work a substantial burden upon [plaintiff's] practice of his faith").

The upshot of these opinions is that, ***HN11*** at a minimum, the government's ban of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion. While not a general rule--the inquiry is fact-specific--we note that such a conclusion accords with the Texas Supreme Court's decision in Barr: "A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely **[**28]** restricted." 2009 Tex. LEXIS 396, 2009 WL 1712798 at *12; accord Greene v. Solano County Jail, 513 F.3d 982, 988 (9th Cir. 2008) ("We have little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise."). If a government's restriction of religious conduct may be a substantial burden, then a complete ban presents a much stronger case. We turn now to the record before us. As noted above, we review the answers to ultimate questions under TRFRA as matters of law, and accordingly undertake a review of the evidence to determine whether Euless's ordinances substantially burden Merced's religious exercise.

The district court concluded that Merced's free exercise of religion was not burdened because he did not testify that the orishas told him to sacrifice at his Euless home. We are troubled by this conclusion for two reasons. First, predicating a substantial burden on the results of a religious ceremony (divining the will of the orishas) impermissibly allows judges to evaluate the intricacies of a religious practice. The judiciary is ill-suited to opine on theological matters, and should avoid doing so. See Smith, 494 U.S. at 887 (***HN12*** "[I]t **[**29]** is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." (quotation marks omitted)).

Second, the evidence does not support the district court's conclusion. Two pieces of evidence are significant to this determination. First, Merced's expert testified, and the city conceded, that animal sacrifice is essential to the Santeria religion, and that it is usually performed in the officiating priest's house. Second, Merced testified that he ceased to perform Santeria rituals outlawed by the Euless ordinances, including the initiation of a priest. He stated that he could not initiate an aspiring priest because he could not do so in his house:

> Q. Mr. Merced, since May of 2005, have you known somebody who might have wanted to be initiated?
>
> A. That is correct, sir, and they are on hold. Yes.
>
> Q. Do they want you to initiate them?
>
> A. That's correct.
>
> **[*591]** Q. And you did not initiate them?
>
> A. Correct.
>
> Q. **[**30]** And why not?
>
> A. Because I cannot do it at home.

The ordaining of new priests, essential to the continuation of the Santeria religion, is barred by the Euless ordinances. Despite Euless's protestation to the contrary, the restriction on killing the four-legged animals needed to initiate priests is absolute; the ability to kill small numbers of fowl does not alter that fact. ***HN13*** The relevant inquiry is not whether governmental

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[14] In Adkins, a member of the Yahweh Evangelical Assembly (YEA) brought a claim under RLUIPA because inmate-adherents of that faith were not allowed to meet on YEA Sabbaths and holy days. 393 F.3d at 571. As in Mayfield, the prison had a policy requiring a religious volunteer at group meetings, but an outside volunteer was able to come about once a month. Id. at 562. The YEA members also had access to religious materials (e.g., books, videos, audiotapes). Id. The Adkins court rejected plaintiff's RLUIPA claim because the policy did not impose a substantial burden on his religious practice as it was equally applied to all religions. Id. at 571.

regulations substantially burden a person's religious free exercise broadly defined, but whether the regulations substantially burden a specific religious practice. See Tex. Civ. Prac. & Rem. Code § 110.001(a)(1) (defining "free exercise of religion" as "an act or refusal to act," indicating that a particular religious activity, not the religion as a whole, is the appropriate focus of the substantial burden analysis); Greene, 513 F.3d at 987 (rejecting, under RLUIPA, the broad interpretation of "religious exercise" as the general practice of one's religion in favor of a narrower interpretation that limits the concept to a particular religious practice). Thus, Merced's ability to perform some ceremonies does not mean the city's ordinances do not burden other Santeria **[**31]** practices. See Barr, 2009 Tex. LEXIS 396, 2009 WL 1712798 at *10 (***HN14*** "[A] burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else."). Likewise, the city's ban on keeping livestock is effectively outright in residential subdivisions where lot sizes are often inadequate to meet the city's size and setback requirements. [15]

Merced cannot perform the ceremonies dictated by his religion. This is a burden, and it is substantial. It is real and significant, having forced Merced to choose between living in Euless and practicing his religion. Cf. Adkins, 393 F.3d at 570 (holding that a government's regulation is significant if it "forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs"). Indeed, **[**32]** the burden on Merced is even greater because, like the Amish parents in Yoder, he faces criminal prosecution if he engages in conduct essential to his religion. See 406 U.S. at 218. [16]

Euless also argues that a burden is not substantial if it is incidental by way of a law of general application. Such an interpretation violates TRFRA's plain language. ***HN15*** TRFRA applies to "any rule, order, decision, practice, or other exercise of governmental authority." Tex. Civ. Prac. & Rem. Code § 110.002(a) (emphasis added). This broad language does not permit this court to read an exception into the statute for generally applicable laws that incidentally burden religious conduct.

In conclusion, we hold that the Euless ordinances at issue substantially burden Merced's free exercise of religion. We move next to consider the governmental interests Euless advances in their defense.

C. Compelling **[**33]** Governmental Interest

HN16 TRFRA places on the government the burden of proving that the burden it created both advances a compelling interest and **[*592]** is the least restrictive means of doing so. Tex. Civ. Prac. & Rem. Code § 110.003(b); Barr, 2009 Tex. LEXIS 396, 2009 WL 1712798 at *14. Federal decisions interpreting the Free Exercise Clause are relevant to this inquiry. Id. § 110.001(b). These cases have described a compelling governmental interest using phrases such as "of the highest order," Lukumi, 508 U.S. at 546, and "paramount," Yoder, 406 U.S. at 213.

Barr cites with approval the United States Supreme Court's opinion in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006), equating the compelling state interest requirements of RFRA and TRFRA. 2009 Tex. LEXIS 396, 2009 WL 1712798 at *13. In O Centro, the Supreme Court interpreted ***HN17*** RFRA to require "the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'--the particular claimant whose sincere exercise of religion is being substantially burdened." 546 U.S. at 430-31. The government cannot rely upon general statements of its interests, but must tailor them to the specific issue **[**34]** at hand: "In [Sherbert and Yoder], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." Id. at 431. The courts' task of balancing the interests is difficult, but the goal is to "strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." Id. at 439.

Barr is particularly instructive. There, the City of Sinton advanced the interests of "safety, preventing nuisance, and protecting children" to justify its exclusion of Barr's religious halfway house. 2009 Tex. LEXIS 396, 2009

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[15] Assuming the five to seven goats or sheep needed to initiate a priest, Merced would need at least two and one-half to three and one-half acres of land to meet the city's requirement. While not impossible, compelling a person to acquire a house on such a lot in a suburban environment to keep a few animals for a matter of hours is a substantial burden.

[16] Euless abandoned on appeal its argument made in the district court that Merced's free exercise is not burdened by its ordinances because he could go elsewhere to practice those elements of his religion. The city failed to include this argument in its brief. See Mosley v. Dretke, 370 F.3d 467, 474 (5th Cir. 2004).

WL 1712798 at *14. The Texas Supreme Court's next sentence is revealing: "But there is no evidence to support the City's assertion with respect to 'the particular practice at issue'--Barr's ministry." Id. While not requiring the city to wait for disturbances before taking preventive measures, the court required more than general platitudes to justify the practical exclusion of a religious ministry from the city limits. Thus, for Euless to prevail, it must show by specific evidence that Merced's religious **[**35]** practices jeopardize its stated interests. This it cannot do.

The two interests Euless claims are compelling are public health and animal treatment, the emphasis being on the former. But the parties stipulated to, and the district court found, the following facts:

> 25. Defendant has no evidence that any of the Plaintiff's religious practices in his home, including the killing of goats, sheep, and turtles, has adversely affected the health of any person.
>
> 26. Defendant has no evidence that any of the Plaintiff's religious practices in his home, including the killing of goats, sheep, and turtles, has adversely affected the safety of any person.
>
> 27. Defendant has no evidence that the Plaintiff ever disposed in an illegal manner of the remains (dead animals or their parts) of any animal sacrifice in his home.
>
> 28. Defendant has no evidence that the Plaintiff ever disposed in an unsanitary manner of the remains (dead animals or their parts) of any animal sacrifice in his home.
>
> 29. Defendant has no evidence that the Plaintiff ever kept any goats, sheep, or other animals on his premises for longer than four hours.
>
> **[*593]** 30. Defendant has no evidence that the Plaintiff ever kept any goats, sheep, or other **[**36]** animals on his premises in a manner that before the killing caused any injury to any animal.
>
> 31. Defendant has no evidence that the Plaintiff ever caused any animal on his premises to suffer any cruelty or harm, other than the killing of the animal.
>
> 32. Defendant has no evidence that the Plaintiff ever kept any goats, sheep, or other animals on his premises in an unsanitary manner.
>
> 33. Defendant has no evidence that the Plaintiff ever kept any goats, sheep, or other animals on his premises in a manner that denied to any animal sufficient food and water.
>
> 34. Defendant has no evidence that any of the Plaintiff's religious practices in his home caused any animal greater suffering than is normal in the legal, commercial slaughter of animals for meat.

In addition, the city's manager admitted that killing livestock would still be illegal in Euless even if it did not present a health hazard, though he considered it "beyond speculation" that these killings presented just such a risk. But it is undisputed that Merced conducted animal sacrifices for sixteen years in Euless without incident.

In their briefs, the parties dwell at length on the health implications of carcass disposal even though, as **[**37]** noted above, the disposal ordinance is not one that prevents Merced's activities. And the city admits, based on these unchallenged findings, that Merced's method of disposal--placing the remains in dumpters or trash cans after double-bagging them [17]--is both lawful and sanitary. Even including disposal within the ken of activities relevant to Euless's stated interests, the above findings eviscerate any possibility of meeting Barr's particularity requirement. The city has absolutely no evidence that Merced's religious conduct undermined any of its interests. Euless's experts did testify that the city's interests would be harmed by activities like those Merced performs, [18] but this general testimony does not vitiate the stipulated facts respecting Merced's practice, [19] and the government bears the burden at this stage to

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[17] We reiterate that the deposition summary of an Euless witness to the contrary is irrelevant in light of the agreed facts approved by the district court.

[18] One of Euless's experts opined that if the keeping and killing of several dozen animals was "allowed all over the city, it would certainly lower the bar of public health." The only evidence of numbers, however, is that there are five Santeria priests in Euless. The danger of allowing them to sacrifice four-legged animals because everyone in Euless will do it appears, like the report of Mark Twain's death, greatly exaggerated.

[19] See Barr, 2009 Tex. LEXIS 396, 2009 WL 1712798 at *14 (noting that Sinton failed to cite a single study or experience with halfway houses to justify its ban on them). Here, Euless does not cite any studies or experiences with the Santeria religion in support of its ordinances.

prove its interests are harmed. Cf. O Centro, 546 U.S. at 428-29 (upholding under RFRA the issuance of a preliminary injunction when the evidence equally supported harm to the plaintiff's religious practice and to the government's asserted interests when the government bore the burden of proof). Again, we are not concerned with keeping, killing, and disposing of animals **[**38]** in the abstract, but with balancing the government's interests with the particular practice at issue. Merced has performed these sacrifices for sixteen years without creating **[*594]** health hazards or unduly harming any animals.

Euless argues that O Centro stands for the proposition that the government cannot refuse to exempt one kind of religious conduct when it **[**39]** already exempts a similar kind of religious conduct; that is, it cannot discriminate between similar practices. We note several exceptions that undermine Euless's public health interest regarding the consumption of uninspected meat and disposal of carcases. First, ***HN18*** Texas law exempts from inspection requirements the slaughter and consumption of meat for the personal use of the livestock's owner, his family, and his non-paying guests. Tex. Health & Safety Code § 433.006(a). Also, Euless permits hunters to bring dead animals into the city, butcher and consume them, and dispose of the unwanted portions. Such exceptions weaken Euless's asserted interests. See Lukumi, 508 U.S. at 546-47 (***HN19*** "Where government restricts only conduct protected by the *First Amendment* and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."). [20]

The city denies that these and other exceptions fall into the same category as allowing a citizen to briefly keep and kill dozens of animals at one time. But the difference is one of degree and not one of kind. The keeping, slaughter, and disposal of a small number of fowl on a regular basis, which Euless permits, over time has the same corrosive effect on the city's interests as infrequent sacrifices of a larger number of animals. [21]

The city's experts did not explain any public health rationale behind the differing treatments afforded different animals. The ordinances allow the killing of several large fowl, like turkeys, but forbid the killing of even a single goat. Also, a hunter could presumably bring home as many deer as he could legally shoot and butcher them without running afoul of any ordinance.

The balancing of interests is difficult. To carry its burden of proof, a government's asserted **[**41]** interest must be particularly directed to the conduct at issue. In answering this legal question, we are persuaded that, on this record, the scales tip in favor of Merced. Thus, we hold that Euless has failed to assert a compelling governmental interest in support of its ordinances that burden Merced's religious conduct.

D. Least Restrictive Means

Even if Euless marshaled a compelling governmental interest in its favor, it must also prove that its chosen regulatory method is the least restrictive means of furthering that interest. Euless does not expend much effort on that score, arguing that it does not totally ban the killing of all animals, and thus implements a less restrictive alternative. But it does entirely ban the killing of goats, sheep, and turtles, which is necessary to initiate a Santeria priest. And TRFRA requires the least restrictive means, not merely less than a complete ban. See Tex. Civ. Prac. & Rem. Code § 110.003(b)(2); cf. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) **[*595]** ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.").

Merced proposes no fewer than three less restrictive alternatives **[**42]** to Euless's current scheme. For purposes of illustration, one will do. Euless could create a permit system whereby Santeria adherents comply with conditions designed to safeguard the city's interests (e.g., reasonable limitations on the time the animals can be kept before the killings) and in return are allowed to sacrifice animals as dictated by their religion. Euless does not rebut any of Merced's alternatives; it does not even try. Thus, as an alternative to our holding that Euless failed to identify a compelling interest, we hold that the Euless ordinances that burden Merced's religious free exercise are not the least restrictive means of advancing the city's interests.

E. Attorney Fees

Euless moved in the district court for an award under 42

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[20] Merced also points to various exceptions to Euless's killing ban, including the killing of fowl and vermin, which likewise weaken the city's interests. Even though the city's manager admitted that killing of four-legged animals is **[**40]** not an evil in itself, see 7 U.S.C. § 1902(b) (describing the slaughter technique used by Merced, severing the carotid arteries with a sharp instrument, as humane), it is still prohibited.

[21] Merced testified that he has typically performed sacrifices of four-legged animals about once a year.

U.S.C. § 1988 of its attorney fees incurred in defending this action. ***HN20*** Section 1988 allows district courts, in their discretion, to award fees to the prevailing party for actions brought under, among others, 42 U.S.C. § 1983, RLUIPA, and RFRA. § 1988(b). ***HN21*** While prevailing plaintiff's are usually entitled to such fees, "prevailing defendants cannot recover § 1988 fees without demonstrating that the plaintiff's underlying claim was frivolous, unreasonable **[**43]** or groundless." Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036, 1053 (5th Cir. 1998). ***HN22*** We review the district court's decision for abuse of discretion. Id. at 1052.

As is plain from our resolution of the merits, Merced's case is not only non-frivolous, it is meritorious and prevailing. Because Euless is not a prevailing party on the TRFRA claim, it is not entitled to attorney fees under § 1988. [22] The district court granted Euless's motion for summary judgment regarding Merced's RLUIPA claim, but that fact alone does not mean it was frivolous, id. at 1053, and Euless offers no additional reasons to deem it so. Thus, we hold the district court did not abuse its discretion in denying Euless's request. Merced did not request attorney fees as allowed by TRFRA, Tex. Civ. Prac. & Rem. Code § 110.005(a)(4), or § 1988 in the district court nor has he requested them on appeal. Accordingly, we do not award any.

III. CONCLUSION

Because we conclude that Merced is entitled under TRFRA to an injunction preventing Euless from enforcing its ordinances that burden his religious practice of sacrificing **[**44]** animals, see Tex. Civ. Prac. & Rem. Code § 110.005(a)(2), we do not reach his claims under the First and Fourteenth Amendments. For the foregoing reasons, we REVERSE the district court's judgment respecting Merced's TRFRA claim, we AFFIRM the district court's denial of attorney fees, and REMAND for further proceedings consistent with this opinion.

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[22] Because we do not reach Merced's constitutional claims, we do not discuss attorney fees in relation to them.

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