No. 06-0074

In the Supreme Court of Texas

PASTOR RICK BARR AND
PHILEMON HOMES, INC.,
Petitioners,

vs.

THE CITY OF SINTON,
Respondent.

On Petition for Review from the Court of Appeals
for the Thirteenth District of Texas at Corpus Christi

BRIEF AMICI CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS, SENATOR DAVID SIBLEY, AND REPRESENTATIVE SCOTT HOCHBERG SUPPORTING PETITIONERS

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STATEMENT OF THE CASE

Nature of the Case:	This is a religious freedom case involving the proper interpretation of the Texas Religious Freedom Restoration Act ("Texas RFRA")
Trial Court (TC):	Hon. Janna K. Whatley, 343rd Dist. Ct. of San Patricia Cty.
TC Disposition:	Final Judgment in favor of Defendant-Respondent
Parties on Appeal:	Plaintiffs-Petitioners: Pastor Rick Barr and Philemon Homes, Inc. Defendant-Respondent: The City of Sinton *Amici Curiae*: Prison Fellowship, the American Center for Law and Justice, the American Civil Liberties Union Foundation of Texas, Senator David Sibley, and Representative Scott Hochberg
Court of Appeals (CA):	Corpus Christi-Edinburg Court of Appeals, Chief Justice Valdez, R (author), joined by Justices Hinojosa and Rodriguez
CA Disposition:	Affirmed the judgment for Defendant-Respondent
CA Opinion:	Memorandum Opinion, November 23, 2005

STATEMENT OF JURISDICTION

Amici adopt by reference the Statement of Jurisdiction in Petitioner Barr's Brief on the Merits ("Barr's Brief").

ISSUES PRESENTED

1. Does Section 110.010 of the Texas RFRA reinstate the strict scrutiny applicable to zoning ordinances prior to *Employment Division v. Smith*, 494 U.S. 872 (1990)?

2. Does the City's ordinance substantially burden Pastor Barr's free exercise of religion such that strict scrutiny is applicable under the Texas RFRA?

AMICI STATEMENT OF INTEREST

Amicus, the American Center for Law and Justice ("ACLJ"), is a public interest law firm with extensive experience in the area of the First Amendment's freedom of speech and religion clauses. ACLJ attorneys have argued and participated as counsel of record in numerous cases involving constitutional issues before the Supreme Court of the United States and other federal and state courts. *See, e.g.*, *Scheidler v. NOW*, 126 S. Ct. 1264 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

The American Civil Liberties Union ("ACLU") is a national non-profit, public-interest organization that exists to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. Since its founding in 1920, the ACLU has vigorously defended the Bill of Rights, including the guarantee of religious freedom embodied in the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution. The ACLU has over 16,000 members in the State of Texas.

Amicus, the American Civil Liberties Union Foundation of Texas ("ACLU Foundation of Texas"), was founded in 1938 and is the eighth largest affiliate of the national organization. The ACLU of Texas is actively involved in defending religious

freedom and other civil liberties before Texas courts, at the Texas legislature, and in local communities throughout Texas.

Amicus, David Sibley, served in the Texas Senate from 1991 to 2002 and was the Senate sponsor of the Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code Ann. § 110.001 et seq. ("Texas RFRA").

Amicus, Scott Hochberg, is serving his seventh term as State Representative to the Texas Legislature, District 137, and was the House sponsor of the Texas RFRA.

Amici are deeply concerned that the Court of Appeals' decision in this case improperly narrowed the scope of the Texas RFRA's broad protection of religious free exercise. No counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Copies of this brief have been served on all parties.

STATEMENT OF THE FACTS

Amici adopt by reference the Statement of the Facts in Petitioner Barr's Brief.

SUMMARY OF THE ARGUMENT

This case presents this Court with the opportunity to ensure that the Texas RFRA is uniformly applied by the lower courts in accordance with the legislature's clear purpose of providing expansive protection for religiously-motivated conduct. Like the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ("federal RFRA"), other state RFRA's, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. ("RLUIPA"), the Texas RFRA was designed to prevent

state and local government officials from substantially burdening religious practices without a compelling justification for doing so. These statutes are modeled after the strict scrutiny analysis applied in *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and other Supreme Court free exercise cases decided before *Employment Division v. Smith*, 494 U.S. 872 (1990), changed the standard.

The City's argument that Section 110.010 of the Texas RFRA creates a "zoning exception" to the statute's strict scrutiny test is unfounded. Section 110.010 serves to clarify that the statute does not give religious organizations an exemption from complying with all municipal zoning, traffic management, or historic preservation ordinances. The Texas RFRA's legislative history shows that the provision was added as an amendment designed to reaffirm that the strict scrutiny required by the statute does not automatically invalidate any zoning or other law remotely affecting religious practice. An examination of pre-*Smith* federal free exercise cases involving zoning ordinances confirms that strict scrutiny is applicable to zoning cases.

Additionally, the Court of Appeals erred in holding that the City's ordinance did not substantially burden Pastor Barr's free exercise of religion. 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. The statute does *not* limit its protection to persons facing criminal penalties or the denial of financial benefits if they refuse to take actions that would violate their

religious beliefs. The Texas legislature did not intend for the process of showing that one's religious free exercise has been substantially burdened to be a Herculean task.

In this case, the City's ordinance substantially burdened Pastor Barr's free exercise of religion by forcing him to either permanently shut down Philemon Homes or relocate beyond city limits. The City's argument that no substantial burden has been imposed because Pastor Barr could operate Philemon Homes in another locality is foreclosed by Supreme Court and Fifth Circuit precedent. Moreover, the Texas RFRA imposes no requirement upon Pastor Barr to demonstrate that housing the residents of Philemon Homes in the homes of individuals would not further his religious beliefs to the same extent as operating Philemon Homes. The statute protects *all* religiously motivated acts regardless of whether there are other means by which a person may carry out the tenets of his faith. Since the City's ordinance has substantially burdened Pastor Barr's free exercise, the City now bears the burden of proving that the ordinance is the least restrictive means of furthering a compelling governmental interest.

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER ADEQUATELY THE CLEAR PURPOSE OF THE TEXAS RFRA TO PROVIDE BROAD, SWEEPING PROTECTION FOR THE FREE EXERCISE OF RELIGION.

The plain language and legislative history of the Texas RFRA demonstrate that the Texas legislature intended the statute to provide broad protection for the free exercise of religion by limiting the authority of state and local government officials to apply laws and ordinances in a way that substantially burdens religiously-motivated conduct. The United

States Court of Appeals for the Fifth Circuit recently summarized the events that prompted the enactment of the federal RFRA, state RFRA's, and RLUIPA:

> The RLUIPA was adopted by Congress in response to the Supreme Court's decisions in [*Smith*] and *City of Boerne* [*v. Flores*, 521 U.S. 507 (1997)]. Prior to *Smith*, the Supreme Court had employed a "compelling state interest" standard for testing the constitutional validity of laws of general applicability that affect religious practices. Government actions that substantially burdened a religious practice had to be justified by a compelling governmental interest. In *Smith*, the Court changed course when it ruled that laws of general applicability that only incidentally burden religious conduct do not offend the First Amendment. Congress sought to reinstate the pre-*Smith* standard by enacting the [RFRA]. In *City of Boerne*, however, the Supreme Court invalidated the RFRA as it applied to states and localities . . . . Congress responded to *City of Boerne* by enacting the RLUIPA . . . [which] is largely a reprisal of the provisions of [RFRA]. . . .

Adkins v. Kaspar, 393 F.3d 559, 566-67 (5th Cir. 2004) (citations omitted). Like Congress, the Texas legislature disagreed with the "changed course" the Supreme Court had adopted in *Smith* and enacted the Texas RFRA to provide expansive protection of religious free exercise. *See id.* The Texas RFRA, "like RLUIPA, was enacted to provide greater protection for religious practices than the federal constitution as currently interpreted." *Balawajder v. Tex. Dep't of Criminal Justice Institutional Div.*, No. 01-04-00820-CV, 2006 Tex. App. LEXIS 6906, at *8 n.4 (Ct. App. July 31, 2006).

By restoring the pre-*Smith* strict scrutiny standard, the Texas legislature essentially codified the approach of Justice O'Connor's concurring opinion in *Smith*. As Justice O'Connor (joined by three other Justices) explained, the *Smith* Court's new approach "dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Id.* at 891 (O'Connor, J., concurring). She also noted that the majority's review of

previous free exercise cases erroneously relied upon the *outcomes* of those cases while overlooking the fact that the Court had either applied the compelling interest test or distinguished the need to apply it to that particular set of facts.[1]

The Texas RFRA was clearly enacted "to provide the rights and protections that the federal [RFRA] would have afforded." *Barr v. City of Sinton*, No. 13-03-727-CV, 2005 Tex. App. LEXIS 9847, at *16 n.9 (Ct. App. Nov. 23, 2005). Like the federal RFRA, the Texas RFRA was designed "to return religious freedom law to its perceived state prior to April 17, 1990, when *Smith* was decided." *Id.* The City, however, relies upon the novel argument that *Smith* worked absolutely no change in federal free exercise jurisprudence. Respondent City of Sinton's Brief on the Merits ("City's Brief") at 42 (arguing that *Smith* "was not making law for the first time, but rather interpreting the federal case law as it existed before April of 1990"). While the *Smith* majority claimed simply to be interpreting prior cases, given the national uproar over the decision and the flurry of statutes enacted in direct response to it, the *Smith* majority's claim and the City's argument are untenable.[2] As the Supreme Court recently stated in a unanimous opinion:

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[1] For example, in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), the Court declined to apply the compelling interest test because "the First Amendment does not 'require the Government itself to behave in ways that the individual believes will further his or her spiritual development . . . .'" *Smith*, 494 U.S. at 900 (O'Connor, J., concurring). Moreover, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court simply recognized that military and prison regulations that burden religious exercise should be analyzed differently than laws applicable to the general public. *Id.* at 900-01.

[2] *See, e.g.*, *City of Boerne*, 521 U.S. at 512-13 ("[In *Smith*], we declined to apply the balancing test set forth in *Sherbert v. Verner* . . . ."); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)(4) ("[In *Smith*], the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."); *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 64 (1992) (statement of Nadine Strossen, President, American Civil Liberties Union) ("[*Smith*] has deserved and received an unprecedented degree of criticism for departing

> In *Smith*, we rejected a challenge to an Oregon statute that denied unemployment benefits to drug users, including Native Americans engaged in the sacramental use of peyote. In so doing, we rejected the interpretation of the Free Exercise Clause announced in *Sherbert v. Verner* . . . .[3]

The Texas RFRA *restores* the compelling state interest standard of *Sherbert* and other pre-*Smith* cases that the Court "rejected" in *Smith*. *See id.* The statute provides:

> (a) Subject to Subsection (b), 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.

Tex. Civ. Prac. & Rem. Code Ann. § 110.003. This is precisely the *Sherbert* standard; "[u]nder the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. Many pre-*Smith* Supreme Court cases stated that this standard was the norm for free exercise cases.[4] For this reason, the Texas RFRA includes a provision that states, "[i]n determining whether an interest is a compelling governmental interest under Section

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so dramatically from traditional constitutional principles"); Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 Mich. L. Rev. 1472 (1997) ("Under [*Smith*'s] new standard of review, the First Amendment no longer protects religious practices that conflict with a 'valid and neutral law of general applicability.' The *Smith* decision sparked a remarkable public outcry. An ecumenical coalition of religious and secular organizations voiced immediate opposition to the Court's new approach").

[3] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1216 (2006) (citations omitted); *see also Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 979 n.1 (1994) (Thomas, J., dissenting from denial of certiorari) (noting that "RFRA was Congress's response to our decision in [*Smith*] which supplanted the compelling interest test in Free Exercise Clause jurisprudence").

[4] *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-85 (1990); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 835 (1989); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18-19 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141-42 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716-19 (1981); *Yoder*, 406 U.S. at 215, 220-21; *Gillette v. United States*, 401 U.S. 437, 461-62 (1971); *Sherbert*, 374 U.S. at 402-03.

110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution." Tex. Civ. Prac. & Rem. Code Ann. § 110.001(b).

Other provisions of the Texas RFRA further indicate that the legislature intended the statute to provide wide-ranging protection for the free exercise of religion. For example, the statute states that "[t]he protection of religious freedom [it] afford[s] . . . *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) (emphasis added).[5] Also, the statute's broad definition of "government agency" ensures that virtually all state and local government entities will be subject to the statute's requirements. Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(2). Moreover, the statute "applies to *any ordinance* . . . or other exercise of governmental authority" as well as to any "act of a government agency . . . granting or refusing to grant a government benefit to an individual" unless otherwise exempted by law. Tex. Civ. Prac. & Rem. Code Ann. § 110.002 (emphasis added). Given these provisions, it is difficult to envision a statute providing broader protection for the free exercise of religion than the Texas RFRA.

The Texas RFRA's legislative history confirms that it should be interpreted in a manner that provides expansive protection for religiously-motivated conduct. The strict scrutiny standard was discussed at length between the introduction and the passage of the statute. *See, e.g.*, Respondent City of Sinton's Motion to Take Judicial Notice ("MTJN"),

[5] As the *City of Boerne* Court noted, "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise." *City of Boerne*, 521 U.S. at 534.

at Appx. 24, pp. 1-2, 5, 8-9, 13. Senator Sibley explained that "freedom of religion is a fundamental civil right, and laws or regulations that impose burdens on that right should be subject to strict scrutiny." *Id.* at Appx. 24, p. 2. Any suggestion that strict scrutiny may not apply under the statute was squarely rejected. *Id.* at Appx. 24, p. 8-10, Appx. 25a, pp. 3, 6, 8, Appx. 26a, pp. 6-7. Since the statute sets forth the compelling governmental interest-least restrictive means test, Tex. Civ. Prac. & Rem. Code Ann. § 110.003(b), an additional provision noting that this test is found in the *Sherbert* and *Yoder* cases was rejected as unnecessary. *See* MTJN Appx. at 24, p. 13, Appx. 26b, p. 23.

II. SECTION 110.010 OF THE TEXAS RFRA CLARIFIES THE STATUTE'S SCOPE AND DOES *NOT* CREATE A "ZONING EXCEPTION" LEAVING LOCALITIES FREE TO SUBSTANTIALLY BURDEN RELIGIOUS FREE EXERCISE THROUGH ZONING ORDINANCES.

Pastor Barr correctly notes that Section 110.010[6] of the Texas RFRA was "a clarifying amendment welcomed by the original sponsors of Texas RFRA in order to alleviate misinformed fears raised by citizen witnesses at a Senate committee hearing on the legislation." Petitioner Barr's Reply Brief ("Barr's Reply Brief") at 3. There is no basis for the City's claim that this Section was "an amendment to exempt zoning and land use regulation from the general application of the Texas RFRA." *See* City's Brief at 15. Like other laws, zoning ordinances that substantially burdened the free exercise of

[6] Tex. Civ. Prac. & Rem. Code Ann. § 110.010 provides:

> 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. This chapter does not affect the authority of a municipality to adopt or apply laws and regulations as that authority has been interpreted by any court in cases that do not involve the free exercise of religion.

religion before *Smith* were subject to strict scrutiny.[7] Section 110.010 merely reassures municipalities that zoning ordinances will not be invalidated under the Texas RFRA unless they would have also been invalidated under the pre-*Smith* strict scrutiny standard applied by the federal courts.

A. The Texas RFRA Restores the Strict Scrutiny Analysis That Was Applied to Zoning Ordinances Before the *Smith* Decision.

There was no "historically recognized specific exception" from the compelling state interest test for zoning laws before *Smith*. *See* City's Brief at 13. To the contrary, federal free exercise cases involving zoning ordinances before *Smith* discussed and applied relevant Supreme Court cases to the facts at hand. By stating that municipalities have "no less authority" to apply zoning laws than they had before *Smith*, Section 110.010 simply reaffirmed that strict scrutiny is applicable to zoning ordinances.

A review of pre-*Smith* federal cases involving free exercise challenges to zoning ordinances shows that strict scrutiny was discussed and applied. For example, in *Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983), the Sixth Circuit began its analysis of a zoning ordinance by citing *Sherbert* and stating, "[i]f the ordinance . . . infringe[s] the Congregation's first amendment right, the City must justify the ordinance *by a compelling governmental interest*." *Id.* at 305

[7] *See, e.g., Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 825 (10th Cir. 1988) (holding that *Sherbert* and other cases required the court to "consider whether an alternative means exists whereby the County may accomplish its purpose by means which do not impose an indirect burden" and rejecting the free exercise claim because the zoning scheme allowed churches as a "by right" use in over half of the zoning districts and was the least restrictive means of achieving the county's interests); *Grosz v. City of Miami Beach*, 721 F.2d 729, 737 (11th Cir. 1983) (stating that zoning laws that burden free exercise must be the least restrictive means to further a "compelling state interest" and rejecting the free exercise claim because the religious activity at issue was permitted in all zones within the city except one).

(emphasis added). The court held that the ordinance did not substantially burden the church's religious practices because the church was able to buy an existing building virtually anywhere within the city. *Id.* Unlike in this case, the ordinance in *Lakewood* "[did] not exclude the exercise of a first amendment right . . . from the City." *See id.*

Similarly, in *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9th Cir. 1990), a church's conditional use permit application to hold worship services in an area zoned for single-family residences was denied. *Id.* at 1222-23. The court expressly rejected the idea that there is a "zoning exception" for free exercise cases, noting that "[w]e have articulated 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*." *Id.* at 1223-24 (emphasis added). The court then articulated a three-factor test applicable to zoning and other free exercise cases that considered the burden the law imposed upon religious exercise, whether a "compelling state interest" justified the burden, and whether an exemption would hamper the objectives furthered by the statute. *Id.* at 1224. The court upheld the ordinance because there were ample locations within the city where the desired activity could take place and the government interests supporting the city's decision were "strong." *Id.* at 1224-25.

Finally, in *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988), an Islamic Center was denied a zoning exception to use property near a public university for religious services. The district court held that the denial of the exception did not abridge the group's free exercise of religion because group members could hold services at more distant locations within the city or in nearby areas outside

city limits. *Id.* at 298. The Fifth Circuit rejected this argument, holding that "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." *Id.* at 299. The court noted that "[o]nce it has been established that an ordinance burdens religious exercise . . . the government must offer evidence of an overriding interest to justify the application of the ordinance." *Id.* The court added that "[w]hen . . . a zoning plan infringes upon first amendment rights, we scrutinize its validity more closely . . . . [I]t must be narrowly drawn in furtherance of a substantial government interest." *Id.* The court struck down the ordinance because the city had "failed to show the importance of its purpose or that it could not have been accomplished by means less burdensome to the Muslim faithful." *Id.* at 303. The court also found it significant that other religious groups that had applied for an exception had received one. *Id.* at 294, 303.

In sum, the federal circuits that considered free exercise challenges to zoning ordinances before *Smith* treated them the same as any other free exercise case. The courts reviewed *Sherbert* and other free exercise cases, considered the burden imposed by the zoning policies, and analyzed whether the government could achieve its objectives by less restrictive means. Rather than holding that "zoning regulations do not impose a substantial burden upon religion," City's Brief at 5, these cases simply held that a zoning ordinance that allows a particular religious activity to take place at many locations within city limits will not typically impose a substantial burden. Thus, the Texas RFRA's statement that municipalities are subject to the same restrictions applicable to them before *Smith* with regard to zoning reaffirms that strict scrutiny applies.

B. The Plain Language and Legislative History of the Texas RFRA Confirm that There is No "Zoning Exception" From Strict Scrutiny.

The City's argument that the Texas RFRA subjects virtually all state and local governmental acts that incidentally place a substantial burden upon religiously-motivated conduct to strict scrutiny while leaving zoning officials free to abridge religious free exercise borders on the absurd. Section 110.010 is not an affirmative grant of authority to zoning officials to take actions more restrictive of religious liberty than all other Texas government actors. Instead, this provision emphasizes that the standard applicable to zoning ordinances under the statute is the pre-*Smith* strict scrutiny test.

First, it makes no sense that the Texas legislature would *want* to exempt zoning officials from having to be more accommodating of religious practices while, at the same time, imposing a higher requirement on all other state and local government actors. Zoning, nuisance, and historic preservation laws directly affect religious organizations more than most other kinds of laws; consequently, the Texas RFRA's promise of restored religious liberty would become largely meaningless for many Texans if localities could substantially burden their religious free exercise through the application of these laws without having to undergo strict scrutiny.

More importantly, if for some reason the Texas legislature had *actually* wanted to exempt zoning ordinances from the provisions of the Texas RFRA, Section 110.010 would have been a peculiar, ineffective way of doing so. The most logical way to exclude zoning ordinances from the Texas RFRA's coverage would have been to revise Section 110.002 to state that the statute "applies to any ordinance, rule, order, decision, practice,

or other exercise of governmental authority, *except for laws and regulations concerning zoning, land use planning, traffic management, urban nuisance, or historic preservation*." Instead, the provision makes the blanket statement that the statute "*applies to any ordinance*, rule, order, decision, practice, or other exercise of governmental authority." *See* Tex. Civ. Prac. & Rem. Code Ann. § 110.002(a) (emphasis added). The legislature also could have amended the definition of "government agency" to exclude municipalities with regard to their zoning, land use planning, and historic preservation functions. *See* Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(2). The definition as it currently exists, however, includes a "municipality" and "any agency of . . . a municipality" without any limitation for zoning. *Id.*

Section 111.010 creates no "zoning exception." By adopting a provision stating that municipalities have "no less authority" than they had "under the law as interpreted by the federal courts before April 17, 1990," the legislature reaffirmed that zoning ordinances would be subject to strict scrutiny. Moreover, the City's interpretation of the first sentence of Section 110.010 makes the second sentence both illogical and irrelevant. The statement that "[t]his chapter *does not* affect the authority of a municipality to adopt or apply [zoning] laws and regulations as that authority has been interpreted by any court *in cases that do not involve the free exercise of religion*" only makes sense if the statute *does* affect the authority of municipalities to apply zoning ordinances in cases that *do* involve the free exercise of religion. *See* Tex. Civ. Prac. & Rem. Code Ann. § 110.010 (emphasis added).

The legislative history of Section 110.010 confirms that the provision was added to address "the misinformed fear that . . . Texas RFRA would subject zoning decisions to *automatic invalidation*, rather than compelling interest review." Barr's Reply Brief at 11. A member of a neighborhood association wanted the bill to be amended to clarify that the Texas RFRA "clearly does not exempt religious organizations from [land use and zoning] laws" because "in reading the bill from a layman's perspective, it appears that . . . a place of religious assembly *might be exempt from local zoning*." MTJN at Appx. 24, p. 30 (emphasis added). In response, "Senator Sibley agreed to adopt a clarifying amendment to make explicit that zoning laws would simply be put to the same compelling interest standards that had existed prior to *Smith*." Barr's Reply Brief at 11. As Senator Sibley explained, "[w]hatever land use planning, whatever zoning, whatever historical preservation powers or authorities that municipalities had in [1990], they will have no less under this bill." MTJN, at Appx. 25a, p. 3. Just as houses of worship are not "exempt from local zoning" under the Texas RFRA, localities are not exempt from the Texas RFRA's strict scrutiny standard in implementing their zoning schemes.

Rather than seeking to exempt localities' zoning ordinances from strict scrutiny, the Texas RFRA was designed, *inter alia*, to deal with "abusive zoning" cases in which a municipality had burdened religiously-motivated conduct without sufficient justification. *See* MTJN at Appx. 26b, pp. 26-27; *Islamic Ctr.*, 840 F.2d at 302-04. The Texas legislature was well aware that religious groups—especially those that are "marginal," have unorthodox practices, or are not "connected politically"—need additional protection from zoning policies that substantially burden their religious free exercise. MTJN at

Appx. 26b, pp. 26-27. Part of the purpose of the Texas RFRA was to give "religion a chance against absolute government power to control zoning." *Id.* at Appx. 26c, p. 25.

The City's reasoning highlights the dilemma faced by legislatures when they are presented with clarifying amendments seeking to correct erroneous interpretations of a bill. On the one hand, a decision to *remove or reject* language intended to clarify legislative intent may be improperly viewed as evidence that the legislature signaled its *disagreement with* that provision's content. *See* City's Brief at 12-16 (arguing that the removal of a "purpose" provision shows that the legislature did not intend for the strict scrutiny illustrated by *Sherbert* and *Yoder* to be applied). On the other hand, a decision to *include* a clarifying amendment may be seized upon as purported evidence that the legislature intended to *substantively change* the statute's meaning. *See id.* (arguing that the inclusion of Section 110.010 serves to exempt zoning ordinances from strict scrutiny). Professor Douglas Laycock analyzed this very issue in discussing the inclusion of Section 110.010:

> This chapter re-establishes the law for this state as it existed before [*Smith*]. . . . I think *that's duplicative but otherwise harmless*. The whole point of this bill is to make it the way it was before 1990. . . . *I think you'll have creative lawyers trying to say, it must have meant something more by that*. Surely it's not just redundant, and they'll fight over that. But, *as the courts [sort] through it and decide*, yeah, it really was, belt and suspenders and *it really is redundant*, then there's no harm done.

MTJN at Appx. 26b, p. 23 (emphasis added). Despite the efforts of "creative lawyers," this Court should rely on the actual language of the statute and hold that Section 110.010 serves to reaffirm that zoning ordinances are subject to the pre-*Smith* compelling governmental interest-least restrictive means test.

III. THE COURT OF APPEALS ERRED IN FAILING TO APPLY STRICT SCRUTINY BECAUSE THE CITY'S ORDINANCE SUBSTANTIALLY BURDENED PASTOR BARR'S FREE EXERCISE OF RELIGION.

The Court of Appeals erred in holding that "Pastor Barr's religious rights were not substantially burdened by the City ordinance." *Barr*, 2005 Tex. App. LEXIS 9847, at *15. The court neither reviewed federal case law on the definition of "substantial burden" nor articulated its own standard; instead, the court stated that "zoning ordinances do not substantially burden . . . auxiliary religious operations." *Id.* at *14. Under any definition of "substantial burden," however, a zoning ordinance that actually or effectively excludes a religious activity from the entire locality—as the City's ordinance does here—certainly imposes a substantial burden upon the free exercise of religion. This case presents this Court with the opportunity to ensure that the term "substantial burden" is not defined in a way that would eliminate virtually all Texas RFRA claims and preclude the strict scrutiny required by the statute.

A. The Court of Appeals Failed to Articulate and Apply the Proper Standard for Determining Whether One's Free Exercise of Religion Has Been "Substantially Burdened."

The Texas RFRA's "substantial burden" provision was not intended to be a nearly insurmountable obstacle denying RFRA plaintiffs in most cases the increased protections that the statute provides. Rather, like the Arizona and Idaho legislatures, the Texas legislature included the term "substantially" in its RFRA "solely to ensure that [the statute] is not triggered by trivial, technical or de minimus infractions." Ariz. Rev. Stat. Ann. § 41-1493.01(E); Idaho Code Ann. § 73-402(5). An examination of cases interpreting what constitutes a "substantial burden" upon the free exercise of religion

reveals that a person need not be thrown in jail, denied financial benefits, or excluded from town in order to show that his religious practices have been substantially burdened.[8]

The broad "religious motivation test" for substantial burden found in various opinions of the federal Fifth, Seventh, and Tenth Circuits is far more consistent with the language and purpose of the Texas RFRA than the narrow reading propounded by the City.[9] As the United States Court of Appeals for the Fifth Circuit recently explained, "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 violates his religious beliefs." *Adkins*, 393 F.3d at 570 (emphasis added).[10] Since the Texas RFRA defines the "free exercise of religion" as "[a]n act or refusal to act that is substantially motivated by sincere religious belief," the appropriate consideration under *Adkins* is whether a statute or ordinance "truly pressures" the religious adherent to "significantly modify" an act that is "substantially motivated by sincere religious belief." *See id.*; Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1). This approach is consistent with the intent of the Texas legislature and allows courts to avoid having to "presume to

[8] The Texas RFRA makes it abundantly clear that the denial of generally available government benefits is merely *one of many ways* that a RFRA plaintiff may show that his religious free exercise has been substantially burdened. While Section 110.002(b) provides that the statute "applies to an act of a government agency . . . granting or refusing to grant a government benefit to an individual," Section 110.002(a) states that the statute also "applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority."

[9] For a comprehensive review of the "compulsion test," the "centrality test," and the "religious motivation" test for substantial burden, see *Coronel v. Paul*, 316 F. Supp. 2d 868, 876 (D. Ariz. 2004) (citation omitted). The *Coronel* court explained that the compulsion and centrality tests improperly entangle courts in questions of church doctrine and have the effect of harming members of the many religious faiths that do not have "central" tenets. *See id.* at 876-78.

[10] Several Texas federal and state courts have found the *Adkins* court's discussion of substantial burden instructive. *Massingill v. Livingston*, No. 1:05-CV-785, 2006 U.S. Dist. LEXIS 68249, at *16 (E.D. Tex. Aug. 9, 2006); *Thunderhorse v. Pierce*, 418 F. Supp. 2d 875, 888 (E.D. Tex. 2006); *Odneal v. Dretke*, 435 F. Supp. 2d 608, 620-21 (S.D. Tex. 2006); *Balawajder*, 2006 Tex. App. LEXIS 6906, at *17 n.8.

determine the place of a particular belief in a religion." *Adkins*, 393 F.3d at 570. There is no question that the City's ordinance has "truly pressure[d]" Pastor Barr to "significantly modify" his operation of Philemon Homes by forcing him to relocate beyond city limits.

Like the Fifth Circuit in *Adkins*, the United States Court of Appeals for the Tenth Circuit noted in the prison context that government regulations substantially burden a person's free exercise of religion when they "meaningfully curtail a [person's] ability to express adherence to his or her faith." *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995). Similarly, Judge Posner of the United States Court of Appeals for the Seventh Circuit explained that the proper test for "substantial burden" is "whether the adherents of a religion are being prevented, without justification based on a compelling interest, from engaging in *religiously motivated conduct or expression*, whether or not the burdened practice is *mandatory* for adherents." *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997) (emphasis added). Judge Posner added that this broad approach "is more faithful both to the statutory language [of RFRA] and to the approach that the courts took before *Smith*, in cases like *Sherbert* . . . and *Thomas v. Review Board*—which is the approach that Congress wanted them to take under [RFRA]." 91 F.3d at 1178-79 (citations omitted).

The "religious motivation" test is based on the "undesirability of making judges arbiters of religious law." *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). A substantial burden test requiring religious adherents to prove that the law has abridged conduct related to a "central tenet" of their faith would force judges to decide "issue[s] of religious law[,] . . . [to] determine the

authoritative sources of law for the religion in question and to interpret the commands emanating from those sources." *Id.* The religious motivation test allows courts to avoid difficult questions of ecclesiastical law and simply consider whether the regulation at issue restricts practices that are "important to the votaries of the religion." *Id*. at 1180.

The City's claim that "zoning regulations do not impose a substantial burden upon religion" suggests that only government actions that impose a criminal punishment or withhold a financial benefit can substantially burden religious free exercise. *See* City's Brief at 5. As the Fifth Circuit noted in *Adkins*, however, free exercise cases "require[] a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise." *Adkins*, 393 F.3d at 571. The *Adkins* court made "no effort to craft a bright-line rule" to govern all land use cases because the nature of the substantial burden inquiry made case-specific analysis "unavoidable." *Id.* It is beyond debate that zoning ordinances can, and sometimes do, substantially burden religious practices; it was precisely for this reason that Congress passed RLUIPA shortly after the Texas RFRA was enacted.[11]

The question of whether a law has substantially burdened a person's religious free exercise must be judged *from the perspective of the religious adherent*, not from the vantage point of the government responsible for imposing the burden. A religious

[11] The Texas Court of Appeals recently noted that RLUIPA cases are particularly instructive in interpreting the Texas RFRA because the statutes are similar in many respects. The court explained:

> The federal counterpart to TRFRA is [RLUIPA]. The language of RLUIPA regarding the burdens of proof required to demonstrate a violation is substantially similar to that language in TRFRA, and we thus refer to federal caselaw construing the RLUIPA burdens of proof for our analysis of TRFRA burdens of proof.

Balawajder, 2006 Tex. App. LEXIS 6906, at *8-9 (citations omitted).

person's articulation of what his beliefs are—and how specific actions further those beliefs—must be given great weight because the government is in no position to answer theological questions on how one should best carry out the tenets of his or her faith. *See id.* at 570 (warning that "judges are ill-suited to resolve issues of theology"). In this case, however, the City argues that Pastor Barr's religious practices have not been substantially burdened because, *inter alia*, "the zoning ordinance is a neutral law of general applicability" and "there is no evidence of purposeful discrimination or animus against Barr's religion." City's Brief at 34-35. These statements, even if true, have no bearing upon whether the ordinance substantially burdens Pastor Barr's religious practices. Whether the ordinance was designed to force Pastor Barr's ministry out of town or merely had that effect by coincidence, the impact upon his free exercise of religion is the same. Even neutral, generally applicable laws enacted with the best of intentions can substantially burden religious exercise.

In sum, the appropriate test for determining whether a law has substantially burdened the free exercise of religion is whether a person has been "truly pressure[d]" to "significantly modify" his religiously-motivated behavior such that his conduct has been "meaningfully curtail[ed]." *Adkins*, 393 F.3d at 570; *Werner*, 49 F.3d at 1480. The Texas RFRA's protection extends to *all* conduct "substantially motivated by sincere religious belief" and does not require a claimant to show that the conduct is necessary to advance a central tenet of his faith. Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1). Moreover, the person's ability to engage in the desired conduct does not have to be *foreclosed entirely* but, rather, it need only be substantially burdened (i.e., meaningfully curtailed) to

invoke the Texas RFRA's protection. The substantial burden requirement simply ensures that there is some basic level of curtailment of religious practices before strict scrutiny is triggered; it is not a virtually insurmountable hurdle for plaintiffs to overcome in order to have strict scrutiny applied.

B. The City's Zoning Ordinance Clearly Imposed a Substantial Burden on Pastor Barr's Religiously-Motivated Conduct.

Since the City's ordinance excluded Philemon Homes from the entire City, it is clear that the ordinance substantially burdened Pastor Barr's free exercise. For this reason, the Court of Appeals erred by failing to apply the strict scrutiny required by the Texas RFRA to the ordinance.

For purposes of the Texas RFRA's definition of "free exercise of religion," the relevant "act or refusal to act that is substantially motivated by sincere religious belief" is Pastor Barr's "faith-motivated effort to establish and operate a special facility [Philemon Homes] to house and minister to recently released low-level offenders, in order to inject a greater presence of religion into their lives." Barr's Brief at 10 n.2. Philemon Homes is "a ministry that reaches out to men [who] are being released from prison or men who also are on the street," and the ministry provides "for religious instruction and counsel." *Barr*, 2005 Tex. App. LEXIS 9847, at *13-14.

While the City relies upon the Court of Appeals' conclusion that forcing Pastor Barr's ministry to *leave the City entirely* would not substantially burden his religious beliefs, the fact that Philemon Homes must leave the City in order to continue operations serves to *heighten*, not alleviate, the substantiality of the burden upon Pastor Barr's

religious practices. *See id.* at *18; City's Brief at 22 n.30 (arguing that no substantial burden has occurred because, *inter alia*, Philemon Homes may be located "beyond the borders" of the City). A municipality *cannot* justify the abridgment of constitutional or statutory rights by simply arguing that people are free to exercise their rights elsewhere: "'[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.'" *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). The Fifth Circuit expressly rejected an argument similar to the City's in *Islamic Center* when it noted that "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." *Islamic Ctr.*, 840 F.2d at 300.

Another erroneous argument made by the City is that Pastor Barr's religious practices have not been substantially burdened because, in the City's view, there are other religious ministry activities available to Pastor Barr that are of equal spiritual value. *See* City's Brief at 34-35 (arguing that Pastor Barr's free exercise has not been substantially burdened because he could provide housing for all of the residents of Philemon Homes at separate locations). The Texas RFRA's definition of "free exercise of religion," however, forecloses the argument that one's religious practice has not been substantially burdened so long as *other* religiously motivated acts of a similar nature are still possible. While the statute defines the "free exercise of religion" as "[a]n act or refusal to act that is substantially motivated by sincere religious belief," the City interprets this provision as if it stated "[a]n act or refusal to act that is substantially motivated by sincere religious

belief [*and that is the only possible way to fulfill that belief*]." Since Pastor Barr has been prevented from committing a particular "act . . . that is substantially motivated by sincere religious belief," namely, operating Philemon Homes within city limits, his "free exercise of religion" has, by definition, been substantially burdened.

The City erroneously believes that it has the authority and competence to weigh the merits of various religious practices that Pastor Barr could conceivably engage in and determine that they are no different than operating Philemon Homes. *See, e.g.*, City's Brief at 23-24, 42 (arguing that Pastor Barr "has made no showing why [housing people in separate homes] does not adequately fulfill his religious practice" and asserting that ministries such as Philemon Homes are "of far less importance to most religions than places of worship and schools"). The City's view assumes that being housed *by parishioners* is identical for religious purposes to being housed in a facility overseen *by a clergyman* and also presumes that being ministered to *in a group setting*, with other people with similar experiences and problems, is no different than being ministered to *in a one-on-one setting*.[12] Aside from the fact that the City lacks the authority or expertise to determine that one religiously motivated act is the religious equivalent of another, Pastor Barr's "free exercise of religion" has been substantially burdened because his operation of Philemon Homes is "[a]n act or refusal to act that is substantially motivated by sincere

[12] The purpose of ministries such as Philemon Homes is to help restore individuals caught in a pattern of poor decisions and destructive lifestyles to a place of spiritual and personal growth. The Christian organization Teen Challenge is well-established in Texas and has found great success utilizing a similar residential approach. *See* Teen Challenge, http://www.teenchallengeusa.com/index.asp (last visited Nov. 27, 2006). Similar to Pastor Barr's ministry to former low-level offenders, Teen Challenge seeks to restore the lives of those suffering from drug and alcohol abuse. *Id.* These ministries clearly constitute the "free exercise of religion" within the meaning of the Texas RFRA.

religious belief." Tex. Civ. Prac. & Rem. Code Ann. § 110.001(a)(1). Moreover, the City turns the Texas RFRA on its head. The statute prescribes that there be *no more burden on religion* than necessary, *not* that there be *no more exercise of religion* than necessary.

PRAYER

For the foregoing reasons, *amici* respectfully request this Court to grant the petition, reverse the decision of the Court of Appeals, and remand the case for application of the strict scrutiny required by Tex. Civ. Prac. & Rem. Code Ann. § 110.003.

Respectfully submitted this 30th day of November, 2006.

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