Nos. 08-10358, 08-10506

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSÉ MERCED, President, Templo Yoruba Omo Orisha Texas, Inc.,

Plaintiff-Appellant,

v.

KURT KASSON, MIKE COLLINS, BOB FREEMAN and CITY OF EULESS,

Defendants-Appellees,

consolidated with

JOSÉ MERCED, President, Templo Yoruba Omo Orisha Texas, Inc.,

Plaintiff-Appellee,

v.

CITY OF EULESS,

Defendant-Appellant.

On appeal from the United States District Court
for the Northern District of Texas (Hon. John H. McBryde, U.S.D.J.)
Case No. 4:06-CV-891

BRIEF OF PLAINTIFF-APPELLANT JOSÉ MERCED

Professor Douglas Laycock
Yale Kamisar Collegiate
Professor of Law
University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109
Phone: (734) 647-9713

Eric C. Rassbach
Hannah C. Smith
Lori H. Windham
Luke W. Goodrich
The Becket Fund for Religious Liberty
1350 Connecticut Avenue, NW, Suite 605
Washington, DC 20036
Phone: (202) 955-0095
Fax: (202) 955-0090

Attorneys for Plaintiff José Merced

September 24, 2008

CERTIFICATE OF INTERESTED PERSONS

In the consolidated appeals Jose Merced, President, Templo Yoruba Omo Orisha Texas, Inc., *Plaintiff-Appellant* v. Kurt Kasson, Mike Collins, Bob Freeman and City of Euless, *Defendants-Appellees* and Jose Merced, President, Templo Yoruba Omo Orisha Texas, Inc., *Plaintiff-Appellee* v. City of Euless, *Defendant-Appellant* (Appeal Nos. 08-10358, 08-10506), the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

José Merced (Plaintiff-Appellant)
Templo Omo Orisha Texas, Inc.
(Plaintiff-Appellant is President of this religious organization)
City of Euless (Defendant-Appellee)
Kurt Kasson (Defendant-Appellee)
Mike Collins (Defendant-Appellee)
Bob Freeman (Defendant-Appellee)
Professor Douglas Laycock (Attorney for Plaintiff-Appellant)
Eric Rassbach (Attorney for Plaintiff-Appellant)
Hannah Smith (Attorney for Plaintiff-Appellant)
Lori Windham (Attorney for Plaintiff-Appellant)
Luke Goodrich (Attorney for Plaintiff-Appellant)
The Becket Fund for Religious Liberty (Law Firm for Plaintiff-Appellant)
William McKamie (Attorney for Defendant-Appellee)
William Messer (Attorney for Defendant-Appellee)
Law Offices of William McKamie, P.C. (Law Firm for Defendant-Appellee)

Eric C. Rassbach
Attorney of Record for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant José Merced requests that thirty minutes of oral argument be allocated to each side. Oral argument is warranted because of the novel constitutional and civil rights issues presented in this lawsuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4). The District Court's order of March 10, 2008, which entered final judgment against Plaintiff, disposed of all of Plaintiff's claims that had not been previously dismissed. This Court has jurisdiction over that decision under 28 U.S.C. § 1291. Plaintiff appeals from the final judgment and order entered on March 10, 2008. Plaintiff timely filed a notice of appeal on April 9, 2008.

STATEMENT OF THE ISSUES

1. Whether Euless violated the Free Exercise Clause by selectively applying its slaughterhouse and animal cruelty ordinances to prohibit Merced's religious sacrifices.

2. Whether Euless violated the Texas Religious Freedom Act by prohibiting Merced's religious sacrifices.

3. Whether Euless violated Merced's Equal Protection rights by selectively enforcing its ordinances on the basis of the suspect classification of religion.

INTRODUCTION

Goat sacrifice is never going to be popular in Texas. So it is not particularly surprising that the City of Euless wants to prohibit it. The question presented by this appeal is whether Euless may apply its slaughterhouse and animal cruelty ordinances to stop Merced from engaging in this unpopular religious exercise, even though those ordinances are shot through with exceptions for other people. Put another way, may Euless permit animal killing for a wide variety of nonreligious reasons, but prohibit animal killing for Merced's religious reasons? The answer, under the Supreme Court's decision in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), is a resounding "no."

This case is on all fours with *Lukumi*. Here, as in *Lukumi*, the city has attempted to prohibit Santería sacrifice with a patchwork of local slaughterhouse and animal cruelty ordinances. *Id.* at 527-28. And here, as in *Lukumi*, the city claims that the ordinances merely promote the city's legitimate interests in protecting public health and preventing animal cruelty. *Id.* at 543. The problem in both cases, however, is the same: while the ordinances prohibit animal killing for Santería sacrifice, they permit animal killing in a wide variety of secular contexts, such as hunting, fishing, meat production, pest control, and veterinary euthanasia. *Id.* at 536-37. According to the Supreme Court, such an ordinance is neither

neutral nor generally applicable and is therefore, under the Constitution's Free Exercise Clause, subject to strict scrutiny. *Id.* at 546.

Euless's ordinances do not survive strict scrutiny. As in *Lukumi*, the ordinances are substantially underinclusive; that is, they fail to prohibit a wide range of animal killing that threatens the city's alleged interests in protecting public health and preventing animal cruelty. Moreover, Merced lived in Euless and engaged in Santería sacrifice for ***16 years*** without incident, and without Euless ever attempting to enforce its ordinances against him. This lack of enforcement, along with Euless' broad exceptions for secular animal killing, demonstrate that Euless' alleged interests are not compelling. And even if Euless' interests were compelling, Euless could easily advance those interests by passing regulations "stopping far short of a flat prohibition of all Santería sacrificial practice"—such as regulations requiring humane methods of slaughter and sanitary disposal of animal remains. *Id.* at 538. The ordinances, therefore, do not satisfy strict scrutiny and are unconstitutional.

Euless's ordinances and selective enforcement not only violate the Free Exercise Clause, but also violate a civil rights statute, the Texas Religious Freedom Act ("TRFA"). TRFA, by design, provides significantly more protection for religious liberty than does the Free Exercise Clause. Under TRFA, even neutral and generally applicable laws are subject to strict scrutiny, so long as they impose

a "substantial burden" on religious exercise. And here, there is little doubt a criminal ban on Santería sacrifice imposes a substantial burden on Merced's religious exercise. Euless's ordinances are therefore subject to strict scrutiny, which, for the reasons mentioned above, Euless cannot satisfy.

Finally, Euless's selective enforcement of its ordinances violates the Constitution's Equal Protection Clause. As the Fifth Circuit has recognized, religion is a "suspect class" under that clause. *Sonnier* v. *Quarterman*, 476 F.3d 349, 368 n.17 (5th Cir. 2007). Thus, Euless's targeted enforcement of its ordinances against Merced's religious exercise is yet another reason to apply strict scrutiny and invalidate those ordinances.

STATEMENT OF THE CASE

On December 22, 2006, Merced filed a complaint alleging violations of 42 U.S.C. § 1983, 42 U.S.C. § 2000cc, the First, Fifth and Fourteenth Amendments, and the Texas Religious Freedom Act, TEX. CIV. PRAC. & REM. CODE § 110. R.18-25.[1] The complaint named the City of Euless and three City officials as defendants. *Id.* Because Euless intended to challenge the constitutionality of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA"), the United States intervened. R.133-34. Euless moved to dismiss the complaint, R.46-59, which the Court granted with respect to the individual defendants, but denied in all other respects. R.129-36.

Merced filed an amended complaint on September 28, 2007. R.170-78. In December 2007, the parties filed cross-motions for summary judgment. R.257-62, 263-70. The court granted Euless's motion for partial summary judgment with regard to the RLUIPA claim. R.312-22. The court denied Merced's motion. *Id*. Because the RLUIPA claim was no longer at issue, the United States was dropped as a party. R.339-40.

After the close of discovery and several pre-trial conferences, the court held a bench trial on March 10, 2008. Tr.18-191. At the close of the plaintiff's

[1] The trial transcript is separately paginated from the other parts of the record on appeal. "Tr." citations are to the official trial transcript. "R." citations are to the remainder of the record on appeal.

evidence, Euless moved for judgment as a matter of law, which the court denied. Tr.114. After the close of evidence, the court announced its rulings from the bench, finding against Merced on all claims. Tr.165-90. Judgment was issued in favor of Euless. R.791.

The court awarded costs against Merced, but denied Euless's motion for attorney's fees. R.928-35, 1043-53. On April 9, Merced filed a timely notice of appeal. R.926-27. On May 22, Euless filed a notice of appeal regarding the denial of attorneys' fees. R.1059-60. The appeals were consolidated into a single cross-appeal.

STATEMENT OF FACTS

Plaintiff José Merced is a Santería *Oba Oriate*, or priest. R.598¶20. He is the President of Templo Omo Orisha Texas, a religious institution dedicated to the practice of Santería. R.598¶20-22; R.440-42; Tr.107-08.

Merced, a native of Puerto Rico, moved to Euless in 1990 and continued his practice of Santería there. Tr.96. Merced, like virtually all Santería priests, maintains a shrine in his home. Tr.46-48; R.535-36¶10. He performs religious rituals at that shrine, some of which involve animal sacrifice. These sacrifices are "essential" for Santería. Tr.44; *see also* Tr.40-41, 46; MIGUEL A. DE LA TORRE, SANTERÍA 12 (2004).

A. Santería practice and rituals

Santería is an Afro-Cuban religion that evolved from Nigerian tribal religion. R.532. As practitioners of African tribal religions moved into Cuba, many of them encountered Catholicism and merged Catholic practices with their existing faith, creating modern-day Santería. *Id.*

Santería worship revolves around spirits called *orishas*, which are deities ranked under a supreme god. Tr.38-39. Santería rituals are ways of encountering the *orishas*, honoring them, and engaging them in the affairs of the temporal world. Tr.39-40; R.533-34. Necessary to this process is the life energy, or *Ashé*, which links the spiritual world to the temporal one. Tr.39-40, 43; R.533. Santería

teaches that *Ashé* is contained in the blood. *Id*. For this reason, many Santería rituals involve a blood offering to the *orishas*. *Id.*; Tr.39-40. Santería practitioners believe that without blood sacrifice, the *orishas* will withdraw from the world and cease to bless and communicate with human beings. Tr.43; R.533-35. As even Euless agrees, animal sacrifice is "essential" for Santería. Tr.44; *see also* Tr.40-41, 46. Without it, it is impossible to initiate new members or ordain priests; without it, the religion would cease to exist. R.534; Tr.40-41. *See also Lukumi*, 508 U.S. at 524-25.

Blood sacrifice takes place in ceremonies to commemorate important events, including initiation into the faith, marriage, birth, death, and the ordination of priests. R.533-34; Tr.40-44. The most complex animal sacrifice in Santería is the initiation ceremony for new priests, in which a new shrine is consecrated. R.534; Tr.44-46. This ceremony generally involves the sacrifice of 7-9 four-legged animals (lambs or goats), 15-20 fowl (doves, chickens, guinea fowl, or ducks), and a turtle. Tr.44-46. The exact composition of the ceremony varies based upon the *orisha* being honored. *Id.* Most ceremonies include a communal meal after the sacrifice, in which the animal offerings are cooked and eaten. Tr.51-53.[2] Sacrifice

[2] In one type of ceremony, the cleansing ceremony, the sacrifice (usually a chicken or other fowl) is not eaten. Tr.67. Euless does not ban this practice, since fowl are considered "general tablefare" which may be slaughtered at home, regardless of whether they are eaten afterwards. R.431(Euless Ord. § 10-65(4)).

and feast are only two parts of the larger religious ceremony, which may last several days. R.534; Tr.51-52, 54. Santería ceremonies involve other kinds of offerings to the *orishas*, such as songs, drum music, fruit, herbs, and other gifts. R.533-34; Tr.39, 108.

These ceremonies take place at the home of the priest performing them. Santería, like many other faiths, utilizes home shrines for worship. R.535-36; Tr.46-49. It is believed that the *orishas* reside in these shrines, and so sacrifices must take place there. *Id.* Although Santería has more than 250,000 practitioners, it has only two temples, neither in the continental United States.[3] The vast majority of Santería practice takes place in private homes. R.535-36; Tr.108-09.

Before a religious ceremony, the priest engages in a complex set of divination rituals to determine the wishes of the *orisha* and where the sacrifice should take place. R.533-36; Tr.79-81. Sacrifices generally take place at the home shrine of the particular priest, but may take place in a temple if one is available, or at the home shrine of another priest. *Id.* The specific location depends upon the wishes of the *orisha*, as understood by the priest. *Id.* Templo Omo Orisha plans to eventually build its own temple, where certain ceremonies will take place, but sacrifices will only occur there if the *orishas* allow it. Tr.107-09. Merced does not

[3] R.532, 535-36; Tr.49. It was noted at trial that the well-known Miami-area congregations also have no temple. *Id.* There was expert testimony at trial that no other cities have banned Santería sacrifice since the Supreme Court decided *Lukumi*. Tr.50-51.

know where the temple will be located; it may be inside or outside the City of Euless. *Id.*

B. Merced sacrifices animals for 16 years without interference.

Since moving to Euless in 1990, Merced has performed many Santería rituals in his home, and he continues to perform those not prohibited by City law. Tr.89-90. For 16 years—from 1990 until 2006—Merced performed the sacrifices at issue in this appeal without interference from Euless. Tr.95-97. Merced performed on average one ceremony initiating new priests per year.[4] *Id.* Until 2006, Merced was unaware of any ordinance prohibiting such sacrifices, Tr.111-12, and City officials did not know the sacrifices were occurring. Tr.160-61.

The sacrifices take place in a bedroom attached to Merced's garage, in an area of the house isolated from the rest. Tr.105. Merced's home is approximately 3,500 square feet, located on a wedge-shaped lot, and set back from the street by a long driveway. Tr.104-05; R.643. Merced purchases the animals from area markets and has them delivered to his home as close to the time of the ceremony as possible, ideally no more than 15 minutes before the killing. R.88, 95. The longest he has kept any four-legged animal at his home has been four hours. R.599¶29. Merced strives to use humane practices, killing the animals quickly by slitting their carotid arteries. Tr.98; *see* Tr.55-56. Vessels are used to collect the

[4] A number of other Santería adherents live in Euless, including five priests. Tr.99. Those priests also carry out animal sacrifices in Euless. *Id.*

blood, and the sacrifice is performed on mats of paper or plastic, which are then wrapped up and thrown away. R.98, 105; *see also* Tr.53. The blood in the vessels is then offered as a sacrifice to the *orishas*. Tr.76-77.

After these sacrifices, the edible portions of the animals are cooked and eaten in a communal feast.[5] Tr.52-54. The inedible portions are double-bagged and placed in the trash, or in a dumpster outside Euless owned by a fellow Santería practitioner. Tr.101. Merced testified, without contradiction, that no person had ever been sickened from one of his ceremonies.[6] Tr.99. Ceremonies often continue for several days after the sacrifice and feast, giving participants the opportunity to observe whether anyone has become ill. Tr.53-54.

Merced was holding a ceremony at his home on September 4, 2004, when two police officers arrived at his home to stop the animal slaughter, telling him he should just go to the grocery store. Tr.100; R.452, 54. The police called in two animal control officers, who allowed Merced to finish the ceremony. Tr.100-01.

In May 2006, Euless police visited Merced a second time. R.453, 455. They received a complaint from an unnamed source stating that several goats were about to be killed. R.458. This, like the earlier visit, was the result of an

---

[5] Some portions, such as the intestines, are not consumed, but are still cooked prior to disposal. Tr.92-93.

[6] The trial expert, who has witnessed "thousands" of such ceremonies, has likewise never observed anyone becoming ill from the sacrifice or communal meal. Tr.53-54.

anonymous neighbor complaint. R.452-58. Merced and several friends were gathered at his home to celebrate a birthday, and were not planning any sacrifices for that day. Tr.102. The officers saw no goats, but told Merced not to conduct any sacrifices because they were likely illegal in Euless. *Id.*; R.458. Merced asked them how he could obtain a permit for the sacrifices, and was told to contact a supervisor. R.458. A few weeks later, Merced and a fellow priest, Ventura Santana, went to a City permits desk to inquire about a permit for animal slaughter. Tr.103. Two different City employees informed Merced that the activity was strictly prohibited within City limits and no such permit existed. Tr.103; R.601¶43.

C. Euless's law and practice regulating animal slaughter, butchering and disposal

Euless has two ordinances banning the killing of animals within city limits.[7]

One is a slaughterhouse ordinance:

> **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.

The other is an animal cruelty ordinance:

[7] The City defines animals as living, non-human vertebrates. R.435(Euless Ord. § 10-2).

Sec. 10-65. Animal care.

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

…

(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.

…

(8) A person exposes any known poisonous substance, whether mixed with food or not, so that such poisonous substance shall be liable to be eaten by a pet animal, livestock or person. This section is not intended to prohibit the prudent use of herbicides, insecticides or rodent control materials. A person shall also not expose an open trap or metal jaw-type trap that shall be liable to injure any pet animal, livestock or person.

See Addendum at 1-2. However, Euless makes a number of exceptions to these ordinances, both on their face and in practice. R.431(Euless Ord. § 10-65 (4)). Section 10-65 includes an exception for domesticated fowl; it also permits the killing of rodents. Another ordinance permits certain City employees (police, animal control, health department) to kill rabid or vicious animals. R.436(Euless Ord. § 10-4). The ordinance contains no similar exception for veterinarians. *See generally* R.430-38.

In practice, Euless permits additional exceptions. It "does not enforce" the ordinances against homeowners who kill snakes and vermin. R.600¶39; R.644. Nor does it enforce these ordinances against veterinarians who kill mammals and reptiles in Euless. R.600¶40. It has never warned a veterinarian that she might be in violation of a City ordinance for euthanizing animals. R.644.

Euless states that the purpose of the ordinance is not to prevent killing, but the public health problems that may result. R.644; Tr.161-62 (identifying public health as the "compelling" interest). Euless nevertheless permits the butchering of large animals, such as deer, so long as they are already dead when they enter City limits. R.644. Euless also permits the killing and butchering of large fowl. R.431(Euless Ord. § 10-65(4)). Although Euless states an interest in preventing fly-breeding, it permits restaurants to dispose of their animal waste in dumpsters, which one of Euless' experts admitted at trial poses the same danger. *See* Tr.156.

Euless admits it "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." R.599¶25; R.645. Nor does it have any evidence that these practices have "adversely affected the safety of any person." R.599¶26.

Euless says that enforcement of these provisions is "complaint-driven," and that it is unaware of sacrifices from other Santería priests in Euless, since there have been no complaints. Tr.136-39, 161; *see, generally,* Ex.6(R.467-530). Both visits to Merced's house were in response to anonymous complaints. R.452-58.

Any violation of either the slaughterhouse ordinance or the animal cruelty ordinance constitutes a misdemeanor, and results in the imposition of a fine. R.551(Euless Ord. § 10-9).

D. Merced's current religious practice.

Since June 2006, Merced has been unable to conduct goat or turtle sacrifices in his home, and for that reason has had to delay initiation for an aspiring Santería priest.[8] Tr.93-94, 109-10. At trial, Merced testified that he must perform the initiation at his home, rather than another location, because that is where his *orishas* reside.[9] Tr.93-95. The initiation ceremony is performed at the home of the initiate's godparents. *Id*. Even if Merced could perform the ceremonies outside his home, Euless would not permit him to do it anywhere else inside City limits. R.431-32, 36(Euless Ord. §§ 10-4, 10-65). Merced has expressed his willingness to comply with disposal or health standards created by Euless for this process, but Euless has been unwilling to grant any sort of permit or exception for him. Tr.104; R.600-01¶42-43. Euless intends to prosecute Merced if he attempts any further sacrifices of four-legged animals inside City limits. R.600¶42.[10]

E. Course of Litigation

On December 22, 2006, Merced filed a complaint alleging violations of 42 U.S.C. § 1983, 42 U.S.C. § 2000cc, the First, Fifth and Fourteenth Amendments, and the Texas Religious Freedom Act, TEX. CIV. PRAC. & REM. CODE § 110. R.18-

---

[8] The aspiring priest has been waiting since summer 2007 for her initiation. Tr.93-94.

[9] Merced has conducted ceremonies involving chickens in his home. He disposes of the remains by placing them in the trash. Tr.90-91.

[10] As noted above, the City does not prohibit the killing of chickens.

25. The original complaint named the City of Euless, Kurt Kasson, Mike Collins, and Bob Freeman. *Id.* Defendants filed a motion to dismiss. R.46-59. At Euless's request, the court abated proceedings until the court issued its order on the motion to dismiss. R.123.

Judge McBryde denied the motion to dismiss in part, but granted it with respect to the individual defendants because "the court is amply satisfied that Merced has sued Kasson, Collins, and Freeman in their personal capacities," and the facts alleged did not support a personal capacity suit. R.129-36. Both Merced and Euless, however, had previously agreed that those defendants had been sued in their *official* capacities. R.19¶9; R.47-51. The court permitted all other claims to proceed.

Merced filed an amended complaint on September 28, 2007. R.170-78. In December, 2007, Euless moved for partial summary judgment, only on the RLUIPA claim, and Merced moved for summary judgment. The court denied Merced's motion and granted Euless's motion, dismissing the RLUIPA claim on the basis that no zoning laws were involved. R.312-22.

The parties exchanged discovery and the case proceeded to trial. The parties requested a two-day trial. R.605. The court denied this request, and instead set the trial for three hours (including recesses). R.247-48. Merced's testimony was

limited to less than twenty minutes. Tr.87.[11] After a few minutes of questioning, primarily by the court, the court ordered a recess "so you can refine the best way of getting him off this witness stand in ten minutes." Tr.95.

The court ordered Merced to choose between presenting evidence of his religious beliefs himself or permitting his expert to testify about Santería. Tr.35-36. The court made this ruling during trial, after Merced's expert had already been sworn. *Id.* Merced chose to allow the expert to testify about Santería. *Id.*[12]

The court permitted two City experts to testify, overruling Merced's objections to the first expert without argument or explanation, Tr.29, and permitting Euless to take testimony from an attorney as an expert on the drafting of health ordinances. Tr.114-33. Although the court initially said the attorney-expert could not testify on legal matters, the witness offered opinion testimony on legal questions. Tr.117-18, 122. The attorney also offered testimony about the conditions of keeping animals. Tr.120-21.

---

[11] The parties were frequently reminded of the court's desire to keep the trial very short. *See, e.g.*, Tr.34, 35-36, 72-73, 85, 113-14; R.247-48; *see also* Tr.87:

> **Gibson:** "Thank you, Your Honor. I would now like to call Mr. Merced."
> **Court:** "Who?"
> **Gibson:** "The plaintiff, Your Honor, Jose Merced."
> **Court:** "How long do you think his testimony will take? Ten minutes? Fifteen minutes?"

[12] The court later cited lack of testimony about the importance of practice inside Merced's home as a reason for ruling against Merced. Tr.175-77.

Deposition excerpts and summaries were introduced into evidence in lieu of the testimony of additional witnesses. Tr.26-27, 113-14, 163-64. The court overruled Merced's objections to Euless's deposition summaries apparently because the court believed that the parties had agreed to the contents of the deposition summaries. Tr.152-53.[13] Merced objected to Euless's deposition summaries and their characterization of the evidence, in particular with regard to the disposal of remains from Merced's ceremonies and the importance of location for Santería worship. *See* R.661-67; Tr.151-53. At the close of the plaintiff's evidence, Euless moved for judgment as a matter of law, which the court denied. Tr.114. All outstanding evidentiary objections were overruled. Tr.25-26.

At the close of trial, the court took a one-hour recess, then returned for decision. Tr.165. The court heard brief argument and announced its conclusions, Tr.165-90; the court found against Merced and in favor of Euless on all claims. *Id*. The court adopted the parties' stipulated facts. Tr.164-65. The court did not make any other factfindings or issue a written opinion. R.790-91. All the issues decided by the court were, as acknowledged by both parties, mixed questions of law and fact. Tr.190. Later that day, the court issued judgment in favor of Euless. R.791. The court awarded costs against Merced, but denied Euless's motion for

[13] Merced had actually consented only to the submission of joint exhibits, R.424-575 and the deposition summaries were not part of those joint exhibits. R.659-67.

attorneys' fees. R.928-35, 1043-53. On April 9, Merced filed a timely notice of appeal. R.926-27. On May 22, Euless filed a notice of appeal regarding the denial of attorneys' fees. R.1059-60. The appeals were later consolidated into a single cross-appeal.

STANDARD OF REVIEW

After a bench trial, this Court "review[s] legal conclusions and mixed questions of law and fact *de novo*." *American Int'l Specialty Lines Ins. Co.* v. *Res-Care Inc.*, 529 F.3d 649, 656 (5th Cir. 2008). Findings of fact are reviewed for clear error, and are reversed when the court is "left with the definite and firm conviction that a mistake has been made." *Mumblow* v. *Monroe Broadcasting, Inc.*, 401 F.3d 616, 622 (5th Cir. 2005).

Like other First Amendment claims, Free Exercise claims are subject to "independent examination" by the reviewing court under *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). *See United States* v. *Friday*, 525 F.3d 938, 949-50 (10th Cir. 2008) (Free Exercise and Religious Freedom Restoration Act claims subject to *Bose* review). *See also United States* v. *Israel*, 317 F.3d 768, 770 (7th Cir. 2003); *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 156-57 (3d Cir. 2002); *New Life Baptist Church Acad.* v. *Town of E. Longmeadow*, 885 F.2d 940, 941-42 (1st Cir. 1989); *Murphy* v. *I.S.K. Con. of New England, Inc.*, 409 Mass. 842, 571 N.E.2d 340, 345 (1991) (Free Exercise claims subject to *Bose* review).

Although normally a court would review factual determinations in the light most favorable to the party prevailing below, *Bose* independent review is different: "[i]n cases raising First Amendment issues, [the Court] ***must*** make an independent

examination of the whole record." *Joe Conte Toyota, Inc.* v. *Louisiana Motor Vehicle Comm'n*, 24 F.3d 754, 755 (5th Cir. 1994) (emphasis added). "This examination includes an independent review of the trier of fact's findings in support of that judgment." *Id.* (citing First and Fourteenth Amendment case *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

SUMMARY OF THE ARGUMENT

Merced presided over religious animal sacrifices for 16 years in his own home, without incident. Once anonymous calls alerted Euless to the sacrifices, it used two ordinances—one regulating slaughterhouses and one prohibiting animal cruelty—to stop Merced's sacrifices. The district court erred by rejecting Merced's Free Exercise, Texas Religious Freedom Act, and Equal Protection claims seeking to overturn Euless's ban on his sacrifices.

Free Exercise claim. The Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) controls the outcome of this claim. Under *Lukumi*, a law is subject to strict scrutiny if it is not generally applicable, not neutral, or employs a system of individualized exemptions. Here the lower court's decision must be reversed because Euless's[14] application of its ordinances to Merced's sacrifices violates the Free Exercise Clause in three different ways.

First, Euless's laws are ***not generally applicable*** because they create categorical exemptions for the secular, but not religious, killing of animals. The ordinances are also not generally applicable because Euless officials do not apply the ordinances to all of the activities the ordinances ostensibly prohibit.

[14] "Euless" refers to Defendant City of Euless only, as Merced does not press his appeal against individual defendants Kurt Kasson, Mike Collins, and Bob Freeman, who had been sued in their official capacities.

Second, Euless's laws are ***not neutral*** because they favor non-religious reasons for killing animals over religious ones. Moreover, because Euless has selectively enforced these ordinances against the religious actor, the application of these ordinances to Merced is not neutral.

Third, for the same reasons, Euless's laws constitute a ***system of "individualized exemptions***" under *Smith* and *Lukumi*.

Each of these three grounds separately makes out a *prima facie* case that Euless has violated Merced's free exercise rights.

The burden then shifts to Euless to prove its affirmative defense that its actions withstand strict scrutiny. This affirmative defense fails for three reasons: (1) Euless's claimed interests in protecting public health and protecting animals are not compelling, (2) the ordinances, as applied to Merced, do not further those alleged interests, and (3) an absolute prohibition on Santería sacrifice is not the least restrictive means of meeting those alleged interests.[15]

[15] The trial court erred by requiring Merced to demonstrate a substantial burden to prove his Free Exercise claim. *See* Tr. 165-78. Merced freely admits that to support his claim under the *Texas Religious Freedom Act*, he must demonstrate a substantial burden on his religious exercise—something he has done here. *See* Section II.A. But when government actions are not neutral or generally applicable, they are subject to strict scrutiny without an additional showing of substantial burden. *See Lukumi*, 508 U.S. at 531-47 (finding violation of Free Exercise Clause without conducting substantial burden analysis); *see also Tenafly*, 309 F.3d at 170 (same); *FOP*, 170 F.3d at 364-67 (same). *See also Lukumi*, 508 U.S. at 537-38 (individualized exemptions).

Texas Religious Freedom Act claim. The Texas Religious Freedom Act provides that "a government agency may not substantially burden a person's free exercise of religion" unless that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE § 110.003. Euless's ban on animal sacrifice substantially burdens Merced's religious exercise because it completely prevents him from performing several sacrifices, including the initiation of new Santería priests. Because the ban cannot withstand strict scrutiny, this Court should reverse the district court's dismissal of this claim.

Equal Protection claim. Euless's ordinances also deprive Merced of equal protection of the laws because their categorical exemptions and selective enforcement create discrimination along the suspect classification of religion. As stated above, the ordinances cannot withstand strict scrutiny.

ARGUMENT

I. Euless's application of its slaughterhouse and animal cruelty ordinances to Merced's religious sacrifices violates the Free Exercise Clause.

In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held unconstitutional several city ordinances that were used to ban the slaughter of animals for Santería sacrifice. As explained below, this case is on all fours with *Lukumi*. As in *Lukumi*, the City of Euless's ordinances are neither generally applicable nor neutral; rather, they prohibit animal slaughter for religious purposes while allowing animal slaughter for a wide variety of secular purposes. As such, they are subject to strict scrutiny. And, as in *Lukumi*, Euless has failed to establish that its ordinances are narrowly tailored to serve a compelling governmental interest. The ordinances are therefore unconstitutional as applied to Merced.

A. Under *Lukumi*, if a law burdening religious exercise is not neutral and generally applicable, it is subject to strict scrutiny.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." U.S. CONST. amend. I (emphasis added). Under the Court's free exercise jurisprudence, a "neutral law of general applicability" does not violate the Free Exercise Clause even when it burdens religious exercise. *Employment Division* v. *Smith*, 494 U.S. 872, 880 (1990). But if a law burdening

religious exercise is "not neutral or not of general application," it is subject to strict scrutiny; that is, it is unconstitutional unless it is narrowly tailored to advance a compelling governmental interest. *Lukumi*, 508 U.S. at 546.

The Supreme Court's leading free exercise case—and the case controlling here—is *Lukumi*. In *Lukumi*, the city passed four ordinances interfering with the plaintiff's ability to engage in Santería sacrifice. One ordinance prohibited ritual animal "sacrifice" (defined as the unnecessary killing of an animal not primarily for food consumption) with exceptions for the slaughter by licensed establishments of animals "specifically raised for food purposes." *Id.* at 527-28. Another ordinance broadly prohibited animal "sacrifice" (defined the same way) anywhere within city limits. *Id.* at 528. A third ordinance prohibited "slaughter" (defined as the killing of animals for food) except in areas zoned for slaughterhouse use, and except for the small scale slaughter of hogs and cattle in accordance with state law. *Id.* A fourth ordinance incorporated Florida's animal cruelty statute, broadly punishing anyone who "unnecessarily…kills any animal." *Id.* Taken together, these ordinances prohibited Santería sacrifice, but allowed animal killing in a wide variety of other contexts, such as hunting, fishing, meat production, pest control, and veterinary euthanasia. *Id.* at 536-37.

The plaintiff, a Santeria priest, challenged the ordinances under the Free Exercise Clause. A unanimous Supreme Court held that the ordinances were

subject to strict scrutiny because they were neither "generally applicable" nor "neutral." *Id.* at 533-46.

On the issue of general applicability, the Court examined whether the ordinances broadly prohibited both religious and nonreligious conduct that threatened the government's alleged interests (namely, protecting public health and preventing cruelty to animals). As the Court explained, however, the ordinances were substantially underinclusive because they allowed a wide variety secular practices that undermined both of those interests. On the issue of animal cruelty, for example, the city allowed fishing; extermination of mice and rats within a home; euthanasia of stray animals; destruction of animals judicially removed from their owners; infliction of pain in the interest of medical science; the placing of poison in one's yard; the use of animals for hunting; and the hunting of wild hogs. *Id.* at 543-44. Similarly, on the issue of public health, the city allowed hunters to bring their kill to their houses and dispose of it; allowed restaurants to improperly dispose of their garbage; allowed hunters and fishermen to eat their catch without inspection; and allowed individuals to eat meat without inspection from animals raised for their own consumption. In short, the ordinances were not "generally applicable" because they "fail[ed] to prohibit nonreligious conduct that endanger[ed] [the government's] interest in a similar or greater degree than Santeria sacrifice d[id]." *Id.* at 543.

On the issue of neutrality, the Court acknowledged that the ordinances were facially neutral; that is, they did not target religion on their face. But, as the Court explained, "[f]acial neutrality is not determinative." *Id.* at 534. What matters is "the effect of a law in its real operation." *Id.* at 535. And because the interpretation and enforcement of the slaughter ordinances accomplished a "religious gerrymander"—prohibiting slaughter for Santería sacrifice, but allowing it for a wide variety of secular purposes—the law was not neutral. *Id.* at 535-38.

Next, the Court applied strict scrutiny. According to the Court, the ordinances neither served a compelling governmental interest nor were narrowly tailored; rather, they were both over- and underinclusive. They were overinclusive (and therefore not narrowly tailored) because the government could have achieved the same interests "by narrower ordinances that burdened religion to a far lesser degree"; for example, the government could have regulated the method of slaughter and disposal of animal carcasses rather than prohibiting animal sacrifice altogether. *Id.* at 546. They were underinclusive because, as noted above, they allowed a variety of nonreligious conduct that infringed the government's supposedly "compelling" interests. The Court therefore held that the ordinances did not pass strict scrutiny and were unconstitutional. *Id.* at 547.

B. Euless's slaughterhouse and animal cruelty ordinances are not generally applicable.

As in *Lukumi*, Euless's ordinances are not generally applicable because they exempt a wide variety of secular conduct that has the same effect as Santería sacrifice. These exemptions result both from the text of Euless's ordinances (and applicable Texas laws), and from Euless's selective enforcement of those ordinances.

1. The ordinances are not generally applicable because they exempt the killing of animals for a wide variety of secular reasons.

Neither Euless nor the State of Texas (whose laws are incorporated within Euless's ordinances) imposes a generally applicable ban on the killing of animals. Indeed, Euless's ordinances *categorically permit* people to kill animals for a wide variety of non-religious reasons, including the reasons highlighted by the Court in *Lukumi*.

Like the State of Florida in *Lukumi*, 508 U.S. at 537-38, Texas grants broad legal protection to the killing of animals through hunting, fishing, and trapping. It is lawful to fish, hunt, and trap in Euless, and it is lawful for residents to return home with their kill. It is also illegal to help animals escape from hunters or to otherwise interfere with those in the process of hunting or catching wildlife. TEX. PARKS & WILDLIFE CODE § 62.0125 (2007); *Morris* v. *State*, 2007 WL 2446572

(Tex.App.—Waco Aug. 29, 2007) (no pet.) (upholding conviction for harassment of a hunter).

As in *Lukumi*, Euless also allows animal control officers to kill stray animals, R.562(Euless Ord. § 10-162(b)); to kill any impounded animal that "appears to be suffering from extreme injury or illness," R.563(Euless Ord. § 10-167); to kill domesticated animals that attack humans, TEX. HEALTH & SAFETY CODE § 822.003, incorporated in Euless Ord. § 10-4(R.550); and to kill any animal that has rabies or bites or attacks humans, R.550(Euless Ord. § 10-4); R.555(Euless Ord. § 10-71)(vicious animals); R.560-61(Euless Ord. § 10-135(a)) (rabies). *Cf. Lukumi*, 508 U.S. at 543-544. Euless also makes it unlawful to tamper with traps or other equipment set by an animal control officer. R.551(Euless Ord. § 10-8). And, going significantly beyond the city in *Lukumi*, Euless also allows residents to kill "domesticated fowl considered as general tablefare such as chicken or turkey." R.431(Euless Ord. § 10-65(4)).

Euless's ordinances are also substantially underinclusive with respect to animal cruelty. As in *Lukumi*, Euless allows its residents to subject animals to "unjustified or unwarranted pain or suffering" that occurs during "fishing, hunting or trapping." TEX. PENAL CODE § 42.09(f)(1)(A), incorporated in Euless Ord. § 10-65(R.554); *Lukumi*, 508 U.S. at 543 (fishing). It is lawful for animals to be subjected to pain and suffering during "experimentation for scientific research."

TEX. PENAL CODE § 42.09(e), incorporated in Euless Ord. § 10-65(R.554); *cf. Lukumi*, 508 U.S. at 544 (medical science). Property owners may use "herbicides, insecticides or rodent control materials" to kill insects, mice, rats, and other pests. Euless Ord. §10-65(8)(R.554); *see also* Ord. No. 1644, § I, 8-31-04, (Sec. 14-204(8)) (occupants and owners of multi-family dwellings responsible to exterminate insects, rodents and other pests); *cf. Lukumi*, 508 U.S. at 543 (extermination of mice and rats). And, again going beyond the city in *Lukumi*, Euless allows animals to be subjected to pain for the purposes of "wildlife management, wildlife or depredation control, or shooting preserve practices," TEX. PENAL CODE § 42.09(f)(1)(B), incorporated in Euless Ord. § 10-65(554), or as part of any "generally accepted … animal husbandry or agriculture practice." TEX. PENAL CODE § 42.09(f)(2), incorporated in Euless Ord. § 10-65(R.554). Indeed, so far as the record shows, Euless has not banned boiling lobsters alive, banned the practice of feeding live rats to pet snakes, banned the killing of frogs for human consumption, or banned the killing of animals that destroy citizens' gardens. As in *Lukumi*, then, because the ordinances ban the killing of animals for Santeria sacrifice but allow the killing of animals for secular a wide variety of secular purposes, the ordinances are not generally applicable. *Lukumi*, 508 U.S. at 545.

The Third Circuit's decisions in *Blackhawk* v. *Commonwealth*, 381 F.3d 202 (3d Cir. 2004)(Alito, J.) and *Fraternal Order of Police* v. *City of Newark*, 170 F.3d

359 (3d Cir. 1999)(Alito, J.)("*FOP*"), shed further light on the application of *Lukumi* to laws granting exemptions for secular, but not religious, conduct.

FOP presented the question of whether a government employer's rule permitting beards for medical reasons, but denying them for religious reasons, triggered heightened scrutiny. *FOP*, 170 F.3d at 365-66. The court concluded that the law was subject to strict scrutiny because it had the effect of targeting conduct based on its religious motivation:

> [T]he Court's concern [in *Smith* and *Lukumi*] was the prospect of the government's deciding that ***secular motivations are more important than religious motivations***. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a ***secular objection*** but not for individuals with a ***religious objection***.

Id. (emphasis added) (citation omitted).

Blackhawk presented a nearly identical question. There, a Pennsylvania law required those who desired to keep wildlife in captivity to obtain a fee permit. The law made categorical exemptions from this policy for those wishing to keep wildlife for certain secular purposes (*e.g.*, for a circus or zoo), but refused to extend an exemption for those desiring to keep wildlife for religious reasons (*e.g.*, for Native American religious purposes). The Third Circuit held that such categorical favoritism of secular conduct over religious conduct violated the Free Exercise Clause. *Blackhawk*, 381 F.3d at 211.

Euless's exemptions for secular animal killing, outlined above, are just like the exemptions rejected by the Third Circuit. Failing to extend an exemption to animal killing done for religious purposes when exemptions are allowed for secular purposes demonstrates favoritism towards non-religious conduct. This is so even when—as in *FOP* and *Blackhawk*—there is no evidence in the record that the offending laws were enacted on the basis of discriminatory intent or with a specific religious group as a target. *FOP* and *Blackhawk* therefore provide an additional ground for concluding that Euless's ordinances are not generally applicable.

2. The ordinances are not generally applicable because Euless selectively enforces them.

Euless's ordinances are also not generally applicable because Euless selectively enforces them. First, the enforcement system is "complaint-driven," driven not by the government but by private actors that may be indulging their own prejudices. Here, Merced conducted sacrifices for 16 years without any government interference before two anonymous telephone calls prompted government action. R.452-58; Tr.96-97, 111-12, 160-61.

Second, Euless admits that it does not enforce its ordinances against other people who kill animals for non-religious reasons. Euless conceded that it does not enforce city ordinances that "prohibit the killing of mammals and reptiles by veterinarians inside the city," R.600¶ 40, and the City Manager testified at trial that Euless allows veterinarians to euthanize animals within city limits. *See* R.644.

Euless also conceded that it does not enforce its ordinances prohibiting "the killing of rats, mice, and snakes by homeowners inside the city," R.600¶39, and has not prosecuted homeowners for killing rats, snakes, or other mammals on their property for at least the last 3 years. *See* R.644. Finally, the City Manager also acknowledged that hunters are permitted to bring animal carcasses into Euless and butcher them, eat the meat, and serve the meat to their guests—all without any regulation or interference by City officials. *See* R.644. Euless's selective enforcement thus further demonstrates that its ordinances are not generally applicable.

C. Euless's ordinances are not neutral.

Euless's ordinances are also subject to strict scrutiny because they are not neutral. As explained below, the same factors that render the ordinances not generally applicable—namely, broad exemptions for secular animal killing, and selective enforcement against religious animal killing—render the ordinances non-neutral as applied to Merced.

1. Categorical exceptions destroy neutrality.

In *Lukumi*, the Court acknowledged that several of the ordinances were facially neutral. Yet, the Court explained, "[f]acial neutrality is not determinative." 508 U.S. at 534. The key question is whether official action, whether masked by a facially neutral statute or overt, "targets religious conduct for distinctive

treatment." *Id.* In *Lukumi*, for example, the city incorporated a Florida law that broadly prohibited any animal killing that was not "necessary." *Id.* at 537. Although this prohibition was neutral on its face, it was problematic because "[k]illings for religious reasons [we]re deemed unnecessary, whereas most other killings f[e]ll outside the prohibition." *Id.* The exemption for secular animal killing thus destroyed the statute's facial neutrality.

Here too, as explained above, Euless has created exceptions for a wide variety of secular purposes—such as hunting, veterinary euthanasia, pest control, scientific experimentation, wildlife management, and animal husbandry—but has refused to create a similar exception for religiously-motivated animal killing. As in *Lukumi*, then, the ordinances are not neutral.

2. Selective enforcement destroys neutrality.

Euless's selective enforcement of its ordinances also render those ordinances non-neutral. In *Tenafly Eruv Association* v. *Borough of Tenafly*, 309 F.3d 144, 168 (3rd Cir. 2002), the Third Circuit held unconstitutional a facially neutral law prohibiting the posting of any item on a utility pole. According to the court, even though the law was facially neutral, the Borough's "selective discretionary application" of the law against Orthodox Jews violated *Lukumi*:

> [T]he Borough's selective, discretionary application of [the ordinance]…'devalues' Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons,' and thus 'single[s] out' the plaintiffs' religiously motivated

> conduct for discriminatory treatment. Just as the exemptions for secularly motivated killings in *Lukumi* indicated that the city was discriminating against Santería animal sacrifice…, ***the Borough's invocation of the often-dormant [ordinance]*** against conduct motivated by Orthodox Jewish beliefs ***is 'sufficiently suggestive of discriminatory intent,' that we must apply strict scrutiny***.

Id. (emphasis added) (internal citations omitted).

Here, too, Euless's selective enforcement of its ordinances "devalues" Merced's reasons for animal sacrifice, "judging them to be of lesser import than nonreligious reasons" widely permitted in Euless. *Id.* Euless's "invocation of the often-dormant ordinance[s]"—in this case dormant for ***16 years***—also exposes Euless's latent hostility towards Merced's religious offerings. Just as in *Tenafly*, then, this non-neutral application of the ordinances violates *Lukumi*.

Moreover, the fact that Euless is employing a ***slaughterhouse*** ordinance to prohibit Merced's conduct—when his conduct is not what the ordinance was designed to prohibit—further highlights Euless's discrimination by selective enforcement. Euless's slaughterhouse ordinance prohibits "slaughter" or the "maint[enance of] any property for the purpose of slaughtering any animal." R.549(Euless Ord. § 10-3). As explained below, however, those terms apply to the *slaughtering of animals for food* and to the operation of *commercial slaughterhouses*—not to the conduct at issue in Merced's religious rituals.

First, although Euless's ordinance does not define "slaughter," Texas law defines "slaughterer" as "a person engaged in the business of (1) slaughtering

livestock for profit; or (2) selling livestock, as a primary business, to be slaughtered by the purchaser on premises owned or operated by the seller, in a county with a population of one million or more." *See* TEX. AGRICULTURE CODE § 148.001. Similarly, the verb "to slaughter" in common usage is understood to mean "to kill (animals) *for food*." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1987) (emphasis added). Second, the ordinance cross-references both State and City laws that pertain to commercial slaughterhouses, businesses, and regulated food establishments, respectively. *See* R.549 (Euless Ord. § 10-3)(State: "slaughterhouses, TEX. HEALTH & SAFETY CODE §§ 433.023, 438.061"; City: "Businesses, ch. 18; health and sanitation, ch. 42"). Third, other city ordinances distinguish between killing and slaughtering, referring to individuals (as opposed to businesses) killing or destroying (as opposed to slaughtering) animals in various contexts. *See* R.550(Euless Ord. § 10-4)(permits individual animal control officers to "kill" specified animals); R.554(Euless Ord. § 10-65(4))(prohibits a "person" from "kill[ing] any animal" with exceptions previously noted); R.555(Euless Ord. § 10-71)(permits animal control officers to "destroy" certain animals).

Given this context, Euless's attempt to apply the slaughterhouse ordinance to Merced's religious practice depends on a highly discretionary stretch of the statutory language—namely, that because in some ceremonies some of the

sacrificed animals are subsequently eaten, Merced's religious practice entails "slaughtering" animals or that Merced's home is a "slaughterhouse." But Merced is not in the business of selling food on the open market, and the number of animals killed in any given ceremony is a small fraction of those killed in a commercial slaughterhouse. It is not neutral for Euless to selectively apply slaughterhouse rules to Merced's religious offerings unless Euless applies slaughterhouse rules to all of the other analogous killings of animals in Euless.[16]

In sum, the fact that Euless has selectively applied "often-dormant" ordinances—one of which plainly applies to the slaughtering of animals *for food* and to *commercial* slaughterhouses (but not to the religious practices of the sort performed by Merced)—demonstrates that Euless's application of the ordinances is not neutral and must be subject to strict scrutiny.

D. Euless's ordinances institute a system of individualized exemptions that require strict scrutiny.

Euless's ordinances are also subject to strict scrutiny because they constitute a "system of individualized exemptions" under *Employment Division* v. *Smith*.

---

[16] If Merced's religious practice constitutes "slaughter," then the ordinance is also pre-empted by federal statutes protecting ritual slaughter. *See* 7 U.S.C. § 1902(b) (1988). The federal statute plainly permits as "humane" the ritual killing of animals using the same method as Merced's religious practice. Even though Merced did not press the pre-emption argument in the district court, the federal government's declaration that this kind of religious practice is humane demonstrates that the City's attempt to apply this ordinance to Merced is not neutral.

494 U.S. at 884. As the Court explained in that case, "where the State has in place a system of individual exemptions [to generally applicable laws], it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* (quoting *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986).

Here, the many secular exemptions in Euless's ordinances, along with the city's selective, "complaint-driven" enforcement, render Euless's statutory scheme a system of individualized exemptions. Indeed, by relying on complaints from others, whether anonymous or not, Euless ensures that its officials evaluate each potential violation on a case-by-case basis. Such a system gives police and other officials unbridled discretion to prohibit or allow animal killing, raising constitutional suspicions. As the Tenth Circuit has held:

> The "system of individualized exemptions" need not be a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a "system." If we were to require the plaintiff to show that the "system of individualized exemptions" was contained in a written policy, we would contradict the general principle that greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect.

Axson-Flynn v. *Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) (citing *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940)). *See also Tenafly*, 309 F.3d at 151 ("Although Ordinance 691 does not allow Borough officials to make exceptions on a case-by-case basis, in practice they have often done so.") Euless's pattern of ad

hoc enforcement thus amounts to a system of individualized exemptions subject to strict scrutiny.

E. Euless has not proven its affirmative defense of strict scrutiny.

As the Supreme Court recently reaffirmed, "the burden [of satisfying strict scrutiny] is placed squarely on the Government." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006). Strict scrutiny is "the most rigorous of scrutiny," and can be satisfied only if the law burdening religious exercise "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546. In the free exercise context, "[t]he compelling interest standard…is not watered down but really means what it says." *Id.* (internal quotations and alterations omitted). Because compelling governmental interests are interests that can justify racial discrimination or forced sterilization, *see Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), courts scrupulously follow the Supreme Court's instruction to classify only "paramount interests" of "the highest order" as worthy of burdening religious exercise. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) (racial equality in education); *Gillette* v. *United States*, 401 U.S. 437, 461-62 (1971) (national defense).

To meet its burden under strict scrutiny, a "Government's mere invocation" of broadly defined interests "cannot carry the day." *O Centro*, 546 U.S. at 432.

Rather, the government must demonstrate both that an interest of the highest order is endangered ***in this particular case***, and that it has employed the least restrictive means necessary to further that interest. *Id.* at 430-32. As the Tenth Circuit has explained, "a court does not consider the [policy] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [policy] to the individual claimant." *Kikumura* v. *Hurley*, 242 F.3d 950, 962 (10th Cir. 2001). In short, Euless must prove that serious harms are occurring as a result of Merced's offerings, and that it has chosen the least restrictive means to curtail real—not speculative—harms. And because the compelling interest determination is a legal conclusion, this Court must "make an independent examination of the whole record" to determine whether Euless has carried its burden. *Bose Corp.*, 466 U.S. at 499.

1. Euless's asserted interests in protecting public health and preventing animal cruelty are not compelling because Euless allows a wide variety of conduct infringing those interests.

Euless has not proven that its ban on Merced's religious exercise—religious exercise it tolerated for 16 years without incident—furthers a compelling governmental interest. In fact, Euless asserts the very same interests rejected in *Lukumi*: protecting public health and preventing cruelty to animals. *See id.* at 538. As in *Lukumi*, however, these interests fail for two reasons. First, the ordinances are substantially underinclusive; that is, they "fail to prohibit nonreligious conduct

that endangers [the government's] interests in a similar or greater degree than Santería sacrifice does." *Id.* at 543. Under *Lukumi*, such underinclusivity demonstrates that Euless's interests are ***not compelling***. Second, Euless has offered no evidence that Merced's sacrifices actually endanger public health or result in animal cruelty. This failure of evidence demonstrates that the ban on Merced's sacrifices ***do not further*** the asserted interests.

a. Prohibiting Merced's sacrifices does not further a compelling interest in protecting public health.

Euless allows a wide variety of nonreligious animal killing that threatens public health just as much as, or even more than, Merced's sacrifices. As the Court explained in *Lukumi*, "[t]he health risks posed by the improper disposal of animal carcasses are the same whether Santería sacrifice or some nonreligious killing preceded it." *Lukumi*, 508 U.S. at 544. Here, as in *Lukumi*, Euless "does not…prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity." *Id.* Euless also fails to regulate the disposal of animals killed for tablefare, as vermin, or through euthanasia. And, as in *Lukumi*, although trial evidence demonstrated that the improper disposal of garbage by restaurants poses the same public health hazards cited against Merced, *see* Tr.156; "restaurants are outside the scope of the ordinances." *Lukumi*, 508 U.S. at 545.

Euless also allows the consumption of uninspected meat for a wide variety of nonreligious purposes—further undermining its claim that the ordinances are

designed to protect the health of those who consume sacrificed animals. For example, like the city in *Lukumi*, Euless allows "hunters [to] eat their kill and fishermen [to] eat their catch without undergoing governmental inspection." *Id.* Moreover, while Texas law generally requires the inspection of slaughtered animals, *see* TEX. HEALTH & SAFETY CODE §§ 433.021, 433.024, it exempts the slaughter of animals for the use of the owner and "a member of the owner's family, or a nonpaying guest of the owner," *id.* § 433.006. *Lukumi* relied on a virtually identical Florida law: "[Florida] law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and 'members of his household and nonpaying guests and employees.'" 508 U.S. at 545 (quoting Fla. Stat. § 585.88(1)(a)). Such exemptions demonstrate that the government's interest in prohibiting the small-scale consumption of uninspected meat is not compelling.

In sum, like the city in *Lukumi*, Euless allows a wide variety of secular conduct that results in "appreciable damage to [its] supposedly vital interest." *Id.* at 547. This demonstrates that "the interest given in justification of [Euless's] restriction is not compelling." *Id.*

Euless also offered no evidence that Merced's animal sacrifices have ever endangered public health. Indeed, Euless conceded—and the lower court adopted as its finding—that Merced's religious offerings in his home ***do not*** endanger the health or safety of any person in Euless. *See* R.599¶25-26. As the City Manager

acknowledged, "[i]t is not the position of the City that the practice of animal sacrifices in [Merced's home] in the past caused a health hazard." R.645. In fact, the city had "no evidence…that killing goats inside a home results in a health hazard." R.646. The city also had "no knowledge of whether [Merced's offerings] caused the breeding or attraction of flies" and "no evidence that any of [Merced's] practice's…resulted in any disease." R.646. And the city admitted that it had no evidence that Merced ever disposed of the remains of sacrificed animals in an illegal or unsanitary manner. *See* R.599¶27-28. Rather, the City Manager testified that he merely "believes it is 'beyond speculation' that killing livestock 'in an urban setting' presents a health hazard." R.646. But, as the City Manager admitted in his deposition, "the killing of an animal would still be prohibited [even] *if i[t] did not cause a health hazard*." R.645 (emphasis added).

Euless also asserted (but offered no evidence) that a ban on Merced's sacrifices protects "the health of the persons who are directly engaged in the conduct." Tr.178. As noted above, such an interest cannot be compelling when Euless allows the consumption of uninspected meat for a wide variety of nonreligious purposes. And Euless did not even attempt to show that the consumption of Santería sacrifices threatens the health of its adherents. As the City Manager acknowledged, Euless had "no evidence" of any participant "becom[ing] sick from eating the meat of animals cooked at [Merced's] house."

R.645. Nor did Euless have evidence of adverse health effects from any other function of the Santería congregation. *Id.* Euless had no data "regarding how great is the risk of getting sick from eating at any Santería ceremony or function," let alone specific data "regarding people getting sick in Euless from eating at Santería ceremonies." *Id.* In short, Euless failed to establish that its prohibition on Santería sacrifice furthered any interest in public health.

b. Prohibiting Merced's sacrifices does not further a compelling interest in preventing animal cruelty.

Euless fares no better on its interest in preventing animal cruelty. Again, Euless allows a wide variety of nonreligious practices that compromise this supposedly compelling interest; and it has adduced no evidence that a ban on Merced's practices actually furthers that interest.

In *Lukumi*, the Court identified several types of permissible killing that compromised the city's interest in preventing animal cruelty: fishing; extermination of mice and rats within a home; euthanasia of stray animals; destruction of animals judicially removed from their owners; infliction of pain in the interest of medical science; the placing of poison in one's yard; the use of animals for hunting; and the hunting of wild hogs. *Id.* at 543-44. Here, the list of permissible killing is even longer and broader: fishing, hunting, and trapping (TEX. PENAL CODE § 42.09(f)(1)(A), incorporated in Euless Ord. § 10-65(R.554)); the use of poison or traps to kill insects, mice, rats, and other pests (Euless Ord.

§10-65(8)); killing of tablefare (Euless Ord. § 10-65(4) (R.431)); killing of stray animals (Euless Ord. § 10-162(b) (R.562)); killing of domesticated animals that attack humans (TEX. HEALTH & SAFETY CODE § 822.003, incorporated in Euless Ord. § 10-4(R.550)); killing of rabid animals (Euless Ord. § 10-135(a)(R.560-61)); infliction of pain and suffering during "experimentation for scientific research" (TEX. PENAL CODE § 42.09(e), incorporated in Euless Ord. § 10-65(R.554)); infliction of pain for the purposes of "wildlife management, wildlife or depredation control, or shooting preserve practices" (TEX. PENAL CODE § 42.09(f)(1)(B), incorporated in Euless Ord. § 10-65(R.554)); and infliction of pain in the course of "generally accepted…animal husbandry or agriculture practice" (TEX. PENAL CODE § 42.09(f)(2), incorporated in Euless Ord. § 10-65(R.554)). As in *Lukumi*, the city has failed to explain "why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals." 508 U.S. at 544. This demonstrates that the city's interest in preventing animal cruelty is not compelling.

Here, moreover, as even the trial court acknowledged, Euless's ban did not advanced the alleged interest in preventing animal cruelty. R.189. The animals in Merced's sacrifices are killed by cutting the carotid arteries with a single stoke of the knife. This very method is approved as "humane" under federal law. *See Lukumi*, 508 U.S. at 539 (quoting 7 U.S.C. §1902(b) (1988) ("simultaneous and

instantaneous severance of the carotid arteries with a sharp instrument")). The fact that the federal government has found this method "humane" is strong evidence that a ban on Santería sacrifice does not advance any interest in preventing cruelty to animals.

Moreover, the City Manager conceded that he had "no information regarding whether any practice at [Merced's] home…has resulted in cruelty to any animal." R.645. Euless conceded that it had no evidence that Merced ever kept any of the animals on his premises for longer than four hours; that he ever kept them in a manner that before the killing caused any injury to the animals; that he ever caused the animals any cruelty or harm other than the killing; that he ever kept the animals in an unsanitary manner or denied them sufficient food or water; or that the animals were caused any greater suffering than is normal in the legal commercial slaughter of animals for meat. *See* R.599-600¶29-34. Indeed, a typical animal on a large commercial farm is far more likely to suffer than animals Merced uses in the practice of Santería. Euless has thus failed to demonstrate that its ban on Merced's religious exercise furthers an interest in preventing animal cruelty.

2. Euless's absolute prohibition on Merced's sacrifices is not the least restrictive means of furthering its asserted interests.

Even assuming Euless's ban on Santería sacrifice furthered compelling governmental interests in protecting public health and preventing animal cruelty, Euless's ordinances are not the least restrictive means of furthering those interests.

Under strict scrutiny, "it is the ***Government's obligation*** to prove that the [less restrictive] alternative will be ineffective to achieve its goals." *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 816 (2000) (emphasis added). "If a less restrictive alternative would serve the Government's purpose, the [government] ***must*** use that alternative." *Id.* at 813 (emphasis added). To make this showing, Euless must "demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *see also United States* v. *Hardman*, 297 F.3d 1116, 1130-31 (10th Cir. 2002) (ruling against government because "[t]he record is devoid of hard evidence" of narrow tailoring and "does not address the possibility of other, less restrictive means of achieving these interests.").

Euless has not satisfied that burden here. First, as in *Lukumi*, the ordinances are substantially overinclusive; that is, "they proscribe more religious conduct than is necessary to achieve their stated ends." 508 U.S. at 538. If, as Euless concedes, the harm to be prevented is not the sacrifice itself but the health problems resulting from improper disposal of remains, "the city could have imposed a general regulation on the disposal of organic garbage." *Id.* But Euless did not do so. Indeed, echoing the city in *Lukumi*, Euless maintained that it would have

prohibited Merced's sacrifices "[even] if [they] did not cause a health hazard." R.645. This is not narrow tailoring.

Similarly, "[a] narrower regulation would [also] achieve the city's interest in preventing cruelty to animals." 508 U.S. at 539. As explained above (and as noted in *Lukumi*), federal law approves the method of killing used in Merced's sacrifices as humane: "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument." *Id.* (quoting 7 U.S.C. § 1902(b)). If Euless were concerned that Merced's methods were somehow unreliable and therefore less humane, "the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it." *Id.* Again, Euless chose not to pursue a narrowly tailored solution.

Finally, Euless offered no evidence that it "actually considered and rejected the efficacy of less restrictive measures." *Warsoldier*, 418 F.3d at 999. Indeed, when the City Manager was asked whether, according to Euless, a complete ban on religious sacrifices was the least restrictive means of accomplishing its interests, he replied that he "[could not] answer 'yes' or 'no' to the question." R.646. He also admitted that he did not know whether other cities had tried to protect their interests in public health through methods short of a complete ban on animal sacrifice. *Id.* These answers demonstrate that Euless did not consider a less

restrictive means of accomplishing its interests. The ordinances thus fail strict scrutiny and are unconstitutional.

II. Euless violated the Texas Religious Freedom Act by prohibiting Merced's religious exercise of animal sacrifice.

A. Euless's actions substantially burden Merced's exercise of religion.

The lower court decision must be vacated because Euless has also violated the Texas Religious Freedom Act (TRFA). TRFA provides that "a government agency may not substantially burden a person's free exercise of religion" unless that burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE § 110.003. By design, TRFA gives significantly *greater* protection to religious exercise than does the Constitution's Free Exercise Clause. Under the Free Exercise Clause, as explained above, a law receives strict scrutiny only if it is not neutral, not generally applicable, or constitutes a system of individualized exemptions. Under TRFA, however, it makes no difference how neutral or generally applicable the government's law might be; the law receives strict scrutiny as long as it imposes a "substantial burden" on religion.

As explained above, Euless's ordinances do not satisfy strict scrutiny (*see* Section I.E). The only question under TRFA, then, is whether Euless's prohibition on religious sacrifice substantially burdens Merced's religious exercise. It does.

1. Texas courts have construed TRFA to track pre-*Smith* Free Exercise precedent.

TRFA's "substantial burden" language mimics the language of the Supreme Court's pre-*Smith* decisions in *Sherbert* v. *Verner*, *Wisconsin* v. *Yoder*, and *Thomas* v. *Review Board*. That's because TRFA was designed to restore the pre-*Smith* status of Free Exercise protections after the Supreme Court held that the federal analogue to TRFA, the Religious Freedom Restoration Act, could not apply to the states. SENATE RESEARCH CENTER, SB 138 BILL ANALYSIS, S. 76(R)-3849 (Tex. 1999) ("The Supreme Court held [in *Boerne*] that Congress exceeded its authority under the Constitution in adopting RFRA; however, this decision does not affect Texas' ability to enact similar legislation."); HOUSE RESEARCH ORGANIZATION, SB 138 BILL ANALYSIS, H. 76(R) at 2 (Tex. 1999) (discussing *Smith*, RFRA, and *Boerne*); *City of Boerne* v. *Flores*, 521 U.S. 507, 514-16 (1997).

The Texas Supreme Court has yet to construe TRFA. Currently pending before that court, but not yet decided, is *Barr* v. *City of Sinton*, No. 06-0074 (argued March 22, 2007), which includes claims under TRFA and the Free Exercise Clause.[17] However, even without a ruling from the Texas Supreme Court, it is clear that TRFA tracks federal law. All of the Texas courts of appeals to decide a TRFA claim have applied federal precedent to decide the claim. In *Scott*

[17] Merced requests additional briefing should the *Barr* decision issue before this Court reaches a decision.

v. *State*, 80 S.W.3d 184 (Tex. App.—Waco 2002) (pet. denied), for example, the court held that TRFA and the Free Exercise clause required an accommodation for Scott, whose religious beliefs prevented him from making an oath or affirmation to testify in court. *Id.* at 194-95. Other cases have also relied on federal pre-*Smith* precedent in construing TRFA.[18] Given the legislative purpose of TRFA, it seems clear that however *Barr* is decided, TRFA will track pre-*Smith* Free Exercise jurisprudence and TRFA's federal analogues, RFRA and RLUIPA.

2. Prohibiting Merced's sacrifices constitutes a substantial burden on his religious exercise under pre-*Smith* precedent and federal statutes analogous to TRFA.

There is no doubt that Merced's religious exercise is substantially burdened under the standards set out in *Sherbert*, *Thomas*, and *Yoder*. In *Sherbert*, the Supreme Court held that a substantial burden is an action that puts "pressure upon [plaintiff] to forego [a religious] practice." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1962). That pressure came from the need to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1962). Although the actual penalty was the denial of unemployment compensation, the Supreme Court described it as "the

---

[18] *See, e.g.*, *In re RM*, 90 S.W.3d 909, 912 (Tex.App.-San Antonio 2002); *see also Barr* v. *City of Sinton*, 2005 WL 3117209 n.9 (Tex.App.-Corpus Christi 2005) (mem.) (pet. granted 2006) (TRFA meant to provide protections struck down in *Boerne*).

same kind of burden upon the free exercise of religion as [] a fine imposed against appellant for her Saturday worship." *Id.* The Supreme Court similarly found a substantial burden on Thomas' religious exercise when the state denied unemployment benefits: "Where the state … put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." 450 U.S. at 717-18.

Merced, by contrast, will be burdened with a fine and a misdemeanor conviction if he engages in the religious exercise of animal sacrifice, a far greater burden than merely being denied unemployment benefits. R.551. Merced's burden is remarkably similar to the one found by the Court in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). In that case the burden Wisconsin imposed on the Amish plaintiffs was criminal prosecution and small fines ($5) for refusing to send their children to public school. The Court held that this burden was not only substantial, but devastating: "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." *Id.* at 218. Merced's situation is, if anything, worse than that facing the Amish—according to his belief system, Santería as a religion would cease to exist if animal

sacrifices were not performed. R.534; Tr.40-41. Yet he faces an even greater criminal sanction than the Amish did for performing those sacrifices.

Precedents interpreting TRFA's federal analogues, RFRA and RLUIPA, also demonstrate the existence of a substantial burden. In *Mayfield* v. *TDCJ*, 529 F.3d 599 (5th Cir. 2008), this Court held 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." *Id.* at 613. The Texas Department of Criminal Justice created a substantial burden by restricting prisoners' group worship, unevenly enforcing rules governing religious volunteers, and restricting access to sacred objects. *Id.* at 613-16. In other RLUIPA prisoner cases, this Court has held that prohibitions on religiously-required activities constitute substantial burdens. *See Gooden* v. *Crain*, 255 Fed.Appx. 858 (5th Cir. 2007) (prohibition on Muslim beards); *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (prohibition on long hair required by Native American beliefs); *Baranowski* v. *Hart*, 486 F.3d 112 (5th Cir. 2007) (denial of kosher food). This Court reached those conclusions even though prison officials, unlike municipal officials, are owed "due deference" in meeting the unique security constraints of the prison setting. *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 (2005)

Other Courts of Appeals applying the RFRA and RLUIPA substantial burden standards have held that far lesser burdens than prohibition are still substantial. *See United States* v. *Friday*, 525 F.3d 938, 947 (10th Cir. 2008) (law limiting access to eagle feather would place substantial burden on Native American religious exercise of Sun Dance under RFRA); *Sts. Constantine and Helen Greek Orthodox Church* v. *City of New Berlin,* 396 F.3d 895, 901 (7th Cir. 2005)("delay, uncertainty and expense" can constitute substantial burden); *Guru Nanak Sikh Soc'y* v. *County of Sutter,* 456 F.3d 978, 988 (9th Cir. 2006) (two permit denials for Sikh temple to build in county and likelihood of future denials constituted a substantial burden). And one court has directly addressed whether absolute prohibitions constitute substantial burdens: "We have little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise." *Greene* v. *Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (citing *Murphy* v. *Missouri Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir.2004)).

Euless has imposed an "outright ban" on Merced's religious exercise of animal sacrifice, and enforces it with criminal sanctions. Such a burden, imposed on a religious practice that is "essential" for the religion to continue to exist, R.600-01¶42-43; Tr.44, would be substantial under pre-*Smith* precedent, RFRA, or

RLUIPA. And since TRFA's substantial burden standard mimics those laws, the prohibition is also a substantial burden under TRFA.

3. Euless cannot alleviate the substantial burden by telling Merced to go somewhere else.

Euless argued, Tr.170-71, and the trial court held, Tr.174-78, that the substantial burden was illusory because Merced could go outside Euless to conduct sacrifices. That analysis is wrong for three reasons.

First, as in many other traditions, such as some forms of Hinduism or African folk religion, *orishas* are localized deities—they do not exist in all places at once, as deities from other religious traditions do. Tr.46-49. Testimony at trial and in depositions indicated that, while Santería can be practiced in different cities, the proper place for most sacrifices is at the home shrine of the priest performing them. *See, e.g.*, Tr.46-48, 93-95, 108-09; R.542-43. Merced testified that his own sacrifices could be moved to a temple only "if the orishas will allow us to go and do it there." Tr.107-08. Moreover, where an *orisha* manifests itself (and therefore where the sacrifice will take place) can only be determined through a complex divination ritual. Tr.79-81; R.540-43. The ceremony to initiate new priests, which Euless has prevented Merced from performing, must take place at the home shrine of one of the initiate's godparents. Tr.93-95, 109. Thus Merced can't simply go somewhere else to sacrifice; his *orishas* reside in his home and he can't simply transport them somewhere else.

Second, governments may not tell their citizens to go somewhere else to get their rights. It is a venerable principle of Constitutional law that "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." *Schneider* v. *State,* 308 U.S. 147, 151-52 (1939). For that reason, municipalities may not ban entire modes of expression within their borders. *See Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (striking down citywide ban on "live entertainment").

This principle applies with equal force to claims of substantial burden under the Free Exercise Clause. "[T]he danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat of criminal prosecution." *Yoder,* 406 U.S. at 218. Far from a solution, "[f]orced migration of religious minorities was an evil that lay at the heart of the Religion Clauses." *Id.* at 218 n.9. Similarly, in *Islamic Center of Mississippi* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988) this Court stated, "[a]s 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." *Id.* at 300. The *Islamic Center* court held that the city's repeated refusals to permit

a mosque in the city imposed a substantial burden on religious exercise. *Id.* at 298-99.

Moreover, Euless's argument proves too much. If any claim of burden can be defeated because the plaintiff can drive to another town, then any restriction Euless wants to impose would be free from TRFA challenge. Euless could ban all churches from locating there, as long as it could show that there are other places in the Metroplex where its citizens could worship.

Third, the trial court's focus on what the *orishas* were telling Merced impermissibly involved the court in deciding religious truth. Rather than accept Merced's descriptions of what his faith required, the lower court erroneously focused—as the centerpiece of its substantial burden analysis—on whether the *orishas* had really told Merced he had to conduct sacrifices in Euless. Tr.172-78. This inquiry into whether Merced's god really had commanded him to sacrifice in Euless is itself an unconstitutional religious validity test that violates binding precedent, and should be rejected by this Court. *Thomas* v. *Review Bd.*, 450 U.S. 707, 715-16 (1981).

B. Euless cannot satisfy strict scrutiny.

Because Merced demonstrated a substantial burden on his religious exercise, Euless must demonstrate that its actions were "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that interest."

TEX. CIV. PRAC. & REM. CODE § 110.003ff. The TRFA strict scrutiny standard mirrors the federal one. *See* HOUSE RESEARCH ORGANIZATION, SB 138 BILL ANALYSIS, H. 76(R) at 2 (Tex. 1999) ("In determining whether an interest was compelling, a court would have to give weight to the interpretation of the 'compelling interest' test in federal case law."). And as demonstrated in Section I.E above, Euless has not met its burden under strict scrutiny.

III. Euless's selective enforcement of its ordinances violates the Equal Protection Clause.

Classifications based on religion are suspect under the Equal Protection Clause, as the Supreme Court stated in *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) and *Burlington N. R.R. Co.* v. *Ford*, 504 U.S. 648, 651 (1992). In *Dukes*, this Court identified race and religion as "inherently suspect" distinctions, and the Supreme Court agreed. *Dukes* v. *The City of New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974).[19] More recently, in *Sonnier* v. *Quarterman*, this Court stated that suspect classes include "those based upon race, ancestry, or religion." 476

[19] *See Dukes*, 427 U.S. at 303 ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.")

F.3d 349, 368 (5th Cir. 2007) (citing *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976)).[20]

Religion is a suspect class because "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, ***religious***, sexual or national class." *Parents Involved in Community Schools* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2757 (2007) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995)) (emphasis added). Governmental classifications on the basis of religion are as insidiously destructive and oppressive as racial classifications. Therefore, "[j]ust as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion." *Bd. of Educ. of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring). When governmental power is used to draw distinctions between persons on the basis of their religious belief, "[t]he danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Id*.

---

[20] Numerous circuits have also recognized that religion is a suspect class. *See Schumacher* v. *Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992); *DeHart* v. *Horn*, 227 F.3d 47, 61 (3d Cir. 2000) (stating that a "classification that draws upon suspect distinctions, such as religion, is subject to strict scrutiny"; *Rick Hill* v. *Cecil Davis*, 58 Fed. Appx. 207, 209 (7th Cir. 2002); *Weems* v. *Little Rock Police Dep't*, 453 F.3d 1010, 1016 (8th Cir. 2006)); *United States* v. *Oakes*, 11 F.3d 897, 899 (9th Cir. 1993) (stating that suspect characteristics under the Equal Protection Clause include race, religion, gender, and personal beliefs).

Euless's selective (and improper) enforcement of the ordinances against Merced, and not against others who kill animals within City limits, constitutes arbitrary discrimination on the basis of Merced's religion.[21] As the Supreme Court held in *Willowbrook* v. *Olech*, "[t]he purpose of the Equal Protection Clause is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its *improper execution through duly constituted agents*." 582 U.S. 562, 564 (2000) (emphasis added); *see also Sonnier* v. *Quarterman*, 476 F.3d 349, 368 (5th Cir. 2007). Euless selectively enforces its ordinances. It does not enforce the ordinances against homeowners who kill snakes and vermin, veterinarians who kill mammals and reptiles, or a wide variety of other secular killings. R.600¶39-40; R.644. Such selectivity in enforcement cannot be justified. If veterinarians are allowed to kill mammals and reptiles within Euless limits as part of their professional practice, there is no reason Merced should be prohibited from killing four-legged animals as part of his practice as a Santería priest. In enforcing the ordinance against Merced and not veterinarians (and others), Euless disfavors Merced on the basis of his religion.

Moreover, Euless's policy of enforcing its ordinances only when it receives complaints—especially anonymous complaints—affords private biases the force of

[21] The City describes its enforcement of these provisions as "complaint-driven." Tr.136-37.

government police power. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 448 (1985). By allowing anonymous complaints about Merced's sacrifices to trigger a ban, the government has deprived Merced of equal protection.

Equal Protection violations lead to strict scrutiny. *Id.* at 440. For the reasons stated in Section I.E, Euless's prohibition on Merced's sacrifices does not withstand strict scrutiny.

CONCLUSION

For 16 years, Merced conducted religious sacrifices in his own home without government interference. He would still be doing so today if those anonymous telephone calls to the police had not been made, or if Euless had decided to let him alone after receiving those calls. Instead Euless has chosen to enforce broadly drafted slaughterhouse and animal cruelty ordinances to stop Merced's religious exercise, while at the same time allowing a wide range of non-religious behavior that could just as easily fall under those ordinances. Therefore this Court should reverse the judgment of the district court and hold that Euless has violated Merced's rights under the Constitution and the Texas Religious Freedom Act.

Respectfully submitted,

Professor Douglas Laycock
Yale Kamisar Collegiate
Professor of Law
University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109
Phone: (734) 647-9713

Eric C. Rassbach
Hannah C. Smith
Lori H. Windham
Luke W. Goodrich
The Becket Fund for Religious
Liberty
1350 Connecticut Avenue, NW
Suite 605
Washington, DC 20036
Phone: (202) 955-0095
Fax: (202) 955-0090

Attorneys for Plaintiff José Merced

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 13,682 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman, 14-point) using Microsoft Word 2003.

Dated: September 24, 2008

Eric C. Rassbach
Attorney for Plaintiff José Merced

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2008, two true and correct printed copies and one electronic copy of the foregoing brief was served upon the following counsel by United States Postal Service delivery:

William Michael McKamie
Law Offices of William M. McKamie P.C.
Suite 640
13750 San Pedro Avenue
San Antonio, TX 78232
Phone: (210) 546-2122

William Andrew Messer
Messer, Campbell & Brady
6351 Preston Road
Suite 350
Frisco, TX 75034
Phone: (972) 424-7200

Dated: September 24, 2008

Eric Rassbach
Attorney for Plaintiff José Merced