

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CASTLE HILLS FIRST
BAPTIST CHURCH,
Plaintiff,

VS.

CITY OF CASTLE HILLS,
Defendant.

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Cause No. SA-01-CA-1149 HG

**INTERVENOR'S CROSS-MOTION FOR SUMMARY JUDGMENT
AND BRIEF IN RESPONSE TO DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

TO THE HONORABLE DISTRICT JUDGE:

Intervenor, John Cornyn, Attorney General of Texas, offers his Cross-Motion for Summary Judgment and Brief in Response to Defendant's Motion for Partial Summary Judgment and would respectfully show the Court that Defendant City of Castle Hills has not met its burden of demonstrating that the Texas Religious Freedom Restoration Act is unconstitutional.

**I.
INTRODUCTION**

A. Necessity of Intervention

Intervenor joined this lawsuit for the sole purpose of defending the constitutionality of the Texas Religious Freedom Restoration Act ("TRFRA").¹ In its Second Amended Answer and Motion for Partial Summary Judgment -- seemingly as an afterthought -- Defendant contends, "the [TRFRA] ... [is] unconstitutional, facially, and/or as applied beyond congressional power under the

¹Intervenor's Motion to Intervene was granted by Order dated November 8, 2002. (Docket No. 46).

circumstances of this case,”² and, “if [TRFRA is] interpreted to exempt from the law an activity such as ‘parking’ – far removed from the zone of permissible protection or accommodation to insure the free exercise of religion – [it is] unconstitutional.”³ Plaintiff’s conclusory allegations do not establish that the TRFRA is at odds with the Establishment Clause of the First Amendment. Accordingly, this Court should deny Defendant’s attempt to have TRFRA declared unconstitutional.

B. Nature of the Texas Religious Freedom Restoration Act

The TRFRA ensures that governmental authorities do not abridge citizens’ free exercise of religion without a compelling governmental interest. Under the heading “Religious Freedom Protected,” the TRFRA states: “subject to subsection (b), a government agency may not substantially burden a person’s free exercise of religion.” TEX. CIV. PRAC. & REM. CODE §110.003(a). Free exercise of religion is defined as “an act or refusal to act that is substantially motivated by sincere religious belief.” *Id.* at § 110.001(a)(1). However, the protection offered by the bill “does not apply if the government agency demonstrates that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.” *Id.* at § 110.003(b).

Zoning is specifically addressed in § 110.010, entitled “Application to Certain Cases.” That section states that municipalities have no less authority concerning “zoning, land use planning, traffic management, urban nuisance, or historic preservation than . . . existed under the law as interpreted by the federal courts before April 17, 1990 [the date of *Employment Division v. Smith*, 494 U.S. 872 (1990)].”

²Defendant’s Second Amended Answer to Plaintiff’s Third Amended Original Complaint, ¶ 135.

³Defendant’s Motion for Partial Summary Judgment, ¶ 53.

II.
ARGUMENTS & AUTHORITIES

A. Federal Courts Attempt to Interpret State Statutes to Avoid Unconstitutionality.

Federal courts construing the constitutionality of duly passed state laws attempt to give such laws a reading that comports with the federal constitution. In *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096, 1107 (5th Cir. 1997), the Fifth Circuit summarized this approach, stating:

When we consider the constitutionality of state statutes, we look to the rules of statutory construction of the state, *see, e.g., Leavitt v. Jane*, 518 U.S. 137 (1996) (*per curiam*); *Barnes v. Mississippi*, 992 F.2d at 1341-42, mindful of the principle that we should avoid ‘federal-court nullification of state law,’ *Leavitt*, 518 U.S. at 145, and ‘[w]here fairly possible, ...construe a statute to avoid a danger of unconstitutionality,’ *Planned Parenthood Ass’n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 493 (1983); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

Accordingly, this Court should construe the TRFRA deferentially. Viewed in this light and as set forth below, the TRFRA is clearly constitutional.

B. The TRFRA Is Constitutional Because It Does Not Violate the Establishment Clause of the First Amendment to the United States Constitution.

Defendant’s sole contention of unconstitutionality, that TRFRA violates the Establishment Clause of the First Amendment to the United States Constitution, is without merit. The TRFRA ensures that governmental agencies do not substantially burden a person’s free exercise of religion unless the agency demonstrates a compelling governmental interest and that the application of the burden to the person is the least restrictive means of furthering that interest. TEX. CIV. PRAC. & REM. CODE § 110.003. Defendant appears to argue that this “strict-scrutiny” requirement causes the TRFRA to “establish” religion in violation of the Establishment Clause of the First Amendment to the United States Constitution. However, even in *Employment Division v. Smith*, 494 U.S. 872

(1990), the case in which the Supreme Court abandoned strict-scrutiny analysis in Free Exercise cases, the Court never held that the use of strict-scrutiny violated the Establishment Clause. In fact, the general rule is that strict-scrutiny is the proper standard anytime a court addresses a fundamental right. *See Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir.2001).

It is well-established that state governments may provide their citizens with greater rights than those provided by the federal Constitution. *See, e.g., Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)(holding California could recognize free-speech rights not recognized by federal constitution). The TRFRA simply provides Texas citizens with additional protections unavailable under the federal constitution. These protections are unavailable under the federal constitution not because they violate the Establishment Clause, but, rather, because Congress does not have the power under the Fourteenth Amendment to fashion such remedies without endangering federal separation of powers. *See City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997); *Smith*, 494 U.S. at 885. However, the Free Exercise Clause of the First Amendment to the United States Constitution triggered strict scrutiny without running afoul of the Establishment Clause prior to *Smith*;⁴ therefore, it is reasonable that the “free exercise” provision of the TRFRA may constitutionally incorporate the same standard at the state level.

Thus, unless the TRFRA runs afoul of the Supreme Court’s Establishment Clause jurisprudence, it is constitutional. Federal courts (including the Fifth Circuit) construing the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, after which the TRFRA is modeled,

⁴*See Sherbert v. Verner*, 374 U.S. 398, 403 (1963). As noted, *Smith* did not hold that the Establishment Clause mandated the abandonment of the strict scrutiny standard in free exercise cases. *Smith* merely held that a claim of free exercise of religion did not invalidate a otherwise valid law of general applicability under the United States Constitution. *Smith*, 494 U.S. at 885.

have held that the federal statute does not violate the Establishment Clause of the First Amendment. See *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd on other grounds*, 521 U.S. 507 (1997); accord *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir. 1997); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996); *EEOC v. Catholic Univ.*, 83 F.3d 455, 470 (D.C.Cir. 1996). These courts analyzed the federal Religious Freedom Restoration Act under the three-part test announced by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). While Defendant claims that, after *City of Boerne*, the Supreme Court “relied again upon neutrality toward religion as the first principle of [E]stablishment [C]lause review,” the *Lemon* test in fact still rules. See generally *Mitchell v. Helms*, 530 U.S. 793 (2000). Pursuant to *Lemon*, in order to pass muster under the Establishment Clause of the First Amendment, “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” *Id.* at 612-13 (internal citations omitted).

The Supreme Court’s decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987), forecloses Defendant’s establishment argument and contains an excellent discussion of each element of the *Lemon* test. In *Amos*, the Court unanimously rejected an Establishment Clause challenge to the Title VII exemption for religious organizations. Specifically, the Court concluded that the exemption met the first prong of the *Lemon* test because it was a permissible purpose to “alleviate significant government interference with the ability of religious organizations to define and carry out their religious missions.” *Id.* at 335. The exemption met the second prong of *Lemon* since “[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden

'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337 (emphasis original). While the Court did not discuss the third prong at length, it noted "the statute effectuates a more complete separation of the two [church and state] and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case." *Id.* at 339. To summarize, *Amos* confirms that government may accommodate religion without advancing or establishing religion in violation of *Lemon*.

Like the Title VII exemption at issue in *Amos*, the TRFRA accommodates religion without impermissibly advancing it. Granting statutory leeway for an individual to practice their religion so long as it does not interfere with a governmental agencies' compelling interests certainly does not advance religion in any appreciable way. Further, like the exemption at issue in *Amos*, the protection afforded by the TRFRA does not equate to the government itself advancing religion through its own activities or influence. As the Court noted in *Amos*, when the government acts to lift burdens on the exercise of religion, it does not similarly have to benefit secular activity. *Id.* at 338. Finally, as in *Amos*, there is no possibility of excessive entanglement; in fact, there could be no such allegation here because the TRFRA does not concern itself with the sincerity or depth of a person's religious convictions. *See* TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1). Thus, as in *Amos*, the TRFRA meets all three prongs of the *Lemon* test for determining compliance with the Establishment Clause.

III. **CONCLUSION**

The Texas Religious Freedom Restoration Act provides Texas citizens with a statutory mechanism for enforcing their right to freely exercise their chosen religion. Under established Supreme Court precedent, Texas may statutorily afford its citizens with more protection than that

provided by the federal constitution so long as the state statute does not offend the United States Constitution. Since the TRFRA does not run afoul of the Establishment Clause, the only ground on which it has been challenged, this Court should rule that it is constitutional.

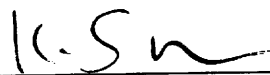
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via certified mail, return receipt requested on November 21, 2002 to:

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FOR THE WESTERN DISTRICT OF TEXAS
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CASTLE HILLS FIRST
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Cause No. SA-01-CA-1149 HG

VS.

CITY OF CASTLE HILLS,
Defendant.

ORDER

CAME ON this day for consideration Intervenor, John Cornyn, Attorney General of Texas' Cross-Motion for Summary Judgment and Brief in Response to Defendant's Motion for Partial Summary Judgment, and it appearing to the Court that the motion is meritorious and should be granted, it is accordingly ORDERED that:

Defendant's claim that the Texas Religious Freedom Restoration Act is unconstitutional is dismissed with prejudice.

Signed this the _____ day of _____, 2002.

UNITED STATES DISTRICT JUDGE