

NO. 19-05-06606

MAGNOLIA BIBLE CHURCH,  
MAGNOLIA'S FIRST BAPTIST CHURCH,  
AND BELIEVERS FELLOWSHIP,

*Plaintiffs,*

v.

THE CITY OF MAGNOLIA,

*Defendant.*

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT OF

MONTGOMERY COUNTY,  
TEXAS  
Montgomery County - 284th Judicial District Court

\_\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION**

Plaintiffs Magnolia Bible Church (“Magnolia Bible”), Magnolia’s First Baptist Church (“Magnolia’s First Baptist”), and Believers Fellowship (collectively, the “Churches”) file this, their Original Petition for a Declaratory Judgment and Permanent Injunction against the City of Magnolia (the “City”).

**I. DISCOVERY LEVEL**

1. The Churches intend Level 2 discovery and affirmatively plead that the expedited actions process in Texas Rule of Civil Procedure 169 does not govern this case because plaintiffs seek injunctive relief.

**II. PARTIES**

2. Magnolia Bible Church is located in Montgomery County, Texas. It owns property at 31611 Nichols Sawmill Road, Magnolia, Texas 77355.

3. Magnolia’s First Baptist Church is located in Montgomery County, Texas. It owns property at 18525 FM 1488 Road, Magnolia, Texas 77354.

4. Believers Fellowship is located in Montgomery County, Texas. It owns property at 31815 Old Hempstead Road, Magnolia, Texas 77355.

5. The City has a population of 5,000 or less and is a Type A City chartered by the general law under the Texas Constitution Article 11 Section 4. The City is located in all or parts of Montgomery County, Texas, and it may be served with process by serving its mayor, clerk, secretary, or treasurer under TEX. CIV. PRAC. & REM. CODE § 17.024(b).

### III. JURISDICTION AND VENUE

6. The Court has personal jurisdiction over the Churches because they are residents of the State of Texas, organized under the laws of Texas, and operate in Montgomery County, Texas. The Court has subject matter jurisdiction because the Churches request declaratory relief.

7. Venue is proper in Montgomery County, Texas. All or a substantial part of the events giving rise to the Churches' claims against the City occurred in Montgomery County, Texas, and the City is located in Montgomery County, Texas. TEX. CIV. PRAC. & REM. CODE §§ 15.002(1), (2).

8. The City has no governmental immunity from the claims asserted in this Petition because Section 37.006(b) of the Texas Civil Practice and Remedies Code “waives a municipality’s immunity in a suit that involves the validity of a municipal ordinance.” *City of Dallas v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011).

### IV. BACKGROUND

9. The City of Magnolia has singled out City churches (and other institutions geared toward the public good) with a water rate that dwarfs that of similarly situated commercial users. The City took this unprecedented action to recoup property tax revenue from churches, notwithstanding that the City is *prohibited by law* from imposing a property tax on churches. Essentially, the City had grown dissatisfied with a balance long struck by Texas law, in which houses of worship contribute to society through charity and spiritual outreach—not by

way of a mandatory property tax. Texas law and common sense prohibit the City from collecting what would be an impermissible property tax simply by levying a disproportionate “water rate” on churches (and others exempt from property taxes).

**A. The property tax exemption and the Churches.**

10. “Churches . . . do something more than occupy valuable . . . real estate”—they “serve the poor and homeless of poverty-stricken . . . areas, providing shelter, food for the hungry, and counseling.” *First Baptist Church of San Antonio v. Bexar Cty. Appraisal Rev. Bd.*, 833 S.W.2d 108, 113 (Tex. 1992) (Cook, J., concurring). By “minister[ing] to human and social needs which the state itself might and does to a greater or less extent undertake to satisfy,” churches thus relieve the state “of its burden.” *River Oaks Garden Club v. City of Houston*, 370 S.W.2d 851, 855 (Tex. 1963) (quotation omitted). To account for this reality, Texas has made a “decision to spare churches from the burden of taxation.” *First Baptist*, 833 S.W.2d at 113 (Cook, J., concurring).

11. Indeed, the property-tax exemption for churches and religious organizations is part of this State’s very fabric; the original Texas Constitution gave the Texas Legislature the option to “exempt from taxation . . . actual places of religious worship, [along with] any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society, and which yields no revenue whatever to such church or religious society.” TEX. CONST. art. 8, § 2. The Legislature took that opportunity, exempting from property taxes all those that qualify as “religious organization[s].” TEX. TAX CODE §§ 11.20(a), (c).

12. The Churches here are emblematic of why that tax exemption exists. Each one is a pillar of the Magnolia community and provides valuable services to Magnolia's residents.

13. Magnolia Bible started as a Bible study 15 years ago. It has since grown from those humble beginnings and now has a membership of about 300. Magnolia Bible's ministries include "GriefShare" and "Celebrate Recovery," both of which are key to the church's ministry and evangelization. Through GriefShare, Magnolia Bible ministers to members to ensure that they do not go through the grieving process alone; GriefShare also provides a way for the church to reach out to the greater community in its time of need, extending the love and care of Jesus Christ to Magnolia community members during the most trying of times. Similarly, through Celebrate Recovery, Magnolia Bible supports community members struggling with addiction by showing them the loving power of Jesus Christ through a Bible-based recovery plan.

14. Magnolia's First Baptist is a multi-generational church that has proudly stood for 169 years on the same patch of land. Today, Magnolia's First Baptist serves a membership of 2,500 and provides weekly Sunday worship services to approximately 1,000. Like Magnolia Bible, Magnolia's First Baptist also seeks to carry out the church's deeply held religious beliefs in ministry and evangelization. For example, Magnolia's First Baptist provides the "Life Touch Christian Counseling" program—a comprehensive counseling service—at no cost to church and community members.

15. Believers Fellowship is the youngest of the three Churches. It is also the smallest, with a total membership around 100. Being newer and smaller, Believers Fellowship feels particularly called to ministry and evangelization. Despite its smaller membership,

Believers Fellowship also offers several community-focused programs such as GriefShare and employment counseling.

16. A common thread connects all three Churches: the Churches and their members hold the religious belief that the Bible is God’s Word and that His Word calls Christians to engage in ministry (serving others in God’s name) and evangelization (sharing God’s Word).

17. Thus, not only are the above services beneficial to the Magnolia community at large, they are acts of faith for the Churches and their members, too.

**B. The City’s dilemma.**

18. Since 2005, to meet increasing population demands, the cost to the City of providing water service has increased. At the same time, the City’s water revenue—including water user fees and fees from new developments—has increased by almost 187 percent from FY 2004–05. The water *rates* themselves, however, had remained largely the same.

19. According to the City, water revenues have not increased fast enough. And the City therefore finds itself in a budgetary hole. In the words of the City Administrator, the City has “been struggling to keep ahead of things because even though [it] ha[s]n’t raised the water rates, the cost of everything has gotten more expensive.”

20. In late 2017, the City considered how to remedy this financial gap. The City authorized engineering firm Jones & Carter to analyze the City’s water and sewer rates for FY 2016–17, and the firm produced a January 2018 report on the topic. From that analysis, the City Council aimed to devise a plan of action. Or, again in the words of the City Administrator, the City hoped to “be able to provide a good product but also put enough money aside—maybe a

couple cents of every 1,000 [cents]—for repairs or for capital improvements so years down the road, when we need to put in a new water well or a water tower, [the City would have] money.”

21. In conjunction with the Jones & Carter analysis, the City Council began holding a series of workshops to discuss when, how, and to what extent to raise water rates to account for the budgetary shortfall. These workshops continued into early 2018.

**C. The City’s Solution: the “Institutional” Water Rate.**

22. The citizens of Magnolia expected that the City would ultimately impose uniform-yet-moderate rate increases—proportionate to a user’s water consumption and coordinate with the increased cost of water. And understandably so, for it has long been the law in Texas that municipalities owe a “duty of supplying all persons along its mains, without discrimination, with the commodity which it was organized to furnish,” such that “all persons are entitled to have the same service on equal terms and uniform rates.” *City of Texarkana v. Wiggins*, 246 S.W.2d 622, 626–27 (Tex. 1952). What emerged from the workshops, however, was something entirely different than what Magnolia citizens had expected.

23. On March 13, 2018, the City Council voted to adopt Ordinance O-2018-003 (later amended on September 11, 2018 by Ordinance No. O-2018-015), thereby adjusting the City’s water and wastewater rates to charge a specific rate to a brand-new category of water user: “Institutional, Tax-Exempt and nonprofit accounts.” Among those “institutional” users are the Churches (and other houses of worship of all faiths), religious nonprofits, and other tax-exempt entities, including Magnolia Independent School District.

24. This new “Institutional Water Rate” marked a dramatic shift in the status quo. Under the City’s old water rate, “institutional” users such as churches paid the same rate as commercial users. But under the new rate, the City now forces them to pay a significantly higher rate than that of their commercial counterparts. To be more specific, the “institutional” users

bear water rates up to nearly 75% greater than commercial users. For instance, a church that uses 5,000 gallons of water bears a water rate of \$52.50, whereas a similarly situated commercial user would pay only \$30 for that same amount of water—less than two-thirds of the cost borne by the church. The below charts more fully illustrate that disparity:

**Magnolia Water Rates – Effective April 2018:**

<b>COMMERCIAL – IN CITY</b>					
Commercial – Banks, real estate - Light industrial, grocery stores - Restaurants, retail, offices - Hospitals - See *Additional Notes at end of Water Section					
Range	Base Rate	\$/1,000 gal.	Major Maint. @ \$0.52/1,000 gals.	Dep. @ \$0.45/1,000 gals.	Total per 1,000 gals.
0 – 5,000	\$ 30.00				
5,001 – 15,000		\$ 7.50	\$ 0.52	\$ 0.45	\$ 8.47
15,001 – 30,000		\$ 8.00	\$ 0.52	\$ 0.45	\$ 8.97
>30,000		\$ 8.75	\$ 0.52	\$ 0.45	\$ 9.72

<b>IRRIGATION – INSTITUTIONAL / TAX-EXEMPT / NON-PROFIT AND/OR INSTITUTIONAL / TAX-EXEMPT / NON-PROFIT</b>					
Institutional/Tax-Exempt/Non-Profit - Schools, churches that are individually metered - County, City, Federal and State facilities that are individually metered - Parks 1. Tax-Exempt & non-profit entity must submit proof of exemption as established by IRS. 2. Account must be in entity's name. 3. Accounts shall be reviewed annually to ensure monthly usage conforms with the range that is used to establish the Base Rate. 4. A 1.5 multiplier is applied to the then current Major Maintenance Fee. 5. A 1.5 multiplier is applied to the then current Depreciation Fee. 6. See *Additional Notes at end of Water Section.					
Range	Base Rate	\$/1,000 gal.	Major Maint. @ \$0.78/1,000 gals.	Dep. @ \$0.67/1,000 gals.	Total per 1,000 gals.
0 – 5,000	\$ 52.50				
5,001-10,000	\$ 52.50	\$ 9.75	\$ 0.78	\$ 0.67	\$ 11.20
10,001 – 40,000	\$ 120.00	\$ 11.25	\$ 0.78	\$ 0.67	\$ 12.70
40,001 – 75,000	\$ 480.00	\$ 13.13	\$ 0.78	\$ 0.67	\$ 14.58
>75,000	\$ 888.00	\$ 13.50	\$ 0.78	\$ 0.67	\$ 14.95

**Magnolia Wastewater Rates – Effective April 2018:**

<b>COMMERCIAL – IN CITY</b>					
Commercial – Banks, real estate - Light industrial, grocery stores - Restaurants, retail, offices - Hospitals - Wastewater flow is based on metered water volume - See **Additional Notes at end of Wastewater Section					
Range	Base Rate	\$/1,000 gal.	Major Maint. @ \$0.33/1,000 gals.	Dep. @ \$0.45/1,000 gals.	Total per 1,000 gals.
0 – 5,000	\$ 25.00				
5,001 – 15,000		\$ 5.50	\$ 0.33	\$ 0.45	\$ 6.28
15,001 – 30,000		\$ 6.00	\$ 0.33	\$ 0.45	\$ 6.75
>30,000		\$ 6.50	\$ 0.33	\$ 0.45	\$ 7.28

<b>INSTITUTIONAL / TAX-EXEMPT / NON-PROFIT</b>					
Institutional / Tax-Exempt / Non-Profit - Schools, churches that are individually metered - County, city, federal and state facilities - Parks 1. Tax-exempt & non-profit entity must submit proof of exemption as established by IRS 2. Account must be in entity's name 3. A 1.5 multiplier is applied to the then current Major Maintenance Fee 4. A 1.5 multiplier is applied to the then current Depreciation Fee 5. See **Additional Notes at end of Wastewater Section					
Range	Base Rate	\$/1,000 gal.	Major Maint. @ \$0.50/1,000 gals.	Dep. @ \$0.67/1,000 gals.	Total per 1,000 gals.
0 – 5,000	\$ 42.50				
5,001 – 10,000	\$ 42.50	\$ 7.90	\$ 0.50	\$ 0.67	\$ 9.07
10,001 – 40,000	\$ 75.00	\$ 8.25	\$ 0.50	\$ 0.67	\$ 9.42
40,001 – 75,000	\$ 375.00	\$ 9.00	\$ 0.50	\$ 0.67	\$ 10.17
>75,000	\$ 562.50	\$ 10.88	\$ 0.50	\$ 0.67	\$ 12.05

25. The City never claimed that these divergent rates have anything to do with the *cost* of delivering water. Nor could it have rationally done so. After all, it costs no more to deliver a gallon of water to “Magnolia’s First Baptist” than it would if the same building was instead occupied by “Magnolia’s first bakery.”

26. Indeed, the City was transparent from the outset that this disproportionate rate increase had everything to do with the *identity* of the end users—tax-exempt entities. In other words, the City had grown frustrated with its inability to collect property taxes from the Churches and other similar entities. It chose to make up for the “lost” revenue by creating a new classification for such entities and imposing upon that new class a significantly higher water rate.

27. This much is painfully clear from the very name of the new group—“Institutional / *Tax-Exempt* / Non-Profit”—and, more strikingly, from statements by the City officials who devised the new rate:

Magnolia City Administrator – Paul Mendes:

- “Implementing an institutional rate would allow the city to collect funds from these entities *in place of taxes or other fees.*”<sup>1</sup>
- “What we’re trying to do is even it out where the burden isn’t just on the homeowners—basically, everyone pays their *fair share.*”<sup>2</sup>

Magnolia Mayor – Todd Kana:

- “Residents and homeowners are *subsidizing the institutional places* in order for them to participate in our system.”<sup>3</sup>

---

<sup>1</sup> *Rising cost of water production, treatment pushes city of Magnolia to consider water, wastewater rate increase*, Community Impact Newspaper, available at <https://communityimpact.com/houston/tomball-magnolia/city-county/2017/12/02/magnolia-considers-adjusting-water-wastewater-rates/> (Dec. 2, 2017) (emphasis added).

<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> *Id.* (emphasis added).



**D. The Churches bear a disproportionate burden, and their services suffer as a result.**

28. The Institutional Water Rate has had a sizeable impact on the Churches. For example, in the year before the rate hike, Magnolia Bible paid an average monthly water/wastewater bill of \$385. Since then, however, Magnolia Bible's bill has jumped to an average of \$1,071—a 178% increase. Magnolia's First Baptist has experienced a similar increase in its average monthly water bills. And Believers Fellowship—new to the Magnolia community—has had to grapple with these exorbitant rates as it tries to find its footing.

29. Importantly, had the City treated religious organizations and businesses on the same terms, the Churches here would have experienced a fraction of these rate increases.

30. But even beyond abstract dollar figures, the City's targeted rate hike carries with it a tangible impact on the Churches' ability to provide services—both to their congregations and to the greater Magnolia community. The great irony, of course, is that by seeking to make the Churches pay their “fair share” of taxes, the City has curtailed the very services the Churches provide in lieu of such monetary contributions.

31. Indeed, as a direct result of the Institutional Water Rate, the Churches have been forced to cut funding for various church-run services. Magnolia Bible, for example, has reduced funding to GriefShare, a service that is premised on the religious belief of ministry and evangelization and that provides emotional and spiritual support to church and community members dealing with the loss of a loved one. Magnolia Bible has also reduced funding to Celebrate Recovery, a service that offers a developed, Bible-based plan to help church and community members overcome addiction. Magnolia's First Baptist reduced funds to Life Touch Christian Counseling, another service that is rooted in ministry and evangelization and that offers counseling services at no cost for church and community members.

32. The Institutional Water Rate has also caused the Churches to both forego needed church ministries and to reduce the amount of funds allocated to church ministry groups. Magnolia Bible, for instance, postponed starting a new after-school program for low-income and at-risk elementary age students. Believers Fellowship has put off hiring much-needed staff. And Magnolia's First Baptist pulled funding from its Preschool Ministry group.

**E. The City ignores repeated requests to comply with the law.**

33. On June 12, 2018, the Texas Pastor Council sent a letter to the City's Mayor and City Council Members. The letter outlined the dilemma illustrated above: that the City is attempting to extract property taxes from Churches by way of artificially increased water rates. The letter also requested that the City cease that practice and instead bill churches at the commercial rate, as it had done all along.

34. The City ignored the request.

35. Later, on December 12, 2018, counsel for the Churches sent a letter to the City Council, again asking the City to reconsider its illegal water-rate scheme. This letter warned further that the Institutional Water Rate violated the Texas Religious Freedom Restoration Act ("TRFRA"), giving the City Council the statutorily required 60-day period to cease its burden on the Churches' and their members' free exercise of religion. *See* TEX. CIV. PRAC. & REM. CODE § 110.006(a) (detailing requirements of the 60-day notice).

36. The City acknowledged receipt of the second letter but did not discontinue its unlawful practice.

37. In sum, Magnolia citizens pleaded with the City to change its course. It did not. And because the City appears bent on levying disproportionate, backdoor taxes on tax-exempt religious organizations, the Churches are now left with no choice but to file this lawsuit to force the City to comply with the law.

## V. CLAIM FOR DECLARATORY JUDGMENT

38. Plaintiffs incorporate by reference paragraphs 1 to 37 above as if fully set forth herein.

39. Under Chapter 37 of the Texas Civil Practice and Remedies Code, a person whose rights are affected by government action “may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.” TEX. CIV. PRAC. & REM. CODE § 37.004.

40. The Institutional Water Rate is void for three independent reasons. First, the Institutional Water Rate is a thinly veiled property tax on a tax-exempt entity, and, as such, it is preempted by state law. Second, even were the Institutional Water Rate not a tax, it would nonetheless be void as a discriminatory, arbitrary utility rate. Finally, by nearly tripling the Churches’ water bills (a substantial burden on free exercise of religion) simply because the Churches do not pay property taxes (an irrational, non-tailored justification), the Institutional Water Rate violates the TRFRA.

41. Any one of those three reasons would suffice to invalidate the Institutional Water Rate. The Churches thus seek a declaration that the City’s Institutional Water Rate violates the law and request an injunction prohibiting the City from enforcing it.<sup>4</sup>

---

<sup>4</sup> Because this lawsuit “involves the validity of a municipal ordinance” and alleges that such ordinance is unconstitutional, the Churches will serve the Texas Attorney General with a copy of this Petition addressed to Ken Paxton, Attorney General of Texas, 300 W. 15th Street, Austin, Texas 78701. TEX. CIV. PRAC. & REM. CODE § 37.006(b).

**A. The Texas Constitution and the Tax Code preempt the Institutional Water Rate.**

42. “[A]n ordinance which conflicts or is inconsistent with state legislation is impermissible.” *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (applying conflict-preemption principles to the ordinance of a general-law city).

43. As discussed above, the Texas Legislature (with the Texas Constitution’s stamp of approval) prohibited municipalities from levying property taxes on “religious organization[s].” *See* TEX. TAX CODE § 11.20(a). To qualify as such, an organization must meet the following four conditions:

(1) be organized and operated primarily for the purpose of engaging in religious worship or promoting the spiritual development or well-being of individuals;

(2) be operated in a way that does not result in accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered, or realization of any other form of private gain;

(3) use its assets in performing the organization’s religious functions or the religious functions of another religious organization; and

(4) by charter, bylaw, or other regulation adopted by the organization to govern its affairs direct that on discontinuance of the organization by dissolution or otherwise the assets are to be transferred to this state, the United States, or a charitable, educational, religious, or other similar organization that is qualified as a charitable organization under Section 501(c)(3), Internal Revenue Code of 1954, as amended.

*Id.* § 11.20(c).

44. The Churches here bear each of those qualifying traits, and so the City may not levy property taxes against them without running afoul of the Legislature’s property-tax exemption.

45. For as long as there have been tax exemptions, governmental bodies have sought to evade those exemptions by simply relabeling a tax as something else. To safeguard

against such practices and to distinguish legitimate fees from illegitimate taxes, Texas courts have applied the “primary purpose” test. That test asks whether, “based upon a consideration of the fee-imposing statute as a whole, the primary purpose of the fee is the raising of revenue.” *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 616 (Tex. App.—Houston [14th Dist.] 2016, no pet.). If the primary purpose is to raise revenue, “then the fee is a tax, regardless of the name given to the fee.” *Id.* The inquiry looks at “*all the facts* in th[e] case” and asks whether “the so-called . . . charge was in fact a tax.” *Bexar Cty. v. City of San Antonio*, 352 S.W.2d 905, 907 (Tex. App.—San Antonio 1961, writ dism’d) (emphasis added).

46. Divining the “purpose” behind a fee might be a difficult task in the mine run of cases, but here it is an easy one. The City has not offered a cost-of-service-based rationale for why it imposes the exorbitant Institutional Water Rate on the Churches while charging far less to similarly situated businesses. Instead, the City’s officials have maintained all along that this disproportionate water rate is but a substitute for the very taxes the Texas Constitution forbids. Thus, by the City’s own admission, the Institutional Water Rate aims to replicate the general-revenue source served by an ad valorem tax. *See* Magnolia Ord. No. O-2012-028 § 3 (establishing ad valorem tax “for *general purposes*,” the proceeds of which “shall be applied to the payment of the *general and current expenses* of the government of the City”) (emphasis added).

47. In sum, the “import and effect” of the Institutional Water Rate is that of a property tax “upon the properties of the [Churches], exempt from taxation by the Constitution, and as such it is void.” *Lower Colorado River Auth. v. Chem. Bank & Tr. Co.*, 185 S.W.2d 461, 468–69 (Tex. App.—Austin 1945), *aff’d*, 190 S.W.2d 48, 49 (Tex. 1945). Were it otherwise, the property-tax exemption would be all but meaningless, since a city could simply recoup taxes as it

pleased by artificially inflating any number of fees paid by tax-exempt agencies (building permit fees, garbage fees, and so on).

**B. The Institutional Water Rate is an arbitrary, discriminatory utility rate.**

48. Even if—despite what the City says—the Institutional Water Rate were not a tax, it would nevertheless be unenforceable as a discriminatory utility rate.

49. In Texas, “[t]he courts should . . . pass upon the unreasonableness of the rates of a municipally owned utility (set by that municipality) in order to protect the utility customers from being unfairly burdened with the costs of city government.” *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 265 (Tex. 1976). Put another way, “when a municipality undertakes to furnish a public service, such as the supplying of water to consumers, it acts in its proprietary, and not its governmental, capacity and it is obliged to serve its customers at reasonable and *non-discriminatory rates*.” *Hatten v. City of Houston*, 373 S.W.2d 525, 537 (Tex. App.—Houston 1963, writ ref’d n.r.e.) (emphasis added).

50. The Institutional Water Rate here bears no justification—not as a matter of geography, water usage, or any other factor conceivably related to the cost of service. *Cf. Gillam v. City of Fort Worth*, 287 S.W.2d 494, 497 (Tex. App.—Fort Worth 1956, writ ref’d n.r.e.) (outlining the relevant factors for setting a water rate). Indeed, until now, the City subjected the Churches and commercial users to the *same rate* precisely because it costs no more to deliver water to one versus the other.

51. Rather, the City’s sole rationale for its disparate treatment is, again, that despite the Churches contributing to the community in myriad ways, the Churches (and other tax-exempt entities) must now pay their “fair share” of money into the City’s coffers. Under settled Texas law, though, the bare difference between taxpayers and tax-exempt entities is an insufficient justification for replacing longstanding uniformity with disparate utility rates.

*Wiggins*, 246 S.W.2d at 626 (“[T]he discrimination cannot be justified on the ground that the residents of the City of Texarkana, Texas, are liable to taxation to pay for acquisition of the water system.”).

52. Thus, the City’s Institutional Water Rate is arbitrary and discriminatory; it cannot stand under Texas law as a result.

**C. The Institutional Water Rate violates the Texas Religious Freedom Restoration Act, as it substantially burdens the Churches’ and their members’ free exercise of religion.**

53. The City’s Institutional Water Rate violates the TRFRA because it places a real and significant—*i.e.*, substantial—burden on the Churches’ and their members’ free exercise of religion. That burden is unlawful, as the City cannot show a compelling governmental interest for it. And, even if the City could, the burden would still violate the TRFRA because the City’s Institutional Water Rate is not the least restrictive means to achieving the City’s only expressed interest—that all pay their “fair share.”

54. The TRFRA ensures that “a government agency may not substantially burden a person’s free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that interest.” TEX. CIV. PRAC. & REM. CODE §§ 110.003(a)–(b). Stated another way, TRFRA imposes strict scrutiny on governmental actions that burden the free exercise of religion and “requir[es] the government to tread carefully and lightly when its actions substantially burden religious exercise.” *Barr v. City of Sinton*, 295 S.W.3d 287, 289 (Tex. 2009).

55. To prevail on their TRFRA claim, the Churches must prove two things: (1) that the City’s actions burden their “free exercise of religion,” and (2) that the burden is “substantial.” TEX. CIV. PRAC. & REM. CODE § 110.003(a). The burden must be evaluated from

the Churches' and their members' perspectives, not the City's. *Barr*, 295 S.W.3d at 301. The burden is “substantial” if it is both “real” and “significant.” *Id.*

56. Once the Churches prove that the City's Institutional Water Rate has substantially burdened their free exercise of religion, the burden then shifts to the City to show first that the Institutional Water Rate “further[s] a compelling governmental interest,” and, then, that that interest is narrowly tailored or “the least restrictive means of furthering that [compelling governmental] interest.” TEX. CIV. PRAC. & REM. CODE §§ 110.003(b)(1)–(2). The City may not offer a broad interest and show only *some* relationship between its actions and stated goal. The City must instead have a specific, compelling interest that it can achieve only through the actions it proposes. *See* sources cited *infra* at ¶¶ 70–72.

57. In applying TRFRA, this Court must consider decisions under analogous federal law. TEX. CIV. PRAC. & REM. CODE § 110.001(b) (“In determining whether an interest is a compelling governmental interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution.”); *see also Barr*, 295 S.W.3d at 298 (holding that Texas courts may consider analogous federal law including the federal Religious Freedom Restoration Act, Religious Land Use and Institutionalized Persons Act, and strict scrutiny free exercise claims).

58. The four-part analysis “requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise.” *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004). Accordingly, this Court must analyze the impact that the Institutional Water Rate has had on each Church, considering, independently, the individual circumstances of each Church.



(i) **The Institutional Water Rate imposes a burden on the Churches' and their members' free exercise of religion.**

59. Ministry and evangelization are central tenets of faith for the Churches and their members, who believe that the Bible calls Christians to engage in acts of ministry to both Christians and non-Christians alike. The City's Institutional Water Rate, however, has substantially burdened and continues to burden the Churches' and their members' ability to freely engage in those key aspects of their faith.

60. Specifically, and as noted, the Institutional Water Rate has led to a nearly 200 percent increase in each of the monthly water bills that the Churches receive from the City. Like any other establishment, the Churches have strict and itemized budgets. And, given that the Churches have never had to pay property taxes, they never budgeted for such an expense. Thus, the back-door, institutional water-rate tax delivered an unexpected blow to the Churches' bottom line. Having no other immediate means to pay for the tax (masked as a water-rate increase), the Churches have been forced to take money away from services that further the Churches' religious practices of ministry and evangelization. *See supra* ¶¶ 28–32.

61. The Institutional Water Rate has thus burdened the Churches' and their members' free exercise of religion, as it has put the Churches in an unlawful dilemma. Either the Churches pay their increased water bill or they do not. As water is a basic life necessity, the Churches have reasonably chosen the first route. To make that "choice," though, the Churches have had to move their non-plenary funds *away from* ministries that fulfill central tenets of faith, resulting in a negative impact on the Churches' and their members' ability to freely exercise their religion. More specifically, the Institutional Water Rate has placed a burden on the Churches' and their members' free exercise of religion because, to pay for the increased water bill caused

by the Institutional Water Rate, the Churches must pull funds away from exercises of faith—*i.e.*, ministry and evangelization.

**(ii) The burden is substantial.**

62. The Institutional Water Rate imposes a substantial burden on the ability of the Churches and their members to freely partake in exercises of faith.

63. It costs money to engage in ministry and evangelization. Thus, given that the Institutional Water Rate has forced the Churches to take funds away from ministries that manifest those religious beliefs, the Institutional Water Rate substantially burdens the Churches' free exercise of religion.

64. As described above, the burden must be evaluated from the perspective of the Churches and their members. From that perspective, the inability to reach one person is considered substantial because, again, the Churches and their members share the religious belief that God desires for his followers to minister and evangelize to all. Thus, the Institutional Water Rate's harm to their ability to minister and evangelize is significant because it necessarily means that the Institutional Water Rate has also substantially burdened the Churches' and their members' free exercise of religion.

65. For instance, and as a direct result of the Institutional Water Rate, Magnolia Bible postponed the launch of a new after-school program that would have served low-income and at-risk elementary age students. The new ministry was supposed to provide children, most of whom were projected to come from single-family homes, with a Christian mentor who could share the love and wisdom of Jesus Christ outside the confines of the classroom. The launch of this ministry has been put on hold, however, because Magnolia Bible has been forced to pay its new and increased water bill with the funds that it had dedicated to supporting the new ministry.

66. Moreover, after Magnolia Bible received its first institutional-rate water bill, it was forced to divert (and has continued to divert) funding away from Celebrate Recovery to pay for the increased water expense. As Celebrate Recovery is a faith-based, addiction-recovery ministry, the lack of funds caused by the Institutional Water Rate and the resultant impact on the number of people served is a substantial burden on Magnolia Bible's and its members' ability to provide ministry and to evangelize.

67. Likewise, Magnolia Bible reduced (and has continued to reduce) funding to GriefShare to offset the increased water expense. GriefShare is considered to be divinely inspired ministry and evangelization. Hence, the loss of funds caused by the institutional rate has caused Magnolia Bible and its congregants to provide fewer ministry services and engage in fewer instances of evangelical outreach—both of which are religious acts.

68. Magnolia's First Baptist has experienced a similar impact and has been forced to reduce funds to Life Touch Christian Counseling, another ministry and evangelization service. Prior to the Institutional Water Rate, the dedicated budget for Life Touch was approximately \$34,800. Now, that budget is around \$21,600 (or a 37.93% budgetary decrease). Magnolia's First Baptist has dedicated most of the \$13,200 difference to pay for its increased water bill. Thus, the Institutional Water Rate has placed a real and significant burden on Magnolia's First Baptist's and its members' ability to exercise their religion.

69. It cannot be disputed that the City's Institutional Water Rate has substantially burdened the Churches' and their members' free exercise of religion. As has been explained, by significantly inflating the Churches' water bills via the Institutional Water Rate, the City caused the Churches and their members to curtail certain activities and programs that are considered to be manifestations of ministry and evangelization—two central pillars of the

Churches' and their respective members' faith. *See C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007) (explaining that government "action may burden the free exercise of religion in two quite different ways: [1] by interfering with an individual's observance or practice of a particular faith . . . and [2] by encroaching on the church's ability to manage its internal affairs").

**(iii) The City lacks a compelling government interest.**

70. The City cannot show that its "interest justifies the substantial burden on religious exercise." *Barr*, 295 S.W.3d at 306. That is, the City cannot demonstrate a compelling interest—one "of the highest order" or one that is "paramount"—that would otherwise justify the substantial burden that the Institutional Water Rate imposes on each of the Churches and their members. *See Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009). Under TRFRA, the government's "invocation of general interests, standing alone, is not enough—a showing must be made with respect to the 'particular practice' at issue." *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 268 (5th Cir. 2010).

71. The City cannot make the required showing. The only possible governmental interest in the Institutional Water Rate is that which has been parroted by City officials: tax-exempt entities—like the Churches—need to pay their supposed "fair share" of property taxes. For reasons already stated, *supra* § A, that interest is illegal under Texas law. And for purposes of TRFRA, that broad interest is not "compelling." *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006) ("Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day."); *see also A.A. ex rel. Betenbaugh*, 611 F.3d at 268 (holding school

district failed to show a compelling interest where it made “only cursory attempts to translate the abstract goals of its” free-exercise-diminishing policy).

72. In summary, the state of “Texas applied the compelling interest standard to free exercise claims—the ‘most demanding test known to constitutional law’—for a reason.” *A.A. ex rel. Betenbaugh*, 611 F.3d at 267 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). For the City “to prevail, then, it cannot rely on ‘general platitudes,’ but ‘must show by specific evidence that [the adherent’s] religious practices jeopardize its stated interests.’” *Id.* at 268 (quoting *Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009)). This the City cannot do. As a result, the City does not have a compelling government interest in the Institutional Water Rate.

**(iv) The City did not choose the least restrictive means to achieve its stated interest in the Institutional Water Rate.**

73. Even if the City’s asserted interest in ensuring that everyone pays their “fair share” were not illegal under the Tax Code and somehow constituted a compelling interest, the City still could not prove that the Institutional Water Rate is the least restrictive means for accomplishing that goal.

74. Rather than imposing the Institutional Water Rate—which, again, is higher than the rates applicable to commercial and residential water users—the City could have made the water rates equal across *all* users (church, commercial entity, family home, etc.); or, at the very least, the City could have made the water rates equal across commercial and institutional users. Those alternatives would have been less restrictive than the Institutional Water Rate—rendering the latter not the *least* restrictive means—because under the alternatives, the Churches would pay a lower water rate than the Institutional Water Rate and, consequently, the Churches and their members would suffer a lesser burden on their free exercise of religion, described *supra* at ¶¶ 53–69. But the City chose neither of those less restrictive means.

75. The City thus did not pursue the least restrictive means to achieve its stated interest of ensuring that everyone pays their “fair share.” *See, e.g., United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”); *see also Merced*, 577 F.3d at 594–95 (“Merced proposes no fewer than three less restrictive alternatives to Eules’s current scheme. For purposes of illustration, one will do.”).

## **VI. REQUEST FOR PERMANENT INJUNCTION**

76. The Churches incorporate by reference the foregoing paragraphs above as if fully set forth herein.

77. The Churches have a probable right to recovery for the claims asserted in this pleading. Additionally, the harm that will result if a permanent injunction is not ordered is irreparable because the Churches cannot be compensated for the harm solely with money damages. Without an injunction, the City will be able to enforce the Institutional Water Rate in the future, subjecting the Churches to additional injury.

78. As a direct and proximate result of the City’s wrongful actions and planned future wrongful actions as alleged in this pleading, the Churches’ free exercise has been burdened, and will be burdened further by future City action. Injunctive relief is the adequate remedy at law for the infringement of religious liberties.

79. The Churches have no other adequate remedy at law to prevent this irreparable injury. Accordingly, injunctive relief is the only adequate remedy available that can protect the Churches. The balance of equities favors issuance of a permanent injunction.

80. For the reasons stated in this pleading, the Churches request that, after a trial on the merits, this Court issue a permanent injunction prohibiting the City from enforcing the Institutional Water Rate.

**VII. ATTORNEYS' FEES**

81. The Churches seek the recovery of reasonable attorneys' fees under Sections 38.001 and 110.005(a) of the Texas Civil Practice and Remedies Code.

**VIII. JURY DEMAND**

82. The Churches assert their rights under Article 1, Section 15, of the Texas Constitution and demand a jury trial. TEX. R. CIV. P. 216.

**IX. RULE 194 REQUEST FOR DISCLOSURE**

83. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, the City is requested to disclose, within 50 days of service of this request, the information or material described in Rule 194.2.

**X. PRAYER**

84. FOR THESE REASONS, the Churches pray that:

- (i) the Court grant a permanent injunction enjoining the City from enforcing the Institutional Water Rate; and
- (ii) the Court grant a declaration that the Institutional Water Rate is preempted as an unlawful tax, void as a discriminatory utility rate, and violative of TRFRA.


The Churches further pray that, upon final judgment, this Court award the Churches' reasonable and necessary attorneys' fees and costs of court and such other and further relief to which the Churches may show themselves to be justly entitled.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Aaron M. Streett

Aaron M. Streett  
State Bar No. 24037561  
Jonathan P. Havens  
State Bar No. 24087686  
Cornelius M. Sweers  
State Bar No. 24102551  
Anthony J. Lucisano  
State Bar No. 24102118  
Alexander Ross Hernandez  
State Bar No. 24106086  
One Shell Plaza  
910 Louisiana Street  
Houston, Texas 77002-4995  
Telephone: (713) 229-1234  
Facsimile: (713) 229-7847



Jeremy Dys  
State Bar No. 24096415  
Reed N. Smith  
State Bar No. 24067875  
FIRST LIBERTY INSTITUTE  
2001 W. Plano Parkway, Suite 1600  
Plano, Texas 75075  
Telephone: (972) 941-4444  
Facsimile: (972) 941-4457

ATTORNEYS FOR PLAINTIFFS MAGNOLIA  
BIBLE CHURCH, MAGNOLIA'S FIRST BAPTIST  
CHURCH, AND BELIEVERS FELLOWSHIP