FIRST LIBERTY

August 12, 2020

Yolanda L. Woods
Senior Assistant City Attorney
City of Houston, Legal Department
900 Bagby, 3rd Floor
Houston, Texas 77002
[redacted]

Via Email and Certified Mail, RRR

Re: City Action Against Jewish Synagogue at [redacted]

Dear Ms. Woods:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. We represent Heimish of Houston, the Orthodox Jewish synagogue that meets at [redacted], Houston, Texas 77071 (the "Property") and Michael Winkler, the owner of [redacted], with respect to the City of Houston's threatened enforcement of restrictive covenants against the Property. Please direct all communications regarding this matter to my attention.

This letter serves as the notice required by the Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. C. § 110.001 *et seq.* ("TRFRA") that the City of Houston's enforcing restrictive covenants against the Property so as to prohibit its use as an Orthodox Jewish synagogue would substantially burden the free exercise of religion of the Orthodox Jewish community that attends Heimish of Houston. The members of Heimish of Houston are limited to holding religious gatherings in their communities because of their religious prohibition against driving on the Sabbath and against carrying anything outside of certain, prescribed areas of their neighborhood. We also express our concern that many non-residential uses within the West Bellfort Property Owners' Association (the "HOA") do not appear to have been subject to similar enforcement actions by the City of Houston or the HOA, but only the one use that, if it is shut down, will require members of the Orthodox Jewish community to be forced to find another neighborhood to be able to worship freely. Furthermore, while the HOA is represented by counsel who is aware that Heimish of Houston meets at the Property, the HOA has taken no legal action to stop the religious exercise at the Property.

Background

Heimish of Houston has served the Orthodox Jewish community in the Fondren Southwest Northfield Subdivision (the "Neighborhood") for over two years, with the full knowledge of the HOA. Heimish of Houston formed after its members left another Orthodox Jewish synagogue over doctrinal issues. Since its founding, several persons have moved into the same neighborhood to be able to walk to synagogue, as is required by Orthodox Jewish religious beliefs.

In Orthodox Judaism, not only is driving prohibited on the Sabbath, but so is carrying anything—including, for example, religious texts or children—outside of a particular geographic region known as an "eruv." Only a few eruvs exist within the City of Houston, and creation of a new eruv is costly and difficult. Heimish of Houston is uniquely situated to be both within feasible walking distance of its members as well as within an eruv that connects its members—many of whom moved to their homes in the Neighborhood specifically to be both within the correct eruv as well as within walking distance of Heimish of Houston.

Because of the religious requirements of Orthodox Judaism and the convictions of the members of Heimish of Houston, applying a residential use restrictive covenant as the City of Houston proposes would end its members' ability to practice their faith within this community and drive them out of the neighborhood.

Legal Analysis

Religious exercise is a foundational right, and nothing can be said to be more central to religious exercise than the ability to attend religious worship. Both state and federal laws—as well as both the Texas and United States constitutions—provide strong protections for religious exercise, such as Heimish of Houston's meeting at [redacted]. Two statutes in particular protect Heimish of Houston's religious exercise at the Property: TRFRA and the federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. ("RLUIPA"). In *Schneider v. Gothelf,* No. 429-04998-2013 (Tex. Jud. Dist.—Collin County [429th Dist.] 2014), the 429th Judicial District Court in Collin County held that both TRFRA and RLUIPA applied to restrictive covenants and held that a homeowners association cannot enforce a residential-use restrictive covenant in such a manner as to prohibit a home from being used as an Orthodox Jewish synagogue.[1]

[1] In *Schneider v. Gothelf,* the HOA itself sought to enforce its restrictive covenant against the synagogue. Though both TRFRA and RLUIPA require government action, the court held that the judicial enforcement of the restrictive covenant constituted the requisite state action as per *Shelley v. Kraemer*. *See Shelley v. Kraemer,* 334 U.S. 1 (1948) (holding that judicial enforcement of a racially restrictive covenant is sufficient state action that the enforcement would violate the Fourteenth Amendment); *see also Konikov*

Texas Religious Freedom Restoration Act

TRFRA provides that "a government agency," which includes "a municipality," "may not substantially burden a person's free exercise of religion" unless "the government agency demonstrates that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. C. §§ 110.001 and 110.003.

Enforcing a restrictive covenant in such a way as to prohibit Heimish of Houston from meeting at the Property would impose a substantial burden on the Orthodox Jewish congregation

In *Barr v. City of Sinton,* 295 S.W.3d 287, 305–06 (Tex. 2009), the Texas Supreme Court noted that TRFRA protects "fundamental, constitutional rights" that are superior to the interests protected by analogous zoning ordinances. In *Barr,* Barr, on the basis of his religious convictions, operated a halfway house in two homes. The City of Sinton, Texas, attempted to block Barr from operating the halfway house on the basis of a zoning ordinance stating, "A correctional or rehabilitation facility may not be located in the City of Sinton within 1000 feet of a residential area, a primary or secondary school, property designated as a public park or public recreation area by any governmental authority, or a church, synagogue, or other place of worship." In holding that the City of Sinton's restrictions on a religious halfway house constituted a substantial burden, the Texas Supreme Court quoted the U.S. Supreme Court, which said, "[O]ne 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." *Barr,* 295 S.W.3d at 302 (quoting *Schneider v. New Jersey,* 308 U.S. 147, 163 (1939)). The Texas Supreme Court also rejected the assertion that Barr could have avoided the implications of the zoning ordinance by having each person who needed assistance meet as a guest in someone's home, noting, "In any event, a burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else." *Id.* at 303. The *Barr* Court also pointed to an example similar to the present situation in *Islamic Ctr. of Miss., Inc. v. City of Starkville,* 840 F.2d 293, 294 (5th Cir. 1988), in which Starkville, Mississippi, was held to have violated the Free Exercise Clause of the U.S. Constitution by attempting to use zoning restrictions to keep Muslim students from worshipping in a home in a residential area of Starkville. "'By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of religion.' . . . Although the zoning ordinance did not foreclose all locations, the court determined 'relatively impecunious Muslim students' were left with 'no practical alternatives for

v. Orange County, 410 F.3d 1317 (11th Cir. 2005) (noting that, under *Shelley v. Kraemer,* restrictive covenants that burden religious land use may violate RLUIPA even if enforced by an HOA). The City of Houston is, of course, a government actor for purposes of TRFRA and RLUIPA.

establishing a mosque in the city limits.'" *Id.* at 304 (quoting *Islamic Ctr.,* 840 F.2d at 299–300).

With respect to Heimish of Houston, the Orthodox Jewish members must meet within walking distance of their homes within the eruv. After a search, the Property was determined to be the only viable location that was available to the congregation. If the congregation cannot meet at [redacted], then, because of the restrictions placed upon them by their Orthodox Jewish religious beliefs, they will be unable to have communal worship. The practical abolition of the members' religious worship is a much more significant burden than that in *Barr,* and is similar to the burden in *Islamic Ctr*.

The City of Houston does not have a compelling interest in enforcing the restrictive covenants in such a manner as to prohibit Heimish of Houston from meeting at the Property

Because the City of Houston's enforcement action would substantially burden the congregation's religious freedoms, the City has the burden of showing that its interests are compelling. The Texas Supreme Court noted that, "[b]ecause religious exercise is a fundamental right, that justification can only be found in 'interests of the highest order', to quote the Supreme Court in [*Wisconsin v.*] *Yoder*[, 406 U.S. 205, 215 (1972)], and to quote *Sherbert* [*v. Verner,* 374 U.S. 398, 406 (1945)], only to avoid 'the gravest abuses, endangering paramount interest[s].'" *Barr*, 295 S.W.3d at 306.

Not only must a compelling interest be an interest "of the highest order," the Texas Supreme Court pointed to the United States Supreme Court's holding that:

> "RFRA requires the Government to demonstrate that the compelling interest is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." To satisfy this requirement, the Supreme Court stated, courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemption to particular religious claimants."

Id. at 306 (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430–31, 439 (2006) (brackets in original)). "In this regard, there is no basis for distinguishing RFRA from [Texas]RFRA; the same requirement verbatim is in both." *Id.*

The Texas Supreme Court held that interests such as "preserv[ing] the public safety, morals, and general welfare" are "the kind of 'broadly formulated interest' that does not satisfy the scrutiny mandated by [Texas]RFRA." *Id.* The Court went on to note,

"'[T]he compelling interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling." *Id.* at 307 (quoting Douglas Laycock, *State RFRAs and Land Use Regulation,* 32 U.C. Davis L. Rev. 755, 784 (1999)).

Although *Barr* was considering zoning ordinances instead of municipal enforcement of restrictive covenants, the considerations that guided the Texas Supreme Court in *Barr* are the same regardless of the style of the land use regulation.

The Religious Land Use and Institutionalized Persons Act

A second, independent statute protects Heimish of Houston's continued religious worship: RLUIPA imposes several limitations, divided into two categories, on land-use restrictions relevant here. First, the "Substantial Burden Clause" uses the same fundamental test that is employed by Texas RFRA. Second, under the category of "Discrimination and exclusion," the "Equal Terms Clause" provides that "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." RLUIPA § 2000cc(b)(1). Third, the "Nondiscrimination Clause" prohibits any government from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." RLUIPA § 2000cc(b)(2). Finally, the "Unreasonable Limitation Clause" prohibits governments from "impos[ing] or implement[ing] a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." RLUIPA § 2000cc(b)(3)(B). Congress specifically provided that RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." RLUIPA § 2000cc-3(g). In addition to violating RLUIPA by substantially burdening Heimish of Houston's religious exercise, enforcing the West Bellfort POA's restrictive covenants in a manner that singles out Heimish of Houston violates RLUIPA's Equal Terms Clause. And implementing the restrictive covenants in a manner that eliminates certain types of Orthodox Jewish practice in the Neighborhood violates both the Nondiscrimination Clause and the Unreasonable Limitation Clause.

Conclusion

The members of Heimish of Houston only want to be able to continue to worship together. They do not want to be driven from their homes because of their Orthodox Jewish religious beliefs. As they committed to the West Bellfort POA, Heimish of Houston will not make any architectural changes to the Property that would change its character from that of a residential use building. Heimish of Houston has also committed to maintaining the property to the satisfaction of the West Bellfort POA.

With the West Bellfort POA deciding not to take action following these commitments, Heimish of Houston also hopes to avoid litigation with the City of Houston over this matter and would welcome a discussion to resolve this issue without unnecessary litigation. Nevertheless, if the City of Houston persists in attempting to enforce restrictive covenants against Heimish of Houston in such a manner as to prohibit its members from worshiping, First Liberty Institute is prepared to defend Heimish of Houston's rights. The City of Houston should be aware that RLUIPA does provide for the recovery of damages and attorneys fees, which can be significant. *See Congregation Etz Chaim v. City of Los Angeles,* No. CV10-1587 CAS (C.D. Cal. 2011) (a substantially similar case involving an Orthodox Jewish congregation and the City of Los Angeles's building code that resulted in a $950,000 recovery by the congregation).

Again, Heimish of Houston does not wish to litigate with the City of Houston and does sincerely desire an amicable resolution to this dispute, but banning the congregants of Heimish of Houston from practicing their religion would require an aggressive defense of their rights.

If you have any questions about this letter, please do not hesitate to contact me at (972) 941-4444 or at [redacted].

Sincerely,

Justin Butterfield

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