CAUSE NO. 2023-82471

TORAH OUTREACH RESOURCE CENTER OF HOUSTON ("TORCH") D/B/A HEIMISH OF HOUSTON and MICHAEL WINKLER,	§	**IN THE DISTRICT COURT**
Petitioners,	§	**281st JUDICIAL DISTRICT**
THE CITY OF HOUSTON,	§	**HARRIS COUNTY, TEXAS**
Defendant.	§	

PETITIONERS' AMENDED ORIGINAL VERIFIED PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

TO THE HONORABLE COURT:

Petitioners Torah Outreach Resource Center of Houston ("TORCH") d/b/a Heimish of Houston ("Heimish") and Michael Winkler bring the following cause of action against Defendant City of Houston, Texas (the "City") as follows:

I. INTRODUCTORY STATEMENT

1. Heimish is an Orthodox Jewish synagogue that has been serving its community in the Fondren Southwest Northfield Subdivision since 2018. Its members' religious beliefs require them to worship at a location (i) within feasible walking distance of their homes and (ii) within a small geographic region called an eruv. After an extensive search and gathering their collective livelihoods into a small geographic area, Heimish's members practice their Orthodox Jewish faith and worship together at 11811 Dandelion Lane, Houston, Texas 77071 ("the Synagogue").

2. Over the past few years, the City has repeatedly exhibited antagonism towards Heimish's use of the Synagogue in a residential neighborhood for religious purposes.

3. In 2020, the City attempted to shut down Heimish's use of the Synagogue through the selective enforcement of a deed restriction. After Heimish filed suit in 2021, the City abandoned its enforcement efforts against Heimish.

4. Two years later, the City is again intruding on Heimish's use of the Synagogue to engage in daily communal religious gatherings. This time, the City is using its permitting regulations to do so.

5. In November 2023, the Synagogue suffered a significant malfunction of its electrical equipment that resulted in a loss of power to its property. The repairs are completed, but power is not restored. To restore power, CenterPoint Energy—the provider for the Synagogue—must consult the City for any holds or red flags on the property.

6. However, the City has refused to issue the permits necessary or remove the holds on the Synagogue to restore power. The City justifies this harsh enforcement by pointing to minor violations related to work Heimish has done on the property without proper permitting—including a small wooden deck and work done in its garage. While Heimish is working to remedy these minor permitting issues, the City's backlog of permitting requests leaves Heimish with no timely remedy to restore power for more than a month until an inspector can conduct a site visit.

7. This enforcement by the City has substantially burdened Heimish and its member's free exercise of their religion as they are left to worship in the dark and cold in the middle of the winter with major religious festivals like Hanukkah (December 7, 2023) just around the corner.

8. The Texas Religious Freedom Restoration Act ("TRFRA"), proscribe local governments from substantially burdening a religious institution or assembly's free exercise of religion unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE § 110.003.

9. Likewise, the Free Exercise Clause of the First Amendment forbids government action that is not neutral or generally applicable from burdening religious exercise unless the action furthers a compelling interest and is narrowly tailored to achieve that interest. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022).

10. Even if the City's permitting enforcement constitutes a legitimate government interest, it is not a compelling one. The City's obstruction of Heimish's efforts to restore power to the Synagogue with no immediate recourse to comply with the City's permitting requirements in the middle of the winter does not represent the least restrictive means of furthering this interest.

11. Heimish is thus entitled to injunctive and declaratory relief, damages, attorney's fees, costs, and other such relief as the Court may deem appropriate.

II. DISCOVERY CONTROL PLAN & RULE 47(c) DISCLOSURE

12. Petitioners intend to conduct discovery in this matter under Level 3 of Rule 190.4 of the Texas Rules of Civil Procedure. Plaintiff affirmatively pleads that the expedited action process of Texas Rule of Civil Procedure 169 does not apply to this case because Petitioners seek injunctive and declaratory relief.

13. Pursuant to TEX. R. CIV. P. 47(c), Petitioners seek non-monetary relief as well as attorney's fees and costs of court.

III. PARTIES

14. Plaintiff TORCH d/b/a Heimish of Houston is a Texas nonprofit corporation located at 11811 Dandelion Lane, Houston, Texas 77071. It is an Orthodox Jewish synagogue.

15. Plaintiff Michael Winkler is a Texas citizen and is the owner of the property housing the Synagogue.

16. Defendant City of Houston, Texas, is a Texas home-rule municipality and may be served with process by serving the City Secretary, Pat J. Daniel, at the City Secretary Department, 900 Bagby St., Rm. P101, Houston, TX 77002 or wherever found.

IV. JURISDICTION, STANDING, AND VENUE

17. This Court has personal jurisdiction over the City of Houston as it is a Texas home-rule municipality in Harris County and may be served with process by serving the City Secretary, Pat J. Daniel, at the City Secretary Department, 900 Bagby St., Rm. P101, Houston, TX 77002 or wherever found.

18. This Court has jurisdiction over the temporary restraining order, temporary injunction, and permanent injunction sought by Petitioners pursuant to TRFRA. TEX. CIV. PRAC. & REM. CODE § 110.001 et seq. TRFRA also waives both "immunity to suit and from liability." *Id.* §§ 110.006(a), 110.008(a). Courts have regularly concluded that this removes both the sovereign immunity of state governments and the governmental immunity of local municipalities like the City of Houston. *See Gonzalez v. Mathis Indep. Sch. Dist.*, 978 F.3d 291, 295 (5th Cir. 2020); *see also Morgan v. Plano Indep. Sch. Dist.*, 724 F.3d 579 (5th Cir. 2013).

19. Petitioners gave the City notice of their TRFRA claim on November 29, 2023. Petitioners may seek relief under TRFRA prior to the end of the 60-day notice period because the City's exercise of governmental authority is substantially and imminently burdening Petitioners' free exercise of religion, and (2) Petitioners were not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide earlier notice. TEX. CIV. PRAC. & REM. CODE § 110.006(b).

20. This Court also has jurisdiction over Petitioners' federal claim pursuant to 42 U.S.C. §§ 1983,1988, and 3613.

21. Petitioners have standing to pursue injunctive remedies because they are threatened with imminent and irreparable harm to their practice of statutorily protected religious rights.

22. This Court is the proper venue for this petition because a substantial part of the events or omissions occurred in Harris County. TEX. CIV. PRAC. & REM.

CODE § 15.002(a)(1). The Synagogue is in Harris County, the permitting issues and the City's enforcement occurred in Harris County, and all other relevant facts at issue in this matter occurred in Harris County. *Id.*

V. FACTUAL BACKGROUND

23. Petitioners reincorporate and adopt by reference for all purposes each and every allegation in the preceding paragraphs and sections.

24. Heimish and its members practice their Orthodox Jewish faith and worship at the Synagogue multiple times a day. The Synagogue is the central meeting place that multiple families and individuals set up their lives around. It is not a once-a-week office space. Religious events that take place include prayers three times a day and many other ceremonies throughout the week including Shabbat which is observed every week beginning at sunset on Friday evening and ending after dark on Saturday evening.

25. In addition to the multiple religious uses of the Synagogue that take place every day of the week, Heimish also uses various rooms in the residence to put up members, visitors, or those in need in the community. These rooms are used to further the religious mission of Heimish.

26. The instant action is not the first time the City has taken enforcement action against Heimish.

27. On July 16, 2020, an attorney for the City sent a letter to Heimish purporting to enforce a deed restriction contained within the Synagogue's deed and

demanding that it cease all activities at the Synagogue within 15 days or face legal action.

28. The City took this action even though the relevant homeowners' association had full knowledge of Heimish's use of the Synagogue and took no action against Heimish.

29. In response to the City's enforcement action, Heimish filed suit against the City in federal court on March 25, 2021.

30. After Heimish filed suit under TRFRA and other similar federal statutes involving the free exercise of religion, the City abandoned its threatened enforcement action against Heimish.

31. Despite dropping its previous enforcement action against Heimish, the city continues to engage in selective enforcement that burdens Heimish's free exercise of religion.

32. In October 2023, Heimish constructed a wooden deck in the backyard of the Synagogue. While the deck itself complies with all City standards, Heimish inadvertently failed to get the proper permit for the deck. Around this time, Heimish also repaired the siding on the Synagogue.

33. Heimish also conducted a small garage conversion project many years ago. Once again, like other homes in the neighborhood, Heimish inadvertently failed to get the proper permit before engaging in these small improvements.

34. On information and belief, a disgruntled next-door neighbor to the Synagogue reported the unpermitted actions to the relevant City authorities.

35. On October 20, 2023, Petitioners received a "Notice of Unpermitted Works" from the City of Houston Code Enforcement Division that addressed permitting issues with the deck and garage conversion. Petitioners took steps to remedy the situation but was informed of the backlog of permitting requests at the City and that it could take months to comply with the notice. On November 3, 2023, Petitioners received a second notice. This time the notice also mentioned permitting issues with the repaired siding.

36. Petitioners sought to comply with the second notice, but was again informed of the long wait time to remedy the situation.

37. On November 8, 2023, after noticing electrical issues in the Synagogue, CenterPoint Energy told Heimish that the "meter jaw" attached to the Synagogue had burned up and needed to be replaced. As a result, CenterPoint temporarily shut off electricity to the property for safety while the repair took place. The service tag from CenterPoint Energy instructed Heimish to call the company back after the repair was complete to reconnect the electricity.

38. On November 9, 2023, after the repairs to the meter jaw were complete, Heimish contacted CenterPoint Energy to reconnect the electricity. However, the CenterPoint Energy informed Heimish that it would not allow Heimish to restore electricity to the Synagogue because of a City hold related to the permitting issues Petitioners were actively taking steps to remedy. As a result of these permitting issues, the City placed a "hold" on Heimish's account and power cannot be restored until it is removed.

39. When asked whether the City would temporarily lift the hold it had placed on Heimish's account so that Heimish could continue its religious activities at the Synagogue, the City refused.

40. Almost three weeks have passed since the City cut off Petitioners from their electricity. And Petitioners—who are actively seeking to remedy their permitting issues—are still without power in the middle of the coldest and darkest period of the year. With Hannukah—the "Festival of Lights"—fast approaching on December 7, 2023, Heimish is severely worried. The Synagogue remains without light, heat, or any of the other benefits of electricity during one of the busiest religious seasons of the year.

41. Upon information and belief, the City has not prevented the provision of vital utilities like electricity against other comparable properties containing similar permit violations.

42. Upon information and belief, the City retains sole discretion to lift the hold placed on Heimish's account but refuses to do so.

43. Upon information and belief, the City's refusal to lift the hold is in part motivated by animus stemming from the 2020 lawsuit between Petitioners and the City in which they legally asserted their right to free exercise of religion.

VI. CAUSES OF ACTION

COUNT I: Violation of Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code § 110.001 *et seq.*

44. Petitioners reincorporate and adopt by reference for all purposes each and every allegation in the preceding paragraphs and sections.

45. TRFRA provides 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.

46. This requires governmental agencies within the state "to tread carefully and lightly when its actions substantially burden religious exercise." *Barr v. Sinton*, 295 S.W.3d 287, 289 (Tex. 2009).

47. By refusing to allow CenterPoint Energy to issue the necessary electricity to the Synagogue with no way to immediately remedy the permitting issue, the City of Houston has substantially burdened Heimish's free exercise of their religion. Heimish is left with a cold and dark Synagogue and rooms that are effectively uninhabitable without electricity. Due to the entire religious community being within walking distance of the Synagogue, no other alternatives are reasonably available. Heimish and its members have no other option but to worship in the cold of winter inside a dark and uninhabitable building—all this without any timely recourse to resolve the issue causing the problem.

48. In addition to this, the events of October 7, 2023, and the global spike in antisemitic activity prevent Heimish and its members from feeling safe enough to conduct events outdoors or in any unsecured or unfamiliar locations.[1]

[1] REUTERS, *How the Surge in Antisemitism is Affecting Countries Around the World*, (Oct, 31, 2023, 8:25 AM), https://www.reuters.com/world/how-surge-antisemitism-is-affecting-countries-around-world-2023-10-31 ("[A]ntisemitic incidents [in the United States rose] by about 400% in the two weeks following the Oct. 7 attack, compared with the same period last year.").

49. As a result, the City's enforcement mechanism of precluding the necessary permit for power substantially burdens Heimish's ability to safely meet at the property for religious teaching, prayer, and worship. Under TRFRA the intent of the City's action leading to the substantial burden is irrelevant. *See* TEX. CIV. PRAC. & REM. CODE § 110.003.

50. Further, the City's enforcement mechanism of holding the permit for power hostage while the other permitting issues are outstanding, substantially burdens Heimish's ability to engage in religiously motivated hospitality and charity with its rooms being rendered effectively uninhabitable.

51. The City of Houston's actions, as applied to Heimish, do not further a compelling government interest. Even if the City's asserted interest in maintaining the enforcement of permitting issues related to small property improvements were genuine, it is not a *compelling* interest within the meaning of TRFRA.

52. Further, assuming the City's ordinance and enforcement as applied to Heimish *did* further a compelling government interest, the City's actions are a far cry from the least restrictive means of furthering its alleged interest. Completely shuttering electrical power to the Synagogue during the coldest period of the year and during one of the busiest religious seasons of the year is not the least restrictive means of solving minor permit violations. Additionally, the City's failure to provide a timely remedy to the problem due to a backlog of permitting requests renders this enforcement mechanism indefensible.

53. As such, Petitioners are entitled to a declaration that the City's enforcement violates TRFRA and a permanent injunction enjoining enforcement that blocks the restoration of power to the Synagogue.

54. Petitioners have complied with TRFRA's notice provisions. TRFRA provides that Petitioners may bring this action immediately, because (1) the exercise of government authority that threatens to substantially burden Petitioners' religious exercise is imminent—indeed, it is currently ongoing; and (2) Petitioners could not reasonably provide such notice prior to the exercise of government authority, since that government authority is already being exercised at this time. *See* TEX. CIV. PRAC. & REM. CODE § 110.006(b). Even so, prior to bringing this action, and despite not needing any notice for injunctive relief, Petitioners' Counsel reached out to various departments and members of the City to resolve this issue to no avail.

55. As a direct and proximate result of the City's conduct, Petitioners have suffered and will continue to suffer irreparable harm, including the loss of their constitutional rights, entitling them to declaratory and injunctive relief.

56. Petitioners are likewise entitled to recover their reasonable attorney's fees and costs pursuant to TEX. CIV. PRAC. & REM. CODE § 110.005, in an amount to be proven at trial.

COUNT II: Violation of the First and Fourteenth Amendments, 42 U.S.C. § 1983

57. Petitioners reincorporate and adopt by reference for all purposes each and every allegation in the preceding paragraphs and sections.

58. This claim is brought pursuant to 42 U.S.C. § 1983, which authorizes a cause of action against any government official who deprives a person of a constitutional right while acting under the color of state law.

59. The City is a person for the purposes of § 1983 and was acting under the color of state law at all relevant times alleged herein.

60. The Free Exercise Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, prohibits any state action abridging the free exercise of religion.

61. State action that substantially burdens religion in a manner that is not generally applicable or neutral to religious exercise is subject to strict scrutiny. See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

62. Government action lacks general applicability if it involves the government making "individualized" assessments and retaining "sole discretion" over the enforcement of a law. *Id.* at 1877–78.

63. Also, government action is neither neutral nor generally applicable if it "treat[s] any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

64. The City's enforcement mechanism of precluding the necessary permit for power substantially burdens Heimish's ability to safely meet at the property for religious teaching, prayer, and worship.

65. The City's actions are not neutral because it has selectively enforced these permitting requirements through a complete power shutoff. Upon information

and belief, this extreme action was partially motivated by the Synagogue's past dealing with the city related to defending its free exercise of religion.

66. The City's actions are also not generally applicable because its enforcement mechanism is based upon individualized assessments of the Synagogue and because the City retains sole discretion to lift the hold placed on Heimish's account with CenterPoint Energy.

67. The City's actions fail strict scrutiny.

68. Even if the City's asserted interest in maintaining the enforcement of permitting issues related to small property improvements were genuine, it is not a *compelling* interest.

69. Further, assuming the City's ordinance and enforcement as applied to Heimish *did* further a compelling government interest, the City's actions are a far cry from the least restrictive means of furthering its alleged interest. Completely shuttering electrical power to the Synagogue in the coldest period of the year and during one of the busiest religious seasons of the year is not the least restrictive means of solving minor permit violations. Additionally, the City's failure to provide a timely remedy due to a backlog of permitting requests renders this enforcement mechanism indefensible.

70. As a direct and proximate result of the City's conduct, Petitioners have suffered and will continue to suffer irreparable harm, including the loss of their constitutional rights, entitling them to declaratory and injunctive relief.

COUNT III: Violation of Texas Civil Practice & Remedies Code § 110.0031

71. Petitioners reincorporate and adopt by reference for all purposes each and every allegation in the preceding paragraphs and sections.

72. Pursuant Texas Civil Practice & Remedies Code § 110.0031, "[a] government agency or public official may not issue an order that closes or has the effect of closing places of worship" in Texas. *See also* Tex. Const. art. I, § 6-a (stating "a political subdivision of this state may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship, in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief").

73. The City's enforcement mechanism of precluding the necessary permit for power has the effect of closing the Synagogue, a place of worship.

74. As a direct and proximate result of the City's conduct, Petitioners have suffered and will continue to suffer irreparable harm entitling them to declaratory and injunctive relief.

VII. REQUEST FOR RELIEF

Wherefore, Petitioners respectfully request that this Court grant judgment in their favor on all claims above and order the following relief:

- Award declaratory relief finding that the City violated TRFRA, the First and Fourteenth Amendments, Texas Civil Practice & Remedies Code § 110.0031,

and the Fair Housing Act by enforcing the minor permitting violation through indefinitely cutting off electricity to the Synagogue.

- Award a temporary restraining order and temporary and permanent injunctive relief, ordering that the City be restrained from its interference with Heimish's Orthodox Jewish practice and communal worship by withholding the permits necessary for CenterPoint Energy to restore power to the Synagogue.
- Award actual and nominal damages to Petitioners.
- Direct the City to pay the attorney's fees and costs incurred by Petitioners associated with the preparation and the prosecution of this action.
- Grant any other such relief as the Court deems just and equitable.

APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

75. Petitioners reincorporate and adopt by reference for all purposes each and every allegation in the preceding paragraphs and sections.

A. Petitioners File Suit

76. Petitioners' counsel diligently worked with various members of the City to resolve the issue. Ver. Pet. at ¶ 53. Despite these efforts, the City's permitting department did not budge from their hardline stance. *Id.* After no progress was made, Petitioners were left with no option but to file suit.

77. On November 29, 2023, Petitioners filed their Verified Original Petition seeking to restrain the City from interfering with Heimish's Orthodox Jewish practice and communal worship by withholding the necessary permits.

78. On November 30, 2023, Petitioners Amended their Verified Petition to include within its pages the Application for Temporary Restraining Order and Temporary Injunction.

B. Legal Standard

79. A temporary restraining order ("TRO") provides emergency relief and preserves the status quo until a hearing may be held on an application for a temporary injunction. *Texas Aeronautics Commission v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971); *Ex parte Pierce*, 161 Tex. 524, 342 S.W.2d 424, 426 (1961). The "status quo" means "the last, actual, peaceable, noncontested status between the parties to the controversy that preceded the pending suit. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

80. To obtain a TRO or a temporary injunction, the applicant must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Health Care Serv. Corp. v. E. Tex. Med. Ctr.*, 495 S.W.3d 333, 337 (Tex. App.—Tyler 2016, no pet.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

81. The decision on whether to grant or deny a temporary injunction lies in the sound discretion of the trial court. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). And the standard of review is whether the trial court abused its discretion. *Butnaru*, 84 S.W.3d at 204. A trial court does not abuse its discretion if there is some evidence present that reasonably supports the court's decision. *Id.*

I. ARGUMENT

A. Petitioners Have Multiple Causes of Action

82. Petitioners maintain valid causes of action under TRFRA and the Free Exercise Clause.

83. TRFRA provides 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. Here, Heimish is an Orthodox Jewish Synagogue—a religious organization that falls within the definition of TRFRA. As such, they maintain a valid cause of action to seek injunctive relief. Further, Heimish

complied with TRFRA's notice provisions because (1) the exercise of government authority that threatens to substantially burden Petitioners' religious exercise is imminent—indeed, it is ongoing; and (2) Petitioners could not reasonably provide such notice prior to the exercise of government authority, since that government authority is already being exercised at this time. *See* TEX. CIV. PRAC. & REM. CODE § 110.006(b).

84. Petitioners also assert a valid cause of action under the Free Exercise Clause. A plaintiff may prove a free exercise violation by showing that "a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (quoting *Employment Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)). Here, Heimish's religion has been burdened by the City's selective enforcement of its permitting regulations. Thus, Petitioners have a valid Free Exercise cause of against the City for which they may seek injunctive relief.

B. Petitioners Have a Probable Right to Relief Sought

85. A probable right of recovery exists when a plaintiff alleges a cause of action and presents evidence tending to sustain it. *See Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 857 (Tex. App.—Fort Worth 2003, no pet.). But a plaintiff need not establish that it ultimately will prevail at trial, only that it is entitled to preservation of the status quo pending trial on the merits. *See Norlyn Enters. v. APDP, Inc.*, 95 S.W.3d 578, 583 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Thus, the analysis under this element "entails a thorough review of the law applicable to

the parties' claims and defenses" but not one that ultimately determines the merits of the case. *Cameron Int'l Corp. v. Guillory*, 445 S.W.3d 840, 846 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

86. Petitioners have a probable right of recovery under both TRFRA and the Free Exercise Clause.

1. The City's enforcement Violates TRFRA.

87. TRFRA provides that "a government agency may not substantially burden a person's free exercise of religion." TEX. CIV. PRAC. & REM. CODE § 110.001(a). Under TRFRA, "free exercise of religion" is defined as "an act or refusal to act that is substantially motivated by sincere religious belief." *Id.*; *see also Sanchez v. Saghian*, No. 01-07-00951-CV, 2009 Tex. App. LEXIS 7944, at *24 (Tex. App.—Houston [1st Dist.] Oct. 8, 2009, no pet.). The Supreme Court of Texas has declined to adopt a bright line test to determine what constitutes a substantial burden, and instead conducts "a case-by-case, fact-specific inquiry."[2] *See Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009). This inquiry focuses "on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression." *Id.* at 301. And this burden "must be measured, of course, from the person's perspective, not from the government's." *Id.*

[2] The Texas Supreme Court also holds that courts should not form a distinction between belief and conduct—elements required by the compulsion and centrality tests—because "it may require a court to do what it cannot do: assess the demands of religion on its adherents and the importance of particular conduct to the religion." *Barr*, 295 S.W.3d at 301 (Tex. 2009). As a result, arguments by governments that use the compulsion and centrality line of logic are not supported under Texas law.

88. Electricity is a necessity in the modern world. Houses and buildings are no longer designed to operate without it, especially in the cold fall and winter months. Heimish—through the City's enforcement—is left with a cold and dark Synagogue and rooms that are effectively uninhabitable without electricity. Ver. Pet. at ¶ 40. Because the entire religious community must be located within walking distance of the Synagogue, no other alternatives are reasonably available. *Id.* at ¶ 46. Heimish and its members have no other option but to worship during the coldest period of the year inside a dark and uninhabitable building or outside in the elements—all this without any immediate recourse to resolve the issue causing the problem. *Id.*

89. This is not a trifling issue or a "tough it out" situation. Heimish and its members religiously meet every day of the week in the synagogue for prayer and other religious events. *Id.* at ¶ 24. This time of year is particularly busy with Hannukah—one of the most important Jewish festivals—starting on December 7, 2023. The synagogue is effectively a second home for Heimish's members during most weeks, but during festivals like Hannukah, it takes on an even more central role. Ironically, Hannukah is the "Festival of Lights," making the City's actions all the more damaging to the impending religious celebrations for this Jewish community.

90. Beyond being forced to meet daily in a cold, dark, and uninhabitable building during the coldest and busiest time of the year, Heimish is also burdened by its inability to use the Synagogue to further its religious goals through hospitality and charity. Ver. Pet. at ¶ 49. Heimish uses various rooms in the Synagogue to host members, visiting speakers, and those in need in their community. *Id.* at ¶ 25. These

rooms are used to further the religious mission of Heimish. *Id.* This type of burden has specific backing in TRFRA case law.

91. In *Barr*, the Supreme Court of Texas expressed "no hesitation" in holding that there was a "substantial burden" where a city ordinance prevented a pastor from operating a "biblically supported" halfway house for convicts. *Id.* There, the court reasoned that because the pastor's halfway house was a religiously motivated action and there was no way to reasonably move this activity to another location, the city ordinance was a substantial burden.

92. Like the pastor in Barr who used rooms in his property to further his religious mission, Heimish also uses the rooms in the Synagogue to host visitors, guests, and those in need. The enforcement action by the city has curtailed its ability to engage in this religiously motivated action as the rooms are left uninhabitable without electricity. Again, like the pastor in Barr, Heimish is also unable to move the location of these rooms or find an alternative due to the walking distance and eruv requirements specific to the location of the Synagogue.

93. Having no heat, light, or any of the benefits that electricity brings during the coldest and busiest religious period of the year is a substantial burden. The inability to perform religious and charitable activities with no alternative is also a substantial burden. For these reasons, the City's action in preventing Heimish from using electricity constitutes a substantial burden on Heimish's free exercise of its religion.

94. TRFRA requires that even when the government acts in furtherance of a compelling interest, it must show that it "is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE § 110.003. While examining a comparable federal statute, the Supreme Court explained the demanding standard that this test requires of the government:

> The least-restrictive-means standard is exceptionally demanding, and it requires the government to "show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Hobby Lobby*, 573 U.S., at 728, 134 S. Ct. 2751, 189 L. Ed. 2d 675, 709. "If a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

Holt v. Hobbs, 574 U.S. 352, 364-65, 135 S. Ct. 853, 864 (2015) (cleaned up).[3]

95. The minor permitting enforcement issues relied upon by the City are not a *compelling* interest. S*ee Barr v. City of Sinton*, 295 S.W.3d 287, 306 (Tex. 2009) (stating compelling interests must be "interests of the highest order" necessary to avoid "the gravest abuses, endangering paramount interest[s]"). However, for the sake of brevity and judicial economy in this preliminary motion, a quick glance at other means the city could take outside of shutting off electricity for months renders this analysis irrelevant.

96. Completely depriving a Synagogue of power over a small deck and garage conversion is perhaps the most restrictive means of enforcement possible.

[3] This was a case addressing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). 42 U.S.C.S. § 2000cc et seq. RLUIPA is known as a sister statute of state RFRA statutes like TRFRA and has the same "least restrictive means" requirement. The Texas Supreme Court has considered federal RLUIPA cases as instructive to interpreting TRFRA before. *See Barr*, 295 S.W.3d at 301 (Tex. 2009).

Rather than a fine or a fee schedule, refusing to restore power completely prevents a habitable premise and plunges the entire Heimish community into the cold and dark. But even if the nuclear option of shutting off power were somehow reasonable, the failure to provide any immediate recourse to return the power to the Synagogue is not. Even as Petitioners seek to comply with the City ordinance and obtain the proper permits, the City has informed them that the wait time to remedy the issue will extend well past Hannukah and could potentially take over a month. Ver. Pet. at ¶ 35.

97. Shutting off the lights and power is an obtrusive, aggressive, and restrictive means to enforce permitting that violates TRFRA. And shutting off the lights and power with no way to turn them back on in a reasonable amount of time goes a step further. Rather than a hearing or an online portal to pay a small fee, Heimish is forced to endure the dark and cold substantial burden on its religion for an indefinite period based not on Heimish's action or inaction, but based on the City's backlog and bureaucratic processes. The City has other less restrictive means available to enforce its interests, and therefore cannot satisfy TRFRA's demanding standard.

* * *

98. Because the enforcement by the City burdens Petitioners free exercise of religion and the enforcement is far from the least restrictive means of furthering the government's interest in this case, Petitioners maintain a probable right to the relief they seek under TRFRA.

2. The City's enforcement violates the Free Exercise Clause.

99. The First Amendment's Free Exercise Clause bars government from "prohibiting the free exercise" of religion. U.S. Const. amend. I. A plaintiff may prove a free exercise violation by showing that "a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (quoting *Employment Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990)). When a plaintiff makes such a showing, a court "will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.*; *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("[T]he government has the burden to establish that [a] challenged law satisfies strict scrutiny."). Under this framework, Petitioners' free exercise claim is highly likely to succeed.

100. Strict scrutiny applies here because the City's actions are neither neutral nor generally applicable. Courts apply strict scrutiny when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877 (citations omitted). In assessing government action, "[f]acial neutrality is not determinative." *Lukumi*, 508 U.S. at 534; *see also Masterpiece Cakeshop, Ltd. v. Col. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (stating the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs."). Instead, courts

"meticulously" scrutinize both the decision itself and the circumstances, considering "the historical background of the decision under challenge, the specific series of events leading to [it], and the . . . administrative history, including contemporaneous statements made by members of the decision-making body." *Lukumi*, 508 U.S. at 534. Here, those circumstances show that the City has a history of selective enforcement towards Heimish's religious activities and has already tried once to shut down Heimish's religious gatherings at the Synagogue. *See* Ver. Pet. at ¶ 3. Combining this history of tension with the extreme enforcement method of making the Synagogue uninhabitable over minor permitting issues, there is substantial evidence that the City is acting in a manner that singles out Heimish. *See Fulton*, 141 S. Ct. at 1877.

101. In addition, the City's actions are not generally applicable. Government action lacks general applicability if it involves the government making "individualized" assessments and retaining "sole discretion" over the enforcement of a law. *Fulton*, 141 S. Ct. at 1877–78. Here, the City's permitting regulations required the City to make individualized assessments of the Synagogue. Specifically, in placing a hold on Heimish's account, the City was required to make individualized assessments of whether other permit violations existed. Further, the City retains "sole discretion" regarding whether it will issue the permits requested by Heimish. It is well within the City's discretion to temporarily remove the hold it has placed upon the Heimish's requested electrical permit, but it has refused to do so. This "sole discretion" over whether to place or remove a hold on a particular account is exactly

the kind of mechanism that the Supreme Court has held to "'invite[] the government to decide which reasons for not complying with [a] policy are worthy of solicitude," thereby triggering strict scrutiny. *Fulton*, 141 S. Ct. at 1877.

102. Because strict scrutiny applies, the City's actions can stand only if they advance compelling state interests "of the highest order" *and* are "narrowly tailored in pursuit of those interests. *Lukumi*, 508 U.S. at 546. And for the same reasons the City cannot satisfy TRFRA's demanding standard, it also fails strict scrutiny.

C. Petitioners Face Probable, Imminent, and Irreparable Injury to Their to their Statutorily Protected Religious Freedom.

103. Petitioners' injuries to their religious freedoms are current, ongoing, and not remediable by anything other than an injunction.

104. To establish a probable injury a plaintiff must show that the injury is imminent and irreparable. Imminence requires "an actual threatened injury, as opposed to a speculative or purely conjectural one." *Texas Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 908 (Tex. App.—Austin 2009, no pet.). An injury is irreparable if "the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204 (Tex. 2002).

105. Petitioners' injuries are imminent and ongoing. The Synagogue has been without power for multiple weeks and according to the City's current enforcement policy, will likely be without power for an even longer period. Petitioners' injuries are also irreparable. Money damages from the City will not restore the days and weeks

of freedom to worship or give back enjoyment and proper use of the Synagogue to Heimish. Indeed, the Supreme Court has long held "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

* * *

106. Because of the imminent and irreparable nature of Petitioners' injuries, all three elements required to obtain a TRO and a temporary injunction are met.

II. TERMS OF REQUESTED RELIEF

107. To prevent the imminent and irreparable harm to Petitioners described above, Petitioners requests that the court issue a TRO followed by a temporary injunction restraining the City from enforcing the block on The Synagogue's electricity as follows:

- Entry of a temporary restraining order, mandating that the City refrain from withholding the issuance of the necessary permit to Heimish's electrician within one day from the date of the Court's order, which will allow CenterPoint Energy to restore power, pending the hearing of Petitioners' application for a temporary injunction;
- After notice and hearing, entry of a temporary injunction, mandating that the City remove any restriction on the Synagogues ability to obtain power from CenterPoint Energy, pending trial on the merits and entry of judgment; and
- Any other relief to which Petitioners may be justly entitled.

Dated: November 30, 2023

Respectfully submitted,

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VERIFICATION

STATE OF TEXAS §
§
§
§
§
COUNTY OF HARRIS §

My name is Michael A. Winkler. I am of sound mind and capable of making this verification. I have personal knowledge of the facts stated in the foregoing AMENDED VERIFIED PETITION from my experience as the Executive Director for Heimish of Houston. I declare under penalty of perjury that the statements and facts contained in the AMENDED VERIFIED PETITION are true and correct.

MICHAEL WINKLER

Sworn to and subscribed before me on the 30th day of November 2023, by Michael A. Winkler.

Ryan McKnight
Notary Public, State of Texas
Comm. Expires 06-11-2025
Notary ID 128497544

Notary Public for the State of Texas

Ryan McKnight
Printed Name

(seal)

My Commission Expires: 06-11-2025