Nos. 08-10358, 08-10506

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

consolidated with

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

Plaintiff-Appellee,

v.

CITY OF EULESS,

Defendant-Appellant.

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

RESPONSE AND REPLY BRIEF OF PLAINTIFF JOSÉ MERCED

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

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

Attorneys for Plaintiff José Merced

November 25, 2008

CERTIFICATE OF INTERESTED PERSONS

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

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

Eric C. Rassbach
Attorney of Record for Plaintiff-Appellant

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Euless's response to Merced's opening brief rests on a straw man. According to Euless, Merced's position is that "if a city allows the keeping and killing of ***any*** animal, it must allow the keeping and killing of ***all*** animals." Opp.44 (emphasis in original). But Merced argues no such thing. Merced argues instead that when a government allows "nonreligious conduct that endangers [the government's] interest in a similar or greater degree than Santería sacrifice," it must also allow Santería sacrifice—unless the government can satisfy strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 543 (1993). Here, Euless ***does not dispute*** that it allows—under both written and unwritten rules—a wide variety of "nonreligious conduct" that poses the same threat to public health and animal cruelty as Santería sacrifice does. It says only that its motives in so doing were pure, and that it hasn't allowed anyone else to engage in the specific killings that Merced seeks to conduct. But those reasons are not enough to distinguish *Lukumi*.

Merced agrees that there is no evidence in the record that Euless has allowed a certain number of goats, chickens, and a turtle to be killed at a residence for secular reasons. Merced also agrees that Euless did not intend to discriminate against (or even know about) Santería in 1974. But these facts are beside the point. *Lukumi* did not turn on either the allowance of killings identical to Santería, or the

existence of discriminatory animus. Instead, it focused on two things: (1) whether the city permitted secular conduct that endangered its interests just as much as Santería sacrifice did (rendering its ordinances not generally applicable), and (2) whether the "effect of a law in its real operation" was to suppress religion (rendering its ordinances non-neutral). *Id.* at 543, 535.

Euless's argument thus fundamentally confuses the meaning of *Lukumi*. The measure of the general applicability of a statute is not whether or not it mentions religion. Instead it is whether the statute applies equally to both religious and non-religious conduct that similarly threatens the government's interests. That is, if a statute purporting to protect public health prohibits religious conduct that threatens public health, but does not prohibit secular conduct that poses the same threat, the statute is not generally applicable. *Id.* at 543.

Similarly, the measure of a statute's neutrality is not the subjective intent of its drafters, but the objectively assessable effects the statute has "in its real operation." *Id.* at 535. If a law is facially neutral but is applied in a manner that disfavors religion, it is not neutral. *Id.* at 537. Euless's ordinances—with their gaping exceptions for secular conduct and selective enforcement against religious conduct—fail both of these tests.

Because Euless's ordinances are not generally applicable and not neutral, they are subject to strict scrutiny—a test that Euless cannot satisfy. Here again,

Euless argues the purity of its motives rather than the nature of its interests. Euless's alleged interests in this case—protecting public health and preventing cruelty to animals—are purely speculative, given the broad generalities relied upon at trial and Merced's long history of engaging in sacrifice without endangering anyone's health. Euless has also failed to prove that it used the least restrictive means of accomplishing its interests. Indeed, Euless has not even attempted to determine whether it could accommodate both its interests and Merced's religious exercise, let alone proved that it cannot do so.

Even if Euless's ordinances did not fail under *Lukumi*, they would still be invalid under the Texas Religious Freedom Act (TRFA). Euless fundamentally misconstrues the meaning of TRFA, substituting its own preferred "general applicability" standard for TRFA's "substantial burden" standard. In doing so, Euless ignores the text, history, and precedent underlying TRFA, all of which confirm that Euless has substantially burdened Merced's religious exercise. Under TRFA, then, Euless's ordinances are again subject to strict scrutiny.

For many of the same reasons that Euless's laws violate the Free Exercise clause under *Lukumi*, they also violate the Equal Protection Clause. Euless's selective enforcement of its ordinances operates upon a suspect classification—religion—and Euless's selective enforcement cannot pass strict scrutiny.

Finally, Euless devotes a single page to its cross-appeal. In that page, it fails to proffer a single reason why Merced's case should be considered frivolous, let alone demonstrate why the district court's decision to the contrary constituted an abuse of discretion.

STATEMENT OF FACTS

Because the same set of facts is relevant to both the primary appeal and the cross-appeal, Merced incorporates by reference the statement of facts from his opening brief. This statement of facts describes only the inaccuracies in Euless's statement of facts.

First, Euless frequently cites to deposition summaries, drafted by Euless's attorneys, that contradict the testimony of Merced and his expert. *See, e.g.*, Opp.12-14. All but one of these misleading summaries use wholly identical wording. R.661-67. The summaries are also problematic because their admission implies that the district court decided, as a fact issue, whether Merced's beliefs about Santería are orthodox. Merced has testified that he sacrifices in his personal temple, his home, and that he will build a temple and sacrifice there only "if the orishas allow us to go and do it there." Tr.108-09. That testimony—the sincerity of which Euless has not contested—cannot be gainsaid by evidence offered by Euless.

Second, Euless frequently states that Merced wants to kill 39 animals. *See, e.g.*, Opp.3. But the record does not show that Merced requested to sacrifice any particular number of animals. Instead it shows that Euless told Merced he could not obtain a permit to conduct ***any*** sacrifices. Tr.103, 113, 135-36. Euless has refused to allow Merced to kill *any* four-legged animals or more than four fowl.

Third, Euless claims Merced wishes to kill *any* four-legged animal, including cows. Opp.12. But Merced himself has not discussed or asked for permission to kill a cow; he refers only to goats and sheep in his testimony. Tr.88-89.

Fourth, Euless asserts, again based upon a deposition summary it drafted, that animal remains are placed in dumpsters "around the city." Opp.14. But that summary does not identify whether the term "city" refers to Euless or the metropolitan area more generally.[1] Trial counsel objected strenuously to the admission of this testimony at trial, stating "I have copied out those exact lines from the deposition itself, and they do not appear to support that summation at all." Tr.153.

Fifth, Euless relies on the testimony of Donald Feare, an attorney admitted as an expert on the drafting of legislation. Opp.15. Despite having no training in public health, Feare testified about the potential health consequences of keeping animals. Opp.15-16 (citing Tr.120-22, 127-28). Feare's testimony on "interspecies conflict" is therefore irrelevant, since Euless introduced no evidence that Merced kept the animals in shared pens. At trial Merced stated the animals were kept in cages. Tr.95.

[1] The latter squares with Merced's testimony that he disposes of the waste in dumpsters outside Euless owned by other Santería practitioners. Tr.101.

Sixth, Euless claims the sale of turtles is prohibited because they may spread salmonella. Opp.17 (citing Tr.154). Euless has not identified the law in question, but it would appear to be 21 C.F.R. § 1240.62. This law prohibits only the sale of turtles smaller than 4 inches; there is no evidence in the record regarding the size of the turtles used in sacrifices.[2]

Seventh, Euless cites to its ordinance regarding the keeping of animals, stating this acts as a restriction on the number of animals Merced use for religious rituals in his home. *See, e.g.*, Opp.18. The district court did not resolve whether keeping an animal in the home for 15 minutes, Tr.95, constitutes "keeping" that animal under the ordinance.[3] Nor did Euless argue below that the keeping provision acted as a numerical limit on the number of animals which may be sacrificed.[4]

Eighth, Euless claims that Merced objected to only one deposition summary. But the trial transcript reveals that the Court admitted the deposition summaries on the mistaken belief that Merced's counsel had consented to them, when Merced's

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[2] *See also* TEX. ADMIN. CODE § 65.331 (permitting sale and possession of some turtles).

[3] *Cf.* COMPACT OXFORD ENGLISH DICTIONARY, *available at* http://www.askoxford.com/concise_oed/keep (defining "keep" as "have or retain possession of" or to "provide accommodation and food for; support").

[4] *See* Tr.118-19, 124-27 (discussing keeping in health context); *see, generally*, Tr.163-90 (closing arguments).

counsel had not. Tr.151-53. The Court overruled Merced's objections to their admission at trial and allowed no further argument. Tr.151-54.

ARGUMENT

I. The application of Euless's ordinances violates the Free Exercise Clause.

Euless's ordinances are subject to strict scrutiny under the Free Exercise for three independent reasons: (1) they are not generally applicable, (2) they are not neutral, and (3) they constitute a system of individualized exemptions.

A. Euless's ordinances are not generally applicable.

In his opening brief, Merced established that Euless's ordinances are not generally applicable. Merced's Brief ("Br.") 30-35. Both on their face and in practice, those ordinances are riddled with exceptions falling into three broad categories.

First, the ordinances have gaping written exceptions for many types of secular killing. Br.30-32. As other courts of appeals have held, allowing secular conduct while prohibiting analogous religious conduct violates *Lukumi*'s requirement that laws burdening religious exercise be generally applicable. Br.30-34.

Second, Euless has an unwritten policy of not enforcing its ordinances against several forms of killing that not only are prohibited by the plain language of the ordinances, but also pose just as much threat to public health and animal cruelty as Santería sacrifice does. Br.34-35.

Third, Euless's policy was long-dormant and was awakened only by anonymous neighbor complaints. Br.34. A law is not generally applicable for purposes of the Free Exercise Clause unless it is applied in a regular way to purportedly prohibited activity.

The following Table 1 shows the written and unwritten exceptions to Euless's prohibitions on the killing of animals.

Table 1—Written and Unwritten Exceptions

Type of killing	Prohibited by law and enforced in practice	Permitted by law (written exceptions)	Prohibited by law but not enforced in practice (unwritten exceptions)
Killing of mammals (sheep or goats) by Santería priest	X		
Killing of reptiles by Santeria priest	X		
Killing of more than 4 fowl by Santeria priest	X		
Killing of mammals by veterinarians			X
Killing of reptiles by veterinarians			X
Killing of reptiles (snakes and vermin) by homeowners			X
Killing of mammals by hunters or trappers		X	
Killing of mammals (rodents) by homeowners		X	
Killing of stray, injured, or ill mammals by City		X	
Killing of rabid or vicious animals by City		X	
Killing of 4 or fewer fowl		X	
Killing of fish		X	

R.549-50, 554-55, 562-63, 600 ¶¶39-42, 644; TEX. PENAL CODE § 42.09(f)(1)(A), incorporated in Euless Ord. § 10-65(R.554); TEX. PARKS & WILDLIFE CODE § 62.0125 (2007).

Euless thus has at least 6 written and 3 unwritten exceptions to its ordinances for a broad range of killing that undermines the purposes of those ordinances. Moreover, this chart does not include the many exceptions for conduct short of killing an animal that undermines Euless's interests in protecting public health and preventing cruelty to animals—such as permitting hunters to butcher and consume uninspected meat, failing to regulate the disposal of restaurant waste, failing to regulate the disposal of lawfully killed animals, and permitting painful scientific experimentation on animals. Br.43-44, 46-47.

In response, Euless does not dispute the existence of these exceptions, or the fact that they are in many cases identical to, or even broader than, the exceptions at issue in *Lukumi*. Instead, Euless makes two arguments. First, it argues that its laws were not motivated by a desire to suppress Santería. Opp.31-33. Second, it argues that its laws apply equally to religious and secular killing and therefore do not "target" Santería. Opp.34-35. Both of these arguments fail.

1. Euless's intent in enacting the ordinances in 1974 is irrelevant.

Merced has admitted all along that Euless did not enact the ordinances in 1974 with the intent of suppressing Santería sacrifice. But that fact is irrelevant to

assessing general applicability. In fact, the portion of *Lukumi* Euless relies on to argue that animus is required is the one part of the opinion that did not command a majority of the justices. *Compare* Opp.32 & n.11 (citing Part II-A-2 of *Lukumi*) *with Lukumi*, 508 U.S. at 523 ("Justice KENNEDY delivered the Opinion of the Court, except as to Part II-A-2").[5] The precedential parts of *Lukumi*, by contrast, looked to the objective effects that Hialeah's ordinances and Florida's laws had on animal killing for religious reasons as compared to the effects on animal killing for non-religious reasons. As the Court explained, "categories of selection are of paramount concern when a law has the ***incidental*** effect of burdening religious practice. The Free Exercise Clause 'protect[s] religious observers against ***unequal treatment***.'" *Lukumi*, 508 U.S. at 542 (quoting *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring)) (emphases added).

Other Courts of Appeals have emphasized that animus is not necessary to make out a Free Exercise claim. *See, e.g.*, *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1260 & n.7 (10th Cir. 2008) (noting that Part II-A-2 of *Lukumi* was joined by only two justices and holding that "the constitutional requirement is of government *neutrality*, through the application of 'generally applicable law[s],' not just of governmental avoidance of bigotry.") (quoting *Employment Division* v. *Smith*, 494 U.S. 872, 881 (1990)) (emphasis and alteration original); *Midrash*

[5] Euless repeatedly cites this non-precedential section of *Lukumi* to support its arguments. Opp.29, 30, 35.

Sephardi, Inc. v. *Town of Surfside*, 366 F.3d 1214, 1234 n. 16 (11th Cir. 2004) ("Under *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law—only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation.").

Although animus is *sufficient* to prove a Free Exercise claim, it is not *necessary*:

> [T]he Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities. Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus.

Shrum v. *City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (citing *Lukumi*, 508 U.S. at 533). Euless's focus on discriminatory intent is thus a red herring.

2. The fact that Euless's ordinances do not mention or facially "target" religion does not render the ordinances generally applicable.

Euless admits, as it must, that its ordinances make categorical exceptions for a wide variety of secular killing. Opp.35, 52-53. Instead, Euless argues that such exceptions are irrelevant because Euless's ordinances do not "target" religion by distinguishing between the religious and non-religious motivation for the killing. Opp.34-35. That is, according to Euless, because its ordinances prohibit (for example) the killing of a goat for either religious or secular reasons, and allow the

killing of a chicken for either religious or secular reasons, its ordinances are generally applicable.

This argument fails for three reasons. First, it is factually inaccurate; Euless does, in fact, prohibit certain Santería killings while allowing *the very same killing* for secular purposes. Second, even assuming Euless never targeted religion, *Lukumi* is not limited to laws that target religion; in fact, one of the four ordinances struck down in *Lukumi* applied equally to both religious and secular killing. Third, as subsequent cases make clear, *Lukumi* extends to any case in which a government makes broad exemptions for secular conduct, but refuses to make exemptions for similar religious conduct.

a. Euless prohibits religious killing that it allows for secular purposes.

According to Euless, "[r]egardless of whether the intent of the person wishing to kill a goat is secular . . . or religious . . . , the answer is the same—it is prohibited inside city limits." Opp. 5, 39. This is factually incorrect. For example, Euless has conceded that it does not enforce its ordinances against veterinarians who kill four-footed animals within city limits. So if Merced brings a goat to a veterinarian in Euless, the veterinarian is free to kill and dispose of the goat without fear of penalty; but if Merced wants to sacrifice the goat next door in a religious ceremony, he cannot—even if he uses the very same method of killing and disposing of the goat as does the veterinarian.

This is analogous to one of the four ordinances struck down in *Lukumi*.[6] In *Lukumi*, Ordinance 87-40 did not, on its face, make any mention of religion, Santería, or sacrifice; it merely incorporated Florida's animal cruelty statute, broadly punishing anyone who "unnecessarily . . . kills any animal." 508 U.S. 537. This prohibition applied to *both* religious and secular killings that were deemed "unnecessar[y]." The problem, however, was "the interpretation given to the ordinance by [Hileah]," which deemed most secular killings necessary (such as hunting, fishing, and veterinary euthanasia), but deemed religious killings "unnecessary." As the Court explained, "[The city's] application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment." *Id.* at 537-38.

The same is true here. Euless has judged veterinary killings to be more valuable than Santería killings; it therefore enforces its ordinances against Merced but not veterinarians. Under *Lukumi*, then, the ordinances are not generally applicable.

[6] Although the Court treated all four ordinances as a group for purposes of its neutrality inquiry, 508 U.S. at 539-540, it analyzed each ordinance separately when it came to general applicability, *id.* at 543-546.

b. *Lukumi* does not require proof of "targeting" for general applicability claims.

Second, even assuming Euless did not target religious killing for stricter treatment, Euless is simply wrong that "targeting" is a required element for proving ***general applicability***. *See* Opp.35-36. The general applicability section of *Lukumi* did not discuss "targeting," only whether the ordinances allowed secular conduct that threatened the government's interest in the same manner as prohibited religious conduct. *Lukumi*, 508 U.S. at 542-46. Indeed, what Euless relies on is *Lukumi*'s ***neutrality*** analysis. *Id.* at 533-38. Euless's conflation of the two tests—intentional or not—is a mistake this Court should take care to avoid.

The fact that *Lukumi* does not require targeting is evident from one of the four ordinances struck down in *Lukumi*. Ordinance 87-72 prohibited the slaughter of animals outside of areas zoned for slaughterhouses. *Id.* at 545. The ordinance said nothing about religion, and there was no evidence that the city enforced the ordinance more strictly against religious slaughter than secular slaughter. But the Court did not conclude that the absence of targeting insulated the ordinance from strict scrutiny. Rather, the Court focused on the fact that the ordinance exempted "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week." *Id.* In other words, the ordinance allowed secular killing that appeared to implicate the city's interests in protecting public health and preventing animal cruelty. According to the Court, Euless "has

not explained" why Santería sacrifice posed any greater threat to those interests than the small-scale slaughter of hogs and cattle. *Id.* at 545-546. Absent such an explanation, an ordinance that granted an exemption for the secular slaughter of hogs and cattle, but not the religious slaughter of sheep and goats, was not generally applicable. *Id.*

The same is true of Euless's ordinances here. Regardless of whether those ordinances target religion or not, they allow a wide variety of secular killing (hunting, fishing, extermination, euthanasia, etc.). And the permissible secular killing undermines Euless's interests in protecting public health and preventing animal cruelty just as much as Santería sacrifice does. Under *Lukumi*, such ordinances are not generally applicable.

c. *Lukumi* extends to cases where the government provides categorical exemptions for secular conduct but refuses to provide an exemption for similar religious conduct.

Subsequent cases have also made clear that *Lukumi* extends to situations where the government provides exemptions for secular conduct that might threaten its interests, but refuses to provide exemptions for similar religious conduct.

One such case is *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) ("*FOP*"). Euless fundamentally misinterprets *FOP*, arguing that it is distinguishable because Euless's ordinances "provide no individualized 'exemptions' of the type present in *Blackhawk* and *FOP*." Opp.39.

FOP concerned "categorical exemptions," not "individualized exemptions." *FOP*, 170 F.3d at 365 (finding categorical exemptions even more likely to violate *Lukumi* than individualized exemptions). And as set out in Merced's opening brief and in Table 1 above, Euless's ordinances (including not only Chapter 10, but also Texas laws adopted by Euless) do have a number of categorical exemptions, both on their face and in their application. Veterinarians, city workers, fishers, hunters, homeowners engaged in pest control—all enjoy categorical exemptions that Euless has refused to extend to Merced's sacrificial activity. As noted above, veterinarians, under Euless's unwritten policy exempting them from its ordinances, can kill as many goats (or turtles) as they want.

Euless argues that *FOP* is not controlling because "Euless does not inquire into the purpose of the permitted or banned kills." Opp.39. Yet the situation here is identical to the one before the Third Circuit in *FOP*: there is an existing general rule with a categorical exemption (in Euless's case, at least nine categorical exemptions), and upon being told of a request for exemption, the defendant city refuses to extend a categorical exemption of similar scope to the religious plaintiff. *FOP*, 170 F.3d at 365-66. Euless has made, and continues to make, a value judgment that Santería sacrifice is worth less than exempting veterinarians, hunters, fishers, city workers, or pest-controlling homeowners from its animal killing laws. Under *Lukumi* and *FOP*, it may not do so. *See also Blackhawk* v.

Commonwealth, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (finding violation of *Lukumi* where circuses or zoos could keep wildlife for secular reasons without a fee, but plaintiff had to pay a fee to keep a black bear for religious reasons).

d. *Grace United* does not apply because its ordinances contained no exceptions.

Euless also conflates the general applicability and neutrality tests in its discussion of *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006). Opp.44-46. Euless incorrectly states that the court in Grace United "found the zoning law to be neutral," Opp.44, when in fact the parties agreed that there was no neutrality claim, only a general applicability claim. *Grace United*, 451 F.3d at 653.

Worse, Euless misrepresents the general applicability holding in *Grace United*. The Tenth Circuit's decision rested on the lack of any contention (or evidence) that Cheyenne "allowed some groups to operate daycare centers in LR-1 zones while denying the Church the same opportunity." *Id*. Instead Cheyenne had a prohibition—***without any exceptions***—for daycare centers in residential districts. *Id.* Indeed, because Cheyenne's refusal to allow the church's daycare center was a "mandatory denial" rather than a "discretionary denial," *id*. at 654, there was no opportunity to make exceptions, in theory or in practice. Here, by contrast, Euless has multiple written and unwritten exceptions to its baseline prohibition against most animal killing. In short, Euless "allow[s] some groups to

[kill animals] in [Euless] while denying [Merced] the same opportunity." *Id.* at 653.

e. The number of animals involved in any given sacrifice is not relevant to the question of neutrality or general applicability.

Finally, Euless often recites the fact that one of Merced's priest initiation ceremonies involved a total of 39 animals. *E.g.*, Opp. 3, 12, 14, 33 n.12, 34, 36. But the number of animals at issue in any given sacrifice is irrelevant to the question of whether Euless's ordinances are neutral and generally applicable. In *Lukumi*, for example, the district court noted that a priest initiation ceremony involved "anywhere from 24 to 56 four-legged animals and fowl." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 723 F. Supp. 1467, 1474 (S.D. Fla. 1989). But the Supreme Court in *Lukumi* did not even discuss the number of animals involved, let alone give the number of animals any weight. 508 U.S. at 524-547.

Moreover, with the lone exception of its four-fowl rule, Euless (like the city in *Lukumi*) does not base its legal prohibitions on the number of animals involved. Regardless of whether Merced wants to sacrifice one goat or fifty goats, Euless forbids it. Regardless of whether a hunter brings home one duck or fifty ducks, he is free to butcher, eat, and dispose of them in Euless. And regardless of whether a veterinarian kills one dog or fifty dogs, Euless permits it. Euless's ordinances are

not generally applicable regardless of the number of animals Merced wants to sacrifice.[7]

3. Euless's ordinances also fail the general applicability test because they are selectively enforced.

Euless's ordinances also fail the general applicability test because they are selectively enforced in two different ways. First, Euless has unwritten exemptions from its anti-killing ordinances for veterinarians, homeowners, and others. These unwritten exemptions constitute a policy of selective enforcement and demonstrate that Euless does not apply its laws to all of its citizens. Br.30-34; *see above* Section I.A.2 (describing exemptions).

Second, Euless rarely enforces its anti-killing ordinance, and then only in response to citizen complaints. The long dormancy of Euless's ordinance, combined with its complaint-driven enforcement mechanism, has resulted in selective enforcement that negates general applicability. Br.34-35 (citing *Tenafly Eruv Association* v. *Borough of Tenafly*, 309 F.3d 144, 168 (3rd Cir. 2002))). As set forth in Section I.B. below, Euless effectively concedes both long dormancy

[7] As discussed below in Section I.D., the number of animals involved in a particular sacrifice might be relevant to the government's ability to demonstrate a compelling governmental interest under strict scrutiny. Here, however, Euless has offered no evidence that Merced's sacrifices (whether they involve one animal or 39 animals) compromise its interests at all, let alone compromise its interests more than the many types of secular killing that Euless permits.

and a complaint-driven enforcement. These are two exacerbating factors that were not present in *Lukumi*.

* * *

Although it offers many excuses, Euless ultimately offers no explanation of why it allows a wide variety of secular killings that are just as threatening to its interests as Santería sacrifice. Like Hialeah, it claims only that "[c]ommon experience tells us" that the secular killings it permits are different. Opp.51; *Lukumi* at 544. But common experience is not enough when it comes to core First Amendment activity.[8]

B. Euless's ordinances are not neutral.

As Merced's opening brief showed, Euless's ordinances also fail the neutrality test, for two reasons: (1) Euless has refused to give Merced the same categorical exemptions that it gives to others, Br.35-36; and (2) Euless selectively

[8] A useful comparison is the Supreme Court's treatment of due process and free speech challenges to over- and under-inclusive statutes. Were this a due process challenge to an ordinance both over- and under-inclusive in relation to its alleged purposes, the ordinance would need be justified only under rational basis review, and the due process challenge would likely fail. *See Burlington Northern RR* v. *Ford*, 504 U.S. 648 (1992). By contrast, if Euless passes an over- and under-inclusive ordinance *burdening free speech*, it can be challenged under the Free Speech Clause and will be subject to strict scrutiny and likely invalidation. *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992); *see also Houston* v. *Hill*, 482 U.S. 451 (1987). Here, Euless has passed an over- and under-inclusive ordinance *burdening a particular type of religious exercise* (Santería sacrifice). Under *Lukumi*, such an ordinance is "not generally applicable" and is therefore, like certain speech restrictions, subject to strict scrutiny. 508 U.S. at 542-46.

enforces its ordinances to the detriment of Merced's religious exercise, Br.36-39. Although Euless has confusingly combined its responses on general applicability and neutrality, it offers two basic responses to the neutrality argument: (1) that Euless does not selectively enforce its ordinances, Opp.41; and (2) that Euless *could* have enforced the more neutral "no-livestock in a residence prohibition" against Merced instead of the no-killing provision, Opp. 42-43. Neither argument has merit.

1. Euless has selectively enforced its ordinances.

In *Tenafly Eruv Association* v. *Borough of Tenafly*, 309 F.3d 144, 168 (3rd Cir. 2002), the Third Circuit held unconstitutional a law prohibiting the posting of any item on a utility pole. Although the law was facially neutral—*i.e.*, it applied to any posting, whether religious or not—the court held the law unconstitutional because of its "selective discretionary application" against Orthodox Jews. *Id.*

As the Court explained, "the Borough has tacitly or expressly granted exemptions from the ordinance's unyielding language for various secular and religious . . . purposes." *Id.* at 167. "From the drab house numbers and lost animal signs to the more obtrusive holiday displays, church directional signs, and orange ribbons . . . the Borough has allowed private citizens to affix various materials to its utility poles." *Id.* Allowing these exemptions while "invo[king] . . . the often-dormant [ordinance] against conduct motivated by Orthodox Jewish beliefs"

violated *Lukumi*. *Id.* at 168; *see also Mayfield* v. *TDCJ*, 529 F.3d 599, 609 (5th Cir. 2008) (citing *Lukumi*) (noting that the neutrality requirement forbids "prison regulators [from] justify[ing] a policy based on a legitimate interest applicable to the overall prison population, while applying the policy in an arbitrary or discriminatory manner in violation of a particular subgroup's First Amendment rights.").

Here, Euless is simply wrong that it has enforced its ordinances neutrally. Opp.41. Like the Borough in *Tenafly*, Euless has "tacitly or expressly granted exemptions" for a wide variety of secular conduct otherwise prohibited under its ordinances. 309 F.3d at 167. In fact, in addition to the animal killing expressly permitted by law, Euless has conceded that it does not enforce its ordinances against veterinarians who kill livestock or residents who kill rodents. It claims only that "common experience tells us" such killings are different. Opp.51.

This "common experience" argument closely mirrors the city's unsuccessful argument in *Lukumi*: "[a]ccording to the city, it is 'self-evident' that killing animals for food is 'important'; the eradication of insects and pests is 'obviously justified'; and the euthanasia of excess animals 'makes sense.'" *Lukumi*, 508 U.S. at 544 (quoting city brief). The Court rejected this justification: "These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel

treatment of animals." Euless never explains why it must place the burden on Merced alone. Of course, there is nothing wrong with furthering interests in public health or preventing animal cruelty; such interests are undoubtedly legitimate. The question is why exceptions for secular conduct that ***harm*** those interests must be denied only to Merced.

Euless also largely concedes that, like the Borough in *Tenafly*, its ordinances were "often-dormant" until applied to Merced. *Tenafly*, 309 F.3d at 168. Although Euless claims that it has issued "numerous citations" for violations of its animal-related ordinances, it relies almost exclusively on citations for irrelevant conduct such as "no vaccine tags" or "failure to spay/neuter." Opp.10-11. The record shows that Euless has enforced the provisions invoked against Merced only ***once***—by issuing a slaughterhouse ordinance citation in 2003. *Id.* Indeed, as far as the record shows, Euless has ***never before enforced the animal cruelty ordinance***. *Id.*

This long dormancy, combined with Euless's complaint-driven enforcement and failure to enforce the ordinances against veterinarians and other homeowners, is more than enough to establish that Euless has not applied its ordinances neutrally. *Tenafly*, 309 F.3d at 168.

2. Euless's invocation of the "keeping livestock" ordinance is further evidence of its discriminatory intent.

Euless invokes its "no livestock in a residence prohibition," as an additional reason for denying Merced the ability to engage in certain Santería sacrifices. Opp.33, 42-43. Euless claims that it could enforce this facially neutral ordinance without regard to whether the animal was killed or treated cruelly. *Id.*

Enforcement of the "no livestock in a residence prohibition," however, would be even *more* obviously discriminatory than the slaughterhouse or animal cruelty ordinances. As the record shows, Merced has never "kept" an animal on his property for more than four hours and often kills the animals immediately upon their arrival. Br.11. That Euless invokes this provision as a reason to stop Merced from *killing* animals simply demonstrates that it is seeking any possible post-hoc justification for stopping Santería sacrifice in Euless.

Euless's selective enforcement system, when mixed with unwritten exceptions to its rules and a complaint-driven enforcement system that empowers private biases, results in a regulatory system for animal killings that is anything but neutral.

C. Euless's ordinances constitute a system of individualized exemptions.

Euless's ordinances also constitute a "system of individualized exemptions" requiring strict scrutiny under *Lukumi*. 508 U.S. at 537. As the record

demonstrates, Euless has an informal system of ad hoc exceptions to its general rules against animal killing. Br.34-35, 39-41. The course of litigation has only confirmed that Euless plans to continue enforcing the unwritten exceptions to its ordinances and that it does not plan to alter the text of its ordinances to codify its unwritten policies.

As the Tenth Circuit has explained, a "'system of individualized exemptions' need not be a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a 'system.'" *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004). "If we were to require the plaintiff to show that the 'system of individualized exemptions' was contained in a written policy, we would contradict the general principle that greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect." *Id.*

Here, Euless's insistence that it can use written ordinances to deny Merced's religious exercise while relying on unwritten exceptions to allow others to engage in animal killing is a classic, ad-hoc system of exemptions. Euless's efforts to defend it reduce to post-hoc justifications for the result it reached.

D. Euless's ordinances do not satisfy strict scrutiny.

Merced explained in his opening brief that Euless's ordinances cannot satisfy strict scrutiny because (a) they leave "appreciable damage" to those

"supposedly vital interest[s] unprohibited" and (b) Euless has not even attempted to show that it has used the least restrictive means to further its interests. Br.41-51 (quoting *Lukumi*, 508 U.S. at 546).

Euless makes three arguments in response. First, Euless argues that its interests are endangered in this particular case. Opp.47-48. Second, it argues that under *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), its interest is compelling so long as it allows secular rather than religious exceptions. Opp.48-54. Third, Euless argues that it has used least restrictive means. Opp.54-56. None of these arguments has merit.

1. Euless's actions do not further a compelling governmental interest.

Merced explained in his opening brief that Euless failed to show that its ordinances further a compelling governmental interest. Br.41-48. In response, Euless cites general evidence that allowing animal sacrifice could threaten public health. Opp.47-48. Under *Lukumi* and *O Centro* that is not enough to establish a compelling governmental interest.

a. Euless invokes only broadly stated general interests.

O Centro requires the government to demonstrate not just a generalized interest, but an interest in applying the law to the religious practice at issue. *See O Centro*, 546 U.S. at 430-34 ("broadly formulated interests . . . cannot carry the day."); *Kikumura* v. *Hurley*, 242 F.3d 950, 962 (10th Cir. 2001) (court does not

look at "its general application, but rather considers whether there is a compelling government reason . . . to apply the [policy] to the individual claimant."); *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) ("we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote").[9] This need for evidence regarding ***specific*** dangers is what *O Centro* means when it says "context matters." *O Centro*, at 546 U.S. at 431-32. It is not enough for Euless to offer the commonplace idea that animal slaughter can create health concerns; it must prove that it has a compelling interest in refusing to allow Merced to sacrifice.

This requires proof that the particular practice at issue is, in fact, dangerous. For instance, in *Spratt* v. *Rhode Island Dept. of Corrections*, 482 F.3d 33 (1st Cir. 2007), the appellate court vacated a decision against a prison inmate because the state failed to prove that its ban on inmate preaching furthered a compelling governmental interest in maintaining prison security. The court acknowledged that prison security itself is compelling, but held that the state failed to "establish that prison security is furthered by barring [plaintiff] from engaging in any preaching." *Id.* at 39. Although the state filed an expert affidavit stating inmate preaching

[9] TRFA, like RFRA, requires that the government to prove that "the application of the burden ***to the person***" passes strict scrutiny. TEX. CIV. PRAC. & REM. CODE § 110.003(b)(emphasis added); *see also O Centro*, 546 U.S. at 430-31 (applying this language from RFRA).

could pose a security risk, the court found that testimony insufficient because it "cites no studies and discusses no research in support of its position." *Id.*

Here, Euless adduced general evidence that animal sacrifice can be dangerous in the abstract, but failed to show that it actually was dangerous in Merced's particular case.[10] Br.41-48. At trial, Euless's experts testified that keeping animals in a home and sacrificing them there could pose health hazards, but "cite[d] no studies and discusse[d] no research in support of [their] position[s]." *Spratt*, 482 F.3d at 39; *see generally* Tr.115-32; 148-58. Nor did they explain why killing turtles (banned) is more dangerous than killing turkeys (allowed), or explain what number of animals would need to be slaughtered to create a health risk. *See id.* They also failed to explain what length or type of confinement would result in animal cruelty.[11] *See id*.

In its response brief, Euless states that the number and kind of animals involved in Santería sacrifice might make Euless's interests compelling. Opp.50-51. But it fails to cite any evidence to back up that assertion. Instead, it relies on "common experience" for the notion that 39 animals can create hazardous health

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[10] Euless's argument is even weaker than Rhode Island's argument in *Spratt* because it does not enjoy "due deference to the experience and expertise of prison and jail administrators in determining prison policy." *Spratt*, 482 F.3d at 39 (quotation omitted).

[11] For instance, Euless's ***legal*** expert suggested interspecies conflict might be a problem with animals in group pens, but Euless produced no evidence that Merced kept the animals in group pens. Tr.127-28.

conditions. *Id.* Merced does not dispute that 39 animals may create more problems than three animals. But the question before the Court is whether Euless *proved* that those animals were dangerous *in this particular case*. It did not. Euless does not explain how many animals must be killed in order to raise compelling public health concerns. *See id.* It does not explain why it is less healthy (or more cruel) to kill goats than dogs. *See id.* It fails to explain why it must limit the number of living animals that may be killed in a residence, but not the number of dead animals that may be butchered there. *Id.* Nor does it explain why the supposed interest is any different than the one claimed by Hialeah. *See Church of the Lukumi*, 723 F. Supp. at 1474 ("24 to 56 four-legged animals and fowl" sacrificed). Euless simply invokes "broadly formulated interests," which "cannot carry the day." *O Centro*, 546 U.S. 431-32.

There is no better proof of this argument than Euless's admission that Merced's sacrifices have never caused health problems in the past. R.599¶25-26; R.645-46; Br.44-46. Euless speculates that it must act in advance to prevent a health threat, Opp.6-7, but "compelling" interests are severely undermined by a long history of safe religious practice. *See Yoder*, 406 U.S. at 224 (rejecting claim of future harm because Wisconsin's "argument is highly speculative. There is no specific evidence" of the harm predicted). In *Spratt*, the state argued that it "need not wait for a dangerous situation to occur before it takes steps to remedy the

threat." 482 F.3d at at 40. But the court rejected that argument in light of the fact that the inmate had been preaching without incident for seven years. *Id.* Here, Merced has a 16-year track record of animal sacrifice, during which Euless cannot point to a single illness or public health problem. If "context matters," then 16 years of context make it clear that Euless's health interest—in Merced's particular case—is not compelling.

b. Euless confuses "compelling interest" with "non-discrimination."

Euless next argues that the problem in *O Centro* was that the government allowed some religious drug use, but not all religious drug use. Opp.49-50. In its reading, so long as Euless does not discriminate among religions, it has satisfied strict scrutiny. In essence, Euless asks the Court to import the first half of the Free Exercise analysis (general applicability and neutrality) into the second half (strict scrutiny).

Neither *O Centro* nor *Lukumi* supports this extraordinary argument. In *O Centro*, the federal government exempted one type of religious drug use from federal drug laws (peyote), but refused to create an exemption for another type of religious drug use (hoasca). 546 U.S. at 433. The problem, however, was not that the government made a different *religious* exception, but that it made an exception that undermined the purpose of the law. In fact, *O Centro* did not rest on the peyote exception alone. The Court also found it important that Congress created a

non-religious exemption by permitting the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." *Id.* at 432-33. The Court likewise relied on the fact that "there is no indication that Congress, in classifying [the drug used in *hoasca*], considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the [church]." *Id.* at 432. The existence of other exemptions—religious or not—proved that the governmental interest was not strong enough to overcome strict scrutiny. *Id.* at 432-34.

Nor were the two religious exemptions in *O Centro* identical. *See* Opp.49-50 (suggesting exceptions must pose the same risks). The existing peyote exception was fundamentally different from the hoasca exception requested in *O Centro*. Peyote and hoasca contain two different psychoactive substances which may well pose two different sets of health risks. *See O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft,* 282 F. Supp. 2d 1236, 1250 (D.N.M. 2002) (hoasca contains DMT, peyote contains mescaline); *id.* at 1264 (hoasca, due to lack of regulation and ease of ingestion, may be more dangerous than peyote). Exceptions need not be identical to undermine claims of compelling interest.

c. Euless's claimed interests are not compelling because Euless leaves appreciable damage to those interests unprohibited.

"It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 546 (quotations omitted; alteration original). In *Lukumi*, the interests were judged non-compelling not merely because of religious exemptions (like kosher slaughterhouses), but also non-religious exemptions (secular slaughterhouses, hunting exemptions, failure to regulate restaurant waste). *Lukumi*, 508 U.S. at 544-45; Br.41-48 (comparing *Lukumi*'s exemptions to those here). It was not religious favoritism that made the *Lukumi* laws non-compelling, but the fact that the government did not consistently protect its allegedly compelling interests. Euless makes an argument to the contrary, but that argument, as noted above, relies upon Part II-A-2 of Justice Kennedy's opinion, a section which seven justices refused to join. *See* Opp.51-52 (citing *Lukumi*, 508 U.S. at 540-41). Neither *Lukumi* nor *O Centro* supports the interpretation Euless attempts to apply.

Euless permits many other killings, by law or by practice. *See above* Section I.A. There is no evidence that, in framing the law, or in refusing an exemption, Euless took into account the controlled environment of Santería sacrifice. *See O Centro*, 546 U.S. at 432 (citing controlled environment of hoasca tea consumption). And even though the circumstances are not identical, Euless's other

exceptions likewise undermine its stated interests. Euless states that the killing of diseased animals promotes the interest in the public health. Opp.52. But not all veterinary or animal control killings are done for disease prevention—many animals are simply stray, or are killed for humane reasons related to injury or non-communicable diseases. *See* Euless Ord. § 10-162(b) (R.562) (authorizing the killing of strays). Moreover, Euless's ordinances do not regulate the disposal of animal remains, meaning that the specific dangers raised at trial (fly breeding, contact with animal blood) are also present in animal control and veterinary killings. Br.43-44 (lack of regulation); Tr.150, 155 (citing these interests).

Euless also alleges that prohibiting slaughter in residential neighborhoods protects quality of life and property values. Opp.52. Euless did not present any evidence at trial as to the diminution of property values caused by the prohibited sacrifices. *See id.* Nor does Euless make any mention of the butchering and consumption of large animals, which its laws permit. Br.43-44. A hunter can legally butcher a deer in his driveway, despite Euless's concerns about "quality of life," fly breeding, blood contact and waste disposal. *See* Tr.150, 155-56 (discussing risks of disposal). In any event, Euless does not explain why protection of property values is a compelling interest of "the highest order." *Id.*

In short, the fact that Euless allows a wide variety of secular conduct that results in "appreciable damage to [its] supposedly vital interest" demonstrates that

that interest, particularly with respect to the prohibition on Santería sacrifice, is not compelling. *Lukumi*, 508 U.S. at 547.

2. Euless's ordinances do not use the least restrictive means available.

As Merced explained in his opening brief, Euless has not used the least restrictive means available to advance its interests. Br.48-51. Euless failed to show that it considered and rejected less restrictive methods, or that it could not meet its goals through some alternative method. *Id.* In response, Euless attempts to dodge its burden, arguing that its decisions are "due judicial deference." Opp.54. It draws this conclusion not from strict scrutiny jurisprudence, nor even Free Exercise jurisprudence, but from the Establishment Clause's *Lemon* test. Opp.54 (citing *McCreary County* v. *ACLU*, 545 U.S. 844, 864 (2005)). But the deferential analysis used under the Establishment Clause is strikingly different from strict scrutiny, where "it is the ***Government's obligation*** to prove that the [less restrictive] alternative will be ineffective to achieve its goals." *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 816 (2000) (emphasis added). Euless fails to meet that obligation.

Euless could have regulated the method of killing and disposal of remains to ensure humane killing and healthful disposal. *See Lukumi*, 508 U.S. at 533-34, 546-47 (city failed strict scrutiny because it did not regulate disposal). Or it could have kept its bans on keeping and killing animals while granting a narrow

exemption for religious killing. *See O Centro*, 546 U.S. at 430-33 (government can further general goals while making targeted exemptions). It could have issued permits to govern the frequency of sacrifices. *United States* v. *Friday*, 525 F.3d 938, 946-48 (10th Cir. 2008) (government can defeat substantial burden claim by issuing permits).[12] But Euless did none of these things.

Euless does not dispute that it failed even to consider these alternatives. Opp.54-56. But to prove its affirmative defense, Euless must "demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). Indeed, its City Manager conceded that he "[could not] answer 'yes' or 'no' to the question" of whether Euless's ban is the least restrictive means of enforcing its interests. R.646. Euless's failure to consider alternatives that would accommodate both its and Merced's interests prevents Euless from satisfying strict scrutiny.

Euless argues that its "partial ban" on Santería sacrifice is narrower than an "absolute ban" on Santería sacrifice. Opp.55. But strict scrutiny does not require *less* restrictive means, it requires *the least* restrictive means. "If a less restrictive alternative would serve the Government's purpose, the [government] ***must*** use that alternative." *Playboy*, 529 U.S. at 813 (emphasis added). The fact that Euless

[12] This would allay Euless's (unsubstantiated) fear that Merced might initiate two priests on the same day. Opp.13.

could have banned even more religious activity is not proof that it chose the least restrictive means of furthering its interests. Rather, the focus is on the conduct that Euless did ban, and whether Euless could have adopted any less restrictive approach. Because several such approaches are available here, Euless cannot satisfy strict scrutiny.

II. Euless's ordinances violate the Texas Religious Freedom Act.

Euless's ordinances are also subject to strict scrutiny under the Texas Religious Freedom Act (TRFA). As Merced explained in his opening brief, TRFA provides more protection for religious exercise than does the Free Exercise Clause. Br.51-53. Under TRFA, even if a law is neutral and generally applicable, it is subject to strict scrutiny if it imposes a "substantial burden" on religious exercise. And, as virtually every court to address the issue has concluded, a total ban on a particular religious exercise—such as Euless's ban on several types of Santería sacrifice—is more than enough to qualify as a substantial burden.

In response, Euless abandons its primary substantial burden argument at trial: that Merced suffered no burden because he could practice his faith outside Euless. *See* Tr.170-74 (making this argument at trial); Br.57-59 (demonstrating why this argument fails); Opp.59-60 (abandoning argument). This was the basis for the trial court's ruling on the claim, *see* Tr.175-78, and Euless makes no attempt to defend the decision of the district court on this point.

Instead, Euless offers two new arguments no better than the old one. First, it claims that a burden cannot be substantial if it results from "a law of ***general application***." Opp.57 (emphasis in original). Second, Euless claims that the burden on Merced is not substantial because Euless's ordinance "is not a total ban on keeping and killing animals," just a ban on certain religious ceremonies. *Id.* 59. Neither argument has merit.

A. Euless's definition of "substantial burden" would render TRFA meaningless.

Euless's first argument—that "[a] burden is not substantial if it is incidental by way of a law of ***general application***"—is not only wrong, but contravenes the text and purpose of TRFA, along with the consistent interpretation of TRFA and its federal analogues. *Id.* at 57 (emphasis in original). Euless's argument would have this Court ignore the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); *accord United States* v. *Ridgeway*, 489 F.3d 732, 737 (5th Cir. 2007). The whole point of TRFA is to protect religious adherents from substantial burdens ***imposed by generally applicable laws***. For that reason, Euless's interpretation of TRFA's "substantial burden" language would render the entire ***statute*** superfluous.

TRFA's purpose is evident from both its text and history. The text of TRFA requires strict scrutiny for "*any* ordinance, rule, order, decision, practice, or other exercise of governmental authority" that imposes a substantial burden on religious exercise. TEX. CIV. PRAC. & REM. CODE § 110.002 (emphasis added). "Any ordinance" means "any ordinance"—TRFA makes no exception for "generally applicable laws." Indeed, that phrase appears nowhere in the statute.

Nor does the term "substantial burden" indicate that generally applicable laws are exempt under TRFA. In fact, generally applicable laws frequently burden religious exercise far more than laws specifically targeting religion. For example, if Euless banned all animal killing within city limits, with absolutely no exceptions, Merced would be prohibited from conducting *any* Santería sacrifices in Euless. The burden in such a case would be far more substantial than if Euless directly targeted Santería sacrifice by allowing animal killing generally, but requiring a special permit for Santería sacrifice. *See United States* v. *Friday*, 525 F.3d at 956 (a general ban on the killing of eagles would substantially burden a religious ceremony that required eagle feathers; but a requirement to obtain a permit for eagle feathers did not).

TRFA's history, which is undisputed, *see* Opp.65, also demonstrates that TRFA is specifically designed to alleviate substantial burdens that result from generally applicable laws:

- From 1963 to 1990, the Supreme Court applied the "*Sherbert* test," requiring strict scrutiny under the Free Exercise Clause for any law imposing a "substantial burden" on the exercise of religion. *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

- In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), the Supreme Court repudiated the *Sherbert* test, concluding instead that strict scrutiny should apply only when a law is not "neutral or generally applicable." *Smith* thus curtailed the protection available under the Free Exercise Clause.

- In 1993, in response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which was designed to overturn *Smith* and reinstate the *Sherbert* test—*i.e.*, applying strict scrutiny to any law that substantially burdens religion, *regardless of whether the law is neutral and generally applicable or not*.

- In *Boerne* v. *Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA exceeded Congress's power under the Fourteenth Amendment and was therefore unconstitutional as applied to the states.

- In the wake of *Boerne*, Texas (along with many other states) passed a state-level version of RFRA, called TRFA, incorporating the "substantial burden" test of *Sherbert* as an element of state law.

See, e.g., *O Centro,* 546 U.S. at 424 (discussing the history of *Sherbert*, *Smith*, and RFRA); *Combs* v. *Central Texas Annual Conference*, 173 F.3d 343, 347-48 (5th Cir. 1999) (discussing *Sherbert, Smith*, RFRA and *Boerne*); Br.52-53 (discussing TRFA's legislative history).

This history shows that TRFA, like RFRA before it, was designed to require an analysis of free exercise claims under the *Sherbert* test, not *Smith*. Br.52-53; Opp.56-57 (conceding this was the purpose of TRFA). *Smith* requires strict scrutiny only when a law is not neutral or generally applicable (or falls into another

narrow exception). *See Smith*, 494 U.S. at 882-84. *Sherbert*, by contrast, requires strict scrutiny any time a law "substantially burdens" religion—regardless of whether the law is "generally applicable" or not. *Sherbert*, 374 U.S. at 404; *O Centro*, 546 U.S. at 424. Because TRFA was designed to reinstate the *Sherbert* test, it stands to reason that the meaning of "substantial burden" under TRFA should be the same as "substantial burden" under *Sherbert*: "pressure upon [plaintiff] to forego [a religious] practice." *Sherbert*, 374 U.S. at 404; *see also* Br.53-54 (applying *Sherbert* to this case).

But that's not what Euless argues. Euless argues that TRFA is actually the *Sherbert* standard ***plus*** the *Smith* standard: a law must substantially burden religion, ***and*** it can only do so by failing to be generally applicable. Opp.57-58 ("A burden is not substantial if it is incidental by way of a law of ***general application***.") (emphasis original). Euless is reading *Smith*'s "generally applicable" requirement into *Sherbert*'s "substantial burden" language. If that were a correct reading of *Sherbert*, then there would be no difference between the *Smith* standard (which requires general applicability) and the *Sherbert* standard (which requires only a substantial burden).

Smith and *Sherbert* are fundamentally different. The Supreme Court itself acknowledges that *Smith* fundamentally altered Free Exercise jurisprudence: "In *Employment Div.* [] v. *Smith*, this Court held that the Free Exercise Clause of the

First Amendment does not prohibit governments from burdening religious practices through generally applicable laws . . . . In so doing, we rejected the interpretation of the Free Exercise Clause announced in *Sherbert* v. *Verner* . . . ." *O Centro*, 546 U.S. at 424 (citation omitted). Countless other cases, analyses and scholarly reviews confirm this fundamental change in Free Exercise jurisprudence.[13] Even Euless agrees, stating that TRFA was written to "change" the *Smith* standard "that neutral laws of general applicability may be applied to religious practices even when not supported by a compelling government interest." Opp.56. Euless's later attempt to read *Smith*'s general applicability requirement into the TRFA substantial burden standard is baffling.

Not surprisingly, no court has adopted Euless's approach to TRFA, and neither of the two cases cited by Euless supports its argument. Euless first cites *Boerne*, which, as noted above, struck down the federal RFRA on the grounds that it exceeded Congress's power under the Fourteenth Amendment. 521 U.S. 507 (1997). According to Euless, *Boerne* concluded that a zoning restriction on a church building was not a substantial burden because the same burden "was equally applicable to secular buildings." Opp.57.

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[13] *See, e.g., Combs*, 173 F.3d at 347-48; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (criticizing change in Free Exercise law wrought by *Smith*).

Boerne, however, says just the opposite. There, the Court explained why RFRA exceeded Congress's authority under the Fourteenth Amendment, emphasizing that RFRA would authorize challenges to numerous state and local laws that were otherwise constitutional. *See Boerne*, 521 U.S. at 534-35. According to the Court, RFRA exceeded Congressional power ***precisely because*** it would impose strict scrutiny on "numerous state laws" which create substantial burdens as "a reality of the modern regulatory state," —even when the religious plaintiffs were not "burdened ***any more than*** other citizens." *Boerne*, 521 U.S. at 535 (emphasis added). In other words, the Court was not describing the difficulty of proving substantial burden under RFRA, but the ease of it.[14] *See id.* And because RFRA would have created exemptions from a wide variety of generally applicable state laws, the Court struck it down as unconstitutional. *Id.* at 534-46. *Boerne* thus demonstrates that generally applicable laws can (and often do) impose a "substantial burden" on the exercise of religion.

Nor does *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2008), support Euless's argument. Opp.58. As this Court explained in *Longoria*, a government can impose a substantial burden in at least ***two*** ways: "(1) [by] influenc[ing] the

[14] The same is true of Justice Stevens's lone concurrence, which Euless also cites in support of its argument. Opp.57 (citing *Boerne*, 521 U.S. at 537). In fact, Stevens objected to RFRA precisely because it could give religious individuals "a federal statutory entitlement to an exemption from a ***generally applicable, neutral civil law***." *Boerne*, 521 U.S. at 537 (emphasis added).

adherent to act in a way that violates his religious beliefs, or (2) [by] forc[ing] the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." *Id.* at 903 (citing *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). Seizing upon the "generally available [] benefit" language in the ***second*** example, Euless claims that Merced cannot demonstrate a substantial burden. Opp.58. But Merced is claiming a substantial burden under the ***first*** example in *Longoria*: by prohibiting Merced from engaging in certain types of animal sacrifice, Euless has "influence[d] [Merced] to act in a way that violates his religious beliefs." Br.53-59; Tr.93-94 (*E.g.*, Merced has been unable to perform priest initiations for 18 months). Under *Longoria*, Merced does not need to demonstrate that animal sacrifices are generally available to others in order to demonstrate a substantial burden.

Finally, Euless neglects to mention that *Longoria* is a prisoner case. The government receives more deference in the prison context than it does when regulating a citizen worshipping in the privacy of his own home. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 723 (2005) (discussing deference due to prison officials regulating religious exercise). If Merced satisfies the standard for substantial burden on religious exercise in the prison context, he certainly satisfies the standard for a substantial burden on his religious exercise in his own home.

B. A ban on a particular religious practice constitutes a substantial burden under TRFA.

Next, Euless claims that Merced has not suffered a substantial burden on his religious exercise because Euless has banned only *some* of Merced's religious practices, not *all* of them. Opp.59. According to Euless, "[b]ecause [its] ordinance is not a total ban on keeping and killing animals . . . Merced is not substantially burdened." *Id.* This argument runs afoul of the text of TRFA (which Euless completely ignores) and virtually every case to interpret the parallel provisions of federal law.

Under the text of TRFA, strict scrutiny applies whenever a government substantially burdens a person's "free exercise of religion." TEX. CIV. PRAC. & REM. CODE § 110.003. "Free exercise of religion" is *not* defined as the exercise of religion as a whole; rather, it is defined as "*an act or refusal to act* that is substantially motivated by sincere religious belief." *Id.*, § 110.001. In other words, the question under TRFA is not (as Euless would have it) whether Euless has substantially burdened the practice of an *entire religion*, but whether Euless has substantially burdened a particular "*act or refusal to act* that is substantially motivated by sincere religious belief." *Id.*

Numerous cases confirm that the focus of the substantial burden inquiry is not on the exercise of a religion as a whole, but on specific religiously-motivated practices. In *Mayfield*, for example, an inmate claimed that Texas substantially

burdened his ability to participate in religious assemblies and to possess religious objects. *Id.*, 529 F.3d at 613. This Court explained that the substantial burden determination is a two-step, fact-specific inquiry: the Court must determine "first whether *the burdened activity* is 'religious exercise,' and second whether that burden is 'substantial.'" *Id.* at 613 (emphasis added). Thus, the Court did not, as Euless suggests, focus on all of the opportunities the plaintiff had to exercise *other* aspects of his religion. Rather, the Court considered first the burden on his participation in religious assemblies, and second the burden on his possession of religious objects, emphasizing that the burden on *either activity* could, independently, be substantial. *Id.* at 613-16. Likewise, the burdens on Merced should be analyzed practice-by-practice. *See also Greene* v. *Solano County Jail*, 513 F.3d 982, 987 (9th Cir. 2008) (rejecting the government's argument that "'religious exercise' is . . . the general practice of one's religion, rather than any particular practice within one's religion").

Supreme Court precedent confirms this analysis. In *Sherbert* and *Thomas* (the first cases applying the substantial burden test), the Supreme Court considered the burden not on the religion as a whole, but on a particular religious practice. The plaintiff in *Sherbert* was free to worship, fast, and participate in many other Seventh-day Adventist practices; government policies merely made it difficult for her to abstain from work on Saturdays. *Sherbert*, 374 U.S. at 403-04. The Court

concluded that the burden on Sabbath-keeping was substantial even though the plaintiff could practice her faith in many other ways. *Id.*

Likewise, the plaintiff in *Thomas* was not prohibited from worshipping with other Jehovah's Witnesses, preaching about his faith, or refraining from violence. *Thomas* v. *Review Board*, 450 U.S. 707 (1981). Government policy simply made it difficult for him to follow his sincerely held religious belief that he should not manufacture weapons. *Id.* at 717-18). Even though he could practice his faith—even his pacifism—in other ways, the Court concluded that the burden on his specific religious exercise was substantial. *Sherbert* and *Thomas* thus demonstrate that the focus of the substantial burden inquiry is on specific religious practices, not religion as a whole. *See also Cutter*, 544 U.S. at 720 ("[T]he 'exercise of religion' often involves not only belief and profession but the *performance of . . . physical acts* [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . ."") (emphasis added) (quoting *Smith*, 494 U.S. at 877).

Here, Euless's ordinances burden several specific Santería rituals. For example, Euless does not dispute that its ordinances, at a minimum, completely ban priest initiation ceremonies. Opp.53. Nor does Euless dispute that its ordinances ban many other types of sacrifices—including any sacrifice involving a goat, sheep, calf, or turtle, and any sacrifice involving more than four animals.

Opp. 50, 53-55, 59. The only question is whether a total ban on these particular religious practices constitutes a "substantial" burden.

The answer is a resounding "yes." Numerous courts have a found that a ban on a particular religious exercise constitutes a substantial burden. In *Spratt*, for example, the government banned a maximum security prison inmate from preaching to other inmates. *Id.*, 482 F.3d at 38. According to the government, the ban on preaching was not a substantial burden because the inmate's "exercise of . . . *religion in general* is not being substantially burdened." *Id.* (emphasis added). The inmate could "still attend and participate in religious services[,] . . . [and could] pray, sing, or recite during such services just as every other inmate [could]." *Id.* The First Circuit rejected that argument, concluding that a ban on preaching constituted a substantial burden. *Id.*

Similarly, in *Greene* v. *Solano County Jail*, a prison banned an inmate from attending group worship. 513 F.3d 982. Noting that "every other case of which we are aware to have considered this issue" had focused on the specific religious practice at issue—not religion as a whole—the Court held that "[w]e have little difficulty in concluding that *an outright ban on a particular religious exercise* is a

substantial burden on that religious exercise." *Id.* at 988 (emphasis added) (citing cases). Other cases have reached the same result.[15]

Indeed, many cases have found a substantial burden where the government does far *less* than ban a particular religious practice. In *Sherbert* and *Thomas*, for example, the government did not ban the plaintiff's religiously-motivated actions; it merely adopted policies "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. Similarly, in *Sts. Constantine and Helen Greek Orthodox Church* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), the Seventh Circuit found that the "delay, uncertainty, and expense" of multiple permit applications required for a church building constituted a substantial burden—even though the building of the church was not ultimately prohibited. *Id.* at 901; *see also Guru Nanak Sikh Soc'y* v. *County of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006) (substantial burden where County "lessened the prospect of [plaintiff] being able to construct a temple in the future"). If mere delay, uncertainty, expense, or pressure constitute a substantial burden, a complete ban on a particular religious practice does as well.

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[15] *See, e.g.*, *United States* v. *Friday*, 525 F.3d at 952 (prohibition on killing eagles, which would effectively ban religious ceremony involving the use of eagle tail, would constitute substantial burden); *Warsoldier*, 418 F.3d 996 (ban on long hair was substantial burden on Native American prisoner's religious practice of keeping long hair).

Lastly, Euless claims that finding a substantial burden here would "erase th[e] distinction" between "laws that burden the exercise of religion and laws that ***substantially*** burden the exercise of religion." Opp.60. Not so. As the above cases show, Euless has many alternatives: it can require reasonably available permits for animal sacrifice,[16] regulate the disposal of waste,[17] or create other rules governing conduct of sacrifices.[18] Its hands are not tied, and Merced does ***not*** claim that TRFA requires Euless to refrain from regulation altogether. TRFA merely requires Euless either to ease the burdens on Merced's religious practice or to satisfy strict scrutiny. Euless has done neither.

C. Euless cannot satisfy strict scrutiny.

As Merced already explained, Euless cannot withstand strict scrutiny. *See above* Section I.C; Br.41-51. In an odd coda to its TRFA argument, Euless states that it used the least restrictive means available, and that its means are "due deference." Opp.60. Of course, under strict scrutiny, Euless is entitled to no deference; it bears the burden to demonstrate that it used the means least restrictive

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[16] *See United States* v. *Friday*, 525 F.3d at 947-48 (concluding that permit requirement did not constitute substantial burden); *Guru Nanak*, 456 F.3d at 992 (mere requirement to obtain permit not a substantial burden).

[17] *See Lukumi*, *supra*; *Mayfield*, 529 F.3d at 616-17 (noting that pilot program allowing limited access to religious objects could alleviate substantial burden, even though program would not give plaintiff unfettered access).

[18] For instance, Euless could limit the number of permits per day so that it does not have to worry about two initiation ceremonies taking place at once. Opp.13.

in this particular case. TEX. CIV. PRAC. & REM. CODE § 110.003(b) (placing burden of proof on government). Because it has failed to do so, Euless has violated TRFA.

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

As Merced explained in his opening brief, Euless's selective enforcement policy constitutes discrimination on the basis of a suspect classification. Br.60-63. In response, Euless does not dispute that religion is a suspect class under the Equal Protection Clause, and that classifications drawn upon it must face strict scrutiny. Opp. 60-61. But Euless makes two errors in its response. First, it asserts that its enforcement is evenhanded and does not turn on the religious motivation of the action. Second, Euless mistakes the meaning of "intentional and arbitrary" discrimination.

Euless's enforcement is not evenhanded. As Merced has repeatedly explained (Br.62-63, *supra* Section I.B.), Euless's enforcement procedures do in fact penalize conduct based upon its religious motivation. For example, it is undisputed that Euless's ordinances prohibit veterinarians from euthanizing mammals and reptiles (including goats and turtles), and prohibit homeowners from killing snakes and vermin—but Euless has never enforced its ordinances against these violations. By contrast, it has threatened to enforce its ordinances against Merced if, as part of a Santería sacrifice, he kills the very same animals. That is

the essence of selective enforcement. *See Lukumi*, 508 U.S. at 540 (discussing similarities to Equal Protection jurisprudence).

The problem is exacerbated by Euless's enforcement mechanism. Because enforcement of the ordinances is entirely complaint-driven, Euless ignores a broad class of repeat offenders who are widely known to be killing animals in violation of the law, *supra* Section I.A, while at the same time conferring a "hecklers' veto" on neighbors who do not wish Santeria sacrifices to take place next door. *See* Tr.136-39, 161 (enforcement based upon neighbor complaints); R.452-58 (visits to Merced based upon neighbor complaints). This is a problem *not* because police act only after receiving a complaint; this is true of many laws. The problem is that the City is aware that violations are widespread, but does nothing to stop them. *See* R.600¶¶ 39-40; R.644 (acknowledging veterinary killings and homeowner killings). It acts only when neighbors complain, Tr.136-39, 161, which results in selective enforcement against a highly unpopular religious practice. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 448 (1985) (law may not give effect to "private biases"). Thus, while the Equal Protection Clause does not, of course, require police to act before they become aware of a violation, Opp. 61, it does require the city to refrain from enforcing its laws on the basis of its citizens' biases against unpopular religious beliefs. *Cleburne*, 473 U.S. at 448.

Euless is also wrong to assert that Merced must prove "intentional and arbitrary discrimination" to make out an Equal Protection claim. Such a showing is applicable only to "class of one" Equal Protection claims. *See Willowbrook* v. *Olech*, 582 U.S. 562, 564 (2000); Opp.61 (citing *Willowbrook*). But Merced is not asserting a "class of one" claim. He is asserting that Euless enforces its ordinances on the basis of a suspect classification.[19] Separate proof of "intentional and arbitrary" action is unnecessary in such cases; the suspect classification fulfills that requirement. *See, e.g.*, *Martin* v. *Shawano-Gresham School Dist.*, 295 F.3d 701 (7th Cir. 2002) (suspect classifications are subject to strict scrutiny, while "class of one" claimants must prove arbitrariness). Because Merced has demonstrated selective enforcement on the basis a suspect classification; Euless's ordinances are subject to strict scrutiny even in the absence of "intentional and arbitrary" discrimination.

As Merced explained in Section I.D., Euless's actions cannot survive strict scrutiny. The district court erred by rendering judgment for Euless on Merced's Equal Protection claim.

[19] Merced cited *Willowbrook* in his opening brief for the proposition that "improper execution" of the laws can violate the Equal Protection clause. *See* Br.62.

IV. Euless is not entitled to attorneys' fees.

Euless devotes a single page to its cross-appeal. Opp. 62. Under 42 U.S.C. § 1988, Euless is entitled to attorneys' fees only if it demonstrates that "the plaintiff's underlying claim was frivolous, unreasonable or groundless." *Hidden Oaks* v. *City of Austin*, 138 F.3d 1036, 1053 (5th Cir. 1998) . Euless has not even begun to show that Merced's claim was frivolous, let alone that the trial court abused its discretion by concluding otherwise. *See Myers* v. *City of West Monroe*. 211 F.3d 289, 292 (5th Cir. 2000) (fee determinations under § 1988 reviewed for abuse of discretion). For that reason alone, Euless's cross-appeal fails.

Euless also strangely claims Merced failed to make a *prima facie* case. Opp.62. But Merced's claims survived a motion to dismiss, went to trial, and survived a motion for judgment as a matter of law. Br.16-20. In *Myers*, by contrast, the Court affirmed a fee award only after the defendant won judgment as a matter of law because the plaintiff "offered no evidence" at trial on several key elements of her case. 211 F.3d at 292-93.

Unable to demonstrate frivolity, Euless resorts to distorting the applicable legal standard, arguing that, as the prevailing party, it should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Opp. 62 (quoting *Blanchard* v. *Bergeron*, 489 U.S. 87, 89 (1989)). But that is the legal standard governing fee claims by a prevailing *plaintiff*; prevailing *defendants*

are never entitled to a presumption of fees and must always demonstrate frivolity. *Hidden Oaks*, 138 F.3d at 1053 ("Unlike prevailing plaintiffs, [] who are generally entitled to § 1988 fees absent special circumstances, prevailing defendants cannot recover § 1988 fees without demonstrating that the plaintiff's underlying claim was frivolous, unreasonable or groundless.").

Finally, Euless introduces a new argument on appeal: that it should win fees on the RLUIPA claim alone because Merced lost that claim on summary judgment. Opp.62. But a grant of summary judgment is not proof that the claim was unreasonable or groundless, particularly where the claim "received the careful consideration" of the district court. *Hughes* v. *Rowe*, 449 U.S. 5, 15 (1980). Euless presents no other argument explaining why Merced's lawsuit is frivolous, unreasonable or groundless. Opp.62. Euless's cross-appeal should itself be denied as frivolous.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court.

Respectfully submitted,

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

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

Attorneys for Plaintiff José Merced

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Dated: November 25, 2008

Eric C. Rassbach
Attorney for Plaintiff José Merced

CERTIFICATE OF SERVICE

I hereby certify that on this November 25, 2008, two true and correct printed copies and one electronic copy of the foregoing brief was served upon the following counsel by United States Postal Service delivery:

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

Dated: November 25, 2008

Eric Rassbach
Attorney for Plaintiff José Merced