IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BIG HART MINISTRIES ASSOC., INC, a/k/a BIG HEART MINISTRIES, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 3:07-CV-0216-P
CITY OF DALLAS,	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Big Hart Ministries Association, Inc. ("Big Hart"), Rip Parker Memorial Homeless Ministry ("Rip Parker"), and William Edwards ("Edwards") filed this lawsuit against the City of Dallas ("City"), arguing *inter alia,* that the Homeless Feeder Defense provision of Dallas's Food Establishment Ordinance ("the Ordinance") violates the Texas Religious Freedom Restoration Act ("TRFRA"). On June 25-28, 2012, the Court conducted a bench trial and heard evidence on Plaintiffs' TRFRA claim.[1]

I. FACTS

A. PLAINTIFFS.

Plaintiffs Big Hart and Rip Parker are two organizations that serve food and minister to the unsheltered homeless population in Dallas, Texas.

1. Big Hart.

[1] Plaintiffs have also asserted several constitutional challenges to the Ordinance. Because courts do not decide constitutional claims when a case can be footed on alternative grounds, the Court's analysis begins with state law – specifically, TFRFA. *See Merced v. Kasson*, 577 F.3d 578, 586 (5th Cir. 2009).

Edwin Don Hart ("Mr. Hart") established Big Hart in 1980. (Docket #158-1 at 165, 272.) Mr. Hart is an ordained minister who believes God and the Bible compel mankind to share food and prayer with the homeless. (Docket #158-1 at 130.) Mr. Hart established Big Hart as a church, but he did not house his church in a building. Rather, Big Hart is a street church. (Docket #158-1 at 127, 275.) Mr. Hart established Big Hart on the street so it could feed the homeless on the streets, where many are often located. (Docket #158-1 at 128, 164.) Mr. Hart describes the homeless people he serves as "street level people, and they've got to be reached where they are." (Docket #158-1 at 163.)

Mr. Hart works at Big Hart with his adult children and anyone else who is interested in volunteering. (Docket #158-1 at 167.) His daughter, Dana Hart-Ball, co-directs Big Hart and is responsible for "coordinat[ing] all the volunteers . . . do[ing] the newsletters . . . [and] the shopping for the food. . ." (Docket #158-1 at 273.)

For years before the Ordinance was passed, Big Hart fed Dallas's homeless primarily at a location on Corsicana Street, though it has served meals to the homeless at other locations over the years. (Docket #158-1 at 132-35, 276-77, 280.) Every week, usually once a week, Big Hart's representatives went to the grocery store to purchase food for that week's event. (Docket #158-1 at 134, 276.) The morning of each event, Mr. Hart met the volunteers to load the food and cookware into two trucks, one of which was a kitchen truck used for cooking. (Docket #158-1 at 134-35, 276.) Once at the feeding location, they set up three large tents, generators, propane stoves, and pots and pans to begin cooking. (Docket #158-1 at 135, 275-77). Volunteers would help prepare and serve hot meals on site. (Docket #158-1 at 135; 278.) (Sometimes the meals were prepared at Mr. Hart's own City-approved kitchen and transported to the feeding site.) (Docket #158-1 at 175.) Typically there would be about 40 volunteers at the site. (Docket

#158-1 at 279.)

Mr. Hart testified he took food safety seriously and that he made sure "five to eight" of his volunteers had completed the City's food safety course and were educated on food handling and food storage. (Docket #158-1 at 137, 196.) He also made sure that before each event the trained volunteers educated the other volunteer servers about food safety. (Docket #158-1 at 135, 279.)

At the Big Hart events, everyone ate together. (Docket #158-1 at 178.) Mr. Hart led a worship service during every meal. (Docket #158-1 at 132, 135-36, 275, 288.) He also offered personal counseling and assistance to some of the homeless individuals – for example, he helped some find jobs and helped others get in touch with their families. (Docket #158-1 at 137.) After every meal, Mr. Hart required the homeless guests to pick up all trash to keep the property clean. (Docket #158-1 at 140, 281.)

2. Rip Parker and William Edwards.

Plaintiff Rip Parker is an organization established by William Edwards ("Mr. Edwards") that ministers to those unable to help themselves by providing food and comfort while sharing religious beliefs. (Docket #158-1 at 30, 34, 243.) Rip Parker's philosophy is based on the religious principle that if you see another person suffering, you help him right there, where he is. "You do not walk away; you pick him up, dress his wounds, and help him get on his way." (Docket #158-1 at 243.) Rip Parker was named after a Dallas man named Roland (Rip) Parker, now deceased, who began sharing food and praying with the homeless about 20 years ago. (Docket #158-1 at 30, 227.) As the organization's founder and director, Mr. Edwards is responsible for "direct[ing] supplies, coordinat[ing] [volunteer] groups, and check[ing] out the [feeding] spots" for the Rip Parker volunteers (groups and individuals), who feed the homeless every night of the week and twice on Saturdays. (Docket #158-1 at 228; *see also* #158-1 at 31, 34-35, 36, 118, 228,

235, 243.) Edwards estimates he coordinates over 400 church groups and 10,000 volunteers in a given year. (Docket #158-1 at 228.)

Rip Parker's volunteers prepare the food in their homes and at churches. Sometimes they purchase prepared food from stores or restaurants (*e.g.*, fried chicken, ice cream). (Docket #158-1 at 32-33, 42.) At least one volunteer per night has completed the City's food safety course. (Docket #158-1 at 61-62, 115, 259.) The volunteers use soap and water or hand sanitizer while preparing the food. (Docket #158-1 at 43.) They use sanitary coolers to store the food and to maintain its temperature during delivery. (Docket #158-1 at 48.)

Rip Parker's mission is to train its volunteers to find the hungry and homeless, provide them with nutritious meals, and develop a relationship with them, so over time the volunteers can help the homeless become self-sufficient. (Docket #158-1 at 84, 240-41, 243.) The organization accomplishes its mission by identifying where the homeless are, going to their territory, and giving them some food and some comfort ("maybe a dry pair of pants or a dry pair of socks"). (Docket #158-1 at 241, 263.) "[A]fter a while, they begin to develop a trust, a relationship. . . And it's only then that [we] can begin to actually alter or change their life." (Docket #158-1 at 241.) "They start to learn that they can become self-sufficient again. And once they start believing that, then they can start doing that." (Docket #158-1 at 241.) This is a "very long process." (Docket #158-1 at 241.)

Every night, the Rip Parker volunteers serve food to the homeless at approximately 10-15 different locations (usually in the downtown area) using the volunteers' vehicles. (Docket #158-1 at 33, 45-46.) Before the Ordinance, the volunteers served anywhere from 30-100 people at each stop. (Docket #158-1 at 254.) At each site, the servers "talk to [the homeless people] individually, one-on-one. [They] share with them, [ ] take Bibles to them . . . [they] are constantly

praying with them and sharing [their religious] beliefs with them, telling them that God loves them and trying to get them off the streets." (Docket #158-1 at 41.) The entire food prep and delivery process typically takes under two hours per night. (Docket #158-1 at 246, 258.)

Rip Parker operates a mobile feeding site (as opposed to a fixed site) because "whenever you're homeless and you've got everything that you own in your life, your sleeping bag and your two changes of clothes and a couple of pairs of shoes, you can't carry those with you everywhere you go . . . it's hard for them to be as mobile as we can be. And so that's why we would like to have it to where we could go to where they are instead of just [ ] one particular location." (Docket #158-1 at 49, 59; Docket #158-2 at 26.) The unsheltered homeless are very attached to their few belongings and it is difficult for them to leave that to go to a fixed feeding site. (Docket #158-2 at 36.) Being mobile also allows Rip Parker's volunteers to reach more people – approximately 60-70 a night – people the shelters are unable to serve. (Docket #158-1 at 49.) The volunteers see and feed many of the same people "all the time." (Docket #158-1 at 61.)

B. HOMELESSNESS.

1. Defined.

The federal government (and most municipalities, agencies, and shelters) generally defines a person as "homeless" if he or she is sleeping in a place not otherwise designated for sleeping, which can include a shelter, a car, or an abandoned building. (Docket #158-2 at 54.) Generally, there are three kinds of homelessness: The first makes up eighty percent of the homeless population and is "transient homelessness" – those who are recently homeless and stay in a shelter for less than two weeks. The other twenty percent is divided between the "episodically homeless" – those who stay in a shelter for three to six months, then find housing for a year or two, and then return to the shelter, and the "chronically homeless" – those who are

continually homeless for a year or more or have four or more episodes of homelessness in the last four years. (Docket #158-2 at 54, 57.) The chronically homeless tend to have a much higher incidence of complex medical, psychiatric, and substance abuse issues. (Docket #158-2 at 58.)

Some homeless people avoid organized shelters and prefer to sleep and live on the streets, under bridges, and in encampments. These are referred to as "rough sleepers." (Docket #158-1 at 81; #158-2 at 12.) [2]

2. Characteristics of The Unsheltered Homeless.

Both Parties acknowledge that a portion of the homeless population lives on the street and rejects organized shelters by choice. As Ron Cowart of the City's Crisis Intervention Unit recognized, some of these rough sleepers "live in encampments because it's a choice, [a] lifestyle which we have to respect." (Docket #158-3 at 42, 44.) Plaintiffs, too, understand there are homeless people that "are never coming in the building, they are never coming in. They are out there in the rain and the sleet." (Docket #158-1 at 140; #158-2 at 11.) They prefer to sleep in alleys and under bridges – for many reasons, this subset of homeless people cannot cope with traditional locations like shelters and clinics. (Docket #158-2 at 11, 32.)

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[2] Dr. James O'Connell testified as Plaintiffs' expert on homelessness. Dr. O'Connell is a physician and President of the Boston Healthcare for the Homeless Program at Massachusetts General Hospital. (Docket #158-2 at 4.) Dr. O'Connell received his medical degree from Harvard Medical School and has cared for homeless people full-time throughout his career. (Docket #158-2 at 6-7.) He and his program have been providing outreach, food, and medical care to the homeless population of the Boston area since he founded the program in 1985. (Docket #158-2 at 4.) Dr. O'Connell's program runs clinics, about seventy different shelters, and a "street team." (Docket #158-2 at 7.) The "street team" focuses its efforts on a subgroup of the homeless population that is reluctant or unwilling to come into the shelters or clinics. (Docket #158-2 at 7.) For 26 years, Dr. O'Connell's organization has been operating a mobile outreach van that serves Boston's rough sleepers by delivering blankets, clothing, and food to them. (Docket #158-2 at 20.) Through use of the mobile outreach van and its supplies, Dr. O'Connell and his staff are able to build relationships with these individuals. (Docket #158-2 at 21.) "Winning trust is probably the best way to ultimately offer the kinds of social services and housing to folks who otherwise may not have been" served. (Docket #158-2 at 28.) Dr. O'Connell's organization serves approximately 12,000 homeless individuals each year. (Docket #158-2 at 8.)

Dr. O'Connell has consulted with major cities around the world about their homeless issues. (Docket #158-2 at 9.) During his work on this case, Dr. O'Connell observed and met directly with some of Dallas's homeless population. (Docket #158-2 at 10.) He also spends a great deal of time researching and writing about homeless issues. (Docket #158-2 at 11-12.)

As Dr. O'Connell pointed out, "[t]hese are people who have been bruised and battered by whatever they have lived through. And all of them have lived in extreme poverty, most have suffered unbelievable stories of abuse as kids and otherwise. And they have very complicated illnesses, both medical and psychiatric, that they are coping with, as well as substance abuse problems." (Docket #158-2 at 27-28.) These people cannot handle the crowds of the shelters and do not have the socialization to handle clinics. (Docket #158-2 at 55.)

The most vulnerable of the homeless live in uninhabitable, unsanitary, and unhealthy conditions. (Docket #158-3 at 42.) They do not have restrooms and tend to use the restroom everywhere. (Docket #158-3 at 42.) These individuals are especially vulnerable to floods, weather extremes, disease, and sexually transmitted diseases. (Docket #158-3 at 43.) The females are especially vulnerable to sexual assault. (Docket #158-3 at 43.) In Dallas, outreach workers have found homeless people in states of semi consciousness, sometimes deceased, in their isolated encampments or along creek beds and tributaries. (Docket #158-3 at 42-43.)

Both the City and Plaintiffs recognize the only way to help these people is to "have a presence in places where they are." (Docket #158-2 at 28.) The way to serve them is by reaching small numbers of people at various sites. (Docket #158-2 at 22.)

Dr. O'Connell testified that while the central sites for feeding and shelter do accommodate a large percentage of the homeless population, the only way to serve the unsheltered homeless is to go to them, for example, though a mobile feeding or mobile care program. (Docket #158-2 at 27.) Mobile outreach enables workers to reach out and engage these people. (Docket #158-2 at 27.) Dr. O'Connell concludes if no one goes out to feed these homeless people, they resort to "dumpster diving" and/or eating old, contaminated food. (Docket #158-2 at 33-34.)

3. Homelessness in Dallas.

According to a 2012 study of Dallas's population, Dallas has about 8,000 homeless people. (Docket #158-2 at 50.) About 1,500 of them reside in shelters. (Docket #158-3 at 132.)

The City is well-aware that the homeless population has a variety of needs that require organized, multi-resource assistance. (Docket #158-2 at 159.) One local organization that coordinates these necessary resources is The Bridge, which opened in 2008. (Docket #158-2 at 114.) The Bridge is an independent non-profit organization that serves the homeless population of North Texas. (Docket #158-2 at 114.) The Bridge partners with the City, Dallas County, the State of Texas, the federal government, private funders, Parkland Hospital, churches, and other institutions to end homelessness. (Docket #158-2 at 144.) It does this by having its staff assess a homeless person's shelter issues, health issues, and criminal justice issues, and then coordinate with the individual to develop a plan to find work and housing. (Docket #158-2 at 119.) The Bridge serves food and feeds the vast majority of Dallas's homeless during the day. It also coordinates shelter for them at night. (Docket #158-2 at 122.)

The City has taken measures to identify and assist those homeless individuals who are not staying in shelters such as The Bridge. The City has a Crisis Intervention Unit supervised by Ron Cowart and made up of caseworkers who respond to emergency calls concerning people that are victims of self-neglect, suffering from mental illness, or living in dangerously unhealthy environments. (Docket #158-3 at 35-37.) Because the Crisis Intervention Unit considers these unsheltered homeless to be in a "state of perpetual crisis," it has formed a Homeless Outreach Team that is made up of three outreach workers that are former mental health professionals. (Docket #158-3 at 37, 39.) This team's job is to link the unsheltered homeless with the assistance and services (shelter, medical care, treatment, etc.) the City makes available to them. (Docket #158-3 at 36, 94.) The caseworkers' objectives are to identify what is going on in these

individuals' lives and to connect them to treatment or shelter services. (Docket #158-3 at 36.) The City recognizes these individuals need one-on-one engagement and help, not law enforcement action. (Docket #158-3 at 37.)

Case workers implement three techniques to help these people: engagement, assessment, and linkage. (Docket #158-3 at 39.) An outreach worker begins serving a person by engaging him or her – by talking to the person in a nonthreatening environment and slowly building a rapport and trust with the person. (Docket #158-3 at 39.) Then, the worker makes an assessment by considering the person's history, observing his or her clothing, demeanor, and environment, and evaluating his or her mental state, to determine why the person is homeless and living in this environment. (Docket #158-3 at 40.) Once the assessment is made, the case worker will try to persuade the homeless individual to accept services from the appropriate organization – whether a clinic, a shelter, or some other facility. (Docket #158-3 at 40, 85.) This can be very challenging and take considerable time and effort. (Docket #158-3 at 96.) The case worker will explain all the reasons a shelter/treatment facility, etc. is better than the street conditions the homeless individual is experiencing. One thing the case worker never brings to the homeless site is food – because homeless individuals are often persuaded to leave the streets by the promises of food and security. (Docket #158-3 at 85-87, 92, 100.)

If the individual agrees to accept services, the case worker will contact the appropriate facility, arrange for the individual's admission, and provide transportation for the individual to the facility. In the case of treatment, the case worker will meet with the staff to discuss his/her assessment of the individual and will meet with the staff again when the person is discharged. (Docket #158-3 at 40-41.) The case worker will work with the individual at the time of discharge to ensure he or she is taken to a place where he or she can recover and gain some stability so he or

she can begin making healthy, independent decisions. (Docket #158-3 at 41.)

A majority of the time, case workers are unable to persuade these homeless individuals to accept services. (Docket #158-3 at 94-95.) The case workers recognize and accept they cannot make a person do something he does not want to do. (Docket #158-3 at 60.) Participation and acceptance of services by the homeless individuals are entirely voluntary. (Docket #158-3 at 98.)

In Dallas, there are certain parts of town where the unsheltered homeless tend to congregate. (Docket #158-3 at 44.) According to a 2012 study, Dallas has about 8,000 homeless people, about 234 of whom are rough sleepers. (Docket #158-2 at 50; 158-3 at 3.) About 50-60% of the rough sleepers in Dallas are considered chronically homeless. (Docket #158-2 at 58.) According to Ron Cowart, Supervisor with the Crisis Intervention Unit (which is part of the Dallas Police Department), about three-quarters of Dallas's unsheltered homeless "suffer from addiction disorders or mental health disorders; many are not compliant with their medications." (Docket #158-3 at 42.)

4. Feeding the Unsheltered Homeless.

The unsheltered, chronically homeless, no matter how isolated, must eat to survive. They know where the feeders are. They know what times certain restaurants will put their excess food into the dumpster. They know how to migrate to a feeding event and how to retreat back to their encampment. (Docket #158-3 at 45.) They are untrusting and they fear being victimized by people serving contaminated food. (Docket #158-3 at 46.) They hoard food which, if left uneaten too long, can become dangerous to eat. (Docket #158-3 at 48, 78-80.)

According to Mr. Cowart, the homeless individuals' access to food affects the Crisis Intervention Unit's ability to get them treatment and other services. (Docket #158-3 at 63.) He explains if a homeless individual panhandles money to buy food or gets food from a food truck, he

feels "fully sustainable where [he is], and [ ] will refuse services." (Docket #158-3 at 71.) Mr. Cowart's team believes that people who go out to the streets and distribute food to the homeless enable the homeless to decline the Crisis Intervention Unit's help. (Docket #158-3 at 78, 85-86.) Mr. Cowart explains that if an unsheltered homeless individual knows he is not going to be fed on the street, he is more likely to accept the City's food and services and get off the street. (Docket #158-3 at 87.) As long as a homeless individual believes "they [the feeders] take care of me, they bring me food, they being me something to eat", the individual will be less likely to go to a treatment facility or a shelter. (Docket #158-3 at 87.) Mr. Cowart even considers dumpsters to be an enabling factor. (Docket #158-3 at 109-10.) Mr. Cowart testified the Crisis Intervention Unit is committed to "remove as much enabling as we possibly can". (Docket #158-3 at 99.) Food is "probably the greatest motivator" for these people. (Docket #158-3 at 99.)

Plaintiffs are two organizations in the business of feeding and proselytizing to the unsheltered homeless population that lives on the streets.

C. THE ORDINANCE.

In 2005, the City adopted Dallas's Food Establishment Ordinance, which regulates food establishments, including organizations that feed the homeless. The stated purpose of the Ordinance is "to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented." Dallas City Code § 17-1.1; 25 Tex. Admin. Code § 229.161 *et seq.* (West 2012). Section 17-1.6 is entitled "Defenses for certain types of activities" and provides that certain food establishments need not comply with the Ordinance if they meet certain criteria. For example, Section 17-1.6(5), known as the "Homeless Feeder Defense," provides that an organization serving food to the homeless need not comply with the Ordinance if it meets other criteria, such as: (1) obtaining location approval from the City; (2) providing restroom facilities;

(3) having equipment and procedures for disposing of waste and wastewater; (4) making available handwashing equipment and facilities, including a five-gallon container with a spigot and a catch bucket, soap, and individual paper towels; (5) registering with the City; (6) obtaining written approval from the property owner; (7) having a person present at all times who has completed the City's food safety training course; (8) complying with food storage and transport requirements; and (9) ensuring the feeding site is left in a clean, waste-free condition. Dallas City Code §17-1.6(5).

1. Big Hart.

Mr. Hart testified he attempted to comply with the Ordinance after it passed, but was unable to meet all its requirements due to their burdensome nature. He testified he continued to feed the homeless even though he was not in compliance with the Ordinance and could not meet the criteria to satisfy the Homeless Feeder Defense. He testified that Dallas police and code enforcement officers began harassing him and his volunteers at Big Hart's feeding sites and that they issued Big Hart several notices of violation. (Docket #158-1 at 142, 143-44, 151.) He testified the harassment went on for years. (Docket #158-1 at 140.) He testified the worst harassment occurred when thirteen police cars and a police van pulled up to Big Hart's feeding site and behaved in a threatening manner toward the volunteers. (Docket #158-1 at 143, 283.) Dana Hart-Ball testified that the police presence at their events has caused people to stop volunteering. (Docket #158-1 at 284.) Both Mr. Hart and his daughter testified that Big Hart spent "hundreds of thousands of dollars of money trying to please the City" and finally "went broke" buying stainless steel kitchen equipment and tents to comply with Chapter 17 of the City Code. (Docket #158-1 at 133, 145, 179, 284.) Ultimately, Big Hart was forced to stop its weekly food service as a result of the Ordinance. (Docket #158-1 at 150, 179.)

Mr. Hart believes the City harassed him because it blamed him for "draw[ing] the homeless to this City." (Docket # 158-1 at 143.)

2. Rip Parker.

The City (via the Dallas police and the Department of Code Compliance) has issued numerous violation notices to Rip Parker for violating the Ordinance and failing to satisfy the criteria to satisfy the Homeless Feeder Defense. Tommy Rogers McIntyre, a Rip Parker volunteer, testified that after the Ordinance was passed, it became very difficult for the volunteers to feed the homeless in multiple locations. (Docket #158-1 at 34.) Mr. McIntyre also testified that law enforcement would sometimes "harass" the volunteers "pretty heavily." (Docket #158-1 at 35.) Though the Department of Code Compliance issues the notices, Dallas police have also approached Mr. McIntrye at feeding sites to warn him about Code violations. (Docket #158-1 at 53.) Mr. Edwards, the founder of Rip Parker, testified that after the Ordinance passed, Dallas police would come to feeding sites and "try to pick a fight with one of us. And then as soon as he got some sort of response, three or four more cars would come up and they would chase us out." (Docket #158-1 at 251.) He testified Rip Parker has lost volunteers in recent years because "[p]eople are fearful of seeing – because whenever we go to feed, the code enforcement people show up and they – you know, in a city car, and they come talk to me and want to see all my paperwork . . . [The volunteers] are concerned. They don't want to do anything wrong." (Docket #158-1 at 46-47.) Mr. Edwards testified that enforcement of the Ordinance has caused Rip Parker to lose "about 98 percent of our volunteer base . . . because they don't want the trouble." (Docket #158-1 at 252.)

Not only are the volunteers fearful, so are the homeless. (Docket #158-1 at 55, 66.) Mr. Edwards testified that the police's enforcement actions have frightened the homeless he is trying to

serve because they do not want to be harassed, have their stuff thrown away, or be sent to jail. (Docket #158-1 at 252.)

Rip Parker continues to serve the homeless, in its usual manner, even though it has received hundreds of violation notices. (Docket #158-1 at 51, 53.)

Rip Parker has received City approval to feed the homeless at one site, and Code Compliance officers and Dallas police officers continue to approach volunteers at that approved site, perhaps "so they can have a presence there, " opined Mr. McIntyre. (Docket #158-1 at 66-69.)

II. DISCUSSION

A. TEXAS RELIGIOUS FREEDOM RESTORATION ACT ("TRFRA").

TRFRA prevents any government agency in Texas from "substantially burden[ing] a person's free exercise of religion" unless it "demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code § 110.003(a), (b) (West 2012).

"Texas did not enact TRFRA on a clean slate. The act is a response to a twenty-year federal kerfuffle over the level of scrutiny to apply to free exercise claims under the First Amendment of the United States Constitution." *AA. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258 (5th Cir. 2010). Nine years before TRFRA's enactment, the United States Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith*, that the first amendment's free exercise clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. 494 U.S. 872, 874, 890 (1990). In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 U.S.C. § 2000bb(b)(1). RFRA expressly adopted the compelling interest test set forth in two

earlier Supreme Court cases, *Sherbert v. Verner*, 374 U.S. 398, 399-402 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 221-29 (1972). That test "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *City of Boerne v. Flores*, 521 U.S. 507, 515-16 (1997) (citations omitted).

As originally enacted, RFRA applied to both federal and state governments. *Needville*, 611 F.3d at 258. In 1997, the Supreme Court held RFRA could not be applied to the states. *City of Boerne*, 521 U.S. at 532-36. So "thirteen states took matters into their own hands, including Texas, which enacted TRFRA 'to provide [ ] the same protections to religious free exercise envisioned by the framers of its federal counterpart RFRA.'" *Needville*, 611 F.3d at 259.

B. STANDING.

The City argues Big Hart and Rip Parker lack standing to bring a TRFRA claim because only natural persons have religious beliefs that are protected by TRFRA. (Docket #149-1 at 2-3.) The City bases this argument on the Fifth Circuit case, *Cornerstone Christian Schools. v. University Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) and the doctrine of "associational standing," which requires an organization to establish three things to bring a claim: (1) that its members would have standing to sue in their own right; (2) that the interests the organization seeks to protect are germane to its organizational purpose; and (3) that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Assoc. for Retarded Citizens of Dallas v. Dallas Co. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 242 (5th Cir. 1994). The City maintains that based

on the reasoning in *Cornerstone*, Plaintiffs' claim requires the participation of the organizations' individual members and therefore, the organizations cannot satisfy the third requirement of associational standing.[3]

Big Hart and Rip Parker contend the statutory language of TRFRA affords standing to organizations like themselves. TRFRA, which is codified in the Texas Civil Practice and Remedies Code, prohibits a government agency from substantially burdening "a *person's* free exercise of religion." Tex. Civ. Prac. & Rem. Code § 110.003(a) (emphasis added). TRFRA itself does not define "person". However, as Plaintiffs point out, Section 1.002 of the Texas Civil Practice & Remedies Code provides that its terms are to be construed in accordance with the Texas Code Construction Act (Chapter 11, Government Code ("CCA")), which defines "person" as a "corporation, organization . . .[or] association." Tex. Gov't Code § 311.005(2) (West 2012). Plaintiffs conclude that as organizations, Big Hart and Rip Parker have standing to assert their claim under TRFRA.

The City responds by looking to Section 311.005 of the CCA, which states that the definitions apply "unless the statute or context in which the word or phrase is used requires a different definition." (Docket #160 at 1.) The City cites to *Cornerstone Christian Schools. v. University Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) for its assertions that only a natural person has religious beliefs and an association lacks standing to bring a religious freedom claim on behalf of its members. (Docket #149-1 at 2-3.) The City argues this TRFRA claim is analogous to *Cornerstone's* first amendment claim involving the free exercise of religion, and therefore *Cornerstone's* reasoning is applicable to this case. (Docket #149-1 at 2.) The City

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[3] The City does not challenge Plaintiffs' ability to satisfy the first two elements of associational standing.

concludes that each individual plaintiff must show how the ordinance restrained him from practicing his own religion and therefore, the context of TRFRA necessitates a different definition of "person" – one that excludes corporations and organizations. (Docket #160 at 2.)

Plaintiffs respond to the City's reasoning with three arguments: (1) TRFRA and the free exercise clause are not the same and therefore, *Cornerstone* does not apply to TRFRA; (2) the City has mischaracterized *Cornerstone* by saying it stands for the principle that "only people, not corporations or associations, have sincerely held religious beliefs"; and (3) the City mischaracterizes *Cornerstone* when it says it holds that organizations cannot have standing under the free exercise clause. Plaintiffs contend *Cornerstone* is completely inapposite to this case because it did not deal with TRFRA and did not analyze standing under TRFRA.

As stated *supra*, TRFRA was enacted to restore a strict scrutiny analysis to free exercise claims under the first amendment. *See Needville*, 611 F.3d at 258. It is predicated on the free exercise clause – the law at issue in *Cornerstone*. On the other hand, TRFRA is a state statute, and the state's laws of statutory construction still apply. The relevant statute provides that "a government agency may not substantially burden a *person's* free exercise of religion." Tex. Civ. Prac. & Rem. Code § 110.003(a) (emphasis added). The CCA defines "person" to include "corporation[s], organization[s], . . . association[s], and any other legal entity." Tex. Gov't Code Ann. § 311.005(2). It also provides that this definition shall apply "unless the statute or context in which the word . . . is used requires a different definition." *Id.* § 311.005.

Thus, the question is whether the statutory definition of "person" should apply in this case or whether the context of this case requires the Court to define "person" as an individual, using the *Cornerstone* reasoning.

Plaintiffs are correct that the City mischaracterized the holding of *Cornerstone*.

Cornerstone did not hold that "only natural persons can have religious practices." (Docket #160 at 2.) *Cornerstone* analyzed its facts in accordance with the Supreme Court case, *Harris v. McRae*, 448 U.S. 297, 321 (1980), and held that free exercise claims "ordinarily" require individual participation because plaintiffs are required to show the "coercive effect of the enactment as it operates against him in the practice of his religion." 563 F.3d at 134. In *Harris*, the plaintiff was an organization with diversity of views within its membership, thereby requiring individual participation to properly understand and resolve the free exercise claim. *Harris*, 448 U.S. 297, 321. In *Cornerstone*, the plaintiff organization was a parochial college preparatory school, and the court held that involvement of the individual parents and teachers would be necessary to resolve the element of coercion.

In this case, there are two organization plaintiffs: Big Hart and Rip Parker. At trial, leaders of both organizations testified the groups were founded on the principle that religious doctrine requires mankind to feed the hungry where they find them. (Docket #158-1 at 129, 130-32, 166.) Big Hart accomplishes its mission by going to a set location where it prepares and serves food to the homeless, while preaching, praying, and proselytizing to them. A significant component of Big Hart's activities is ministering to the homeless. The Court does not need any individual's testimony to analyze the effect the Ordinance has on this organization's ability to fulfill this religious mission.

Rip Parker is an organization founded and operating based on the Judeo-Christian principle that people should feed the hungry wherever they find them – to go out to the poor and help them. (Docket #158-1 at 261; #158-2 at 105-11, 157.) Its website describes the organization as "do[ing] as Christ instructed all believers to do." (Docket #158-1 at 230.) Its website describes its volunteers as "believers from many different churches throughout the Dallas metroplex area."

(Docket #158-1 at 230.) It goes on to state that "[w]e are a collection of dedicated Christian brothers and sisters obligated by the spirit of God to do as Christ commands." (Docket #158-1 at 233.) Rip Parker's volunteers travel throughout the Dallas area, delivering food to the homeless and hungry wherever they may be, pursuant to this religious principle. (Docket #158-2 at 261.) Most, if not all, of its volunteers are groups from different churches. (Docket #158-1 at 112.) The Court does not need any individual volunteer's testimony to analyze the effect the Ordinance has on this organization's ability to fulfill its religious mission.

Neither the TFRFA claim nor the relief requested requires the participation of Big Hart's or Rip Parker's individual volunteers. *See, e.g, Cornerstone*, 563 F.3d at 134. Therefore, the Court concludes this is not a situation where it would be improper to define "person" in accordance with the definition provided in the CCA. Accordingly, these organizations have standing to sue under TFRFA.[4]

C. MOOTNESS.

The City also argues Big Hart's claim is moot and should be dismissed because Big Hart no longer serves food to homeless people, and therefore, is not exercising any religious belief. (Docket #155 at 6-7; #149-1 at 4.) The City points to Mr. Hart's testimony that Big Hart is no longer operational because it went out of business due to the cost of complying with the Ordinance and his own poor health. (Docket #158-1 at 145.)

A court only has jurisdiction over claims based on an existing controversy. "[T]o qualify as a case for federal court adjudication, a case or controversy must exist at all stages of the

[4] Since the Court has determined Plaintiffs have standing to sue on their own behalf, the Court need not resolve the issue of whether Plaintiffs have standing to prosecute their TRFRA claims on behalf of their volunteers/members.

litigation, not just at the time the suit was filed." *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs,* 217 F.3d 393, 396 (5th Cir. 2000). Mr. Hart testified that "I'm coming back" and "we are not through." (Docket #158-1 at 145-46.) He also testified he hopes to resume his feeding activities "about Labor Day" 2012. That means notifying volunteers where the feeding site will be the following week, either in person, by internet, and/or by postcard. (Docket #158-1 at 167-68.) He explained his poor health interfered with his ability to operate Big Hart, but as he regains his strength, "we will be going again." (Docket #158-1 at 152.)

Having considered the City's argument, the facts of this case, and the relevant law, the Court concludes Big Hart's claims are not moot just because it has discontinued operations that violate the Ordinance until the controversy is resolved and Mr. Hart regains his health. *See Comm. Visual Comm'ns, Inc. v. City of San Antonio,* 148 F. Supp. 2d 764 (W.D. Tex. 2000) (case is not rendered moot because plaintiff/business owner ceases conduct that violates ordinance; if ordinance was declared unconstitutional, he would resume the violative conduct); *Trimble v. City of New Iberia*, 73 F.Supp.2d 659, 664 (W.D. La. 1999) (plaintiffs discontinued practice as psychic readers and healers in accordance with ordinance out of fear of prosecution; judgment declaring ordinance unconstitutional would redress plaintiffs' injuries as they would be able to practice skills without fear of prosecution). Having heard the trial testimony of Mr. Hart and his daughter, the Court believes Big Hart intends to resume operations if the Ordinance is found to be unconstitutional. Big Hart has pursued this case for several years – its owners are passionate about Big Hart's mission and its work. The City's motion requesting dismissal based on mootness is DENIED.[5]

[5] Under Section 17-10.2(s) of the Ordinance, a food establishment may apply to the director for a variance modifying or waiving the Ordinance's requirements. Dallas City Code §17-10.2(s). The City argues Plaintiffs'

D. DOES THE ORDINANCE VIOLATE TRFRA?

TRFRA requires a court to review with strict scrutiny any ordinance that substantially burdens a person's free exercise of religion. Tex. Civ. Prac. & Rem. Code §§110.002(a); 110.003(a). To succeed on a claim under TRFRA, a plaintiff must demonstrate (1) that the government's ordinance burdens the plaintiff's free exercise of religion and (2) that the burden is substantial. If the plaintiff manages that showing, the government can still prevail if it establishes that (3) its ordinance furthers a compelling government interest and (4) the ordinance is the least restrictive means of furthering that interest. *Needville,* 611 F.3d at 259; *Merced,* 577 F.3d at 588.

1. Sincerely-Held Religious Beliefs.

As a threshold matter, TRFRA defines "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). "In determining whether an act . . . is substantially motivated by sincere religious belief . . ., it is not necessary to determine that the act or refusal to act is motivated by a central part

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failure to seek a variance from the requirements of the Ordinance bars Plaintiffs' claim. It contends because Plaintiffs did not seek a variance, they cannot know whether they would be allowed to feed the homeless in the manner they desire while still being in compliance with the law. (Docket #155 at 24.) The City cites *Westgate Tabernacle, Inc. v. Palm Beach County*, 14 So.3d 1027 (Fla. Dist. Ct. App. 2009) to support its argument that Plantiffs failed to "exhaust the administrative remedies available to them by seeking a variance." (Docket #155 at 24-25.)

The *Westgate* case involved a church that wanted to operate as a homeless shelter and was required to obtain a permit from the county before it could lawfully house the people. The church argued the application requirement was a substantial burden and the court disagreed. Here, Plaintiffs are required to comply with a lengthy list of rules, including providing toilets and handwashing facilities, getting property owner consent, etc. The burden at issue is much greater in this case. Second, the church in *Westgate* was required to apply for and obtain the permit, which was a prerequisite to its operating as a homeless shelter. The court concluded a jury could find the church was not substantially burdened by the requirement because the church never even sought a permit. Here, the City has not offered any authority to support its argument that Plaintiffs were required to seek a variance. The Ordinance provides that a food establishment *may* apply for a variance to waive the requirements of the Ordinance. Dallas City Code §17-10.2(s). This language indicates Plaintiffs have the option of seeking a variance. The City has offered no legal authority to support its argument that a variance application is a prerequisite to filing this suit. Thus, the Court rejects the City's contentions that Plaintiffs failed to "exhaust administrative remedies" and are barred from pursuing this suit.

or central requirement of the person's sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). "Not only is such a determination unnecessary, it is impossible for the judiciary." *Barr v. City of Sinton*, 295 S.W.3d 287, 300 (Tex. 2009). The focus of this initial prong is on whether the plaintiff's sincere religious beliefs motivate his conduct. *Merced*, 577 F.3d at 578.

The City argues Rip Parker failed to establish it held a sincere religious belief. (Docket #55 at 8.)[6] Having heard all the trial testimony and having reviewed all the trial exhibits, the Court finds that Rip Parker was a ministry, organized and operated to fulfill the Christian mission of feeding the homeless. Its founder and director of day-to-day operations, Mr. Edwards, presented testimony and evidence that its members were primarily church groups of different Christian denominations – but with the unified purpose of fulfilling Christ's command to feed the needy/homeless. (Docket #158-1 at 34, 229-238.) Though its individual participants were not required to be of a particular religion, they did share religious beliefs with the homeless when sharing food with them. (Docket #158-1 at 41.) One of the members/volunteers, Mr. McIntyre, testified that Rip Parker volunteers distributed Christian literature to the homeless (*e.g.*, Bibles) and prayed with them, "telling them that God loves them and trying to get them off the streets." (Docket #158-1 at 41.) Rip Parker was founded and continues to operate based on the principle that the Bible and Christianity compel mankind to seek out homeless individuals and provide them with food and prayer wherever they are located at a given time. (Docket #158-1 at 40-41.) Rip Parker's witnesses offered compelling evidence that Rip Parker is motivated by a sincerely-held religious belief that God and the Bible instruct mankind to feed the hungry and pray with them wherever they may be.

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[6] The City does not argue that William Edwards, individually, or Big Hart lack a sincerely-held religious belief.

2. Substantial Burden.

TRFRA provides that a government agency may not "substantially burden a person's free exercise of religion." Tex. Civ. Prac. & Rem. Code § 110.003(a). Under TRFRA, a burden is substantial if it is real (versus merely perceived) and significant (versus trivial). *Needville*, 611 F.3d at 264. Courts should focus on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression. *Id.* This inquiry should be considered from the person's perspective, not the government's. *Id.* Therefore, this inquiry is case- and fact-specific and must take into account individual circumstances. *Id.*

Plaintiffs contend the requirements they must meet to invoke the Homeless Feeder Defense substantially burden their ability to exercise the religious act of feeding the homeless.

a. Restroom Requirements.

The Ordinance requires Plaintiffs to make available "portable toilets or other restroom facilities for the homeless and for persons preparing and serving food to the homeless." Dallas City Code §17-1.6(5)(A)(i). Plaintiffs sought to establish at trial that this provision substantially burdens their ability to practice their religious beliefs. Mr. Hart testified Big Hart does not have the financial means to purchase, store, transport, or rent such facilities at every feeding site. (Docket #158-1 at 149, 184-5, 285.) Thus, complying with this provision places a substantial burden on Big Hart's ability to share food with the homeless in accordance with its religious mission. Additionally, it is impossible for Rip Parker to transport toilet facilities in its volunteers' cars or to rent them at every one of the several sites it visits during each outing.[7] (Docket #158-1

[7] The City argues "[t]here is no substantial burden placed on an individual's free exercise of religion where a law or policy merely operates so as to make the practice of the individual's religious beliefs more expensive." (Docket #155 at 23.) It cites to *Living Water Church of God v. Charter Township of Meridian*, 258 Fed. Appx. 729 (6th Cir. 2007) and *Goodall v. Stafford County School Board*, 60 F.3d 168 (4th Cir. 1995) for this principle. While

at 64; Docket #158-2 at 22.)[8]

The City argues the Ordinance does not "substantially burden" Plaintiffs' religious freedom because they can still feed the homeless, minister to the homeless, give money to the homeless for food (Docket #158-1 at 89), take the homeless to restaurants (Docket #158-1 at 90, 264), serve them prepackaged food (Docket #158-1 at 264), purchase or operate a restaurant (Docket #158-1 at 86), feed the homeless in the volunteers' homes (Docket #158-1 at 265), join with another organization to feed the homeless (Docket #158-1 at 267), and purchase and operate a mobile food truck (Docket #158-1 at 87).

"[A] burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else." *Barr*, 295 S.W.3d at 303; *see Merced,* 577 F.3d at 589 (finding ordinance substantially burdened plaintiff's free exercise of religion because it prohibited the plaintiff from keeping for slaughter and slaughtering four-legged animals in the home; the fact that the ordinance allows the plaintiff to "kill a small number of fowl does not alter that fact"). However, the alternatives proposed by the City are impractical and, in many cases, impossible. The evidence established it is impractical to take the homeless to restaurants because restaurants seldom allow homeless people to come inside. (Docket #158-1 at 264-65). The evidence also established that Plaintiffs' purpose is not fulfilled by serving "prepackaged food," such as "Gatorade and power bars". (Docket #158-1 at 83-84.) Their purpose is to connect with the

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this is true, a court must also consider whether "that government action places substantial pressure on [the plaintiff] to violate its religious beliefs or effectively bar[s] [the plaintiff] from" exercising its religious beliefs. *Living Water*, 258 Fed. Appx. at 739. In this case, the evidence established that the expense of providing a toilet at Plaintiffs' feeding sites "effectively bars" Plaintiffs from feeding the homeless where they are. Thus, the expense of meeting this requirement does pose a substantial burden on Plaintiffs.

[8] Mr. McIntyre testified that Rip Parker obtained a portable toilet for use at the Gano site. (Docket 158-1 at 63.) He also testified that neither the volunteers nor the homeless "ever use the restrooms." (Docket #158-1 at 110, 286.)

homeless people by serving satisfying and filling meals with nutritional value. (Docket #158-1 at 135-36.) The suggestion that Plaintiffs purchase or operate a restaurant (Docket #158-1 at 86) is impractical for at least two reasons: first, the Plaintiff organizations, comprised of volunteers, do not have the financial resources to purchase or operate a restaurant (Docket #158-1 at 120) and second, the alternative fails to account for the fact that Plaintiffs want to take the meals to the homeless where they are; they do not want to make the homeless people gather all their belongings to come to them. (Docket #158-1 at 86.) The suggestion that Plaintiffs feed the homeless in the volunteers' homes or their churches (Docket #158-1 at 91, 265) is impractical because Plaintiffs do not have the resources to transport dozens of homeless people to one or more locations and back. (Docket #158-1 at 91.) The City's suggestion that Plaintiffs join with another organization to feed the homeless (Docket #158-1 at 91, 267) also fails to take into account the fact that Plaintiffs' mission is to reach out to the homeless at their locations to make their lives easier. They do not want to make access to food difficult for them. (Docket #158-1 at 87.) Plaintiffs also presented evidence that other organizations are reluctant to join forces with Plaintiffs because of Plaintiffs' conflict with the City. (Docket #158-1 at 120.) Finally, Plaintiffs do not have the resources to purchase and operate a mobile food truck. (Docket #158-1 at 87, 121.)

The central inquiry as to whether Plaintiffs' free exercise of religion has been substantially burdened is whether the Ordinance pressures Plaintiffs to significantly modify their religious behavior and significantly violates their religious beliefs. *Barr*, 295 S.W.3d at 301. "The relevant inquiry is not whether governmental regulations substantially burden a person's religious free exercise broadly defined, but whether the regulations substantially burden a specific religious practice." *Merced*, 577 F.3d at 591. The religious behavior at issue is not simply feeding the homeless – the evidence established the religious conduct at issue is feeding the homeless where

they are; either by setting up a single feeding location that is convenient to the homeless (Big Hart) or by driving to different areas of Dallas where the homeless are located at any given time (Rip Parker). Though the Ordinance does not prohibit Plaintiffs from giving money to the homeless for food (Docket #158-1 at 89), Plaintiffs choose to minister to and feed the needy in a personal way, pursuant to their religious principles. Their religious beliefs compel them to engage and interact with the homeless individuals by providing them spiritual guidance and nourishment. Their feeding activities and proselytizing are part of their religious expression. The fact that alternative methods for feeding the homeless exist does not mean the burden on Plaintiff's religious expression is not substantial.[9] The Court finds that the Ordinance's requirement that Plaintiffs provide access to toilets or other restroom facilities for the homeless and the servers at each feeding location poses a substantial burden on Plaintiffs' ability to serve food to the homeless in accordance with their religious beliefs.

b. Handwashing Facilities and Wastewater Disposal.

The Ordinance requires Plaintiffs to make available "equipment and procedures at the location for handwashing" and to make available "equipment and procedures at the location for the lawful disposal of waste [trash] and wastewater." Dallas City Code §§ 17-1.6(5)(A)(ii), (iii). It also provides that "where non-prepackaged food is served to the homeless, a convenient handwashing facility must be provided for persons preparing and serving the food, and the handwashing facility must include at a minimum: (aa) a five-gallon container with a spigot that provides free-flowing water and a catch bucket to collect wastewater for handwashing; and (bb)

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[9] Defendants argue the Ordinance does not burden Plaintiffs' free exercise of religion because the Ordinance is neutral and applied equally to all regardless of the person's religion. (Docket #155 at 16.) However, "'laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.'" *Barr*, 295 S.W.3d at 295 (quoting Congress in enacting the federal Religious Freedom Restoration Act).

soap with individual paper towels". Dallas City Code §17-1.6(5)(D)(iv). The Ordinance also mandates that all "wastewater generated at the feeding site (including but not limited to wastewater from handwashing, utensil washing, sinks, and steam tables) must be placed in an approved container until properly disposed of into a sanitary sewer system or in a manner that is consistent with federal, state, and local regulations and requirements relating to liquid waste disposal.[10]

The testimony at trial established that neither Plaintiff regards the concept of handwashing as unreasonable or burdensome. (Docket #155 at 17; #158-1 at 110, 191, 256) The testimony also established that Plaintiffs are not familiar with the technical requirements of the Ordinance with regard to handwashing and water disposal. (*See, e.g.,* Docket #158-1 at 191.) The Ordinance requires Plaintiffs (when serving non-prepackaged food) to provide its servers access to (1) a five-gallon container with a spigot that provides free-flowing water, (2) a catch bucket to collect wastewater from handwashing, (3) soap, and (4) individual paper towels. It also requires Plaintiffs to ensure that wastewater from handwashing and cooking be placed in an "approved" container until "properly disposed of into a sanitary sewer system" or in a manner that is consistent with government rules and regulations relating to liquid waste disposal. Dallas City Code § 17-1.6(a)(5)(D)(iv), (v).

After examining all the evidence in this case, the Court finds the handwashing and disposal of wastewater provisions pose a substantial burden on Plaintiffs' ability to serve food to the homeless in accordance with their religious beliefs. It is impractical and unnecessary for every Rip Parker volunteer to fill and transport a five-gallon container, a catch basin, soap, and paper

[10] Despite statutory language to the contrary, the City's representative testified he interprets the Ordinance as requiring the feeder to provide handwashing facilities for use by the homeless individuals being served. (Docket #158-3 at 22.)

towels for their own use to every location on their food delivery route each night. Further, the evidence established that Rip Parker's volunteers wash their hands at the food preparation site with soap and water. (Docket #158-1 at 256.) The evidence also established that hand sanitizer is an adequate substitute for keeping hands clean and germ-free. (Docket #158-1 at 23-24, 47, 88.)

Second, it is impractical and burdensome for Plaintiffs to collect the "wastewater" from each handwashing and, after all the food is served, dispose of it in a government-approved manner. The Ordinance requires servers to collect and transport all "wastewater," determine what constitutes an "approved" container, identify, locate and interpret the federal, state, and local regulations relating to liquid waste disposal, and then dispose of the wastewater in the prescribed manner. The amount of time and effort Plaintiffs would have to expend to comply with this provision places an unreasonable and substantial burden on their ability to feed the homeless in accordance with their religious beliefs.

c. Consent of Landowner.

Big Hart typically serves meals at a single, designated location each week, whereas Rip Parker's volunteers travel to multiple locations every evening distributing food to those in need. The Ordinance provides that for each site at which food is served to the homeless, the organization must have written consent from the property owner to serve homeless people there. Dallas City Code § 17-1.6(a)(5)(B).

The evidence established that property owners who are willing to let Big Hart use their land as a feeding site become unwilling when they learn they must fill out paperwork and get the City involved. (Docket #158-1 at 192.) This intrusive and onerous requirement substantially burdens Big Hart's ability to feed the homeless in accordance with its religious beliefs.

With regard to Rip Parker, it is impractical, if not impossible, for Rip Parker to obtain

written consent from every landowner at every location they will be delivering food to each night. The homeless people Rip Parker feeds are transient and Rip Parker's volunteers may not know exactly where they will find a person in need on a given night. It is a substantial burden for every Rip Parker volunteer to have to identify every feeding site ahead of time, identify the owner of every location at which they will be serving, contact every owner, and obtain his written consent. The amount of time and effort Rip Parker would have to expend to comply with this provision places an unreasonable and substantial burden on its ability to feed the homeless in accordance with its religious beliefs.

d. Location and Registration Requirements.

In order to assert the homeless-feeder defense, an organization must receive City approval of its feeding location and must be registered with the City. Dallas City Code §§ 17-1.6(5)(A), (C), (D). Both these provisions require an organization to comply with the requirements discussed *supra*, which the Court has found pose substantial burdens on Plaintiffs' ability to feed the homeless in accordance with their religious beliefs. Therefore, the Court concludes the location and registration requirements also substantially burden Plaintiffs' ability to feed the homeless in accordance with their religious beliefs.

3. COMPELLING INTERESTS.

Though Plaintiffs have satisfied their burden of proving (1) the government's ordinance burdens their free exercise of religion and (2) the burden is substantial, the City can still prevail if it establishes that these provisions of the Ordinance further compelling government interests and are the least restrictive means of furthering those interests. "'To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct.'" *Needville*, 611 F.3d at 266 (citation omitted). "The government may regulate such

conduct in furtherance of a compelling interest." *Barr*, 295 S.W.3d at 305.

The City argues the Ordinance furthers many compelling interests, specifically, its interests in (1) protecting the health, safety and welfare of its citizens; (2) preventing the spread of foodborne illness and disease; (3) protecting the homeless and the foodservers; (4) protecting the property rights of those on or near the feeding sites; (5) protecting the dignity of the homeless; (6) detecting and preventing littering; (7) protecting the safety of the feeders so they are not put in a dangerous position by providing food to the homeless wherever they see fit; (8) preventing the homeless from urinating and defecating in public; (9) providing services to the homeless; (10) preventing trespassing; and (11) preventing violence. (Docket #155 at 26-27.)

TRFRA places the burden on the City to prove that the burden created by the Ordinance advances a compelling governmental interest. Tex. Civ. Prac. & Rem. Code § 110.003. A government's interest is "compelling" "when the balance weighs in its favor – that is, when the government's interest justifies the substantial burden on religious exercise." *Barr*, 295 S.W.3d at 306. "Because religious exercise is a fundamental right, that justification can be found only in 'interests of the highest order.'" *Needville*, 611 F.3d at 266; *Barr,* 295 S.W.3d at 306 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

TRFRA requires the City to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Barr*, 306 S.W.3d at 306. As the Supreme Court has stated, courts must "'look[ ] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Merced,* 577 F.3d at 592; *Barr*, 306 S.W.3d at 306.

Under TRFRA, when a person's free exercise of religion is at stake, a city's "invocation of general interests, standing alone, is not enough – a showing must be made with respect to the 'particular practice' at issue." *Needville*, 611 F.3d at 268. "A court 'must searchingly examine the interests that the [City] seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.'" *Id.* (citation omitted). For the City to prevail, it cannot rely on "'general platitudes,' but 'must show by specific evidence that [Plaintiffs'] religious practices jeopardize [the City's] stated interests.'" *Id.*

"The courts' task of balancing the interests is difficult, but the goal is to 'strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." *Merced*, 577 F.3d at 592.

a. Protecting the Health, Safety, and Welfare of Dallas Citizens.

The first compelling interest the City cites for the Ordinance and the Homeless Feeder Defense's requirements is "protecting the health, safety, and welfare of its citizens." (Docket #155 at 26.) These are exactly the kind of "broadly formulated interests" that courts routinely reject in these cases. *Barr*, 295 S.W.3d at 306 (rejecting the city's argument that the ordinance's provision was necessary to "preserve the public safety, morals, and general welfare"). These generalized interests do not satisfy the scrutiny mandated by TRFRA. *Id.*

b. Preventing the Spread of Foodborne Illnesses.

The City also contends the Homeless Feeder Defense's hand washing requirement operates to "prevent the spread of foodborne illness and disease by having hand washing equipment available at the location for hand washing. (Docket #155 at 26; Dallas City Code §17-1.6(5)(A)(iii).) The City interprets the Ordinance as requiring the feeder to provide hand washing facilities at the food sharing location for use by the homeless individuals being served.

(Docket #158-3 at 18.)

To establish that the prevention of the spread of foodborne illnesses is a compelling interest in this case, the City must show the interest is "tailored to the specific issue at hand" or "the particular practice at issue – here, homeless feeding (both mobile and fixed-site). *Merced*, 577 F.3d at 578; *Barr*, 295 S.W.3d at 307. Thus, for the City to prevail, it must show by specific evidence – not mere speculation – that Plaintiffs' "religious practices jeopardize its stated interests." *Merced*, 577 F.3d at 578. This it has not done.

The City has presented no evidence that Plaintiffs' feeding operations have caused the spread of any foodborne illness. (Docket #158-1 at 60, 61, 155.) It has presented no evidence that the volunteers' hand washing practices have caused the spread of any foodborne illness. The City has not presented any evidence that Plaintiffs have failed to keep their hands clean during the preparation or serving of food. The City has not presented any evidence that Plaintiffs failed to provide hand washing equipment to their volunteers or to the homeless individuals. In fact, the evidence at trial was to the contrary. Both Big Hart and Rip Parker's witnesses testified they had access to and used hand washing equipment (soap and water and/or hand sanitizer) to keep their hands clean while preparing and serving food. (Docket #158-1 at 42-43, 65, 191, 256.) Mr. Edwards testified that, to his knowledge, not a single homeless person has gotten sick from eating food prepared by Rip Parker. (Docket #158-1 at 258.) Dana Hart-Ball testified no one has ever gotten sick from eating at one of Big Hart's events and if someone had, she would know about it. (Docket #158-1 at 279-80.)

In fact, according to Dr. O'Connell, the homeless are at greater risk of contracting a foodborne illness when the mobile feeders do not feed them and they are forced to get their food from unsanitary dumpsters. (Docket #158-2 at 33-34.) He also testified he has studied the issue

of the homeless and foodborne illness and has concluded that the greatest risk comes from shelters with kitchens that are serving large numbers of people, not from mobile feeding units. (Docket #158-2 at 41.) Dr. O'Connell has studied this area "carefully" and has not learned of a single incident of a homeless individual contracting a foodborne illness as a result of people bringing food to small numbers out in the community. (Docket #158-2 at 42.)

While the City is not required to wait until people are sickened and harmed by homeless feeders' unsanitary practices before regulating their operations, it is not permitted to assert a compelling interest in practically excluding religious-based feeding groups from operating in this way based on nothing more than speculation.[11] *See Barr*, 295 S.W.3d at 307; (see also Docket #158-3 at 18, 32-33).

c. Protecting the Homeless and the Feeders.

The City contends the Ordinance and the Homeless Feeder Defense's requirements serve the City's compelling interests of "protecting the homeless and those serving food to the homeless." (Docket #155 at 33.) These are exactly the kind of "broadly formulated interests" that courts routinely reject in these cases. *Barr*, 295 S.W.3d at 306 (rejecting the city's argument that the ordinance's provision was necessary to "preserve the public safety, morals, and general welfare"). These generalized interests do not satisfy the scrutiny mandated by TRFRA. *Id.*

d. Protecting Property Owners' Rights and Preventing Trespassing.

The City also contends the Homeless Feeder Defense's requirements further the City's

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[11] The City's speculation during trial was rampant. The City speculated a health hazard might occur if someone "makes an egg salad sandwich with mayonnaise and leaves it in the car at 150 degrees and is riding around looking for homeless folks." (Docket #158-1 at 113.) It speculated that a health hazard might occur if one of its volunteers has a contagious disease that could contaminate the food. (Docket #158-1 at 114.) It speculated that someone might "pose as a Big Hart volunteer so it could access the homeless and harm them by giving them tainted food. (Docket # 158-1 at 158.) The City speculated that a homeless feeder group might put its volunteers in danger by "provid[ing] food on a busy highway." (Docket #158-1 at 163.)

compelling interests to protect the property rights of those on and near where feeding is to occur to prevent trespassing. (Def.'s Exs. 19 at 1, 86; Docket #155 at 26); Dallas City Code §17-1.6(5)(A)(iii).

As an initial matter, the law already prohibits trespassing. This Ordinance places an unreasonable burden on homeless feeders to prove they are not trespassing when the law already provides a vehicle for prosecuting individuals who are.

To establish that protecting the property rights of those near the feeding operation is a compelling interest in this case, the City must show the interest is "tailored to the specific issue at hand" or "the particular practice at issue" – here, homeless feeding (both mobile and fixed-site). *Merced*, 577 F.3d at 578; *Barr*, 295 S.W.3d at 307. Thus, for the City to prevail, it must show by specific evidence – not mere speculation – that Plaintiffs' "religious practices jeopardize its stated interests." *Merced*, 577 F.3d at 578. This it cannot do.

At trial, the City's witness, Mr. Jay Dunn, testified that "most of the street feeding that I have seen has been interpreted by property owners as criminal trespassing because they don't want it occurring on their property." (Docket #158-3 at 143.) However, the City did not present any evidence that these Plaintiffs have trespassed on others' property. In fact, Mr. Hart testified that property owners are willing to give consent, but are unwilling to fill out all the necessary paperwork and "get involved because of the City." (Docket #158-1 at 192.) "There are property owners downtown that would really help us if we just let them look the other way . . . the landowner [would]n't protest. . . But when they get involved with the City, all of that changes." (Docket #158-1 at 202.)

The City has not offered any compelling reason for imposing these additional burdens on homeless feeders to prevent conduct that is already illegal. It has not established any compelling

interest in interfering with the transactions and agreements between private entities. And it has not articulated any compelling interest in preventing these Plaintiffs from trespassing.

e. Protecting the Dignity of the Homeless.

The City contends the Ordinance and the Homeless Feeder Defense's requirements serve the City's compelling interests of "protecting the dignity of the homeless." (Docket #155 at 27.) This is exactly the kind of "broadly formulated interest" that courts routinely reject in these cases. *Barr*, 295 S.W.3d at 306 (rejecting the city's argument that the ordinance's provision was necessary to "preserve the public safety, morals, and general welfare"). This generalized interest does not satisfy the scrutiny mandated by TRFRA. *Id.* In fact, there was evidence at trial that Rip Parker and Big Hart's mission is to treat these humans with dignity and respect – by feeding them a nutritious, hot meal, talking to them, counseling them, ministering to them, and praying with them.

f. Ensuring the Safety of the Feeders.

The City also contends the Ordinance and the Homeless Feeder Defense's requirements further the City's compelling interests to protect the feeders from going to dangerous areas to feed the homeless and to prevent homeless-on-feeder violence. (Def.'s Exs. 19 at 1, 86; Docket #155 at 26; Section (5)(A)(iii).)

To establish that ensuring the safety of the feeders is a compelling interest in this case, the City must show the interest is "tailored to the specific issue at hand" or "the particular practice at issue" – here, homeless feeding (both mobile and fixed-site). *Merced*, 577 F.3d at 578; *Barr*, 295 S.W.3d at 307. Thus, for the City to prevail, it must show by specific evidence – not mere speculation – that Plaintiffs' "religious practices jeopardize its stated interests." *Merced*, 577 F.3d at 578. This it has not done.

The City did not present any evidence at trial that Plaintiffs (or any other homeless feeder) operated or were harmed in "dangerous areas" or "high traffic areas" or were harmed by the homeless people they are feeding. These concerns are pure speculation. There was no evidence of any homeless feeder being injured from traffic while feeding. Additionally, Plaintiffs' witnesses testified that these volunteers work hard to and are able to establish relationships of trust and acceptance with these homeless individuals. The City did not present any evidence of harm to the homeless feeders at the hands of the homeless.

While the City is not required to wait until feeders are victimized and harmed before regulating their operations, it is not permitted to assert a compelling interest in practically excluding religious-based feeding groups from operating in this way based on nothing more than speculation. *See Barr*, 295 S.W.3d at 307.

g. Preventing the Homeless from Urinating and Defecating in Public.

The City also contends the Ordinance furthers the City's compelling interest to prevent the homeless from urinating and defecating in public. (Docket #155 at 26); Dallas City Code §17-1.6(5)(A)(i).

To establish that preventing the homeless from urinating and defecating in public is a compelling interest in this case, the City must show the interest is "tailored to the specific issue at hand" or "the particular practice at issue" – here, homeless feeding (both mobile and fixed-site). *Merced*, 577 F.3d at 578; *Barr*, 295 S.W.3d at 307. Thus, for the City to prevail, it must show by specific evidence – not mere speculation – that Plaintiffs' "religious practices jeopardize its stated interests." *Merced*, 577 F.3d at 578. This it cannot do.

The City did not present any evidence at trial that the homeless were urinating and defecating in public because they were being fed by Rip Parker and Big Hart. The City's

argument is based on a flawed underlying assumption – that but for these feeders, many homeless individuals would be off the streets and housed at The Bridge, where they would have access to bathrooms (and other necessities). (Docket #158-3 at 77-78, 85-87, 109, 152-53.) The evidence at trial established this is likely not the case. The unsheltered homeless are unwilling to go to a large, government-sanctioned, organized facility under any circumstance. They prefer to stay on the streets and continually resist law enforcement/city efforts to provide counseling and support. Without the fresh food provided by Plaintiffs, these homeless people would find their food in dumpsters, not at The Bridge. And their bathroom needs and habits would be the same.

Additionally, the evidence established it usually takes one to four hours for a person to digest his meal and need to use the bathroom. (Docket #158-2 at 18.) Rip Parker is a mobile site that will have left its feeding site long before a bathroom is needed. The City's argument is further undermined by the fact that the City Code does not require restaurants to provide restrooms for its patrons and does not require caterers to provide toilets to the people they feed. (Docket #158-1 at 184-85; #158-3 at 18.)

h. Preventing Traffic or Street Congesting by Homeless Feeders.

The City also contends the Ordinance furthers the City's compelling interest in preventing traffic or street congestion by homeless feeders. (Docket #155 at 26.) There was no evidence of street congestion caused by Plaintiff's homeless feeding. The City offers speculation by counsel that if Rip Parker was feeding 500 homeless folks (presumably at a single site), they could be blocking the street or blocking the sidewalk. (Docket #158-1 at 124.) Mr. McIntyre testified the usual mobile feeding site would receive between 15 and 30 homeless individuals. (Docket #158-1 at 125.)

When questioned at trial, Mr. Hart testified he has never seen any homeless feeder group,

including his own, "block[ ] the sidewalk as they were handing out food." (Docket #158-1 at 173.) Dana Hart-Ball testified that their food sharing activities "never" blocked or impeded the roadway. (Docket #158-1 at 277.) Mr. Edwards testified they would "make everyone line up, intentionally, so they would not block the sidewalks and they would not block the streets. . . " (Docket #158-1 at 251; #Docket #158-3 at 51 (feeding the homeless "could conceivably" create a traffic hazard).)

Though one of the City's witnesses, Jay Dunn, President and CEO of The Bridge, testified he has witnessed street feeding in Dallas that causes congestion on public sidewalks and on public roadways, he did not attribute this congestion to either Plaintiff's operation. (Docket #158-3 at 143, 152.) If Plaintiffs were to improperly block a sidewalk or roadway, the City would be authorized to issue a citation for such a violation, should it occur. The City has not presented any evidence that the Ordinance would advance this interest.

i. Providing Services to Homeless Persons.

As stated *supra*, the City believes if Plaintiffs would stop feeding the homeless, the City would have a better chance of persuading them to accept social services. At trial, Dr. O'Connell testified that if you take away the fresh food provided by Plaintiffs, these people would most likely find their food in dumpsters, not at The Bridge. Even the City acknowledged it has a low success rate in persuading this segment of the homeless populaiton to accept social services. The City did not establish the Ordinance furthers the City's interest in providing services to the homeless.

CONCLUSION

The Court does not make a judgment about whether the City has an interest in regulating the operations of homeless feeders. However, in this case, the homeless feeders are religiously motivated institutions that are afforded statutory protection to practice their religions without

being substantially burdened by government regulation. The Ordinance's Homeless Feeder Defense requirements were instituted based on speculation and assumptions. The City did not establish that any of its interests have been harmed by Plaintiffs' conduct. What the City did establish is that it wants to provide as many homeless people as possible with food, social services, showers, safety, job counseling, and beds in an effort to get them off the streets. The City believes that organizations that feed the homeless on the streets are thwarting the City's efforts to get the homeless off the streets.

The City has not established that its interest in regulating Plaintiffs in this way justifies the substantial burden on Plaintiffs' free exercise – in other words, it has not established the balance weighs in its favor. *See Barr*, 295 S.W.3d at 306. Therefore, the Court finds that Dallas City Code §17-1.6(5), the Homeless Feeder Defense, violates the Texas Religious Freedom Restoration Act.

SO ORDERED, this 25th day of ~~February~~ March 2013.

Jorge A. Solis

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE