Petition in Intervention, filed March 13, 2014, at 12-13. Schneider brings the same claim against the Gothelfs and the Congregation, although the relevant statute does not authorize individual homeowners to pursue damages. *See* First Amended Petition, filed April 2, 2014, at 16-18.

- The HOA brings a claim against the Gothelfs to recover its attorneys' fees and costs. *See* Petition in Intervention, filed March 13, 2014, at 13.

- Schneider brings a purported claim against Defendants for $50,000 in compensatory damages for allegedly causing his home to decline in value. *See* First Amended Petition, filed April 2, 2014, at 18. It is unclear what legal cause of action (if any) Schneider sues under, as the title of the claim is simply "Count 4 – Damage to Schneider's Property," and nothing within the text of the count identifies a specific cause of action. *Id.*

Each of these claims requires Plaintiffs to show that Defendants have breached the restrictive covenants. Thus, if there has been no breach and/or if Defendants establish an affirmative defense on the issue of breach, all of Plaintiffs' claims necessarily fail.

III. SUMMARY JUDGMENT GROUNDS

Defendants are entitled to summary judgment on the following independent grounds:

- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense under the Texas Religious Freedom Restoration Act.

- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense under the Religious Land Use and Institutionalized Persons Act.

- The Gothelfs are entitled to summary judgment on all of the HOA's claims because Defendants have established their affirmative defense that the HOA's actions were arbitrary, capricious, or discriminatory under the Texas Property Code.

- Defendants are entitled to summary judgment on all of Schneider's claims, and the Gothelfs are entitled summary judgment on all of the HOA's claims because Defendants have established their affirmative defense that the Highlands of McKamy's residential use restriction has been waived and/or abandoned.

- The Gothelfs are entitled to summary judgment on all of the HOA's claims because Defendants have established the affirmative defense of laches.

- Defendants are entitled to summary judgment on all of Schneider's claims because Defendants have established the affirmative defense of unclean hands.

- Defendants are entitled to summary judgment on Schneider's claim for a permanent injunction, and the Gothelfs are entitled to summary judgment on the HOA's claim for a permanent injunction to the extent Plaintiffs seek injunctive relief that would prohibit the Congregation from meeting at 7103 Mumford Court. No balancing of the equities could possibly support the issuance of such an injunction.

- Defendants are entitled to summary judgment on Schneider's claim for statutory damages under the Texas Property Code because the law does not permit individual homeowners to recover such damages. Therefore, no evidence supports the claim.

- Defendants are entitled to summary judgment on Schneider's claim for an alleged decline in value of his home because there is no evidence that supports the claim.

IV. ARGUMENT AND AUTHORITIES

A. Summary Judgment Standards

Texas Rule of Civil Procedure 166a governs the propriety of summary judgments. Entry of summary judgment is appropriate where the summary judgment record establishes that there are no genuine issues of material fact, and that movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action, or conclusively establish an affirmative defense. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). When moving for summary judgment on a plaintiff's claim, once a defendant presents evidence entitling it to summary judgment by negating an element of the claim, the burden shifts to the plaintiff to present evidence raising a fact issue on the negated element. *Lection v. Dyll*, 65 S.W.3d 696, 701 (Tex. App.—Dallas 2001, pet. denied). When moving for summary judgment

on an affirmative defense, the defendant has the burden to conclusively establish that defense. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

Under Texas Rule of Civil Procedure 166a(i), a party may also move for summary judgment on the ground that there is no evidence of one of the essential elements of a claim on which an adverse party would have the burden of proof at trial. A no-evidence motion for summary judgment "is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). "The Court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." Tex. R. Civ. P. 166a(i).

B. Defendants are Entitled to Summary Judgment on Each of Their Affirmative Defenses.

Defendants have asserted six independent affirmative defenses, each of which independently entitles Defendants to summary judgment. *See* Defendants' First Amended Answer, filed October 1, 2014, at ¶¶ 2-7. Each defense is entirely dispositive as to all claims of one or both Plaintiffs. *See supra* Section III. Thus, although Defendants contend that each defense has been established as a matter of law, Defendants need only win summary judgment on a single defense as to each Plaintiff in order for Plaintiffs' claims to be dismissed in their entirety.

1. Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the Texas Religious Freedom Restoration Act.

Texas RFRA prohibits the government from "substantially burden[ing] a person's free exercise of religion" unless the burden "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. This prohibition against governmental burden of the free exercise of religion applies

whether or not the government itself is a party to the action. Tex. Civ. Prac. & Rem. Code § 110.004 ("A person whose free exercise of religion has been substantially burdened . . . may assert that violation as a defense in a judicial or administrative proceeding without regard to whether the proceeding is brought in the name of the state or by any other person.").

a. Texas RFRA applies to this litigation.

Texas RFRA applies to this litigation in three independent ways: (i) Plaintiffs are seeking to enforce state statutes that are subject to Texas RFRA, (ii) judicial enforcement of restrictive covenants is itself state action subject to Texas RFRA, and (iii) homeowners' associations are quasi-governmental entities that are themselves subject to Texas RFRA.

i. Plaintiffs are seeking to enforce state statutes that are subject to Texas RFRA.

Texas RFRA "applies to each law of this state unless the law is expressly made exempt from the application of this chapter by reference to this chapter." Tex. Civ. Prac. & Rem. Code § 110.002(c). Each of Plaintiffs' claims is based in state law that has not been exempted from Texas RFRA. Fundamentally, Plaintiffs are seeking to enforce restrictive covenants, both the creation and the enforcement of which are authorized by Tex. Prop. Code §§ 5.001 *et seq.* and 202.001 *et seq.* None of these statutes, however, has been exempted from Texas RFRA and are thus subject to the limitations imposed by Texas RFRA. This is true even though the state is not a party to this litigation. Tex. Civ. Prac. & Rem. Code § 110.004.

ii. Judicial enforcement of restrictive covenants is itself state action subject to Texas RFRA.

Not only are the underlying statutes themselves subject to Texas RFRA, but any judicial enforcement of Plaintiffs' claims is itself state action subject to Texas RFRA. The principle that judicial enforcement of restrictive covenants is state action subject to constitutional protections

was first applied by the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1943). In that case, the Court refused to enforce restrictive covenants that limited the use or occupancy of a building on the basis of race because judicial action enforcing them would be state action that would violate the Fourteenth Amendment to the United States Constitution. The Court noted that judicial enforcement had long been considered state action in other contexts as well. *Shelley*, 334 U.S. at 16-18 (*see, e.g.*, *American Federation of Labor v. Swing*, 312 U.S. 321 (1941) (refusing to enforce a common-law policy that would restrain peaceful picketing because judicial enforcement of the policy would offend the Constitution)); *see also Shaver v. Hunter*, 626 S.W.2d 574, 578-79 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (subjecting the state's action in enforcing a restrictive covenant to constitutional scrutiny); *Gerber v. Long Boat Harbour*, 757 F. Supp. 1339, 1341 (M.D. Fla. 1991) ("[J]udicial enforcement of private agreements contained in a declaration of condominium constitutes state action and brings the heretofore private conduct within the scope of the Fourteenth Amendment, through which the First Amendment guarantee of free speech is made applicable to the state.").

That judicial enforcement is state action subject to Texas RFRA is an even easier case. Texas RFRA itself includes a definition of state action that is very broad, applying to "any ordinance, rule, order, decision, practice, or other exercise of governmental authority," which encompasses judicial action. Accordingly, at least one Texas court has suggested that judicial enforcement of restrictive covenants would be subject to Texas RFRA. *See Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 672 n.10 (Tex. App.—Austin 2005, no pet.) ("Cornerstone did not raise the Texas Religious Freedom [Restoration] Act below in its pleadings, summary-judgment response, or briefing. *See* Tex. Civ. Prac. & Rem. Code § 110.004 (person whose free exercise of religion has been violated under act may assert

violation as defense in judicial or administrative proceeding). . . . Thus, we have no occasion here to consider the potential implication of the Act or the merit of ExxonMobil's contention that it does not apply to courts. *See id.* § 110.001(a)(2) (defining 'Government agency' to include 'any agency of this state . . . including a department'), .002(a) (Act 'applies to any . . . order, decision, practice or other exercise of governmental authority.')" (second and third ellipses in original)).

iii. Homeowners' associations are quasi-governmental entities that are themselves subject to Texas RFRA.

Finally, homeowners' associations themselves are subject to Texas RFRA because of their quasi-governmental nature. *See Mayad v. Cummins Lane Owners Ass'n*, 1988 Tex. App. LEXIS 1973, at *4 (Tex. App.—Houston [1st Dist.] Aug. 11, 1988, no writ) ("[A]n owners association is a 'quasi-governmental' entity with the power to charge individual owners assessments to fund common expenses."); *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 617 N.E.2d 1075, 1080 (Ohio 1993) ("An owners' association acts as a 'quasi-governmental entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government.'") (quoting Hyatt & Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations, 12 Wake Forest L. Rev. 915, 918 (1976)); *Colo. Homes v. Loerch-Wilson*, 43 P.3d 718, 722 (Colo. Ct. App. 2001) (homeowners associations serve "quasi-governmental functions").

In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court struck down a privately-owned town's restrictions on distributing flyers and recognized that Constitutional protections can limit even private property rights when the property is taking on the nature of a governmental entity. The *Marsh* Court stated,

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights." *Schneider v. State*, 308 U.S. 147, 161. In our view, the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.

Marsh, 326 U.S. at 509 (ellipses in original).

Here, the HOA is "govern[ing] a community of citizens" in just such a way that it is violating their most fundamental rights—rights that Texas RFRA was intended to protect. *See Barr v. City of Sinton*, 295 S.W.3d 287, 305-06 (Tex. 2009) (noting that Texas RFRA protects "fundamental, constitutional rights" that are superior to the interests protected by zoning ordinances); *see also E. Tex. Baptist Univ. v. Sebelius*, 2013 U.S. Dist. LEXIS 180727 at *77-78 (S.D. Tex. Dec. 27, 2013) (holding, in interpreting the Federal Religious Freedom Restoration Act, upon which Texas RFRA is based, that "[p]rotecting constitutional rights and the rights under RFRA are in the public's interest"). If fully private property, as in *Marsh*, is limited in its ability to restrict fundamental liberties, how much more should a quasi-governmental entity such as the HOA be limited in its ability to restrict fundamental liberties.

b. Preventing the Congregation from meeting at 7103 Mumford Court would completely prevent thirty families from being able to worship, which is a substantial burden on their religious exercise.

There is no bright-line rule for what constitutes a "substantial burden." The Texas Supreme Court has held that Texas RFRA, "like its federal cousins, 'requires a case-by-case, fact-specific inquiry.'" *Barr*, 295 S.W.3d at 302 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)).

Barr, however, provides an example of a situation that the Texas Supreme Court held to be a substantial burden. In that case, Barr, on the basis of his religious convictions, operated a halfway house in two homes. The City of Sinton, Texas, wanted Barr to relocate, but finding a viable alternative location for the halfway house was unlikely. *Barr*, 295 S.W.3d at 302. The Texas Supreme Court held that prohibiting Barr from exercising his faith through operating the halfway house was a substantial burden. Furthermore, the Texas Supreme Court held that "evidence of *some* possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden." *Id.* The Court noted that "[i]n a related context, the [United States] Supreme Court has observed that 'one is not to have the exercise of his liberty of expression in appropriate places abridges on the plea that it may be exercised in some other place.'" *Id.* (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). The *Barr* Court also pointed to an example similar to the present case in *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 294 (5th Cir. 1988), in which Starkville, Mississippi, violated the Free Exercise Clause by attempting to use zoning restrictions to keep Muslim students from worshipping in a home in a residential area of Starkville. "'By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion.' . . . Although the zoning ordinance did not foreclose all locations, the court determined 'relatively impecunious Muslim students' were left with 'no practical alternatives for establishing a mosque in the city limits.'" *Id.* at 304 (quoting *Islamic Ctr.*, 840 F.2d at 299-300).

The Texas Supreme Court also rejected the idea that the size of the relevant location alleviates the substantial burden, stating, "The City argues that its zoning restrictions on locating Barr's ministry inside city limits could not have been a substantial burden because the City is so

small that excluding the ministry from inside the city limits was inconsequential. But size alone is not determinative. . . . [In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), t]he Supreme Court did not consider the small size of the municipality to be important and specifically rejected the argument that the adult entertainment business at issue could simply move elsewhere." *Id.* at 302-03.

The City of Sinton also argued that relocating Barr's halfway house was not a substantial burden because the parolees could be disbursed among other homes. The Texas Supreme Court rejected this argument, too, holding that "a burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else." *Id.* at 303.

In the present case, the Congregation must meet within walking distance of its members and within the North Dallas Eruv. *See supra* Sections II.A., II.D., II.E.; Exhibit C at 28:20-29:2; Exhibit D at 30:20-31:4, 39:25-40:4, 74:16-75:3, 84:1-84:13; Exhibit F at 72:9-73:4. After searching for a suitable location to replace Rabbi Rich's home, which is within the HOA, 7103 Mumford Court was determined to be the only viable location that was available to the Congregation. Exhibit C at 31:4-33:19; Exhibit D at 41:15-42:7, 66:1-68:4. If the Congregation cannot meet at 7103 Mumford Court, then, because of the restrictions placed upon the Congregation by their Orthodox Jewish religious beliefs, they will be unable to have communal worship. *Id.*; *see supra* Section II.E. The practical abolition of the Congregation's members' religious worship is a much more significant burden than that in *Barr*, and is similar to the burden in *Islamic Ctr.*

c. Plaintiffs do not have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court.

Because Plaintiffs' action would substantially burden Defendants' religious freedoms, Plaintiffs have the burden of showing that their interests are compelling. The Texas Supreme

Court noted that, "[b]ecause religious exercise is a fundamental right, that justification can only be found in 'interests of the highest order', to quote the Supreme Court in [*Wisconsin v.*] *Yoder*[, 406 U.S. 205, 215 (1972)], and to quote *Sherbert* [*v. Verner*, 374 U.S. 398, 406 (1945)], only to avoid 'the gravest abuses, endangering paramount interest[s].'" *Barr*, 295 S.W.3d at 306.

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

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

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

The Texas Supreme Court held that interests such as "preserv[ing] the public safety, morals, and general welfare" are "the kind of 'broadly formulated interest' that does not satisfy the scrutiny mandated by [Texas]RFRA." *Id.* The Court went on to note, particularly relevantly to the present litigation, "'[T]he compelling interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling." *Id.* at 307 (quoting Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 784 (1999)).

Plaintiffs have not shown any compelling interest in preventing the Congregation from meeting at 7103 Mumford Court. Their stated interests have included being forced to wait while a blind man and a woman pushing a stroller crossed the street and general concerns about parking. *See supra* Section II.F. None of these concerns are "real and serious burdens to neighboring properties" that would constitute "an interest of the highest order" and avoid "the gravest abuses, endangering paramount interests."

Any assertion by Plaintiffs that they have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court is further undercut by their refusal to stop other uses within the Highlands of McKamy IV and V that are non-residential. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. As the Supreme Court noted, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citations omitted). In this case, Plaintiffs have never sued to prohibit non-residential uses within the HOA, and thus the same claimed "harms" Plaintiffs allege here abound throughout the neighborhood without any attempt to curb them. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Their efforts to stop the Congregation and the Gothelfs are thus unique, demonstrating that the interests are manufactured and not compelling.

d. Prohibiting the Congregation from meeting at 7103 Mumford Court is not the least restrictive means of furthering any compelling interest.

To avoid summary judgment, not only must Plaintiffs show that they have a compelling interest in prohibiting the Congregation from meeting at 7103 Mumford Court, Plaintiffs must also show that their actions in prohibiting the Congregation from meeting at 7103 Mumford

Court are the "least restrictive means" of achieving their compelling interest. Tex. Civ. Prac. & Rem. Code § 110.003. "The least-restrictive-means standard is exceptionally demanding. . . ." *Hobby Lobby Stores, Inc. v. Burwell*, 134 S. Ct. 2751, 2781 (2014). In order to satisfy the least-restrictive-means test, Plaintiffs must show that they lack any other means of achieving any compelling interest "without imposing a substantial burden on the exercise of religion by the objecting parties." *Id.* at 2782. Plaintiffs have been unwilling to even discuss alternatives to completely prohibiting the Congregation from meeting at 7103 Mumford Court, but even if Plaintiffs had an interest that qualified as compelling, a resolution short of stopping the religious exercise of the members of the Congregation could be found. For example, Plaintiffs could have sought to limit parking near 7103 Mumford Court, ensure that the home maintains its exterior character, etc. Instead, Plaintiffs seek the broadest possible relief—a complete shutdown of the Congregation that would prohibit any gathering at all.

2. Interpreting the restrictive covenants to prevent the Congregation's religious activities would violate the Religious Land Use and Institutionalized Persons Act.

There is a second, independent statute that forecloses Plaintiffs' claims—a statute that Congress enacted to prohibit the very actions taken by Plaintiffs here. RLUIPA "is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [the Supreme] Court's precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Following the Supreme Court's refusal to apply Federal RFRA against the states, Congress enacted a more measured attempt to ensure that state and local governments protect the rights of religious institutions and adherents in two particular contexts where Congress concluded that constitutional rights were most threatened by laws of general applicability: land use regulation and religious exercise by institutionalized persons. *Cutter*, 544 U.S. at 715; 42 U.S.C. §§ 2000cc, 2000cc-1. As Congress recognized, land use

regulations pose a particularly serious risk to religious freedom because "[t]he right to assemble for worship is at the very core of the free exercise of religion," and "[c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements." 146 Cong. Rec. 16698 (2000). Importantly, Congress specifically described "[t]he right to build, buy, or rent such a space [a]s an indispensable adjunct of the core First Amendment right to assemble for religious purposes." *Id*.

To protect this right, RLUIPA imposes several limitations, divided into two categories, on government land-use restrictions relevant here. *First*, the "Substantial Burden Clause" uses the same fundamental test that is employed by Texas RFRA. *Second*, under the category of "Discrimination and exclusion," the "Equal Terms Clause" provides that "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." RLUIPA § 2000cc(b)(1). *Third*, the "Nondiscrimination Clause" prohibits any government from "impos[ing] or implement[ing] a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." RLUIPA § 2000cc(b)(2). *Finally*, the "Unreasonable Limitation Clause" prohibits governments from "impos[ing] or implement[ing] a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." RLUIPA § 2000cc(b)(3)(B). Congress specifically provided that RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." RLUIPA § 2000cc-3(g). Plaintiffs violate all four of these restrictions.

a. RLUIPA applies to this litigation.

RLUIPA applies to this litigation for the same reasons that Texas RFRA applies to this litigation as discussed in Section IV.B.1.a. above. Furthermore, while the application of RLUIPA to restrictive covenants has yet to be litigated, the United States Court of Appeals for the Eleventh Circuit itself raised the issue that RLUIPA may apply to restrictive covenants. *Konikov v. Orange County*, 410 F.3d 1317, 1324 n.3 (11th Cir. 2005) (noting that a restrictive covenant "originating from" a neighborhood homeowners' association "might constitute a constitutional violation and substantial burden in violation of RLUIPA").

b. Plaintiffs have violated RLUIPA's Substantial Burden Clause.

RLUIPA's Substantial Burden Clause has the same basic test that Texas RFRA uses. This clause provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." RLUIPA § 2000cc(a)(1). Because this test is the same as the test used by Texas RFRA, and because Plaintiffs have substantially burdened Defendants' religious exercise, do not have a compelling interest to do so, and have not used the least restrictive means, Defendants are entitled to prevail under the Substantial Burden Clause of RLUIPA.

c. Plaintiffs have violated RLUIPA's Equal Terms Clause.

RLUIPA's Equal Terms Clause prohibits the government from "treat[ing] the Church on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions." *The Elijah Grp. v. City of Leon Valley, Tex.*, 643 F.3d 419, 424 (5th Cir. 2011).

The test is one of strict liability: if a restrictive covenant treats a church on less than equal terms than a similarly situated nonreligious institution, Plaintiffs have no opportunity to offer a justification for the disparity. *See, e.g.*, *id.* (finding a violation of RLUIPA's Equal Terms Clause after determining that a church was treated on less than equal terms with a nonreligious institution, without any analysis of possible justification); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007) (same). The only concern of the Equal Terms Clause is whether "secular and religious institutions are treated equally." *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 671 (2d Cir. 2010); *see also Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) ("Both because the language of the equal terms provision does not allow for it, and because it would violate the 'broad construction' provision, we cannot accept the notion that a 'compelling governmental interest' is an exception to the equal terms provision, or that the church has the burden of proving a 'substantial burden' under the equal terms provision.").

In the present case, Plaintiffs have acknowledged that while there are non-residential uses within the HOA, no enforcement action has been brought against any such uses. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. The only enforcement action brought under the residential use provision of the restrictive covenants has been against Defendants in violation of RLUIPA's Equal Terms Clause.

d. Plaintiffs have violated RLUIPA's Nondiscrimination and Unreasonable Limitation Clauses.

Because of Plaintiffs' refusal to enforce their restrictive covenants against anyone except Defendants, their enforcement is both discriminatory against Defendants' religious exercise and unreasonable, in violation of RLUIPA.

3. The HOA's claims are barred because the HOA has arbitrarily singled out Defendants.

The Texas Property Code also independently forecloses the HOA's claims. Under that statute, a homeowners' association may not enforce a restrictive covenant if the decision to do so is arbitrary, capricious, or discriminatory. *See* Tex. Prop. Code § 202.004(a). The Property Code prevents homeowners' associations from enforcing a restrictive covenant against a property owner when the association has not enforced similar alleged violations against others in the neighborhood. *Leake v. Campbell*, 352 S.W.3d 180, 190 (Tex. App.—Fort Worth 2011, no pet.) (enforcement against one owner but not others committing similar alleged violations is evidence of arbitrariness); *Nolan v. Hunter*, 2013 Tex. App. LEXIS 11990, at *12-14 (Tex. App.—San Antonio Sept. 25, 2013, no pet.) (homeowners association's opposition to a fence was arbitrary, capricious, or discriminatory when there were other similar fences in the neighborhood).

Here, this lawsuit is the only enforcement action the HOA has ever brought since it was formed in 1979. *See supra* Section II.I.; Exhibit I at 14:12-15:5, 17:17-17:20; Exhibit J at 58:1-61:16; Exhibit O at 55:10-55:13. Yet, there are numerous non-residential uses of property in the neighborhood that the HOA has never attempted to stop. *See supra* Section II.I. As catalogued above, non-residential uses such as an eldercare facility, a residential care facility, swimming camps, a court reporting business, a music school, a used car business, and others have occurred freely in the neighborhood. *See supra* Section II.I. Only after Schneider took over the board and the Schneider Board implemented a "new policy" in early 2014 did the HOA decide to get involved in this suit. *See supra* Section II.G. The "new policy," however, has not been enforced against anyone other than Defendants. The HOA's action can only be described as arbitrary as a