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SUPREME COURT OF TEXAS
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No. 24-0714

IN THE SUPREME COURT OF TEXAS

GARY PEREZ AND MATILDE TORRES

v.

THE CITY OF SAN ANTONIO

RESPONSE BRIEF ON THE MERITS OF THE CITY OF SAN ANTONIO

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STATEMENT OF THE CASE

Nature of the Case: This appeal presents a question of Texas law certified to this Court by the Fifth Circuit. In the underlying suit, Plaintiffs-Appellants Gary Perez and Matilde Torres ("Plaintiffs") sued Appellee City of San Antonio ("City"), claiming that repairs to crumbling historic riverbank walls within Brackenridge Park would infringe on Plaintiffs' free exercise of religion in an area of the City-owned Park they consider sacred (the "Sacred Area"). Plaintiffs pled claims under the Texas Religious Freedom Restoration Act (TRFRA) and provisions of the Texas and federal constitutions, including art. I, § 6-a of the Texas Constitution, which is the subject of the certified question.

Trial Court: U.S. District Court for the Western District of Texas, San Antonio Division; Hon. Fred Biery, presiding.

Course of Proceedings: After an evidentiary hearing on Plaintiffs' request for a preliminary injunction, the court granted an injunction allowing Plaintiffs access to the Sacred Area once a hanging limb was removed but otherwise denied relief.

Court of Appeals: Fifth Circuit panel including Chief Judge Richman and Judges Stewart and Higginson.

Disposition in Court of Appeals: Opinion by Judge Stewart joined by Chief Judge Richman affirmed, finding that the planned Park renovations would not substantially burden Plaintiffs' sincerely held religious beliefs, and they are the least restrictive means to advance compelling governmental interests. App.2 p.37. Judge Higginson dissented in part on the issue of least restrictive means. *Id*. p.44. All three panel members agreed that any claim regarding access to the Sacred Area was moot because the City opened the area once the hanging branch was removed. App.2 pp.11, 44.

Disposition on Rehearing: On rehearing, the panel withdrew its opinion and certified to this Court a question regarding the proper interpretation of art. I, §6-a of the Texas Constitution. App.1.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this certified question pursuant to Tex. R. App. P. 58.

ISSUE ON APPEAL – CERTIFIED QUESTION

In response to the effect of COVID-era lockdowns on religious services in Texas, the Texas Constitution was amended in 2021 to provide as follows:

> **RELIGIOUS SERVICE PROTECTIONS.** This state or a political subdivision of this state may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship, in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief.

Tex. Const. art. 1, § 6-a (the "Amendment").

The Fifth Circuit certified the following question to this Court:

> Does the "Religious Service Protections" provision of the Constitution of the State of Texas—as expressed in Article 1, Section 6-a—impose a categorical bar on any limitation of any religious service, regardless of the sort of limitation and the government's interest in that limitation?
>
> We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified.

App.1 p.11.

The answer to the certified question must be:

> *No. The Amendment categorically forbids unequal treatment of religious services, but its text and context confirm that it does not impose an absolute bar on "any" limitation whatsoever. Relevant here, the Amendment does not preclude the City from addressing the undisputed public health and safety hazards in the City-owned Park.*

RECORD AND APPENDIX

The following items are included in the Appendix to this brief:

App.1 Opinion Certifying Question from the Fifth Circuit (*Perez v. City of San Antonio*, 115 F.4th 422 (5th Cir. 2024)).

App.2 Original Published Panel Opinion in the Fifth Circuit (*Perez v. City of San Antonio*, 98 F.4th 586 (5th Cir. 2024), *opinion withdrawn on other grounds and superseded on reh'g*, 115 F.4th 422 (5th Cir. 2024)).

TO THE HONORABLE SUPREME COURT OF TEXAS:

During the COVID-19 pandemic, state and local governments issued orders that prohibited and limited religious services but carved out exceptions for secular activities deemed to be "essential." Ensuing litigation revealed that RFRA, TRFRA, and existing constitutional free exercise jurisprudence were inadequate safeguards for the free exercise of religion. In response, the Texas Legislature passed, and the People of Texas ratified, the Amendment.

Plaintiffs urge that the Amendment imposes an *absolute* bar "on *any* limitation of any religious service, regardless of the sort of limitation." But a truly absolute bar on "any" limitation whatsoever would imply a right of unprecedented scope, unrecognizable to history and tradition, with absurd unintended consequences. It would far surpass any constitutional right construed by any court in the country. Indeed, the Supreme Court's "jurisprudence over the past 216"—now 233—"years has rejected an absolutist interpretation" of constitutional protections enshrined in the Bill of Rights. *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482 (2007). Even Plaintiffs shrink from an absolute interpretation, retreating to an "alternative" proposal that this Court invent an entirely new constitutional standard fashioned from bits and pieces of other areas of law.

None of this is what the Legislature or the People intended. The Amendment was passed to answer "[c]oncerns…over [the] restrictions put in place by state and

local governments in response to the COVID-19 pandemic,"[1] to "make it clear across all 254 counties...that the people of Texas believe that churches and religious liberty are essential."[2] To that end, the Amendment mandates that religious services be treated at least as favorably under the law as any secular activity.

But, emphatically, the Amendment was not intended to preclude—or even encompass—routine local governance to address clear public health and safety issues of the sort at issue here, like "removing dead and dying trees" from City-owned park land to "prevent[] them from falling and injuring visitors to the Park." App.2 p.21. Legislators left no room for doubt: "I don't think there's anybody, any court, anywhere that would read this to say that if there's a true health and safety issue, that you cannot enforce that health and safety issue."[3] As the Amendment's sponsor put it with respect to instances where addressing health and safety issues might have an incidental effect on religious services, "I trust our judges across the state, our fact finders in conjunction with the people to make sure that those instances are still protected. *That's not what this bill is meant to address*."[4]

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[1] House Comm. on State Affs., Resolution Analysis, Tex. S.J. Res. 27, 87th Leg., R.S. (2021), https://tinyurl.com/2t7duspw.
[2] Debate on Tex. H.J.R. 72 in the House Comm. on State Affs., 87th Leg., R.S. (March 25, 2021), https://tinyurl.com/mtx8wafe ("House Comm. Debate") (Statement of J. Saenz).
[3] House Comm. Debate (Statement of Rep. King).
[4] Debate on Tex. S.J.R. 27 on the Floor of the House, 87th Leg., R.S. (March 25, 2021), https://tinyurl.com/4tdaw5es ("House Floor Debate") (Statement of Rep. Leach) (emphasis added).

The Amendment forbids laws through which the government discriminates between different types of in-person activities on the basis of their religious character. Such laws are presumed unconstitutional, and their unequal treatment of religious services is subject to rigorous strict scrutiny, which amicus First Liberty Institute ("First Liberty") and the City agree is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *accord* First Liberty Br. p.7. This approach draws a clear line to forbid laws that discriminate against religious services vis-à-vis other in-person activities.

In practice, laws that treat religious services less favorably than other activities will virtually always fail strict scrutiny review. The presence of secular exemptions indicates that either the government's asserted interest is not compelling, or its means are not narrowly tailored to avoid burdening religious exercise. Construed in this way, the Amendment provides a clear step up from the free exercise protections that existed before the pandemic, which allowed such laws to stand.

The textual framework, historical context, and common sense all confirm this construction. The Amendment responded swiftly and directly to lockdown orders that closed church doors while exempting secular activities deemed to be "essential." The Amendment's scope reaches government action to "enact, adopt, or issue a statute, order, proclamation, decision, or rule"—a phrase that refers to action with the force of law like the lockdown orders. Its specific protection of "religious

services" confirms its purpose to eliminate unequal treatment for in-person gathered worship, which again points back to the lockdown orders. And its core triggering verbs "prohibits" and "limits" signal comparison with an *un*restricted or *un*limited status quo, indicating that religious services can't be impaired while secular activities continue unfettered. This construction also tracks the emerging consensus among courts and scholars clarifying how to approach free exercise challenges in a post-pandemic world.

Under the Amendment, the discriminatory treatment of religious services experienced during the pandemic cannot happen again. But the answer to the Fifth Circuit's certified question must be "no," because the Amendment does not absolutely forbid "any" limitation of "any" sort. It does not bar the City from addressing the undisputed public health and safety hazards in Brackenridge Park.

STATEMENT OF FACTS

A. Voters passed a bond and the City developed a plan to address undisputed health and safety hazards in Brackenridge Park.

Brackenridge Park is a large urban park on the San Antonio River. The Park is an integral part of the City's history and culture and includes the San Antonio Zoo, Sunken Garden Theater, Japanese Tea Garden, and Witte Natural History Museum. ROA.557-58; ROA.597-98. The Park also serves as a habitat for various wildlife species, including migratory birds such as herons, egrets, and cormorants. ROA.558. The City owns and manages the Park through its Parks and Recreation Department.

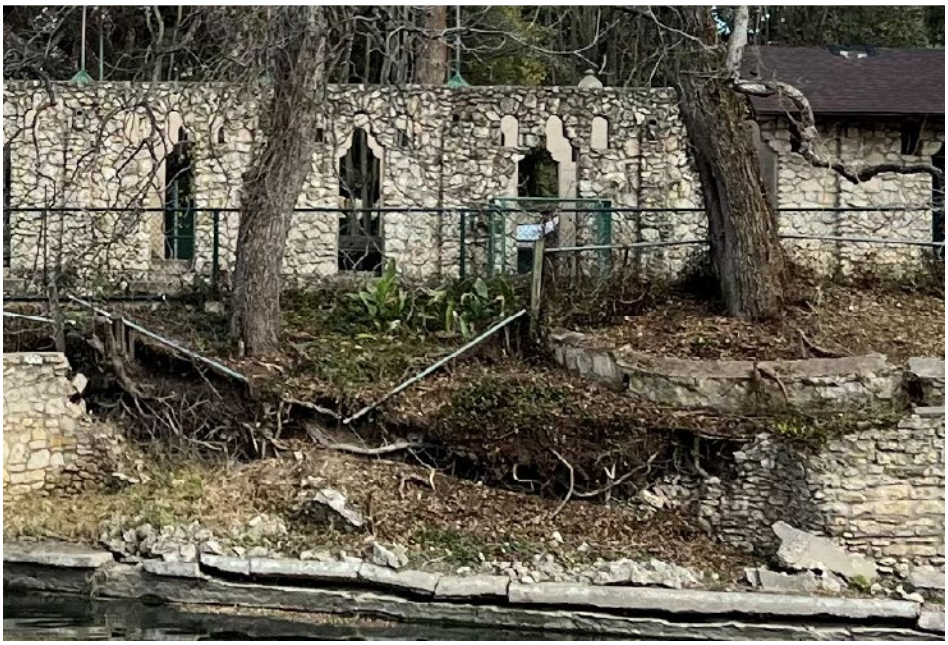
ROA.598. All of the activity at issue in this lawsuit thus involves the City's conduct on the City's own land. Plaintiffs have no ownership or property interest in the Park. ROA.4134-4135; ROA.4178-4179.

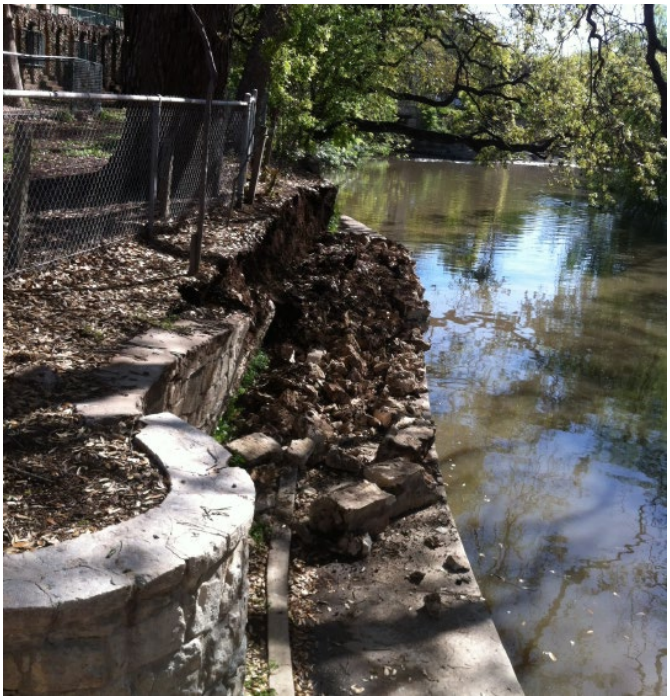
1. The riverbank walls are failing.

In the early 1900s, Lambert Beach was constructed at a bend in the river within the Park:

ROA.3100.

Trees and their root systems have damaged the north-bank retaining walls of the river along Lambert Beach. ROA.4309. The walls present a safety hazard. ROA.558; ROA.2268-2281. Some portions have already failed, and others are at risk of failing:





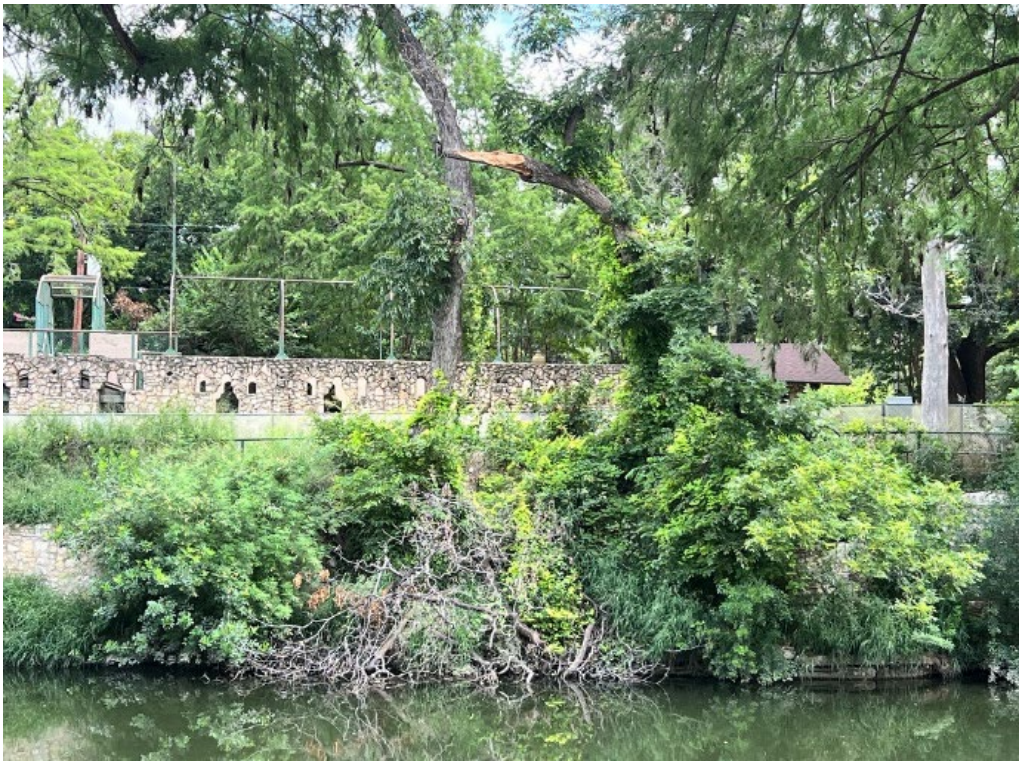
ROA.2342; ROA.171; ROA.2269.

The City's expert arborist explained that if the retaining walls are not repaired, they will eventually fail, and all of the trees will be lost:

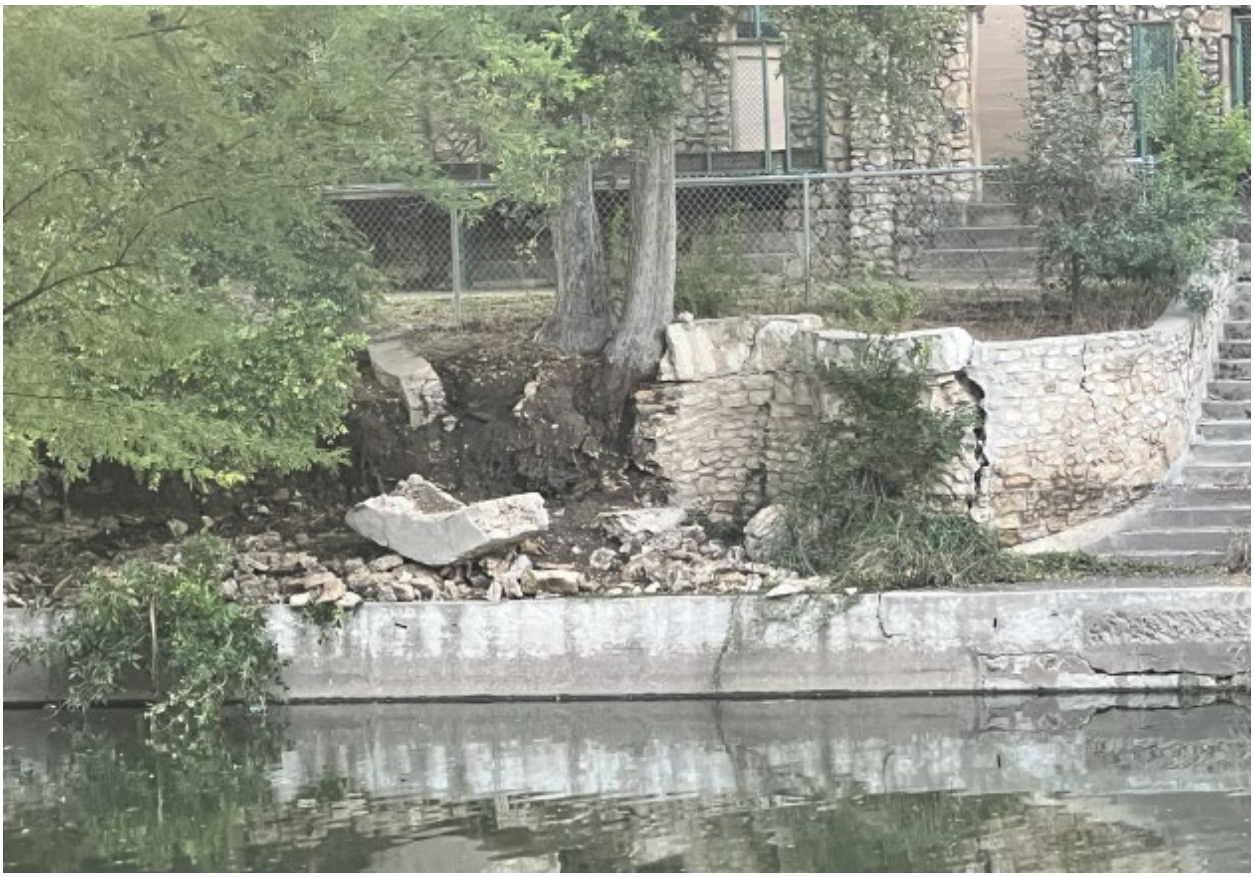
> Those trees and those walls are competing for the same space and, in fact, I'll go further that the trees are benefiting from the wall. If the walls were—if they weren't repaired and if they were to fail, in my opinion over time, it would not necessarily be immediate, but over time weather is going to erode out[,] floods is going to erode out the soil from under those trees...[I]t's just a matter of time before the trees will [fall].

ROA.4806.

Recent events have confirmed the arborist's analysis, as the situation continues to deteriorate. In June 2024, a large section of a pecan tree adjacent to the Sacred Area failed:



See App.1 to Resp. to Mot. for Extension, filed 10/1/24. And in September 2024, a section of the walls adjacent to the Sacred Area collapsed due to flooding caused by rainstorms:



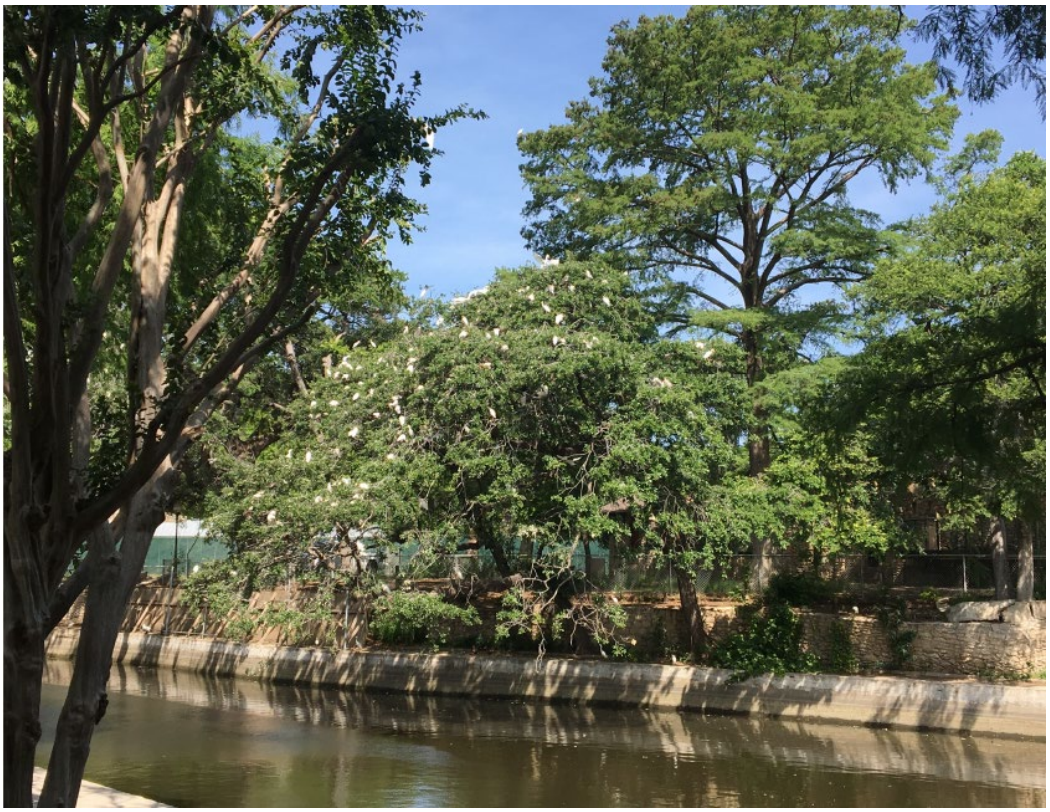
Id.

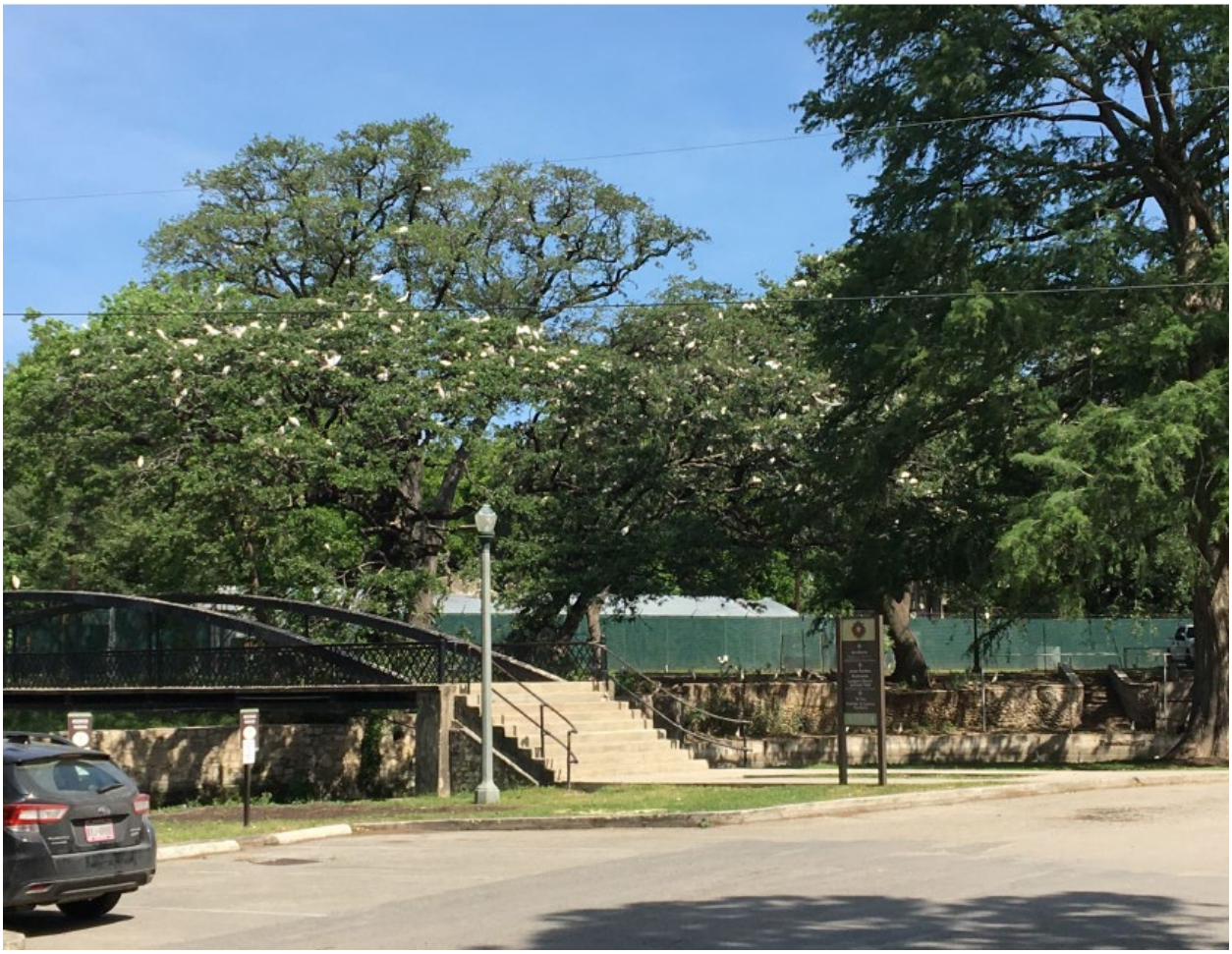
Plaintiffs do not dispute that the walls need repair and that some of the trees will necessarily be removed in that process. ROA.56 ("The riverbanks within the Park are largely bare and eroded."); ROA.4116 ("Q. And you don't dispute that the walls need to be repaired, correct? A. I don't dispute that. No, ma'am."); ROA.4145-4146 ("I have no objection to the walls' repair...I understand that...trees need to be removed."). As discussed below, Plaintiffs' primary complaint is with the City's chosen engineering methodology to accomplish that end.

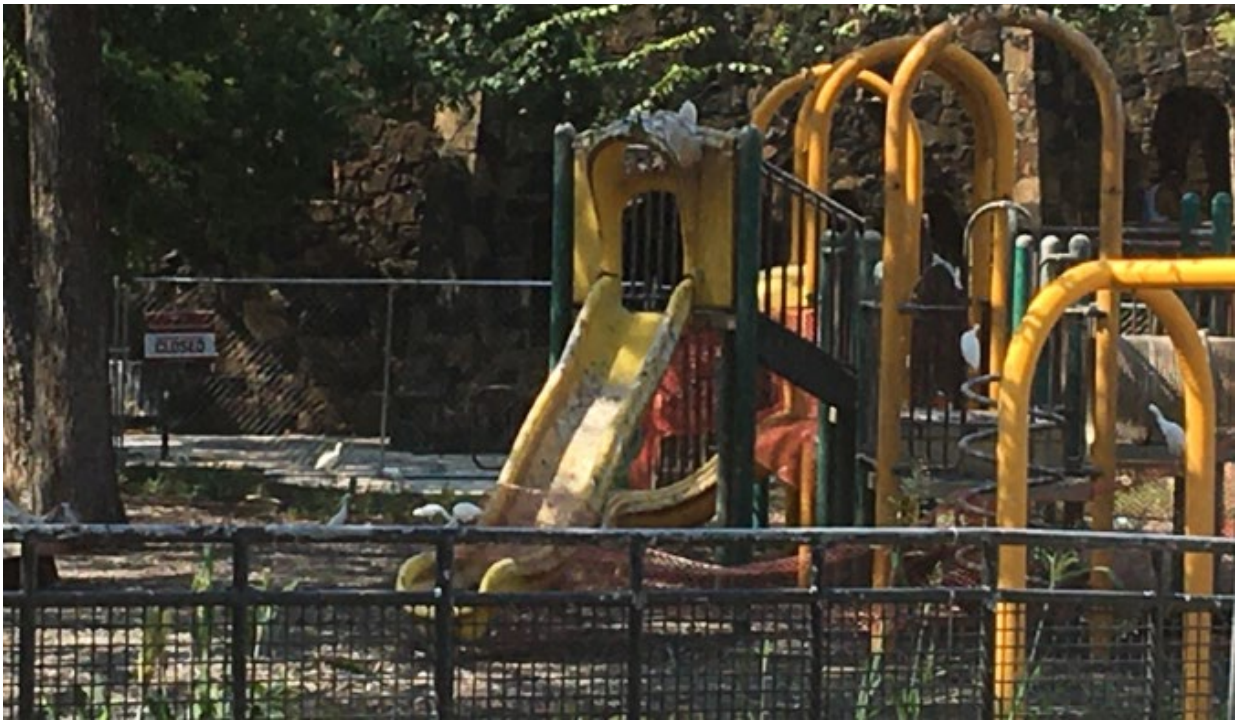
2. Migratory birds are depositing copious guano, and federal law prohibits construction to fix the walls if these birds are nesting.

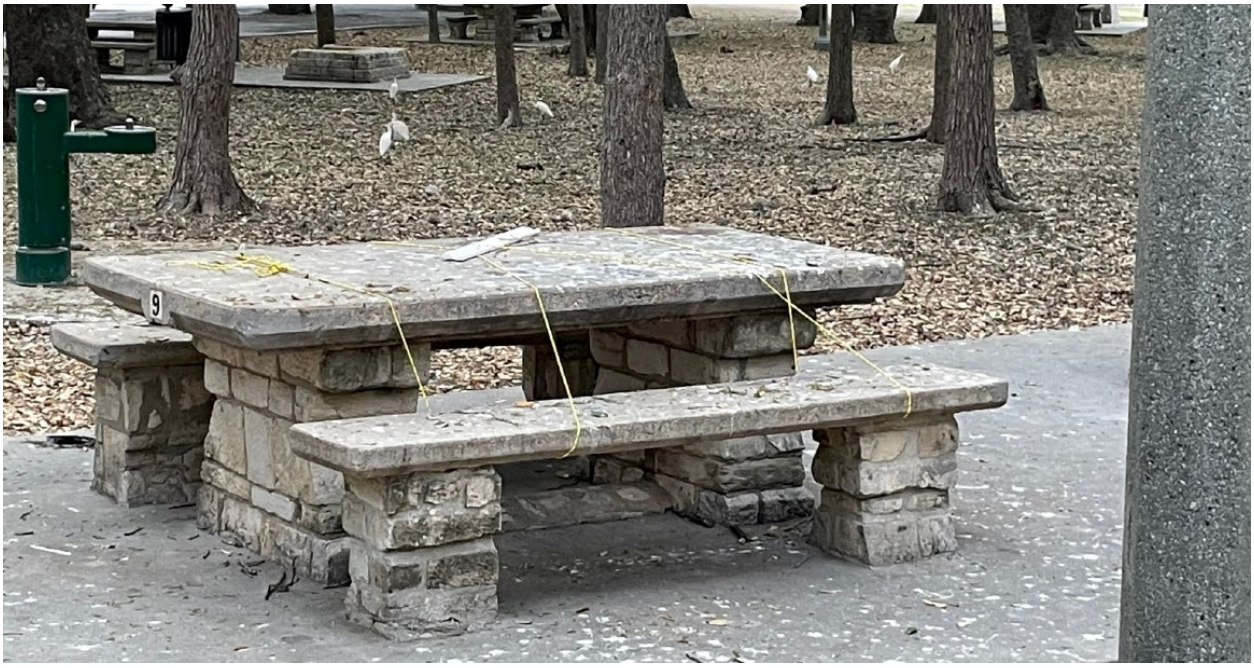
The Park is a seasonal home to migratory birds. The birds historically developed a rookery (a large colony of breeding birds) around Lambert Beach. ROA.2379. The river there has elevated E.coli levels because of the birds' fecal bacteria. ROA.2381-82. Picnic areas and playgrounds become "covered in bird feces." ROA.4478-79.

The situation is so severe that the area becomes "nearly unusable for 10 months of the year due to the bird density/habitat." ROA.2381. The rookery and its associated hazards are extensive:









ROA.2386; ROA.2399; ROA.2390; ROA.2393.

State wildlife veterinarian Dr. J. Hunter Reed, who has a Master's degree in Public Health in addition to his veterinary education, explained that the rookery presents health and safety issues *particularly to children* because of the significant amount of guano near playgrounds and other areas in the Park where children play:

> As it pertains to the rookery in Brackenridge Park, I have significant public health concerns for my fellow San Antonians. When large rookeries are established in the immediate vicinity of playgrounds, infrastructure, and recreational hardscapes, the risk of zoonotic disease transmission from several agents (including histoplasmosis, psittacosis, salmonellosis, among others) increases substantially. The sheer magnitude of fecal contamination, high likelihood of human contact with fecal matter, and limited ability to perform effective environmental decontamination make rookery management action paramount to disease risk mitigation. Additionally, the population most likely to be exposed in this scenario, young children, are also the most likely to develop severe disease if infected. This is an outcome that I believe everyone seeks to avoid.

ROA.2267; ROA.2426 ("When rookeries establish near playgrounds,…the risk of zoonotic disease transmission…increases.").

To address the health threat within the public Park, the City and Texas Parks and Wildlife developed a rookery management program "to deter birds from an undesired location and encourage them to go to an area where they would be more desirable." ROA.4604; ROA.2425-2440. The program includes trimming trees and brush to reduce nesting habitat as well as deterrent techniques including mylar balloons, pyrotechnics, and spotlights. ROA.2382. These measures "do not harm the birds or keep them from reproducing." ROA.2426. They just encourage the birds to nest elsewhere.

These methods began in 2022 and in large part have successfully deterred migratory birds from nesting in the Lambert Beach area for the past two years. ROA.4494. Notwithstanding the relocation of the rookery, the birds still regularly visit Lambert Beach and the City does not bother them: "They come in and hang out, you see them in the morning, they come in through the day. They'll come in the trees and then they'll go down in the water and then they'll fly back to their nesting area. So it's foraging and then they'll go back and switch out with their mate." ROA.4501.

Among the various species at issue, egrets and herons pose the greatest threat to human health and safety; they are the real target of the program. ROA.4617; ROA.4461. But the different species (egrets, herons, and cormorants) are also

colonial—"they want to be in the group"—and will follow one another to nesting areas irrespective of species. ROA.4494. That behavior includes moving in and out of each other's nests interchangeably. ROA.4474.

Consequently, "there is not a way" to deter the more problematic species like egrets and herons without deterring the less problematic species like cormorants. ROA.4472-4474 (there is no "way to do habitat modification that would deter herons and egrets but would not deter cormorants"). The record is abundantly clear on this point: "There isn't a way." ROA.4625. In order to accomplish the goal of mitigating the hazard of bird feces, all species must be deterred.

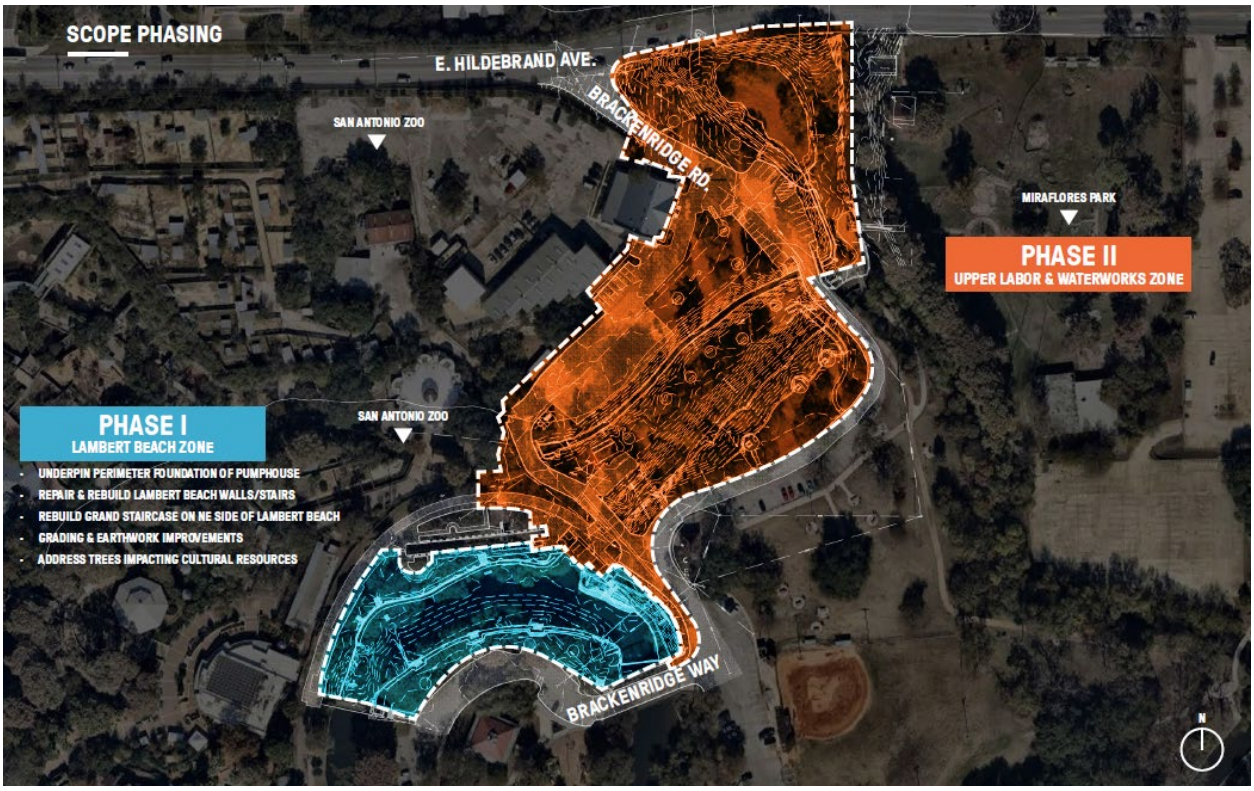
That said, once a critical mass of the early nesters establishes a rookery elsewhere, it is sometimes possible for activities to "slow down and cease" with respect to the "stragglers, who are on the end of the migration train," because these late-arriving birds tend to follow the flock. There are documented exceptions to that dynamic, however, including instances where the established nesting is disrupted "and then the birds will look to create again." ROA.4497.

In 2022, the City employed this "slow-down-and-cease" approach. Having persuaded the majority of the colony to establish its rookery elsewhere, the City "stop[ped] bird deterrent activities in June of that year." Through careful monitoring, this allowed some late-arriving cormorants to "come in and nest" at Lambert Beach, to the exclusion of the problematic species. ROA.4385.

Finally, the federal Migratory Bird Treaty Act, 16 U.S.C. § 703, forbids interference with actively nesting migratory birds and their nests. The statutory prohibition lasts "from the moment that egg is conceived in the nest until the fledgling can get out on its own." ROA.4470. "Some are weeks, some are months. It's a long period." *Id*. So, separate and apart from the hazards posed by guano from the rookery, any construction project to address the failing riverbank walls can proceed only if no migratory birds are nesting within the Lambert Beach area.

3. The City developed its plan to address the hazards in the Park while preserving as many trees as possible through a lengthy process that accounted for Plaintiffs' religious beliefs.

In May 2017, San Antonio voters approved bonds for repairs to the Park, and the City spent several years developing its plan. ROA.562-67. The City fenced off a two-acre area ("Project Area") for the first phase. ROA.599; ROA.619-42. The Project Area is highlighted in blue in this map:

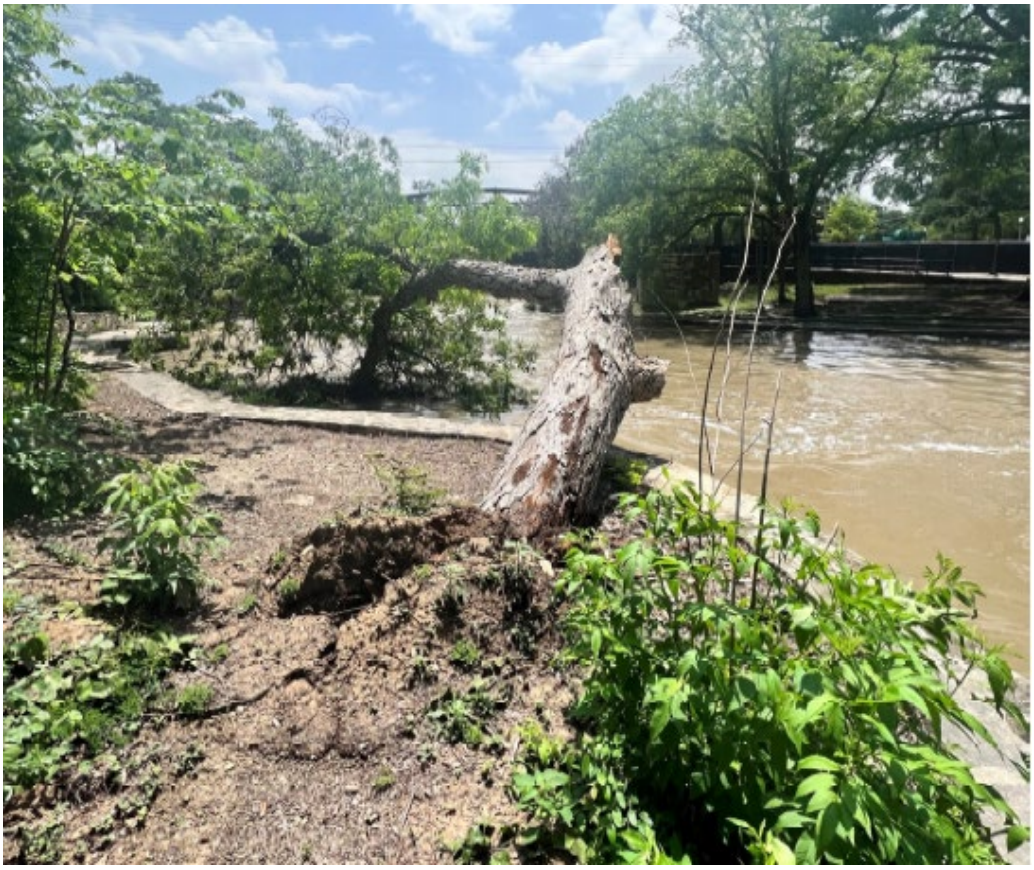


ROA.2221.

The City's plan calls for using a cantilever method to repair the north-bank retaining walls at Lambert Beach across the river from the Sacred Area. ROA.644; ROA.2249. That repair will entail removing some trees on the north bank and relocating others that are close to the river. No trees will be affected in the Sacred Area on the south bank.

The City will also remove dead and dying trees that present real health and safety dangers to the public. The dangers from falling trees within the public Park are not hypothetical. In March 2023, a limb from a cedar elm fell onto a sidewalk at the San Antonio Zoo, allegedly injuring seven individuals, four of whom have filed

a lawsuit seeking damages of $1 million. ROA.566. In September 2023 a cedar elm failed and fell into the river near Plaintiffs' Sacred Area:



ROA.2355-69. And, as evidenced by photographs from June and September 2024, the situation continues to deteriorate.

While developing its plan for Park renovations, the City consulted highly-credentialled arborists and engineers; held numerous hearings to consider public input; and adjusted plans in an effort to save the greatest number of trees. ROA.3096-99. The City did not simply decide on the cantilever method to repair the retaining walls and leave it at that. City personnel overseeing the project, four volunteer arborists involved with the tree study, and two engineers met "to really look at the

alternatives and to figure out whether or not what was being proposed was the best solution moving forward, that we were saving as many trees as possible." ROA.4662. The group considered Plaintiffs' alternative pier-and-spandrel method to analyze its potential efficacy to save more trees:

> And so what we did is we talked about what [an engineering expert] was recommending in terms of pier and spandrel and…how that works, like how that would be installed and what the differences are, and [he] had the opinion that if we used the pier and spandrel method, that additional trees could be saved and so we talked through that with the arborists and with our design engineer that afternoon.
>
> And then following that, there was also a site visit…to talk specifically about specific trees.

Id. The group concluded that Plaintiffs' method would not save any additional trees: "The consensus in the meeting with the arborists was that no additional trees would be saved because they would still be impacted by the construction regardless of the methodology." ROA.4663.

In addition to those extensive deliberations, the City also considered input from members of the public during seven public meetings, one of which was a tour of the Park, and a virtual town hall. ROA.4401. The City took that "public information into account when making further design modifications to the construction plan." *Id*. Contrary to Plaintiffs' representations, the City considered Plaintiffs' input specifically and modified its plan based on their input:

> Q. Do you recall receiving any input during these meetings from either of the plaintiffs?

A. Yes. Yes, I did.

Q. And the City took that input?

A. We did.

Q. And did the City give it consideration in the implementation of the design and construction plan?

A. Yes, we did.

Q. Were any of the plans modified based on any of the public feedback?

A. They were.

Q. What was modified?

A. The amount of trees to be destroyed was modified. There's a lot of detail in there. But, yes.

ROA.4406; *see* ROA.2263-66 ("In response to public input, the project has been updated to preserve 35 additional trees.").

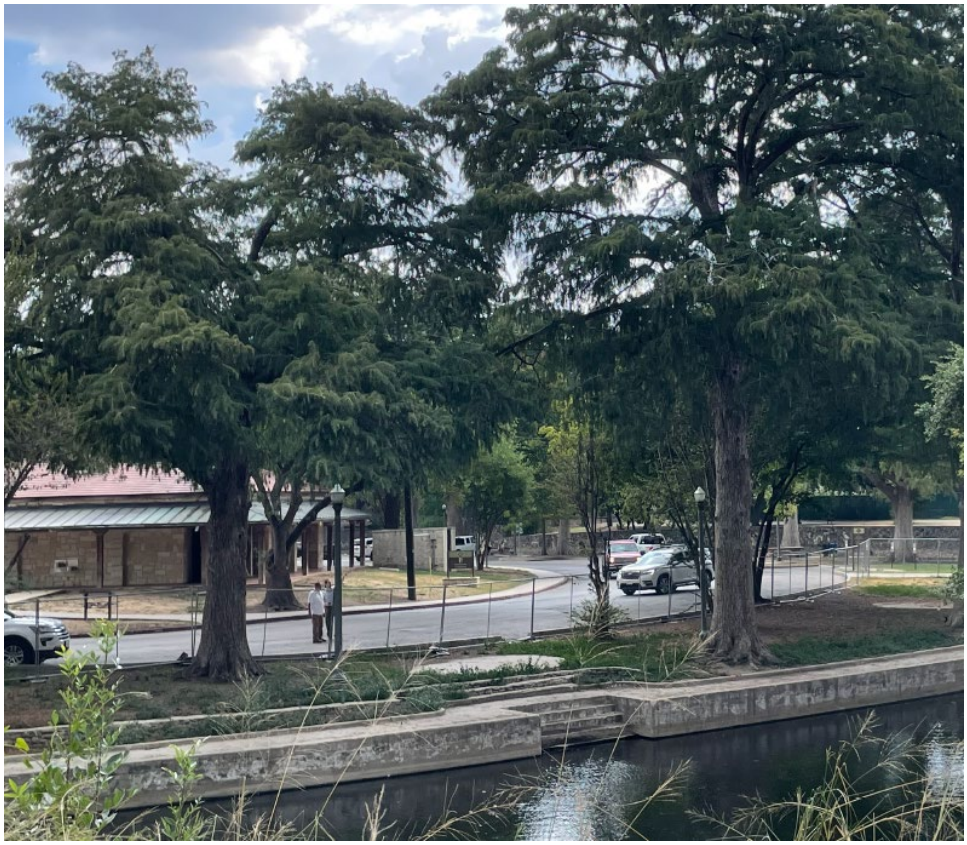
When Plaintiffs allege, again and again, that the City did not consider their beliefs in developing the plan, that is simply false. *See* App.2 p.26 ("The record does not support Appellants' allegations that the City has refused to try to accommodate Appellants' religious exercise.").

B. The record contradicts Plaintiffs' assertions that the City is "denying them access to and destroying a unique place of worship."

Plaintiffs would have this Court believe that the City is "blocking access to a sacred site and...destroying necessary components of a religious service." BOM.3. The record contradicts both suggestions.

1. Plaintiffs conduct religious services on a twenty-by-thirty-foot "Sacred Area" within the Park.

Plaintiffs believe in the sacredness of a twenty-by-thirty-foot "Sacred Area" situated between two bald cypress trees on the southern bank of the river near Lambert Beach:



ROA.2209.

Plaintiffs' religion requires performing ceremonies at the Sacred Area. The Sacred Area provides "access to the steps on the southern bank," ROA.4244. Plaintiffs incorporate the riverfront into their ceremonies. One important ceremony—the "Midnight Water" ceremony—takes place on the winter solstice in

late December. ROA.4839; BOM.11. Plaintiffs state that "nesting cormorants" must be present during such ceremonies to be viewed in the cypress trees:

> [W]orshippers view a reflection of the cormorant in the river (the underworld), while standing both in the presence of nesting cormorants (the middle world) and beneath the Eridanus constellation (the upper world)...*This 'Midnight Water' ceremony can only be performed once a year: on the winter solstice*.

BOM.11 (emphasis added).

According to Plaintiffs, the religious effectiveness of their ceremonies turns on being able to see one's own reflection in the water, silhouetted against the cypress tree branches and cormorants above, while standing on the Sacred Area. ROA.4094 ("I must see my reflection in the water."); ROA.4093; ROA.4129; ROA.4144. But no tree canopies that would be visible behind one's own reflection viewed from the vantage point of the Sacred Area will be removed or relocated by the City's plan. ROA.4503 ("They're being preserved in place."). Only trees across the river, on the north bank, will be removed or relocated as part of the Park remediation.

During their migration season, cormorants visit the Sacred Area even when they don't nest there—which has largely been the case for at least the past two years due to the City's rookery management program. ROA.4529 ("[W]e were able to fend them from the project area the last two years."); ROA.4501.

But cormorants' annual migration is bounded. They migrate to San Antonio each year in April or May. ROA.4607. All of the migratory birds, including

cormorants, leave and migrate south at the "first cold snap" in mid-to-late-October. ROA.4623. Irrespective of rookery management activities, no cormorants are in the Park between the end of October and late spring. As the Fifth Circuit observed, "the record shows that, regardless of the rookery management program, no cormorants, due to their migration patterns, inhabit the area for extended periods of time each year." App.2 p.18. As a matter of fact, therefore, no cormorants are present in the Sacred Area during Plaintiffs' "Midnight Waters" ceremony on the winter solstice.

2. Plaintiffs enjoy unfettered access to the Sacred Area—indeed, even more access than the general public.

To facilitate project operations and protect the public, the City fenced off the Project Area where the first phase of work is slated to occur. ROA.599; ROA.619-42. The Sacred Area is within the Project Area. Due in part to a dangerous broken tree limb hanging over the Sacred Area, the Sacred Area was initially included in the fenced-off area. But the City removed that limb and reconfigured the fencing in November 2023 such that the Sacred Area is fully open to the public. Accordingly, the Fifth Circuit held that Plaintiffs' "access claims are moot." App.2 p.11.

The City has gone beyond merely ensuring that Plaintiffs enjoy access to the Sacred Area equal to that of the general public. On every occasion that Plaintiffs have requested a permit to conduct overnight ceremonies at the Sacred Area during periods when the Park is normally closed, the City has granted the requested permit.

It is thus not true that the City is "blocking access to a sacred site," as Plaintiffs represent to this Court. BOM.3, 31.

3. The City's plan would not "destroy" the Sacred Area any more than Plaintiffs' suggested alternative would.

Plaintiffs complain that the City's relocation and removal of trees as part of the retaining wall remediation would "destroy the very components that make [Plaintiffs'] services possible." BOM.31. But the City's plan to remediate the *north* riverbank will not affect trees in the Sacred Area, which is on the *south* riverbank. The bald cypress trees that flank the Sacred Area will remain exactly as they are today. ROA.4648-4649. The retaining wall work—and the attendant removal or relocation of trees—is on the *opposite* bank of the river from the Sacred Area.

The dispute regarding trees is one of degree. Plaintiffs agree that the north-bank retaining walls must be repaired. And they agree that some trees will necessarily be removed as part of that work (indeed, multiple trees on the north bank have failed on their own in the time that this litigation has been pending because of the crumbling walls and erosion). Plaintiffs contend, however, that their competing engineering method for repairing the walls could save more trees. *See* App.2 p.6 (noting that Plaintiffs sought injunctive relief for "(2) preservation of the spiritual ecology of the Sacred Area by minimizing tree removal").[5]

[5] Plaintiffs ignore the very real public safety threat from trees in the Park falling because of the crumbling riverbank and lack of needed remediation. The City, as owner of the Park, could be

In the district court, Plaintiffs claimed that the City's chosen cantilever engineering method was inferior and touted pier-and-spandrel as their chosen alternative. In fact, as both the district court and Fifth Circuit found, Plaintiffs' plan would *not* save more trees than the City's plan. Additional trees would be lost to excavate a wide enough trench to ensure the safety of the construction workers. The pier-and-spandrel trench needs "some kind of support so that the soil doesn't collapse on the worker." ROA.4308; *see also* ROA.4308 (discussing the need for "shoring" excavation for the pier "to make sure that neither collapses on the worker"); ROA.4421. There are also "practical factors that affect the options available to the engineers." ROA.4687. Tree location matters—"how are you going to get a drilling rig in here?...It will require removing a whole series of canopies." ROA.4688. The walls' condition matters because "if you put a large piece of equipment on top of the wall, that will generate horizontal pressure on the face of the wall." ROA.4688. These factors weigh against the pier-and-spandrel method, which requires large and heavy equipment. *See also* App.2 pp.29-32 (summarizing evidence of the City's efforts to preserve as many trees as possible and its analysis of pier-and-spandrel and concluding that "the City's tree removal plan is narrowly

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responsible for injuries to the public from falling trees and hazards like the hanging limb that kept the Sacred Area temporarily closed off. Plaintiffs' claims—which seek injunctive relief expressly to stop tree removal and relocation—do not acknowledge the imperative of that compelling governmental interest.

tailored to achieve the City's compelling governmental interest of making the Project Area safe for visitors to the Park").

But more to the point as relates to the Amendment, even Plaintiffs admit that their plan would eliminate at least some trees. One of two things therefore must be true. Either (1) Plaintiffs' proposed methodology would flunk Plaintiffs' own "absolute bar" construction of the Amendment, rendering Plaintiffs' construction infirm; or (2) Plaintiffs' beliefs allow that some aspects of the Sacred Area's "spiritual ecology" can be changed while still maintaining its sacredness, meaning that the City's plan does not "prohibit or limit" their services, even under an absolute construction. Either way, the upshot is that the Amendment does not—and cannot be read to—preclude the City from addressing safety hazards within the public Park.

C. Every court to have considered the question has ruled that the City's remediation plan satisfies strict scrutiny.

Plaintiffs filed this lawsuit in federal court and sought a preliminary injunction. They requested access to the Sacred Area and asked the district court to enjoin the City's remediation plan to the extent of tree-removal activities and the rookery management program. After a four-day evidentiary hearing, the court did three things: (i) ordered the City to remove the dangerous broken limb hanging over the Sacred Area and provide Plaintiffs access, ROA.736; (ii) denied Plaintiffs' requests as to the trees and birds, ROA.984; and (iii) denied an injunction pending appeal, ROA.1155. The thrust of the rulings was that the City's plan satisfied strict

scrutiny as to the trees and birds; that is, it was the least restrictive means to advance a compelling governmental interest.

The City removed the hanging limb and reconfigured fencing to allow full access to the Sacred Area, thus mooting the access issue. ROA.740. Plaintiffs appealed from the order denying injunctive relief as to the trees and birds.

On appeal to the Fifth Circuit, all panel members agreed that any dispute regarding access to the Sacred Area was moot because the City allowed full access after the dangerous hanging branch was removed. App.2 pp.9, 44. A divided panel issued an opinion affirming the denial of other injunctive relief. App.2. The majority concluded that the City "met its burden" to satisfy strict scrutiny under TRFRA, including as articulated in this Court's opinion in *Barr v. City of Sinton*, 295 S.W.3d 287, 299 (Tex. 2009) (requiring the government to show that it used the least restrictive means of furthering a compelling interest). App.2 p.37 ("We also conclude that the City's tree removal plan and rookery management program do not violate TRFRA because they are the least restrictive means to advance the City's compelling governmental interests.").

On rehearing, the panel withdrew the opinion and certified a question to this Court regarding whether the "Religious Services Protection" Amendment was intended as an *absolute* bar that forbids "any" limitation whatsoever and thus

prevents the City from addressing the public health and safety hazards in the Park. App.1 p.11. This Court accepted the certified question.

SUMMARY OF ARGUMENT

The certified question regarding the Amendment arrives at this Court in a very different context than the COVID-era enactments that prompted its adoption. The Amendment was aimed at lockdown orders that closed church doors and prohibited worship services while at the same time permitting other secular functions that were deemed "essential." Nothing in the Amendment's text, context, or legislative history indicates an intent to go far beyond such orders to preclude day-to-day municipal actions on city-owned land like park renovations to address safety issues that may have incidental downstream impact on religious practice.

The Amendment employs categorical terms—government "*may not* enact"—but so do all constitutional protections, and the courts uniformly construe them in balance with other societal imperatives. Justice Kavanaugh recently observed that, "[r]ead literally," the First and Second Amendments "might seem to grant absolute protection, meaning that the government could never regulate speech or guns in any way. *But American law has long recognized, as a matter of original understanding and original meaning, that constitutional rights generally come with exceptions*." *United States v. Rahimi*, 144 S. Ct. 1889, 1911 (2024) (Kavanaugh, J., concurring) (emphasis added) (upholding statute restricting certain persons from possessing

firearms). Even Plaintiffs concede that "may not" in the Amendment properly carries exceptions. BOM.38 (acknowledging undefined "boundaries" to the Amendment's reach). Nothing about the Amendment indicates an intent to abandon that longstanding construct wholesale.

The Amendment ensures that if a law allows secular activities to proceed while prohibiting or limiting religious services, that law is presumed unconstitutional. If the law allows any doors to be open, then the church doors must be open. Guaranteeing such equality between religious and secular activity in fact changes the law. It provides greater protection for religious services than existed before the Amendment. But that increased protection does not mark a wholesale abandonment of constitutional jurisprudence or warrant crafting an entirely new and heretofore unknown standard.

ARGUMENT

A. The Amendment enshrines the will of the People that religious services be deemed "essential" and treated at least as favorably under the law as any secular activity.

During a time of unprecedented crisis and uncertainty in the COVID-19 pandemic, state and local governments around the country issued sweeping lockdown orders prohibiting individuals from gathering together, including for religious worship.[6] Under enforced isolation, worshippers struggled to practice

[6] *E.g.*, Bexar County, *Executive Order NW-03 of County Judge Nelson W. Wolff* at 5 (Mar. 23, 2020), https://tinyurl.com/5x4f2mu9; Dallas County, *Amended Order of County Judge Clay*

according to the tenets of their faith. That tension became more pronounced in light of exemptions the orders made for certain secular activities. As churches closed, bars and restaurants stayed open. Governments deemed some types of activities to be "essential," to the exclusion of other activities.

Religious practitioners challenged lockdown orders as violating their free exercise rights. These challenges often were unavailing. Courts regularly found that lockdowns met the standards of strict scrutiny in light of the pandemic's exigencies, notwithstanding acknowledged exemptions for certain secular activities to the exclusion of religious worship.

Texas rejected that unequal treatment by enacting the Amendment. The Amendment mandates that no government may pass a law that "prohibits or limits religious services." In doing so, the Amendment guarantees that religious services must be treated at least equally under the law to any comparable secular activity.

1. Pandemic lockdowns and legal challenges provide historical context.

Before the Amendment, Texas had three primary layers of protections for free exercise: RFRA, TRFRA, and the federal First Amendment. All three laws apply a

Jenkins at 2 (Mar. 18, 2020), https://tinyurl.com/4xnkvtxa; Harris County, *Order of County Judge Lina Hidalgo* at 4 (Mar. 24, 2020), https://tinyurl.com/ymyzrn49; Tarrant County, *Executive Order of County Judge B. Glen Witley* at 5 (Mar. 24, 2020), https://tinyurl.com/mr26pa7y; Travis County, *Order by the County Judge* at 1-2 (Mar. 17, 2020), https://tinyurl.com/2xfwk2w3.

version of strict scrutiny. *See generally Barr*, 295 S.W.3d at 294-97.[7] A brief history of these laws sets the stage for the passage of the Amendment.

The Fifth Circuit explained that Texas adopted TRFRA in "response to a twenty-year kerfuffle over the level of scrutiny to apply to free exercise claims under the First Amendment." *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258 (5th Cir. 2010). It began when the Supreme Court held, in *Employment Division, Department of Human Resources of Oregon v. Smith*, that the First Amendment's Free Exercise Clause does not bar otherwise valid laws of general application that incidentally burden religious conduct. 494 U.S. 872, 890 (1990).

In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), which adopted the compelling interest test articulated in two prior Supreme Court cases. 42 U.S.C. § 2000bb *et seq*. That test prohibits government from substantially burdening a person's free 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

[7] Two other sources of law bear mentioning. They are the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and the Texas Constitution's Freedom of Worship Clause, located at art. I, §6. RLUIPA is a federal law protecting the religious freedoms of individuals confined to federal correctional facilities. It also protects individuals, houses of worship, and other religious institutions from discrimination in zoning and landmarking laws. This second prong applies to state and local governments receiving federal funding. RLUIPA applies strict scrutiny. The Texas Constitution art. I, §6, enacted in 1876, is lengthier than the federal First Amendment Religion Clauses, but has been described as "Texas' equivalent of the Establishment Clause." *Williams v. Lara*, 52 S.W.3d 171, 186 (Tex. 2001). The Amendment's language was appended to §6, as §6-a. Because neither RLUIPA nor § 6 are implicated, this brief will not discuss them in depth.

least restrictive means of furthering that compelling governmental interest. *Id*. (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). After the Supreme Court held that RFRA does not apply to the states, *City of Boerne*, 521 U.S. at 532-36, Texas adopted TRFRA to "provide the same protections to religious free exercise envisioned by the framers of its federal counterpart, RFRA." *Merced v. Kasson*, 577 F.3d 578, 587 (5th Cir. 2009). Because TRFRA, RFRA, and RLUIPA "were all enacted in response to *Smith* and were animated in their common history, language and purpose by the same spirit of religious freedom," Texas courts "consider decisions applying the federal statutes germane in applying the Texas statute." *Barr*, 295 S.W.3d at 296.

During the pandemic, these layers of protection proved inadequate. Courts construed lockdown orders as neutral laws of general applicability, even where the government exempted some secular activities. Courts applied strict scrutiny to the lockdown orders at face value and readily found social distancing during the pandemic to be a compelling state interest. For example, in *South Bay Pentecostal Church v. Newsom*, the Supreme Court issued a *per curiam* memorandum opinion denying an injunction against California's statewide lockdown order. 140 S.Ct. 1613 (2020). Chief Justice Roberts noted that, "[a]lthough California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment." *Id.* at 1613 (Roberts, C.J., concurring).

Justices Kavanaugh, Thomas, and Gorsuch dissented from the denial of injunction, highlighting the "litany of other secular businesses that are not subject to an occupancy cap." *Id.* at 1615 (Kavanaugh, J., dissenting).

This short but influential memorandum opinion has been cited in more than 300 cases. One free exercise scholar described *South Bay* as a "superprecedent," and "one of the most influential Supreme Court decisions in the modern era." Josh Blackman, "The 'Essential' Free Exercise Clause," 44 Harv. J.L. & Pub. Pol'y 637 (2021). Blackman notes that the "bulk of the cases" in the immediate aftermath of *South Bay* "involved houses of worship challenging restrictions on public gatherings," and "[i]n every case but one, the courts relied on elements of Chief Justice Roberts's concurrence, and ruled against the house of worship." *Id.*

Such was the state of free exercise law leading up to the drafting and passage of the Amendment.

2. Church closures and secular exemptions led directly to the Amendment

Parallel to these developments in the courts, lockdowns were playing out on the ground in Texas. Invariably, lockdown orders prohibited gathering for in-person religious services while other activities were carved out and allowed to continue. For example, the Bexar County lockdown order mandated that "Religious and worship services may only be[] provided by video, teleconference or other remote measures," but liquor stores, dry cleaners, plumbers, electricians, and exterminators were all

deemed "Exempted Business and Exempted Individual Activities" that could continue to operate unfettered.[8] Under the Tarrant County lockdown order, in-person religious services were prohibited, but real estate transactions and pool services could continue.[9]

Against that backdrop, the Legislature passed and the People ratified the "Religious Services Protection" Amendment.

a. The Legislature intended the Amendment to mandate that religious services are "essential," not to impair local governments from addressing day-to-day health and safety issues.

The purpose of the Amendment is to make clear "that officials cannot shut down places of worship under the pretense of public protection, and that churches and places of worship are essential because faith itself is essential."[10] As the Amendment's sponsor emphasized, "In many instances when liquor stores and casinos have been able to operate at full capacity, churches have been closed down."[11] This type of discriminatory treatment of protected religious rights is what drove the Amendment:

[8] https://tinyurl.com/5ajd2w8b.
[9] https://tinyurl.com/puf23jkt.
[10] Debate on Tex. S.J.R. 27 in the Senate Comm. on State Affs., 87th Leg., R.S. (March 8, 2021), https://tinyurl.com/bdjcusme ("Senate Comm. Debate") (Statement of J. Covey).
[11] House Comm. Debate (Statement of Rep. Leach).

- "...casinos and liquor stores were permitted to stay open as essential but churches were shuttered."[12]

- "What took place during this initial stage of the pandemic [] in regards to the church both by the judiciary and executive was unprecedented and far overreaching such as when some of our government officials deemed church unessential and ordered them to pause."[13]

- "At the same time, however, comparable secular businesses were allowed to operate."[14]

- "If we've learned anything that elected officials have made any mistake during the pandemic that we've now lived through, it has been that of treating our houses of worship as some sort of social club of minimal value compared to laundromats, liquor stores, and banks rather than the dynamic essential service that sustains the literal heart and soul of a nation."[15]

- "Why was closing the church on top of the priority while they left liquor stores, strip clubs open[?]...I think we saw over this past year with the difference of priorities being placed, whether as she said liquor stores, strip clubs, whatever, placed in a position to where the church has become just something to tolerate."[16]

But in ensuring that religious services would enjoy no worse treatment than secular activities, the Legislature did not intend for the Amendment to impair the ability of local governments to conduct their day-to-day activities and address garden-variety public health and safety issues:

> [E]xisting local laws and ordinances and rules dealing with the fire code, with health and safety hazards, with zoning restrictions, those

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[12] Senate Comm. Debate (Statement of J. Covey).

[13] *Id.* (Statement of H. Avila).
[14] *Id.* (Statement of G. McCarthy).
[15] *Id.* (Statement of J. Dys).
[16] *Id.* (Statement of L. Nimri).

> with criminal justice and public safety laws, *those would still be able to be to be enforced and this constitutional amendment does nothing to affect those*. We are not on a fact-finding mission by way of this amendment to take every single instance where a fire code may be violated or where a police officer may need to enter a church to do his or her job. And so *I trust our judges across the state, our fact finders in conjunction with the people to make sure that those instances are still protected. That's not what this bill is meant to address*.[17]

Indeed, First Liberty's Senior Counsel testified before a Texas Senate Committee that the Amendment would not prevent local governments from performing day-to-day functions, subject to court oversight under a strict scrutiny standard: "That standard has been very easily applied throughout the country in just requiring the state officials to first assert a compelling justification for the substantial burden upon the free exercise of religion. And if they can demonstrate that they have a compelling justification for doing so and are doing so in the least restrictive means, that action can continue."[18]

Plaintiffs skip over this uniform, unequivocal expression of intent to entrust the courts with ensuring the ability of local governments to address public health and safety issues like the hazards in the Park. *Cf.* BOM.27 ("[T]hose who ratify constitutional provisions choose to take some matters out of judges' hands.").

[17] House Floor Debate (Statement of Rep. Leach) (emphases added).
[18] Senate Comm. Debate (Statement of J. Dys).

Nevertheless, legislators agreed that the Amendment was emphatically not intended to encompass routine local governance to address health and safety issues that may affect religious worship:

> I don't think there's anybody, any court, anywhere that would read this to say that if there's a true health and safety issue, that you cannot enforce that health and safety issue....It simply says that you cannot go in and say "You folks can't meet. You can't have church this Sunday. You can't have Sunday School this Sunday morning. You can't have your youth group meet this Wednesday night." That's all it says.[19]

b. The People understood the Amendment as intended by the Legislature.

In the weeks before the voters ratified the Amendment, press reports and commentary about the proposed Amendment uniformly characterized it as barring government orders that closed church doors and restricted religious services.

KXAN in Austin described the constitutional amendment ballot proposition this way in a news story three weeks before the ratification election:

> Proposition 3 would ban state and local officials from enacting occupancy limits on religious services or outright prohibiting them altogether, even during a natural disaster or pandemic. The resolution was authored in response to the restrictions put in place at the start of the pandemic, such as last March's stay-at-home order and capacity limits on businesses.[20]

The Texas Tribune described the Amendment this way in articles published three weeks before the ratification election and again on election day:

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[19] House Comm. Debate (Statement of Rep. King).
[20] https://tinyurl.com/h44ajsy2.

> If approved, Proposition 3 would ban the state from prohibiting or limiting religious services, including those in churches and other places of worship.
>
> The move stems from conflicts over churches that closed during the early months of the pandemic in 2020. Some local officials extended stay-at-home orders to include places of worship, requiring them to limit attendance or make services virtual….[21]

Austin-based Voters Values explained in on-line materials that the "proposed constitutional amendment, if passed, would protect churches and places of worship, as well as religious organizations, from being shut down by the government such as happened during the initial period of the COVID-19 pandemic."[22]

The People, in ratifying the Amendment, thus understood it to mean that government would not close the church doors and restrict religious services like it had done through the pandemic lockdown orders.

3. This reading of the Amendment's purpose tracks the emerging consensus of courts and scholars regarding free exercise in the wake of the pandemic.

The Amendment stands for the principle "that religious worship and assembly must be treated at least as favorably as any other comparable private activity." Michael Stokes Paulsen, "Freedom for Religion," 133 Yale L.J. Forum 403, 422 (2023) ("Paulsen"). Under the Amendment, if a law treats secular activity more favorably, that unequal treatment triggers strict scrutiny's presumption of

[21] https://www.texastribune.org/2021/10/15/texas-constitution-amendment-election/
[22] https://txvalues.org/txprop3religiousfreedom/

unconstitutionality. That review will virtually always be fatal to the challenged law; in what scenario would discriminatorily disfavoring religious services be the most narrowly-tailored means of serving a compelling interest? Compared with pre-pandemic free exercise jurisprudence, this approach is "more rigorous, essentially equating the existence of a secular exemption with necessarily failing strict scrutiny." Note, "Pandora's Box of Religious Exemptions," 136 Harv. L. Rev. 1178, 1187 (2023).

This approach also tracks developments in the broader jurisprudential response to pandemic lockdown cases. Soon after *South Bay*, the Supreme Court faced a similar case out of Nevada, and once again upheld the state's restrictions. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020). Dissenting, Justice Kavanaugh wrote that although a state "may subject religious organizations to the *same* limits as secular organizations," it "may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms." *Id.* at 2610 (Kavanaugh, J., dissenting).

The Court switched course with *Roman Catholic Diocese of Brooklyn v. Cuomo* and enjoined New York's lockdown order, which capped the number of congregants who could attend services in "cluster" zones. 141 S. Ct. 63 (2020) (per curiam). Justice Kavanaugh reiterated his reasoning: "New York's restrictions

discriminate against religion by treating houses of worship significantly worse than some secular businesses." *Id.* at 74 (Kavanaugh, J., concurring).

In *Tandon v. Newsom*, the Court enjoined California's lockdown policy, which gave preferential treatment to "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." 593 U.S. 61, 63 (2021). The Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Id.* at 62.

Under this framework—which emerged as the "focal point in the COVID litigation"[23]—the "use of government power so as to exclude religious persons, groups, or organizations from participation in a public program is subject to strict scrutiny, and presumptively unconstitutional, if that power is used or is even capable of being used specifically to exclude religious views and religious conduct." Paulsen at 421 (citing *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021)).

[23] Jim Oleske, *Tandon steals Fulton's thunder: The most important free exercise decision since 1990*, SCOTUSblog (Apr 15, 2021), www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

B. The text and context of the Amendment carry out its purpose to protect religious services against unequal treatment.

The Amendment's textual structure fits hand-in-glove with that emerging framework. Its scope reaches government action to "enact, adopt, or issue a statute, order, proclamation, decision, or rule"—a phrase that refers to action with the force of law, like the lockdown orders. Its specific protection of "religious services" confirms its purpose to eliminate unequal treatment for in-person gathered worship, which again points back to the lockdown orders. And its triggering verbs "prohibits" and "limits" signal comparison with an *un*restricted or *un*limited status quo, indicating that religious services can't be impaired while secular activities deemed to be "essential" go on unfettered.

1. "enact, adopt, or issue a statute, order, proclamation, decision, or rule"

Each of the three verbs in the list of "enact, adopt, or issue" refers to a process resulting in government action that carries the force of law:

- "Enact" means "To make into law by authoritative act; to pass." *Black's Law Dictionary* (12th ed. 2024).
- "Adopt" equates with "Pass," which means "To enact (a legislative bill or resolution); to adopt." *Black's Law Dictionary* (12th ed. 2024) (sense 3); *see Univ. of Houston v. Barth*, 403 S.W.3d 851, 855 (Tex. 2013) (equating "adopted" with "enacted").

- "Issue" means "To be put forth officially" or "To send out or distribute officially." *Black's Law Dictionary* (12th ed. 2024) (senses 2 and 3).

These three verbs (as with all lists in the Amendment) are "known by the words immediately surrounding [them]," according to the canon "*noscitur a sociis* — 'it is known by its associates.'" *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015). The common thread is that each word connotes an official lawmaking process requiring the use of government power. First Liberty agrees. First Liberty Br. pp.12-13 ("The three verbs encompass the full range of the processes by which law is *made*...These three verbs sweep in any government action that creates law.").

Dovetailing with that reality, each of the five nouns to which those three verbs' action is directed—"statute, order, proclamation, decision, or rule"—correspondingly refers to government action that carries the force of law:

- A "statute" is "legislation enacted by any lawmaking body." *Black's Law Dictionary* (12th ed. 2024).
- An "order" is a "written direction or command delivered by a government official." *Black's Law Dictionary* (12th ed. 2024) (sense 2).
- A "proclamation" is a "formal public announcement made by the government." *Black's Law Dictionary* (12th ed. 2024).

- A "decision" is a "judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case. *Black's Law Dictionary* (12th ed. 2024).
- A "rule" is an "established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation." *Black's Law Dictionary* (12th ed. 2024).

Again, *noscitur a sociis* applies and, in addition to calling for each of these words to be construed in relation to the other four, the canon further counsels to "consider the scope of the enumerated categories preceding" this list—namely, the preceding list of three verbs connoting official government lawmaking power. *Greater Houston P'ship*, 468 S.W.3d at 61. And again, First Liberty agrees. First Liberty Br. pp.13 ("The five nouns also encompass anything that carries the force of *law*.")

In the context of an amendment regulating the conduct of "political subdivision[s]," the phrase "enact, adopt, or issue a statute, order, proclamation, decision, or rule" plainly refers to government action that carries the force of law.

2. "that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief"

The triggering verbs "prohibits or limits" must be read within "the context and framework of the entire [Amendment]" in order to "construe it as a whole." *Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796, 802 (Tex. 2019) (cleaned up). To that end, it merits first understanding the Amendment's specific application only to "religious services" before returning to the meaning of "prohibits or limits."

a. "religious services, including religious services conducted in churches, congregations, and places of worship in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief"

The Amendment precludes laws that target "religious services." The term "religious services," informed by the list of exemplars that follows, presupposes gathered, in-person worship—meaning a congregation of two or more individuals. *Accord State v. Loe*, 692 S.W.3d 215, 247 (Tex. 2024) (Blacklock, J., concurring) (describing the Amendment as "protecting an absolute right *to gather in person for worship*, no matter what government epidemiologists think") (emphasis added). Although "religious services" is not defined in the Constitution or elsewhere in state statutes, various statutes use the term "religious services" to define the word "Church." *E.g.*, Tex. Loc. Gov't Code §215.006 (defining "Church" to "mean[] a facility that is owned by a religious organization and that is used primarily for

religious services"); Tex. Health & Safety Code § 161.121 (same); Tex. Ins. Code §544.251 (same); Tex. Bus. Orgs. Code §22.355 (essentially same). Congruent with that usage, the Fifth Circuit has defined "religious services" to mean "activities whose primary purpose is to teach and experience the subject of religion...[t]hese are activities distinct from a topical discussion, a social gathering, or a political meeting." *Campbell v. St. Tammany's Sch. Bd.*, 206 F.3d 482, 487 (5th Cir. 2000), *cert. granted, judgment vacated on other grounds*, 533 U.S. 913 (2001). By focusing specifically on "religious services," the Amendment commands a narrower scope than the federal and Texas Free Exercise Clauses, which more broadly protect "the free exercise [of religion]" and "worship," respectively.

Why does the Amendment pertain specifically to in-person, gathered-worship "religious services" as opposed to, say, "*any* religious exercise" or "*any* form of religious worship"? Because the Amendment was intended to address the specific issue of disparate treatment for in-person gathered worship that arose during the pandemic. Under pandemic-era lockdown orders, "religious services" were prohibited or limited while secular in-person gatherings were not, and the Amendment addressed that specific discrimination.

For example, the Travis County lockdown order discriminatorily "*prohibited*" "religious services" when it "PROHIBIT[ED] any public or private Community Gatherings," specifically including "religious services," while exempting

enumerated "critical facilities" including schools, grocery stores, and gas stations.[24] The Dallas County order discriminatorily "*limited*" "religious services" by mandating that "religious services" were capped at 50 people, while excepting enumerated "critical facilities" including office buildings and big box stores.[25]

These are the "prohibitions" and "limits" on "religious services" that the Amendment was adopted to rectify. And that is the context in which the phrase "prohibits or limits religious services" must be construed. The verbs "prohibits or limits" connote comparative treatment of "religious services" relative to the secular in-person activities exempted from the lockdown orders as "essential" or "critical"—things like grocery stores, pharmacies, schools, hospitals, and even office buildings.

b. "that prohibits or limits religious services..."

Given that context, the analysis turns to the core triggering verbs "prohibits or limits." The five nouns discussed above referring to government action that carries the force of law ("statute, order, proclamation, decision, or rule") also serve as the subjects that perform the action of the verbs "prohibits or limits." Read in that context, "prohibit" means "[t]o forbid by law." *Black's Law Dictionary* (12th ed. 2024). And "limit" means "to curtail or reduce" by law. *Webster's Third New International Dictionary* 1312 (1986) (listing "restrict," "circumscribe," and

[24] https://tinyurl.com/25efwpba.
[25] https://tinyurl.com/5y6vamdw.

"confine" as synonyms). Importantly, based on its immediate textual context, the word "limit" does not reach every incidental downstream effect that a law might have on "religious services." Instead, as First Liberty emphasizes, the Amendment touches only laws carrying "restrictions" or "curtailments" "of such magnitude that they dictate the character of the religious service itself"; "because 'limit' and 'prohibit' are part of the same list, they share a definitional magnetism—one that repels trivialities." First Liberty Br. p.15.

Read thus, the Amendment precludes laws that (1) "forbid" "religious services," or (2) "restrict the bounds of or curtail" "religious services" by dictating their character. And to determine whether a law "prohibits or limits" a "religious service" in this sense necessitates reference to an *un*restricted or *un*curtailed status quo, which in turn requires comparison to the degree to which in-person activities other than "religious services" are prohibited or limited. The Amendment precludes laws that treat "religious services" less favorably than such secular activities.

3. Construed correctly, the Amendment does not preclude the City from addressing hazards in the City-owned Park.

Government lawmaking has a special character. Enactments with the force of law pass through official lawmaking processes. They are often generally applicable, regulating a broad swath of activity. They are durable, in that it would take some additional governmental process to dislodge them. Local government laws can have sweeping and invasive effects—like an ordinance proscribing certain religious

activities. These characteristics justify particular legal safeguards. If a type of law would threaten fundamental liberty interests, the People might preemptively disallow it, as they did with the Amendment.

But local governments do more than make and enforce the law. They also engage in day-to-day management of local matters, like paving streets and fixing potholes. When a city fixes a pothole, its actions do not carry the force of law, not even if the pothole is located on a street fronting a church. And if city employees temporarily put down traffic cones redirecting churchgoers to drive a longer but safer path, that does not bring the City into conflict with the Amendment. Such garden-variety local management, including maintenance of City-owned parks to remedy safety issues for protection of park visitors, does not fall within the scope of the Amendment.

The principles underlying the Amendment—reflected in its text—indicate that some government activities naturally fall outside its ambit. Fixing potholes does not come with an enactment carrying the force of law. Redirecting street traffic does not prohibit or limit religious services. Nor does City action to remove hazardous trees and rehabilitate and preserve historic landmarks on its own property. These activities might have incidental downstream impacts on religious services, but they do not treat secular activities in a different way, and they do not trigger the concerns that the Amendment was passed to address.

Here, the details of the City's plan to remediate undisputed public health and safety hazards on its own property do not carry the force of law and thus do not fall within the scope of the Amendment in the first place.[26] But even if they did, the City's plan does not treat "religious services" less favorably than secular activities. Indeed, it does not forbid or dictate the character of religious services at all.

C. Plaintiffs' absolute construction is ahistorical and unsupportable.

Plaintiffs assert that, under the Amendment, "the government may not take *any* action—regardless of its form or justification—that 'prohibits or limits religious services.'" BOM.2. Such a rule would leap lightyears beyond any other constitutional right in existence, brush aside reams of Texas and federal law, require absurd results, and run headlong into conflict with the federal Establishment Clause.

Plaintiffs recognize this. They acknowledge that the Amendment must be read against its historical and legal context. BOM.35. To avoid absurd results, they concede that unnamed "longstanding principles" limit its scope. BOM.38. And, as a backup, Plaintiffs suggest a new standard of review, stricter than strict scrutiny and formed through a mixture of rules of evidence, presumptions, and other bits drawn from diverse sources of law.

[26] If the Court agrees with the City and First Liberty and construes the Amendment's prohibition to apply only to governmental actions carrying the force of law, then this appeal could be disposed by a conclusion that the City's Park remediation plan does not rise to that threshold.

The Legislature did not intend this result. This is not what the People ratified. And it defies both longstanding constitutional understanding and common sense. This Court should decline to follow Plaintiffs into such murky waters.

1. Every constitutional right involves limits.

While constitutional protections are often phrased in categorical terms, each applies against a balance of other considerations. Consider our enumerated federal constitutional rights. "Congress shall make no law...abridging the freedom of speech"—other than time, place, and manner restrictions, that is. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Speech cannot be restricted based on its content—unless the restriction furthers a compelling interest and is narrowly tailored. *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 340 (U.S. 2010). And "the First Amendment tolerates absolutely no prior judicial restraints of the press"—except for that "narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." *New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring) (citation omitted).

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." That right is "among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010). And yet: "Of course the right was not unlimited, just as the First Amendment's right of free speech was not." *D.C. v. Heller*, 554 U.S. 570, 595

(2008). "[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." *Id.* (emphasis in original); *see also Rahimi*, 144 S. Ct. at 1911 (2024) (Kavanaugh, J., concurring) ("American law has long recognized, as a matter of original understanding and original meaning, that constitutional rights generally come with exceptions.").

The Texas Constitution is the same; guarantees phrased as categorical in the text actually apply in a balance of other considerations. For example, the text of the guarantee of free speech in the Texas Bill of Rights is categorical: "[N]o law shall ever be passed curtailing the liberty of speech…" Tex. Const. art. I, § 8. But this Court recognizes exceptions and explains that injunctions curtailing speech "must burden no more speech than necessary to serve a significant government interest." *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Se. Tex., Inc.*, 975 S.W.2d 546, 560 (Tex. 1998). Balancing and limits thus feature in all constitutional guarantees, even those that appear categorical in their text.

The cases Plaintiffs cite are not to the contrary. They cite *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 147 (Tex. 2010), for the sound-bite that a "constitutional prohibition is absolute when it applies." BOM.22. Yet two sentences later, the Court quoted Justice Oliver Wendell Holmes expounding on limits that

conflicting interests impose on all constitutional rights that, on their faces, purport to be absolute:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Robinson, 335 S.W.3d at 147 (quoting *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908)). And, though the *text* of the Texas constitutional prohibition against retroactive laws is categorical and absolute ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."), *Robinson* articulated a test that is not absolute, but rather applies "a presumption that a retroactive law is unconstitutional without a compelling justification that does not greatly upset settled expectations." *Id*.; Tex. Const. art. I § 16. A test that balances settled expectations and compelling justifications is, emphatically, not an absolute standard.[27]

Members of this Court have similarly recognized that the Amendment, though phrased in "absolute" terms, is subject to limitations. *See Loe*, 692 S.W.3d at 247-48 (Blacklock, J. concurring); *see also* Senate Comm. Debate (Statement of J. Dys)

[27] First Liberty argues that the Amendment is categorical because it uses the phrase "may not," which it argues is synonymous with "shall not." First Liberty Br. p.3. In fact, "shall not" appears numerous times in the Texas Bill of Rights—and has been construed not to impose an absolute bar. *See, e.g.*, Tex. Const. art. I, § 3a ("Equality under the law *shall not* be denied or abridged because of sex, race, color, creed, or national origin") (emphasis added); *In Int. of McLean*, 725 S.W.2d 696, 698 (Tex. 1987) (holding that art. I, § 3a must "yield" to "compelling state interests").

(First Liberty Senior Counsel stating that Amendment "utiliz[es] a standard that goes back for several decades now that lawyers are all too familiar with. We call it strict scrutiny").

Plaintiffs attempt to distinguish the "force" of the Amendment (absolute) from its "scope" (not so much). *See* BOM.22 n.27, 25. But what do Plaintiffs mean when they say that the *scope* of the Amendment does not reach ritual human sacrifice? BOM.38. Certainly, a religiously-motivated human sacrifice ceremony would constitute a "religious service[]" within the plain meaning of the Amendment.[28] *See Service, Oxford English Dictionary*, https://tinyurl.com/ycxb466z (sense I.3) ("A ceremony of (usually communal) worship conducted according to a prescribed form of liturgy or ritual."); BOM.31-32. And under Plaintiffs' absolute rule, the Amendment would protect such a religious service—an absurd result.

To fix that problem, Plaintiffs use "scope" as an artificial proxy to exclude conduct whose protection would raise such absurdities. By gerrymandering the Amendment's "scope" in this manner, Plaintiffs concede that constitutional rights phrased in categorical terms must admit of certain exceptions—even under their absolute construction. Yet in reality, the Amendment does not protect human sacrifice, not because it falls outside the Amendment's "scope," but because the

[28] *See, e.g.*, "Archaeologists in Peru unearth 227 bodies in biggest-ever discovery of child sacrifice," Australia Broadcasting Corp., available at https://tinyurl.com/3ujhh5v7 (describing human sacrifice by the Chimu people in a ritual "to appease the El Niño phenomenon").

State's interest against religious murder is overwhelmingly strong. As Justice Kavanaugh observed, any distinction between "exceptions" and "scope" is one without a meaningful difference: "Either way, the analysis is the same—does the constitutional provision, as originally understood, permit the challenged law?" *Rahimi*, 144 S. Ct. at 1912 n.1 (Kavanaugh, J., concurring).

Human sacrifice aside, under Plaintiffs' construct, how should government respond when its action or inaction would limit some party's religious service? Suppose one of the historic San Antonio Missions[29] were falling apart; the roof partially caved in. If the government does nothing, the church will collapse, making it impossible to worship there. But for the government to fix the church, it needs to close the area temporarily. Churchgoers disagree with each other about what the government should do. No matter what, the government's decision of how to proceed will restrict the ability of some individuals to worship.

Or imagine that a city constructs a public multifaith center, in which different religious groups can reserve space for worship. The center is in high demand, so to ensure that all groups have access, the city orders that each religious group can only worship in the multifaith center once per week. That law would place a limit on

[29] Four of the five Missions comprise the San Antonio Missions National Historic Park, a UNESCO World Heritage Site, which is managed by the National Park Service. https://www.nps.gov/saan/learn/historyculture/world-heritage-site.htm. The Missions are active parishes in the Archdiocese of San Antonio, and Mass is celebrated in at least 3 of the churches on a regular weekly schedule. *See* https://archsa.org/.

religious services, and Plaintiffs' absolute construction would bar it. But is that a result the Amendment was meant to achieve?

Or consider the real-life examples of churches that gather to worship inside public schools through weekend rental agreements with school districts.[30] If a natural disaster like flooding makes the space unavailable for use, thus causing the district to breach its contractual obligation to make the space available for religious services, can the church seek injunctive relief under the Amendment to force the district to specifically perform? Or what if the district's voters pass a bond to renovate the gym, which would entail closing the gym to the public. Can the church bypass contract remedies and sue to enjoin the renovation under the Amendment?

These common-sense scenarios indicate that the Amendment—like each and every other constitutional guarantee—is not absolute, notwithstanding that its text is phrased in categorical language.

2. Plaintiffs' construction contradicts history and precedent.

Plaintiffs contend that history and context should guide this Court. BOM.35-38. The City agrees. The Amendment should be read in the same light courts have interpreted constitutional rights since the Founding. *See Wisconsin Right To Life,* 551 U.S. at 482 (analyzing the words of the First Amendment and explaining that

[30] If a school district makes its facilities available for public rental, the refusal to rent to religious groups would constitute unconstitutional viewpoint discrimination. *See, e.g.*, *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

the Court's "jurisprudence over the past 216 years has rejected an absolutist interpretation of those words"). Plaintiffs admit that under their interpretation, "there is no analogue to the Amendment in any other constitution." BOM.40. What history would shed light on Plaintiffs' unprecedented rule when it would leapfrog even the religiosity of the Founders?

Consider also the history of this State and its courts. A slew of state precedent carefully developed over the past 100 years would be summarily discarded under Plaintiffs' absolute construction. A limited sampling:

- The right to develop property, including for houses of worship, is subject to zoning laws under the police power. *Connor v. City of University Park*, 142 S.W.2d 706 (Tex. Civ. App.—Dallas 1940, writ ref'd).
- Zoning ordinances cannot be imposed to prohibit a religious organization from building a place of worship unless such a prohibition is reasonably necessary to preserve the public health, safety, morals, or general welfare. *Congregation Comm., N. Fort Worth Congregation, Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700 (Tex. Civ. App.—Fort Worth 1956, no writ).
- City regulations relating to fire, health, sanitation, and the like are applicable to buildings used for church purposes. *Simms v. City of Sherman*, 181 S.W.2d 100 (Tex. Civ. App.—Dallas 1944), *aff'd*, 183 S.W.2d 415 (Tex. 1944).

- The location of a church building, along with the time and manner of its use, is subject to abatement as a nuisance. *Waggoner v. Floral Heights Baptist Church*, 116 Tex. 187, 288 S.W. 129 (Comm'n App. 1926).

These precedents—and many others like them decided by Texas courts over many decades—are an important part of any interpretation of the Amendment because the Court "presume[s]" that the Legislature acts "with complete knowledge of existing law." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009). A "legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both." *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). The Amendment's history, against the backdrop of this longstanding constitutional jurisprudence, disclaims any intent to discard the well-settled principle that neutral municipal regulations can apply to places of worship just as they apply to any other building. But under Plaintiffs' construct, all of that law would be discarded as an absolute matter because such regulations would "limit" religious services.

3. Plaintiffs' construction conflicts with the U.S. Constitution.

Under the canon of constitutional avoidance, courts should interpret a statute in a manner that avoids constitutional infirmity. *Paxton v. Longoria*, 646 S.W.3d 532, 539 (Tex. 2022). That canon is implicated here because Plaintiffs' construction

would put the Amendment in conflict with the federal constitution. Under the Establishment Clause, a religious accommodations law cannot be absolute. Courts must be allowed to consider the countervailing interests of nonbeneficiaries, *i.e.*, people who do not belong to the accommodated group and might be burdened by the accommodation.[31] Otherwise, the law impermissibly grants primacy to one religious interest over everyone else. *See generally Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (striking down a workplace accommodation for Sabbatarians because it amounted to an "unyielding weighting in favor of Sabbath observers over all other interests").

For instance, RLUIPA survived judicial review because it required courts to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id.* at 722. "Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." *Id.* Note that the text of RLUIPA included a "compelling government interest" standard—so the question before the Court was whether this standard was

[31] Here, the people who would bear the burden of Plaintiffs' religious interests would be the San Antonio public using the Park, who would face the dangers of falling trees, failing riverbanks, and excessive bird excrement so that Plaintiffs' interests could be accommodated.

too high to permit adequate balancing of interests. The Court did not even contemplate a law with absolute effect of the type Plaintiffs advance.

This Court has explained that "our current Constitution intends to maintain the vitality and independence of our state law to the extent permissible under the Federal Constitution." *Davenport v. Garcia*, 834 S.W.2d 4, 17 (Tex. 1992). In interpreting questions of constitutional law, it is desirable to "avoid[] unnecessary federal review." *Id.* "State courts are not free from federal constitutional considerations in determining fundamental rights. The delicate balance among those rights and other interests must also be maintained." *Id.* at 42 (Hecht, J., concurring). Thus, in analyzing the proper interpretation of the Amendment within the Texas constitution, this Court should be mindful that Plaintiffs' absolute construction would run afoul of the federal Constitution.

4. The Court should reject Plaintiffs' proposed new "heightened strict scrutiny" standard.

Strict scrutiny is the "most rigorous and exacting standard of constitutional review." *Miller v. Johnson*, 515 U.S. 900, 920 (1995). It is "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. Plaintiffs apparently disagree. They reach for a "heightened strict scrutiny standard." BOM.41. This

standard, a mishmash of bits from other areas of law, has no precedent, and this Court should not adopt it.[32]

Moreover, it is unnecessary. Plaintiffs' primary argument for "heightened strict scrutiny" is that the Amendment must offer more protection than what came before. To the extent that is correct, as discussed in Parts A and B of the Argument, the City has offered such an interpretation of the Amendment.[33] Plaintiffs correctly point out that strict scrutiny has not always been applied in the strictest way. But that fault lies in the application, not the rule. In recent cases, the Supreme Court has indicated that a rigorous application of strict scrutiny—not a wholesale new standard—may be appropriate.

Plaintiffs' proposed heightened standard has four subparts, none of which holds water.

1. No "substantial burden" requirement. Plaintiffs infer that because the Amendment does not mention "burden," it requires no showing of burden, only of a "prohibit[ion] or limit[ation]." BOM.42.[34] That draws a distinction without a

[32] *Cf. Twitter, Inc. v. Garland*, 61 F.4th 686 (9th Cir. 2023), cert. denied sub nom. *X Corp. v. Garland*, 144 S. Ct. 556 (2024) (party's request for "some extra-strict form of strict scrutiny," a "higher standard than strict scrutiny," was "meritless").

[33] If the Amendment simply reaffirmed existing protections, the City won on those claims in the Fifth Circuit. App.2. But if the Amendment expanded protections, it did so in a way not radically different than anything previously known to constitutional law.

[34] Plaintiffs want this Court to adopt a new standard that does not require a showing of substantial burden because the Fifth Circuit panel opinion concluded that the City's remediation plans do not substantially burden Plaintiffs' religious exercise. App.2 pp.15-19. If the Amendment requires a

difference. Any law expressly prohibiting or limiting religious services would necessarily impose a burden on it. And without a burden, there is no limitation.

Plain language is in accord. "Burden" means "[s]omething that hinders or oppresses." *Black's Law Dictionary* (12th ed. 2024) (sense 2); *Webster's Third New International Dictionary* 298 (1986) (sense 2) (defining burden as "something that weighs down" or "oppresses"). Again, "prohibit" means "forbid," *Black's Law Dictionary* (12th ed. 2024), and "limit" is synonymous with "restrict," *Webster's Third New International Dictionary* 1312 (1986). In summary: if a law prohibits or limits something, that means it *restricts* it—either absolutely ("forbids") or partially ("limits"). In plain language, such a restriction may be referred to as a burden.

Plaintiffs seem to contend that the Amendment bars any law that is theoretically capable of imposing *some* burden—even a *de minimis* one—on *some* religious service, even if the burden does not affect Plaintiffs themselves (or anyone else).[35] Under Plaintiffs' construct, no actual "substantial" burden on Plaintiffs would be necessary. Putting aside that the lack of any concrete injury would

showing that any limit on religious services impose a substantial burden on Plaintiffs' religious services, they lose on the merits.

[35] Per the Fifth Circuit, this accurately characterizes Plaintiffs' position. Plaintiffs asserted that it was essential to their religious service that they be able to observe the reflection of the cormorant in the river on the winter solstice. The panel noted that, because of migration patterns, no cormorants could be found in Brackenridge Park on the winter solstice, regardless of the City's rookery management practices. Hence, there could be no substantial burden on Plaintiffs' religious service. App.2 p.18 ("regardless of the rookery management program, no cormorants, due to their migration patterns, inhabit the area for extended periods of time each year").

implicate constitutional standing issues, this interpretation is extratextual. The Amendment forbids laws prohibiting or limiting religious services—not *theoretically capable of* prohibiting or limiting religious services.

Ultimately, the nature of a concrete burden, as compared to the government's interest, matters. Plaintiffs' "heightened strict scrutiny standard" involves plenty of balancing, but they conspicuously avoid calling it that. Plaintiffs admit that in evaluating the government's burden to accommodate a religious interest, there must be an "upper bound of reasonableness." BOM.46. They also say that the Amendment creates "the strongest presumption" of protection, which the government can only "overcome" by meeting a sufficiently high standard. BOM.48. That sounds a lot like a compelling government interest.

2. Duty to investigate alternatives before litigation. Plaintiffs ask this Court to hold that, to satisfy the least-restrictive-means prong of strict scrutiny, a government must have investigated and rejected less restrictive measures earlier in time than the start of litigation.[36] BOM.42-45. Otherwise, the government loses,

[36] If there is a temporal requirement, the City satisfied it. The City considered and rejected Plaintiffs' proposed pier-and-spandrel method before finalizing its plan and before litigation. In addition to numerous public meetings during the planning process, on March 1, 2023, the City convened a meeting of engineers, arborists, the project manager, and an outside engineer who advocated pier-and-spandrel for the specific purpose of analyzing whether any additional trees could be saved. ROA.4661-4663. The participants "were asked to really look at the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, that we were saving as many trees as possible." *Id*. The group concluded that Plaintiffs' method would not save any additional trees. *Id*.; *see also* ROA.4547-57 (testimony of arborist explaining that, under either method, the construction process will necessarily damage trees by cutting their

even if it proves that its chosen means were, in fact, the least restrictive. This proposed temporal rule is not supported by the case law Plaintiffs cite, and it fails on its own merits.

Plaintiffs credit their rule to *Warsoldier v. Woodford,* 418 F.3d. 989, 999 (9th Cir. 2005). BOM.43. But the Ninth Circuit later clarified and walked back this broad construct. In *Walker v. Beard*, that court, construing its earlier precedent, held that "[a]lthough the government bears the burden of proof to show its practice is the least-restrictive means, *it is under no obligation to dream up alternatives that the plaintiff himself has not proposed.*" *Walker v. Beard*, 789 F.3d 1125, 1137 (9th Cir. 2015) (emphasis added). The Fifth Circuit likewise has not adopted a temporal rule but instead explains that a defendant's burden in a strict scrutiny inquiry "is not to show that it considered the claimant's proposed alternatives but rather to demonstrate those alternatives are ineffective." *Davis v. Davis*, 826 F.3d 258, 264 (5th Cir. 2016) (RLUIPA case); *Ali v. Stephens*, 822 F.3d 776, 786 (5th Cir. 2016) (same).

The Supreme Court has likewise rejected a temporal element: "[N]othing in the Court's opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA's least restrictive means requirement. Nor does it intimate that officials must prove that they considered less restrictive alternatives *at a*

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roots at the flare, compacting soil with heavy equipment, and trimming canopies to accommodate heavy equipment).

particular point in time." *Holt v. Hobbs*, 574 U.S. 352, 868 (2015) (Sotomayor, J., concurring) (noting that "the Department inadequately responded to the less restrictive policies that petitioner brought to the Department's attention *during the course of the litigation*") (emphasis added). The government "need not 'do the impossible—refute each and every conceivable alternative regulation scheme' but need only 'refute the alternative schemes offered by the challenger.'" *Id.* (quoting *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011)).[37]

Plaintiffs have not identified any case applying their proposed temporal rule. To be sure, a government that has engaged in a rigorous decision-making process is more likely to emerge with a narrowly tailored policy. But it is not *necessary* for a government to have considered every alternative at a particular moment in time. No court, having found that the government selected the most narrowly tailored means, rejected the government's policy because it had not earlier considered alternatives later shown to be inadequate.

Plaintiffs suggest that without their temporal rule, courts would "perversely reward a government's inadvertent or conscious failure to investigate potential

[37] Plaintiffs' citations to additional recent Supreme Court cases are not to the contrary. BOM.43. *Ramirez v. Collier*, 595 U.S. 411 (2022), says nothing about a temporal requirement, only that once plaintiffs make a showing of substantial burden, the government must show least restrictive means. That has always been the burden under strict scrutiny. The fact that *Ramirez* reaches the question of whether less restrictive alternative means might be feasible, and does not stop as soon as it finds that the government had not considered these alternatives in advance, contravenes Plaintiffs' suggested temporal rule.

alternatives." BOM.44-45. How so? It is the government's burden at trial to rebut alternative means; to show, in other words, that the government's chosen means are the least restrictive. Under that framework, the government is not *rewarded* for failing to investigate alternatives. On the contrary, the government risks incurring expensive and time-consuming litigation if it fails to identify alternative means that are, in fact, better than the government's chosen means.

Governments are incentivized to perform searching inquiries at the outset, subject to reasonable constraints. Local governments do not have infinite resources or clairvoyance, and they depend on local communities to raise concerns particular to those communities. That is why the City held public meetings and sought input from numerous stakeholders, including the Plaintiffs, during the lengthy process of developing its plans.

Moreover, policymaking inherently can be an iterative process. For a large-scale multi-year infrastructure project like the Brackenridge Park rehabilitation, numerous variables emerge along the way and give rise to corresponding stakeholder concerns to which the government responds in an ongoing manner. That is precisely what happened here. If anything, Plaintiffs' construction would penalize cities who listen to concerned citizens raising new issues after the advent of such a project, because doing so could expose the city to an allegation that they were "too late" to address such concerns.

3. Duty to accommodate. Plaintiffs would "require governments to accommodate religious services that are limited by government action wherever it is possible to do so." BOM.45. A duty to accommodate already exists. RFRA *is* a religious accommodations statute; it requires the government to "accommodate citizens' religious beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014). TRFRA, modeled on RFRA, likewise imposes a duty to accommodate. Written into TRFRA is a procedural mechanism for plaintiffs to seek accommodations, with which the government must comply or face suit. Tex. Civ. Prac. & Rem. Code §110.006; *see also A.H. ex rel. Hernandez v. Northside Indep. Sch. Dist*., 916 F. Supp. 2d 757, 774 (W.D. Tex. 2013) (describing the "right to accommodate"). The Supreme Court has held that, under the First Amendment, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. That *is* a duty to accommodate.

But "[c]ontext matters." *Betenbaugh*, 611 F.3d at 269-72 (collecting religious accommodations cases where context mattered). Under each of these sources of law, the government has a duty to accommodate. But that duty is not *absolute*. Plaintiffs concede that there must be "some sort of upper bound of reasonableness" to the duty to accommodate. BOM.46. Yet they ask this Court to adopt an absolute standard of "if the government can, it must." *Id.* Plaintiffs seek to have their cake and eat it too.

They concede a duty that isn't absolute, but then would turn around and impose an "if it's possible, it's required" standard on the government.

4. Clear and convincing evidence. Finally, Plaintiffs seek to impose a never-before-seen "clear and convincing evidence" standard on this "heightened strict scrutiny" inquiry. BOM.47-48. But "clear and convincing" is not an appropriate overlay to a constitutional balancing test.

"Clear and convincing evidence is defined as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979); *accord Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013) ("Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm belief or conviction...so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of precise facts of the case.").

The clear and convincing evidence standard applies primarily to discrete factual inquiries. For instance, a court may involuntarily terminate a parent-child relationship only if it finds by clear and convincing evidence that the parent has engaged in one of a list of specified actions. Tex. Fam. Code §161.001(b). Or, to impose exemplary damages on a defendant in a civil suit, the factfinder must find by clear and convincing evidence that the harm for which the claimant seeks recovery

resulted from fraud, malice, or gross negligence by the defendant. Tex. Civ. Prac. & Rem. Code. § 41.003. Or, indefinite commitment of a person under the Texas Medical Code requires proof by clear and convincing evidence that the person "was mentally ill and that he required hospitalization in a hospital for his own welfare and the protection of others." *State v. Addington*, 588 S.W.2d at 569. No court has applied it to any constitutional inquiry, let alone one as diffuse as whether a particular engineering method is the "least restrictive means" to remediate particular crumbling riverbed retaining walls.

Further, it is not apparent how this evidentiary standard would map onto strict scrutiny. Which assertion must the government prove by clear and convincing evidence: That its chosen means are narrowly tailored? That the interest is compelling? Or is it the overall test as a whole: that the means are narrowly tailored and are the least restrictive means to advance a compelling government interest? Moreover, the nature of the "least restrictive means" inquiry already requires the government to prove a negative, *i.e.*, that another less-restrictive means does not exist. How does one prove a negative by clear and convincing evidence?

But most significant, what would a shift to a clear and convincing evidence standard accomplish? A government's actions are the least restrictive means to accomplish a compelling governmental interest or they are not. Injecting a clear and

convincing evidence standard into that inquiry will not protect the free exercise of religion to a greater degree.

Plaintiffs' proposed new "heightened strict scrutiny" standard does not exist in constitutional law, and the Court should not adopt it. Caution is particularly warranted given that the brand-new Amendment has not yet been interpreted by any court. Adopting a new constitutional standard wholesale, before any competing understanding of its components has been tested in the lower courts, is a risky course, because "an error by this Court can be corrected only with great difficulty." Statement by Justice Young, Nov. 1, 2024.

CONCLUSION

The Fifth Circuit asked this Court a discrete certified question: does the Amendment impose a categorical bar on *any* limitation of *any* religious service, regardless of the sort of limitation and the government's interest in that limitation? The answer to that question must be "no." Neither the text of the Amendment nor its context reflects a wholesale departure from standards that have governed constitutional jurisprudence since the original framing, which is what an absolute prohibition would do. The City's plans to remediate its public Park do not treat religious services in any way different from secular activities, and they do not come within the scope of the Amendment.

Respectfully submitted,

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COUNSEL FOR CITY OF SAN ANTONIO

CERTIFICATE OF SERVICE

I certify that the foregoing pleading was served on all counsel of record by electronic filing on November 4, 2024.

Jane Webre

CERTIFICATE OF COMPLIANCE

I certify that the foregoing pleading was prepared using Microsoft Word 2019, and that, according to its word-count function, the sections of the foregoing brief covered by Tex. R. App. P. 9.4(i)(1) contain 14,451 words in a 14-point font size and footnotes in a 12-point font size.

Jane Webre

App.1

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 28, 2024
Lyle W. Cayce
Clerk

No. 23-50746

GARY PEREZ; MATILDE TORRES,

Plaintiffs—Appellants,

versus

CITY OF SAN ANTONIO,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:23-CV-977

ON PETITION FOR PANEL REHEARING

Before RICHMAN, *Chief Judge*, and STEWART and HIGGINSON, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

The original opinion in this case was filed on April 11, 2024. *Perez v. City of San Antonio*, 98 F.4th 586 (5th Cir. 2024). There we held that "[b]y way of their sparse briefing on the question, Appellants fail to establish a likelihood of success on the merits of their claims under Article I, § 6-a of the Texas Constitution." Because Appellants did not adequately brief that issue, and because their other arguments lacked merit, we affirmed the district court's judgment and denied Appellants' Emergency Motion for Injunction

Pending Appeal. Appellants then submitted a petition for panel rehearing and a petition for rehearing en banc, which are now pending before the court. In their petitions, Appellants requested, in the alternative, that we certify a question to the Supreme Court of Texas on grounds that the scope of Article I, § 6-a of the Texas Constitution is a significant issue of first impression.

For the following reasons we GRANT the petition for panel rehearing, we WITHDRAW our original opinion, and we issue the following order certifying a question to the Supreme Court of Texas.

I. Factual and Procedural History

Gary Perez and Matilde Torres (together "Appellants") brought action against the City of San Antonio (the "City") alleging that the City's development plan for Brackenridge Park (the "Park") prevented them from performing ceremonies essential to their religious practice. Appellants sued the City under the First Amendment Free Exercise Clause, the Texas Religious Freedom Restoration Act ("TRFRA"), and the Texas Constitution and sought declaratory and injunctive relief to require the City to (1) grant them access to the area for religious worship, (2) minimize tree removal, and (3) allow cormorants to nest. Following a preliminary injunction hearing, the district court ordered the City to allow Appellants access to the area for religious ceremonies but declined to enjoin the City's planned tree removal and rookery management measures.

A. The Lipan-Apache Native American Church

Appellants are members of the Lipan-Apache Native American Church ("Native American Church"). Perez serves as the principal chief and cultural preservation officer for the Pakahua/Coahuiltecan Peoples of Mexico and Texas and for the Indigenous Governors' office for the State of Coahuila, Mexico. Torres is a member of the Pakahua Peoples of Mexico and Texas. Perez has worshipped and led religious ceremonies in the Park for at

least twenty-five years. Torres has worshipped and participated in religious ceremonies in the Park for at least ten years.

The district court determined that Appellants' religious beliefs are sincerely held. According to their complaint, Appellants believe that life in the region of San Antonio began at a spring called the Blue Hole. Specifically, a spirit in the form of a blue panther lived in the Blue Hole. And when a spirit in the form of a cormorant visited the Blue Hole, the blue panther scared the bird. As the bird fled, water droplets from its tail scattered across the San Antonio River Valley, including the Park, spurring life in the region. The San Antonio River flows through the northern portion of the Park. Appellants also believe that a riverbend, located within the Lambert Beach area of the Park, mirrors the celestial constellation Eridanus and bridges the physical and spiritual worlds. Appellants require certain religious ceremonies to be performed only at this riverbend located within the Lambert Beach area. Moreover, they proclaim that this space's capacity to function as a holy place relies on the presence of trees, birds, and other natural features, which are all part of its "spiritual ecology." Appellants also proclaim that certain religious ceremonies cannot be properly administered without specific trees present and cormorants nesting.

B. Brackenridge Park, the Sacred Area and Project Area, and the Bond Project

The Park is a public park in the City, consisting of approximately 343 acres. The Park contains various features and attractions including paths, sports fields, the San Antonio Zoo, the Japanese Tea Garden, the Sunken Garden Theater, and the Witte Natural History Museum. The Park has also been inhabited and utilized by indigenous peoples for thousands of years. Appellants and other members of the Native American Church believe that a specific area within the Lambert Beach section of the Park is a sacred location where they must gather to worship and conduct religious

ceremonies. This area is also the site of the City's planned reformation efforts, which include repairing retaining walls along the San Antonio River. In this litigation, Appellants refer to this area as the "Sacred Area" and the City refers to it as the "Project Area." Appellants define the Sacred Area as the twenty-foot by thirty-foot area between two cypress trees on the southern riverbank of the Lambert Beach area. Within the Project Area, the City developed plans to repair the retaining walls along the San Antonio River, repair the historic Pump House, and construct a handicap-accessible ramp.

In May 2016, San Antonio citizens voted in favor of a $850 million bond package for public improvements. Proposition 3 of the bond package—dedicated to improvements related to parks, recreation, and open spaces—included $7,750,000 for improvements to the Park. The improvements planned for the Park, which are the subject of this suit, are collectively referred to as the "Bond Project." To design the Bond Project and determine the repair methodology to be utilized, the City commissioned the bond project design team, a team of various professionals, including architects, engineers, and historic preservation officials. The bond project design team recommended utilizing a cantilevered wall system to repair the retaining walls. To arrive at this recommendation, the team considered multiple factors including, but not limited to, tree density and location, topography, existing retaining wall stability and height, equipment accessibility, construction feasibility, legal compliance, and regulatory compliance. The City also determined that certain trees in the Project Area would (1) interfere with the construction, (2) be irreparably damaged by the construction, or (3) damage the repaired retaining walls and historical structures in the future. Thus, the City developed plans to (1) completely remove 46–48 trees, (2) relocate 20–21 trees to other areas of the Park, (3) preserve about 16 trees in place, and (4) plant at least 22 new trees in the Project Area. The City held public meetings to receive community input regarding repairs of the original

walls. Appellants, and other citizens, expressed concern with the removal and relocation of trees in the Project Area and a desire for the City to consider alternative plans that would preserve more trees in place.

Additionally, the City's plan for the Bond Project includes bird deterrent techniques[1] intended to deter migratory birds from nesting in the Lambert Beach area. Pursuant to the Migratory Bird Treaty Act,[2] the removal or relocation of trees planned for the Project Area cannot proceed if migratory birds, including cormorants, are nesting in the area. The City contracted with the U.S. Department of Agriculture ("USDA") and coordinated with the Texas Parks and Wildlife Department ("TPWD") and the U.S. Fish and Wildlife Service ("UFWS") to modify bird habitats and deter birds from nesting in highly urbanized areas of the Park, including the Project Area.

To complete the Bond Project, the City must comply with local, state, and federal regulations. Locally, with the San Antonio Development Services Department, the City applied for and received a variance from a City Unified Development Code ("UDC") provision that requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-

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[1] The litigants and the district court use "rookery management," "anti-nesting" measures, and "bird deterrence" activities interchangeably. The rookery management program is the product of extensive consultation and engagement with technical advisors and wildlife management experts. To assist with the City's bird deterrence efforts, the Texas Parks and Wildlife Department ("TPWD") recommended habitat modifications (by removing old nests and dead wood to open the tree canopy) and other deterrent techniques to encourage the birds to relocate from the undesired location or to prevent establishment in the first place. Those techniques include pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, explosives, and drones. Notably, these measures "do not harm the birds or keep them from reproducing." Moreover, these techniques are legal and in accordance with U.S. Fish and Wildlife Service ("UFWS") guidelines, as well as TPWD Code.

[2] 16 U.S.C. § 703 *et seq*.

year floodplain. Moreover, state and federal regulations govern the preservation of the Lambert Beach retaining walls. As historic structures, the retaining walls contribute to the Park's designation as a City Historic Landmark and as a State Antiquities Landmark and its placement on the National Register of Historic Places. Because of this historic designation, construction is regulated by the Texas Historical Commission and the United States Army Corps of Engineers ("USACE"). The City must submit a final treatment plan and obtain a permit from USACE before repairing the retaining walls or removing or relocating trees within the Lambert Beach area. Once USACE approves the final treatment plan, a thirty-day comment period will begin to solicit feedback from stakeholders, including local indigenous tribes. Lastly, the Secretary of the Interior's Design guidelines, the Americans with Disabilities Act, and Occupational Safety and Health Administration regulations are all applicable to the bond project improvements.

From roughly February 2023 to November 2023, the City temporarily prevented Appellants, Native American Church members, and peyote pilgrims from entering the Lambert Beach area. Appellants filed the instant suit on August 9, 2023, alleging that the City's bird deterrence activities, temporary closure of the Project Area, and proposed removal or relocation of trees in the Project Area place a substantial burden on their religious beliefs in violation of the First Amendment of the U.S. Constitution, the Texas Constitution, and TRFRA. They sought a preliminary injunction, which itemized the relief requested as (1) access to the Sacred Area for religious services, (2) preservation of the spiritual ecology of the Sacred Area by minimizing tree removal, and (3) preservation of the spiritual ecology of the Sacred Area by allowing cormorants to nest. As to the preservation of the spiritual ecology, Appellants requested that the district court order the City

to "reevaluate the Bond Project to develop alternative plans that will accommodate [their] religious beliefs."

C. The District Court's Decision

After holding a four-day preliminary injunction hearing, the district court adopted the parties' stipulated facts[3] and determined that the City's plans did not burden Appellants' free exercise of religion. The district court concluded that Appellants held a sincere religious belief and had met their burden to prove the four elements for injunctive relief as to "access for religious services in the Sacred Area." It thus granted access for religious services involving fifteen to twenty people for approximately an hour on specified astronomical dates coinciding with Appellants' spiritual beliefs. [4] The district court also ordered the City to immediately remove the broken limb that the City maintained "pose[d] a risk of injury or death" in the Project Area. As to their request for "access for individual worship," the district court held that Appellants had waived this request but also noted that the balance of equities supported the conclusion that unplanned, unsupervised individual access was impractical. Following expert testimony, the district court concluded that the bird deterrent operation was in the realm

[3] To the extent any of the findings of fact constituted conclusions of law, the district court adopted and treated them as such.

[4] Torres testified at the injunction hearing that the average number of congregants participating in religious ceremonies or worship services has been between fifteen and twenty since 2020.

of public health and safety.[5] It also determined that the City had met its burden of proving "a compelling government interest for public health and safety, and the [balance of] equities favor[ed] the City on" Appellants' requested relief regarding minimizing tree removal and allowing cormorants to nest.

D. Appellants' Emergency Motion for Injunction Pending Appeal

After the district court denied Appellants access for individual worship and declined to enjoin the City's planned tree removal and rookery management measures, Appellants filed with this court an Emergency Motion for Injunction Pending Appeal and to Expediate the Appeal (the "Emergency Motion"). In their Emergency Motion, Appellants contended that they satisfied the "irreparable harm" and "success on the merits" elements of a claim for an injunction because they had sufficiently proven a TRFRA violation and federal and Texas constitutional violations. *See Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018) (citation omitted). Appellants further argued that they satisfied the remaining requirements for obtaining an injunction pending appeal. The City opposed the motion.

We granted Appellants' motion to expedite the appeal and held oral argument in December 2023. We also issued a temporary administrative stay and ordered that Appellants' opposed motion for injunction pending appeal

[5] Expert opinion from Dr. J. Hunter Reed, a state wildlife veterinarian and health specialist, expressed significant public health concerns for citizens enjoying the Park. He warned that "[w]hen large rookeries are established in the immediate vicinity of playgrounds, infrastructure, and recreational hardscapes, the risk of zoonotic disease transmission . . . increases substantially." He continued that "[t]he sheer magnitude of fecal contamination, high likelihood of human contact with fecal matter, and limited ability to perform effective environmental decontamination make rookery management action paramount to disease risk mitigation."

be carried with the case on October 27, 2023. On February 21, 2024, at the City's request, we lifted the temporary administrative stay in part to allow the rookery bird deterrent management activities to proceed for the immediate next months until migratory cormorants arrived.

II. Discussion

Appellants have raised four claims for relief—(1) a TRFRA claim, (2) a First Amendment Free Exercise claim, (3) a claim under the freedom-to-worship provision of the Texas Constitution, and (4) a claim under the religious-service-protections provision of the Texas Constitution. Appellants argue that they are likely to succeed on the merits of each claim because the City previously barred them from worshipping in the Sacred Area, seeks to permanently prevent them from performing religious services by destroying the area's spiritual ecology, and has never attempted to accommodate their religious exercise. Those arguments, and each of Appellants' claims for relief, were addressed in the original panel opinion filed in this case. We pretermit further consideration of those claims pending resolution of the Texas constitutional issue we now certify.

Appellants assert that the City's plan violates the religious-service-protections provision of the Texas Constitution, which provides that the state of Texas and its political subdivisions:

> may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship . . . by a religious organization established to support and serve the propagation of a sincerely held religious belief.

Tex. Const. art. I, § 6-a.

Appellants contend that the City's planned changes to the Sacred Area amount to a limitation of their religious services, while the City argues that those changes aim to promote safety and public health. Appellants further argue that § 6-a "does not even allow the City to try to satisfy strict scrutiny; it is a categorical bar on what the City seeks to do." Notwithstanding the City's interest in the park project, Appellants aver that the City's tree-removal and rookery management measures independently[6] violate § 6-a because they would "prohibit and limit [Appellants'] future religious services by irreparably destroying the very aspects of the Sacred Area that make it a living place of worship for [Appellants]."

Whether § 6-a imposes a complete bar on all restrictions to religious services or invokes a strict scrutiny inquiry is a determination best left to the Supreme Court of Texas.[7] To ascertain Texas law, this court looks first to the final decisions of the Supreme Court of Texas. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007). Where there is no definite pronouncement from the Supreme Court of Texas on an issue, we may choose to certify a question to that court.[8] Neither party has cited any cases interpreting this constitutional provision, nor has this court found any. This potentially outcome determinative issue raises novel and sensitive questions about the scope of religious service protections under the Constitution of the

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[6] In addition to their arguments that the City's fencing violates §6-a by barring access for religious services, Appellants contend that "the City's tree-removal and anti-nesting measures independently violate Section 6-a."

[7] *See, e.g.*, *Barr v. City of Sinton*, 295 S.W.3d 287, 305 (Tex. 2009) (holding that Texas citizens do not have "an absolute right to engage in [religious] conduct" because "[t]he government may regulate such conduct in furtherance of a compelling interest").

[8] Under Texas law, "[t]he Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent." Tex.R.App. P. 58.1*; see also* Tex. Const. art. V, § 3–c(a).

State of Texas. Thus, we conclude that certification of this issue to the Supreme Court of Texas is appropriate.

III. QUESTION CERTIFIED

We CERTIFY the following question to the Supreme Court of Texas:

> Does the "Religious Service Protections" provision of the Constitution of the State of Texas—as expressed in Article 1, Section 6-a—impose a categorical bar on any limitation of any religious service, regardless of the sort of limitation and the government's interest in that limitation?

"We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified." *See, e.g.*, *Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015).

App.2

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 11, 2024
Lyle W. Cayce
Clerk

No. 23-50746

GARY PEREZ; MATILDE TORRES,

Plaintiffs—Appellants,

versus

CITY OF SAN ANTONIO,

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Appeal from the United States District Court
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CARL E. STEWART, *Circuit Judge*:

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removal, and (3) allow cormorants to nest. Following a preliminary injunction hearing, the district court ordered the City to allow Appellants access to the area for religious ceremonies but declined to enjoin the City's planned tree removal and rookery management measures. The parties appealed. We AFFIRM. Also before us is Appellants' Emergency Motion for Injunction Pending Appeal. Because we conclude that Appellants have failed to show a likelihood of success on the merits, we DENY the Emergency Motion.

I. Factual and Procedural History

A. The Lipan-Apache Native American Church

Appellants are members of the Lipan-Apache Native American Church ("Native American Church"). Perez serves as the principal chief and cultural preservation officer for the Pakahua/Coahuiltecan Peoples of Mexico and Texas and for the Indigenous Governors' office for the State of Coahuila, Mexico. Torres is a member of the Pakahua Peoples of Mexico and Texas. Perez has worshipped and led religious ceremonies in the Park for at least twenty-five years. Torres has worshipped and participated in religious ceremonies in the Park for at least ten years.

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To complete the Bond Project, the City must comply with local, state, and federal regulations. Locally, with the San Antonio Development Services Department, the City applied for and received a variance from a City Unified Development Code ("UDC") provision that requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-year floodplain. Moreover, state and federal regulations govern the preservation of the Lambert Beach retaining walls. As historic structures, the retaining walls contribute to the Park's designation as a City Historic

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Landmark and as a State Antiquities Landmark and its placement on the National Register of Historic Places. Because of this historic designation, construction is regulated by the Texas Historical Commission and the United States Army Corps of Engineers ("USACE"). The City must submit a final treatment plan and obtain a permit from USACE before repairing the retaining walls or removing or relocating trees within the Lambert Beach area. Once USACE approves the final treatment plan, a thirty-day comment period will begin to solicit feedback from stakeholders, including local indigenous tribes. Lastly, the Secretary of the Interior's Design guidelines, the Americans with Disabilities Act, and Occupational Safety and Health Administration regulations are all applicable to the bond project improvements.

From roughly February 2023 to November 2023, the City temporarily prevented Appellants, Native American Church members, and peyote pilgrims from entering the Lambert Beach area. Appellants filed the instant suit on August 9, 2023, alleging that the City's bird deterrence activities, temporary closure of the Project Area, and proposed removal or relocation of trees in the Project Area place a substantial burden on their religious beliefs in violation of the First Amendment of the U.S. Constitution, the Texas Constitution, and TRFRA. They sought a preliminary injunction, which itemized the relief requested as (1) access to the Sacred Area for religious services, (2) preservation of the spiritual ecology of the Sacred Area by minimizing tree removal, and (3) preservation of the spiritual ecology of the Sacred Area by allowing cormorants to nest. As to the preservation of the spiritual ecology, Appellants requested that the district court order the City to "reevaluate the Bond Project to develop alternative plans that will accommodate [their] religious beliefs."

C. The District Court's Decision

After holding a four-day preliminary injunction hearing, the district court adopted the parties' stipulated facts[3] and found that the City's plans did not burden Appellants' free exercise of religion. The district court concluded that Appellants held a sincere religious belief and had met their burden to prove the four elements for injunctive relief as to "access for religious services in the Sacred Area." It thus granted access for religious services involving fifteen to twenty people for approximately an hour on specified astronomical dates coinciding with Appellants' spiritual beliefs. [4] The district court also ordered the City to immediately remove the broken limb that the City maintained "pose[d] a risk of injury or death" in the Project Area. As to their request for "access for individual worship," the district court held that Appellants had waived this request but also noted that the balance of equities supported the conclusion that unplanned, unsupervised individual access was impractical. Following expert testimony, the district court found that the bird deterrent operation was in the realm of public health and safety. It also determined that the City had met its burden of proving "a compelling government interest for public health and safety, and the [balance of] equities favor the City on" Appellants' requested relief regarding minimizing tree removal and allowing cormorants to nest.

D. Appellants' Emergency Motion for Injunction Pending Appeal

After the district court denied Appellants access for individual worship and declined to enjoin the City's planned tree removal and rookery

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[3] To the extent any of the findings of fact constituted conclusions of law, the district court adopted and treated them as such.

[4] Torres testified at the injunction hearing that the average number of congregants participating in religious ceremonies or worship services has been between fifteen and twenty since 2020.

management measures, Appellants filed with this court an Emergency Motion for Injunction Pending Appeal and to Expediate the Appeal (the "Emergency Motion"). In their Emergency Motion, Appellants contended that they satisfied the "irreparable harm" and "success on the merits" elements of a claim for an injunction because they have sufficiently proven a TRFRA violation and federal and Texas constitutional violations. *See Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018) (citation omitted). Appellants further argued that they satisfied the remaining requirements for obtaining an injunction pending appeal. The City opposed the motion.

We granted Appellants' motion to expedite the appeal and held oral argument in December 2023. We also issued a temporary administrative stay and ordered that Appellants' opposed motion for injunction pending appeal be carried with the case on October 27, 2023. On February 21, 2024, at the City's request, we lifted the temporary administrative stay in part to allow the rookery bird deterrent management activities to proceed for the immediate next months until migratory cormorants arrived.

II. STANDARD OF REVIEW

"We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 671 (5th Cir. 2022) (citation omitted). To obtain the "extraordinary remedy" of a preliminary injunction, the movant must show he is likely to prevail on the merits and also "demonstrate a substantial threat of irreparable injury if the injunction is not granted; the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and the injunction will not disserve the public interest." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018) (citation omitted).

III. Discussion

Appellants have raised four claims for relief—(1) a TRFRA claim, (2) a First Amendment Free Exercise claim, (3) a claim under the freedom-to-worship provision of the Texas Constitution, and (4) a claim under the religious-service-protections provision of the Texas Constitution. Appellants argue that they are likely to succeed on the merits of each claim because the City previously barred them from worshipping in the Sacred Area, seeks to permanently prevent them from performing religious services by destroying the area's spiritual ecology, and has never attempted to accommodate their religious exercise. Notably, Appellants argue that the City cannot show that its tree-removal plan, rookery management measures, and fencing further a compelling governmental interest and are the least restrictive means of furthering that interest.

A. Access

The City contends that Appellants' request for additional injunctive relief to restore their access to the Sacred Area for routine personal worship is moot. We agree. At the start of this suit, fencing prevented Appellants from physically accessing the Sacred Area for religious exercise. But, immediately following the injunction hearing, the district court held that Appellants were entitled to access the Sacred Area for ceremonies on two specific astronomical dates, November 17 and December 21, 2023, as prescribed by the hearing.[5] To comply with the court order, the City was also ordered (1) to immediately remove the hazardous broken limb posing risks to visitors of the Sacred Area and (2) to ensure that the fencing was unlocked and accessible for Appellants on the designated dates and any additional proposed dates of religious

[5] Torres testified at the hearing that November 17 and December 21, 2023 were the forthcoming dates for which Appellants would need access for religious ceremonies.

ceremonies. Even more, as of early November 2023, the City had removed the fencing and broken limb ahead of Appellants' scheduled ceremonies.

Thus, Appellants no longer have any personal interest in challenging the City's once fenced-off closure of the Project Area because the City has since removed any fencing impeding their access. The mootness doctrine requires that "litigants retain a personal interest in a dispute at its inception and throughout the litigation." *Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 204 (5th Cir. 2010) (citation and internal quotation marks omitted). A claim is moot if it becomes "impossible for the court to grant any effectual relief whatever to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (citation and internal quotation marks omitted); *see Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003). When a claim becomes moot on appeal, as is the case here, the appeal must be dismissed. *Church of Scientology*, 506 U.S. at 12.

Still, Appellants urge this court to apply the voluntary cessation exception to mootness. The Supreme Court has held that a party's voluntary cessation of an unlawful action will not moot an opponent's challenge to that practice. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." (internal citation omitted)). Regardless, an exception to the mootness doctrine declares that "[v]oluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). "The 'heavy burden of

persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203).

While this appeal was pending, the City removed the dangerous limb that previously made the Sacred Area inaccessible. Moreover, the City affirmed that it undertook several additional efforts "going beyond what the district court ordered." The City conceded that removing the limb allowed it to reconfigure the construction fencing and it subsequently granted public access to the entire area. Likewise, the City granted Appellants access to conduct a religious ceremony at the Sacred Area from midnight to 4 a.m. on November 18, 2023, during hours when the Park is normally closed. Furthermore, on November 21, 2023, the City moved to dismiss its cross-appeal in this action, deciding to no longer pursue the issue of access to the Sacred Area. Based on these subsequent developments, "[i]t is therefore clear that [the City officials] harbor no animosity toward [Appellants]." *See Preiser v. Newkirk*, 422 U.S. 395, 402 (1975). Appellants now have "no reasonable expectation that the wrong challenged by [them] would be repeated." *See id*. Thus, the voluntary cessation exception does not apply. Hence, Appellants' access claims are moot.

B. Tree-removal Plan and Rookery Management Measures

i. TRFRA

Turning to Appellants' claims pertaining to the City's tree-removal plan and rookery management measures, "we begin by analyzing [their] statutory claim under TRFRA, which, if successful, obviates the need to discuss the constitutional questions." *Merced v. Kasson*, 577 F.3d 578, 586 (5th Cir. 2009); *see, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) ("It is a well-established principle governing the

prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."). Appellants allege that the City prohibits and limits their religious exercise by irreparably destroying the very aspects of the Sacred Area that make it a living place of worship. For purposes of the Texas Constitution, the Texas Supreme Court has not adopted *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and its declaration that generally applicable and facially neutral laws are not subject to strict scrutiny with regard to free exercise claims. *See Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("*Smith*'s construction of the Free Exercise Clause does not preclude a state from requiring strict scrutiny of infringements on religious freedom, either by statute or under the state constitution, and many states have done just that, Texas among them."). Thus, the challenged government action is subject to strict scrutiny.

To succeed on their TRFRA claim, Appellants must demonstrate that the City's actions burden their free exercise of religion and that the burden is substantial. If they manage that showing, the City can still prevail if it establishes that its actions further a compelling governmental interest and that the actions are the least restrictive means of furthering that interest. *Merced*, 577 F.3d at 588 (citing *Barr*, 295 S.W.3d at 296); *see also* TEX. CIV. PRAC. & REM. CODE § 110.003(a)–(b); *Barr*, 295 S.W.3d at 307 ("Although TRFRA places the burden of proving a substantial burden on the claimant, it places the burden of proving a compelling state interest on the government."). Because the district court determined the existence of the Appellants' sincere religious beliefs and the City does not dispute this finding, we first consider whether the City's development plans substantially burden their sincere religious practices.

a. Substantial Burden

As a threshold matter, the parties dispute whether the district court held that the City's actions—specifically its tree removal and rookery management measures—substantially burden Appellants religious exercise. In their opening brief, Appellants address the substantial burden element only by stating that "there is no serious dispute that the City's current and intended actions substantially burden Appellants' religious exercise." The City argues that "[Appellants] do not even brief the issue of substantial burden and instead focus solely on the secondary question of whether the City's actions are narrowly-tailored to advance a compelling governmental interest." We agree.

A party forfeits arguments by inadequately briefing them on appeal. *Rollins v. Home Depot USA*, 8 F.4th 393, 397 n.1 (5th Cir. 2021); *see also* FED. R. APP. P. 28(a)(8)(A). "Adequate briefing requires a party to raise an issue in its opening brief." *Guillot ex rel. T.A.G. v. Russell*, 59 F.4th 743, 751 (5th Cir. 2023) (citing *United States v. Bowen*, 818 F.3d 179, 192 n.8 (5th Cir. 2016)). "To be adequate, a brief must address the district court's analysis and explain how it erred." *SEC v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022) (citation and internal quotation marks omitted). Appellants maintain on appeal that "the district court found . . . that the City's current and intended measures substantially burden [their] religious exercise." But contrary to Appellants' contentions, the record shows that the district court denied their relief as to rookery management and tree removal plans because the court had determined that these measures *did not* substantially burden their religious exercise. The district court determined that "[Appellants] have not shown that the City's bird deterrence program [or] the removal and relocation of

trees in the Project Area . . . place a substantial burden on their religious exercise." [6]

However, Appellants do not attempt in their briefing to rebut the district court's judgment that they failed to show that either the City's bird deterrence program or its removal and relocation of trees in the Project Area placed a substantial burden on their religious exercise. Appellants have the initial burden of establishing a substantial burden upon religion. *See Barr*, 295 S.W.3d at 307. Only if a substantial burden is proven does it become necessary to consider whether the City's interests served are compelling or whether the City has adopted the least burdensome method of achieving its goals. *Id.* Instead, Appellants maintain that the City expressly waived any argument that its actions do not substantially burden Appellants' religious exercise.[7] It is in their reply brief that Appellants attempt to address the substantial burden element. There, they argue that they did not fail to brief substantial burden arguments and contend that "[t]he destruction of the tree canopy [where] cormorants need to nest—and the driving away of the cormorants themselves—will end Appellants' ability to conduct religious services." Since establishing a substantial burden is an essential element of which Appellants bear the burden to prove, any purported waiver of

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[6] The district court was clear in its determination as to access for worship as well. It concluded that "[b]y fencing off the southern bank of the Lambert Beach Area, the City has substantially burdened Appellants' religious exercise by prohibiting their exercise at risk of criminal and civil punishment for entering the area."

[7] The City maintains that it did not waive its arguments disputing that its development plan substantially burdens Appellants' religious practices. In its response in opposition to Appellants' emergency motion for injunction pending appeal, the City stated that it "does not believe Appellants have demonstrated a substantial burden on their religious exercise," but it "believes it can accommodate the district court's requirement to provide Appellants" access to the Sacred Area. The City's response goes on to state expressly that "[t]he City does not, however, waive the 'substantial burden' issue for trial."

arguments by the City is inconsequential. And because these arguments were first mentioned in their reply brief, Appellants have forfeited this argument. *See Guillot*, 59 F.4th at 754. Still, we opt to consider Appellants' substantial burden arguments submitted in reply because we have discretion to consider a forfeited issue if "it is a purely legal matter and failure to consider the issue will result in a miscarriage of justice." *Rollins*, 8 F.4th at 398 (quoting *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 453 (5th Cir. 2008)).

Nevertheless, even if we were to consider their arguments, Appellants did not sufficiently establish a substantial burden. Appellants emphasize that if the City were permitted to proceed with its tree removal and rookery management procedures, the measures would irreversibly destroy the Sacred Area and their ability to practice their religion there.[8] To bolster these contentions, they cite caselaw analyzing governmental actions that involve complete bans or prohibition of religious exercise. As is the case here, "[w]hen a restriction is not completely prohibitive, Texas law still considers it substantial if 'alternatives for the religious exercise are severely restricted.'" *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 265 (5th Cir. 2010) (quoting *Barr*, 295 S.W.3d at 305). This court has held that according to *Barr*'s prescriptions, "that means a burden imposing a less-than-complete ban is nonetheless substantial if it curtails religious conduct and impacts religious expression to a 'significant' and 'real' degree." *Needville*, 611 F.3d at 265.

The City contends that "[w]hen analyzing whether a governmental body's activities on its *own land* impose a substantial burden on a plaintiff's

[8] Notably, these proffered arguments are Appellants' pleas as to the irreparable harm factor of the preliminary injunction inquiry. Because these assertions are as close to an argument in support of the substantial burden element of the strict scrutiny inquiry for which the briefing offers, we consider them here.

religious beliefs, courts agree that the activity does not impose a substantial burden where it affects only the subjective religious experience of the plaintiff." The City argues "that a government's use of its own land does not substantially burden religious beliefs if the conduct is not coercive and impacts the subjective religious experience only." The City is correct to pinpoint that the proposed construction is indeed occurring on its own land. Still, Appellants are not merely alleging subjective religious experiences here. Moreover, because we are analyzing Appellants' claims under TFRA, not the Religious Freedom Restoration Act ("RFRA"), the correct standard for evaluating substantial burden is not "coercion" but whether the burden is "real" and "significant." *Compare Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) ("Where, as here, there is no showing the government has coerced the Appellants to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Appellants' religious beliefs, there is no 'substantial burden' on the exercise of their religion.") and *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."), *with Barr*, 295 S.W.3d at 301 ("Thus defined, 'substantial' has two basic components: real vs. merely perceived, and significant vs. trivial. These limitations leave a broad range of things covered.").

In analyzing Appellants' contention that the destruction of the tree canopies, where cormorants nest, and the driving away of the cormorants themselves will burden their religions, we consider whether the presupposed burden is real and significant. Under TRFRA, a burden is substantial if it is "real vs. merely perceived, and significant vs. trivial"—two limitations that "leave a broad range of things covered." *Barr*, 295 S.W.3d at 301. The focus

of the inquiry is on "the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression," as "measured . . . from the person's perspective, not from the government's." *Id.* This inquiry is "case-by-case" and "fact-specific" and must consider "individual circumstances." *Merced*, 577 F.3d at 588; *Barr*, 295 S.W.3d at 302, 308. "Federal case law interpreting RFRA and [the Religious Land Use And Institutionalized Persons Act ("RLUIPA")] is relevant." *Merced*, 577 F.3d at 588 (citing *Barr*, 295 S.W.3d at 296).

First, the burden here is real. Unlike the *Navajo Nation* plaintiffs, Appellants here argue that trees possessing religious significance will be removed and cormorants of religious significance will be deterred from nesting. As the Ninth Circuit posited, "the sole question [in *Navajo Nation* was] whether a government action that affects only subjective spiritual fulfillment substantially burdens the exercise of religion." *Navajo Nation*, 535 F.3d at 1070 n.12. The court explained that the project did not substantially burden the plaintiffs' religious beliefs because the sole effect was on their subjective religious experience. *Id.* at 1063. But, here, Appellants are arguing that natural resources of religious significance will be destroyed or altered.

Nevertheless, the burden is not significant. The court in *Needville* determined that the challenged exemptions placed a significant burden on the plaintiff's religious conduct because the burden was both indirect and direct. *Needville*, 611 F.3d at 265. As the *Needville* court posited, "because the District's exemptions directly regulate a part of [the plaintiff's] body and not just a personal effect . . . the burden on [his] religious expression is arguably even more intrusive." *Id.* at 266. Here, the City's development plan only indirectly impacts Appellants' religious conduct and expression. Appellants continue to have virtually unlimited access to the Park for religious and cultural purposes. Appellants' reverence of the cormorants as sacred genesis creatures from the Sacred Area is not implicated here because the City's

rookery management program does not directly dictate or regulate the cormorants' nesting habits, migration, or Park visitation. For example, the record shows that, regardless of the rookery management program, no cormorants, due to their migration patterns, inhabit the area for extended periods of time each year.[9] Moreover, the City's rookery management program does not substantially burden Appellants' religious beliefs because cormorants can still nest elsewhere in the 343-acre Park or nearby. The deterrent activities are deployed only within the two-acre Project Area and only to persuade the birds to nest elsewhere.[10]

Equally, the Ninth Circuit's analysis in *Navajo Nation* is persuasive here as to the City's development plan. The Ninth Circuit held that "a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what [the legislature] has labeled a 'substantial burden'. . . on the free exercise of religion." *Navajo Nation*, 535 F.3d at 1063. The Ninth Circuit cautions that defining "substantial burden" otherwise would give "one religious sect a veto over the use of public park land" and "deprive others of the right to use what is, by definition, land that belongs to everyone." *Id.* at 1063–64. Thus, any, and all, government action, "including action on its own land, would be subject to the personalized oversight of millions of citizens" if each citizen could "hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires." *Id.* at 1063.

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[9] *See infra* Section III.B.i.c (mentioning the double-crested cormorants' typical migration patterns to the City).

[10] *See infra* Section III.B.i.b–c (discussing the goal of the City's rookery management program as dissuading the egret and heron rookeries not to nest in "undesired" locations in favor of nesting in "more desirable" locations).

We conclude that the City's development plan for the Park does not substantially burden Appellants' religious exercise. In any event, independent of the substantial burden inquiry, the development plan advances a compelling interest through the least restrictive means. Because Appellants maintain on appeal that the City "does not dispute that . . . the tree-removal plan, and the anti-nesting measures all substantially burden [their] religious exercise," they immediately launch into their strict scrutiny arguments condemning the City for never accommodating their religious exercise and arguing that "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *See Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). Thus, we conduct a thorough strict scrutiny analysis and address those arguments below.

b. Compelling Interest

The City argues that it has a compelling governmental interest in repairing the crumbling retaining walls on the northern bank of the riverbend, and as a result tree removal and tree relocation are an integral part of that repair plan. It further avers that the bird deterrence activities are necessary to protect the health and safety of citizens who visit the Park. The City avers that the purpose of the rookery management program is twofold: (1) to mitigate the health and safety hazards arising from the bird guano[11] that dense bird colonies produce and (2) to ensure no migratory birds are nesting in trees within the Project Area such that work can begin under the Migratory Bird Treaty Act and the bond project improvements can proceed without delay.

In response to the City's public safety arguments, Appellants maintain that "the undisputed evidence is that the retaining walls in the Sacred Area [on the southern bank] do not need repair." Further, they aver

[11] Guano is the accumulated excrement of birds.

that the City must prove that its "tree removal design is necessary in the context of these Appellants' religious practice" pursuant to TRFRA. *Barr*, 295 S.W.3d at 307. Likewise, Appellants contend that the City's rookery management plan fails strict scrutiny. They argue that preventing a pause in construction is not a compelling governmental interest. They contend that the City's cursory assertions—such as its asserted interest in making the Project Area safe for visitors in the Park—and other "public safety" arguments are "the kinds of statements that the Texas Supreme Court has held insufficient to establish a compelling governmental interest."[12] We disagree.

The court in *Barr* determined that "the trial court's brief finding—that '[t]he ordinance was in furtherance of a compelling government interest'—[fell] short of the required scrutiny." *Barr*, 295 S.W.3d at 307–08. Dissimilarly, the district court here, after holding a four-day preliminary injunction hearing, published three separate orders evaluating the City's interests—(1) the October 2, 2023 "Partial Order," (2) the October 11, 2023 "Memorandum Opinion and Order," and (3) the October 25, 2023 Order. Moreover, contrary to the instant case, the *Barr* court seemed to also admonish the city council from merely reciting a published section of the challenged ordinance when asserting that the law "serves a compelling interest in advancing safety, preventing nuisance, and protecting children." *Barr*, 295 S.W.3d at 306–07. Specifically, the code there read that the "City Council finds the requirements of this section are reasonably necessary to preserve the public safety, morals, and general welfare." *Id.* at 291. Rather,

[12] *See Barr*, 295 S.W.3d at 306 (reasoning that "[the City Council's recitation that the Ordinance's requirements] 'are reasonably necessary to preserve the public safety' . . . is the kind of 'broadly formulated interest[]' that does not satisfy the scrutiny mandated by TRFRA").

the *Barr* court directed that "[c]ourts and litigants must focus on real and serious burdens [], and not assume that [] 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 306.

Here, the district court complied with *Barr*'s directive. It did not assume that the City's bond project improvements inherently served a compelling interest. Rather, it conducted an injunction hearing over several days in which litigants interrogated the interests served by the Bond Project. In its Memorandum Opinion and Order, the district court determined that "[w]ith reference to [tree removal rookery management measures] of [Appellants]' requested relief, the court finds the City has met its burden of proving a compelling government interest for public health and safety[.]"

The City advanced specific public health and safety considerations, which the district court acknowledged and adopted, including that (1) removing dead and dying trees prevents them from falling and injuring visitors to the Park; (2) removing or relocating some trees is necessary because of the likelihood of their future failure; and (3) failing retaining walls pose a substantial risk to safety. The goal of repairing walls and removing trees, which pose dangers to visitors in a public park, is a compelling interest. As it relates to the bird excrement, the City raised well-founded concerns that large populations of migratory birds in highly urbanized areas of the Park have an adverse impact on the water quality in the San Antonio River and contribute to unsanitary conditions in the Park, which can pose a risk of disease to humans and animals. Moreover, the record provides vivid, descriptive, photographic details pertaining to the quantity of excrement and the dangers associated with human contact with the excrement.

The record indicates that various areas of the Park "become nearly unusable for 10 months of the year due to the bird density/habitat." The resulting feces causes damage to various park amenities, including picnic tables, water fountains, playground equipment, restrooms, and sidewalks. The record provides a variety of pictures illustrating the volume of excrement affecting these facilities. The record also indicates that the excrement could harm humans and other wildlife. The 2022 Draft Rookery Management Plan noted: "When rookeries establish near playgrounds, infrastructure, or other recreational areas, the risk of zoonotic disease transmission (i.e., histoplasmosis, psittacosis, and salmonellosis) increases substantially." The Draft Rookery Management Plan further observed that "the magnitude of fecal contamination, high likelihood of human contact with fecal matter, and limited ability to perform effective environmental decontamination make rookery management crucial to disease risk mitigation in urban areas."

Moreover, breathing problems can occur from avian diseases linked to the uric acid produced by bird feces. The high concentrations of bird fecal matter also affect the Park's water quality. The City measured elevated levels of Escherichia coli ("E. coli") and other substances harmful to human health due to fecal bacteria from the birds. The San Antonio River Authority conducted bacterial source tracking throughout the Park and determined that the largest contributors to E. coli contamination is "non-avian and avian wildlife." Those two classifications make up around 50-60% of the total E. coli in the water.

The record also includes the expert opinions of Dr. J. Hunter Reed, a state wildlife veterinarian and health specialist, and Jessica Alderson, an

urban wildlife biologist. Alderson[13] provided technical guidance to the City related to the egret and heron rookery located at the Park and provided recommendations on how to deter these birds from "an undesired location [i.e., areas that are high use to the public, such as playgrounds or picnic tables, or where there's lots of human activity and potential encounters with wildlife and humans] and encourage them to go to an area where they would be more desirable." And, in providing technical guidance to the City about its rookery management efforts, Alderson testified that she also relied on "a letter from [the TPWD] state wildlife biologist, Dr. Hunter Reed" as to the "public health and safety regarding the rookery and the birds being in a highly used area of the Park."

Dr. Reed expressed significant public health concerns for citizens enjoying the Park. He warned that "[w]hen large rookeries are established in the immediate vicinity of playgrounds, infrastructure, and recreational hardscapes, the risk of zoonotic disease transmission . . . increases substantially." He continued that "[t]he sheer magnitude of fecal contamination, high likelihood of human contact with fecal matter, and limited ability to perform effective environmental decontamination make rookery management action paramount to disease risk mitigation." He maintained that "well-coordinated and human response to manage the rookery . . . will support the persistence of nesting birds." Accordingly, mitigating these dangers, posed by amassed bird guano in highly urbanized areas of the Park, is a compelling interest. Likewise, because repairing the retaining walls is a compelling interest—which the litigants agree requires the relocation or removal of even *one*, *single* tree—then it logically follows that complying with the demands of the Migratory Bird Treaty Act—which

[13] Alderson is the urban wildlife technical guidance program leader for TPWD. Her background and knowledge are in wildlife and natural resource management.

prohibits interference with or disturbance of nests already present in trees—is equally a compelling interest.

c. Least Restrictive Means

On appeal, Appellants repeatedly argue that, according to *Fulton*, the City must accommodate their religious exercise in crafting the bird deterrence measures and tree-removal plans. They plainly state that "[the City's] intolerant view is forbidden under the Supreme Court's command that, if [the] government can *accommodate* religious exercise, it must." But recall that the *Fulton* Court did not declare that "if [the] government can *accommodate*, it must"—rather it stated that "so long as the government can *achieve its interests in a manner that does not burden religion*, it must do so." This is simply a rewording of the strict scrutiny standard, not a command to commence all or even any of the proposed measures. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) (holding that to survive strict scrutiny, a challenged action must be "justified by a compelling governmental interest and . . . narrowly tailored to advance that interest"); *McCullen v. Coakley*, 573 U.S. 464, 493–94 (2014) ("The point is not that [the state] must enact all or even any of the proposed measures discussed[.] The point is instead that the [state] has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals [exercising their First Amendment rights]."). In *Fulton*, the Court's full quote reads as follows: "A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests . . . Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. Thus, the *Fulton* Court proclaimed that a government action subject to strict scrutiny must achieve its interests in a narrowly tailored manner that would not burden religion. We continue this analysis here.

At the injunction hearing and on appeal, Appellants rely heavily on the City's answer to their complaint to bolster their argument that "the City never commissioned a study that aims to achieve its governmental purposes while accommodating [our] religious exercise." This contention requires us to unpack Appellants' complaint and the City's answer. In their complaint, Appellants alleged that "the City has refused to commission a design firm tasked with creating a plan that would preserve the walls and the double-crested cormorant's presence and habitat." Using the Appellants' proffered language as articulated in their complaint,[14] the City (1) admitted that it did not commission the studies as characterized by Appellants and (2) denied that any such studies were needed. In its answer, the City declared that:

> The City denies [the Complaint's allegations], including without limitation the following: (a) [Appellants'] characterization or summary of the "study" to determine the impact of the Bond Project on [Appellants'] religious beliefs; (b) that the City was required to "commission a design firm" to "creat[e] a plan to preserve the walls and the double-crested cormorant's presence and habitat"; and (c) that the Bond Project, as proposed, does not sufficiently address tree preservation, wildlife protection, and safe access to the Park.

And, while the City admitted that it did not commission the studies as described by the Appellants, it averred that "the City did, however, study viable alternatives to design the Bond Project to achieve the governmental goals of public health and safety with the least adverse impact." When

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[14] Paragraph 59 of Appellants' complaint alleges that "the City has never commissioned a study to determine if the Bond Project could be completed if the priority was ensuring the double-crested cormorant could inhabit the Park afterwards." Paragraph 59 continues that "the City has never commissioned a study that aims to achieve its governmental purposes while accommodating [Appellants'] religious exercise."

questioned about the City's answer to the complaint, Shanon Miller[15] testified that "the City did look at viable alternatives." She further clarified that "the City received feedback from many stakeholders, and considered all of it. It wasn't just one particular interest or stakeholder interest that was examined." According to Miller, considering the many interests and stakeholders prompted the City to "change[] the project as a result."

This is a far cry from an overt admission by the City that "it has not considered—and it refuses to consider—[Appellants'] religious exercise" as Appellants allege. Rather, the City's answer declares that "[t]he City denies that it has not attempted 'to accommodate [Appellants'] constitutional and statutory religious freedom rights' . . . [and] also denies that it 'is willing to adjust its plans under its favored causes . . . but not to protect the rights of its citizens.'" The City's answer continues that "[t]he City admits that [Appellants] requested access to Lambert Beach to perform a religious ceremony on August 12, 2023 . . . [and] the City offered various reasonable accommodations that balanced the [Appellants'] asserted religious interest with the governmental goal of public safety (including the safety of [Appellants] and any other participants in the ceremony), but the [Appellants] declined those accommodations."

The record does not support Appellants' allegations that the City has refused to try to accommodate [Appellants'] religious exercise. Rather, the record illustrates that many entities were involved in approving the bond project improvements, and at various stages in the public comment and meeting process, stakeholder interests were considered and incorporated in the development plan's design. Moreover, Appellants participated in many

[15] Miller is the director of the Office of Historic Preservation and the City's historic preservation officer.

private and public meetings with the City's employees related to the Bond Project.[16]

Relevant here, the City's Public Works Department operates as the project manager for bond projects and facilitates with the Bond Project owner, Homer Garcia III.[17] In 2022, the Public Works Department applied for a certificate of appropriateness, related to tree removal, with the Office of Historic Preservation ("OHP").[18] The Historic and Design Review Commission ("HDRC"), whose volunteer members are appointed by the mayor and each councilmember to represent their district, is the recommending body responsible for design review cases. HDRC officials dedicate a significant amount of time to their volunteer roles as commissioners, including attending public hearings, site visits, and committee meetings. After reviewing applications, HDRC makes recommendations to OHP, and Miller, as historic preservation officer and director of OHP, issues the final decision on the certificates of appropriateness. In February 2022, HDRC held its first hearing concerning the Bond Project. However, HDRC did not initially approve the Public Works Department's application but tabled it because it required additional information. Hence, the bond project design team circled back to gather additional public input at public meetings from March 2022 through summer

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[16] Namely, Perez spoke and gave a presentation to the Parks and Recreation Department on July 29, 2022. Perez was invited by the Brackenridge Park Conservancy to give a presentation about concerns with the Bond Project at its January 10, 2023 meeting.

[17] Garcia is the City's Parks and Recreation director.

[18] OHP staff members help applicants (i.e., the Public Works Department) assemble application materials to provide to the Historic and Design Review Commission ("HDRC"). OHP staff members also prepare staff recommendations to accompany the applications submitted to HDRC. In the instant case, the application was prepared by the bond project design team and the OHP staff recommendation was prepared by OHP staff member, Cory Edwards.

2022. A number of City councilmembers, commissions, and departments were involved in the public meetings, including the Public Works Department, the Parks and Recreation Department, the Development Services Department,[19] the City manager's office, the City attorney's office, the Planning Commission,[20] OHP, and HDRC. After conducting the 2022 public meetings, the bond project design team returned to its application for a certificate of appropriateness in 2023, specifically taking into account the public input related to the bond project design, which pertains to the Project Area. Miller testified that the additional information "made it easier for the commissioners and the public to understand the tree removal request and the context of the larger design."

To approve the Bond Project, the Planning Commission first approved the variance that the Public Works Department requested from the City UDC. Next, after receiving the updated Bond Project application in 2023, HDRC convened a hearing on April 19, 2023 and unanimously recommended to approve the application with three stipulations.[21] Then, on April 27, 2023, the OHP issued the certificate of appropriateness consistent with the HDRC recommendation to move forward with improvements to the

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[19] The Development Services Department reviews applications for permitting and arboreal standards.

[20] The Planning Commission, whose volunteer members are appointed by the mayor and each councilmember to represent their district, approved the variance the Public Works Department requested from the City UDC provision that requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-year floodplain.

[21] The stipulations were that (1) work would not occur until approvals were complete pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*, (2) any additional tree removals would return to HDRC for approval, consistent with the UDC, and (3) the City would monitor and maintain the heritage and significant trees during and after construction.

Lambert Beach area in the Park. At each level of the application process—the Planning Commission approval, HDRC recommendation, and the OHP issuance of the certificate—public meetings were held to solicit comments in either opposition or in favor of the project. Appellants acknowledge that they testified at the March 3, 2023 Texas Historical Commission meeting, the April 19, 2023 HDRC hearing, and the August 3, 2023 City Council hearing.

The City took these public comments, including Appellants', under consideration, evaluated whether more trees could be preserved in place in the Project Area, and revised its plan for the work in the Project Area. Miller testified that the City decided to change the original design so as to preserve or relocate more trees as a result of the public debate and meetings. The original design would have removed 70 trees in the Project Area, and that number has been reduced to 48 trees, with 21 of those trees being relocated, as a result of the public input process.

The City contends that it cannot accomplish its compelling governmental interest in making the Project Area safe for visitors, preserving historic structures, and making Park amenities accessible and available to the public by any less restrictive means than the bird deterrence program and the removal and relocation of the designated trees in the Project Area. Foremost, the City maintains that it analyzed engineering options and selected the method to repair the retaining walls that it determined would save the greatest number of large trees. From an engineering standpoint, the City contends that the pier-and-spandrel method,[22] submitted by Appellants, did not entail a "markedly reduced amount of excavation required"—a necessary condition in order to save additional trees. Moreover, the City

[22] The pier-and-spandrel method requires piers to be drilled approximately 15 to 20 feet into the ground directly behind an existing retaining wall and pins to be drilled from the outside of the existing retaining walls (i.e., from the river) into the piers.

argues that the bird deterrence activities are limited in scope as they do not harm or prevent birds, including the double-crested cormorants, from entering the Park or the Project Area. Since the implementation of the bird deterrence measures, the City avers that double-crested cormorants have been observed in the Park, including in the Project Area.

Appellants contend that "the City [] has an insurmountable narrow-tailoring problem: Its witnesses candidly testified that the City selected the cantilever plan requiring tree removal 'without any consideration' of [their] religious exercise." Citing *Fulton*, they maintain that the City must pursue "viable, less-restrictive alternatives [to repair the retaining walls] that would save more trees" because "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." Appellants also argue that "the City runs into a similar narrow-tailoring problem," in regard to the rookery management program, because there are a "number of [alternative] less-restrictive means that the City easily could have considered." They argue that rookery management measures are not narrowly tailored because the City has not tried to accommodate Appellants' religious exercise in crafting the bird deterrence plan. They pinpoint that the City proffered no testimony addressing narrowly tailored alternatives to the planned bird deterrence measures. We disagree.

The City has demonstrated that it "seriously undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *See McCullen*, 573 U.S. at 494. The City commissioned a team of various professionals, which ultimately decided on the cantilevered design after considering the proposed pier-and-spandrel method and analyzing its potential efficacy to save more trees. At the injunction hearing, the City articulated that, during the course of the bond project design, City personnel, engineers, and arborists, met to examine "the

alternatives and to figure out whether or not what was being proposed was the best solution moving forward, [and] that [it was] saving as many trees as possible."

Miller and Bill Pennell[23] both testified that they met with the Tree Assessment Committee[24] in March 2023 in anticipation of the HDRC approval process. Specifically, Miller testified that City personnel, including herself and Garcia, "were asked to really look at the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, that we were saving as many trees as possible." As a result, Jamaal Moreno,[25] Ross Hosea,[26] Shawn Franke,[27] three independent arborists, who were involved in the Tree Assessment Committee, Moises Cruz,[28] Pennell, and Miller examined alternatives. Cruz had recommended the pier-and-spandrel design, and the meetings' attendees discussed the design in great detail—including how it works, how it would be installed, and how it differs from alternative designs. Miller testified that the team discussed "with the arborists and with our design engineer that afternoon" whether using the pier-and-spandrel method would allow for additional trees to be saved.

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[23] Pennell is the City's assistant capital programs manager, overseeing the project management of trail projects managed by the San Antonio River Authority and the City's Public Works Department.

[24] The Tree Assessment Committee was tasked with evaluating trees scheduled for removal in the Park and prepared a tree assessment report, authored on May 16, 2022, for the City. The committee comprised of certified volunteer arborists, David Vaughan, Michael Nentwich, Mark Kroeze, and Mark Duff.

[25] Moreno is the project manager of the City's bond project design team and a licensed Texas landscape architect.

[26] Hosea is the City's forester in the Parks and Recreation Department.

[27] Franke is the structural engineer who designed and provided engineering support for the bond project design team.

[28] Cruz is a volunteer engineer.

Following the meeting, City personnel accompanied Cruz to the Project Area "to talk specifically about specific trees." Still, according to Miller, "[t]he consensus in the meeting with the arborists was that no additional trees would be saved because they would still be impacted by the construction, regardless of the methodology." The City maintains, and presented evidence at the hearing, that in evaluating the alternative engineering methods it sufficiently balanced engineering challenges and safety considerations.

Although Appellants would prefer that the City consider either repairing the retaining walls in place or using a pier-and-spandrel system, the City's tree removal plan is narrowly tailored to achieve the City's compelling governmental interest of making the Project Area safe for visitors to the Park, including Appellants. Moreno testified that the City's informed position is that it cannot save any additional trees in the Project Area under the current engineering design plan, and alternatively, if the City were to choose an alternate design (i.e., the pier-and-spandrel method) no additional trees would be saved compared to what the City is able to achieve as presently designed. The record shows that the City considered, but ultimately rejected, the pier-and-spandrel system in part because it (1) required drilling through the face of the historic walls, in violation of applicable standards promulgated by the Secretary of the Interior, (2) would not allow for the preservation of significantly more trees, and (3) would cost two to three times as much as the cantilevered wall solution, exceeding the budget for the Bond Project. The record also shows that the City even considered moving the walls further into the River to distance them from the trees, but that solution was rejected because it would have required a floodplain mitigation project.

As it relates to the City's bird deterrence measures, Appellants primarily rely on *Merced* to argue that the City has not pursued the least restrictive means. Notably, the *Merced* panel acknowledged that:

> [The plaintiff] propose[d] no fewer than three less restrictive alternatives to [the City's scheme] . . . [And the City did] not rebut any of [the plaintiff's] alternatives; it [did] not even try. Thus . . . we hold that the [City's] ordinances that burden [the plaintiff's] religious free exercise are not the least restrictive means of advancing the city's interests.

Merced, 577 F.3d at 595. So, too, Appellants here attempt to enumerate a list of *possibly* less restrictive alternatives to the City's current scheme. Appellants outline several alternatives that the City could have pursued or investigated instead of its presently planned bird deterrence measures such as (1) conducting rookery management measures that exclude cormorants, (2) completing construction within the four-month period between mid- to late-October and February when no migratory birds are present, (3) starting construction within that same four-month period, pausing while migratory birds nest, and resuming when the migratory birds leave; (4) completing construction within the six-month period between mid- to late-October and March or April before the cormorants begin to arrive;[29] or (5) conducting rookery management measures and completing the construction within the eight-month period between mid- to late-October and June, when cormorants may still arrive and nest. However, the proposed means must not only be conceivable but must be (1) in the context of the compelling governmental interest and (2) be the least restrictive of the proffered choices to achieve that governmental interest. *See* TEX. CIV. PRAC. & REM. CODE § 110.003(a)–(b).

In the instant case, the City rebuts all of Appellants' proposed alternatives. *See Merced*, 577 F.3d at 595. The record indicates that no other

[29] Alderson testified that double-crested cormorants typically arrive to San Antonio around April and May "or oftentimes later into the season."

means exists to deploy deterrent efforts aimed only at egrets and herons but not cormorants. As discussed, Alderson provided technical guidance to the City related to the egret and heron rookery located at the Park and offered recommendations on how to deter birds from "an undesired location and encourage them to go to an area where they would be more desirable." She testified that, in her experience as an urban wildlife biologist and working with urban rookeries, there is no way (1) to sequence deterrence efforts to deter egrets and herons from nesting in a site but not deter double-crested cormorants or (2) to utilize noise deterrents that would deter egrets and herons but not cormorants. Essentially based on her experience and expertise, she testified that she is not aware of any kind of deterrent measure that would work on egrets and herons but not disturb cormorants because "the deterrent techniques are going to impact other species than the ones that you're specifically targeting." She testified that the difficulty lies in these species being colonial nesting birds.[30]

In evaluating the relative restrictiveness of the bird deterrence plans, the record shows that the City's activities are the least restrictive means to advance the compelling governmental interests presented. Limited by the predictability of migration and habitat patterns of colonial nesting birds, start and stoppage periods of construction at four-month, six-month, or eight-month intervals, as suggested by Appellants, would not achieve the compelling goals of adhering to the Migratory Bird Treaty Act. Moreover, they certainly would not achieve the goal of mitigating bird excrement. Alderson maintained that she "bas[ed] [her] technical guidance [related to bird deterrence] on the biology behind everything." Since the deterrent methods are targeted at nesting and not a species, at times birds of any species

[30] A colonial nesting bird is a bird that nests in large colonies or with large numbers of birds in a given area as a way of protecting their young and their resources.

can—despite the deterrent efforts and unbeknownst to the program managers—enter the deterrence area and nest. Once any species nests, the program administrators must stop work in that area and notify the respective regulatory agencies. Once deterrent efforts have been halted, this invites all different migratory birds to enter and nest in the area. As such, the district court posited, and we agree that the record shows that there could not be an eight-month window of opportunity to accomplish the bond project improvements. Even more, given this credible testimony regarding the different species' migration patterns and coverage of the Migratory Bird Treaty Act, Appellants' arguments that the bond project improvements could have been completed during various periods when migratory birds are not present do not sufficiently refute that the City's bird deterrence satisfies the least restrictive means to advance its compelling governmental interests.

Similarly, Pennell testified that based on his knowledge of the area and the birds' migratory patterns, the double-crested cormorants arrive around the same time, or within the same period, as the cattle egrets and snow egrets. Thus, he too confirmed there is not a way to time the bird deterrence activities so that only double-crested cormorants can nest in the deterrent zone but not allow egrets and herons to nest there. Additionally, Pennell confirmed that no separate or additional study needed to be commissioned to answer the question of whether it is possible to utilize deterrent methods that are effective *only* against egrets and herons but do not disturb cormorants. Furthermore, he confirmed that no additional or separate study needed to be commissioned to understand the migratory and habitat patterns of these birds. These conditions have been uniformly observed and widely accepted.

Likewise, the record shows that the City applies deterrence efforts only to the extent required to achieve the goal of relocating the targeted species—and no further. As the City avers, "[the] bird deterrence policy does not prohibit migratory birds from visiting, roosting, or foraging in the

Project Area," and the deterrent activities are deployed only within the two-acre Project Area and only to persuade the birds to nest elsewhere.

As it relates to the bird excrement, the record provides information pertaining to the remedial measures the City has previously instituted in the Park to curtail human exposure. The record indicates that the City has implemented various bird deterrent techniques to prevent mass congregation of birds and limit the accumulation of the excrement. At times, the City has closed the playground areas and restricted access to other facilities due to the excrement. Other times, these amenities are simply "removed." Still, Pennell noted that the Park's ability to clean the amenities depends on the material that the excrement is on. For example, fecal matter can absorb into plastic and "eat away" at metal paint. As such, the record shows that the rookery management program is the least restrictive means to advance the City's interest in mitigating the hazardous effects of bird guano to make the Park safe for visitors. Throughout the record, Pennell reiterates the City's stance: bird mitigation is important for the safety of park-goers. In his opinion, the bird deterrence policies have been effective to reduce and more effectively manage the migratory bird rookeries in the Park.

The record establishes that the studies requested by Appellants[31] were not needed to ascertain the least restrictive means. Moreover, the record shows that the City considered viable alternatives and "different methods that other jurisdictions have found effective" before ultimately deciding on the "less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494. Consequently, the City's tree removal and bird deterrence plans—which deter only to the extent required to dissuade the targeted species from nesting

[31] Supra note 14.

and remove minimal trees necessary to excavate—are the least restrictive means.

As stressed, the burden is on the City to establish that its proposed measures advance a compelling governmental interest and is the least restrictive means of furthering that interest. *Barr*, 295 S.W.3d at 299. We conclude that the City's construction plan serves two compelling interests: (1) public health and safety and (2) compliance with federal law to serve the interests underlying the construction project. We also conclude that the City's tree removal plan and rookery management program do not violate TRFRA because they are the least restrictive means to advance the City's compelling governmental interests. On this record, the government has met its burden.

ii. First Amendment Free Exercise and Texas freedom-to-worship provision

The parties' dispute under the Free Exercise Clause centers on which standard of constitutional review applies to the instant case, rational basis or strict scrutiny. Appellants argue that the City's plans for tree removal and rookery management measures are not neutral and generally applicable and, therefore, must be analyzed under the more exacting strict scrutiny standard. The City contends that its planned Park improvements are neutral and generally applicable and that the more deferential rational basis standard of review applies. Applying strict scrutiny, we conclude that the challenged government action in this case withstands Appellants' Free Exercise challenge, as illustrated *infra* in the TRFRA claim analysis.

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Free Exercise Clause has been applied to the States through the Fourteenth Amendment. *Lukumi*, 508 U.S. at 531. Although the freedom to believe is

absolute, the freedom to act on one's religious beliefs "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). Under strict scrutiny review, a challenged government action will be deemed invalid unless it is (1) justified by a compelling governmental interest and (2) is narrowly tailored to advance that interest. *Lukumi*, 508 U.S. at 533. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest[.]" *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam). The government must also demonstrate that it "seriously undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494. The City has provided ample support demonstrating that it has compelling interests for its adoption of the tree-removal and bird deterrence plans and that it has pursued the least burdensome method of achieving its goals. Therefore, Appellants have failed to establish a likelihood of success on the merits of their Free Exercise claim.

Additionally, Appellants argue that the City's plan violates their freedom of worship under the Texas Constitution.[32] Because Appellants incorporate by reference their arguments on the Free Exercise and TRFRA claims, they similarly fail to establish a likelihood of success on the merits of their claims under Article I, § 6 of the Texas Constitution.[33]

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[32] The Freedom of Worship provision of the Texas Constitution states that "[n]o human authority ought . . . to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship." TEX. CONST. art. I, § 6.

[33] Appellants declare that they "incorporate by reference their arguments on the TRFRA, Free Exercise Clause, and Article I, Section 6-a claims" to establish the likelihood of success on their claim under Texas's freedom-to-worship provision (§ 6).

iii. Texas religious-service-protections provision

Appellants assert that the City's plan violates the religious-service-protections provision of the Texas Constitution.[34] Appellants further argue that § 6-a of Article I of the Texas Constitution "does not even allow the City to try to satisfy strict scrutiny; it is a categorical bar on what the City seeks to do," but do not cite caselaw or other persuasive authorities to support this assertion. Appellants aver that their § 6-a claim plainly alleges that the City's tree-removal and rookery management measures independently[35] violate § 6-a because they would "prohibit and limit [Appellants'] future religious services by irreparably destroying the very aspects of the Sacred Area that make it a living place of worship for [Appellants]."

Whether this provision of the Texas Constitution imposes a complete bar on all restrictions to religious services or invokes a strict scrutiny inquiry is a determination best left to the Texas Supreme Court to decide,[36] and a determination we need not reach in the instant case. Even accepting that the "relatively new provision bars any government action that prohibits or limits religious services," Appellants do not sufficiently brief the question of whether a compelled "preservation of spiritual ecology" was envisioned in

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[34] This 2021 enacted provision of the Texas Constitution, titled "Religious Service Protections," provides that the state of Texas "may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship . . . by a religious organization established to support and serve the propagation of a sincerely held religious belief." TEX. CONST. art. I, § 6-a.

[35] In addition to their arguments that the City's fencing violates 6-a by barring access for religious services, Appellants contend that "the City's tree-removal and anti-nesting measures independently violate Section 6-a."

[36] *See, e.g.*, *Barr v. City of Sinton*, 295 S.W.3d 287, 305 (Tex. 2009) (holding that Texas citizens do not have "an absolute right to engage in [religious] conduct" because "[t]he government may regulate such conduct in furtherance of a compelling interest").

the statute's definition of a "religious service" protected from state-sanctioned prohibitions or limitations. *See* TEX. CONST. art. I, § 6-a. Appellants contend that the City's planned changes to the Sacred Area's spiritual ecology amounts to a limitation of their religious services.[37] They have not sufficiently established that this statute compels the relief that they seek. By way of their sparse briefing on the question, Appellants fail to establish a likelihood of success on the merits of their claims under Article I, § 6-a of the Texas Constitution.

Accordingly, the likelihood of success on Appellants' claims—or lack thereof—controls for purposes of determining whether they are entitled to injunctive relief. We conclude that the district court did not abuse its discretion in determining that Appellants failed to show a likelihood of success on the merits on any of their four claims—the TRFRA claim, the First Amendment Free Exercise claim, the claim under the freedom-to-worship provision of the Texas Constitution, or the claim under the religious-service-protections provision of the Texas Constitution. *See Scott*, 28 F.4th at 671. Thus, no additional analysis is required. Where appellants fail to meet their burden to show a likelihood of success on the merits, "failure to show a likelihood of success alone is sufficient to justify a denial." C*AE Integrated, L.L.C. v. Moov Techs., Inc.*, 44 F.4th 257, 264 n.22 (5th Cir. 2022).

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[37] As the district court articulated, "the area does not look the same as it did thousands of years ago . . . Nor does it look the same as 100 years ago . . . Nor will it look the same 100 years from now." The landscape is perpetually changing. Whether trees die, are damaged, or sprout by natural causes or human-manufactured sources, or whether birds decide to migrate and nest in the Park based on natural occurrences or designed measures—is a thing of chance and neither chance occurrence seems to be as definite or permanent as Appellants allege.

C. Injunction Pending Appeal

To obtain an injunction pending appeal, Appellants must satisfy each of the injunction elements. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). To determine whether to grant an injunction pending appeal, we consider the four elements typically used to determine whether to grant injunctive relief: (1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the injunction; (3) the potential harm to opposing parties if the injunction is issued; and (4) the public interest. *See Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. Unit B 1981); *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 939 (5th Cir. 1984) (per curiam). As the parties seeking the injunction, Appellants bear the burden of showing that they satisfy each of these elements. *See Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).

We begin and end with the first factor: likelihood of success on the merits. Appellants claim that they are likely to succeed on the merits of their appeal, arguing that the City's actions—specifically its tree-removal plan and rookery management plan—fail strict scrutiny because these plans (1) lack any compelling governmental interest and (2) are not narrowly tailored. Specifically, Appellants argue that the City seeks to permanently prevent them from performing religious services by destroying the area's spiritual ecology and has never attempted to accommodate their religious exercise.

We have considered Appellants' arguments based on the parties' filings, the district court's opinion, and the relevant caselaw, and conclude that Appellants have failed to establish a likelihood of success on the merits of their claims that the City violated their rights under the federal Free Exercise Clause, the Texas Constitution, or TRFRA. The record evidence

establishes that the City has compelling interests. And, in evaluating the relative restrictiveness of the tree-removal and rookery management plans, the record indicates that the City's activities are the least restrictive means to advance the compelling governmental interests presented. The evidence supports that the City's design of the project was a thorough, comprehensive, and complex process involving experts in many disciplines, including arborists, civil engineers, architects, landscape architects, wildlife biologists, and scientists. The City (1) solicited the opinions of experts and others expressing concerns about the Park's trees and wildlife and (2) adjusted its plans regarding the trees so that the number of trees now scheduled for removal has been reduced from 70 to 48, with another 20 trees scheduled for relocation. The City appointed a committee of highly qualified independent arborists to evaluate which trees in the Project Area needed to be removed because of construction restrictions imposed by the bond project construction plans. Moreover, the City's bird deterrence measures are aimed at nesting, not preventing their presence. The migratory birds are still allowed to forage, feed, and rest in the Project Area. Likewise, Appellants' bird deterrence alternatives are not as effective as the current design. The City and its bond project design team theorize that the project will take eight months. To the contrary, Appellants' suggestions—offering a four-month alternative, a six-month alternative, or the prospect of deterring one type of bird and not another—are not the least restrictive means as to the City's compelling interests.

Based on our review, we conclude that Appellants have not demonstrated that they are likely to prevail on their claim that the district court abused its discretion in only partially granting their motion for a

preliminary injunction.[38] Because we have concluded that Appellants' have not made the requisite showing of the likelihood of success on the merits, they are not entitled to an injunction pending appeal. *Janvey*, 647 F.3d at 595. Thus, we do not analyze the other injunction elements here.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment. Correspondingly, the appeal as to Appellants' access to the Project Area within the Park is DISMISSED AS MOOT. Accordingly, because Appellants have failed to show a likelihood of success on the merits, we DENY their Emergency Motion for Injunction Pending Appeal. Further, the temporary administrative stay issued by this court on October 27, 2023, is VACATED.

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[38] Appellants sought injunctive relief to require the City to grant them unfettered access to the fenced Project Area for religious worship, minimize tree removal in the Project Area, and allow cormorants to nest in the Project Area. The district court granted injunctive relief as to scheduled group access to the area for religious ceremonies. The court also ordered the City to repair a large broken limb in the Project Area that the City maintained "pose[d] a risk of injury or death." The district court however declined to enjoin the City's planned tree removal and rookery management measures and denied Appellants access for unscheduled individual worship, while the Project Area fencing was actively erected and any dangerous tree limbs posed safety risks to Park visitors. On November 13, 2023, the City affirmed that it had removed the dangerous limb that had previously made the Project Area inaccessible, as ordered by the district court. The City avowed that removing the limb allowed it to reconfigure the construction fencing to grant public access to the entire area.

STEPHEN A. HIGGINSON, *Circuit Judge*, concurring in part and dissenting in part:

I fully agree with the majority that Plaintiffs' core access claim is moot and the voluntary-cessation exception is inapplicable. And despite my respect for the majority's comprehensive further analysis, I am compelled to write narrowly that the City of San Antonio ("the City") ought to have done more to accommodate Plaintiffs' religious beliefs across the two remaining "items of relief": the City's tree-removal ("Item 2") and anti-nesting ("Item 3") measures.

I appreciate that in its succinct order, the district court tried to broker a compromise between the City and these religious Plaintiffs, but I still conclude that it abused its discretion by denying Plaintiffs' request for a preliminary injunction as to Items 2 and 3. Plaintiffs have demonstrated a likely violation of their rights under the Texas Religious Freedom Restoration Act, which "prevents the state and local Texas governments from substantially burdening a person's free exercise of religion unless the government can demonstrate that doing so furthers a compelling governmental interest in the least restrictive manner." *Merced v. Kasson*, 577 F.3d 578, 581 (5th Cir. 2009).

Plaintiffs contend that "the City never tried to accommodate" Plaintiffs' religious exercise, and the record—which includes concessions from City officials that (1) they could have sought an exemption from U.S. Department of the Interior guidelines as to the retaining walls but instead obtained a zoning variance to remove more trees; (2) their engineering design "was chosen without any consideration of [P]laintiffs' free exercise request" because "[i]t would take time and money" to try to accommodate Plaintiffs' requests and "[the City] would like to proceed with the project"; and (3) "the City never actually investigated whether it could alter the timing of its

bird deterrence specifically to accommodate [P]laintiffs' religious exercise"—on the whole bears out Plaintiffs' assertion.

Accordingly, I would GRANT the preliminary injunction as to Issues 2 and 3, directing the City to consider Plaintiffs' accommodation requests, while also avoiding indefinite delay of the project.

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John Greil		john.greil@law.utexas.edu	11/4/2024 4:55:50 PM	SENT
Eli Barrish		ebarrish@scottdoug.com	11/4/2024 4:55:50 PM	SENT
Susie Smith		ssmith@scottdoug.com	11/4/2024 4:55:50 PM	SENT

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Associated Case Party: City of San Antonio

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Filing Description: Response Brief on the Merits of The City of San Antonio
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