No. 24-0714

In the Supreme Court of Texas

GARY PEREZ AND MATILDE TORRES,
Plaintiffs-Appellants,
v.
CITY OF SAN ANTONIO,
Defendant-Appellee.

On Certified Question from the
United States Court of Appeals for the Fifth Circuit
No. 23-50746

APPELLANTS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the case:	This is a religious liberty case on a certified question from the United States Court of Appeals for the Fifth Circuit, asking this Court to interpret the Religious Services Amendment to the Texas Constitution as an issue of first impression. Appellants brought this suit against the City of San Antonio to enforce their rights guaranteed by the state and federal constitutions and state law. Appellants moved for a preliminary injunction against the City to prevent it from denying them access to and destroying a unique place of worship that is necessary for their religious services. The core issue before this Court is the protection provided by the Religious Services Amendment, TEX. CONST. art. I, § 6-a, by which the People of Texas forbade state and local governments from prohibiting or limiting religious services.
Trial court:	Before Hon. United States District Judge Fred Biery, Case No. 5:23-CV-00977, *Perez v. City of San Antonio* (United States District Court for the Western District of Texas, San Antonio Division).
Trial court disposition:	Motion for preliminary injunction granted in part and denied in part.
Court of appeals:	Before Hon. Priscilla Richman, Hon. Carl E. Stewart, and Hon. Stephen A. Higginson, Case No. 23-50746, *Perez v. City of San Antonio* (United States Court of Appeals for the Fifth Circuit).
Court of appeals opinion:	*Perez v. City of San Antonio*, No. 23-50746, 115 F.4th 422 (5th Cir. Aug. 28, 2024) (on petition for rehearing).
Court of appeals disposition:	Granted rehearing and certified question to this Court regarding the Religious Services Amendment to the Texas Constitution.

STATEMENT OF JURISDICTION

This Court has jurisdiction to answer questions of Texas law certified to it by the United States Court of Appeals for the Fifth Circuit pursuant to Article V, Section 3-c of the Texas Constitution and Rule 58 of the Texas Rules of Appellate Procedure.

ISSUE PRESENTED – CERTIFIED QUESTION

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?

For the sake of analytical clarity, Appellants will address the question both as to the force of the Religious Services Amendment and the scope of the Religious Services Amendment. Accordingly, Appellants will address:

> Whether the "Religious Services Protections" provision of the Constitution of the State of Texas—as expressed in Article 1, Section 6-a—imposes a categorical bar on government action that limits or prohibits a religious service; and
>
> Whether the "Religious Services Protections" provision of the Constitution of the State of Texas—as expressed in Article 1, Section 6-a—protects "any limitation of any religious service, regardless of the sort of limitation."

INTRODUCTION

During the COVID-19 pandemic, governments limited and in some places even prohibited individuals from worshipping in religious buildings and public parks. It was a time when many people of faith felt called to gather for worship, but their governments prevented them from doing so. After passing through that tumult, the People of Texas amended their state constitution so that believers would never again be prevented from worshipping together, regardless of the views or value judgments of bureaucrats or politicians.

Before the COVID-19 pandemic, religious services had already received the protections of strict scrutiny—the most demanding standard known to constitutional law—under the Texas Religious Freedom Restoration Act ("TRFRA"). But Texans determined that more protection was needed after they and their loved ones experienced government orders shutting down their religious services. In November 2021, the People overwhelmingly[1] adopted the Religious Services Amendment to the Texas Constitution. TEX. CONST. art. I, § 6-a (the "Amendment").

The Amendment states that "[t]his state or a political subdivision of this state may not enact … [a] rule that prohibits or limits religious services[.]" The original public meaning of the text imposes a categorical bar on government action that either prohibits or limits religious services. This is evidenced by the plain meaning of the text, the debate

[1] The result was 62.42% of votes "Yes" to only 37.58% "No." *See* Texas Election Results, 2021 November 2nd Constitutional Amend., TEXAS SECRETARY OF STATE, https://tinyurl.com/jaerdxsu (last visited October 14, 2024).

from the legislators who drafted the Amendment (the "Legislature"), and the public discussion of the People of Texas who ratified it at the ballot box (the "People").

The certified question in this case asks whether the Amendment means what it says: that the government may not take any action—regardless of the form taken or the justification provided—that "prohibits or limits religious services." A proper interpretation of the text and its public meaning proves that it does.

At the same time, the Amendment's text and longstanding interpretive principles of Texas constitutional law limit the circumstances in which that categorical bar applies. But where it applies—as it does in Appellants' case against the City of San Antonio—the Amendment categorically protects religious services from government interference.

Although the best interpretation of the Amendment's plain text and its manifest purpose requires a categorical bar, if this Court does not agree, it should adopt a heightened level of scrutiny, above and beyond strict scrutiny, for state and local government action that prohibits or limits religious services. Such heightened scrutiny must be faithful to the plain text of the Amendment, which protects religious services whenever the government prohibits or limits them. Judicial interpretation therefore need not impose on worshippers any artificial standard to prove a "substantial," "direct," or "significant" burden on their religious services. Proof of a prohibition or limitation invokes the Amendment's protection.

This Court's heightened scrutiny should, however, require the government to prove that it investigated alternatives and tried to accommodate religious services

before the fact, as the federal courts have done in the better-reasoned strict scrutiny cases. And if this Court allows the government to burden or limit religious services, it should not only require the government to prove a compelling interest accomplished by the least restrictive alternative; it should also require the government to make this proof through clear and convincing evidence. Applying such heightened strict scrutiny to this case shows that the City of San Antonio violates the Amendment by blocking access to a sacred site and by destroying necessary components of a religious service.

STATEMENT OF FACTS

I. GOVERNMENTS RESTRICTED RELIGIOUS SERVICES DURING THE COVID-19 PANDEMIC.

During the COVID-19 pandemic, government entities in Texas—including for the five most populous counties—prohibited or severely limited in-person religious services. The mayors of McKinney and Frisco, for example, ordered that all "public or private gatherings of any number of people occurring outside a single household or living unit [were] prohibited" and that "[r]eligious and worship services may ONLY be provided by video and teleconference."[2] Similarly, Dallas County,[3] Tarrant County,[4] and Bexar County[5] issued orders requiring remote religious services, such as by video

[2] City of McKinney, *THIRD REVISED MAYORAL DECLARATION OF LOCAL STATE OF DISASTER DUE TO PUBLIC HEALTH EMERGENCY*, (May 25, 2020), https://www.nbcdfw.com/news/coronavirus/theres-a-lot-of-confusion-mckinney-mayor-on-stay-home-order-issued-in-collin-county/2338227/; City of Frisco, *AMENDED DECLARATION OF LOCAL DISASTER FOR PUBLIC HEALTH EMERGENCY*, Ord. No. 2020-04-13, (Apr. 13, 2020), https://www.friscotexas.gov/DocumentCenter/View/21946/--3-27-2020---AMENDED-DECLARATION-OF-LOCAL-DISASTER-FOR-PUBLIC-HEALTH-EMERGENCY--?bidId=.

[3] Dallas County, *Amended Order of County Judge Clay Jenkins*, (Apr. 6, 2020), https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/2020/april/040620-AmendedOrder.pdf.

[4] Tarrant County, *Executive Order of County Judge B. Glen Whitley,* (Mar. 24, 2020), https://www.tarrantcountytx.gov/content/dam/main/global/Covid-19/TarrantCountyExecutive Order-Executed-3-24-20%20-003.pdf.

[5] Bexar County, *Executive Order NW-03 of County Judge Nelson W. Wolff,* (Mar. 23, 2020), https://www.bexar.org/DocumentCenter/View/26253/Executive-Order-NW-03---Judge-Nelson-Wolff---March-23-2020?bidId=.

or teleconference. Travis County limited in-person religious services to ten people or fewer,[6] while Harris County limited religious services to "individual settings."[7]

Around the country, governments imposed similar and even stricter restrictions. In New York, the governor limited attendance at religious services to "no more than 10 people." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020). Jews could not attend Shabbat services, and Catholics could not receive communion. *Id.* at 19. Using the threat of criminal penalties, in California, the governor and local governments banned in-home Bible studies involving multiple households and outlawed "outdoor gatherings" at public areas if people from "more than one Household" were present for "religious services."[8] *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam).

Church services on public beaches became targets of government action as well.[9] In Kentucky, state officials notified attendees of a "drive-in" Easter service of "future

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[6] Travis County, *County Judge Order No. 2020-04: Related to Declaration regarding COVID-19 Response and Preparedness*, (Mar. 21, 2020), https://www.traviscountytx.gov/images/docs/covid-19-order-4.pdf.

[7] Harris County, *Stay Home Work Safe*, (Mar. 24, 2020), https://agenda.harriscountytx.gov/2020/03-24-20StayHomeWorkSafe.pdf.

[8] CA Exec. Order No. N-60-20, (May 5, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20.pdf; City and County of San Francisco, *Directive of the Health Officer No. 2020-19d*, (Oct. 20, 2020), https://sfbos.org/sites/default/files/2020.11.28_PURPLE_FINAL_Directive_2020-19d__Outdoor_Gatherings.pdf; Cal. Gov't Code § 8665 ("Any person who violates any of the provisions of this chapter…. shall be punishable by a fine of not to exceed one thousand dollars ($1,000) or by imprisonment for not to exceed six months or by both such fine and imprisonment").

[9] Alex Wigglesworth & Paul Sisson, *Church services move to California beaches, sparking fears of coronavirus outbreaks*, LOS ANGELES TIMES (July 28, 2020), https://www.latimes.com/california/story/2020-07-28/church-services-move-to-california-beaches-sparking-fears-of-coronavirus-outbreaks.

'enforcement measures,'" including criminal charges, for violating rules on gathering and travel. *Roberts v. Neace*, 65 F.4th 280, 283 (6th Cir. 2023). North Carolina,[10] Alabama,[11] and Missouri[12] limited in-person worship services to ten people or fewer.

II. THE PEOPLE OF TEXAS RESPONDED TO RESTRICTIONS ON RELIGIOUS SERVICES BY AMENDING THEIR CONSTITUTION.

In response to the restrictions imposed on religious services, the Legislature considered an amendment to the Constitution. The proposed Amendment stated:

> 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. I, § 6-a.

One of the Amendment's proponents explained that it "ma[de] it explicitly clear that the state, or any political subdivision of the state, cannot close down or limit our houses of worship or religious services. Period."[13] When discussing the proposed

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[10] North Carolina, *Stay at Home Order and Strategic Directions for North Carolina in Response to Increasing COVID-19 Cases,* (Mar. 27, 2020), https://www.ncdhhs.gov/eo121-stay-home-order-3pdf/download?attachment.

[11] Alabama, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19,* (Apr. 3, 2020), https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf.

[12] Missouri, *Order*, (Apr. 3, 2020), https://content.govdelivery.com/attachments/MOGOV/2020/04/03/file_attachments/1419322/Stay%20at%20Home%20Missouri%20Order.pdf.

[13] Editorial, *Constitutional Amendment to Keep Religious Services Open During Disasters Passes Texas House*, THE TEXAN (May 12, 2021), https://thetexan.news/state/legislature/87th-session/constitutional-amendment-to-keep-religious-services-open-during-disasters-passes-texas-house/article_4b7e87ca-745a-5f07-a952-bbba15e9aa89.html.

Amendment, the editorial boards for the most widely published Texas publications emphasized the strong nature of the ban, recognizing that it would "exempt[] houses of worship from any emergency measures rooted in public safety."[14]

The Amendment passed the Senate with a vote of 28-2, and the House of Representatives approved it by a vote of 108-33.[15] The People of Texas then approved it with a vote of 62.42 percent in favor and 37.58 percent opposed.[16]

[14] *See* Editorial, *No on Prop 3: Safety measures should apply to churches, too*, AUSTIN AMERICAN-STATESMAN (Oct. 21, 2021), https://www.statesman.com/story/opinion/editorials/2021/10/12/no-prop-3-safety-measures-should-apply-churches-too/5970287001/; Editorial, *We recommend: Texas constitutional amendments*, DALLAS MORNING NEWS (Oct. 17, 2021), https://www.dallasnews.com/opinion/editorials/2021/10/17/we-recommend-texas-constitutional-amendments/; Editorial, *Vote no on Proposition 3. 'Religious freedom' amendment goes too far,* HOUSTON CHRONICLE (Oct. 14, 2021), https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Vote-no-on-Proposition-3-Religious-16531227.php; Editorial, *Chronicle Endorsements for the Propositions on the November Ballot*, THE AUSTIN CHRONICLE (Oct. 15, 2021), https://www.austinchronicle.com/news/2021-10-15/chronicle-endorsements-for-the-propositions-on-the-november-ballot/; Editorial, *Rodeo raffles, road funding, judges: Our recommendations on Texas Constitution* props, THE FORT WORTH STAR-TELEGRAM (Oct. 15, 2021), https://www.star-telegram.com/opinion/editorials/article255014117.html; Editorial, *Our recommendations, Propositions 1-4*, SAN-ANTONIO EXPRESS NEWS (Oct 14, 2021), https://www.expressnews.com/opinion/editorial/article/texas-amendments-props-1-4-16529649.php; Opinion, *Recommendations on how to vote for the eight Texas propositions on Nov. 2*, EL PASO TIMES (Oct. 18, 2021), https://www.elpasotimes.com/story/opinion/2021/10/18/recommendations-how-vote-eight-texas-propositions-nov-2/8469050002/.

[15] *See* H.J. of Tex., 87th Leg., R.S. 2816–17 (2021); S.J. of Tex., 87th Leg., R.S. 409–10 (2021).

[16] *See* Texas Election Results, *supra* n.1.

III. APPELLANTS LEAD RELIGIOUS SERVICES AT A BEND IN THE SAN ANTONIO RIVER THAT HAS BEEN A CEREMONIAL SITE FOR INDIGENOUS TEXANS FOR THOUSANDS OF YEARS, BUT THE CITY SEEKS TO MAKE THOSE SERVICES IMPOSSIBLE.

Gary Perez and Matilde Torres are members and ceremonial leaders of the Lipan-Apache Native American Church, which combines ancient indigenous and Christian traditions. [17] ROA.4044, 4072, 4083–84. They believe a specific bend in the San Antonio River ("Yanaguana") located in Brackenridge Park is unique. That bend is central to their Creation story, and they believe the shape of the River, mirroring the constellation Eridanus, connects the physical and spirit worlds when Appellants perform central religious ceremonies. ROA.4075.

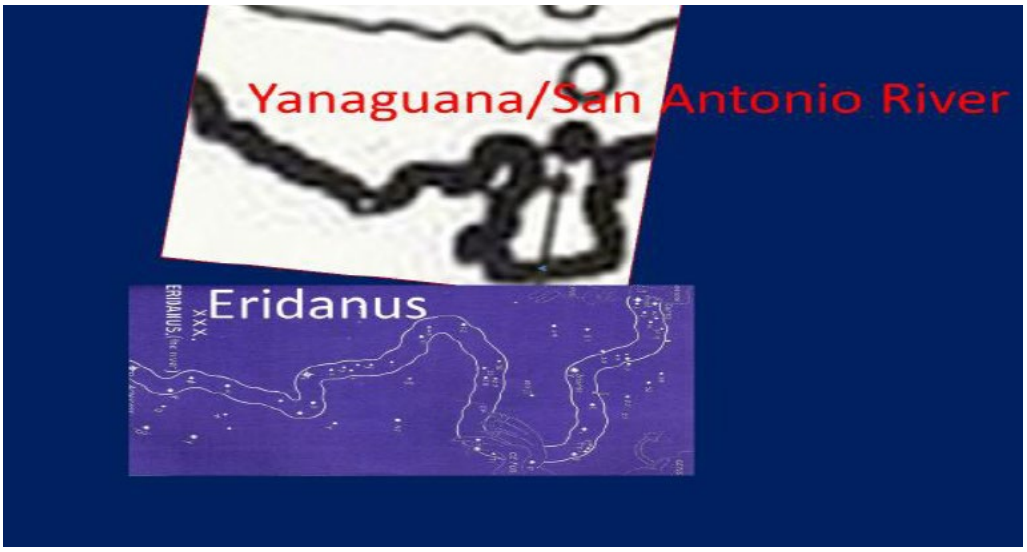

Figure 1 – This image compares the shape of the constellation Eridanus to the bend of the San Antonio River that is located in Brackenridge Park. ROA.19.

[17] Perez serves as the principal chief and cultural preservation officer for the Pakahua/Coahuiltecan Peoples of Mexico and Texas. Torres is a member of the Pakahua Peoples of Mexico and Texas. ROA.989–90.

The trees surrounding the river at this bend, the cormorants that nest in those trees, the river itself, and the celestial river Eridanus uniquely connect the three spiritual worlds—the upper, middle, and under worlds. ROA.4069–70 (river and spiritual worlds); ROA.4112 (trees); ROA.4120–21 (nesting cormorants). The bend is the only place on Earth where they can perform certain religious ceremonies because of that connection. ROA.4075–76, 4083, 4085, 4093–94, 4141. And Appellants must perform those ceremonies at a specific spot ("the Sacred Area")[18] on the south bank of the river, where they can access the water and face north. ROA.4079, 4085, 4093–94, 4141.

Figure 2 – Diagram of Fencing Around Sacred Area. Fifth Cir. Rec., 106.

[18] To distinguish the area where Appellants stand to perform their ceremonies from the broader sacred bend, the parties used "Sacred Area" to refer to the 20'x30' foot portion that Appellants needed for access and the "Project Area" to refer to the two-acre portion where the tree removal and zero-nesting will occur. That entire bend is sacred to Appellants, and the trees and nesting cormorants in the Project Area are necessary components of the disputed ceremonies. *See, e.g.*,

These beliefs are not unique to Mr. Perez and Ms. Torres. Today, the ceremonies form a central tenet of the Native American Church. ROA.4087. And for millennia, the indigenous people of Texas have worshiped at that bend. Indeed, hieroglyphics over 4,000 years old discovered along the Pecos River reflect that very bend as a sacred site. In court, Ms. Torres identified the mural, and located "the area of Brackenridge Park," the "San Antonio River," and "the cormorant," in the mural. ROA.4156–58.

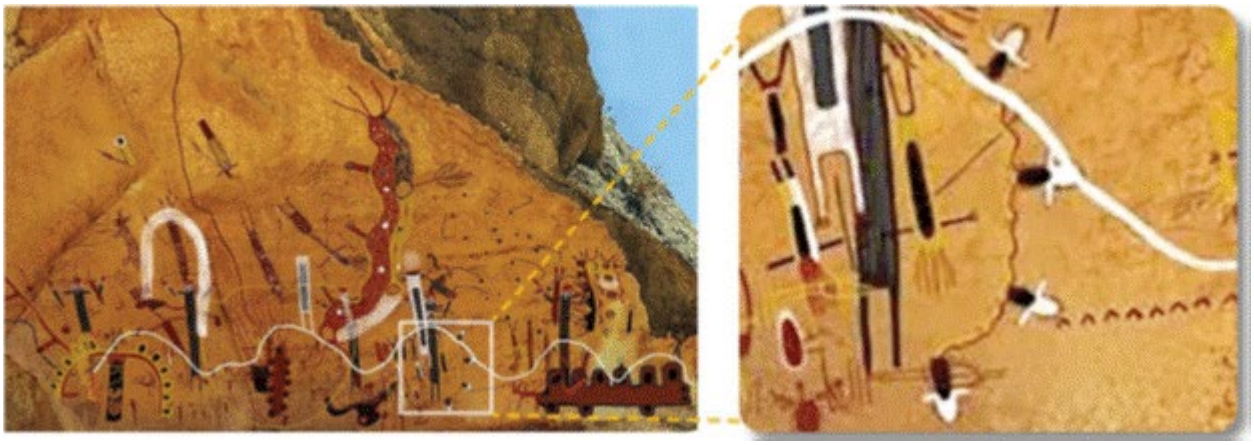

Figure 4 – This figure isolates iconography within the White Shaman Mural that correspond with springs within the San Antonio River system.[19] ROA.22.

Appellants believe that the trees and cormorant birds at that river bend are necessary components of their religious services. ROA.4112 (trees); ROA.4120–21 (nesting cormorants). As part of their faith, they believe that the dozens of trees surrounding the Sacred Area descend from trees that previously stood there; just as

ROA.4112 (describing "the oak tree that hangs over the river bank on the north side of the bend that contains the rookery of the cormorant birds").

[19] Mr. Perez published his findings of the ancient theology of the mural in the Bulletin of the Texas Archaeological Society. *See* Eric A. Schroeder, Gary R. Perez, and Joe R. Tellez, *Written on Stone and Practiced on the Landscape: Pre-contact Native American Cosmovision and the Sacred Landscape of the Edwards Plateau*, 93 BULLETIN OF THE TEXAS ARCHEOLOGICAL SOCIETY (2022).

Appellants' religious "teachings get passed on," believers witness that those trees continue "from generation to generation." ROA.4132–33. In those trees nest double-crested cormorants, the bird whose flight gave rise to life in the river valley, according to Appellants' creation story. ROA.4074.

One ceremony illustrates this sacred connection: worshippers view a reflection of a 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). ROA.4089. In that holy moment, Appellants' prayers transcend time and space, and as the cormorants ascend into the sky, they "take[] our prayers ... to the heavens." ROA.4161. This "Midnight Water" ceremony can only be performed once a year: on the winter solstice. ROA.4097.

Worship in the Sacred Area is a personal and spiritual obligation for Appellants and the members of their Church. ROA.4141, 4161. They cannot worship elsewhere because "[i]t's not religiously effective ... I'm not standing where I need to stand to make my petitions to God almighty." ROA.4093–94. Nor can they perform their ceremonies unless cormorants "continue to nest in that area," because the birds "tell that story" of creation through their nesting and presence. ROA.4174, 4181. And if the trees are destroyed, Plaintiffs' ability to perform their ceremonies would "be gone forever." ROA.4173. When asked "[w]hat effect will [the City's plan] have on your ability to practice religious ceremonies that you think are necessary," Mr. Perez's testimony was unequivocal: "They're gone. It's over." ROA.4070.

The City of San Antonio, as part of a municipal bond project (the "Bond Project"), plans to destroy the Sacred Area by (i) removing 69 of 83 sacred trees from the riverbend to renovate a wall adjacent to the river, and (ii) preventing cormorants from nesting there. ROA.4289, 4385. Setting aside the City's *ex post* litigation statements, the City has never considered any accommodation to achieve its objectives while preserving Appellants' religious services. The project manager overseeing reconstruction of the wall testified that the wall design "was chosen without any consideration of the plaintiffs' free exercise request" and that the City would not reconsider the design because doing so "would take time and money." ROA.4390–91. The City's point person for zero-nesting measures testified that "the City hasn't specifically tried to accommodate plaintiffs' religious exercise in crafting the bird deterrence." ROA.4455–56.

For months, the City denied Appellants all access to the Sacred Area for religious worship. ROA.4352. The City partially changed course only when the District Court ordered it to. ROA.740. Even then, the City claimed the power to bar Appellants from access to the Sacred Area for religious ceremonies, Fifth Cir. Rec., 2922–23, filing a cross appeal and taking the position that the City could do whatever it pleased with the Park. *Id.* at 2924–25. Midway through the Fifth Circuit merits briefing, the City finally abandoned that approach. *Id.* at 2572.

But the destruction that the City still plans will limit and prohibit Appellants' religious services just the same. Without the presence of ancestral trees and the cycle of

nesting cormorants, Appellants cannot perform their religious ceremonies. *See, e.g.*, ROA.4132–34.

IV. PROCEDURAL HISTORY

On August 9, 2023, Appellants sued the City under the Free Exercise Clause of the United States Constitution, TRFRA, the Freedom of Worship Clause of the Texas Constitution, and the Amendment. Appellants sought three forms of injunctive relief: (a) access for religious worship in the Sacred Area that the City had fenced off pursuant to the Bond Project; (b) an injunction against the Bond Project design that calls for the removal or relocation of nearly all (*i.e.*, 83%) trees from the area where the City proposed to carry out the Bond Project (the "Project Area"); and (c) an injunction against the City's anti-nesting measures targeting cormorants in the Project Area. ROA.33–40.

Appellants sought an emergency temporary restraining order to gain access to the Sacred Area for a critical religious ceremony.[20] The City opposed, asserting that Appellants "apparently want to 'second guess' the opinions of tree experts,"[21] and the District Court denied the TRO "in light of significant public safety issues raised by the Defendant."[22]

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[20] *Perez v. City of San Antonio*, No. SA-23-CV-977-FB, ECF No. 5 (W.D. Tex. Aug. 10, 2023).

[21] ROA.313 ("Mr. Perez's affidavit does not describe any education, experience, or expertise that qualifies him to opine on the safety of retaining walls or trees and his 'opinion' about the safety of the fenced-off area should be respectfully disregarded.").

[22] ROA.342.

The next month, the District Court held a preliminary injunction hearing to consider the requested relief. The court granted an injunction for group worship access because the sole danger was "a large broken [tree] limb which the evidence showed can be removed quickly."[23] The court denied the preliminary injunction as to the tree removal and cormorant anti-nesting because "the City has met its burden of proving a compelling interest for public health and safety, and the equities favor the City on those two items."[24] In so holding, however, the District Court accepted that Appellants' religious beliefs were sincere. ROA.985.

Appellants appealed, and a divided panel of the Fifth Circuit affirmed. Judge Higginson dissented, concluding that the injunctions under TRFRA as to tree removal and anti-nesting were appropriate, in light of "concessions from City officials" that the "engineering design 'was chosen without any consideration of [Appellants'] free exercise request' because 'it would take time and money' to try to accommodate" and that "'the City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [Appellants'] religious exercise."[25]

[23] ROA.736.

[24] ROA.988.

[25] *Perez v. City of San Antonio*, 98 F.4th 586, 614 (5th Cir. 2024) (Higginson, J., concurring in part and dissenting in part), *opinion withdrawn and superseded on reh'g*, 115 F.4th 422 (5th Cir. 2024), *certified question accepted* (Sept. 6, 2024).

Appellants petitioned for a panel rehearing. The Fifth Circuit granted Appellants' petition, withdrew its original opinion, and certified the question regarding the Amendment to this Court.

SUMMARY OF THE ARGUMENT

The Religious Services Amendment found in article I, § 6-a of the Texas Constitution creates a categorical bar on government actions that prohibit or limit religious services. The text and original public meaning support this natural interpretation of the Amendment. Further, the Amendment's text and longstanding interpretive principles of Texas constitutional law limit the scope of the Amendment. But where it applies—and it applies here—it categorically protects religious services like Appellants' from government interference.

Before the Amendment was adopted, TRFRA had already provided strict scrutiny protection for religious services. The Legislature and People of Texas decided that more was needed, and they responded to government actions that restricted religious services during the COVID-19 pandemic by amending the Constitution to prevent any restrictions on religious services from ever happening again. The Amendment thus necessarily provides greater protection than strict scrutiny and categorically bars government interference in religious services, such as those at issue in this case.

Should this Court hold the Amendment does not create a categorical bar, it should hold at a minimum that any government action that limits or prohibits a religious service under the Amendment receives a heightened form of strict scrutiny. Under this heightened strict scrutiny, the plain text of the Amendment requires the worshipper to prove only that state or local government action "limits or prohibits religious services"

of a religious organization supporting sincerely-held beliefs. The burden should then shift to require the government to prove that it investigated alternatives aimed at protecting the plaintiff's religious services before it limited or prohibited those services—not merely that the government developed excuses afterward for trial. Heightened strict scrutiny should also require the government to accommodate a religious claimant when alternatives that will not burden religion exist, and finally, it should demand that the government meet its burden of proof on all elements by a clear and convincing evidentiary standard.

Under this heightened strict scrutiny standard as well, the Amendment would not allow government to limit or prohibit the religious services at issue in this case.

ARGUMENT

The Amendment establishes a right to be free from government intrusion in religious services. The text and longstanding interpretive principles of Texas constitutional law limit the circumstances in which the Amendment applies. But within that scope, the Amendment categorically bars government actors from limiting or prohibiting religious services, including those of the Appellants at issue in their dispute with the City. This Court should give effect to the plain meaning expressed in the Amendment.

While a categorical bar protecting religious services to which the Amendment applies is most consistent with the original public meaning of the text, if the Court disagrees, it should still hold that the Amendment establishes a legal standard that is more exacting and harder to satisfy than traditional strict scrutiny analysis. Before the Amendment was adopted, TRFRA had already forced the government to overcome strict scrutiny if it wanted to burden religious exercise. Texans reflected on what happened during the pandemic and determined that TRFRA was not sufficient protection for religious services. In light of that, the Amendment must provide Texans with greater protections for religious services than what already existed at the time of its passing; otherwise, the Amendment would be superfluous or meaningless.

This Court can find that higher standard in the text of the Amendment, in recent decisions of the United States Supreme Court and in federal appellate courts interpreting protections for the free exercise of religion, and in the clear and convincing

evidence standard that this Court has imposed in civil matters of great sensitivity. First, a plaintiff need not prove a substantial burden on their religious exercise to trigger application of this heightened version of strict scrutiny. The Amendment, by its plain terms, covers any prohibition or limitation on a religious service; that is all a claimant must show. Second, the government has an affirmative duty to investigate alternatives to the limitations that it wishes to place on the plaintiff's religious service. Third, if those investigations reveal any potential alternatives, the government must accommodate or exempt the plaintiff's religious services from prohibitions or limitations, unless doing so is *truly* infeasible. *See Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 541 (2021) ("[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so."). As it has done in other highly sensitive areas, this Court should also adopt a higher evidentiary burden—clear and convincing evidence—that the government must satisfy to prevail.

I. THE TEXT OF THE RELIGIOUS SERVICES AMENDMENT IMPOSES A CATEGORIAL BAR ON GOVERNMENTS LIMITING OR PROHIBITING RELIGIOUS SERVICES.

When interpreting the Constitution, this Court gives effect to "to the plain meaning of the text as it was understood by those who ratified it." *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021). To achieve this goal, the Court relies heavily on the "literal text." *Bosque Disposal Sys., LLC v. Parker Cnty. Appraisal Dist.*, 555 S.W.3d 92, 94 (Tex. 2018). The Court presumes "that the framers carefully chose the language," and "interpret[s] their words accordingly." *Degan v. Bd. of Trustees of Dallas Police & Fire Pension*

Sys., 594 S.W.3d 309, 313 (Tex. 2020).

To aid interpretation, the Court may give substantial value to the framers' "construction and contemporaneous exposition of a constitutional provision." *Abbott*, 628 S.W.3d at 293. The Court may also consider "contextual factors such as the history of the legislation, the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished." *Degan*, 594 S.W.3d at 313 (quotations and citations omitted).

This Court applies the same principles to amendments to the Texas Constitution. Interpreting an amendment, this Court "rel[ies] heavily on its literal text and must give effect to its plain language," striving to give it the effect the "makers and adopters intended." *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 545 (Tex. 2016). The Court does not construe an amendment's language "differently from its plain meaning." *Cramer v. Sheppard*, 167 S.W.2d 147, 154 (1942). The Court considers constitutional provisions and amendments that relate to the same subject matter in light of each other, striving "to avoid a construction that renders any provision meaningless or inoperative." *Wood*, 505 S.W.3d at 545.

A. The Amendment Must Provide Greater Protections Than Those Already Provided by TRFRA.

Before the Legislature passed and the People of Texas adopted the Amendment, religious services already received robust protections from TRFRA. Any government that wanted to burden religious services, a form of religious exercise, needed to survive

strict scrutiny to do so. Tex. Civ. Prac. & Rem. Code § 110.003; *see City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (describing RFRA's strict scrutiny standard as "the most demanding test known to constitutional law").

Legal texts like the Amendment are interpreted in light of their "historical and legal background." *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178, 186 (Tex. 2023). This Court "examine[s] the legal background to ascertain what the legislature changed (and left unchanged), assess[es] how [a new provision] affects the legal landscape, and then determine[s] whether and to what extent the [change in law] abrogated rather than merely supplemented existing law." *S.C. v. M.B.*, 650 S.W.3d 428, 437 (Tex. 2022). Courts also avoid constructions that render language "meaningless or superfluous." *City of Dallas v. TCI W. End, Inc.*, 463 S.W.3d 53, 57 (Tex. 2015) (per curiam).

But to interpret the Amendment's text to impose a strict scrutiny test would do just that: worshippers would have no broader rights after the Amendment than before.[26] This cannot be. The Amendment must do more than provide the same protections the Legislators and People of Texas found wanting during the pandemic. The Amendment must be interpreted against this legal background, which means its text does more than what TRFRA already provided.

[26] *Cf. Perez v. City of San Antonio*, 115 F.4th 422, 428 (5th Cir. 2024), *certified question accepted* (Sept. 6, 2024) ("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.").

B. The Text and Structure of the Amendment Show That It Categorically Bars Government Action That "Prohibits or Limits Religious Services."

The plain language of the Amendment categorically bars the government when it attempts to prohibit or limit people from holding and participating in religious services by religious organizations supporting their sincere religious belief. The Amendment provides:

> 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. I, § 6-a.

Contrast the Amendment's language with TRFRA. Under TRFRA, the government may not burden religion *unless* it demonstrates a compelling interest and least restrictive means. Tex. Civ. Prac. & Rem. Code § 110.003. The Amendment provides no such opportunity for the government to justify a limitation on religious services. Instead, the Amendment's text is a clear "Thou shalt not" commandment to government actors. "[T]he constitutional prohibition is absolute when it applies." *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 147 (Tex. 2010).[27] "This language is clear, unequivocal, and binding." *Wood*, 505 S.W.3d at 544. The most natural reading of the text is a categorical bar.

[27] Appellants discuss the scope of the Amendment—the question of *when* it applies—in § II.

C. The Original Public Meaning of the Amendment Imposes a Categorical Bar When the Government "Prohibits or Limits Religious Services."

The Legislature and the People of Texas understood the language of the Amendment to impose a categorical bar on government attempts to prohibit or limit religious services.

1. The Legislature understood the text of the Amendment to impose a categorical bar.

The Legislature drafted the Amendment to protect a "fundamental right" so that Texans would always be able "to meet with fellow believers in prayer and worship and service to their citizens." Debate on S.J.R. 27 on the Floor of the House, 87th Leg., R.S., (May. 11, 2021), https://house.texas.gov/videos/10097 (Statement of Rep. Leach). The protections apply to all worshippers, "[n]o matter what faith they may practice[.]" *Id.*; *see also id.* (Statement of Rep. Canales) ("This is about all people of faith.").

The Legislature understood the Amendment to impose an absolute bar. The legislative debate did not focus on *whether* the language was absolute, but rather whether a categorical bar *went too far*. One Texas representative opposed the Amendment because it would be "absolute, there can be no local rule or state rule that would limit religious services." *Id.* (Statement of Rep. Turner).

A Texas representative who supported the Amendment lauded the Amendment's categorical bar as a virtue of the text and said that: "to be denied the privilege to worship God is not something the government should ever have its hand

in." *Id.* at 2816 (Statement of Rep. Canales); *see also* Debate on Tex. S.J.R. 27 on the Floor of the Senate, 87th Leg., R.S., (March 25, 2021), https://senate.texas.gov/videoplayer.php?vid=17674&lang=en (Statement of Sen. Hancock) (stating that the Amendment prohibits government from limiting religious services during a natural disaster or public health emergency); *id.* ("What this does is really codify what is in the constitution is that we as individuals have the freedom and we have that liberty to continue to worship without the impediment of government prohibiting that.").

The Legislature rejected efforts to ratchet back the Amendment's categorical bar. One Texas representative proposed revising the text to incorporate the "normal language" that "the regulation must be narrowly tailored to serve a compelling state interest in order to be permissible." Debate on Tex. S.J.R. 27 on the Floor of the House, 87th Leg., R.S. (May 11, 2021), https://house.texas.gov/videos/10097 (Statement of Rep. Turner). That proposal failed. *See id.* (Statement of Rep. Leach) (asserting that "there is a reason we have left that language out").

The legislative debate clarified that proponents and opponents of the Amendment believed its bar was categorical, even in the face of extreme government interests. "We've heard a lot of hypotheticals—nuclear disasters, pandemics. Yeah, that [i.e. at a religious service] might be the place you want to be." H.J. of Tex., 87th Leg., R.S. 2816 (2021) (Statement of Rep. Canales); *see also id.* ("If it's dangerous and you want to go to church, well, by God, you go to church.").

The original understanding of the Legislature was that the force of the Amendment was absolute; that is, it denied the government any opportunity to justify a limitation on religious services.

2. The People understood that the Amendment's text imposed a categorical bar.

In addition to looking to the Legislature's understanding of the Amendment, this Court looks to the understanding of the People who ratified it at the ballot box. In doing so, the Court's goal in interpreting the Texas Constitution is to "give effect to the plain meaning of the text as it was understood by those who ratified it." *Abbott*, 628 S.W.3d at 293.

Supporters of the Amendment, such as the editors of the Dallas Morning News, understood that the Amendment imposed a categorical bar:

> In a public health crisis, religious leaders must always place the well-being of their congregants and others first, but the state should not infringe on the right to attend funerals, services or other religious observances.[28]

Opponents of the Amendment, such as the Editorial Board of the Austin American-Statesman, urged readers to vote against the Amendment *because* it was categorical:

> … its true meaning is to exempt religious organizations from *any* of the public safety measures that apply to the rest of the community. . . . Prop 3 prohibits any government entity from issuing any rule that "prohibits or limits religious services." No exceptions.[29]

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[28] Editorial, *We Recommend: Texas Constitutional Amendments*, DALLAS MORNING NEWS (Oct. 17, 2021), https://www.dallasnews.com/opinion/editorials/2021/10/17/we-recommend-texas-constitutional-amendments/.

[29] Editorial, *No On Prop 3*, AUSTIN AMERICAN-STATESMAN (Oct. 12, 2021), https://www.statesman.com/story/opinion/editorials/2021/10/12/no-prop-3-safety-measures-

Although proponents and opponents disagreed on the wisdom of the Amendment as policy, they agreed on its meaning. After considering whether a categorical bar would be appropriate, the People of Texas decided the issue at the ballot box and withdrew all discretion from government and judges to limit people of faith from holding or attending religious services. Instead, the People entrusted religious leaders (and worshippers) to govern themselves. *Cf. Waak v. Rodriguez*, 603 S.W.3d 103, 111 (Tex. 2020) ("It is certainly not [this Court's] place to make policy decisions that are for the Legislature to make. But it is exclusively our place to determine what policy decisions they have made.").

Both sides of the public debate on the Amendment understood it as a categorical bar. The Court should adopt that construction as well and give effect "to the plain meaning of the text as it was understood by those who ratified it." *In re Abbott*, 628 S.W.3d at 293.

3. The Amendment, read in light of the structure of the Texas Constitution, imposes a categorical bar.

The absolute force of the Amendment is more in line with the Texas Constitution than a test based on strict scrutiny.

First, "everything in [the] 'Bill of Rights' is excepted out of the general powers

should-apply-churches-too/5970287001/; *see also* Isaiah Mitchell, *Law to Keep Faith Organizations 'Essential' During Disasters Takes Immediate Effect*, TEXAN (June 22, 2021), https://thetexan.news/law-to-keep-faith-organizations-essential-during-disasters-takes-immediate-effect/; Benjamin J. Dueholm, *Religious Freedom Is Protected by the Constitution; Texas Doesn't Need Its Own Amendment*, DALLAS MORNING NEWS (Nov. 2, 2021, 1:30 AM), https://www.dallasnews.com/opinion/commentary/2021/11/02/religious-freedom-is-protected-by-the-constitution-texas-doesnt-need-its-own-amendment/.

of government." TEX. CONST. art. I, § 29. The application of government power to limit or prohibit a religious service is therefore an "exception[] to the legislative authority." *State v. Loe*, 692 S.W.3d 215, 250 (Tex. 2024) (Busby, J., concurring) (quoting THE FEDERALIST NO. 78, 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). It does not make sense to ask how important an interest the government has in doing something it has no authority to do.

Second, at times, those who ratify constitutional provisions choose to take some matters out of judges' hands. *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64 (1992) ("Rules embody a distrust for the decisionmaker they seek to constrain."); *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) ("Only by announcing rules do we hedge ourselves in."). The Legislature and the People chose to do that with religious services. They made a policy choice that no neutral, judicially manageable standards exist to weigh a believer's interest in attending worship at penalty of mortal sin versus the public interest in counteracting a public health or safety emergency. They concluded that when the Amendment applies, the believer's interest in attending religious services is of such importance that nothing can outweigh it. A right with categorical force implements this choice.

II. THE SCOPE OF THE RELIGIOUS SERVICES AMENDMENT IS LIMITED BY ITS TEXT AND LONGSTANDING INTERPRETIVE PRINCIPLES OF TEXAS CONSTITUTIONAL LAW.

When interpreting Constitutional rights, this Court distinguishes the *force* of a

right from its *scope*. As this Court has acknowledged, "the constitutional prohibition *is absolute when it applies*." *Robinson*, 335 S.W.3d at 147 (emphasis added) (listing "the right to worship" as one of the Texas Constitution's "absolute" rights). But there is a separate question of "determin[ing] whether and how the Bill of Rights' provisions apply." *Id.*

As to the Fifth Circuit's question of whether the Amendment applies to "*any* religious service," the answer is no. The text of the Amendment itself, other provisions of the Texas Constitution, and background interpretive principles of Texas law limit the circumstances in which the Amendment applies. But even within these limitations, Appellants' religious services fall squarely within the Amendment's protection.

A. The Text of the Amendment Limits Its Scope.

To state a claim or defense under the Amendment, a party must establish specific elements. The text lists four elements for establishing a claim under the Amendment: (1) this state or political subdivision of the state; (2) enacted, adopted, or issued a statute, order, proclamation, decision, or rule that prohibits or limits; (3) a religious service in Texas; and (4) those religious services are of a religious organization that propagates sincerely held religious beliefs. Those elements limit the scope of religious services that the Amendment protects.

1. The Amendment is limited to "This State or Political Subdivision of This State."

The first element requires *government* action from either "This state or a political subdivision of this state[.]" Political subdivisions include counties, cities, and school districts. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003),

judgment withdrawn and reissued (May 13, 2003). Here, the "political subdivision of this state" is Appellee, the City of San Antonio.

The corollary of that textual limitation is that the Amendment does not obligate governments to prevent limitations from other sources. A congregation whose church burns down in a thunderstorm has its religious services limited. But the government did not limit them. A church that cannot afford communion wine cannot demand funds from a city. And, as applied here, the City has no duty to stock the trees in the river bend with cormorants; it is merely prevented from limiting the religious services through anti-nesting measures by chasing them away.

2. The Amendment is limited to legal action that prohibits or limits religious services.

The second element requires the government to take an official legal action. "Enact," "adopt" and "issue" denote an official act from the government.[30] The government action must be of a legal character. The five listed nouns result from a decision-making process whereby a government agent pronounces a change in the legal landscape through either a statute, order, proclamation, decision, or rule.[31] That

[30] *See Enact*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("To make into law by authoritative act; to pass."); *Adopt*, OXFORD ENGLISH DICTIONARY (3rd ed. 2021-2022) ("To approve or accept (a report, proposal, resolution, etc.) formally; to ratify."); *Issue*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("To be put forth officially" or "[t]o send out or distribute officially.").

[31] "Statute" means "[a] law enacted by a legislative body." *Statute*, BLACK'S LAW DICTIONARY (12th ed. 2024). "Order" means "[a] command, direction, or instruction." *Order*, BLACK'S LAW DICTIONARY (12th ed. 2024). "Proclamation" means "[a] formal public announcement made by the government." *Proclamation*, BLACK'S LAW DICTIONARY (12th ed. 2024). "Decision" means "[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." *Decision*, BLACK'S LAW DICTIONARY

requirement is met here, because the City issued "statutes," "rules," and "orders" that (1) fenced off the Sacred Area without accommodating religious access, (2) proposed to remove over 80 percent of the Project Area's sacred trees, and (3) implemented a zero-nesting policy for cormorants in the Project Area. ROA.4092, 4289, 4455–62.

The government action in question must prohibit or limit a religious service. "Prohibit" means "to forbid by authority", "to prevent; preclude," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011), or "make impossible." *Prohibit*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010); *see also Prohibit*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[t]o forbid by law" or "[t]o prevent, preclude, or severely hinder"); *accord Prohibit*, OXFORD ENGLISH DICTIONARY (3rd ed. 2021-2022) ("To forbid (an action, event, commodity, etc.) by a command, statute, law, or other authority; to interdict."). To "limit" is "to restrict the bounds or limits of or to curtail or reduce in quantity or extent." *Limit*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020).

Appellants specifically testified that they cannot perform their religious ceremonies at other locations, that they cannot do so without the presence of ancestral trees surrounding the riverbend, and that they cannot do so without the cycle of nesting, living, and migrating of the cormorants. ROA.4094 (other locations "not religiously effective"); ROA.4174, 4181 (cormorants must "continue to nest in that area");

(12th ed. 2024). And "rule" means "[a] regulation governing a court's or an agency's internal procedures . . . ." *Rule*, BLACK'S LAW DICTIONARY (12th ed. 2024).

ROA.4173 (without trees ceremonies would "be gone forever"). Each of the City's challenged actions—blocking access, destroying substantially all ancestral trees, and implementing anti-nesting measures against cormorants—*prohibit* Appellants' religious services by "forbid[ding]," "preventing, precluding, … severely hindering," or "mak[ing] [them] impossible." By destroying necessary components, the City limits the religious services by "curtailing" them and "restricting" their very existence.

And just as the City prohibited Appellants' religious services when it denied them access to the Sacred Area (until ordered to reopen it), so, too, will the City's plan to destroy the trees and drive away the cormorants prohibit Appellants' services. Indeed, the City plans to destroy the very components that make Appellants' services possible—the cormorants and trees which, together with the River bend and the constellation Eridanus, allow worshippers' prayers to rise to the heavens.

By destroying these necessary components of Appellants' church services, the City will both prohibit the services—making them impossible and severely hindering them—and *limit* the services by "curtailing" them. *Cf. DeMarco v. Davis*, 914 F.3d 383, 389 (5th Cir. 2019) ("[C]onfiscat[ing] copies of the Bible and religious books … placed a substantial burden on practice of reading religious literature.").

3. The Amendment is limited to "religious services."

The third element requires a party to establish that it wishes to or tried to hold or participate in a religious service in Texas. A "service" can be "a meeting for worship," *Service*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, or "a ceremony of

(usually communal) worship conducted according to a prescribed form of liturgy or ritual. *Service*, OXFORD ENGLISH DICTIONARY (3rd ed. 2021–2022).

The Amendment provides a few examples of "religious services," such as those "conducted in churches, congregations, and places of worship." A "place of worship" is "not limit[ed] … to an enclosed structure." *Kerrville Indep. Sch. Dist. v. Sw. Texas Encampment Ass'n*, 673 S.W.2d 256, 259 (Tex. App. 1984), *writ refused NRE* (Oct. 10, 1984). For example, this Court affirmed a trial court's ruling that an open-air chapel and surrounding land, among other areas, were places of worship. *Davies v. Meyer*, 541 S.W.2d 827, 829 (Tex. 1976).[32]

Further, the use of the word "including" "typically indicates a partial list," *Include*, BLACK'S LAW DICTIONARY (12th ed. 2024), and in Texas is a term of enlargement. *In re E.C.R.*, 402 S.W.3d 239, 246 n.6 (Tex. 2013) (collecting authorities). By using the word "including," the Amendment expands the scope beyond the three terms to cover other locations for religious services, such as temples, synagogues, mosques, or outdoor locations. Thus, the Amendment provides a non-exhaustive list of examples of "religious services." And indeed, one would expect that the Amendment's broad language covers outdoor worship services, given Texans' rich tradition of tent revivals, camp meetings, river baptisms, blessings of the fleet, prayers at the flagpole, and Easter

[32] The Legislature passed the Texas Freedom to Worship Act weeks after passing the Amendment. It added a definition for "place of worship" to TRFRA and a statutory prohibition on closures of "places of worship." Tex. Civ. Prac. & Rem. Code § 110.001; *id.* § 110.0031. The Legislature defined "place of worship" as "a building or grounds where religious activities are conducted." *Id.* § 110.001. Thus, the legislature defined "places of worship" to include outdoor locations ("grounds").

sunrise services, among others.

Again, the text of the Amendment itself limits the scope of the right. But the City has not disputed that Appellants' ceremonies, which involve communal worship, prayer, and song are "religious services."

4. The Amendment is limited to religious services "by a religious organization established to support and serve the propagation of a sincerely held religious belief."

Only services by members of "a religious organization established to support and serve the propagation of a sincerely held religious belief" fall under the Amendment's protection.

The Texas Code's definition is helpful: "religious organization" means "the organization's primary purpose and function are religious, it is a religious school organized primarily for religious and educational purposes, or it is a religious charity organized primarily for religious and charitable purposes; and" qualifies as a 501(c)(3). Tex. Civ. Prac. & Rem. Code § 110.011 (TRFRA); Tex. Gov't Code § 2401.001 (Protection of Religious Organizations Act, passed within weeks of the Amendment).

The effect is that the Amendment does not apply to anyone who tries to invoke it by claiming he or she is engaging in a religious service. Rather, it applies only to those people who are doing so as part of a religious organization. In this case, for example, plaintiffs practice their regular worship services as part of the Lipan-Apache Native American Church. ROA.4153, 4071–73.

The phrase "established to support and serve the propagation of a sincerely held

religious belief" limits the scope of the Amendment as well.[33] For the Amendment to apply to a religious service, that service must function for the purpose of advancing or expressing sincerely held religious beliefs. The Amendment would not protect, for example, people engaged in ceremonies that are meant only to protect the environment. *Cf.* ROA.4175 (Q: "Are you objecting to the bond project because of environmental reasons? No. . . . [I'm objecting because] it's, you know, disrupting a tenet, you know, within our ceremonies. And the ceremony is how they survive."). It would also not protect those who are engaged in satirical or artistic depictions of religion. Thus, Friar Lawrence's on-stage marriage of Romeo and Juliet would not be protected, even though a real minister marrying a real couple would be, if conducted on behalf of an actual religious organization.

Following the preliminary injunction hearing, the District Court held that Appellants had established that they have "sincere religious belief … to support granting access for 'religious services.'" ROA.985. Further, the District Court ordered the City to accommodate Appellants "for entry to the Sacred Area and appropriate security provided." *Id.*

[33] "Support" means "[t]o strengthen the position of (a person or community) by one's assistance, adherence, or toleration; to uphold the rights, claims, authority, or status of; to stand by, back up." *Support*, OXFORD ENGLISH DICTIONARY (3rd ed. 2021–2022). The word "serve" means "[t]o work to defend, uphold, or maintain (a cause or principle, a person's reputation, etc.); to support or promote." *Serve*, OXFORD ENGLISH DICTIONARY (3rd ed. 2021–2022). "Propagation" means "[t]he dissemination, advancement, or promotion of a belief, idea, practice, etc." *Propagation*, OXFORD ENGLISH DICTIONARY (3rd ed. 2021–2022).

As noted in the District Court's findings of fact and conclusions of law, Appellants are both members of the Lipan-Apache Native American Church. The Church supports, serves, and propagates sincerely held religious beliefs about Christianity and the Lipan-Apache traditional beliefs.[34] The District Court's findings of fact and conclusions of law show that Appellants have established this element.

B. The Amendment's Categorical Bar Does Not Disturb Long-Standing Interpretive Principles of Texas Constitutional Law.

Longstanding interpretive principles of Texas constitutional law limit the scope of the Amendment. To determine the scope of a constitutional rule, this court interprets texts in light of their "historical and legal background." *Cf. Hidalgo Cnty. Water Improvement*, 669 S.W.3d at 186. That is because new texts are chosen and enacted against an existing body of statutory law, constitutional text, and court precedent that includes "background interpretive principle[s] of general application." *Brogan v. United States*, 522 U.S. 398, 406 (1998) (plurality op.).

Those "settled nuances or background conventions [may] qualify the literal meaning of language and, in particular, of legal language." John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003). For instance, the ministerial exception—which categorically bars certain employment discrimination lawsuits against religious institutions—acts with absolute force. *See HEB Ministries, Inc. v. Tex. Higher Educ.*

[34] *Native American Church*, HARVARD UNIVERSITY: THE PLURALISM PROJECT (Oct. 14, 2024), https://pluralism.org/native-american-church.

Coordinating Bd., 235 S.W.3d 627, 654 (Tex. 2007) (acknowledging the right against "government interference in selection of the clergy").

But when defining the scope of that right, the United States Supreme Court "looked to the 'background' against which 'the First Amendment was adopted,'" including specific wrongs to be remedied like "16th-century British statutes [giving] the Crown the power to fill high 'religious offices,' … various Acts of Uniformity … [and] religious restrictions on education in the 18th century." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 748 (2020) (describing *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*, 565 U.S. 171, 183 (2012)). The legal background helps set the scope of the absolute right.

Similarly, this Court explained that it "examine[s] the legal background to ascertain what the legislature changed (and left unchanged), assess how [a new provision] affects the legal landscape, and then determine whether and to what extent the new statute abrogated rather than merely supplemented existing law." *S.C.*, 650 S.W.3d at 437.

These principles clarify the scope of the Amendment. It does not protect religious services that long-existing background principles of law would have forbidden. Nor does it alter longstanding rules of private property law; or the rule that the Texas Bill of Rights acts against the government and not private parties.

1. The Amendment need not protect religious services that would contradict longstanding principles of law.

Longstanding interpretive principles of Texas law dictate that the Amendment does not extend to "*any* religious service." Some services fall outside its scope. This is not unusual. The fact that a "constitutional prohibition is absolute when it applies … does not determine whether and how" that right applies. *Robinson*, 335 S.W.3d at 147.

This Court has applied this approach when determining the scope of other constitutional rights. For example, Texas has long determined that its citizens have a right to work and earn a living. *Texas Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 654 (Tex. 2022). But it has also recognized that this right to work has limits. As this Court has explained, the right to work has never been extended to occupations "long deemed 'inherently vicious and harmful.'" *Id.* at 655. (quoting *Murphy v. California*, 225 U.S. 623 (1912)).

Similarly, the Court has recognized a right to church autonomy and freedom from government entanglement under the federal Free Exercise Clause's text, but it also surmised that right might not allow churches to engage in some intentionally tortious conduct "with impunity." *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 12 (Tex. 2008) (quotations omitted).

The Court may acknowledge that similar longstanding interpretive principles limit the scope of the Amendment, following what it has done in its earlier cases. The Amendment, applied in light of the existing legal and historical context, need not

protect those acts that longstanding principles would allow government to prohibit. To take one example of prohibited conduct, the Amendment would not extend to a religious service for human sacrifice, even if the attendees belonged to a religious organization sincerely propagating that belief.

The Court need not define in this case everything that might fit into these limitations. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) ("In this case we need not define with precision the standard … for these ordinances fall well below the minimum standard necessary to protect First Amendment rights."). Whatever the boundaries are, Appellants' worship services fall nowhere close. The ceremonies they perform are peaceful acts of song and prayer to God.

2. The Amendment does not extend to private property, while leaving traditional protections for religious services in public parks undisturbed.

The Amendment is housed in the Bill of Rights of the Constitution, which only applies to *government* action. *See* TEX. CONST. art. I. The Bill of Rights "serves as a shield against the powers and laws of government. Similar protections do not exist for actions by private individuals." *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89–90 (Tex. 1997). Thus, while the Amendment protects worshippers from *government* limits and prohibitions on religious services, it does not grant worshippers the right to infringe on another citizen's private property.

Texas law is well settled that citizens have no right to worship on "private property without [the landowner's] permission." *Good v. Dow Chem. Co.*, 247 S.W.2d 608, 610 (Tex. App.—Galveston 1952, writ ref'd n.r.e.). The Amendment does not disturb this background principle of law. If a private owner terminates a lease with a place of worship, the Amendment does not prevent that landlord's action. Similarly, the Amendment does not create a right to trespass on private property, even if the private property owner is "limiting" a religious service by preventing such trespass or if government prosecutes someone for criminal trespass.

On the other hand, the Amendment protects religious services conducted in public parks, which "have immemorially been held in trust *for the use of the public*." *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939) (emphasis added); *see also Fowler v. State of R.I.*, 345 U.S. 67, 69 (1953) (free exercise claim in public park). Today, some religious Texans use public parks for river baptisms.[35] During the COVID-19 pandemic, public health officials in California pursued worshippers who fled to public beaches for services.[36] Again, nothing in the Amendment upsets the settled principle that governments protect constitutional rights in public parks.

[35] *See, e.g., River Baptism Service*, PROMISELAND CHURCH (accessed Oct. 14, 2024), https://www.psmchurch.com/baptisms ("We will be gathering at City Plaza Park [in San Marcos] on August 11th[.]").

[36] Wigglesworth, *supra* note 9.

III. ALTERNATIVELY, THE AMENDMENT REQUIRES A HEIGHTENED LEVEL OF STRICT SCRUTINY.

This Court should interpret the Amendment according to its plain text, which imposes a categorical bar on government actions that limit religious services. If the Court disagrees, however, the Court should hold that the Amendment demands a "heightened" level of strict scrutiny, applying the Amendment's text and encompassing principles already applied by many courts and already implied by the United States Supreme Court.

This Court is not bound to choose between only a categorical bar *or* a strict scrutiny standard copied from federal courts. Some jurists consider "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution" to be "[a] grave threat to independent state constitutions." *See* Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS 174 (2018). Given that there is no analogue to the Amendment in any other constitution (that Appellants are aware of), there may be nothing to imitate. Accordingly, this Court may decide to implement the constitutional text through a heightened standard, such as a clear and convincing evidence burden on the government.

A. When the Amendment Was Enacted, Government Actions Prohibiting or Limiting Religious Services Had Already Received Strict Scrutiny; the Amendment Must Require Something More.

As already explained, the Amendment provides the People of Texas with more robust religious liberty protection than they enjoyed prior to its passage. The People

saw what various governments were doing in the name of public health and safety and determined that strict scrutiny was not sufficient to protect Texans' right to hold and participate in religious services. Thus, the People decided strict scrutiny failed to provide sufficient protection for their religious services and passed an Amendment that would afford them even greater protections than they already enjoyed.

If this Court determines that the Amendment does not impose a categorical bar, then it must require the government to meet an even more exacting standard than that under strict scrutiny. In other words, this new standard must grant more protection for religious services than "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. The Amendment must at least require a government to meet a "heightened strict scrutiny standard" before it can prohibit or limit Texans' religious services.

B. A Heightened Strict Scrutiny Standard Should Eliminate an Artificial Burden Analysis, Should Incorporate Better-Reasoned Rules of Strict Scrutiny, and Should Hold Governments to a Higher Evidentiary Burden.

Heightened strict scrutiny must impose a heightened burden—beyond a compelling interest achieved through least-restrictive means—on the government before it could prohibit or limit religious services. To begin, under heightened strict scrutiny, a worshipper would not need to show anything more than that government action limits the party's right to hold or attend a religious service. Upon that showing, an on-notice government would be required to prove that it investigated alternatives

prior to litigation and could not accommodate the challenger. Lastly, the government would need to meet a higher clear and convincing evidentiary burden.

1. The protections of the Amendment apply, by its plain text, when the government "limits or probits religious services," and therefore a worshipper need not prove any additional burden on religious services.

The Amendment was ratified even though TRFRA already provided that "a government agency may not *substantially burden* a person's free exercise of religion." Tex. Civ. Prac. & Rem. Code § 110.003(a) (emphasis added). TRFRA's language of "burden" does not appear in the Amendment. By forbidding any government action that prohibits or limits a believer's ability to hold or attend religious services, the Amendment eliminates any need for the plaintiff to separately prove a substantial burden. Instead, the text operates under the common sense view that limits and prohibitions on religious services constitute real injuries that courts may remedy.

2. A heightened strict scrutiny standard requires a duty to investigate alternatives.

To establish the second element of heightened strict scrutiny—*the government* must prove that its action is the least restrictive means of furthering its claimed compelling interest. *See Barr v. City of Sinton*, 295 S.W.3d 287, 308 (Tex. 2009) ("Although TRFRA places the burden of proving a substantial burden on the claimant, it places the burden of proving a compelling state interest [and least restrictive means] on the government."). But it is not enough for the government to meet this burden of proof by simply raising arguments in litigation that its actions were narrowly tailored. It must

investigate and consider alternatives *before* it attempts to prohibit or limit a religious service. If government knew or later learned that its action limited or prohibited a religious service but did not even investigate ways to accomplish its goal without doing so, then it fails to satisfy its burden. Period. It should not matter what government lawyers or expert witnesses say in litigation.

This is the rule multiple federal circuits have used to implement the text of federal RFRA: to satisfy the least-restrictive means burden, government must have "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford,* 418 F.3d. 989, 999 (9th Cir. 2005); *accord Washington v. Klem,* 497 F.3d. 272, 284 (3d Cir. 2007); *see generally Knight v. Thompson,* 797 F.3d. 934, 946 (11th Cir. 2015) (identifying circuit split).

This approach accords with the United States Supreme Court's recent clarification of strict scrutiny in *Ramirez v. Collier*, *Fulton v. City of Philadelphia*, and *Holt v. Hobbs*. *See Ramirez v. Collier,* 595 U.S. 411 (2022)*; Fulton*, 593 U.S. at 526; *Holt v. Hobbs,* 574 U. S. 352 (2015). In *Holt* , the court reemphasized that the least restrictive means test requires *the government* to prove that no less restrictive means is available. *See Holt*, 574 U.S. at 364–65. Requiring the government to demonstrate that they sought out alternative means before acting is an articulation of *how* a government meets its burden of proof. A corollary of the government bearing the burden is that a plaintiff has *no burden* to give the government (or the court) an alternative. As eight justices reasoned

in *Ramirez*, it "gets things backward" to suggest that the plaintiff must demonstrate least restrictive means. 595 U.S. at 432.

In this case, for example, Appellants testified about the impact the Bond Project would have on their religion at public hearings that were held before the design was finalized. ROA.4168–70. Yet the City's witnesses who were in charge of the construction plan and anti-nesting admitted that they were unaware of Appellants' religious beliefs or practices before this litigation commenced, ROA.4382, 4459, and once the witnesses learned about them, the City did not even attempt to consider alternative ways of pursuing the Bond Project that would protect Appellants' religious services. ROA.4382–83, 4390, 4431, 4445, 4455–56, 4520–21, 4589–90.

Only once litigation commenced did the City argue that no other alternatives were plausible. But, of course, at that point, the City was not acting as a conscientious steward of the public trust trying to accommodate religious services. It was trying to win a lawsuit. This is why the United States Supreme Court has reasoned that "[g]overnment 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented post hoc in response to litigation.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

This Court should not countenance a version of strict scrutiny that would perversely reward a government's inadvertent or conscious failure to investigate

potential alternatives. It could clearly state that an on-notice government that did not investigate alternatives *per se* cannot demonstrate it is using the least-restrictive means.

3. A heightened strict scrutiny standard requires a duty to accommodate.

It would not be enough for government under a heightened standard to simply investigate alternatives. Heightened strict scrutiny would also require governments to accommodate religious services that are limited by government action wherever it is possible to do so. *Contra Perez v. City of San Antonio*, 98 F.4th 586, 603 (5th Cir. 2024), *opinion withdrawn and superseded on reh'g*, No. 23-50746, 2024 WL 3963878 (5th Cir. Aug. 28, 2024), *certified question accepted* (Sept. 6, 2024) ("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.'").

Under the federal RFRA, the Supreme Court has made clear that government has a duty to provide a reasonable accommodation. Sometimes that means allowing a person that would be regulated under one program to instead be regulated by a different program that they would not have otherwise qualified for. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730–31 (2014) (requiring government to allow closely-held for-profit corporations to use accommodation created for "nonprofit organizations with religious objections"). Like federal RFRA, the Amendment may sometimes "require

creation of entirely new programs" if that is the only way government can avoid prohibiting or limiting a religious service. *Id.* at 729.

As the United States Supreme Court recently explained, strict scrutiny means that "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. Heighted strict scrutiny under the Amendment should clarify that "if the government can, it must." While there may be some sort of upper bound of reasonableness,[37] meeting this duty may require an accommodation or exemption and a significant level of increased effort or money from the government. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014) (RFRA "may require the Government to expend additional funds to accommodate citizens' religious beliefs" including the "creation of entirely new programs"). But that, at a minimum, is the policy choice the Legislature and People implemented in the Amendment.[38]

[37] *Cf. Morath v. Lampasas Indep. Sch. Dist.*, 686 S.W.3d 725, 737 (Tex. 2024), *reh'g denied* (Apr. 19, 2024) (holding that "statutory scheme's text and context—including its evident purpose—fairly implies a reasonable time standard").

[38] No proper interpretation of the Amendment can partake of the United States Supreme Court's much-criticized decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which held that laws incidentally burdening religion are not ordinarily subject to strict scrutiny under the United States Constitution so long as they are neutral and generally applicable. 494 U.S. 872 (1990). The Amendment's manifest purpose was to end *any and all* government limitations on protected religious services—whatever law imposed them—and its plain text does so without exception. Moreover, the Legislature squarely rejected *Smith* in restoring religious freedom to Texans with TRFRA, and this Court has never adopted it. *See* Tex. Civ. Prac. & Rem. Code § 110.003(a)–(b); H.R.O. Bill Analysis, CSSB 138 (1999); *Barr*, 295 S.W.3d at 296 & n. 37.

4. A heightened strict scrutiny standard should impose a clear and convincing evidentiary burden on government actors.

American civil courts use a heightened evidentiary burden for the most sensitive issues and should do so for the sensitive issue of religious services. Some states require that common-law fraud claims require clear and convincing evidence[39] to establish liability. *See, e.g.*, *Credit Suisse AG v. Claymore Holdings, LLC*, 610 S.W.3d 808, 825 (Tex. 2020) (applying New York law); *Arkoma Basin Expl. Co., Inc. v. FMF Associates 1990-A, Ltd.*, 249 S.W.3d 380, 383 (Tex. 2008) (applying Virginia law). By statute, exemplary damages in Texas require clear and convincing evidence of fraud, malice, or gross negligence. Tex. Civ. Prac. & Rem. Code § 41.001(2). Those making claims for separate property must prove their cause by a clear and convincing standard. Tex. Fam. Code § 3.003(b). Most sensitively, Texas requires the standard for involuntary termination of parental rights. Tex. Fam. Code § 161.001.

Courts also choose the clear and convincing standard to adjudicate issues that are particularly sensitive or carry a strong presumption. In *Schneiderman v. United States*, the U.S. Supreme Court held that naturalized citizenship can only be set aside "with evidence of a clear and convincing character." 320 U.S. 118, 123 (1943). This Court chose to implement a clear and convincing evidence standard "in refuting the presumption of gift" in constructive trust cases. *Bogart v. Somer*, 762 S.W.2d 577, 577

[39] "'Clear and convincing' means the measure or degree of proof that 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." Tex. Civ. Prac. & Rem. Code § 41.001(2).

(Tex.1988) (per curiam). And in *State v. Addington*, this Court adopted it for civil commitment. 588 S.W.2d 569, 570 (Tex. 1979).

This Court imposes the clear and convincing standard "[o]nly in extraordinary circumstances, such as when [it has] been mandated to impose a more onerous burden." *Ellis Cnty. State Bank v. Keever*, 888 S.W.2d 790, 792 (Tex. 1994). The Amendment, which provides protections that are *more* protective than "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534, is such an extraordinary circumstance.

When a party's religious service falls within the Amendment, the strongest presumption is that the Amendment protects that service, and the government can only overcome that presumption by meeting a high evidentiary standard. *Cf. New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022) ("[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."). Holding the government—which already bears the burden of evidence—to the clear and convincing standard would ensure that the Amendment's heightened strict scrutiny has teeth.

CONCLUSION AND PRAYER FOR RELIEF

Appellants respectfully request that this Court answer the certified question that (1) yes, the Amendment implements a categorical bar on government action that prohibits or limits a religious service; (2) the text, structure, and context of the Texas Constitution create the proper scope of that protected right; and (3) Appellants' religious services fall within that scope.

If this Court declines to so construe the Amendment, then, in the alternative, this Court should apply heightened strict scrutiny under the Amendment to protect Appellants' religious services.

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Respectfully submitted,

/s/ John Greil

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