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

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INTRODUCTION

Texans responded to unprecedented interference with religious liberty with a robust and equally unprecedented constitutional amendment. The Religious Services Amendment goes beyond the strict scrutiny framework that failed to protect religious services during the COVID-19 pandemic. The text is clear: governments have no power to prohibit or limit religious services. The Amendment carries *absolute force* within a *workable scope* that is informed by its text and established principles of Texas law.

The City's proposed interpretation of the Amendment as an anti-discrimination provision renders it redundant and toothless. That interpretation lacks a textual basis. If accepted, it would mean that the Amendment provides *zero new legal protection* for religious services. This Court should reject the City's attempt to interpret the Amendment out of existence, and instead give full effect to its clear textual mandate.

ARGUMENT

The City says the Amendment only: (1) provides an anti-discrimination provision that deems religious services "essential," RBOM.3, and (2) subjects laws with "unequal treatment of religious services" to "strict scrutiny." *Id.* If true, that means that local governments *may very easily* limit or prohibit religious services. They need only pass neutral and generally applicable laws.

The City's interpretation is incorrect because it has three main flaws. First, it has no textual basis. Second, it provides zero new legal protections for worshippers because the federal Free Exercise Clause already subjects discriminatory laws to strict scrutiny,

while TRFRA subjects even neutral and generally applicable laws to strict scrutiny. Third, it makes no sense. No one would say that a "neutral" and "generally applicable" law that bans *all* criticism of the government preserves the right of free speech. And no one would say that you have a right to keep and bear arms if the government is able to ban all citizens from owning any guns.

Appellants' proposed interpretation is correct because it is faithful to the Amendment's text and plain meaning and provides a workable legal framework. Here, the City plans to permanently destroy Appellants' place of worship and forever prevent them from performing essential religious ceremonies. Appellants' interpretation of the Amendment will not stop the City from repairing or restoring the historical walls, but it will ensure the City does so in a way that will not permanently prevent religious services. The text of the Amendment provides that protection.

I. THE CITY'S PROPOSED INTERPRETATION FAILS.

A. The City Misstates the Legislative History, Which Does Not Support Its Interpretation.

"The text is the law, and it is the text that must be observed." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 763 (Tex. 2018) (quoting ANTONIN SCALIA,: A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997)). "[P]ermutations placed on that text by others, even those who urge its adoption, must ordinarily yield when the text's plain meaning says the opposite." *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 467 (Tex. 2011).

Rather than grapple with the plain text of the Amendment, which forbids government action that "prohibits or limits religious services," the City engages in purposivism, trying to divine the legislature's (and not even the people's) subjective purpose in drafting the Amendment from a patchwork of random quotes. Incredibly, according to the City, the Court's textual analysis must focus on the word "essential," even though that word does not appear anywhere in the Amendment.

The City's foray into legislative history thoroughly misstates the actual testimony. Take the testimony of Jeremy Dys, a representative from First Liberty. The City says he testified that "the Amendment would not prevent local governments from performing day-to-day functions, subject to court oversight under a strict scrutiny standard." RBOM.34. But this portrayal of Mr. Dys's testimony is incorrect.

When asked whether the Amendment would legalize child marriage and human sacrifice, Mr. Dys responded, "If there is any concern that you or the other senators might have related to that, a very simple solution to that might be just to simply borrow from … the Texas Religious Freedom Restoration Act. Simply inserting that language … the *Sherbert* standard … that language has been very easily applied throughout the country[.]"[1] Yet that exact textual change—inserting the compelling interest test—was debated and rejected on the House floor. *See* BOM.24.

[1] 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 at 2:46:00–2:48:55.

Elsewhere, the City relies on debate involving *other* legislative bills. The City invokes remarks of L. Nimri and H. Avila. RBOM.33. But that testimony concerned a different piece of legislation, SB 26, which was aimed at preventing emergency executive orders from overriding the protections of TRFRA and had a much narrower scope than SJR 27, the legislation that created the Amendment.[2]

Similarly, J. Covey testified at the same hearing for both SB 26 and SJR 27. But the quote the City offers was actually referring to the statutory language of SB 26, not the constitutional language of SJR 27. RBOM.32.[3]

If the Court looks to legislative history, it should rely on Appellants' discussion, which, unlike the City's, focuses on meaning over intention and accuracy over misrepresentation. BOM.6–7, 23–26.

B. The City's Non-Discrimination Interpretation Is Atextual.

1. The Text Does Not Support the City's Non-Discrimination Gloss.

Lawmakers know how to draft a non-discrimination requirement in the Texas Constitution. The Equal Rights Clauses guarantee that "[a]ll freemen … have equal rights" and that "[e]quality under the law shall not be denied or abridged because of …

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[2] *Compare* Witness List for SB 26, Texas Senate, March 8, 2021. (https://capitol.texas.gov/tlodocs/87R/witlistbill/pdf/SB00026S.pdf#navpanes=0), *with* Witness List for SJR 27, Texas Senate, March 8, 2021. (https://capitol.texas.gov/tlodocs/87R/witlistbill/pdf/SJ00027S.pdf#navpanes=0).

[3] 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 at 2:03:00–2:06:32 (Statement of J. Covey) ("I believe that SB 26 will make it clear in statutory law 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.").

creed[.]" TEX. CONST. art. I §§ 3, 3a. The City's proposed reading of the Amendment—that government may not treat religion worse *because* it is religion—would be redundant to those clauses.

Lawmakers also know how to establish a comparison. The Right to Worship provision guarantees that "no preference shall ever be given by law to any religious society or mode of worship" and charges the Legislature with the duty "to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship." TEX. CONST. art. I § 6. That language—"no preference" and "protect equally"—involves comparisons to other groups. The Amendment's text—government "may not" take action that "prohibits or limits religious services"—does not.

The City says that the "verbs 'prohibits' and 'limits' signal comparison with an unrestricted or unlimited status quo." RBOM.39. It then argues that the comparison must be with "secular activities deemed to be 'essential' that go on unfettered." *Id.* That does not follow from the text. "The language … does not tie this right to the treatment of persons not in this group." *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 568 (2021) (Alito, J., concurring in the judgment) (rejecting non-discrimination interpretation for federal Free Exercise Clause). If a religious service is prohibited, then it is prohibited, regardless of whether secular activities are too.

By contrast, "equality under the law shall not be denied or abridged because of … creed" requires a comparison to other creeds or the secular. *See* TEX. CONST. art. I § 3a. But the Amendment, using the words "prohibits" and "limits," requires a

comparison to a world without government prohibition or limitation of religious services. For instance, a singing ban that prohibits or limits a church service clearly runs afoul of the Amendment. Yet under the City's interpretation, the singing ban escapes the Amendment so long as it outlaws opera concerts and high school musicals as well. That makes no sense.

The City's anti-discrimination reading flips the Amendment on its head. Instead of banning government from "prohibiting or limiting" religious services, it grants broad powers to do so, provided that the government restricts other things too. Here, the City is trying to cram the Amendment into the anti-discrimination reading of the Free Exercise Clause associated with *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990). But, as the State of Texas explained just this year, "protection from discrimination is a faint shadow of the religious liberty recognized by the founding generation," and that reading "can't be squared with the ordinary meaning of the text of the Free Exercise Clause." Amicus Br. of State of Texas et al., *Roman Catholic Diocese of Albany v. Harris*, U.S. No. 24-319 at 17–18 (Oct. 21, 2024) (quoting *Fulton*, 593 U.S. at 553).

This is a not a new insight. Federal RFRA, which was passed as a direct rebuke of *Smith*, begins with a congressional finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C.A. § 2000bb(a)(2). That same insight—from the perspective of the worshipper, a burden is a burden whether neutral or intentional—is the core of Texas

RFRA. Thus, TRFRA requires strict scrutiny even of "neutral laws of general application" that burden religion. *See Barr v. City of Sinton*, 295 S.W.3d 287, 306 (Tex. 2009).

2. Other States Codified Religious Services as "Essential." Texas Chose a Different Approach.

The Amendment was not limited to ensuring that religious services are deemed "essential" because the text says no such thing. Instead, the text forbids government action "that prohibits or limits religious services."

Some states *did* react to COVID by deeming religion "essential." Take Arizona. That state declared that "[d]uring a state of emergency, religious services are declared essential services." ARIZ. REV. STAT. § 41-1495.01(B). The Arizona statutory scheme includes comparative language, specifying that the state must allow religious services "to the same or greater extent than state government allows other organizations or businesses that provide essential services." *Id.* § 41-1495.01(C). And it clarifies that there is no protection against "neutral health, safety or occupancy requirements … that apply to all organizations and businesses that provide essential services. *Id.* § 41-1495.01(D). Indiana and Arkansas did the same. *See* IND. CODE § 10-14-3-12.5; ARK. CODE § 12-75-134.

Texas's Amendment looks nothing like these other states' statutes. It does not redefine "essential," it does not speak with comparisons, and it does not exempt neutral or generally applicable laws. Instead, it forbids government action that "prohibits or

limits religious services." Full stop. This approach makes sense in Texas, where the Governor declared religious services to be essential as early as March 31, 2020.[4] The City's reading, however, would go far beyond interpretation and require courts "rewriting text that lawmakers chose." *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 183 (Tex. 2019) (cleaned up).

3. The City Refuses to Distinguish the Amendment's Force from Its Scope.

Appellants submit that the Amendment has *absolute force* within a *workable scope* that is informed by the text of the Amendment and established principles of Texas law. The City rejects this framework and argues "the courts uniformly construe [constitutional rights] in balance with other societal imperatives." RBOM.26; *see also* RBOM.48. This conflation of the Amendment's force and scope leads the City to attack strawman after strawman. For example, although Appellants explained why the Amendment would ***not*** protect a religious service for human sacrifice, BOM.38, the City stubbornly insists that it would, RBOM.51.

The City is wrong as a matter of constitutional law that every constitutional right requires courts to "balance" other "societal imperatives." For example, some speech—such as true threats, fraud, or obscenity—falls outside the scope of the First Amendment's protection as "historic and traditional categories of expression long

[4] Proclamation, Office of the Tex. Governor, Governor Abbott Issues Exec. Ord. Implementing Essential Serv. & Activities Protocols (Mar. 31, 2020), https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-implementing-essential-services-and-activities-protocols.

familiar to the bar." *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (cleaned up).[5] Other government actions are reviewed under the tiers of scrutiny: content-based restrictions get strict scrutiny, *see id.*, while restrictions on commercial speech receive intermediate scrutiny, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). But none of that means that citizens do not have an *absolute right* against viewpoint-based restrictions in traditional public fora. *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018).

The same framework exists with religious protections. Some restrictions on religious exercise are analyzed under strict scrutiny. For instance, government may argue that it has a compelling interest in preventing cruelty to animals when it tries to prevent religious services that involve animal sacrifice. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). And its arguments will likely fail if it refuses to protect against other equally harmful ways of killing animals. *Id.*

But there are circumstances in which government may not try to use strict scrutiny to justify interfering with religion. A religious institution has an absolute right against government "interfering with internal management decisions that are central to

[5] The United States Supreme Court has explicitly rejected the City's vision for courts to weigh constitutional rights in "balance with other societal imperatives." RBOM.26; *see Alvarez*, 567 U.S. at 717 ("[T]his Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage based on an ad hoc balancing of relative social costs and benefits.'") (cleaned up).

The City also bizarrely quotes Justice Kavanaugh's concurrence in *Rahimi* as if it supports their view that all rights require means-ends scrutiny. RBOM.52. Yet Part III of that separate opinion decries "means-ends scrutiny" as "policy by another name." *United States v. Rahimi*, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring).

its mission." *In re Lubbock*, 624 S.W.3d 506, 517 (Tex. 2021). Religious institutions also have a categorical right to hire and fire their own ministers, although the scope of the right is limited by who counts as a "minister." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring employment discrimination claim by minister against church). In that narrower band of cases, the force of the right is absolute, even if the scope of the right—such as whether *this* individual served as a minister—gets litigated. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 737 (2020). At no point, however, does the analysis involve weighing the government interest involved.

Such is the case with the Amendment. Its force is absolute, but its scope is informed by its own text and also by established Texas law.

C. The City's Non-Discrimination Interpretation of the Amendment Renders It Superfluous.

The City's proposed interpretation would mean that the Amendment, adopted in November 2021, provided zero new legal protections for religious services, leaving Texans with the same protections that the federal Free Exercise Clause already provided.

Under *Smith*, neutral and generally applicable laws that burden religion are reviewed only under the rational basis standard. 494 U.S. at 884 (1990). Strict scrutiny

only applies when the government action is not neutral,[6] or is not generally applicable.[7]

But as the City describes the pandemic free-exercise cases, "[c]ourts construed lockdown orders as neutral laws of general applicability" and then "applied strict scrutiny to the lockdown orders." RBOM.30. That is wrong. Under the federal Free Exercise Clause, courts do *not* apply strict scrutiny when they construe laws as neutral and generally applicable. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Laws and the Free Exercise of Religion*, 95 Nev. L. Rev. 1 (2016). Rather, in the pandemic cases, courts applied strict scrutiny because they decided the laws were ***not*** generally applicable.

The Chief Justice in *South Bay* invoked *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), with its police power/rational basis framework *because* he declined to apply strict scrutiny, unlike dissenting Justice Kavanaugh who relied on strict scrutiny cases like *Lukumi* and *Trinity Lutheran*. *See generally S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). The fight in the COVID cases was over what counts as a neutral and generally applicable law.

In *Tandon v Newsom*, decided in April 2021, Justice Kavanaugh's *South Bay* position became the position of the court: "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

[6] *E.g. Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617 (2018).

[7] *E.g. Lukumi*, 508 U.S. 520.

exercise." 593 U.S. 61, 62 (Apr. 9, 2021) (per curiam). The upshot is that by—at the latest—April 2021, the Free Exercise Clause definitively required religious services to be treated as well as the best-treated similar secular activity.

Under the City's construction, however, Texans added a brand new amendment to their Constitution in November 2021 merely to conform their Constitution to the federal Free Exercise Clause, which already protected them. This Court should not gut the Amendment by presuming that the Legislature and the People would have wasted their time on such a meaningless constitutional amendment.

D. The City's Proposed Interpretation Would Permit Myriad Prohibitions and Limitations on Religious Services.

The City's (and amicus First Liberty's) proposed interpretation would not protect worshippers from cleverly-drafted limitations, including some of the very actions taken during COVID. First Liberty's list of prohibited actions are each direct limitations or prohibitions on religious services:

- A state proclamation limiting *in-person worship services* to fewer than 25 persons.
- A city decree banning singing *during worship services*.
- A state law prohibiting a Catholic priest from *serving consecrated Holy Communion wine* to persons under age 21.

First Liberty Br. at 18 (emphasis added).

Under that reading, the Amendment provides no protection against "neutral application of law that carries some downstream consequence for religious services."

First Liberty Br. at 1. The rule thus leaves the door open for local governments to construct clever language that does not mention religious services yet has the effect of preventing them. A City could ban all people from leaving their homes during a pandemic, and the Amendment would offer no protection.

The City asserts that "[i]nvariably, lockdown orders prohibited gathering for in-person religious services while other activities were carved out and allowed to continue." RBOM.31. Not true. In Massachusetts, "[g]atherings of over 25 people [were] prohibited throughout the Commonwealth."[8] The order did not exempt essential services or provide preferred treatment for some secular activities. That ban plainly passes muster under the City's interpretation of the Amendment—indeed, it does not even trigger strict scrutiny. And it is unclear how it fits into First Liberty's scheme, which does not present any neutral and generally applicable examples.

A state law prohibiting a Catholic priest from dispensing communion wine is clearly out of bounds. But what about the 18th Amendment, which did not prohibit use or possession of alcohol, but merely "the manufacture, sale, or transportation of intoxicating liquors"? U.S. CONST. amend. XVIII. That does not "forbid by law" anything that happens during a Catholic Mass, nor does it "dictate the character of religious services." *Cf.* First Liberty Br. at 18. Under both the City's and First Liberty's

[8] Charles D. Baker, *Order Prohibiting Gatherings of More than 25 People and On-Premises Consumption of Food or Drink* (Mar. 16, 2020), https://www.mass.gov/doc/march-15-2020-large-gatherings-25-and-restaurants-order/download.

proposed readings, full-blown Prohibition would bar Catholic Mass and Jewish Seder, and the Amendment would not protect them.

On the other hand, under Appellants' interpretation, a city-wide curfew, the blanket Massachusetts attendance limit, or Prohibition would be unconstitutional because they restrict, prevent, or preclude religious services.

Under the Amendment's plain text, that result obtains—whether or not the government targets religious services explicitly, intentionally, or directly. It does not matter that such Prohibition was a "downstream" effect.

E. The Worshipper's Perspective, Not the Government's, Determines Whether Government Action Interferes With Religious Services.

The City submits that "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." RBOM.46.[9] Chopping down dozens of trees may be "garden-variety local management" to the City of San Antonio, but to Gary Perez and Matilde Torres, it would permanently desecrate an area that is sacred to them, their Church, and generations of their ancestors.

[9] The City argues the Court could "dispose" of this appeal because the City's "remediation plan does not rise to" the level of a "governmental action[] carrying the force of law." RBOM.47, n.26. Nonsense. The authority for this specific construction plan comes from a certificate of appropriateness issued by the City's Office of Historic Preservation. *Perez v. City of San Antonio*, 98 F.4th 586 (5th Cir. 2024), *opinion withdrawn and superseded on reh'g*, 115 F.4th 422 (5th Cir. 2024), *certified question accepted* (Sept. 6, 2024); ROA.2693–97, 3088–91. The City's zero-nesting actions are pursuant to a Urban Rookery Management Plan and accompanying field agreement executed by the City's Parks and Recreation Department and entered into the record. ROA.2425–48; *see* BOM.29, n.31 (defining legal actions in the Amendment). These government decisions and rules carry the force of law.

Regardless of how the City wishes to characterize its actions, they would prohibit and limit Appellants' religious services *forever*—and without the City ever having tried to determine if it could accommodate Appellants. *See infra*, § V.

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's assertion that it "does not prohibit or limit religious services" any more than filling in a pothole, RBOM.46, is an insult to Appellants. It displays the same kind of governmental ignorance and arrogance that inspired Texans to pass the Amendment in the first place. As to ignorance, the City, *as it has in every court in this litigation*, implies Appellants do not know how to perform their own ceremonies. *See* RBOM.21 ("As a matter of fact, therefore, no cormorants are present in the Sacred Area during Plaintiffs' 'Midnight Waters' ceremony on the winter solstice."). But whether the City believes it or not, the people of faith who actually perform these ceremonies know their faith better than adversarial government attorneys. ROA.4120 ("There are some younger crested neotropic cormorants and some double-crested. They do stay throughout the year. They don't leave.").

Bureaucrats are not theologians. Accordingly, the Amendment asks whether *a religious service is prohibited or limited*—not whether *the government thinks* its actions are "garden-variety local management." Many "day-to-day activities" that are unexceptional to the government are profoundly important to people of faith. Consider:

- Setting a lunch menu is "garden-variety local management" for a prison, but not for the prisoner keeping kosher. *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 785 (5th Cir. 2012), *as corrected* (Feb. 20, 2013);
- Establishing a grooming policy is "garden-variety local management" for a police department, but not for officers whose Sunni Muslim beliefs do not let them shave their beards. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.);
- Zoning correctional facilities away from residential areas is "garden-variety local management" for a planning commission, but not for the Christian minister called to open a halfway house. *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009);
- Managing a work schedule is "garden-variety local management" for a public employer, but not for a worker observing the Sabbath. *Groff v. DeJoy*, 600 U.S. 447 (2023).

And destroying sacred trees while chasing away sacred birds at Yanaguana is not "garden-variety local management" to members of the Native American Church. Religious beliefs that may seem strange, incomprehensible, or inconvenient to non-believers constitute, in James Madison's words "the duty which we owe to our Creator" for people of faith. *See Memorial and Remonstrance Against Religious Assessments* (1785), *in* 8

THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. ed., Chicago Univ. Press 1973).

The City's proposed interpretation, which would prioritize the mundaneness of the government action over prohibitions and limitations on religious services, is inconsistent with the Amendment's text and would obliterate fundamental religious liberty principles.

II. THE AMENDMENT'S UNAMBIGUOUS TEXT CATEGORICALLY FORBIDS GOVERNMENT ACTION "THAT PROHIBITS OR LIMITS RELIGIOUS SERVICES."

The Amendment's plain meaning forbids government action that prevents, precludes, or restricts religious services, or makes them impossible. The ordinary meaning of the words "limit" and "prohibit" is key. Appellants agree that "prohibit" ***can*** mean "forbid by authority." *Compare* RBOM.30; First Liberty at 14.[10] But that is not ***all*** that "prohibit" means.

It also carries the meaning "to prevent; preclude"[11] which need not involve an authority that is deliberately targeting anything. For example, pharmacists are exempt from certain requirements if a "natural or manmade disaster prohibits the pharmacist from being able to contact the prescribing practitioner."[12] The disaster does not tell

[10] The City largely adopts First Liberty's construction of "prohibit" and "limit," asserting that "the Amendment precludes laws that (1) 'forbid' 'religious services,' or (2) 'restrict the bounds of or curtail' 'religious services' by dictating their character." RBOM.45.

[11] *Prohibit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[12] 1 TEX. ADMIN. CODE § 354.1868.

them "thou shall not;" it prevents them from doing something. This usage fits the ordinary meaning of "prohibit" as "prevent" or "preclude." Similarly, "prohibit" can mean to "make impossible,"[13] as in "the lack of oxygen prohibits the survival of most animals"[14] at the bottom of the ocean. Both of those ordinary meanings reach beyond the City's limited definition.

And, as explained above, not only does the City's (and First Liberty's) reading depart from the plain meaning of the Amendment, but it fails to acknowledge that indirect and neutral laws can prohibit or limit religious services just as much as direct and targeted laws can, unjustifiably (and unwisely) importing the holding of *Smith* into the Amendment

III. THE SCOPE OF THE AMENDMENT IS WORKABLE AND LIMITED.

A. The Religious Services Amendment's Scope Is Workable.

The City fears that the Amendment will stop cities from filling potholes as the State descends into religious anarchy. Not so.

Increased protections for religious exercise have often been greeted with similar fears. *See e.g., Smith*, 494 U.S. at 888 ("adopting such a system would be courting anarchy …."). Yet Congress responded to *Smith* with RFRA and RLUIPA, and Texas responded

[13] *Prohibit*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

[14] Poonam Narotam, *Dancing with Data*, OCEANUS: THE JOURNAL OF OUR OCEAN PLANET (July 3, 2023), https://www.whoi.edu/oceanus/feature/dancing-with-data-boston-ballet-photo-essay/.

with TRFRA. Decades later, the business of government goes on. Those same fears of anarchy are overblown today.

Perhaps the City fears that Texans of faith are engaged in death cults that seek to harm each other and the general public. But the Amendment evidences a more charitable (and accurate) judgment—people of faith are reasonable citizens who will work together with governments to ensure religious ministry. Texans have answered the question "who decides?" with "ministers and congregations," not "bureaucrats and experts." If the City disagrees with that judgment, then the solution is the political process, not red-penciling a popularly-enacted constitutional text.

The City trots out hypothetical parades of horribles. RBOM.51–53. But if anything, those examples prove just how workable the scope of the Amendment is.

Consider the City's example of a mission church where "Churchgoers disagree with each other" so that "[n]o matter what, the government's decision of how to proceed will restrict the ability of some individuals to worship." RBOM.52. But as Appellants noted in their opening brief, the requirement that the religious service be conducted "by a religious organization" limits the Amendment's scope. *See* BOM.33–35. The members who disagree with the church's official position—the religious organization—would be out of luck.

As to the flooding hypothetical, RBOM.53 ("[i]f a natural disaster like flooding makes the space unavailable for use"), the text of the Amendment answers that too: government action is not what prohibits or limits that service. *See* BOM.29 ("A

congregation whose church burns down in a thunderstorm has its religious services limited. But the government did not limit them."). Accordingly, no claim lies.

The City rejects out-of-hand this Court's "inherently vicious" rule from *Crown Distributing* as "an artificial proxy to exclude conduct whose protection would raise such absurdities." RBOM.51. But that same argument could have been levied against *Crown* itself—"the manufacture and processing of smokable hemp products" is, literally, an occupation and a way to make a living. *See Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 655 (Tex. 2022). Nevertheless, the background principle that the right "has never been interpreted to protect a right to work in fields our society has long deemed 'inherently vicious and harmful,'" limits the scope of the right to earn a living. *Id.* (quoting *Murphy v. California*, 225 U.S. 623, 628, 630 (1912)).

A background principle does not always come into play, but that does not make it an "artificial proxy." Courts decide one case at a time, based on the particular facts and laws at issue. *See Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 792 & n.58 (Tex. 2016) (identifying "case or controversy" requirement in Texas Constitution's separation-of-powers provision, TEX. CONST. art. II, § I). This Court need not identify every possible established principle of law that could affect future cases. Faced with a case that implicates such a principle, this Court can invoke it where it applies—just as this Court did in the right-to-work context.

As to the City's fear that the Amendment will upset the whole legal landscape, it raises more of a whimper than a roar. The City proclaims that "[a] slew of state

precedent carefully developed over the past 100 years would be summarily discarded under Plaintiffs' absolute construction." RBOM.54. How? By removing zoning laws from the police power? The City seems completely unaware that "houses of worship" have not been "subject to zoning laws under the police power" the same way as other institutions since RLUIPA was enacted in 2000. Indeed, *Barr v. City of Sinton invalidated a zoning ordinance* under TRFRA's compelling interest standard and discussed one of the City's cited cases. *Barr v. City of Sinton*, 295 S.W.3d 287, 297 (Tex. 2009) (discussing *City of Sherman v. Simms*, 183 S.W.2d 415, 416–417 (Tex. 1944)); *cf.* RBOM.54 (citing *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 change brought about by TRFRA, which replaced *Smith*'s rational-basis test with strict scrutiny of *any* government action that burdens religious exercise, swept far more broadly than the Amendment, which provides greater-than-strict-scrutiny protections only for religious services. Yet cities still function. The text's limitations, along with established principles of Texas law, ensure that the Amendment is limited to a workable scope.

B. The Amendment's Limited Scope Does Not Violate the Establishment Clause.

The City's refusal to acknowledge the Amendment's limited scope leads it to posit absurd outcomes. The City now argues for the first time that the Amendment violates the Establishment Clause. But to succeed on such a facial challenge, the City

would have to show that the Amendment violates the Establishment Clause "in all its applications." *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019). The City does not even attempt this.

According to the City, "[u]nder the Establishment Clause, a religious accommodations law cannot be absolute." RBOM.56. The City relies on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). That case, recently described as a separationist outlier "border[ing] on religious hostility,"[15] applied the *Lemon* test, which the Supreme Court "long ago abandoned."[16] More specifically, the *Thornton* theory was most recently rejected in *Little Sisters of the Poor*, where the U.S. Supreme Court upheld absolute moral and religious exemptions for employers who objected to some or all forms of contraception. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 658 (2020). The City echoes the dissent in that case. *See id.* at 710 (Ginsburg, J., dissenting) (invoking *Thornton*). But the dissent is not the law.

The Amendment's limited scope comes nowhere close to causing the types of third-party harms that might theoretically trigger Establishment Clause concerns.

[15] *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 494 (2020) (Thomas, J., concurring)

[16] *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (discussing *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971)).

IV. THIS COURT IS NOT LIMITED TO USING CONSTITUTIONAL TESTS CREATED BY FEDERAL COURTS.

Appellants agree that strict scrutiny is "the most demanding test known to constitutional law." RBOM.57 (quoting *City* of *Boerne*, 521 U.S. at 534); *cf.* BOM.21 (quoting same). But that does not mean that a *more* protective test cannot be fashioned.

The Amendment was enacted to provide stronger protection for religious services than the strict-scrutiny protections of TRFRA. The Amendment is unique among state constitutions for the strength of its protection, and Texans have a right to craft their independent state constitution as they see fit.

Indeed, this Court has recognized that federal construction of the Free Exercise Clause does not preclude a State from going further to protect religious liberty "either by statute *or under the state constitution*." *See Barr*, 295 S.W.3d at 296 & nn. 37–38 (emphasis added); *cf. Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 86–87 (Tex. 2015) (Texas Constitution's due-course-of-law provisions were intended to go beyond United States Supreme Court interpretations of similar federal right); *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) ("Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans.").

If this Court sees the need, then Appellants suggest ways to go over and above the strict-scrutiny test. First, courts can dispense with the artificial "substantial burden" test, which does not appear in the text of the Amendment. An action that limits or prohibits a religious service is sufficient.

As to the duty to investigate alternatives, the City relies on a solo opinion from Justice Sotomayor in *Holt v. Hobbs*. RBOM.61–62. According to the City, "[i]t is the government's burden at trial to rebut alternative means." *Id.* at 63. But that framing—the plaintiff offers alternatives and the government rebuts them—is precisely the approach that eight Justices, *including Justice Sotomayor*, rejected just a few years later in *Ramirez v. Collier*. 595 U.S. 411, 432 (2022) (government's suggestion "that it is [plaintiff]'s burden to 'identify any less restrictive means' … gets things backward") (cleaned up).

On the duty to accommodate, the City accuses Appellants of "ask[ing] this Court to adopt an absolute standard of 'if the government can, it must.'" RBOM.64. Respectfully, Appellants have not made this up. It is what the U.S. Supreme Court has mandated under the First Amendment: "[S]o 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 (emphasis added).

And as to the clear-and-convincing evidence standard, the Amendment warrants its use. Granting protection to religious services in categorical language stronger than any other state response to COVID, the Amendment demands more than strict scrutiny. The clear-and-convincing standard would not be cumbersome to apply. In the compelling interest test, the government already bears the burden of "demonstrat[ing] that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest."

TEX. CIV. PRAC. & REM. CODE § 110.003(b). Before it prohibits or limits religious services under the Amendment, government would have to persuade the fact-finder to a clear-and-convincing level of certainty instead of the preponderance-of-the-evidence standard employed today.

V. THE CITY MISSTATES THE RECORD.

Seeking a sympathetic ear, the City suggests that it faces an impossible task if this Court interprets the Amendment as the text demands. The City portrays its functionaries as having bent over backwards to accommodate Appellants' religious services. But the record shows the opposite, as Judge Higginson recognized in a dissent premised on the City's own concessions. He concluded that the record "on the whole bears out Plaintiffs' assertion" that "the City never tried to accommodate Plaintiffs' religious exercise."[17] To the extent the facts of this case inform the Court's analysis regarding the force and scope of the Amendment, Appellants invite the Court to review the Record. Below, Appellants highlight some of the inaccuracies in the City's "Statement of Facts."[18]

The City mischaracterizes as "simply false" Appellants' allegations that the City did not consider their beliefs in developing the plan. RBOM.18. But the record amply demonstrates the truth of Appellants' allegations:

[17] *Perez*, 98 F.4th at 614 (5th Cir. 2024) (Higginson, J., concurring in part and dissenting in part).

[18] All emphasis in this section is added.

- The City's Bond Project Manager testified: "**I didn't know the plaintiffs' religion – at the time we were doing the design, that the plaintiffs' religion required that we try to save more trees.**" ROA.4430:24–4431:2.

- Asked whether **"[The City] did not study whether it could achieve its governmental purposes while accommodating plaintiffs' religious exercise**, right?" the City's Historic Preservation Officer responded, "**Right.**" ROA.4590:17–20.

- Asked whether he agreed "that **the City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate plaintiffs' religious exercise**, correct?" the Texas Parks and Wildlife Urban Wildlife Technical Guidance Program Leader responded, "**Right.**" ROA.4520:17–21.

The City alleges that it "consulted highly-credentialled arborists and engineers," when evaluating alternatives. RBOM.16. But the record shows that the City never actually investigated alternatives:

- When asked if the arborists "**were to take as given the City's chosen engineering design**," the City's Bond Project Manager answered, "**Yes.** But they didn't – they didn't ask to see any details or construction details or anything like that." When asked on follow-up **whether the City told the arborists to "consider alternative designs to repair or reconstruct the walls," the same witness testified, "I don't believe so."** ROA.4428:10–16.

- When asked **whether the Tree Assessment Committee "stud[ied] any alternative plans**," an arborist member of the Committee answered, "**I don't recall any alternative plans that we studied, no.**" ROA.4547:7–10.

The City asserts that it "modified its plan based on [Appellants'] input." RBOM.17. Again, the record contradicts this:

- When asked **whether any changes to the Bond Project plan "were made to accommodate plaintiffs' religious exercise**," the City's Bond Project Manager testified that he was "not sure that was taken into account," and that he thought,

"**all of those changes happened before we were – or at least before I was aware of this [lawsuit]**." ROA.4382:18–25.

Likewise, the City claimed it considered Appellants' alternative pier-and-spandrel method. RBOM.17. The record shows this was not so:

- When asked **if the wall design was "chosen without any consideration of the plaintiffs' free exercise request**," the City's Project Manager of the Bond Project stated, "**Yes. It was chosen well before we understood there was an issue**." When asked to confirm that the City did not want to start over, the same witness stated, **"It would take time and money. That's – but no. We would like to proceed with the project.**" ROA.4390:20–4391:8.

The City also repeatedly emphasizes "health and safety" risks related to trees in the park. RBOM.2, 15. But as with its other assertions, the record proves otherwise:

- In an email predating this litigation, the City's Bond Project Manager and Senior Landscape Architect wrote, "[T]here is **only one reason for the removal of each individual tree**, 'slated for demolition due to the proposed new construction within the project area'. That's it. **We are not removing trees because of a rookery, we are not removing trees for any other reason than they must be removed in order to complete the bond project scope of work.**" ROA.1447.

The City also argues 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." RBOM.11.[19] However, the record shows that the City deterred birds to protect its construction project, not to protect children from guano:

- When asked **if "cormorant nesting [is] a health concern**," the City's Assistant Capital Programs Manager stated, "**No. Cormorant nesting would mean the**

[19] The City's Response incorporates multiple photos that either (1) are not in the Project Area, RBOM.10, 11, or (2) are not part of the record on appeal. RBOM.7, 8.

project could not go on. So the project – there could not be nesting – can't be nesting in the trees in the Project Area for the project to be able to start construction." ROA.4462:18–22.

The City claims that the "river there has elevated E.coli levels because of the birds' fecal bacteria." RBOM.9. Yet the record shows that this is not due to cormorants:

- When asked if cormorants present a health risk, the City's Assistant Capital Programs Manager testifying: "**Based on the numbers that we know them to be, [cormorants] do not present a health risk.**" ROA.4463:2–6.

The City asserts that the record is "abundantly clear" that "'there is not a way' to deter the more problematic species like egrets and herons without deterring the less problematic species like cormorants." RBOM.13. However, the record rebuts the City's implication that it actually investigated this and that it is in fact impossible:

- When asked to confirm that the City "**never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate plaintiffs' religious exercise,**" the Texas Parks and Wildlife Urban Wildlife Technical Guidance Program leader answered, "**Right.**" ROA.4520:17–21.

- When asked if it was "possible for the City to do bird deterrence in a way that still allows cormorants to nest," the City's Assistant Capital Programs Manager answered, "**It is possible to allow the later season cormorants to nest, yes.**" ROA.4455:13–16.

In mischaracterizing the impacts on Appellants' religious practices, the City asserted that, "[o]nly trees across the river, on the north bank, will be removed or relocated as part of the Park remediation." RBOM.20. But the record shows how this impacts Appellants' religious practices:

- When asked whether "**the presence of trees and birds on the northern bank of the San Antonio River affect[s] the spiritual ecology**," Gary Perez testified, "**Yes, it does … [b]ecause it's within our view, in the direction**

> **that we're facing, we're looking in a particular direction.** We're standing over the river, and we saw our reflection. The reflection in the trees at that point where we stand and the birds in it tell us that everything's okay, you know, that everything is, you know, right with the world." ROA.4091:13–23.

The City paints Mr. Perez and Ms. Torres as recalcitrant and insensitive to "the very real public safety threat from trees in the Park falling." RBOM.22 n.5. Appellants have *never* opposed repairing the walls. ROA.4040 ("The plaintiffs' position is not that the City can't repair or reconstruct those walls. Plaintiffs' position is that if the City chooses to repair and reconstruct those walls, it needs to do so in a way that does not destroy their religious exercise."). This lawsuit came about because the City failed to investigate alternatives that would protect Appellants' religious services and stubbornly refused even to try to accommodate Appellants' religious exercise. And the City remains unrepentant in opposition to religious liberty, as the record and the City's own brief demonstrate. This Court should not be deceived by the City's attempt to shift blame elsewhere.

CONCLUSION AND PRAYER FOR RELIEF

Appellants ask this Court to construe the Religious Services Amendment in accordance with its clear mandate and the will of the People of Texas. The force of the Amendment categorically bars governments from prohibiting or limiting religious services, within a limited scope. The plain meaning of that text forbids government action that prevents, precludes, restricts, or makes religious services impossible. That

includes official government decisions that permanently destroy necessary components of a religious ceremony.

The Court should reject the City's contrary interpretation, which leaves people of faith no better off than they were before the Amendment was adopted.

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Respectfully submitted,

/s/ John Greil

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I certify that, on November 19, 2024, a true and correct copy of the foregoing document has been electronically served on the following counsel through the electronic filing manager and by email in accordance with Tex. R. App. P. 9.5(b):

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