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

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF THE CITY OF SAN ANTONIO

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Interest of Amicus Curiae

The certified question presented by this case requires the Court to confront an issue of first impression concerning the scope of the Religious Service Protections Amendment—a three-year-old constitutional amendment adopted in the wake of the COVID-19 pandemic that no Texas court has yet had the opportunity to construe. Because the Amendment applies, by its plain terms, not just to political subdivisions of Texas like the City of San Antonio, but also to "the State" itself, Tex. Const. art. I, § 6-a, the State has an interest in the outcome of this case and in the proper construction of this constitutional amendment more broadly.

No fee has been or will be paid for the preparation of this brief.

Certified Question

Does the "Religious Service Protections" provision of the Texas Constitution—as expressed in Article I, 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?

Introduction

The COVID-19 pandemic presented unprecedented and unique public-health challenges on both a global and local scale. Governments across the nation, those in Texas included, adopted heretofore unthinkable restrictions on individual liberty in an effort to "stop the spread." One such measure, adopted in many jurisdictions across the country and in certain large counties in Texas, involved the outright closure of churches and other houses of worship or severe restrictions on their ability to gather for services. In response, the Legislature passed, and the People ratified, a constitutional amendment that functioned as a referendum on this particular pandemic-relief measure and sought to ensure that governments could never again wield such power—even in the event of future pandemics or other disasters.

By its plain language, the Religious Service Protections Amendment (the "Amendment") forbids any government in Texas to "prohibit[] or limit[] religious services, including religious services conducted in churches, congregations, and places of worship." Tex. Const. art. I, § 6-a. As the text and the ratification history demonstrate, the Amendment "protect[s] an absolute right to gather in person for worship, no matter what government epidemiologists think." *State v. Loe*, 692 S.W.3d 215, 247 (Tex. 2024) (Blacklock, J., concurring). When that Amendment applies, moreover, it applies categorically to bar the offending governmental regulation, without resort to any means-ends balancing test on the back end.

But Plaintiffs in this case seek to wield the Amendment to challenge a very different type of governmental action: the renovation of a public park, which involves removing certain trees and rehoming particular migratory birds. Although the City's

park-renovation project might have an incidental, downstream effect on Plaintiffs' ability to perform a religious service in the park that requires viewing the reflection of birds in the river, that is not the *type* of limitation of a religious service against which the Amendment protects. After all, San Antonio's park-renovation project is not a direct regulation of Plaintiffs' right to *gather* for worship. Instead, it is a neutral regulation with only incidental effects on their religious service.

Although neutral laws with only an incidental effect on a religious service are not subject to challenge under the Amendment, that does not leave Plaintiffs without recourse. Existing constitutional and statutory protections for religious liberty—Article I, Section 6 of the Texas Constitution, the First Amendment to the U.S. Constitution, and the Texas Religious Freedom Restoration Act ("TRFRA")—already supply avenues to challenge governmental regulations that substantially burden religious exercise or target religious activity for disfavor. And because nothing in the text or history of the Amendment indicates that, by ratifying it, the People intended to supplant these extant religious-liberty protections, the Court should construe the Amendment as complementary, not cumulative, of them. Doing so here also comports with longstanding First Amendment precedent holding that plaintiffs asserting religious-liberty claims have no right to veto government policies affecting the disposition of the government's *own* property, as Plaintiffs endeavor to do here with regard to a public park in San Antonio.

ARGUMENT

This Court's "goal when interpreting the Texas Constitution is to 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 288, 293 (Tex. 2021) (orig. proceeding). "As with any legal text, both the text and context in which it appears can be important indicators of meaning." *Hogan v. S. Methodist Univ.*, 688 S.W.3d 852, 857 (Tex. 2024). "Plain-language analysis and contemporary dictionary definitions are certainly very useful ways to understand the original meaning of constitutional text." *Id.*; *cf. Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (plurality op.). But "[w]ords must be read in light of their historical and linguistic context," *In re Dallas County*, 697 S.W.3d 142, 157 (Tex. 2024) (orig. proceeding), so the "context" of those words as elucidated by constitutional "history" is also relevant to discerning "the constitution's original meaning," *Hogan*, 688 S.W.3d at 857. Stated simply, this Court's "'guiding principle when interpreting the Texas Constitution is to give effect to the intent of the voters who adopted it,'. . . which requires sensitivity to the full context of the constitutional language and history." *Dallas County*, 697 S.W.3d at 158 (quoting *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 594 S.W.3d 309, 313 (Tex. 2020)); *see Hogan*, 688 S.W.3d at 857 ("[O]ur bottom-line task is to identify what the constitutional provision would have meant to those who ratified it.").

Here, text and history demonstrate that the Amendment's bar on "prohibit[ing] or limit[ing] religious services," Tex. Const. art. I, § 6-a, is narrowly focused on securing the right to *gather* for religious worship. Nothing in the text or history of the Amendment suggests that it was intended to apply to neutral regulations that

incidentally affect a religious service or to individualized religious practice more broadly. To the contrary, existing protections for religious liberty enshrined in the First Amendment to the U.S. Constitution, Article I, Section 6 of the Texas Constitution, and the TRFRA supply avenues for plaintiffs to contest the validity of such laws. The Amendment should be read to complement, not supplant, those extant constitutional and statutory protections for religious liberty.

The protections afforded by the Amendment are therefore both narrow and categorical. Narrow because the Amendment applies only to direct regulations of "religious services" like the ones governments enacted during the COVID-19 pandemic—not to every routine, neutral government regulation that incidentally affects a religious service or practice. Yet categorical because, when a governmental law or regulation does "prohibit[] or limit[]" a religious service, the Amendment's bar on such laws or regulations applies totally and absolutely, without any resort to means-ends balancing tests. Application of these principles here forecloses Plaintiffs' claim that the City's tree-removal and bird-rehoming projects—neutral regulations with only an incidental effect on a religious service—violate the Amendment.

I. The Amendment Narrowly, but Categorically, Applies to Restrictions on "Religious Services."

In response to COVID-19 restrictions on the right to attend a religious gathering, the Texas Legislature proposed, and the people of Texas ratified, a constitutional amendment preventing the State and its political subdivisions from "prohibit[ing] or limit[ing] 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. By its express terms, the Amendment applies exclusively to restrictions on a *religious service*—that is, a gathering of people for the purpose of religious worship. And the history of the Amendment's drafting and ratification confirms that it was aimed at a discrete problem that arose during the COVID-19 pandemic: government-mandated closure of churches and other houses of worship.

A. The text of the Amendment demonstrates that it protects the right of persons to gather together for religious worship.

By its plain terms, the text of the Amendment forbids the government to impose restrictions on a person's right to attend a religious gathering, especially an in-person religious gathering. *See In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 466-67 (Tex. 2011) (orig. proceeding) (observing that the "literal text" is the North Star of constitutional interpretation).

1. Start with the subject of the Amendment: "*religious services*," including those "conducted in churches, congregations, and places of worship." Tex. Const. art. I, § 6a. Common dictionary definitions, *see Hogan*, 688 S.W.3d at 857, demonstrate that a "service" is a type of formal *gathering* of persons—and in this context a gathering for the purpose of "religious" ends. For example, Webster's Third defines a "service" as "an assembly or meeting for worship." *Service*, Webster's Third New International Dictionary 2075 (2002 ed.). The New Oxford American Dictionary defines a "service" as "a ceremony of religious worship according to a prescribed form," *Service*, New Oxford American Dictionary 1596 (3d ed. 2010), and in turn defines a "ceremony" as "an act or series of acts performed according to a

traditional or prescribed form," *id.* at 283. The American Heritage Dictionary defines a "service" as "[a] religious rite or formal ceremony." *Service*, The American Heritage Dictionary of the English Language 1602 (5th ed. 2016); *see also Service*, American Heritage College Dictionary 1246 (3d ed. 1997) ("[a] religious rite"). And the Collins English Dictionary defines a "service" as "public worship carried out according to certain prescribed forms" or "the prescribed form according to which a specific kind of religious ceremony is to be carried out." *Service*, Collins English Dictionary 1809 (12th ed. 2014); *see also Service*, The Random House College Dictionary 1203 (1988 rev. ed.) ("public religious worship according to prescribed form and order").

The Amendment's further description of "religious services" as "including religious services conducted in churches, congregations, and places of worship," Tex. Const. art I, § 6-a, underscores the Amendment's focus on securing Texans' right to *gather* among fellow worshippers. After all, "churches, congregations, and places of worship" are the typical locales where worshippers gather to practice their religion corporately and where a "religious organization established to support and serve the propagation of a sincerely held religious belief" will "conduct[]" such ceremonies. *Id.*

2. Couple the ordinary definition of "religious service" with the operative verbs in the Amendment—"prohibit[] or limit[]"—and the Amendment's plain meaning takes form: No governmental actor may "prohibit" or "limit" the ability of persons to *gather* at a formal ceremony—typically taking place in "churches, congregations, and places of worship." *Id.* These two verbs, separated by the disjunctive

"or" convey "alternative" ways that a government could improperly regulate a "religious service" that boil down to a difference in degree. *See Broadway Nat'l Bank, Tr. of Mary Frances Evers Tr. v. Yates Energy Corp.*, 631 S.W.3d 16, 25-26 (Tex. 2021). The verb "prohibit" means "[t]o forbid by law"—a severe or absolute restriction on such services. *Prohibit*, Black's Law Dictionary 1465 (11th ed. 2019). By contrast, the term "limit" denotes a lesser intrusion on that service—"[t]o confine or restrict within a boundary or bounds," or "[t]o fix definitely." *Limit*, American Heritage College Dictionary, *supra* at 787; *see also Limit*, Webster's Third, *supra*, at 1312 ("to set bounds or limits to" or "to curtail or reduce in quantity or extent"). Thus, as ordinary definitions show, the plain language of the Amendment prohibits the government from outright banning or setting limits on the ability of persons to gather together for a formal religious ceremony.

B. Drafting and ratification history confirms that the Amendment targets restrictions on the ability to gather.

The drafting and ratification history of the Amendment confirms that the Amendment's aim was to prevent restrictions on religious *gatherings*. *See Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000) (observing that the Court "may also consider its legislative history" in construing a "constitutional amendment"); *see also In re Abbott*, 628 S.W.3d at 293 ("Legislative construction and contemporaneous exposition of a constitutional provision is of substantial value in constitutional interpretation.") This history shows that the Amendment bars the type of COVID-19 stay-at-home orders that prohibited people from attending church or limited the number of people who could do so. The Legislature proposed the

Amendment because of the "restrictions put in place by state and local governments in response to the COVID-19 pandemic that violated the right to the free exercise of religion" and the subsequent "calls for the state to do more to protect this right for all Texans and ensure that religious liberty is not abridged in the future." Tex. S.J. Res. 27, 87th Leg., R.S., 2021 Tex. Gen. Laws 3864-65 (Resolution Analysis), https://tinyurl.com/muaedwun.

1. As Justice Gorsuch recently explained, the COVID-19 pandemic ushered in perhaps "the greatest intrusions on civil liberties in the peacetime history of this country." *Arizona v. Mayorkas*, 143 S.Ct. 1312, 1315 (2023) (Gorsuch, J., statement). "Executive officials across the country issued emergency decrees on a breathtaking scale," many of which ignored burdens on religious exercise or, worse, targeted religious exercise as such. *Id.* at 1314. Some state or local governments "closed churches even as they allowed casinos and other favored businesses to carry on." *Id.* Others "surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct." *Id.* (citing *Roberts v. Neace*, 958 F.3d 409, 412 (6th Cir. 2020) (per curiam)).

Colorado, for example, imposed occupancy limits on houses of worship but exempted "meat-packing plants, distribution warehouses, P-12 schools, grocery stores, liquor stores, marijuana dispensaries, and firearms stores." *Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 832 (D. Colo. 2020). Though the state made "a total of eight exemptions" to its mask mandate, "none . . . appl[ied] to worship services." *Id.* at 833. Illinois, for its part, restricted houses of worship and religious

organizations to gatherings of no more than ten people, while permitting hardware stores, garden centers, cannabis dispensaries, and other secular establishments to cap occupancy at 50% of store capacity. *See Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 343-44 (7th Cir. 2020); Illinois Executive Order 2020-32. Maine allowed exemptions to its vaccination mandate for those expressing "mere *trepidation* over vaccination . . . but only so long as it [was] phrased in medical and not religious terms." *Does 1-3 v. Mills*, 142 S.Ct. 17, 19 (2021) (Gorsuch, J. dissenting). And Nevada "treat[ed] numerous secular activities and entities significantly better than religious worship services" by allowing "[c]asinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities [up] to 50% of fire-code capacity," while limiting "houses of worship . . . to fifty people regardless of their fire-code capacities." *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020).

Lamentably, Texans were not immune from such governmental overreach. In Harris County, for example, the County Judge limited "[r]eligious and worship services" to "video and teleconference" and only permitted "[f]aith leaders" to "minister and counsel in individual settings," provided that "six-foot social distancing" protocols were observed. Harris County, *Order of County Judge Lina Hidalgo* at 4 (Mar. 24, 2020), https://tinyurl.com/384z9brb. In Travis County, the County Judge "prohibit[ed] . . . anywhere in [the] county" any "religious services," whether "indoor or outdoor," that "bring[] together or [are] likely to bring together ten (10) or more persons at the same time in a single room or space." Travis County, *Order by the Travis County Judge* at 1-2 (Mar. 17, 2020),

https://tinyurl.com/3ettyep8. And in Bexar County, the County Judge ordered that "[r]eligious and worship services may only be[] provided by video, teleconference or other remote measures." Bexar County, *Executive Order NW-03 of County Judge Nelson W. Wolff* at 5 (Mar. 23, 2020), https://tinyurl.com/5ctj5b5z.

When religious adherents sought to challenge such COVID-19 lockdown orders in court, they achieved only mixed success. For example, the U.S. Supreme Court denied injunctive relief to a church seeking relief from a "25% capacity limitation on indoor worship services" and a "prohibition on singing and chanting during indoor services." *S. Bay United Pentecostal Church v. Newsom*, 141 S.Ct. 716, 716 (2021). It likewise denied injunctive relief to a church seeking relief from a Nevada COVID-19 order restricting religious gatherings to fifty people or fewer but allowing casinos and other secular facilities to operate at 50% of capacity. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020) (Mem.). But even when the U.S. Supreme Court later stepped in to protect the rights of religious worshippers, it did so only on the ground that the government was burdening religion in a non-neutral way by favoring some secular activities over comparable religious ones, implying that evenhanded application of those stay-at-home orders would be fully permissible under the First Amendment. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16-19 (2020) (per curiam); *Tandon v. Newsom*, 593 U.S. 61, 62-64 (2021) (per curiam). Application of that narrower Free Exercise Clause holding nevertheless required the Supreme Court to "summarily reject[] the Ninth Circuit's analysis of California's COVID-19 restrictions on religious exercise" five times within five months. *Tandon*, 593 U.S. at 64; *see Gateway City Church v. Newsom*, 141 S.Ct. 1460 (2021); *Gish v. Newsom*,

141 S.Ct. 1290 (2021); *S. Bay United Pentecostal Church*, 141 S.Ct. at 716; *Harvest Rock Church, Inc. v. Newsom*, 141 S.Ct. 889 (2020).

2. The Amendment was proposed and ratified against the backdrop of this national and local response to the COVID-19 pandemic. The history of the drafting and ratification of the Amendment confirms that its chief purpose was to prevent any future governmental restrictions on Texans' right to gather for religious services. Indeed, both supporters and opponents of the Legislature's joint resolution agreed that the Amendment's purpose was to prevent the government from restricting religious adherents' ability to gather by "limit[ing] in-person religious gatherings" or "[c]losing houses of worship." Tex. Leg. Council, *Analyses of Proposed Constitutional Amendments* 14 (Aug. 2021), https://tinyurl.com/4hd5vcxy. The Amendment was therefore designed to preserve those individuals' "ability to meet in person" by "[a]llowing places of worship to remain open during public health emergencies" or even "in the event of a disaster." *Id.*; *see also* James Quintero & Jack Vincent, Tex. Pub. Pol'y Found., 2021 Guide to Constitutional Amendments in Texas 6 (Oct. 2021), https://tinyurl.com/ywj88tjc (explaining that the Amendment "would prohibit all governments in Texas from barring or limiting in-person attendance of religious services").

Consider first the statements of the joint-resolution sponsors in the House of Representatives and the Senate.[1] As one of those Representatives put it, the

[1] The floor statements of the two sponsors in the House were later unanimously adopted by the House as official statements of intent and placed in the House Journal *See* Debate on Tex. S.J.R. 27 on the Floor of the House, 87th Leg., R.S., at 8:31:59-

Amendment's purpose was "simple and straightforward": to "mak[e] it explicitly clear that the state or any political subdivision of the state cannot close down or limit our houses of worship." H.J. of Tex., 87th Leg., R.S. 2815-16 (2021). That is, the Amendment was designed to "protect the fundamental rights of our fellow Texans to practice their faith, to *congregate* with fellow believers, to *attend* church or mosque or synagogue, [and] to *meet* with fellow believers in prayer and worship." *Id.* at 2815 (emphasis added). Likewise, another Representative made clear that under this Amendment "no government, no mayor, no governor, no one should be able to keep you from *going to church*." *Id.* at 2816 (emphasis added). To put a finer point on it, he further stated that, even when faced with "nuclear disasters [and] pandemics," church "might be the place you want to be" and that if "you want to *go to* church, well, by God, you *go to* church." *Id.* at 2816 (emphasis added).

The same was true of the statements that the bill's Senate author made. That Senator explained that the Amendment's purpose was "to ensure the *right to worship corporately* in Texas will never be revoked and to provide explicit protection for churches[,] congregations[,] and places of worship." Debate on Tex. S.J.R. 27 on the Floor of the Senate, 87th Leg., R.S., at 1:11:30-42 (Mar. 8, 2021), https://tinyurl.com/3xkbt97e. Each of these statements telegraphs an overriding concern with

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32:08, 8:33:42-52 (May 11, 2021), https://tinyurl.com/yc8jvvpj (identifying motions as prevailing without objection). The House may vote to reduce statements to writing and place them in the journal for purposes of legislative intent. *See* Tex. H. Rule 2, § 2(a)(1)(P), Tex. H. Res. 4, 87th Leg., R.S., 2021 H.J. of Tex. 17, 20 (requiring the journal clerk to enter "official state documents, reports, and other matters, when ordered by the house" into the journal).

ensuring that Texans would face no obstacles to gathering together for a religious ceremony—even in the face of pandemics or natural disasters.

The debate over the Amendment in the House also clarified its intended scope. As the sponsor of the joint resolution explained, the Amendment was designed to prevent government edicts "shut[ting] down" churches and telling religious adherents that they "cannot congregate[,] . . . worship[,] . . . [or] gather to pray." Debate on Tex. S.J.R. 27 on the Floor of the House, 87th Leg., R.S. at 8:29:36-40 (May 11, 2021), https://tinyurl.com/yc8jvvpj. Stated simply, the Amendment is a "tried and true protection of our ability to gather, and to congregate, and to practice our religion," *id.* at 8:18:29-36—whether during "a hurricane on the coast" or during "severe pandemics," *id.* at 8:19:14-25, 8:21:02-8:22:03. Yet this Amendment would not only prohibit things like "capacity" limitations that take direct aim at the ability to gather, *id.* at 8:16:45-8:17:16, 8:19:11-23, 8:20:00-20, but also government orders that directly limit the nature of a service by, for example, prohibiting "sing[ing]," "shar[ing] the [L]ord's supper," or "tak[ing] off your shoes, even though your religion dictates that you do [so]," *id.* at 8:29:41-53. But the Amendment was *not* intended to "affect" "existing local laws, ordinances, and rules" that indirectly affect a religious service, such as those "dealing with the fire code, with health and safety hazards, with zoning restrictions, [or] with criminal and justice and public safety laws." *Id.* at 8:17:22-50.

Commentators and the public likewise understood the Amendment to protect the right to gather in a physical location, as contemporaneous coverage of the Amendment's passage and ratification showed. For example, the Texas Tribune

observed that the Amendment's passage in the Legislature was motivated by "conflicts over churches that closed during the early months of the pandemic in 2020," including "stay-at-home orders [that] include[d] places of worship, requiring them to limit attendance or make services virtual." Andrew Zhang, *Texans Will Decide Eight Proposed Amendments to the State Constitution on Nov. 2. Here's What You Need to Know.*, Tex. Tribune (Oct. 15, 2021), https://tinyurl.com/yyrtykfe. Likewise, the Austin American-Statesman explained that the Amendment "was inspired by state and local government orders that closed in-person church services and religious gatherings at the height of the pandemic last year." Chuck Lindell, *Here's What You Need to Know about the 8 Proposed Amendments to the Texas Constitution*, Austin American-Statesman (Oct. 18, 2021), https://tinyurl.com/3fjnbsnj. The Houston Chronicle's Editorial Board, writing to oppose the ratification of the Amendment on the ground that the Amendment would "allow[] churches to disregard public health," nevertheless acknowledged that the Amendment champions "the desire to *gather* as a faith community, especially in challenging times." Ed. Bd., *Editorial: Vote No on Proposition 3. 'Religious Freedom' Amendment Goes Too Far*, Hous. Chronicle (Oct. 14, 2021), https://tinyurl.com/32b8e39v. And religious leaders who opposed the Amendment "appreciate[d] the desire . . . to gather in person for religious activities" but fretted that the Amendment would "giv[e] religious gatherings a preemptive exemption from future emergency orders" and thereby threaten public health. Rev. Dr. Jim Bankston & Rabbi David Lyon, *Opinion: Our Faith Calls Us to Oppose Proposition 3*, Hous. Chronicle (Oct. 25, 2021), https://tinyurl.com/yhydc76f.

As one member of this Court aptly put it, the Amendment constituted a "direct rejection by the People of Texas of a pandemic measure they never want to see again." Hon. Jimmy Blacklock, *The Constitution After Covid*, 2023 Harv. J.L. & Pub. Pol'y Per Curiam, no. 8, at 5. And the people of Texas, in adopting the Amendment, "chose not to leave it up to scientists or judges to decide whether they can worship as they choose the next time the WHO or the CDC declares a pandemic." *Id.* at 4; *see also Loe*, 692 S.W.3d at 247 (Blacklock, J., concurring) (explaining that the Amendment "protect[s] an absolute right to gather in person for worship, no matter what government epidemiologists think").

C. When the Amendment applies, its prohibition applies categorically.

As its text and history demonstrate, the Amendment's purpose was to secure Texans' rights to attend a religious gathering, free from governmental restrictions of the type that were commonplace during the COVID-19 pandemic. *See supra* at 5-15. But nothing in that text or history suggests that a law falling within the Amendment's scope is subject to a means-ends balancing test that weighs "the sort of limitation" against "the government's interest in that limitation." *Perez v. City of San Antonio*, 115 F.4th 422, 428 (5th Cir. 2024). Indeed, the text is categorical, declaring that the government "may not" prohibit or limit a religious service; it contains no qualifying language such as "unless," "except," or "until." *See* First Liberty Amicus Br. 4-5. Likewise, the history of the Amendment's adoption, recounted above, indicates that the People intended to fully withdraw from the power of the government the ability

to prevent Texans from gathering together for religious worship—even in extreme cases of pandemics or natural disasters. *Supra* at 7-15.

The adoption of a means-ends balancing test that would presumably allow a court to approve of COVID-19 pandemic orders if only a good enough justification were provided would be flatly inconsistent with this text and history. For one, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 23 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)). Yet "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* (quoting *Heller*, 554 U.S. at 634). For another, "[t]he balancing approach requires judges to weigh the benefits of a law against its burdens—a value-laden and political task that is usually reserved for the political branches." *United States v. Rahimi*, 144 S.Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring). Here, the Amendment itself "is the very *product* of an interest balancing by the people" that the judicial department should not "conduct for them anew." *Heller*, 554 U.S. at 635.

For these reasons, scholars and jurists "have reasonably doubted whether the" type of means-ends scrutiny for constitutional analysis, which the Fifth Circuit's formulation of its certified question suggests, "'ha[s] [any] basis in the text or original meaning of the Constitution.'" *Tex. Dep't of Ins. v. Stonewater Roofing Co.*, 696 S.W.3d 646, 671 (Tex. 2024) (Young, J., concurring) (quoting Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 Nat'l Affs. 72, 73 (2019)).

Indeed, "before the late 1950s, 'what we would now call strict judicial scrutiny did not exist.'" *Rahimi*, 144 S.Ct. at 1921 (Kavanaugh, J., concurring) (quoting Richard Fallon, The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny 30 (2019)). The U.S. Supreme Court "'appears to have adopted' heightened-scrutiny tests 'by accident' in the 1950s and 1960s in a series of Communist speech cases, 'rather than as the result of a considered judgment.'" *Id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in the judgment)). That is why the U.S. Supreme Court has recently shied away from deploying such balancing tests in conducting constitutional analysis. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 424-35 (2024); *Bruen*, 597 U.S. at 19-31; *Gamble v. United States*, 587 U.S. 678, 683-88 (2019). This Court should eschew that approach, too.

Instead of means-ends balancing, the Court should adopt a categorical approach that aligns with the text of the Amendment and that is more consonant with the prevailing approach in federal constitutional adjudication today—and, indeed, consistent with "what Framers such as Madison stated, what jurists such as Marshall and Scalia did, what judges as umpires should strive to do, and what th[e] [U.S. Supreme] Court has actually done across the constitutional landscape for the last two centuries." *Rahimi*, 144 S.Ct. at 1921 (Kavanaugh, J., concurring). Under that approach, if the Amendment's "plain text covers an individual's conduct, the Constitution presumptively protects that conduct," no back-end balancing required. *Bruen*, 597 U.S. at 17. Deploying that approach depends, as it must with broadly worded constitutional text like the Amendment's, on "reasoning by analogy—a

commonplace task for any lawyer or judge." *Id.* at 28. That analogical reasoning will, in turn, depend upon comparing the governmental "prohibit[ion]" or "limit[ation]" on a "religious service[]" being challenged, Tex. Const. art. I, § 6-a, to determine if it is "relevantly similar," *Bruen*, 597 U.S. at 29, to the type of COVID-19 lockdown orders restricting religious services that motivated the Amendment's passage in the first place. And the "applicable metric" of similarity, *id.*, when making that comparison is whether the restriction directly targets religious services as such by thwarting Texans' ability to gather together in worship. *See supra* at 5-15. If it does, then the Amendment applies categorically to bar that regulation.

II. The Amendment Did Not Displace Existing Constitutional and Statutory Protections that Apply to Neutral Governmental Regulations that Incidentally Affect a Religious Service.

The Amendment's text and history leave little doubt that its aim is to prevent future restrictions on Texans' ability to gather for and attend religious services, even during a pandemic or natural disaster. *See supra* at 5-15. But nothing in either its text or history indicates that the Amendment was meant to reach neutral governmental regulations that only incidentally affect a religious service. If anything, the "jurisprudential history" in which the Amendment is situated is to the contrary. *Hogan*, 688 S.W.3d at 857. That is to say, the "history of constitutional" protections, *id.* at 858, for religious liberty—Article I, Section 6 of the Texas Constitution, the First

Amendment's Free Exercise Clause, and the TRFRA—should also inform the Court's analysis of the Amendment's scope.

Nothing in the Amendment's text or history even hints that it is intended to supplant existing protections for religious liberty. Indeed, if the Amendment applied to every regulation that indirectly affected a religious service, then it would render extant religious-liberty protections effectively inoperative. The Court should therefore read the Amendment in harmony with those extant protections to avoid rendering them superfluous. *Cf.* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 176 (2012). Doing so here means that those pre-existing constitutional protections—not the Amendment—provide recourse for religious plaintiffs, like Plaintiffs here, claiming that neutral governmental policies incidentally affect a religious service or otherwise impede religious practice.

A. The Amendment was passed and ratified in the context of a legal regime that provides several layers of protection for Texans' religious liberty. Article I, Section 6 of the Texas Constitution, for example, secures Texans' "natural and indefeasible right to worship" in language that is more intricately and expansively worded than the First Amendment to the United States Constitution. Tex. Const. art. I, § 6. Nevertheless, this Court has stated that, under Article I, Section 6, while freedom of belief is absolute, "freedom of conduct is not." *Tilton v. Marshall*, 925 S.W.2d 672, 677 (Tex. 1996) (quoting Tex. Const. art. I, § 6 interp. commentary). And any "conduct even under religious guise remains subject to regulation for the *protection of society*." *Id.* (emphasis added) (quoting Tex. Const. art. I, § 6 interp. commentary). Article I, Section 6 thus "do[es] not necessarily bar all claims which may touch on religious

conduct." *Id.* And notably, it does not "relieve one from obedience to *reasonable health regulations*, enacted under the police power of the state, because such regulations happen not to conform to one's religious belief." *City of New Braunfels v. Waldschmidt*, 207 S.W. 303, 308-09 (Tex. 1918) (emphasis added).

This Court has never defined Article I, Section 6 in relation to the First Amendment to the U.S. Constitution. *See* Tex. Att'y Gen. Op. No. GA-0289 at 4 n.8 (2005); *Barr v. City of Sinton*, 295 S.W.3d 287, 296 n.37 (Tex. 2009). But it has "assume[d] without deciding that the state and federal free exercise guarantees are coextensive." *Tilton*, 925 S.W.2d at 677 n.6; *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 649-50 (Tex. 2007). *But see Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 677 (Tex. 2022) (Young, J., concurring) ("Freedom of speech, freedom of worship, protection from searches and seizures—all of these and more are provided with much greater detail than their federal analogues." (citing Tex. Const. art. I, §§ 6, 8, 9)); *Ex parte Herrera*, Nos. 05-14-00598-CR, 05-14-00626-CR, 05-14-00627-CR, 2014 WL 4207153, at *4 (Tex. App.—Dallas Aug. 26, 2014, no pet.); *Howell v. State*, 723 S.W.2d 755, 758 (Tex. App.—Texarkana 1986, no writ). That familiar federal amendment secures an individual right to the "free exercise" of religion. U.S. Const. amend. I. And as the U.S. Supreme Court currently construes it, the Free Exercise Clause "'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017)

(quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)); *see also Fulton v. City of Philadelphia*, 593 U.S. 522 (2021).

To be sure, prior to the U.S. Supreme Court's controversial[2] decision in *Employment Division of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that Court had provided much broader protection for religious adherents than simply a neutrality principle. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). In the aftermath of *Smith*, many States, including Texas, sought to restore the pre-*Smith* standards under various Religious Freedom Restoration Acts. *See generally Barr*, 295 S.W.3d at 294-96 (recounting this history). As a result, by statute in Texas the "government 'may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that interest.'" *Id.* at 296 (quoting Tex. Civ. Prac. & Rem. Code § 110.003(a)-(b)).

B. When construing the Amendment, the Court should do so in the light of these extant constitutional and statutory protections for religious liberty. After all, "[t]he Constitution must be read as a whole, and all amendments thereto must be

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[2] Many jurists, legal scholars, and commentators have argued that *Smith* is inconsistent with the original public meaning of the Free Exercise Clause. *See, e.g.*, *Fulton*, 593 U.S. at 545-94 (Alito, J., concurring); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990); Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & Religion 99 (1990).

considered as if every part had been adopted at the same time and as one instrument, and effect must be given to each part of each clause." *In re Nestle USA, Inc.*, 387 S.W.3d 610, 619 (Tex. 2012) (quoting *Collingsworth County v. Allred*, 40 S.W.2d 13, 15 (Tex. 1931)). Consequently "[d]ifferent sections, amendments, or provisions of a Constitution which relate to the same subject[] matter should be construed together and considered in the light of each other." *Id.* at 619-20 (quoting *Allred*, 40 S.W.2d at 15). Similarly, because nothing in the text or history of the Amendment indicates that it was intended to supplant or repeal TRFRA, *see City of Dallas v. Emps. Retirement Fund of City of Dall.*, 687 S.W.3d 55, 60 (Tex. 2024), the Court should read the Amendment to be complementary of, not cumulative of, that statute, *see Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000).

Application of these principles supplies the key to resolving this case. Plaintiffs argue that the City of San Antonio has "limited" a religious service of the Lipan-Apache Native American Church within the meaning of the Amendment by removing trees from a public park and making efforts to deter birds from nesting in a certain area of that park. *See* Appellants' Br. 10-12. Plaintiffs argue that the presence of these birds is necessary for them to conduct a ceremony during the Winter Solstice in which they must observe the reflection of the birds in the river, but that the City's park-renovation project is chasing away the birds and therefore "limiting" their religious service. *Id.*

The City's park-renovation project, however, is not the kind of "limitation" of a "religious service" that is subject to the Amendment's protections. Most significantly, the City's park-renovation project does not directly regulate the religious

service of the Lipan-Apache or restrict their right to gather in the park at all.[3] In that regard, it looks nothing like the type of COVID-19 orders that consciously targeted religious services as the object of regulation. *See supra* at 8-10. That is, the City's renovation of a public park does not target the Lipan-Apache's religious service as such, but any effects on the service are merely incidental and downstream of the City's efforts to improve the safety of the park for all San Antonians. *See* Appellee's Br. 4-18.

By contrast, the COVID-19 lockdown orders that motivated the passage and ratification of the Amendment were not merely incidental to the various governments' COVID-19 response but instead were a primary component of that pandemic response, *see supra* at 9-10, as churches and other houses of worship were seen as vectors for the spread of COVID-19. As one contemporaneous article recounted: "Top scientists and public health experts have warned that religious services appear to be particularly conducive to COVID-19 transmission, with multiple documented cases of spread in houses of worship across the globe." Kiah Collier et al., *Despite Coronavirus Risks, Some Texas Religious Groups are Worshipping in Person—with the Governor's Blessing*, Tex. Tribune (Apr. 2, 2020), https://tinyurl.com/2sxpcsjn; *see also* Kate Conger et al., *Churches Were Eager to Reopen. Now They are Confronting Coronavirus Case.*, N.Y. Times (July 10, 2020), https://tinyurl.com/38emnyvb (quoting an "infectious-disease expert" for the proposition that "church gatherings" are "an

[3] Although Plaintiffs once maintained a claim for *access* to the park, the parties resolved that claim and the Fifth Circuit has concluded that the claim is now moot. *See* Appellee's Br. 25; *Perez v. City of San Antonio*, 98 F.4th 586, 596 (5th Cir. 2024).

ideal setting for transmission" of COVID-19); Stephanie Becker, *At Least 70 People Infected with Coronavirus Linked to a Single Church in California, Health Officials Say*, CNN (Apr. 4, 2020, 11:39 AM EDT), https://tinyurl.com/nhhav55d.

This does not leave the Lipan-Apache without legal recourse, however. To the contrary, the type of neutral, generally applicable governmental regulations at issue in this case—tree-removal and bird-rehoming efforts in a public park—are precisely the type that are more appropriately subject to challenge under the TRFRA, the First Amendment, or Article I, Section 6 of the Texas Constitution. *See Perez*, 98 F.4th at 596-611 (rejecting Plaintiffs' claims under the First Amendment and Article I, Section 6 in now-vacated decision). Construing the Amendment in this fashion ensures that each of these other sources of legal protection for religious liberty retains independent force. To wit, the First Amendment and Article I, Section 6 of the Texas Constitution supply protection against laws that single out religious practice for disfavor or subject religious exercise to non-neutral or uneven burdens. *See Trinity Lutheran*, 582 U.S. at 458. TRFRA guards against laws that substantially burden religious exercise (irrespective of whether they are neutral and generally applicable) without a compelling governmental interest backing them. *See Barr*, 295 S.W.3d at 296. And the Amendment steps into the breach to protect against a narrow class of governmental regulations that escaped the other provisions' protective ambit during the COVID-19 pandemic: those that close down churches and other houses of worship by restricting Texans' right to gather.

C. Construing the Amendment to complement rather than cumulate existing protections for religious liberty also wards off a further conundrum: Plaintiffs'

interpretation of the Amendment, if accepted, would effectively supply them with a right to veto how the government manages *public* land—here, a vast city park. But that is fundamentally incompatible with the longstanding principle that "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). The government is not required, under the aegis of the Free Exercise Clause, to confer what is in effect a "religious servitude" that would essentially convey to plaintiffs "*de facto* beneficial ownership of some . . . tracts of public property." *Id.* at 452-53; *see also Bowen v. Roy*, 476 U.S. 693, 700 (1986) (explaining that the Free Exercise Clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures"). After all, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng*, 485 U.S. at 452.

In *Lyng*, the U.S. Supreme Court applied these principles to reject a Free Exercise Clause claim by a Tribe that sought to prevent the federal government from paving a road and harvesting timber through a portion of a national park that the Tribe used for religious purposes. *Id.* at 447-53. The Court rejected that First Amendment claim even on the assumption that the federal government's road-building and timber-harvesting activities would "virtually destroy the . . . Indians' ability to practice their religion." *Id.* at 451. The Court reasoned that the federal government's actions would neither "coerce[]" the Tribe into "violating their religious beliefs" nor "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. Accepting the Tribe's First

Amendment claim, on the other hand, would result in "the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion." *Id.* at 453. Yet "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* (emphasis in original).

Earlier this year, the Ninth Circuit, sitting en banc, applied these principles to reject Free Exercise Clause and federal RFRA claims by a Tribe that sought to prevent the federal government from transferring federal land on which the Tribe worships to a private company that would mine the iron ore deposit on which the land sits. *Apache Stronghold v. United States*, 101 F.4th 1036, 1049-63 (9th Cir. 2024) (en banc), *pet. for cert. filed*, No. 24-219 (U.S. Sept. 11, 2024). The court concluded that the Free Exercise claim was squarely controlled by *Lyng*, and that, under that case, "it is not enough . . . to show that the Government's management of its own land and internal affairs will have the practical consequence of 'preventing' a religious exercise." *Id.* at 1053. Instead, "a disposition of government real property is not subject to strict scrutiny when it has no 'tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious adherents, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id.* at 1055 (quoting *Lyng*, 485 U.S. at 449-50). *Lyng* also resolved the Tribe's RFRA claim, as the court held that "RFRA's understanding of what counts as 'substantially burden[ing] a person's exercise of religion' must be understood as subsuming, rather than abrogating, the holding of *Lyng*." *Id.* at 1063. That was so because *Lyng* itself was part of the pre-

Smith framework that RFRA's substantial-burden standard sought to restore. *Id.* at 1060-61.

Plaintiffs' claim here runs squarely into the teeth of this existing federal precedent, which may inform the scope of both Article I, Section 6 of the Texas Constitution, *Tilton*, 925 S.W.2d at 677, and the TRFRA, *see Barr*, 295 S.W.3d at 296 ("[W]e will consider decisions applying the federal [RFRA] germane in applying the Texas [RFRA]."). Nothing in the text or ratification history of the Amendment suggests that the Amendment was intended to upend decades-old principles of religious liberty that afford the government a freer hand when disposing of its own property. And "as the old maxim goes, the Legislature does not hide elephants in mouseholes," *Hogan v. Zoanni*, 627 S.W.3d 163, 174 (Tex. 2021) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); neither do the People of Texas when ratifying a constitutional amendment. Because Plaintiffs' claim here would usher in, without any textual or historical warrant, a novel principle of law that runs counter to decades of settled religious-liberty precedent, the Court should reject that claim and construe the Amendment as complementary of, not in conflict with, those principles.

Prayer

The Court should answer the certified question by holding that the Amendment erects a categorical bar to governmental prohibitions or limitations that directly limit Texans' ability to *gather* at a religious service but that the Amendment does not apply to neutral governmental regulations that incidentally affect a religious service, like the tree-cutting and bird-rehoming efforts at issue here.

Respectfully submitted.

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