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
Case No. 23-50746

BRIEF OF FIRST LIBERTY INSTITUTE AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans through *pro bono* legal representation of individuals and institutes of diverse faiths—Catholic, Protestant, Islamic, Jewish, the Falun Gong, Native American religious practitioners, and others. First Liberty has won several religious freedom cases at the U.S. Supreme Court, including *Groff v. DeJoy*, 600 U.S. 447 (2023); *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022); *Carson v. Makin*, 596 U.S. 767 (2022); and *American Legion v. American Humanist Association*, 588 U.S. 29 (2019).

As part of its mission, First Liberty represented numerous individuals and organizations in lawsuits and other challenges to unlawful government action that restricted religious liberty during the COVID-19 pandemic. *See, e.g.*, First Liberty, *Covid-19 Breaking Cases & Victories*, https://firstliberty.org/covidvictories/. In response to government overreach during the pandemic, and in recognition of the work that First Liberty and other groups did to protect religious liberty against that overreach, the people of Texas enshrined Section 6-a into the Texas Constitution to make explicit that the government may not suspend the foundational free-exercise right to religious services irrespective of any governmental interest it may invoke. First Liberty accordingly has a strong interest in the correct interpretation of Section 6-a.

CERTIFIED QUESTION

The Texas Constitution provides that:

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

Tex. Const. art. 1, § 6-a. The certified question is:

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

Perez v. City of San Antonio, 115 F.4th 422, 428 (5th Cir. 2024).

INTRODUCTION & SUMMARY OF ARGUMENT

Section 6-a categorically bars the government from prohibiting or limiting bona fide religious services. Under Section 6-a, the government "may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services . . . by a religious organization established to support and serve the propagation of a sincerely held religious belief." That bar applies no matter the government's interest, and no matter the circumstances giving rise to the prohibition or limitation. Section 6-a's text and context each confirm that the phrase "may not" invites no exceptions. The background of Section 6-a's ratification further confirms that, unlike other constitutional and statutory regimes grounded in means-end balancing, Section 6-a's bar on governmental restrictions within its scope is absolute. The Court should thus answer the certified question "yes."

Section 6-a's scope reaches only government actions that wield the force of law to forbid or to dictate the character of bona fide religious services. It does not implicate every neutral application of law that carries some downstream consequence for religious services. Here, the certified question is whether Section 6-a imposes a categorical bar—not whether Defendant's actions are within Section 6-a's scope. The federal courts are well positioned to decide in the first instance whether and how Section 6-a, properly construed, applies to the particular facts at issue in this case. Accordingly, this Court need not opine on the merits of the underlying dispute.

ARGUMENT

I. Section 6-a Imposes a Categorical Bar on Government Activity Within Its Scope.

The certified question is whether Section 6-a "impose[s] a categorical bar." *Perez*, 115 F.4th at 428. That question invokes the longstanding federal-law distinction between "categorical constitutional guarantees," on one hand, and "open-ended balancing tests," on the other. *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004); *see N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022) (rejecting "means-end scrutiny" and holding that when "plain text covers an individual's conduct, the Constitution presumptively protects that conduct" unless the government can "justify its regulation by demonstrating that it is consistent with . . . historical tradition"). Viewed in this light, the text, context, and history of Section 6-a each attest to a categorical bar—not means-end balancing.

A. The text imposes a categorical bar.

In interpreting the Texas Constitution, this Court "first consider[s] the text and history." *Hogan v. S. Methodist Univ.*, 688 S.W.3d 852, 855 (Tex. 2024).

1. Section 6-a's key text consists of a modal verb ("may") and an adverb of negation ("not"). In constitutions and other legal documents, "the basic phrase at issue—*may not*—is conventionally viewed as unambiguous." *Garner's Dictionary of Legal Usage* 569 (3d ed. 2011). The phrase "stat[es] a prohibition," *id.* at 568, about what the subject "is not permitted to" do, *id.* at 954. For example, the Legislature uses "may not" to "impose[] a prohibition"

that is "synonymous with 'shall not.'" Tex. Gov't Code § 311.016(5). Dictionaries say the same thing. *See, e.g.*, *Webster's Third New International Dictionary* 1396 (2002) ("*Webster's Third*") (in legal instruments, "may" means "shall" or "must"); Oxford English Dictionary Online ("*Oxford Online*"), https://tinyurl.com/2dpz3ewp (defining "may" as "Expressing obligation: be required to do something in law" (sense II.i.6.b ("*Law.*"))).

Therefore, in Section 6-a, "may not" means that the government: is prohibited from, is not permitted to, is obligated not to, is required not to, shall not, and must not enact a law that prohibits or limits religious services.[1] *See Woods v. Littleton*, 554 S.W.2d 662, 668-69 (Tex. 1977) (discussing the "mandatory" sense of "may"). Because Section 6-a's plain text offers no exceptions, it is categorical. *See Oxford Online*, https://tinyurl.com/4kc63n73 (defining "categorical" as "[a]sserting absolutely or positively; not involving a condition . . . ; unqualified" (sense 1.a), and as "unconditional" (sense 1.b)); *Webster's Third* at 253 ("categorical" means "without qualifying[]").

2. The phrase "may not" appears more than 100 times in the Texas Constitution. As far as amicus has determined, each time a court has construed one such provision, it has read the provision to impose a categorical bar. *See, e.g.*, *Baggett v. State*, 722 S.W.2d 700, 702 (Tex. Crim. App.

[1] Unless otherwise indicated, this brief uses "the government" as shorthand for "[t]his state or a political subdivision of this state," and it uses "law" or "statute" as shorthand for "a statute, order, proclamation, decision, or rule."

1987) (construing the phrase "may not" in Tex. Const. art. 3, § 35 as categorical). And amicus is unaware of any court applying means-end balancing to a provision of the Texas Constitution grounded in "may not." That background is strong textual evidence that Section 6-a likewise imposes a categorical bar. *See Goodnight v. City of Wellington*, 13 S.W.2d 353, 354 (Tex. [Comm'n App.] 1929) ("In determining . . . the use of the words under consideration, it is proper to consider other parts of the Constitution which are *in pari materia*."); *Dickson v. Strickland*, 265 S.W. 1012, 1021 (1924) (similar).

For example, "[*t*]*he legislature* may not impose a tax on the net incomes of individuals." Tex. Const. art. 8, § 24-a (emphasis added). Next, "[i]f a person has been rejected by the Senate to fill a vacancy, *the Governor may not* appoint the person to fill the vacancy or[] . . . to fill another vacancy in the same office." Tex. Const. art. 4, § 12(f) (emphasis added). Likewise, *courts "may not"* hold that a statute is "void on the basis of an insufficient title." Tex. Const. art. 3, § 35(c) (emphasis added). None of these provisions offers a balancing test. *See Baggett*, 722 S.W.2d at 702. Neither does Section 6-a.

3. Conversely, when the people and the Legislature wish to use "may not" as part of a non-categorical bar, they use additional words. For example, many parts of the Constitution use the phrase "may not . . . unless." *E.g.*, Tex. Const. art. 3, § 49(d); art. 3, § 65(b); art. 9, § 9B; art. 16, § 59(c-1). Similar combinations abound. *E.g.*, Tex. Const. art. 7, § 5(c) ("Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose.");

art. 3, § 48-f ("may not . . . until"); art. 7, § 18(e) ("may not . . . until . . . except as necessary to"); art. 16, § 40(b) ("may not . . . except").

That Section 6-a conspicuously avoided words like "unless," "until," and "except" underscores its categorical nature. *See Baylor Scott & White, Hillcrest Med. Ctr. v. Weems*, 575 S.W.3d 357, 364 n.22 (Tex. 2019) (citation omitted) ("'When the Legislature uses a word or phrase in one portion of a statute but excludes it from another, the term should not be implied where it has been excluded.'").

B. Context confirms that Section 6-a imposes a categorical bar.

Section 6-a does not exist in a vacuum. It entered a legal regime already replete with robust protections for religious exercise. The U.S. Constitution's First Amendment, the Texas Constitution's Freedom of Worship provision, federal statutes, and state statutes all protections religious services using means-end scrutiny. Section 6-a would be surplusage if it imposed yet another mere balancing test duplicative of these other protections. And because this Court "avoid[s] constructions that would render any constitutional provision meaningless," *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000), it should recognize as a contextual matter that Section 6-a creates more powerful protections than those other regimes.

Before Section 6-a was ratified, Texans already enjoyed religious-liberty protections—subject to the government's ability to proffer a sufficiently compelling interest. For example, under Sections 6 and 7 of the Texas

Constitution, "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 651 (Tex. 2007) (cleaned up). The same goes for the U.S. Constitution's First Amendment. *See id.* at 642 (treating "these federal and state constitutional provisions . . . [as] coextensive"). Statutory regimes also used means-end scrutiny. For example, "for religious activity affected by neutral laws of general application," the Texas Religious Freedom Restoration Act "imposes [that] requirement by statute." *Barr v. City of Sinton*, 295 S.W.3d 287, 300 (Tex. 2009) (citing Tex. Civ. Prac. & Rem. Code §§ 110.001-.012 ("TRFRA")).

Thus, even before Section 6-a became part of the Constitution in 2021, a statute "affect[ing]" "religious activity," *id.*, was already unlawful unless it satisfied "strict scrutiny," *id.* at 296. That test requires the government to show that such a statute serves "a compelling governmental interest" and is "the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code § 110.003 (TRFRA); *Kinney v. Barnes*, 443 S.W.3d 87, 95 (Tex. 2014) (similar test under the Texas Constitution); *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 597 (2021) (similar test under the U.S. Constitution).

If Section 6-a just adopted strict scrutiny for any law that "prohibits or limits religious services," Tex. Const. art. 1, § 6-a, it would be surplusage, because the federal and state constitutions and TRFRA had already adopted that test. When "constru[ing] constitutional provisions and amendments," this Court "strive[s] to avoid a construction that renders any provision

meaningless or inoperative." *Doody v. Ameriquest Mort. Co.*, 49 S.W.3d 342, 344 (Tex. 2001). Interpreting Section 6-a as a categorical bar is the natural way to avoid this disfavored surplusage. *See Spradlin*, 34 S.W.3d at 580.

No other interpretation is coherent. Section 6-a cannot have adopted some as-yet untold "stricter" scrutiny, because strict scrutiny itself is "the most demanding [balancing] test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Nor would it make sense to conclude that Section 6-a merely constitutionalized TRFRA's balancing test (for "religious services," Tex. Const. art. 1, § 6-a). The same legislature that proposed Section 6-a also amended TRFRA to prohibit the government from "issu[ing] an order that closes or has the effect of closing places of worship." Tex. Civ. Prac. & Rem. Code § 110.0031; *see* Act of June 16, 2021, 87th Leg., R.S., ch. 799 (H.B. 1239). It would be bizarre for the Legislature to override the preexisting balancing test (by amending TRFRA) while also enshrining that discarded balancing test in the Texas Constitution (by proposing Section 6-a).

C. Ratification history confirms that Section 6-a imposes a categorical bar.

Were the text not sufficiently clear, Section 6-a's legislative and ratification history confirm a categorical bar. "'Legislative construction and contemporaneous exposition of a constitutional provision is of substantial value in constitutional interpretation.'" *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021) (cleaned up). Naturally, then, "[i]n construing a constitutional

amendment," this Court "may also consider its legislative history." *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000).

The text of what later became Section 6-a was introduced in the Legislature to address "[c]oncerns . . . over restrictions put in place by state and local governments in response to the COVID-19 pandemic."[2] Those concerns were well founded. Counties across Texas—including the top five most populous—had each issued orders prohibiting or limiting "[r]eligious and worship services."[3] Some counties issued absolute bans, "prohibit[ting] . . . . religious services" "anywhere."[4] Others decided that "[n]o in-person worship services are permitted,"[5] or issued similar onerous limitations.[6]

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[2] House Comm. on State Affs., Resolution Analysis, Tex. S.J. Res. 27, 87th Leg., R.S. (2021), https://tinyurl.com/bdhtn4p7.

[3] Harris County, *Order of County Judge Lina Hidalgo* at 4 (Mar. 24, 2020), https://tinyurl.com/4ujk7fzr.

[4] Travis County, *Order by the County Judge* at 1-2 (Mar. 17, 2020), https://tinyurl.com/25efwpba.

[5] Tarrant County, *Executive Order of County Judge B. Glen Witley* at 5 (Mar. 24, 2020), https://tinyurl.com/puf23jkt.

[6] *E.g.*, Bexar County, *Executive Order NW-03 of County Judge Nelson W. Wolff* at 5 (Mar. 23, 2020), https://tinyurl.com/5ajd2w8b ("Religious and worship services may only be[] provided by video, teleconference or other remote measures."); Dallas County, *Amended Order of County Judge Clay Jenkins* at 2-3 (Mar. 18, 2020), https://tinyurl.com/5y6vamdw (prohibiting "religious services" that "bring together fifty (50) or more persons").

Legislators from both parties understood Section 6-a's text as a categorical response to these restrictions. Representative Jeff Leach (R-Plano), the author of the House version of what became Section 6-a, said that Section 6-a "mak[es] it explicitly clear that the state . . . cannot close down or limit our houses of worship or religious services. Period."[7] Across the aisle, Representative Terry Canales (D-Edinburg) "said his faith outweighed whatever dangers might prompt a shutdown of his church" and that "no government, no mayor, no governor, no one, should be able to keep you from going to church."[8] Indeed, even legislators who *opposed* Section 6-a understood it to impose a categorical bar, such that the government "could never restrict capacity in a church service for any reason."[9]

Commentators and the public also understood Section 6-a as categorical. Those in favor argued that Section 6-a "would protect churches . . . from being shut down by the government such as happened during the initial

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[7] Joseph Brown, *Voters will decide if Texas leaders can close churches during a disaster*, The Huntsville Item (July 29, 2021), https://perma.cc/NS7K-MV4J.

[8] Christina Heath, *Leach praises House's approval of bill 'to prohibit any government official from ever closing our churches*,' The Dallas Express (May 14, 2021), https://perma.cc/722G-CQ3L.

[9] Dorothy Isgur, *The 8 Texas constitutional amendments on your 2021 ballot*, KXAN (Oct. 13, 2021), https://tinyurl.com/2hkenm4b (quoting statement of Rep. John Turner (D-Dallas)).

period of the Covid-19 pandemic,"[10] and "w[ould] make sure our freedom to worship at church will never again be violated."[11] Opponents warned that Section 6-a was a "blanket approach" under which "no state interests can ever justify limiting religious services."[12] Others described it as a "blanket exemption" that "would prohibit restrictions on religious gatherings even during a deadly pandemic or other emergency."[13] Yet both sides understood that Section 6-a imposed a categorical bar—not any sort of balancing test.

That understanding matched the facts. Even under the "strict scrutiny" framework, "the government still often prevailed due to courts finding a compelling interest in protecting public health and deferring to the government's determinations on the narrow tailoring analysis."[14] The government also prevailed when courts treated religious restrictions as "'neutral and generally applicable rules.'" *Elim Romanian Pentecostal Church*

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[10] Texas Values, *Texas Proposition 3 Religious Freedom* (Nov. 2, 2021), https://tinyurl.com/3azzkfpu.

[11] Texas Freedom Caucus, *2021 Guide to Texas Constitutional Amendments* (Oct. 18, 2021), https://tinyurl.com/pzxv86jh.

[12] Editorial, *Vote no on Proposition 3. 'Religious freedom' amendment goes too far.*, Houston Chronicle (Oct. 14, 2021), https://tinyurl.com/y8cje5b5.

[13] Progress Texas, *2021 Texas Statewide Ballot Guide* (Oct. 11, 2021), https://perma.cc/XX6P-545M.

[14] Tyler Shannon, *Texas Proposition 3: A State Constitutional Response To Restrictions On Religious Gatherings*, 55 Tex. Tech L. Rev. 559, 565 (2023); *see Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (per curiam).

v. Pritzker, 962 F.3d 341, 344 (7th Cir. 2020) (citation omitted). And it prevailed by lumping in religious services with "comparable secular gatherings." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). The result was that things like "percentage capacity limitations" and "prohibition[s] on singing and chanting" were left in place. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) ("*South Bay II*").

The same happened in Texas, where "several localities relied on early Supreme Court decisions upholding restrictions on religious gatherings."[15] Some localities even mirrored the language of the court-created "strict scrutiny" balancing test, declaring that their prohibitions and limitations were "the least restrictive means possible."[16] Section 6-a replaced that amorphous balancing test with a simple, categorical rule.

* * *

All tools of interpretation lead to one conclusion: Section 6-a imposes a categorical bar as to the activities within its scope. It is not subject to means-end scrutiny. The Court should answer the certified question "yes."

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[15] *Shannon*, *supra* n.14, at 566.

[16] Clay County, *Order CJ 492020* at 1 (Apr. 09, 2020), https://tinyurl.com/yc26sh9k; *see id.* at 3 (allowing "worship services outdoors" only if "at least six feet distance is maintained"); Montague County, *Order of the County Judge* at 1 (Mar. 26, 2020), https://tinyurl.com/4rp5e8fs (declaring order was "least restrictive means").

II. The Federal Courts Are Best Positioned to Decide the Application of Section 6-a's Categorical Bar to These Facts.

Section 6-a imposes a categorical bar, but that alone does not guarantee that Plaintiffs' Section 6-a claim against Defendant City of San Antonio necessarily succeeds. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Bruen*, 597 U.S. at 34 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008)). Here, the plain text and common understanding of Section 6-a show that Section 6-a does not cover every downstream effect of every government action. Rather, Section 6-a's careful text stamps out government action that prohibits or limits religious services by bona fide religious organizations.

The record-focused question of whether the facts of this dispute implicate Section 6-a is not before this Court. The federal courts are properly positioned to assess in the first instance whether these Plaintiffs may pursue a Section 6-a challenge against this Defendant's actions.

A. Section 6-a does not implicate most garden-variety, neutral governmental regulation.

Just as Section 6-a's text imposes a categorical bar, it also precisely defines the scope of government action that is within the scope of that bar.

1.a. *"Enact, adopt, or issue."* The three verbs encompass the full range of the processes by which law is *made*. Tex. Const. art. 1, § 6-a. This is especially evident when the terms are construed together, because each word "in a list[] should be known by the words immediately surrounding it." *Greater*

Hous. P'ship v. Paxton, 468 S.W.3d 51, 61 (Tex. 2015). "Enact" means to "make into a law." *Webster's Third* at 745 (sense 2). "Adopt" can mean to "accept formally" or to "enact." *Id.* at 29 (sense 2(a)); *see Univ. of Hous. v. Barth*, 403 S.W.3d 851, 855 (Tex. 2013) (equating "adopted" with "enacted"). And "issue" can mean to "officially put forth or . . . proclaim[] or promulgate[]." *Webster's Third* at 1201 (sense 5(a)). These three verbs sweep in any government action that creates law.

b. *"Statute, order, proclamation, decision, or rule."* The five nouns also encompass anything that carries the force of *law*. Tex. Const. art. 1, § 6-a. In context, the "quality that those words surely have in common is a legally binding effect prescribed by a governmental authority." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (2012) (discussing "act" and "ordinance"). That quality is apparent not only for statutes, but also for a "state agency rule, order, or decision." Tex. Gov't Code § 2001.005. All of those instruments can "have the same force as [a] statute[]." *Rodriguez v. Serv. Lloyds Ins.*, 997 S.W.2d 248, 254 (Tex. 1999). So can a "proclamation." *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 915 (Tex. 2020).

While Section 6-a does not include the verb "enforce," it goes without saying that the government may not enforce an unconstitutional law or decision. Any such law is "legally void from its inception," *In re Lester*, 602 S.W.3d 469, 475 (Tex. 2020), "is not a law at all," *Nat'l Biscuit Co. v. State*, 135 S.W.2d 687, 692 (1940), and "may not be enforced at any time," *Carrollton-*

Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 566 (Tex. 1992). Section 6-a's text confirms this conclusion, as the State may not "adopt" or "issue" any enforcement "decision" that would violate Section 6-a's text. Tex. Const. art. 1, § 6-a.

c. "*That prohibits*." "Prohibit" means "[t]o forbid by law." *Black's Law Dictionary* (11th ed. 2019) (sense 1). It follows that a law violates Section 6-a if *the law itself* forbids a religious service from occurring (subject, of course, to Section 6-a's further restrictions on the specific types of "religious services" that are covered). The Constitution elsewhere uses "prohibit" in this same manner. *E.g.*, Tex. Const. art. 1, § 35 ("[A] nursing facility . . . may not prohibit in-person visitation" by certain visitors, but it can adopt "policies and procedures" for visitation).

Understanding "prohibit" to mean "forbid" also makes sense given the circumstances that motivated Section 6-a's proposal and ratification. *See supra* p.7. For instance, Travis County had issued a pandemic-era order that "prohibit[ed] any public or private community gatherings . . . anywhere in Travis County."[17] The same order expressly designated all "religious services" as "community gatherings."[18] In other words, all religious services were forbidden. Section 6-a now ensures that such an order is "void,"

[17] Travis County Order, *supra* n.4, at 1 (capitalization adjusted).

[18] *Id.* at 1-2 (capitalization adjusted).

"confer[s] [no] rights," "bestows no power on any one," and "justifies no acts performed under it." *Sharber v. Florence*, 115 S.W.2d 604, 607 (Tex. 1938).

d. *"Or limits."* A law also violates Section 6-a if it "limits" certain "religious services." Tex. Const. art. 1, § 6-a. "Limit" means "to bound" or "restrict." *Oxford Online*, https://tinyurl.com/2994exzf (sense 1.a); *see Webster's Third* at 1312 ("limit," as used "chiefly in legal terms," means "to assign to or within certain limits fix, constitute, or appoint definitely," or to "allot" or "prescribe" (sense 1)). Two textual points deserve special notice.

First, because "limit" and "prohibit" are part of the same list, they share a definitional magnetism—one that repels trivialities. *See Greater Hous. P'ship*, 468 S.W.3d at 61. In other words, the meaning of "prohibit" informs the meaning of "limit." *See id.* Prohibitions are significant and are among the most consequential restrictions the government could ever impose on a religious service. In moving from "prohibit" to "limit," the Legislature did not leave behind all sense of materiality and importance. Instead, "limit" applies only to restrictions of such magnitude that they dictate the character of the religious service itself. Thus, Section 6-a could block a city from issuing water-use restrictions that would "limit" the availability of baptism. But Section 6-a likely would not block water-use restrictions that prevented a church from hosting a recreational pool party or watering its front lawn. That is because baptism is part of the character of some religious services, while recreational swimming and verdant landscaping usually are not.

Second, "limit" blocks the government from "bound[ing]" any aspect of a religious service. *Oxford Online*, https://tinyurl.com/2994exzf (sense 1.a). While the word "limit" can connote numerical borders and ceilings, the broader sense refers to any boundary—not just numerical boundaries, and not just upper limits. Seen in this broader sense, "limit" bars the government from dictating both the maximum *and the minimum* number of congregants (or the distance between them). It also bars the government from dictating what attendees at a religious service say (or sing). Shaping any part of a religious service is categorically beyond the government's purview.

Together, these observations show that the government violates Section 6-a's "limit[ing]" restriction whenever it makes a law that dictates the character of a religious service. Section 6-a's history confirms this view. On top of the outright bans discussed above, many local governments limited religious services by dictating *where* they could occur—such as "outside,"[19] "by video,"[20] or at "a drive-in service that avoids all contact of individuals other than those in a family unit in a closed vehicle."[21] Others limited religious services by dictating *who* could attend—such as fewer than fifty

[19] Clay County Order, *supra* n.16, at 3.

[20] Bexar County Order, *supra* n.6, at 5.

[21] Bastrop County, *Bastrop County COVID-19 ORDER #1* at 2 (Mar. 31, 2020), https://tinyurl.com/msym4z3d.

people,[22] or fewer than "ten . . . persons in the same venue."[23] Still other governments limited religious services by dictating *what* could occur, including by "prohibiti[ng] . . . singing and chanting." *South Bay II*, 141 S. Ct. at 716. Indeed, the author of the Senate version of what became Section 6-a specifically noted "worship" and "singing" as practices that Section 6-a would protect.[24] All of those restrictions—whether where, who, or what—dictated the character of the religious service. Section 6-a now prohibits that.

e. *"By a religious organization established to support and serve the propagation of a sincerely held religious belief."* The final clause of Section 6-a confirms that these affirmative protections extend only to a special category of persons and activities. Tex. Const. art. 1, § 6-a. An "organization" that is not "religious" cannot avail itself of Section 6-a's protections. *Id.* Plaintiffs' opening brief (at p.33) indicates that the parties do not dispute that Plaintiffs belong to "a religious organization established to support and serve the propagation of a sincerely held religious belief."

2. In application, Section 6-a's careful language bars government action that forbids or that dictates the character of a religious service, while permitting virtually all of the government's neutral application of tax codes,

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[22] Dallas County Order, *supra* n.6, at 2-3.

[23] Bastrop County Order, *supra* n.21, at 2.

[24] Chuck Lindell, *Christians: Change laws to protect religious gatherings in pandemic*, Austin Am.-Statesman (Mar. 8, 2021), https://perma.cc/Y7Q9-2FQ9 (quoting statement of Sen. Kelly Hancock (R-North Richland Hills)).

trespass laws, building codes, permitting rules, and the like. Some examples illustrate the point. Each of the following government actions is properly understood as "enact[ing], adopt[ing], or issu[ing] a statute, order, proclamation, decision, or rule that prohibits or limits religious services" as those terms are used in Section 6-a. Each is therefore categorically barred without regard to means-end scrutiny:

- 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.
- A county decision to revoke a synagogue's building permit due to personal conflict with the synagogue's rabbi.

By contrast, absent more, Section 6-a does not implicate governmental activities that merely carry downstream consequences, such as:

- An agency's decision to raise rates for a toll road near a church.
- A public utility's decision to shut off power to a place of worship that has failed to pay its electricity bill.
- A city's decision to enforce trespassing laws against a church group that without permission meets in a public school after hours.

Each example falls outside Section 6-a because none is a "decision" "that prohibits or limits religious service." As set out above, Section 6-a concerns itself with laws that forbid or that dictate the character of religious services. Section 6-a does not sweep in every downstream effect of every law.

Section 6-a also does not reach non-religious services or non-religious organizations. For example, an organization opposed to climate change cannot concoct a false "religious service" to prevent the government from approving a pipeline development. Likewise, the government cannot evade Section 6-a by enacting a law that nominally targets non-religious conduct yet in reality aims to "prohibit[]" or "limit[]" religious services. Tex. Const. art. 1, § 6-a. For one thing, the government cannot do indirectly what it is barred from doing directly. *E.g.*, *Odyssey 2020 Acad. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 551 (Tex. 2021). And laws grounded in religious animus were prohibited long before Section 6-a. *E.g.*, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993).

B. This Court need not opine on the underlying merits, which can be resolved by the federal courts on a full record.

The Fifth Circuit has not asked this Court to apply the proper understanding of Section 6-a to the facts of this case, and there is no reason for this Court to do so in the first instance. The development plan for Brackenridge Park and the City's bond project likely are "decision[s]" within Section 6-a's text. But it is appropriate for the federal courts to determine in the first instance whether the decisions *themselves* "prohibit[] or limit[] religious services," a precise phrase that does not encompass every downstream effect of every governmental decision. *See supra* pp.14-17. The federal courts should assess whether the development plan and bond project violate Section 6-a. *See In re Troy S. Poe Tr.*, 646 S.W.3d 771, 780 (Tex. 2022)

("As a court of last resort, it is not our ordinary practice to be the first forum to resolve novel questions, particularly ones of widespread import.").

CONCLUSION

The Court should answer the certified question "yes." The Court should further clarify that Section 6-a's categorical bar reaches only the activities within Section 6-a's scope, not every government action that has downstream effects on religious services.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

On October 18, 2024, this document was served electronically on John Greil, counsel for Gary Perez and Matilde Torres, via email (john.greil@law.utexas.edu) and was served electronically on Jane Webre, counsel for the City of San Antonio, via email (jwebre@scottdoug.com).

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 4,747 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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