No. ____

IN THE

# Supreme Court of the United States

GARY PEREZ; MATILDE TORRES,
*Petitioners,*

v.

CITY OF SAN ANTONIO,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I


KELLY J. SHACKELFORD
JEFFREY C. MATEER
HIRAM S. SASSER, III
DAVID J. HACKER
STEPHANIE N. TAUB
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy.
Suite 1600
Plano, TX 75075
[redacted]

STEVEN T. COLLIS
*Counsel of Record*
JOHN GREIL
LAW AND RELIGION CLINIC
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton St.
Austin, TX 78705
[redacted]

*Counsel for Petitioners*


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## QUESTIONS PRESENTED

Gary Perez and Matilde Torres are ceremonial leaders of the Lipan Native American Church. Like their ancestors before them, they perform religious ceremonies at a specific bend of the San Antonio River now located within a municipal public park.

The City of San Antonio nevertheless plans to cut down the trees around the riverbend and to drive off cormorants nesting there—permanently destroying necessary components of Petitioners' religious services. Joining the wrong side of two circuit splits, the Fifth Circuit held that this would not "substantially burden" Petitioners' religious exercise, despite Judge Oldham's retort that the "burdens on plaintiffs' religious freedoms are undeniable." App.54a (Oldham, J., dissenting from denial of rehearing en banc). Although Petitioners explained that other locations are "not religiously effective," the panel found *no* burden because Petitioners retain "virtually unlimited access" to *other* parts of the Park. And although Petitioners testified that the *nesting* of cormorants *at the riverbend* is religiously necessary, the panel brushed that aside because cormorants can still "nest nearby or elsewhere in the 343-acre Park."

The questions presented are:

1. Whether the Religion Clauses of the First Amendment permit courts, when deciding whether government action burdens religious exercise, to override a claimant's sincere theological judgment of what the religious exercise requires.

2. Whether the government can satisfy its burden to prove that its action is the least religiously restrictive means available when, after notice that its

action would burden religious exercise, the government admits that it failed to consider any workable alternatives prior to litigation.

## PARTIES TO THE PROCEEDINGS

Petitioners Gary Perez and Matilde Torres, were plaintiffs in the U.S. District Court for the Western District of Texas and appellants in the U.S. Court of Appeals for the Fifth Circuit.

Respondent City of San Antonio, Texas, was defendant in the U.S. District Court for the Western District of Texas and appellee in the U.S. Court of Appeals for the Fifth Circuit.

## RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

*Perez v. City of San Antonio*, No. 5:23-cv-00977, U.S. District Court for the Western District of Texas. Preliminary injunction denied in part on October 11, 2023.

*Perez v. City of San Antonio*, No. 23-50746, U.S. Court of Appeals for the Fifth Circuit. Opinion published on April 11, 2024, opinion withdrawn on August 28, 2024, and question certified to Supreme Court of Texas on August 28, 2024.

*Perez v. City of San Antonio*, No. 24-0714, Supreme Court of Texas. Opinion published on June 13, 2025.

*Perez v. City of San Antonio*, No. 23-50746, U.S. Court of Appeals for the Fifth Circuit. Opinion published on August 13, 2025, and withdrawn December 11, 2025.

*Perez v. City of San Antonio*, No. 23-50746, U.S. Court of Appeals for the Fifth Circuit. Opinion published on December 12, 2025.

*Perez v. City of San Antonio*, No. 23-50746, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 12, 2025.

*Perez v. City of San Antonio*, No. 23-50746, U.S. Court of Appeals for the Fifth Circuit. Order entered denying Petition for Rehearing En Banc on February 27, 2026.

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## INTRODUCTION

For centuries, indigenous worshippers have performed religious ceremonies at a specific bend of Yanaguana ("the Spirit Waters"), now commonly known as the San Antonio River. Petitioners Gary Perez and Matilde Torres, ceremonial leaders of the Lipan Native American Church, believe that a precise spot at this riverbend uniquely connects different spiritual worlds. Their ceremonies require the conjunction of the river, the surrounding trees, and cormorants nesting at that place. Destroy those components, and the church cannot perform its religious services.

The City of San Antonio plans to cut down the trees around the riverbend and to drive away the nesting cormorants. This will destroy Petitioners' religious exercise forever. Yet, over powerful dissents from Judges Oldham, Ho, and Higginson, the Fifth Circuit found that this was not even a substantial burden on Petitioners' religious exercise, with reasoning that joined the wrong side of two existing circuit splits.

The first split involves courts telling believers that their honest theological convictions are wrong. The Fifth Circuit recognized that Petitioners believe some religious ceremonies can be "performed only at this riverbend" and "cannot be properly administered without specific trees present and cormorants nesting." App.4a. Yet it ignored those beliefs and held there was no substantial burden because Petitioners retain access to other parts of the 343-acre park and because cormorants can nest elsewhere.

That reasoning is a theological judgment disguised as a burden analysis. Both Religion Clauses of the First Amendment forbid it. Whether a claim arises under the Free Exercise Clause, federal religious freedom statutes, or state law, when determining if a burden on religion exists, judicial analysis must remain within the boundaries of the Religion Clauses.

Courts are not arbiters of theological truth. The Free Exercise Clause forbids courts from overruling a religious practitioner's sincere beliefs, while the Establishment Clause prohibits government officials from deciding religious dogma. This Court has long recognized that interpreting religious doctrine is "not within the judicial function and judicial competence." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981).

Yet the Fifth Circuit ventured to rely on its own theological judgment over Petitioners' because of an unresolved split in lower courts.

This Court last faced the split in a different context, but it did not resolve it. In *Zubik v. Burwell*, 578 U.S. 403 (2016), this Court granted review in seven consolidated cases to answer when a government can reject a religious organization's own theological account of "complicity" with sin when analyzing a burden on religion. But the Court did not resolve the question. It vacated and remanded the cases after oral argument, while "expressing no view on the merits." 578 U.S. at 407–08.

The split in the lower courts persists. Religious claimants of all faith traditions deserve a resolution, and this case proves why. The Fifth Circuit replaced

Petitioners' views of what their religion requires with its own mistaken understanding.

The second circuit split involves the proper application of the compelling interest test. The decision below deepened an entrenched split over whether the government may satisfy the least-restrictive-means standard when it refuses to consider workable alternatives before litigation. This Court has explained that when the government can achieve its interests in a way "that does not burden religion, it must do so." *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). Yet the decision below found the least-restrictive-means burden satisfied even though the City's project manager testified that the City chose not to modify the design to accommodate religion because doing so "would take time and money" and the City wanted "to proceed with the project." App.547a. Another witness—who designed the City's anti-nesting regime—testified that the City only informed her of the religious significance of those birds as a result of this litigation. App.564–65a.

The City admitted that it refused to consider least-restrictive alternatives before litigation. App.278a ("The City also admits that it 'never commissioned a study that aims to achieve its governmental purposes while accommodating Plaintiffs' religious exercise,' as alleged in paragraph 59 of the Complaint and denies that any such study is required."). The City then changed its case strategy and asserted *post hoc*, made-for-litigation rationales on narrow tailoring. The Fifth Circuit allowed it.

That approach conflicts with six circuits that require the government to investigate or account for less-restrictive alternatives *before* claiming that none

will work and taking the challenged action. It instead aligns with five circuits that continue to apply a defer-to-government standard drawn from outdated cases that predate this Court's most-recent least-restrictive-means clarifications. Unless this Court intervenes, that split will remain, and some lower courts will continue to allow government to burden religious exercise without ever even considering less-restrictive alternatives.

## OPINIONS BELOW

The Fifth Circuit's order denying rehearing en banc is published at 168 F.4th 345 and reproduced at App.51a. The Fifth Circuit's Second Revised Panel Opinion is published at 163 F.4th 110 and reproduced at App.1a. The Texas Supreme Court's decision on the question certified to it by the Fifth Circuit is published at 715 S.W.3d 709 and reproduced at App.191a. The district court's order is accessible at 2023 WL 6629823 and reproduced at App.300a.

## JURISDICTION

The Fifth Circuit entered judgment on December 12, 2025. It denied full-court rehearing on February 27, 2026. Justice Alito extended the deadline for filing a petition for a writ of certiorari to June 27, 2026. Application 25A1261. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the First Amendment to the United States Constitution and the Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code § 110.001 *et seq.*, are reproduced at App.570a.

## STATEMENT OF THE CASE

### I. Factual Background

#### A. The Sacred Site

For centuries, indigenous worshippers have passed down the creation story of Yanaguana, the Blue Panther spirit, and the cormorant. Before there was life in the Yanaguana river valley, the cormorant flew into the Blue Hole spring, where it encountered the Blue Panther. Roaring, the Blue Panther chased the cormorant out of the Blue Hole. As the cormorant fled, its tail feathers shed water droplets from the spring onto the surrounding land. These droplets nourished the dry land and brought life to the valley. App.404a.

Indigenous people have told this story for generations. And they have done so while worshipping at the site where this creation took place: a bend in Yanaguana ("the Spirit Waters"), known today as the San Antonio River, located close to the Blue Hole spring. App.405a.

The creation story is not all that makes the riverbend special. The shape of the river "mirrors the celestial constellation Eridanus" in the sky above. App.3a. Sacred cormorants nest in the trees around the riverbend. The river, the stars, the trees, and the cormorants all come together to create a spiritual ecology that exists nowhere else in the world. *Id.*

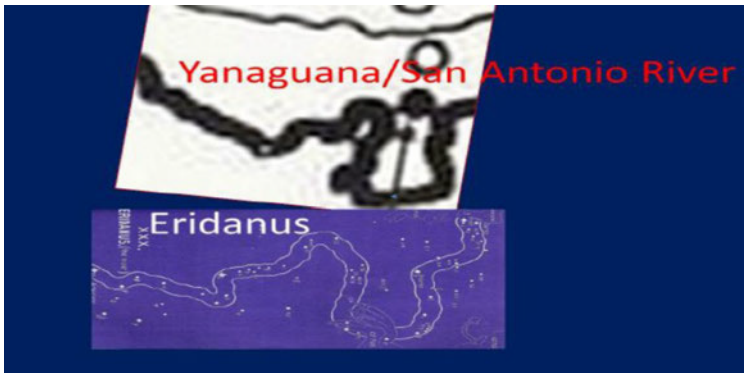


**Figure 1.** This image compares the shape of the constellation Eridanus to the bend of the San Antonio River located in Brackenridge Park. App.238a.

One indigenous ceremony illustrates the sacred connections at this site: A practitioner views a reflection of a cormorant in the river (which represents the underworld), while standing in the presence of nesting cormorants (the middle world) and beneath the Eridanus constellation (the upper world). App.421a. In that holy moment, spirit worlds connect, and as the cormorants ascend into the sky, they "take[] our prayers . . . to the heavens." App.500a.

The White Shaman Mural, a 2,500-year-old rock art painting in South Texas, depicts Yanaguana as a ceremonial landscape tied to ancient indigenous cosmology and theology. App.240–42a.[1]

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[1] *See generally* Eric A. Schroeder, Gary R. Perez, and Joe R. Tellez, *Written on Stone and Practiced on the Landscape: Pre-contact Native American Cosmovision and the Sacred Landscape of the Edwards Plateau*, 93 BULLETIN OF THE TEXAS ARCHEOLOGICAL SOCIETY (2022).

**Figure 2.** This figure isolates iconography within the White Shaman Mural that corresponds with springs in the San Antonio River system. App.242a.

Petitioners Gary Perez and Matilde Torres have been practicing members of the Lipan Native American Church for decades. App.3a. Like their ancestors before them, they perform religious ceremonies at the Yanaguana riverbend. They believe this particular spot serves as a bridge between the physical and spiritual worlds. *Id.* The Church performs ceremonies throughout the year aligned with cosmological events, and the sacred riverbend also serves in times of personal spiritual need, such as the death of a loved one. App.480–81a.

Petitioners testified that these ceremonies are "essential to [their] religious exercise." App.400a. Petitioners assist indigenous pilgrims from Mexico and Canada by bringing them to the sacred site. App.418–19a. Members of the Ponca and Comanche sing Yanaguana songs and visit the sacred riverbend. App.501a.

The physical environment—including the trees and cormorants—includes necessary components of these religious ceremonies. App.4a (components determine "this space's capacity to function as a holy place").

For Petitioners, the riverbend is "more than a morphological feature—it is 'a place of birth[,] . . . rebirth[,] . . . [and] the afterlife.'" App.110a. The trees are the "axis mundi" connecting the spirit worlds with this one. *Id.* Petitioners believe "[t]heir roots go into the underworld, underneath the earth, and even [touch] the water down below, the water table. It rises to our level of existence as human beings, and then it continues to rise all the way up into the heavens." App.421a. And the trees also provide a nesting area for the sacred cormorants.

In a week-long evidentiary hearing, Petitioners testified as to how the City's plan would destroy their religious exercise, not merely alter the surroundings. Ms. Torres testified that religious services at the riverbend would be "meaningless" without the trees or cormorants. App.514a.

Worship at the riverbend is "necessary" to Petitioners' faith and a personal and spiritual obligation that constitutes a tenet of their church. App.416–17a. Mr. Perez explained that worship elsewhere is "not religiously effective" because "I'm not standing where I need to stand to make my petitions to God almighty." App.426a. Petitioners cannot perform those ceremonies unless cormorants "continue to nest in that area," because the birds "tell that story" of creation through the cycle of nesting, begetting, presence, migration, and return. App.522a; App.514a.

Mr. Perez likened the riverbend's religious components to a "'tapestry,' testifying that 'if you go and ... pull a thread off'— be it the river, the trees, or the cormorants—then it all 'begins to unravel.'" App.111a. The City's removal of the trees and

cormorants would mean Petitioners' ability to perform their sacred ceremonies would "be gone forever." App.514a. If those actions are taken, Ms. Torres testified, "the Church's creation story will not 'survive for the next generation.'" App.111a.

### B. Destruction of the Sacred Site

In 1691, Spanish explorers renamed the Yanaguana the San Antonio River.[2] By 1899, George W. Brackenridge had purchased the land containing the riverbend and donated it to the City of San Antonio to become Brackenridge Park.[3] The City later developed the riverbend as "Lambert Beach," a whites-only swimming area.

In 2016, the City obtained funding to make improvements to the park. App.5a. Among these improvements are repairs to retaining walls along the San Antonio River, including near but not on the sacred site where worshippers stand to perform ceremonies. App.541–42a. This two-acre Project Area encompasses the sacred riverbend.[4]

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[2] MARY ANN NOONAN GUERRA, THE SAN ANTONIO RIVER 8 (1987).

[3] *History*, Brackenridge Park Conservancy, https://brackenridgepark.org/history/ (last visited Feb. 17, 2026).

[4] "To distinguish the area where Appellants stand to perform their ceremonies from the broader sacred bend, [Petitioners] used 'Sacred Area' to refer to the 20'x30' foot portion that Appellants needed for access and the 'Project Area' to refer to the two-acre portion where the tree removal and zero-nesting will occur. That entire bend is sacred to [Petitioners], and the trees and nesting cormorants in the Project Area are necessary components of the disputed ceremonies." Br. of Appellants, *Perez v. City of San Antonio*, No. 24-0714 (Tex. Oct. 14, 2024).

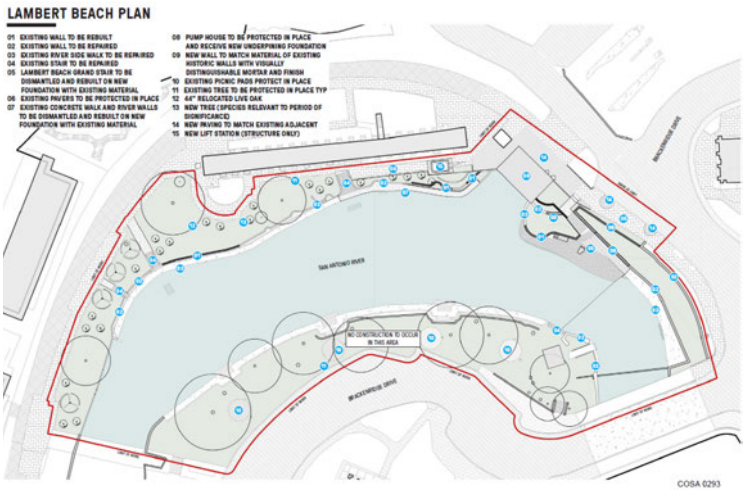


**Figure 3.** In this figure, a red line roughly depicts the boundaries of the City's Project Area at the riverbend. App.394a.

As part of its renovations, the City plans to remove or relocate 83% of the 83 trees surrounding the bend. App.435a. The City intends to use a cantilever system to repair the retaining walls on the north bank. App.5a. The City's chosen design involves a significant excavation behind the retaining walls, requiring substantial tree removal and relocation. App.435a.

Under the Migratory Bird Treaty Act, the City cannot remove these trees while protected migratory birds, including cormorants, are nesting in them. App.6a. So the City deploys "heavy artillery" to keep the cormorants away: "pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, explosives, and drones." App.55a. The City concedes that the measures are designed to prevent cormorants from nesting at the bend. *Id.*

The City's proposed plan, which would eliminate the bulk of the sacred trees in the area and prevent the sacred cormorants from nesting, would be an erasure of the "spiritual ecology." App.436–37a. It would destroy Petitioners' ability to exercise their religion.

### C. Respondent's Refusal to Accommodate

Petitioners have repeatedly told the City that the park renovations would destroy their religious practice. App.508–09a. Before resorting to a lawsuit, they met with the City in January 2022 to share the story of the Blue Panther and the cormorant. *Id*. They gave the City opposition letters from the Comanche Nation and the Lipan Apache Tribe of Texas that protested the renovations' impact on their religious ceremonies. App.510a.

When the letters didn't work, Petitioners testified about their religious objections to the project at an April 2023 committee meeting. App.508a. They testified again at an August 2023 city council hearing. *Id.* They consistently told the city that it is "possible to repair the retaining walls and preserve the spiritual ecology of the Sacred Area." App.481a. And they encouraged the City to choose a design that would do both.

Yet the City made no changes to its plans, nor did it even attempt to meet with Petitioners to discuss potential religious accommodations. App.445a. This was true despite the City considering an alternative design proposed by a secular neighborhood association. App.248a, 279a. It was only after this string of failed attempts at win-win accommodation that Petitioners filed this suit.

Despite the City's silence, Petitioners proposed an alternative design for repairing the walls: a front-anchored pier-and-spandrel system. This design would require the removal of just ten trees while allowing the City to safely restore the walls. App.536–37a. By drilling through the front of the wall, the design avoided the City's 12-foot clear cut ditch behind the wall.

The City's engineer testified that this alternative design would "save more trees." App.568a. But he testified that the City rejected a similar design offered by the neighborhood group because City officials believed their "hands [we]re basically tied by a series of legal issue[s]—or regulatory restrictions." *Id.*

The City did not identify the specific regulation that purportedly tied its hands. And the City's own employee testified that the City knew it could likely obtain a waiver of the unidentified restriction but chose not to do so. App.552a.

In this very project, the City has applied for waivers that increased tree removal. A local tree preservation ordinance requires the preservation of all heritage trees, but the City obtained an exemption from these requirements. App.546a. The project manager for the renovation explained that "[w]e didn't necessarily have to remove them all," but "we decided . . . let's put in a variance request to . . . remove all of the trees." App.545a. Yet the City did not explore obtaining waivers to facilitate Petitioners' alternative design. Nor did it analyze how state or federal religious freedom law may alter regulatory requirements.

The City conceded that it "did not study whether it could achieve its governmental purposes while accommodating plaintiffs' religious exercise." App.121a. And "[t]he City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [Petitioners'] religious exercise." *Id.*

When asked whether the City ever reconsidered its choices after learning of the Petitioners' religious objections, the project manager explained, "[t]he choice was already approved . . . [a]nd so no." "It would take time and money." "We would like to proceed with the project." *Id.*

## II. Proceedings Below

### A. The District Court and Fifth Circuit Reject Petitioners' Religious Beliefs

Petitioners filed this lawsuit in the Western District of Texas alleging violations of their rights under the First Amendment's Free Exercise Clause, Texas's state Religious Freedom Restoration Act (TRFRA), and the Texas Constitution. App.2a. Petitioners sought declaratory and injunctive relief to gain access to the sacred site for religious worship, reduce tree removal, and prevent the anti-nesting measures. App.2–3a.

Following a preliminary injunction hearing, the District Court granted in part and denied in part the Petitioners' request. The court agreed that Petitioners have a "sincere religious belief" and

granted injunctive relief providing "access for religious services in the Sacred Area." App.302a.[5]

But it denied Petitioners' request for access for individual worship because Petitioners "still [had] access to over 300 acres of Brackenridge Park for meditation in nature." App.303a. The court also denied injunctive relief preventing tree removal and bird-deterrence measures, concluding that Respondent "met its burden of proving a compelling government interest for public health and safety." App.305a.

On appeal, the Fifth Circuit affirmed the district court's decision. App.49a. The court noted that the sacred site's "capacity to function as a holy place relies on the presence of trees, birds, and other natural features, which are all part of its 'spiritual ecology.'" App.4a. But it concluded that Respondent's anti-nesting plan "d[id] not substantially burden [Petitioners'] religious beliefs because cormorants can still nest elsewhere in the 343-acre Park or nearby." App.157a. It also concluded, in the alternative, that the plan "advances a compelling interest through the least restrictive means." App.158a.

Judge Higginson dissented as to tree removal and anti-nesting. He concluded that the City "ought to have done more to accommodate" Petitioners' religious beliefs, emphasizing the City's own concessions: it never studied whether it could achieve its objectives while accommodating Petitioners'

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[5] Respondent cross-appealed that grant of access, then "moved to dismiss its cross-appeal in this action, deciding to no longer pursue the issue of access to the Sacred Area." App.14a.

religious exercise; it never investigated whether it could adjust bird-deterrence timing to accommodate their religious exercise; and it pressed forward with a tree-removal design because revisiting that choice "would take time and money." App.188–89a.

Petitioners sought—and the Fifth Circuit granted—a petition for panel rehearing and a request that the court certify a question to the Supreme Court of Texas about the scope of the newly-enacted Religious Services Amendment to the Texas Constitution. App.124a.

After the Supreme Court of Texas answered the certified question, the Fifth Circuit issued a second panel opinion affirming the district court. App.61a. It concluded that Respondent's development plan "may affect the nesting of cormorants within two acres of the 343-acre Park." App.79a. However, it held that Petitioners failed to establish a substantial burden because they "continue to have virtually unlimited access to the Park for religious and cultural purposes." App.78a. It also held that Respondent satisfied strict scrutiny under the Free Exercise Clause. App.101a–03a.

Judge Higginson expanded his dissent. He noted that "the cormorants' ability to nest 'elsewhere' is legally irrelevant given that we assess religious curtailment from [Petitioners'] perspective," and, in Petitioners' undisputedly sincere perspective, their ceremonies required cormorant nesting at the riverbend. App.118a. Access to other parts of the park "mean[t] nothing for [Petitioners]" because their religious ceremonies could only be performed in the sacred site. App.119a.

Petitioners filed a second petition for rehearing en banc.

The panel subsequently withdrew its opinion and issued a third opinion revising an issue of whether Texas RFRA recognized indirect burdens on religion. App.1a. But the panel again held that Petitioners' religion was not burdened and that the City satisfied strict scrutiny. Judge Higginson again dissented, writing that "[t]he majority's reduced opinion that this burden [on Petitioners' religious exercise] is trivial or mere perception now rests on ipse dixit, not analysis rooted in law." App.50a.

### B. Over Powerful Dissents, the Fifth Circuit Denies Rehearing En Banc

Petitioners filed a third petition for rehearing en banc, which the court denied, over the noted dissent of six judges.

Judge Oldham wrote the principal dissent, joined by Chief Judge Elrod and by Judges Smith, Higginson, Willett, and Ho. App.54a.

He noted that the panel opinion failed to evaluate substantial burden from "the person's perspective, not from the government's." App.56a.

This error was more serious "than just misreading" the compelling interest test. App.57a. It resulted in the judiciary "opin[ing] on theological matters." App.58a. And when parsing religious obligations, he explained, "These are judgment calls we simply do not make." *Id.*

Judge Oldham emphasized that "respecting sacred sites—and recognizing the substantial burdens that attend their destruction—would not privilege Native

American religions. Rather, it treats them equally." App.59a. To analyze those religions differently would be to "apply a different, less-protective standard to people of Indigenous faiths." App.60a.

Judge Ho dissented separately to emphasize that courts must "apply[] the same standard to people of all faiths, and that among those is the principle that '[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" App.53a (quoting *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984)).

## REASONS FOR GRANTING THE PETITION

This case presents two entrenched conflicts over religious liberty adjudication. The first concerns who defines religious exercise. Courts decide the legal question of whether a burden is substantial. But they must answer that question by accepting the claimant's sincere account of what the religious exercise requires. The decision below crossed that constitutional line.

The second conflict concerns who bears strict scrutiny's burden—and when. *Fulton* holds that when government can achieve its interests without burdening religion, "it must do so." 593 U.S. at 541. *Ramirez v. Collier* holds that it "gets things backward" to place the burden on the religious claimant to identify less restrictive means. 595 U.S. 411, 432 (2022). And *Kennedy* confirms that First Amendment justifications must be genuine, not hypothesized or invented for litigation. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022).

Yet the Fifth Circuit allowed the City to do exactly what those decisions forbid: ignore religious accommodations after receiving notice, then satisfy strict scrutiny through *post hoc* litigation explanations after suit was filed.

## I. The decision below deepens a split over whether the First Amendment permits courts, when deciding whether government action burdens religious exercise, to reject a claimant's sincere theological judgment of what the religion requires.

When determining if government action burdens religious exercise, this Court has emphasized that "it is not for us to say that the line [the claimant] drew was an unreasonable one." *Thomas*, 450 U.S. at 715. Courts are not arbiters of theological correctness; their "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (quoting *Thomas*, 450 U.S. at 716).

But lower courts disagree about how to apply that principle when assessing a burden on religion. On one side, courts accept the claimant's sincere religious account of what the exercise requires, then ask whether the government's action pressures, prevents, or interferes with that exercise. Others conclude that courts may determine the accuracy of a religious belief when interpreting a secular law. In practice this latter approach means courts decide questions such as whether government action is too attenuated to affect religious practice or whether alternative practices are religiously adequate.

Because the First Amendment sets the boundaries of judicial action here, the issue is critical to both federal and state courts, and the interpretation of both federal and state law. The Religion Clauses set constitutional limits on what any court may do when deciding a case or controversy.

This Court explained the point in *Espinoza*, which involved a petition from a state supreme court interpretation of state law: when a court is "called upon to apply" state law in a way forbidden by the First Amendment, "it [is] obligated by the Federal Constitution to reject the invitation." *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 487–88 (2020). A decision that "flow[s] directly" from a court's "failure to follow the dictates of federal law" is appropriate for this Court's review. *Id.* at 488.

Whenever a court resolves religious burden by rejecting a claimant's theological account, that court has exceeded the limits that the Religion Clauses impose.

### A. Some courts recognize that the Religion Clauses prevent judges from second-guessing a religious claimant's honest theological judgment as to whether a government act interferes with his or her religious exercise.

Some courts have recognized the constitutional limitations placed on judicial action in a variety of statutory and constitutional religion-law contexts. Although these cases arise under different sources of law, the constitutional limits on judicial action remain the same.

**Tenth Circuit—RLUIPA.** Then-Judge Gorsuch, writing for the court, held that the Religion Clauses set the bounds of the substantial burden inquiry under RLUIPA. *See Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (judges are not "arbiters of scriptural interpretation") (quoting *Thomas*, 450 U.S. at 716). The burden analysis "must take religious claimants as we find them" and courts must assess the burden of the government's activity on the claimant's religious exercise "as [the claimant] understands that exercise and the terms of his faith." *Id.*

**Seventh Circuit—RFRA.** Considering whether a contraception insurance mandate substantially burdened plaintiffs' religion, the Seventh Circuit reasoned that courts may not "ask whether the claimant has correctly interpreted his religious obligations." *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013).

**Arizona—State Free Exercise of Religion Act.** The Arizona Supreme Court, interpreting its state RFRA, "reject[ed] the City's invitation to assess the reasonableness of [Plaintiffs'] sincerely held religious beliefs" during the burden analysis. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 921 (Ariz. 2019). The Court invoked the "well-established rule that courts may not, under the guise of conducting a substantial burden analysis, examine the reasonableness of a person's belief." *Id.* (citing *Hobby Lobby*, 573 U.S. at 724).

**Texas—State Religious Freedom Restoration Act.** The Texas Supreme Court, interpreting its state RFRA, has similarly held that the "burden must be measured, of course, from the person's perspective,

not from the government's." *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009). Any other approach "may require a court to do what it cannot do: assess the demands of religion on its adherents and the importance of particular conduct to the religion." *Id.*

### B. Other courts hold that when determining a burden on religion, the Constitution permits an "objective" approach under which a court may reject a claimant's theological judgment as to how a law interferes with his or her religious exercise.

Other courts conduct a so-called "objective" investigation into burden, through which judges are the ultimate arbiter of how government action interferes with religious exercise.

**D.C. Circuit—RFRA.** The D.C. Circuit held that no substantial burden existed on a group of priests claiming that the proffered accommodation burdened their religion through complicity. *See Priests for Life v. U.S. Dep't of Health & Hum. Servs.,* 772 F.3d 229, 246 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell,* 578 U.S. 403 (2016). Then-Judge Kavanaugh dissented from denial of rehearing en banc in that case, emphasizing that the *constitutional* limits of *Thomas v. Review Board* prevent courts from rejecting believers' understanding of how government action affects their faith. *Priests for Life*, 808 F.3d at 17 (Kavanaugh, J., dissenting from denial of rehearing en banc) (citing *Hobby Lobby* and *Thomas v. Review Bd.*).

**Third Circuit—RFRA.** In *Real Alternatives*, the Third Circuit held that employee participation in a

health plan that covers contraceptives cannot substantially burden the religion of employees opposing abortifacients because merely subscribing to an insurance plan was too "attenuated" a connection to violate the claimant's religion, even if the claimant expressly argued otherwise. *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 359–60 (3d Cir. 2017). The panel expressly reincorporated the analysis vacated by this Court in *Zubik*. *See id.* at 356 n.18.

**Pennsylvania—State Religious Freedom Protection Act**. The split is not limited to federal courts. Pennsylvania state courts have adopted the "objective" test for analyzing burdens on religion under the Commonwealth's Religious Freedom Protection Act. That approach has resulted in a court interpreting Islamic law contrary to a believer. *Alsyrawan v. Dep't of Hum. Servs.*, 316 A.3d 1076, 1094 (Pa. Commw. Ct. 2024), *appeal allowed in part*, 329 A.3d 448 (Pa. 2024) (relying on *Real Alternatives*).

**Vermont—State Constitution.** The Vermont Supreme Court has also rejected parties' theological judgments as to what violates their religious beliefs. *Brady v. Dean*, 790 A.2d 428, 435 (Vt. 2001). In *Brady*, plaintiffs claimed that issuing marriage licenses to same-sex couples or appointing assistant clerks to issue marriage licenses to same-sex couples violated their sincerely held religious beliefs. *Id.* at 433. The court told the plaintiffs they were wrong about their religious beliefs. *Id.* at 435.

### C. The Fifth Circuit's decision joined the wrong side of the split and its adoption of the "objective" test allows courts to deny religious burdens by rejecting religious practitioners' theological judgment.

The decision below joined the wrong side of that split. The panel accepted that Petitioners' ceremonies can be performed "only at this riverbend" and "cannot be properly administered without specific trees present and cormorants nesting." App.3a. Yet it held that the burden of permanently removing trees and cormorants was not substantial because Petitioners retain access to other parts of the Park and because cormorants can nest elsewhere. App.19a.

Judge Higginson was correct that cormorants' ability to nest "elsewhere" is "legally irrelevant." App.118a. As Judge Oldham wrote: "plaintiffs will be unable to practice their faith if the City's plans go forward. If that is not a substantial burden, I do not know what is." App.56a.

The "objective" test is constitutionally infirm. It fosters improper entanglement between courts and religion, discriminates against believers of lesser-known faiths, and encourages governments to litigate the veracity of religious beliefs. It is anything but objective—it allows judges to substitute their subjective and flawed understanding of another's beliefs for the believer's. Only this Court's review can prevent that structural error from recurring: so long as the "objective" approach remains available, courts will resolve burden questions by privileging judges' religious decisions over those of religious believers.

### 1. The "objective" test promotes excessive entanglement in theological determinations.

The decision below illustrates the dangers of this Court not clarifying the correct side of the split: judges will continue to second guess claimants' understanding of how government action interferes with their religious exercise. The Fifth Circuit waded into theological waters and declared that Mr. Perez and Ms. Torres were wrong when they testified about what their religion requires. The test replaces believers with judges as arbiters of religious truth.

For example, Mr. Perez explained that the migratory patterns of the cormorants are critical to the religious worship that occurs at the riverbend: "There's an ebb and flow with their migratory behaviors," he said. "And they tell us—every time they return and they nest there and we hear the little chicks, that tells us that everything's going to be all right for the future." App.422a. The Fifth Circuit, in contrast, tells Mr. Perez that the migratory nature of the birds actually means he has been incorrectly performing Native American Church ceremonies. The panel's decision dismissed the effects of the bird-deterrence program on Petitioners' religious practice, ostensibly because "no cormorants, due to their migration patterns, inhabit the area for extended periods of time each year." App.19a.

Elsewhere, Perez explained that the cormorants must nest at the riverbend so practitioners can see the birds in the river's reflection while performing certain religious ceremonies. App.421a. The mere presence of the nesting birds in *other* parts of the park, he explained, does not carry the same religious

significance. App.457a. The Fifth Circuit again told Mr. Perez he is theologically mistaken, reasoning that his religious exercise was not burdened because the cormorants are permitted to nest "nearby or elsewhere" within the park. App.19a. *But see* App.120a (Higginson, J.) ("To the extent the majority suggests that Appellants can obtain spiritual fulfilment by exercising their religious beliefs in a manner contrary to their testimony, such reasoning is forbidden.").

The lack of clarity in the law allowed the Fifth Circuit to cross the line from analyzing whether the facts support a burden on Petitioners' religious exercise to second-guessing Petitioners' beliefs themselves.

**2. The "objective" test discriminates against believers of unfamiliar faiths.**

Allowing courts to try to "objectively" assess religious impact results in judges discriminating against lesser-known religions, or any religion the judges do not understand well. The District Court's and Fifth Circuit's decisions are a potent example. They discriminate against the land-based religious practices of indigenous Americans—"religious practices [which] may be unfamiliar to many." *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1489 (2025) (Gorsuch, J., dissenting from denial of writ of certiorari).

Multiple judges below highlighted the lack of equal treatment. Judge Ho wrote that the panel's approach fails to "apply[] the same standard to people of all faiths," including the rule that religious exercise

in an appropriate place cannot be abridged "on the plea that it may be exercised in some other place." App.53a. Judge Oldham made a similar point: "respecting sacred sites—and recognizing the substantial burdens that attend their destruction—would not privilege Native American religions. Rather, it treats them equally." App.59a.

The preliminary injunction hearing revealed that the district court held significant misunderstandings of the Petitioners' religious testimony. At one point, the district court attempted to compare Petitioners' Creation Story to the "Circle of Life" from Disney's *The Lion King*. App.463a.

On other occasions, the district court, over the explicit objections of both Mr. Perez and Ms. Torres, compared Petitioners' situation—in which a city is knowingly destroying their most sacred site when viable alternatives exist—to the 2019 accidental fire in the Notre Dame Cathedral in Paris. App.488a. Petitioners repeatedly explained that analogy was inapt. App.489a (Perez: "But this is different. This is not the same."); App.533–34a (Torres: "[W]e're saying that we don't want that spiritual ecology gone forever[.]"). Nevertheless, the district court grounded its denial of injunctive relief in the Notre Dame analogy. App.305a.

The district court then compared itself to King Solomon and suggested it could resolve this case through compromise. *See* App.298a ("Following the example of another individual who had to make difficult decisions, it is so ORDERED. 1 Kings 3:16-28."). The "compromise" the district court tried was not a compromise at all: the court ordered temporary access to the sacred site, while allowing the City to

actually destroy the sacred site forever. A viable compromise does exist in this case, but the district court missed it by failing to understand the religious burden Petitioners face.

The Fifth Circuit fared no better. Petitioners testified—and the panel majority acknowledged—that their religion requires them to hold ceremonies that can be performed "only at this riverbend." App.3a. Despite seeming to acknowledge that fact as a matter of Petitioners' theology, the panel opinion held that their religious exercise was not burdened because Petitioners have "virtually unlimited access to the rest of the park." App.18a.

Judge Oldham rejected this approach. "Does anyone imagine," he asked, "that a court would deem insubstantial a ban on accessing the Lord's Table because congregants can still sit in the pews? Could the government ban baptisms as long as Christians have 'virtually unlimited access' to water? Or could the State ban Lord's Day services because the church is empty six days a week?" App.57a. "These are judgment calls we simply do not make." App.58a.

That emphasis echoes then-Judge Gorsuch's warning against the dangers of the "objective" test: asking courts to assess religious impact risks "not only many mistakes—given our lack of any comparative expertise when it comes to religious teachings, perhaps especially the teachings of less familiar religions—but also favoritism" for other religions. *See Yellowbear*, 741 F.3d at 54.

Courts accepting the sincere theological judgments of the claimants avoid this thicket by treating religious claimants alike.

### 3. The "objective" test invites impermissible government hostility toward claimants' religious beliefs.

Allowing parties to litigate theological truth encourages constitutionally impermissible arguments from government litigants.

Apart from the constitutional limits on judicial resolution of theological disputes, the First Amendment forbids government actors from acting with "clear and impermissible hostility" towards religion generally or one religion in particular. *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Yet the ongoing circuit split encourages such behavior. If judges decide whether government action interferes with a religious practice, government defendants will argue it does not, often by attacking the faith itself.

Such hostility is evident here.

At multiple stages of the litigation, the City explicitly attacked the validity of Petitioners' beliefs. At the preliminary-injunction hearing, the City tried to diminish the river's spiritual significance to Petitioners by showing that City pumping keeps the water flowing. App.396a. The City argued that Petitioners misunderstood the spiritual importance of cormorants because migration schedules made their ceremonies theologically improper. App.456a. And the City challenged the sacred character of the trees by challenging Petitioners to distinguish old trees from young trees, and natural trees from planted trees, even though City experts could not identify the trees' exact ages. App.450a. This would be as

improper as examining a Catholic priest to prove transubstantiation by distinguishing a consecrated host from an unconsecrated one based on microscope biopsies.

Most shocking, the City explicitly asserted in its appellate pleadings that the area *could not be sacred* as Petitioners, *undisputedly*, sincerely believe it is. The City argued that the spiritual ecology Petitioners seek to protect "does not and cannot" reflect Petitioners' ancestors' beliefs, due to man-made changes at the riverbend. Br. of Appellee, Dkt. 120 at 17–18, *Perez v. City of San Antonio*, No. 23-50746 (5th Cir. Nov. 15, 2023). That theological assault on religion is forbidden for government actors to make, *see Masterpiece*, 584 U.S. at 638, and for courts to accept, *see Thomas*, 450 U.S. at 714. Religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" to receive constitutional protection. *Thomas*, at *ibid.*

An "objective" substantial-burden test invites theological attacks on believers' faith into courtrooms.

## II. The decision below deepens a split over whether the government can satisfy its least-restrictive-means burden when it refused to consider less restrictive alternatives prior to litigation.

The second question independently warrants review. Strict scrutiny does not allow government officials to ignore religious burdens when decisions are being made, wait for litigation, and then ask lawyers and experts to generate reasons why accommodation would have been inconvenient. This Court has repeatedly held that when government can

achieve its interests without burdening religion, "it must do so." *Fulton*, 593 U.S. at 541. And *Kennedy* forecloses justifications "hypothesized or invented *post hoc* in response to litigation." 597 U.S. at 543 n.8. The decision below, and the side of the split it falls on, allow precisely what *Fulton* and *Kennedy* forbid.

The Court uses this articulation of the least-restrictive-means burden in both its Free Exercise Clause cases, *see, e.g.*, *Fulton*, 593 U.S. at 541 (applying *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 431 (2006), a RFRA case, to the constitutional question), as well as in the statutory compelling-interest regime, *see, e.g.*, *Ramirez*, 595 U.S. at 427, 430 (applying *Fulton*, a free exercise case, and *Hobby Lobby*, a RFRA case, to the RLUIPA question). Articulating it correctly is thus of great importance.

### A. The lower courts are divided over whether the government's burden requires evidence that it actually considered alternatives.

While this Court has clarified the government's burden to satisfy the strict scrutiny framework, lower courts have continued applying outdated formulations of the test. Today, the circuits split on whether the government can satisfy its least-restrictive means burden through *post hoc* litigation arguments.

#### 1. Six circuits require the government to show that it considered less restrictive alternatives.

Some courts hold that government "cannot meet its burden to prove least restrictive means unless it

demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) (collecting strict scrutiny cases in both speech and equal protection contexts).

That means "the government must show that it 'seriously undertook to address the problem with less intrusive tools readily available to it.'" *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)). Under this standard, the government must provide "evidence" that it actually "considered less restrictive alternatives." *Singh v. Berger*, 56 F.4th 88, 104 (D.C. Cir. 2022).

In all, the First, Second, Third, Eighth, Ninth, and D.C. Circuits require the government to provide evidence that it considered the feasibility of less religiously restrictive alternatives. *See Lowe v. Mills*, 68 F.4th 706, 718 (1st Cir. 2023); *Agudath Israel*, 983 F.3d at 633; *Nunez v. Wolf*, 117 F.4th 137, 148 (3d Cir. 2024); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 694 (9th Cir. 2023) (en banc); *Singh*, 56 F.4th at 107.

This standard is particularly evident in free exercise cases. The Second Circuit requires the government to show that its justification is "genuine, not hypothesized or invented post hoc in response to litigation," and that it "seriously undertook" less intrusive tools. *Agudath Israel*, 983 F.3d at 633. The Ninth Circuit requires free exercise defendants to offer evidence that they have "considered less restrictive measures." *Fellowship of Christian*

*Athletes*, 82 F.4th at 694 (en banc). And the First Circuit requires governments to analyze the likely effect of a religious exemption and explain why such an exemption would prevent the State from achieving its goals. *Lowe*, 68 F.4th at 718.

Taken together, *Fulton*, *Ramirez*, and *Kennedy* show that this is the proper articulation of the government's burden of persuasion. *Fulton* explains that when government can achieve its interests without burdening religion, "it must do so." 593 U.S. at 541. *Ramirez* confirms that the government bears the burden to prove that no less restrictive means is available, which is not merely limited to excluding the plaintiff's proffered alternatives. 595 U.S. at 432. And *Kennedy* forecloses justifications "hypothesized or invented *post hoc* in response to litigation." 597 U.S. at 543 n.8.

When government knows before litigation that its chosen action will burden religious exercise, but chooses not to investigate whether accommodation is possible, it has failed the high bar strict scrutiny imposes. The government cannot later satisfy its burden by offering litigation explanations for why accommodation supposedly would have failed; by then, the government is no longer proving that it chose the least restrictive means, but only rationalizing a choice already made.

**2. Five circuits allow the government to satisfy its burden by relying on post-litigation justifications.**

Other courts allow the government to satisfy its least-restrictive-means burden solely through post-litigation argument.

The Tenth Circuit articulates the approach this way: "[T]he government's burden is two-fold: it must support its choice of regulation, and it must refute the alternative schemes offered by the challenger, but it must do both through the evidence presented in the record." *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011). Under this approach, the government is "required to refute only the one alternative [the plaintiff] proposed." *Smith v. Owens*, 13 F.4th 1319, 1326 (11th Cir. 2021). There is no requirement that the government ever investigate alternatives.

Five circuits—the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits—apply this more deferential test. *See Faver v. Clarke*, 24 F.4th 954, 960 (4th Cir. 2022); *Perez*, 163 F.4th at 125; *West v. Hoy*, 126 F.4th 567, 574 (7th Cir. 2025); *Wilgus,* 638 F.3d at 1289; *Smith*, 13 F.4th at 1327.

This side of the split derives from a premise that the Court has now rejected: that the government's burden of persuasion is limited to answering the plaintiff's proposals (and has no independent obligation to investigate other alternatives). Thus, in the Fourth Circuit, the government must "'demonstrate that it considered and rejected' the alternatives *brought to the government's attention*." *Faver*, 24 F.4th at 960 (quoting *Greenhill v. Clarke*, 944 F.3d 243, 251 (4th Cir. 2019)) (emphasis added). The Eleventh Circuit (mistakenly) believed this to follow from this Court's precedent: "*Holt* … [held] that courts should consider only the plaintiff's proposed alternatives in deciding whether there is an available less restrictive means[.]" *Smith*, 13 F.4th at 1322.

This approach is a misreading of *Holt*, incompatible with *Fulton*, squarely rejected in *Ramirez*, and contrary to *Kennedy*. It will arise every time a court applies strict scrutiny in a free exercise context.

### B. Requiring government to consider alternatives prior to litigation better aligns with this Court's strict scrutiny jurisprudence.

The "no consideration" approach is a vestigial test arising from outdated caselaw. The courts applying it primarily ground their reasoning in expansive readings of old cases that do not reflect the fully developed doctrine of this Court. The Tenth Circuit's *Wilgus* decision is a good example. That case was decided four years before *Holt*'s holding that the government must demonstrate that it "lacks other means of achieving its desired goal." *Holt v. Hobbs*, 574 U.S. 352, 364–65 (2015). The *Wilgus* panel grounded its rule in its belief that it was impractical to "require[] the government to prove a negative." *Wilgus*, 638 F.3d at 1288. So the panel limited itself "to consideration of the alternative regulation schemes proffered by the parties, and supported in the record." *Id.* at 1289. And it was satisfied by post-litigation evidence and arguments.

This Court, through *Holt*, *Fulton*, and *Ramirez*, has adopted exactly the test that *Wilgus* thought unworkable. In *Ramirez*, this Court explicitly rejected the argument "that it is [plaintiff's] burden to identify any less restrictive means." 595 U.S. at 432. That approach "gets things backward," because "*it is the government* that must show its policy" is the least religiously restrictive means. *Id.* (emphasis added).

This is a natural articulation of the burden of proof within "strict scrutiny," where government actions "are presumptively unconstitutional." *See Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (internal quotation marks omitted).

The "no consideration needed" approach is grounded in the belief that strict scrutiny ought not "beg[] a judge to go on a fishing expedition in his or her own mind" into alternatives. *Smith*, 13 F.4th at 1326 (quoting *Wilgus*, 638 F.3d at 1289). Yet in *Ramirez*, this Court held the government failed its least-restrictive-means burden because it failed to "rebut these obvious alternatives," *Ramirez*, 595 U.S. at 432, including at least one—"requir[ing] some training on procedures"—that the Court proposed *sua sponte*.[6]

Requiring an on-notice government to consider alternatives *before* litigation commences is also in line with this Court's emphasis that "Government 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" *Kennedy*, 597 U.S. at 543 n.8 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). A government informed of a religious burden that took steps to see if alternatives were feasible can plausibly demonstrate that no less restrictive alternative exists. Once litigation commences, though, all government witnesses will naturally argue that any alternative is impossible. In strict scrutiny, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541.

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[6] *Compare Ramirez*, 595 U.S. at 436 *with*, Brief of Petitioner at 26 (omitting additional training as alternative).

Where government has notice of the religious burden before litigation, it cannot satisfy *Fulton*'s command by asserting "we cannot" only after suit is filed.

## III. This Case Is an Ideal Vehicle to Address Issues Affecting All Free Exercise Cases.

This case presents an ideal vehicle for resolving each question presented. The questions were fully litigated through an evidentiary preliminary-injunction hearing, three Fifth Circuit panel opinions, and a petition for rehearing en banc that drew six votes. The record is ample on the impact of the City's actions on Petitioners' religion. Their sincere religious beliefs were credited, the relevant religious testimony is in the record, and the City's own witnesses and answer to the complaint supply the admissions that make this case unusually clean on the facts.

As to the first question presented, the panel found that Petitioners' sacred cormorants needed to nest at the sacred riverbend, then held that Petitioners' religious exercise was not burdened because the birds could still nest nearby. The panel acknowledged that Petitioners needed to worship at the sacred riverbend, then held their religious exercise was not burdened because they could go elsewhere in the park. That is judicial substitution of a court's theological interpretation over religious practitioners' sincere testimony.

The second question is equally clean. The City admitted that it "never commissioned a study that aims to achieve its governmental purposes while accommodating Plaintiffs' religious exercise," and its witnesses confirmed that the City did not study whether it could achieve its objectives while

accommodating Petitioners' religion. App.122a. Those are unusually clear admissions, and the City's evolving litigation strategy cannot erase them.

Nor do Respondent's likely vehicle objections withstand scrutiny. The preliminary-injunction posture strengthens the case for review because waiting for final judgment may allow the City to permanently destroy Petitioners' religious exercise before this Court can act. And the state-law label does not obscure the federal issue for either question. This Court routinely reviews state-law judgments that turn on a misunderstanding of federal constitutional limits. *See Espinoza*, 591 U.S. at 487–88. Here, the Religion Clauses set the constitutional boundaries for any court deciding whether government action burdens religious exercise. And the panel's strict-scrutiny analysis was incorporated into the analysis of Petitioners' federal free exercise claim, where it is now binding circuit precedent.

This case gives the Court the cleanest available opportunity to put both questions on a firmer—and constitutionally sounder—footing before a sacred site is permanently destroyed and Petitioners' religious exercise is "gone forever." App.514a.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

Steven T. Collis
*Counsel of Record*
John Greil
LAW AND RELIGION CLINIC
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton St.
Austin, TX 78705
[redacted]

Kelly J. Shackelford
Jeffrey C. Mateer
Hiram S. Sasser, III
David J. Hacker
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy.
Suite 1600
Plano, TX 75075
[redacted]

*Attorneys for Petitioners*

# APPENDIX

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**United States Court of Appeals**
**for the Fifth Circuit**

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No. 23-50746

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GARY PEREZ; MATILDE TORRES,

*Plaintiffs—Appellants*,

*versus*

CITY OF SAN ANTONIO,

*Defendant—Appellee*.

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Appeal from the United States District Court for the
Western District of Texas
USDC No. 5:23-CV-977
December 12, 2025

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

CARL E. STEWART, *Circuit Judge*:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 40 I.O.P.), the petition is GRANTED and *Perez v. City of San Antonio*, 150 F.4th 430 (5th Cir. 2025) is WITHDRAWN. The following opinion is substituted therefor.

This case returns to us after the Supreme Court of Texas accepted our certified question regarding the scope of the religious-service-protections provision of the Texas Constitution. In its opinion answering our question, it concluded that the provision does not extend to the government's preservation and management of publicly owned lands. With the benefit of that guidance, and upon further consideration of the issues in this appeal, we once again AFFIRM the judgment of the district court and DENY Appellants' Emergency Motion for Injunction Pending Appeal.

## I. Factual and Procedural History[1]

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

[1] Although we provided much of the relevant factual and procedural background in our order certifying this question to the Supreme Court of Texas, *see Perez v. City of San Antonio*, 115 F.4th 422 (5th Cir. 2024), we do so again here to the extent necessary for ease of comprehension.

access to the area for religious ceremonies but declined to enjoin the City's planned tree removal and rookery management measures.

### *A. The Lipan-Apache Native American Church*

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

The district court determined that their religious beliefs are sincerely held. According to their complaint, Appellants believe that life in the region of San Antonio began at a spring called the Blue Hole. Specifically, a spirit in the form of a blue panther lived in the Blue Hole. And when a spirit in the form of a cormorant visited the Blue Hole, the blue panther scared the bird. As the bird fled, water droplets from its tail scattered across the San Antonio River Valley, including the Park, spurring life in the region. The San Antonio River flows through the northern portion of the Park. Appellants also believe that a riverbend, located within the Lambert Beach area of the Park, mirrors the celestial constellation Eridanus and bridges the physical and spiritual worlds. Appellants require certain religious ceremonies to be performed only at this riverbend located within the Lambert

Beach area. Moreover, they proclaim that this space's capacity to function as a holy place relies on the presence of trees, birds, and other natural features, which are all part of its "spiritual ecology." Appellants also proclaim that certain religious ceremonies cannot be properly administered without specific trees present and cormorants nesting.

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

The Park is a public park in the City, consisting of approximately 343 acres. The Park contains various features and attractions including paths, sports fields, the San Antonio Zoo, the Japanese Tea Garden, the Sunken Garden Theater, and the Witte Natural History Museum. The Park has also been inhabited and utilized by indigenous peoples for thousands of years. Appellants and other members of the Native American Church believe that a specific area within the Lambert Beach section of the Park is a sacred location where they must gather to worship and conduct religious ceremonies. This area is also the site of the City's planned reformation efforts, which include repairing retaining walls along the San Antonio River. In this litigation, Appellants refer to this area as the "Sacred Area" and the City refers to it as the "Project Area." Appellants define the Sacred Area as the twenty-foot by thirty-foot area between two cypress trees on the southern riverbank of the Lambert Beach area. Within the Project Area, the City developed plans to repair the retaining walls along the San Antonio River, repair the historic Pump House, and construct a handicap-accessible ramp.

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

Additionally, the City's plan for the Bond Project includes bird deterrent techniques[2] intended to dissuade migratory birds from nesting in the Lambert Beach area. Pursuant to the Migratory Bird Treaty Act,[3] the removal or relocation of trees planned for the Project Area cannot proceed if migratory birds, including cormorants, are nesting in the area. The City contracted with the U.S. Department of Agriculture ("USDA") and coordinated with the Texas Parks and Wildlife Department ("TPWD") and the U.S. Fish and Wildlife Service ("UFWS") to modify bird habitats and deter birds from nesting in highly urbanized areas of the Park, including the Project Area.

To complete the Bond Project, the City must comply with local, state, and federal regulations. Locally, with the San Antonio Development Services

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

[3] 16 U.S.C. § 703 *et seq.*

Department, the City applied for and received a variance from a City Unified Development Code ("UDC") provision that requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-year floodplain. Moreover, state and federal regulations govern the preservation of the Lambert Beach retaining walls. As historic structures, the retaining walls contribute to the Park's designation as a City Historic Landmark and as a State Antiquities Landmark and its placement on the National Register of Historic Places. Because of this historic designation, construction is regulated by the Texas Historical Commission and the United States Army Corps of Engineers ("USACE"). The City must submit a final treatment plan and obtain a permit from USACE before repairing the retaining walls or removing or relocating trees within the Lambert Beach area. Once USACE approves the final treatment plan, a thirty-day comment period will begin to solicit feedback from stakeholders, including local indigenous tribes. Lastly, the Secretary of the Interior's Design guidelines, the Americans with Disabilities Act, and Occupational Safety and Health Administration regulations are all applicable to the bond project improvements.

From roughly February 2023 to November 2023, the City temporarily prevented Appellants, Native American Church members, and peyote pilgrims from entering the Lambert Beach area. Appellants filed the instant suit on August 9, 2023, alleging that the City's bird deterrence activities, temporary closure of the Project Area, and proposed removal or relocation of trees in the Project Area place a substantial burden on their religious beliefs in violation of the First

Amendment of the U.S. Constitution, the Texas Constitution, and TRFRA. They sought a preliminary injunction, which itemized the relief requested as (1) access to the Sacred Area for religious services, (2) preservation of the spiritual ecology of the Sacred Area by minimizing tree removal, and (3) preservation of the spiritual ecology of the Sacred Area by allowing cormorants to nest. As to the preservation of the spiritual ecology, Appellants requested that the district court order the City to "reevaluate the Bond Project to develop alternative plans that will accommodate [their] religious beliefs."

### *C. The District Court's Decision*

After holding a four-day preliminary injunction hearing, the district court adopted the parties' stipulated facts[4] and found that the City's plans did not burden Appellants' free exercise of religion. The district court concluded that Appellants held a sincere religious belief and had met their burden to prove the four elements for injunctive relief as to "access for religious services in the Sacred Area." It thus granted access for religious services involving fifteen to twenty people for approximately an hour on specified astronomical dates coinciding with Appellants' spiritual beliefs.[5] The district court also

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

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

ordered the City to immediately remove the broken limb that the City maintained "pose[d] a risk of injury or death" in the Project Area. As to their request for "access for individual worship," the district court held that Appellants had waived this request but also noted that the balance of equities supported the conclusion that unplanned, unsupervised individual access was impractical. Following expert testimony, the district court found that the bird deterrent operation was in the realm of public health and safety. It also determined that the City had met its burden of proving "a compelling government interest for public health and safety, and the [balance of] equities favor the City on" Appellants' requested relief regarding minimizing tree removal and allowing cormorants to nest.

### *D. Appellants' Emergency Motion for Injunction Pending Appeal*

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

obtaining an injunction pending appeal. The City opposed the motion.

We granted Appellants' motion to expedite the appeal and held oral argument in December 2023. We also issued a temporary administrative stay and ordered that Appellants' opposed motion for injunction pending appeal be carried with the case on October 27, 2023. On February 21, 2024 and January 30, 2025, at the City's request, we lifted the temporary administrative stay in part to allow the rookery bird deterrent management activities to proceed for the immediately proceeding months until migratory cormorants arrived. On June 24, 2025, after the Supreme Court of Texas answered our certified question, we granted the City's motion to lift the temporary administrative stay.

## II. Standard of Review

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

## III. Discussion

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

### *A. Access*

The City contends that Appellants' request for additional injunctive relief to restore their access to the Sacred Area for routine personal worship is moot. We agree. At the start of this suit, fencing prevented Appellants from physically accessing the Sacred Area for religious exercise. But, immediately following the injunction hearing, the district court held that Appellants were entitled to access the Sacred Area for ceremonies on two specific astronomical dates, November 17 and December 21, 2023, as prescribed by the hearing.[6] To comply with the court order, the

[6] Torres testified at the hearing that November 17 and December 21, 2023 were the forthcoming dates for which

City was also ordered (1) to immediately remove the hazardous broken limb posing risks to visitors of the Sacred Area and (2) to ensure that the fencing was unlocked and accessible for Appellants on the designated dates and any additional proposed dates of religious ceremonies. Even more, as of early November 2023, the City had removed the fencing and broken limb ahead of Appellants' scheduled ceremonies.

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

Still, Appellants urge this court to apply the voluntary cessation exception to mootness. The Supreme Court has held that a party's voluntary

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Appellants would need access for religious ceremonies.

cessation of an unlawful action will not moot an opponent's challenge to that practice. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." (internal citation omitted)). Regardless, an exception to the mootness doctrine declares that "[v]oluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203).

While this appeal was pending, the City removed the dangerous limb that previously made the Sacred Area inaccessible. Moreover, the City affirmed that it undertook several additional efforts "going beyond what the district court ordered." The City conceded that removing the limb allowed it to reconfigure the construction fencing and it subsequently granted public access to the entire area. Likewise, the City granted Appellants access to conduct a religious ceremony at the Sacred Area from midnight to 4 a.m.

on November 18, 2023, during hours when the Park is normally closed. Furthermore, on November 21, 2023, the City moved to dismiss its cross-appeal in this action, deciding to no longer pursue the issue of access to the Sacred Area. Based on these subsequent developments, "[i]t is therefore clear that [the City officials] harbor no animosity toward [Appellants]." *See Preiser v. Newkirk*, 422 U.S. 395, 402 (1975). Appellants now have "no reasonable expectation that the wrong challenged by [them] would be repeated." *See id*. Thus, the voluntary cessation exception does not apply. Hence, Appellants' access claims are moot.

### *B. Tree-removal Plan and Rookery Management Measures*

#### *i. TRFRA*

Turning to Appellants' claims pertaining to the City's tree-removal plan and rookery management measures, "we begin by analyzing [their] statutory claim under TRFRA, which, if successful, obviates the need to discuss the constitutional questions." *Merced v. Kasson*, 577 F.3d 578, 586 (5th Cir. 2009); *see, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."). Appellants allege that the City prohibits and limits their religious exercise by irreparably destroying the very aspects of the Sacred Area that make it a living place of worship. For purposes of the Texas Constitution, the Supreme Court of Texas has not adopted *Employment Division, Department of Human*

*Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and its declaration that generally applicable and facially neutral laws are not subject to strict scrutiny with regard to free exercise claims. *See Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("*Smith*'s construction of the Free Exercise Clause does not preclude a state from requiring strict scrutiny of infringements on religious freedom, either by statute or under the state constitution, and many states have done just that, Texas among them."). Thus, the challenged government action is subject to strict scrutiny.

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

*a. Substantial Burden*

Appellants did not sufficiently establish a

substantial burden. Appellants emphasize that if the City were permitted to proceed with its tree removal and rookery management procedures, the measures would irreversibly destroy the Sacred Area and their ability to practice their religion there.[7] To bolster these contentions, they cite caselaw analyzing governmental actions that involve complete bans or prohibition of religious exercise. As is the case here, "[w]hen a restriction is not completely prohibitive, Texas law still considers it substantial if 'alternatives for the religious exercise are severely restricted.'" *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 265 (5th Cir. 2010) (quoting *Barr*, 295 S.W.3d at 305). This court has held that according to *Barr*'s prescriptions, "that means a burden imposing a less-than-complete ban is nonetheless substantial if it curtails religious conduct and impacts religious expression to a 'significant' and 'real' degree." *Needville*, 611 F.3d at 265.

The City contends that "[w]hen analyzing whether a governmental body's activities on its *own land* impose a substantial burden on a plaintiff's religious beliefs, courts agree that the activity does not impose a substantial burden where it affects only the subjective religious experience of the plaintiff." The City argues "that a government's use of its own land does not substantially burden religious beliefs if the conduct is not coercive and impacts the subjective

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

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

In analyzing Appellants' contention that the destruction of the tree canopies, where cormorants nest, and the driving away of the cormorants themselves will burden their religions, we consider whether they have met their burden of establishing a likelihood of success on their argument that the presupposed burden is real and significant. Under TRFRA, a burden is substantial if it is "real vs. merely perceived, and significant vs. trivial"—two

limitations that "leave a broad range of things covered." *Barr*, 295 S.W.3d at 301. The focus of the inquiry is on "the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression," as "measured . . . from the person's perspective, not from the government's." *Id*. This inquiry is "case-by-case" and "fact-specific" and must consider "individual circumstances." *Merced*, 577 F.3d at 588; *Barr*, 295 S.W.3d at 302, 308. "Federal case law interpreting RFRA and [the Religious Land Use And Institutionalized Persons Act ("RLUIPA")] is relevant." *Merced*, 577 F.3d at 588 (citing *Barr*, 295 S.W.3d at 296).

While Appellants argue that the City's plan would destroy or alter natural resources of religious importance, they plainly failed to establish a likelihood of success on their position that the burden is real and significant under this circuit's case law. Indeed, Appellants did not even address this issue in their principal brief because they incorrectly assumed that the City would agree that its plans substantially burden their religious exercise.[8] Moreover, the record does not support Appellants' argument that the plan constitutes a substantial burden on their religious exercise. *See Barr*, 295 S.W.3d at 301. Appellants continue to have virtually unlimited access to the Park for religious and cultural purposes. And as the

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[8] Appellants assumed that the City "does not dispute that the current fencing, the tree-removal plan, and the anti-nesting measures all substantially burden [Appellants]' religious exercise." In retort, the City explained that it "absolutely disputes that the project substantially burdens [Appellants]' free exercise of religion."

record reflects, regardless of the rookery management program, no cormorants, due to their migration patterns, inhabit the area for extended periods of time each year.[9] Further, cormorants are not specifically targeted nor dissuaded from nesting nearby or elsewhere in the 343-acre Park.

Mindful of the preliminary posture of this expedited appeal, we conclude that though the City's development plan may affect the nesting of cormorants within two acres of the 343-acre Park, Appellants did not meet their burden to show that they are likely to succeed on their claim that the plan constitutes a substantial burden of their religious exercise. Even if they did, that would not change the outcome of this appeal because the City's plan advances a compelling interest through the least restrictive means—and thus survives strict scrutiny. *See Merced*, 577 F.3d at 588 (citing *Barr*, 295 S.W.3d at 296).

*b. Compelling Interest*

The City argues that it has a compelling governmental interest in repairing the crumbling retaining walls on the northern bank of the riverbend, and that tree removal and relocation is an integral part of that plan. It further contends that the bird deterrence activities are necessary to protect the health and safety of citizens who visit the Park. The

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

City avers that the purpose of the rookery management program is twofold: (1) to mitigate the health and safety hazards arising from the bird guano[10] that dense bird colonies produce and (2) to ensure no migratory birds are nesting in trees within the Project Area such that work can begin under the Migratory Bird Treaty Act and the bond project improvements can proceed without delay.

In response to the City's public safety arguments, Appellants maintain that "the undisputed evidence is that the retaining walls in the Sacred Area [on the southern bank] do not need repair." Further, they aver that the City must prove that its "tree removal design is necessary in the context of these Appellants' religious practice" pursuant to TRFRA. *Barr*, 295 S.W.3d at 307. Likewise, Appellants contend that the City's rookery management plan fails strict scrutiny. They argue that preventing a pause in construction is not a compelling governmental interest. They contend that the City's cursory assertions—such as its asserted interest in making the Project Area safe for visitors in the Park—and other "public safety" arguments are "the kinds of statements that the Texas Supreme Court has held insufficient to establish a compelling governmental interest."[11] We disagree.

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[10] Guano is the accumulated excrement of birds.

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

In *Barr*, the Supreme Court of Texas determined that "the trial court's brief finding—that '[t]he ordinance was in furtherance of a compelling government interest'—[fell] short of the required scrutiny." *Barr*, 295 S.W.3d at 307–08. Dissimilarly, the district court here, after holding a four-day preliminary injunction hearing, published three separate orders evaluating the City's interests—(1) the October 2, 2023 "Partial Order," (2) the October 11, 2023 "Memorandum Opinion and Order," and (3) the October 25, 2023 Order. Moreover, contrary to the instant case, the *Barr* court seemed to also admonish the city council from merely reciting a published section of the challenged ordinance when asserting that the law "serves a compelling interest in advancing safety, preventing nuisance, and protecting children." *Barr*, 295 S.W.3d at 306–07. Specifically, the code there read that the "City Council finds the requirements of this section are reasonably necessary to preserve the public safety, morals, and general welfare." *Id*. at 291. Rather, the *Barr* court directed that "[c]ourts and litigants must focus on real and serious burdens [], and not assume that [] codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling." *Id*. at 306.

Here, the district court complied with *Barr*'s directive. It did not assume that the City's bond project improvements inherently served a compelling interest. Rather, it conducted an injunction hearing over several days in which litigants interrogated the interests served by the Bond Project. In its Memorandum Opinion and Order, the district court

determined that "[w]ith reference to [tree removal rookery management measures] of [Appellants]' requested relief, the court finds the City has met its burden of proving a compelling government interest for public health and safety[.]"

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

The record indicates that various areas of the Park "become nearly unusable for 10 months of the year due to the bird density/habitat." The resulting feces causes damage to various park amenities, including picnic tables, water fountains, playground equipment, restrooms, and sidewalks. The record provides a variety of pictures illustrating the volume

of excrement affecting these facilities. The record also indicates that the excrement could harm humans and other wildlife. The 2022 Draft Rookery Management Plan noted: "When rookeries establish near playgrounds, infrastructure, or other recreational areas, the risk of zoonotic disease transmission (i.e., histoplasmosis, psittacosis, and salmonellosis) increases substantially." The Draft Rookery Management Plan further observed that "the magnitude of fecal contamination, high likelihood of human contact with fecal matter, and limited ability to perform effective environmental decontamination make rookery management crucial to disease risk mitigation in urban areas."

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

The record also includes the expert opinions of Dr. J. Hunter Reed, a state wildlife veterinarian and health specialist, and Jessica Alderson, an urban wildlife biologist. Alderson[12] provided technical

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

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

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

even *one*, *single* tree—then it logically follows that complying with the demands of the Migratory Bird Treaty Act—which prohibits interference with or disturbance of nests already present in trees—is equally a compelling interest.

*c. Least Restrictive Means*

On appeal, Appellants repeatedly argue that, according to *Fulton v. City of Philadelphia*, the City must accommodate their religious exercise in crafting the bird deterrence measures and tree-removal plans. 593 U.S. 522 (2021). They plainly state that "[the City's] intolerant view is forbidden under the Supreme Court's command that, if [the] government can *accommodate* religious exercise, it must." But recall that the *Fulton* Court did not declare that "if [the] government can *accommodate*, it must"—rather it stated that "so long as the government can *achieve its interests in a manner that does not burden religion*, it must do so." This is simply a rewording of the strict scrutiny standard, not a command to commence all or even any of the proposed measures. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) (holding that to survive strict scrutiny, a challenged action must be "justified by a compelling governmental interest and . . . narrowly tailored to advance that interest"); *McCullen v. Coakley*, 573 U.S. 464, 493–94 (2014) ("The point is not that [the state] must enact all or even any of the proposed measures discussed[.] The point is instead that the [state] has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals [exercising their First Amendment rights]."). In

*Fulton*, the Court's full quote reads as follows: "A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests . . . Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. Thus, the *Fulton* Court proclaimed that a government action subject to strict scrutiny must achieve its interests in a narrowly tailored manner that would not burden religion. We continue this analysis here.

At the injunction hearing and on appeal, Appellants rely heavily on the City's answer to their complaint to bolster their argument that "the City never commissioned a study that aims to achieve its governmental purposes while accommodating [our] religious exercise." This contention requires us to unpack Appellants' complaint and the City's answer. In their complaint, Appellants alleged that "the City has refused to commission a design firm tasked with creating a plan that would preserve the walls and the double-crested cormorant's presence and habitat." Using the Appellants' proffered language as articulated in their complaint,[13] the City (1) admitted that it did not commission the studies as characterized by Appellants and (2) denied that any such studies were needed. In its answer, the City

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

declared that:

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

And, while the City admitted that it did not commission the studies as described by the Appellants, it averred that "the City did, however, study viable alternatives to design the Bond Project to achieve the governmental goals of public health and safety with the least adverse impact." When questioned about the City's answer to the complaint, Shanon Miller[14] testified that "the City did look at viable alternatives." She further clarified that "the City received feedback from many stakeholders, and considered all of it. It wasn't just one particular interest or stakeholder interest that was examined." According to Miller, considering the many interests and stakeholders prompted the City to "change[] the project as a result."

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

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

The record does not support Appellants' allegations that the City has refused to try to accommodate their religious exercise. Rather, the record illustrates that many entities were involved in approving the bond project improvements, and at various stages in the public comment and meeting process, stakeholder interests were considered and incorporated in the development plan's design. Moreover, Appellants participated in many private and public meetings with the City's employees related to the Bond Project.[15]

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[15] Namely, Perez spoke and gave a presentation to the Parks and Recreation Department on July 29, 2022. Perez was invited by the Brackenridge Park Conservancy to give a presentation about

Relevant here, the City's Public Works Department operates as the project manager for bond projects and facilitates with the Bond Project owner, Homer Garcia III.[16] In 2022, the Public Works Department applied for a certificate of appropriateness, related to tree removal, with the Office of Historic Preservation ("OHP").[17] The Historic and Design Review Commission ("HDRC"), whose volunteer members are appointed by the mayor and each councilmember to represent their district, is the recommending body responsible for design review cases. HDRC officials dedicate a significant amount of time to their volunteer roles as commissioners, including attending public hearings, site visits, and committee meetings. After reviewing applications, HDRC makes recommendations to OHP, and Miller, in his capacity as historic preservation officer and director of OHP, issues the final decision on the certificates of appropriateness. In February 2022, HDRC held its first hearing concerning the Bond Project. However, HDRC tabled its approval of the Public Works Department's application because it required additional information. Hence, the bond project design team circled back to gather additional

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concerns with the Bond Project at its January 10, 2023 meeting.

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

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

public input at public meetings from March 2022 through summer 2022. A number of City councilmembers, commissions, and departments were involved in the public meetings, including the Public Works Department, the Parks and Recreation Department, the Development Services Department,[18] the City manager's office, the City attorney's office, the Planning Commission,[19] OHP, and HDRC. After conducting the 2022 public meetings, the bond project design team returned to its application for a certificate of appropriateness in 2023, specifically taking into account the public input related to the bond project design, which pertains to the Project Area. Miller testified that the additional information "made it easier for the commissioners and the public to understand the tree removal request and the context of the larger design."

To approve the Bond Project, the Planning Commission first approved the variance that the Public Works Department requested from the City UDC. Next, after receiving the updated Bond Project application in 2023, HDRC convened a hearing on April 19, 2023 and unanimously recommended to approve the application with three stipulations.[20]

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

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

[20] The stipulations were that (1) work would not occur until

Then, on April 27, 2023, the OHP issued the certificate of appropriateness consistent with the HDRC recommendation to move forward with improvements to the Lambert Beach area in the Park. At each level of the application process—the Planning Commission approval, HDRC recommendation, and the OHP issuance of the certificate—public meetings were held to solicit comments in opposition or in favor of the project. Appellants acknowledge that they testified at the March 3, 2023 Texas Historical Commission meeting, the April 19, 2023 HDRC hearing, and the August 3, 2023 City Council hearing.

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

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approvals were complete pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*, (2) any additional tree removals would return to HDRC for approval, consistent with the UDC, and (3) the City would monitor and maintain the heritage and significant trees during and after construction.

The City contends that it cannot accomplish its compelling governmental interest in making the Project Area safe for visitors, preserving historic structures, and making Park amenities accessible and available to the public by any less restrictive means than the bird deterrence program and the removal and relocation of the designated trees in the Project Area. Foremost, the City maintains that it analyzed engineering options and selected the method to repair the retaining walls that it determined would save the greatest number of large trees. From an engineering standpoint, the City contends that the pier-and-spandrel method,[21] submitted by Appellants, did not entail a "markedly reduced amount of excavation required"—a necessary condition in order to save additional trees. Moreover, the City argues that the bird deterrence activities are limited in scope as they do not harm or prevent birds, including the double-crested cormorants, from entering the Park or the Project Area. Since the implementation of the bird deterrence measures, the City avers that double-crested cormorants have been observed in the Park, including in the Project Area.

Appellants contend that "the City [] has an insurmountable narrow-tailoring problem: Its witnesses candidly testified that the City selected the cantilever plan requiring tree removal 'without any

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

consideration' of [their] religious exercise." Citing *Fulton*, they maintain that the City must pursue "viable, less-restrictive alternatives [to repair the retaining walls] that would save more trees" because "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." Appellants also argue that "the City runs into a similar narrow-tailoring problem," in regard to the rookery management program, because there are a "number of [alternative] less-restrictive means that the City easily could have considered." They argue that rookery management measures are not narrowly tailored because the City has not tried to accommodate Appellants' religious exercise in crafting the bird deterrence plan. They pinpoint that the City proffered no testimony addressing narrowly tailored alternatives to the planned bird deterrence measures. We disagree.

The City has demonstrated that it "seriously undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *See McCullen*, 573 U.S. at 494. The City commissioned a team of various professionals, which ultimately decided on the cantilevered design after considering the proposed pier-and-spandrel method and analyzing its potential efficacy to save more trees. At the injunction hearing, the City articulated that, during the course of the bond project design, City personnel, engineers, and arborists, met to examine "the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, [and] that [it was] saving as many trees as possible.

Miller and Bill Pennell[22] both testified that they met with the Tree Assessment Committee[23] in March 2023 in anticipation of the HDRC approval process. Specifically, Miller testified that City personnel, including herself and Garcia, "were asked to really look at the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, that we were saving as many trees as possible." As a result, Jamaal Moreno,[24] Ross Hosea,[25] Shawn Franke,[26] three independent arborists, who were involved in the Tree Assessment Committee, Moises Cruz,[27] Pennell, and Miller examined alternatives. Cruz had recommended the pier-and-spandrel design, and the meetings' attendees discussed the design in great detail—including how it works, how it would be installed, and

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

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

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

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

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

[27] Cruz is a volunteer engineer.

how it differs from alternative designs. Miller testified that the team discussed "with the arborists and with our design engineer that afternoon" whether using the pier-and-spandrel method would allow for additional trees to be saved. Following the meeting, City personnel accompanied Cruz to the Project Area "to talk specifically about specific trees." Still, according to Miller, "[t]he consensus in the meeting with the arborists was that no additional trees would be saved because they would still be impacted by the construction, regardless of the methodology." The City maintains, and presented evidence at the hearing, that in evaluating the alternative engineering methods it sufficiently balanced engineering challenges and safety considerations.

Although Appellants would prefer that the City consider either repairing the retaining walls in place or using a pier-and-spandrel system, the City's tree removal plan is narrowly tailored to achieve the City's compelling governmental interest of making the Project Area safe for visitors to the Park, including Appellants. Moreno testified that the City's informed position is that it cannot save any additional trees in the Project Area under the current engineering design plan, and alternatively, if the City were to choose an alternate design (i.e., the pier-and-spandrel method) no additional trees would be saved compared to what the City is able to achieve as presently designed. The record shows that the City considered, but ultimately rejected, the pier-and-spandrel system in part because it (1) required drilling through the face of the historic walls, in violation of applicable standards promulgated by the Secretary of the Interior, (2) would not allow for the

preservation of significantly more trees, and (3) would cost two to three times as much as the cantilevered wall solution, exceeding the budget for the Bond Project. The record also shows that the City even considered moving the walls further into the River to distance them from the trees, but that solution was rejected because it would have required a floodplain mitigation project.

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

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

*Merced*, 577 F.3d at 595. So, too, Appellants here attempt to enumerate a list of *possibly* less restrictive alternatives to the City's current scheme. Appellants outline several alternatives that the City could have pursued or investigated instead of its presently planned bird deterrence measures such as (1) conducting rookery management measures that exclude cormorants; (2) completing construction within the four-month period between mid- to late-October and February when no migratory birds are present; (3) starting construction within that same four-month period, pausing while migratory birds nest, and resuming when the migratory birds leave;

(4) completing construction within the six-month period between mid- to late-October and March or April before the cormorants begin to arrive;[28] or (5) conducting rookery management measures and completing the construction within the eight-month period between mid- to late-October and June, when cormorants may still arrive and nest. However, the proposed means must not only be conceivable but must be (1) in the context of the compelling governmental interest and (2) be the least restrictive of the proffered choices to achieve that governmental interest. *See* TEX. CIV. PRAC. & REM. CODE § 110.003(a)–(b).

Here, the City successfully rebuts each of Appellants' proposed alternatives. *See Merced*, 577 F.3d at 595. The record indicates that no other means exists to deploy deterrent efforts aimed only at egrets and herons but not cormorants. As discussed, Alderson provided technical guidance to the City related to the egret and heron rookery located at the Park and offered recommendations on how to deter birds from "an undesired location and encourage them to go to an area where they would be more desirable." She testified that, in her experience as an urban wildlife biologist and working with urban rookeries, there is no way (1) to sequence deterrence efforts to deter egrets and herons from nesting in a site but not deter double-crested cormorants or (2) to utilize noise deterrents that would deter egrets and herons but not cormorants. Essentially based on her

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

experience and expertise, she testified that she is not aware of any kind of deterrent measure that would work on egrets and herons but not disturb cormorants because "the deterrent techniques are going to impact other species than the ones that you're specifically targeting." She testified that the difficulty lies in these species being colonial nesting birds.[29]

In evaluating the relative restrictiveness of the bird deterrence plans, the record shows that the City's activities are the least restrictive means to advance the compelling governmental interests presented. Limited by the predictability of migration and habitat patterns of colonial nesting birds, start and stoppage periods of construction at four-month, six-month, or eight-month intervals, as suggested by Appellants, would not achieve the compelling goals of adhering to the Migratory Bird Treaty Act. Moreover, they certainly would not achieve the goal of mitigating bird excrement. Alderson maintained that she "bas[ed] [her] technical guidance [related to bird deterrence] on the biology behind everything." Since the deterrent methods are targeted at nesting and not a species, at times birds of any species can—despite the deterrent efforts and unbeknownst to the program managers—enter the deterrence area and nest. Once any species nests, the program administrators must stop work in that area and notify the respective regulatory agencies. Once deterrent efforts have been halted, this invites all different migratory birds to enter and nest in the

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

area. As such, the district court posited, and we agree that the record shows that there could not be an eight-month window of opportunity to accomplish the bond project improvements. Even more, given this credible testimony regarding the different species' migration patterns and coverage of the Migratory Bird Treaty Act, Appellants' arguments that the bond project improvements could have been completed during various periods when migratory birds are not present do not sufficiently refute that the City's bird deterrence satisfies the least restrictive means to advance its compelling governmental interests.

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

Likewise, the record shows that the City applies deterrence efforts only to the extent required to

achieve the goal of relocating the targeted species—and no further. As the City avers, "[the] bird deterrence policy does not prohibit migratory birds from visiting, roosting, or foraging in the Project Area," and the deterrent activities are deployed only within the two-acre Project Area and only to persuade the birds to nest elsewhere.

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

The record establishes that the studies requested by Appellants were not needed to ascertain the least restrictive means. Moreover, the record shows that

the City considered viable alternatives and "different methods that other jurisdictions have found effective" before ultimately deciding on the "less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494. Consequently, the City's tree removal and bird deterrence plans—which deter only to the extent required to dissuade the targeted species from nesting and remove minimal trees necessary to excavate—are the least restrictive means.

As the dissent notes, the voluminous record in this case also contains a few statements from City officials asserting that (1) the City could have sought an exemption from federal guidelines as to the retaining walls; (2) the City's engineering design "was chosen without any consideration of [Appellants'] free exercise request" for financial reasons; and (3) "the City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [Appellants'] religious exercise." But those select statements pale in comparison to the wealth of evidence outlined above demonstrating that the City considered and ultimately pursued the least burdensome method of achieving its development plans. Indeed, each of the statements highlighted in the dissent were considered by the district court in its four-day preliminary injunction hearing. The district court ultimately concluded, as we do here, that the weight of the evidence supports a holding that the City's development plans are the least restrictive means of furthering its compelling government interests. Further, in this preliminary posture, our review of the facts ascertained below is for clear error. *Scott*, 28 F.4th at 671. "Where there are two permissible views of the evidence, the factfinder's

choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (citation omitted). We cannot say, on the record before us, that the district court clearly erred.

In short, even if the City's tree removal plan and rookery management plans substantially burden Appellants' religion, they appear to be the least restrictive means to advance the City's compelling governmental interests. Thus, Appellants failed to establish a likelihood of success on their argument that the City's plans violate TRFRA.

*ii. First Amendment Free Exercise*

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

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise Clause has been applied to the States

through the Fourteenth Amendment. *Lukumi*, 508 U.S. at 531. Although the freedom to believe is absolute, the freedom to act on one's religious beliefs "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). Under strict scrutiny review, a challenged government action will be deemed invalid unless it is (1) justified by a compelling governmental interest[30] and (2) is narrowly tailored to advance that interest. *Lukumi*, 508 U.S. at 533. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest[.]" *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam). The government must also demonstrate that it "seriously undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494.

As discussed, the City has provided ample support

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[30] In this context, when considering whether the City has stated a compelling interest, we do not assess whether its development plan generally furthers a compelling governmental interest in safety or public health. Instead, the City must show that "the compelling[-]interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (quoting *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682, 726 (2014)). This requires "scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants" and "'look [ing] to the marginal interest in enforcing' the challenged government action in that particular context." *Id.* (quoting *Hobby Lobby*, 573 U.S. at 726–27). Applied in this case, we consider compelling the City's interests in rookery management and tree removal over the specific objections of Appellants.

demonstrating that it has compelling interests for its adoption of the tree-removal and bird deterrence plans and that it has pursued the least burdensome method of achieving its goals. Thus, Appellants have failed to establish a likelihood of success on the merits of their Free Exercise claim.

*iii. Texas freedom-to-worship provision*

Appellants also argue that the City's plan violates their freedom of worship under the Texas Constitution.[31] But because Appellants incorporate by reference their arguments on the Free Exercise and TRFRA claims, they similarly fail to establish a likelihood of success on the merits of their claims under Article I, § 6 of the Texas Constitution.

*iv. Texas religious-service-protections provision*

Appellants initially asserted that the City's development plan violates the religious-service-protections provision of the Texas Constitution. Under that provision the state of Texas:

> may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship . . . by a religious organization

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

> established to support and serve the propagation of a sincerely held religious belief.

TEX. CONST. art. I, § 6-a. We certified a question regarding the scope of that provision to the Supreme Court of Texas. *Perez*, 115 F.4th at 428, *certified question accepted* (Sept. 6, 2024), *certified question answered*, No. 24-0714, 2025 WL 1675639 (Tex. June 13, 2025). The Supreme Court of Texas accepted and answered that question. *Id.* In doing so, it held that:

> When the Texas Religious Services Clause applies, its force is absolute and categorical, meaning it forbids governmental prohibitions and limitations on religious services regardless of the government's interest in that limitation or how tailored the limitation is to that interest, but the scope of the clause's applicability is not unlimited, and it does not extend to governmental actions for the preservation and management of public lands.

*Perez*, No. 24-0714, 2025 WL 1675639 at *13. In other words, the Supreme Court of Texas made it clear that the religious-service-protections provision of the Texas Constitution does not preclude the City's actions in this case. Because they challenge the City's preservation and management of its public lands, Appellants cannot demonstrate a likeliness of success on the merits of their claim under the religious-service-protections provision of the Texas Constitution. *See id.*

* * *

Accordingly, we conclude that the district court did not abuse its discretion in determining that

Appellants failed to show a likelihood of success on the merits on any of their four claims—the TRFRA claim, the First Amendment Free Exercise claim, the claim under the freedom-to-worship provision of the Texas Constitution, or the claim under the religious-service-protections provision of the Texas Constitution. *See Scott*, 28 F.4th at 671. Thus, no additional analysis is required. "[F]ailure to show a likelihood of success alone is sufficient to justify a denial." C*AE Integrated, L.L.C. v. Moov Techs., Inc.*, 44 F.4th 257, 264 n.22 (5th Cir. 2022).

*C. Injunction Pending Appeal*

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

We begin and end with the first factor: likelihood of success on the merits. Appellants claim that they are likely to succeed on the merits of their appeal,

arguing that the City's actions—specifically its tree-removal plan and rookery management plan—fail strict scrutiny because these plans (1) lack any compelling governmental interest and (2) are not narrowly tailored. Specifically, Appellants argue that the City seeks to permanently prevent them from performing religious services by destroying the area's spiritual ecology and has never attempted to accommodate their religious exercise.

We have considered Appellants' arguments based on the parties' filings, the district court's opinion, and the relevant caselaw, and conclude that Appellants have failed to establish a likelihood of success on the merits of their claims that the City violated their rights under the federal Free Exercise Clause, the Texas Constitution, or TRFRA. The record evidence establishes that the City has compelling interests. And, in evaluating the relative restrictiveness of the tree-removal and rookery management plans, the record indicates that the City's activities are the least restrictive means to advance the compelling governmental interests presented. The evidence supports that the City's design of the project was a thorough, comprehensive, and complex process involving experts in many disciplines, including arborists, civil engineers, architects, landscape architects, wildlife biologists, and scientists. The City (1) solicited the opinions of experts and others expressing concerns about the Park's trees and wildlife and (2) adjusted its plans regarding the trees so that the number of trees now scheduled for removal has been reduced from 70 to 48, with another 20 trees scheduled for relocation. The City appointed a committee of highly qualified independent arborists

to evaluate which trees in the Project Area needed to be removed because of construction restrictions imposed by the bond project construction plans. Moreover, the City's bird deterrence measures are aimed at nesting, not preventing their presence. The migratory birds are still allowed to forage, feed, and rest in the Project Area. Likewise, Appellants' bird deterrence alternatives are not as effective as the current design. The City and its bond project design team theorize that the project will take eight months. To the contrary, Appellants' suggestions—offering a four-month alternative, a six-month alternative, or the prospect of deterring one type of bird and not another—are not the least restrictive means as to the City's compelling interests.

Based on our review, we conclude that Appellants have not demonstrated that they are likely to prevail on their claim that the district court abused its discretion in only partially granting their motion for a preliminary injunction.[32] Because we have concluded

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

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

## IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment. Correspondingly, the appeal as to Appellants' access to the Project Area within the Park is DISMISSED AS MOOT. Because Appellants have failed to show a likelihood of success on the merits, we DENY their Emergency Motion for Injunction Pending Appeal.

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reconfigure the construction fencing to grant public access to the entire area.

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

I dissent for the reasons I stated before. *See Perez v. City of San Antonio*, 150 F.4th 430, 456-63 (5th Cir. 2025) (Higginson, J., concurring in part and dissenting in part). I am grateful that the majority has once again[1] collegially agreed to withdraw a decision that I think is mistaken, this time to avoid misapplication of *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010). Simple subtraction of legal authority, however, does not alter the substantial burden on these Church members' religious expression. The majority's reduced opinion that this burden is trivial or mere perception now rests on ipse dixit, not analysis rooted in law.

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[1] *See Perez v. City of San Antonio*, 115 F.4th 422 (5th Cir. 2024).

**United States Court of Appeals**
**for the Fifth Circuit**

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No. 23-50746

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GARY PEREZ; MATILDE TORRES,

*Plaintiffs—Appellants*,

*versus*

CITY OF SAN ANTONIO,

*Defendant—Appellee*.

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Appeal from the United States District Court for the
Western District of Texas
USDC No. 5:23-CV-977
February 27, 2026

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ON PETITION FOR REHEARING EN BANC

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

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. The petition

for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P.40 and 5TH CIR. R.40).

In the en banc poll, six judges voted in favor of rehearing, CHIEF JUDGE ELROD, and JUDGES SMITH, HIGGINSON, WILLETT, HO, and OLDHAM, and eleven judges voted against rehearing, JUDGES JONES, STEWART, RICHMAN, SOUTHWICK, HAYNES, GRAVES, DUNCAN, ENGELHARDT, WILSON, DOUGLAS, and RAMIREZ.

JAMES C. HO, *Circuit Judge*, dissenting from the denial of rehearing en banc:

I am in profound agreement with my dissenting colleagues that we must "apply[] the same standard to people of all faiths," *post*, at _—and that among those is the principle that "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Post*, at _ (quoting *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984) (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981)). That's why I sought rehearing en banc in *Siders v. City of Brandon*, 130 F.4th 188 (5th Cir. 2025). And it's why I stand with my dissenting colleagues in voting for rehearing en banc here as well.

ANDREW S. OLDHAM, *Circuit Judge*, joined by ELROD, *Chief Judge*, and SMITH, HIGGINSON, WILLETT, and HO, *Circuit Judges*, dissenting from denial of rehearing en banc:

The City of San Antonio plans to destroy a sacred Native American religious site. The burdens on plaintiffs' religious freedoms are undeniable. But a panel of our court dismissed them. In my view, this easily meets the standard for en banc rehearing. And I respectfully dissent from the majority's contrary view.

I

Gary Perez and Matilde Torres are members of the Lipan-Apache Native American Church. "For centuries, [their] ancestors have gathered at a specific bend along the [San Antonio] River to meditate, worship, and pray." *Perez v. City of San Antonio*, 150 F.4th 430, 456 (5th Cir. 2025) (Higginson, J., concurring in part and dissenting in part), *opinion withdrawn and superseded on reh'g,* 163 F.4th 110 (5th Cir. 2025). Specifically, church members understand "the trees and cormorants that occupy a twenty-foot by thirty-foot area" near the River to be "the 'axis mundi,'" a bridge between this world and the after-life. *Id.* at 457. These elements form a cohesive "spiritual ecology;" the trees' roots "go into the underworld, underneath the earth," before "ris[ing] all the way up into the heavens," while the cormorants signify "a spirit . . . [that] scattered life-giving water across the San Antonio River Valley" in the church's creation story. *Ibid.* As in many faiths, the trees and cormorants' religious significance to the Native American Church turns on a tight relationship between the sign and the

thing signified—"ceremonies cannot be properly administered without specific trees present and cormorants nesting." *Id.* at 435.

The City of San Antonio owns the land on which this sacred site rests, called Brackenridge Park. In 2022, the City announced "reformation efforts" in the Park. Among other things, the City plans to uproot most of the trees in the sacred area and deploy "pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, explosives, and drones" to keep the cormorants away. *Perez*, 163 F.4th at 116. The City maintains that this campaign "[will] not harm the birds." *Ibid.* But the City concedes that its heavy artillery is intended to and likely will prevent cormorants from nesting in the Sacred Area.

Recognizing a grave threat to their religious practices, Perez and Torres sued under, *inter alia*, the Texas Religious Freedom Restoration Act ("TRFRA"). They sought an injunction preventing the City from moving forward with its destructive campaign. The district court denied the injunction, and plaintiffs appealed.

After a tortured procedural history, including a certified question to the Texas Supreme Court, a panel of this court affirmed. *See Perez*, 163 F.4th at 114. As to TRFRA, the panel held that the City's campaign of tree removal, pyrotechnics, lasers, and explosives would not substantially burden the plaintiffs' religious practice and, even if it did, the City's deforestation and artillery were the least restrictive means of furthering its compelling need to repair the park.

II

That's wrong on both counts. But the substantial-burden point is the most egregious. First, the City's plan substantially burdens religious conduct under any reading of TRFRA. Second, the panel majority's faulty substantial burden analysis poses a particularly acute risk to minority faiths. Third, the better approach is to apply the same standards to all people.

*First*, the existence of a substantial burden. Under TRFRA, a burden is "substantial if it curtails religious conduct and impacts religious expression to a 'significant' and 'real' degree." *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 265 (5th Cir. 2010) (citing *Barr v. City of Sinton*, 295 S.W.3d 287, 305 (Tex. 2009)). And burden is considered from "the person's perspective, not from the government's." *Id.* at 264. This is not a high bar for religious observers. The government can still prevail if it can show that it's using the least-restrictive means to pursue a compelling interest. But the law requires the government to bear that burden; it requires relatively little from would-be worshipers.

Nobody disputes that plaintiffs' religious practice at the Sacred Area "relies on the presence of trees [and] birds," even down to "specific trees." *Perez*, 163 F.4th at 115 (majority opinion). So nobody should dispute that destroying most of the trees, relocating others, and targeting the birds with a campaign of pyrotechnics and explosives objectively burdens plaintiffs' worship. To put it quite simply, plaintiffs will be unable to practice their faith if the City's plans go forward. If that is not a substantial burden, I do not know what is.

*Second*, the panel majority's contrary analysis is wanting. In the few sentences the majority devoted to substantial burden, the panel noted that plaintiffs "continue[] to have virtually unlimited access to the park," that "no cormorants . . . inhabit [the park] for extended periods of time each year," and that "cormorants are not specifically targeted" and may "nest[] nearby or elsewhere in the 343-acre Park." *Perez*, 163 F.4th at 122. Respectfully, these are non sequiturs. "[V]irtually unlimited access to the park" is useless if the park's Sacred Area is destroyed. *See Perez*, 150 F.4th at 460 (Higginson, J., concurring in part and dissenting in part) (calling this logic "mistaken"). That cormorants do not nest in the park for "extended periods" is interesting, but the City intends to *permanently* drive off the birds with pyrotechnics and lasers. And plaintiffs' ability to go "elsewhere in the 343-acre Park" misses the point entirely: their practice relies on the unique spiritual ecology of this riverbend. *Id.* at 135; *see Perez*, 150 F.4th at 461 (HIGGINSON, J., concurring in part and dissenting in part) ("To the extent the majority suggests that Appellants can obtain spiritual fulfilment by exercising their religious beliefs in a manner contrary to their testimony, such reasoning is forbidden."). One searches this analysis in vain for a "granular focus on the specific facts, practices, and interests" at stake. *Paxton v. Annunciation House, Inc.*, 719 S.W.3d 555, 584 (Tex. 2025).

But there's more at play here than just misreading TRFRA. Does anyone imagine, for instance, that a court would deem insubstantial a ban on accessing the Lord's Table because congregants can still sit in the pews? Could the government ban baptisms as long

as Christians have "virtually unlimited access" to water? Or could the State ban Lord's Day services because the church is empty six days a week? These are judgment calls we simply do not make. *See Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so."). And if the government were to padlock a church on the theory that Christians could worship elsewhere, we would not hesitate to hold it unlawful: "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984).

Yet in singling out plaintiffs' beliefs for dismissal, the panel joins an unfortunate line of cases treating "the distinctive qualities of Indigenous religious practices regarding sacred sites" as a reason to deny relief. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1298–99 (2021); *see also* Jessica M. Wiles, *Have American Indians Been Written Out of the Religious Freedom Restoration Act*, 71 MONT. L. REV. 471, 474 (2010). The encouragement to simply worship "elsewhere" reflects this unfortunate tendency.

As Justice Gorsuch recently noted in *Apache Stronghold v. United States*, 605 U.S. ___, 145 S. Ct. 1480, 1488 (2025), many American Indians "live far from Washington, D.C., and their history and religious practices may be unfamiliar to many. But that should make no difference." (GORSUCH, J., dissenting from denial of certiorari). Here, treating all religions alike requires recognizing the Sacred Area's

value to plaintiffs and the burden posed by the City's destructive plans, just as courts recognize the value of church attendance and the burden imposed by forbidding such attendance. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717–20 (2021) (statement of GORSUCH, J.) (recognizing a "total ban on religious singing" and church attendance as clearly unconstitutional).

*Third*, respecting sacred sites—and recognizing the substantial burdens that attend their destruction—would not privilege Native American religions. Rather, it treats them equally. The law already recognizes that other believers have the right "to use their sacred sites in a manner consistent with their theological requirements, free from government interference." Barclay & Steele, *supra*, at 1346. An obvious example is *McCurry*, which held barring the doors of a Christian church obviously and substantially burdens religion. *See id.* at 1327–28 (discussing the case). And courts already prohibit objective governmental interference with religious volunteerism in the context of non-Indigenous faiths. *Id.* at 1346. For example, imposing mandatory LGBTQ+ instruction can substantially burden families with contrary religious beliefs. *Mahmoud v. Taylor*, 606 U.S. 522 (2025). The threat of a small criminal fine is a substantial burden on Amish families who do not want to send their kids to public school. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *see also Mahmoud*, 606 U.S. at 557–59 (reaffirming *Yoder*). And the prohibition on bringing a kirpan to a government workplace substantially burdens a Sikh IRS agent. *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013).

It is no answer to say the substantial-burden analysis should be different when the government owns the place where individuals worship, as it owns Brackenridge Park. Courts routinely recognize substantial burdens on religious practice in prisons, the military, and zoning decisions—even though the government has plenary power and coercive control over those areas. *See* Barclay & Steele, *supra*, at 1333–43 (collecting cases). The substantial burdens recognized in those areas include denying scented oils and sweat lodges in prisons, *id.* at 1334–35, denying Sikh turbans in the military, *id.* at 1338, and denying zoning approval for church expansions, *id.* at 1338–39.

Why apply a different, less-protective standard to people of Indigenous faiths? And if we're applying the same standard to people of all faiths, can it seriously be said that bulldozing a sacred site and artillery-blasting the cormorants in a church's creation story is somehow less burdensome than the five-dollar fine in *Yoder* or the workplace kirpan ban in *Tagore* or the denial of scented oils in prisons?

I respectfully dissent.

**United States Court of Appeals**

**for the Fifth Circuit**

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No. 23-50746

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GARY PEREZ; MATILDE TORRES,

*Plaintiffs—Appellants*,

*versus*

CITY OF SAN ANTONIO,

*Defendant—Appellee*.

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Appeal from the United States District Court for the
Western District of Texas
USDC No. 5:23-CV-977
August 13, 2025

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

CARL E. STEWART, *Circuit Judge*:

This case returns to us after the Supreme Court of Texas accepted our certified question regarding the scope of the religious-service-protections provision of the Texas Constitution. In its opinion answering our question, it concluded that the provision does not

extend to the government's preservation and management of publicly owned lands. With the benefit of that guidance, and upon further consideration of the issues in this appeal, we once again AFFIRM the judgment of the district court and DENY Appellants' Emergency Motion for Injunction Pending Appeal.

## I. Factual and Procedural History[1]

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

### *A. The Lipan-Apache Native American Church*

Appellants are members of the Lipan-Apache

[1] Although we provided much of the relevant factual and procedural background in our order certifying this question to the Supreme Court of Texas, *see Perez v. City of San Antonio*, 115 F.4th 422 (5th Cir. 2024), we do so again here to the extent necessary for ease of comprehension.

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

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

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

The Park is a public park in the City, consisting of approximately 343 acres. The Park contains various features and attractions including paths, sports fields, the San Antonio Zoo, the Japanese Tea Garden, the Sunken Garden Theater, and the Witte Natural History Museum. The Park has also been inhabited and utilized by indigenous peoples for thousands of years. Appellants and other members of the Native American Church believe that a specific area within the Lambert Beach section of the Park is a sacred location where they must gather to worship and conduct religious ceremonies. This area is also the site of the City's planned reformation efforts, which include repairing retaining walls along the San Antonio River. In this litigation, Appellants refer to this area as the "Sacred Area" and the City refers to it as the "Project Area." Appellants define the Sacred Area as the twenty-foot by thirty-foot area between two cypress trees on the southern riverbank of the Lambert Beach area. Within the Project Area, the City developed plans to repair the retaining walls along the San Antonio River, repair the historic Pump House, and construct a handicap-accessible ramp.

In May 2016, San Antonio citizens voted in favor of a $850 million bond package for public improvements. Proposition 3 of the bond package—dedicated to improvements related to parks, recreation, and open spaces—included $7,750,000 for improvements to the Park. The improvements planned for the Park, which are the subject of this suit, are collectively referred to as the "Bond Project." To design the Bond Project and

determine the repair methodology to be utilized, the City commissioned the bond project design team, a team of various professionals, including architects, engineers, and historic preservation officials. The bond project design team recommended utilizing a cantilevered wall system to repair the retaining walls. To arrive at this recommendation, the team considered multiple factors including, but not limited to, tree density and location, topography, existing retaining wall stability and height, equipment accessibility, construction feasibility, legal compliance, and regulatory compliance. The City also determined that certain trees in the Project Area would (1) interfere with the construction, (2) be irreparably damaged by the construction, or (3) damage the repaired retaining walls and historical structures in the future. Thus, the City developed plans to (1) completely remove 46–48 trees, (2) relocate 20–21 trees to other areas of the Park, (3) preserve about 16 trees in place, and (4) plant at least 22 new trees in the Project Area. The City held public meetings to receive community input regarding repairs of the original walls. Appellants, and other citizens, expressed concern with the removal and relocation of trees in the Project Area and a desire for the City to consider alternative plans that would preserve more trees in place.

Additionally, the City's plan for the Bond Project includes bird deterrent techniques[2] intended to dissuade migratory birds from nesting in the Lambert Beach area. Pursuant to the Migratory Bird Treaty Act,[3] the removal or relocation of trees planned for the Project Area cannot proceed if migratory birds, including cormorants, are nesting in the area. The City contracted with the U.S. Department of Agriculture ("USDA") and coordinated with the Texas Parks and Wildlife Department ("TPWD") and the U.S. Fish and Wildlife Service ("UFWS") to modify bird habitats and deter birds from nesting in highly urbanized areas of the Park, including the Project Area.

To complete the Bond Project, the City must comply with local, state, and federal regulations. Locally, with the San Antonio Development Services Department, the City applied for and received a variance from a City

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

[3] 16 U.S.C. § 703 *et seq*.

Unified Development Code ("UDC") provision that requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-year floodplain. Moreover, state and federal regulations govern the preservation of the Lambert Beach retaining walls. As historic structures, the retaining walls contribute to the Park's designation as a City Historic Landmark and as a State Antiquities Landmark and its placement on the National Register of Historic Places. Because of this historic designation, construction is regulated by the Texas Historical Commission and the United States Army Corps of Engineers ("USACE"). The City must submit a final treatment plan and obtain a permit from USACE before repairing the retaining walls or removing or relocating trees within the Lambert Beach area. Once USACE approves the final treatment plan, a thirty-day comment period will begin to solicit feedback from stakeholders, including local indigenous tribes. Lastly, the Secretary of the Interior's Design guidelines, the Americans with Disabilities Act, and Occupational Safety and Health Administration regulations are all applicable to the bond project improvements.

From roughly February 2023 to November 2023, the City temporarily prevented Appellants, Native American Church members, and peyote pilgrims from entering the Lambert Beach area. Appellants filed the instant suit on August 9, 2023, alleging that the City's bird deterrence activities, temporary closure of the Project Area, and proposed removal or relocation of trees in the Project Area place a substantial burden on their religious beliefs in violation of the First Amendment of the U.S. Constitution, the Texas

Constitution, and TRFRA. They sought a preliminary injunction, which itemized the relief requested as (1) access to the Sacred Area for religious services, (2) preservation of the spiritual ecology of the Sacred Area by minimizing tree removal, and (3) preservation of the spiritual ecology of the Sacred Area by allowing cormorants to nest. As to the preservation of the spiritual ecology, Appellants requested that the district court order the City to "reevaluate the Bond Project to develop alternative plans that will accommodate [their] religious beliefs."

### *C. The District Court's Decision*

After holding a four-day preliminary injunction hearing, the district court adopted the parties' stipulated facts[4] and found that the City's plans did not burden Appellants' free exercise of religion. The district court concluded that Appellants held a sincere religious belief and had met their burden to prove the four elements for injunctive relief as to "access for religious services in the Sacred Area." It thus granted access for religious services involving fifteen to twenty people for approximately an hour on specified astronomical dates coinciding with Appellants' spiritual beliefs.[5] The district court also ordered the City to immediately remove the broken limb that the City maintained "pose[d] a risk of injury or death" in the

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

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

Project Area. As to their request for "access for individual worship," the district court held that Appellants had waived this request but also noted that the balance of equities supported the conclusion that unplanned, unsupervised individual access was impractical. Following expert testimony, the district court found that the bird deterrent operation was in the realm of public health and safety. It also determined that the City had met its burden of proving "a compelling government interest for public health and safety, and the [balance of] equities favor the City on" Appellants' requested relief regarding minimizing tree removal and allowing cormorants to nest.

### *D. Appellants' Emergency Motion for Injunction Pending Appeal*

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

We granted Appellants' motion to expedite the appeal and held oral argument in December 2023. We

also issued a temporary administrative stay and ordered that Appellants' opposed motion for injunction pending appeal be carried with the case on October 27, 2023. On February 21, 2024 and January 30, 2025, at the City's request, we lifted the temporary administrative stay in part to allow the rookery bird deterrent management activities to proceed for the immediately proceeding months until migratory cormorants arrived. On June 24, 2025, after the Supreme Court of Texas answered our certified question, we granted the City's motion to lift the temporary administrative stay.

## II. Standard of Review

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

## III. Discussion

Appellants have raised four claims for relief—(1) a TRFRA claim, (2) a First Amendment Free Exercise claim, (3) a claim under the freedom-to-worship provision of the Texas Constitution, and (4) a claim

under the religious-service-protections provision of the Texas Constitution. Appellants argue that they are likely to succeed on the merits of each claim because the City previously barred them from worshipping in the Sacred Area, seeks to permanently prevent them from performing religious services by destroying the area's spiritual ecology, and has never attempted to accommodate their religious exercise. Notably, Appellants argue that the City cannot show that its tree-removal plan, rookery management measures, and fencing further a compelling governmental interest and are the least restrictive means of furthering that interest.

*A. Access*

The City contends that Appellants' request for additional injunctive relief to restore their access to the Sacred Area for routine personal worship is moot. We agree. At the start of this suit, fencing prevented Appellants from physically accessing the Sacred Area for religious exercise. But, immediately following the injunction hearing, the district court held that Appellants were entitled to access the Sacred Area for ceremonies on two specific astronomical dates, November 17 and December 21, 2023, as prescribed by the hearing.[6] To comply with the court order, the City was also ordered (1) to immediately remove the hazardous broken limb posing risks to visitors of the Sacred Area and (2) to ensure that the fencing was unlocked and accessible for Appellants on the designated dates

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

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

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

Still, Appellants urge this court to apply the voluntary cessation exception to mootness. The Supreme Court has held that a party's voluntary cessation of an unlawful action will not moot an opponent's challenge to that practice. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he

left off, repeating this cycle until he achieves all his unlawful ends." (internal citation omitted)). Regardless, an exception to the mootness doctrine declares that "[v]oluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203).

While this appeal was pending, the City removed the dangerous limb that previously made the Sacred Area inaccessible. Moreover, the City affirmed that it undertook several additional efforts "going beyond what the district court ordered." The City conceded that removing the limb allowed it to reconfigure the construction fencing and it subsequently granted public access to the entire area. Likewise, the City granted Appellants access to conduct a religious ceremony at the Sacred Area from midnight to 4 a.m. on November 18, 2023, during hours when the Park is normally closed. Furthermore, on November 21, 2023, the City moved to dismiss its cross-appeal in this action, deciding to no longer pursue the issue of access to the Sacred Area. Based on these subsequent developments, "[i]t is therefore clear that [the City officials] harbor no animosity toward [Appellants]." *See Preiser v. Newkirk*, 422 U.S. 395, 402 (1975).

Appellants now have "no reasonable expectation that the wrong challenged by [them] would be repeated." *See id*. Thus, the voluntary cessation exception does not apply. Hence, Appellants' access claims are moot.

### *B. Tree-removal Plan and Rookery Management Measures*

#### *i. TRFRA*

Turning to Appellants' claims pertaining to the City's tree-removal plan and rookery management measures, "we begin by analyzing [their] statutory claim under TRFRA, which, if successful, obviates the need to discuss the constitutional questions." *Merced v. Kasson*, 577 F.3d 578, 586 (5th Cir. 2009); *see, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."). Appellants allege that the City prohibits and limits their religious exercise by irreparably destroying the very aspects of the Sacred Area that make it a living place of worship. For purposes of the Texas Constitution, the Supreme Court of Texas has not adopted *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) and its declaration that generally applicable and facially neutral laws are not subject to strict scrutiny with regard to free exercise claims. *See Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("*Smith*'s construction of the Free Exercise Clause does not preclude a state from requiring strict scrutiny of infringements on religious freedom, either by statute or under the state constitution, and many

states have done just that, Texas among them."). Thus, the challenged government action is subject to strict scrutiny.

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

*a. Substantial Burden*

Appellants did not sufficiently establish a substantial burden. Appellants emphasize that if the City were permitted to proceed with its tree removal and rookery management procedures, the measures would irreversibly destroy the Sacred Area and their ability to practice their religion there.[7] To bolster

[7] Notably, these proffered arguments are Appellants' pleas as to the irreparable harm factor of the preliminary injunction inquiry. Because these assertions are as close to an argument in

these contentions, they cite caselaw analyzing governmental actions that involve complete bans or prohibition of religious exercise. As is the case here, "[w]hen a restriction is not completely prohibitive, Texas law still considers it substantial if 'alternatives for the religious exercise are severely restricted.'" *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 265 (5th Cir. 2010) (quoting *Barr*, 295 S.W.3d at 305). This court has held that according to *Barr*'s prescriptions, "that means a burden imposing a less-than-complete ban is nonetheless substantial if it curtails religious conduct and impacts religious expression to a 'significant' and 'real' degree." *Needville*, 611 F.3d at 265.

The City contends that "[w]hen analyzing whether a governmental body's activities on its *own land* impose a substantial burden on a plaintiff's religious beliefs, courts agree that the activity does not impose a substantial burden where it affects only the subjective religious experience of the plaintiff." The City argues "that a government's use of its own land does not substantially burden religious beliefs if the conduct is not coercive and impacts the subjective religious experience only." The City is correct to pinpoint that the proposed construction is indeed occurring on its own land. Still, Appellants are not merely alleging subjective religious experiences here. Moreover, because we are analyzing Appellants' claims under TRFRA, not the Religious Freedom Restoration Act ("RFRA"), the correct standard for evaluating substantial burden is not "coercion" but whether the

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support of the substantial burden element of the strict scrutiny inquiry for which the briefing offers, we consider them here.

burden is "real" and "significant." *Compare Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) ("Where, as here, there is no showing the government has coerced the Appellants to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Appellants' religious beliefs, there is no 'substantial burden' on the exercise of their religion.") and *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."), *with Barr*, 295 S.W.3d at 301 ("Thus defined, 'substantial' has two basic components: real vs. merely perceived, and significant vs. trivial.").

In analyzing Appellants' contention that the destruction of the tree canopies, where cormorants nest, and the driving away of the cormorants themselves will burden their religions, we consider whether they have met their burden of establishing a likelihood of success on their argument that the presupposed burden is real and significant. Under TRFRA, a burden is substantial if it is "real vs. merely perceived, and significant vs. trivial"—two limitations that "leave a broad range of things covered." *Barr*, 295 S.W.3d at 301. The focus of the inquiry is on "the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression," as "measured . . . from the person's perspective, not from the government's." *Id.* This inquiry is "case-by-case" and "fact-specific" and must consider "individual circumstances." *Merced*, 577 F.3d at 588; *Barr*, 295 S.W.3d at 302, 308. "Federal case law interpreting

RFRA and [the Religious Land Use And Institutionalized Persons Act ("RLUIPA")] is relevant." *Merced*, 577 F.3d at 588 (citing *Barr*, 295 S.W.3d at 296).

While Appellants argue that the City's plan would destroy or alter natural resources of religious importance, they plainly failed to establish a likelihood of success on their position that the burden is real and significant under this circuit's case law. Indeed, Appellants did not even address this issue in their principal brief because they incorrectly assumed that the City would agree that its plans substantially burden their religious exercise.[8]

Moreover, under our precedent, it is unclear that the burden on Appellants is significant. In *Needville*, we determined that the challenged exemptions placed a significant burden on the plaintiff's religious conduct because the burden was both indirect and direct. *Needville*, 611 F.3d at 265. As we explained, "because the District's exemptions directly regulate a part of [the plaintiff's] body and not just a personal effect . . . the burden on [his] religious expression is arguably even more intrusive." *Id.* at 266. While we do not suggest that directness is dispositive, we note that here, the City's development plan only indirectly impacts Appellants' religious conduct and expression. Appellants continue to have virtually unlimited

[8] Appellants assumed that the City "does not dispute that the current fencing, the tree-removal plan, and the anti-nesting measures all substantially burden [Appellants]' religious exercise." In retort, the City explained that it "absolutely disputes that the project substantially burdens [Appellants]' free exercise of religion."

access to the Park for religious and cultural purposes. The record shows that, regardless of the rookery management program, no cormorants, due to their migration patterns, inhabit the area for extended periods of time each year.[9] Further, cormorants are not specifically targeted nor dissuaded from nesting nearby or elsewhere in the 343-acre Park.

Mindful of the preliminary posture of this expedited appeal, we conclude that though the City's development plan may affect the nesting of cormorants within two acres of the 343-acre Park, Appellants did not meet their burden to show that they are likely to succeed on their claim that the plan constitutes a substantial burden of their religious exercise. Even if they did, that would not change the outcome of this appeal because the City's plan advances a compelling interest through the least restrictive means—and thus survives strict scrutiny. *See Merced*, 577 F.3d at 588 (citing *Barr*, 295 S.W.3d at 296).

*b. Compelling Interest*

The City argues that it has a compelling governmental interest in repairing the crumbling retaining walls on the northern bank of the riverbend, and that tree removal and relocation is an integral part of that plan. It further contends that the bird deterrence activities are necessary to protect the health and safety of citizens who visit the Park. The City avers that the purpose of the rookery management program is twofold: (1) to mitigate the health and safety

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

hazards arising from the bird guano[10] that dense bird colonies produce and (2) to ensure no migratory birds are nesting in trees within the Project Area such that work can begin under the Migratory Bird Treaty Act and the bond project improvements can proceed without delay.

In response to the City's public safety arguments, Appellants maintain that "the undisputed evidence is that the retaining walls in the Sacred Area [on the southern bank] do not need repair." Further, they aver that the City must prove that its "tree removal design is necessary in the context of these Appellants' religious practice" pursuant to TRFRA. *Barr*, 295 S.W.3d at 307. Likewise, Appellants contend that the City's rookery management plan fails strict scrutiny. They argue that preventing a pause in construction is not a compelling governmental interest. They contend that the City's cursory assertions—such as its asserted interest in making the Project Area safe for visitors in the Park—and other "public safety" arguments are "the kinds of statements that the Texas Supreme Court has held insufficient to establish a compelling governmental interest."[11] We disagree.

In *Barr*, the Supreme Court of Texas determined that "the trial court's brief finding—that '[t]he ordinance was in furtherance of a compelling

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[10] Guano is the accumulated excrement of birds.

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

government interest'—[fell] short of the required scrutiny." *Barr*, 295 S.W.3d at 307–08. Dissimilarly, the district court here, after holding a four-day preliminary injunction hearing, published three separate orders evaluating the City's interests—(1) the October 2, 2023 "Partial Order," (2) the October 11, 2023 "Memorandum Opinion and Order," and (3) the October 25, 2023 Order. Moreover, contrary to the instant case, the *Barr* court seemed to also admonish the city council from merely reciting a published section of the challenged ordinance when asserting that the law "serves a compelling interest in advancing safety, preventing nuisance, and protecting children." *Barr*, 295 S.W.3d at 306–07. Specifically, the code there read that the "City Council finds the requirements of this section are reasonably necessary to preserve the public safety, morals, and general welfare." *Id*. at 291. Rather, the *Barr* court directed that "[c]ourts and litigants must focus on real and serious burdens [], and not assume that [] codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling." *Id*. at 306.

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

public health and safety[.]"

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

The record indicates that various areas of the Park "become nearly unusable for 10 months of the year due to the bird density/habitat." The resulting feces causes damage to various park amenities, including picnic tables, water fountains, playground equipment, restrooms, and sidewalks. The record provides a variety of pictures illustrating the volume of excrement affecting these facilities. The record also indicates that the excrement could harm humans and other wildlife. The 2022 Draft Rookery Management Plan noted: "When rookeries establish near playgrounds,

infrastructure, or other recreational areas, the risk of zoonotic disease transmission (i.e., histoplasmosis, psittacosis, and salmonellosis) increases substantially." The Draft Rookery Management Plan further observed that "the magnitude of fecal contamination, high likelihood of human contact with fecal matter, and limited ability to perform effective environmental decontamination make rookery management crucial to disease risk mitigation in urban areas."

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

The record also includes the expert opinions of Dr. J. Hunter Reed, a state wildlife veterinarian and health specialist, and Jessica Alderson, an urban wildlife biologist. Alderson[12] provided technical guidance to the City related to the egret and heron rookery located at the Park and provided recommendations on how to deter these birds from "an undesired location [i.e., areas that are high use to the public, such as playgrounds

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

or picnic tables, or where there's lots of human activity and potential encounters with wildlife and humans] and encourage them to go to an area where they would be more desirable." And, in providing technical guidance to the City about its rookery management efforts, Alderson testified that she also relied on "a letter from [the TPWD] state wildlife biologist, Dr. Hunter Reed" as to the "public health and safety regarding the rookery and the birds being in a highly used area of the Park."

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

*c. Least Restrictive Means*

On appeal, Appellants repeatedly argue that, according to *Fulton v. City of Philadelphia*, the City must accommodate their religious exercise in crafting the bird deterrence measures and tree-removal plans. 593 U.S. 522 (2021). They plainly state that "[the City's] intolerant view is forbidden under the Supreme Court's command that, if [the] government can *accommodate* religious exercise, it must." But recall that the *Fulton* Court did not declare that "if [the] government can *accommodate*, it must"—rather it stated that "so long as the government can *achieve its interests in a manner that does not burden religion*, it must do so." This is simply a rewording of the strict scrutiny standard, not a command to commence all or even any of the proposed measures. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993) (holding that to survive strict scrutiny, a challenged action must be "justified by a compelling governmental interest and . . . narrowly tailored to advance that interest"); *McCullen v. Coakley*, 573 U.S. 464, 493–94 (2014) ("The point is not that [the state] must enact all or even any of the proposed measures discussed[.] The point is instead that the [state] has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals [exercising their First Amendment rights]."). In *Fulton*, the Court's full quote reads as follows: "A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests . . . Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. Thus,

the *Fulton* Court proclaimed that a government action subject to strict scrutiny must achieve its interests in a narrowly tailored manner that would not burden religion. We continue this analysis here.

At the injunction hearing and on appeal, Appellants rely heavily on the City's answer to their complaint to bolster their argument that "the City never commissioned a study that aims to achieve its governmental purposes while accommodating [our] religious exercise." This contention requires us to unpack Appellants' complaint and the City's answer. In their complaint, Appellants alleged that "the City has refused to commission a design firm tasked with creating a plan that would preserve the walls and the double-crested cormorant's presence and habitat." Using the Appellants' proffered language as articulated in their complaint,[13] the City (1) admitted that it did not commission the studies as characterized by Appellants and (2) denied that any such studies were needed. In its answer, the City declared that:

> The City denies [the Complaint's allegations], including without limitation the following: (a) [Appellants'] characterization or summary of the "study" to determine the impact of the Bond Project on [Appellants'] religious beliefs; (b) that the City was required to "commission a design firm" to

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

> "creat[e] a plan to preserve the walls and the double-crested cormorant's presence and habitat"; and (c) that the Bond Project, as proposed, does not sufficiently address tree preservation, wildlife protection, and safe access to the Park.

And, while the City admitted that it did not commission the studies as described by the Appellants, it averred that "the City did, however, study viable alternatives to design the Bond Project to achieve the governmental goals of public health and safety with the least adverse impact." When questioned about the City's answer to the complaint, Shanon Miller[14] testified that "the City did look at viable alternatives." She further clarified that "the City received feedback from many stakeholders, and considered all of it. It wasn't just one particular interest or stakeholder interest that was examined." According to Miller, considering the many interests and stakeholders prompted the City to "change[] the project as a result."

This is a far cry from an overt admission by the City that "it has not considered—and it refuses to consider—[Appellants'] religious exercise" as Appellants allege. Rather, the City's answer declares that "[t]he City denies that it has not attempted 'to accommodate [Appellants'] constitutional and statutory religious freedom rights' . . . [and] also denies that it 'is willing to adjust its plans under its favored causes . . . but not to protect the rights of its citizens.'" The City's answer continues that "[t]he City admits that [Appellants] requested access to Lambert Beach to perform a

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

religious ceremony on August 12, 2023 . . . [and] the City offered various reasonable accommodations that balanced the [Appellants'] asserted religious interest with the governmental goal of public safety (including the safety of [Appellants] and any other participants in the ceremony), but the [Appellants] declined those accommodations."

The record does not support Appellants' allegations that the City has refused to try to accommodate their religious exercise. Rather, the record illustrates that many entities were involved in approving the bond project improvements, and at various stages in the public comment and meeting process, stakeholder interests were considered and incorporated in the development plan's design. Moreover, Appellants participated in many private and public meetings with the City's employees related to the Bond Project.[15]

Relevant here, the City's Public Works Department operates as the project manager for bond projects and facilitates with the Bond Project owner, Homer Garcia III.[16] In 2022, the Public Works Department applied for a certificate of appropriateness, related to tree removal, with the Office of Historic Preservation ("OHP").[17] The Historic and Design Review

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

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

[17] OHP staff members help applicants (i.e., the Public Works Department) assemble application materials to provide to the Historic and Design Review Commission ("HDRC"). OHP staff

Commission ("HDRC"), whose volunteer members are appointed by the mayor and each councilmember to represent their district, is the recommending body responsible for design review cases. HDRC officials dedicate a significant amount of time to their volunteer roles as commissioners, including attending public hearings, site visits, and committee meetings. After reviewing applications, HDRC makes recommendations to OHP, and Miller, in his capacity as historic preservation officer and director of OHP, issues the final decision on the certificates of appropriateness. In February 2022, HDRC held its first hearing concerning the Bond Project. However, HDRC tabled its approval of the Public Works Department's application because it required additional information. Hence, the bond project design team circled back to gather additional public input at public meetings from March 2022 through summer 2022. A number of City councilmembers, commissions, and departments were involved in the public meetings, including the Public Works Department, the Parks and Recreation Department, the Development Services Department,[18] the City manager's office, the City attorney's office, the Planning Commission,[19] OHP,

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members also prepare staff recommendations to accompany the applications submitted to HDRC. In the instant case, the application was prepared by the bond project design team and the OHP staff recommendation was prepared by OHP staff member, Cory Edwards.

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

[19] The Planning Commission, whose volunteer members are appointed by the mayor and each councilmember to represent their district, approved the variance the Public Works

and HDRC. After conducting the 2022 public meetings, the bond project design team returned to its application for a certificate of appropriateness in 2023, specifically taking into account the public input related to the bond project design, which pertains to the Project Area. Miller testified that the additional information "made it easier for the commissioners and the public to understand the tree removal request and the context of the larger design."

To approve the Bond Project, the Planning Commission first approved the variance that the Public Works Department requested from the City UDC. Next, after receiving the updated Bond Project application in 2023, HDRC convened a hearing on April 19, 2023 and unanimously recommended to approve the application with three stipulations.[20] Then, on April 27, 2023, the OHP issued the certificate of appropriateness consistent with the HDRC recommendation to move forward with improvements to the Lambert Beach area in the Park. At each level of the application process—the Planning Commission approval, HDRC recommendation, and the OHP issuance of the certificate—public meetings were held

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Department requested from the City UDC provision that requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-year floodplain.

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

to solicit comments in opposition or in favor of the project. Appellants acknowledge that they testified at the March 3, 2023 Texas Historical Commission meeting, the April 19, 2023 HDRC hearing, and the August 3, 2023 City Council hearing.

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

The City contends that it cannot accomplish its compelling governmental interest in making the Project Area safe for visitors, preserving historic structures, and making Park amenities accessible and available to the public by any less restrictive means than the bird deterrence program and the removal and relocation of the designated trees in the Project Area. Foremost, the City maintains that it analyzed engineering options and selected the method to repair the retaining walls that it determined would save the greatest number of large trees. From an engineering standpoint, the City contends that the pier-and-spandrel method,[21] submitted by Appellants,

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

did not entail a "markedly reduced amount of excavation required"—a necessary condition in order to save additional trees. Moreover, the City argues that the bird deterrence activities are limited in scope as they do not harm or prevent birds, including the double-crested cormorants, from entering the Park or the Project Area. Since the implementation of the bird deterrence measures, the City avers that double-crested cormorants have been observed in the Park, including in the Project Area.

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

The City has demonstrated that it "seriously

undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *See McCullen*, 573 U.S. at 494. The City commissioned a team of various professionals, which ultimately decided on the cantilevered design after considering the proposed pier-and-spandrel method and analyzing its potential efficacy to save more trees. At the injunction hearing, the City articulated that, during the course of the bond project design, City personnel, engineers, and arborists, met to examine "the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, [and] that [it was] saving as many trees as possible."

Miller and Bill Pennell[22] both testified that they met with the Tree Assessment Committee[23] in March 2023 in anticipation of the HDRC approval process. Specifically, Miller testified that City personnel, including herself and Garcia, "were asked to really look at the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, that we were saving as many trees as

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

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

possible." As a result, Jamaal Moreno,[24] Ross Hosea,[25] Shawn Franke,[26] three independent arborists, who were involved in the Tree Assessment Committee, Moises Cruz,[27] Pennell, and Miller examined alternatives. Cruz had recommended the pier-and-spandrel design, and the meetings' attendees discussed the design in great detail—including how it works, how it would be installed, and how it differs from alternative designs. Miller testified that the team discussed "with the arborists and with our design engineer that afternoon" whether using the pier-and-spandrel method would allow for additional trees to be saved. Following the meeting, City personnel accompanied Cruz to the Project Area "to talk specifically about specific trees." Still, according to Miller, "[t]he consensus in the meeting with the arborists was that no additional trees would be saved because they would still be impacted by the construction, regardless of the methodology." The City maintains, and presented evidence at the hearing, that in evaluating the alternative engineering methods it sufficiently balanced engineering challenges and safety considerations.

Although Appellants would prefer that the City

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

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

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

[27] Cruz is a volunteer engineer.

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

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

> [The plaintiff] propose[d] no fewer than three less restrictive alternatives to [the City's scheme] . . . [And the City did] not rebut any of [the plaintiff's]

> alternatives; it [did] not even try. Thus . . . we hold that the [City's] ordinances that burden [the plaintiff's] religious free exercise are not the least restrictive means of advancing the city's interests.

*Merced*, 577 F.3d at 595. So, too, Appellants here attempt to enumerate a list of *possibly* less restrictive alternatives to the City's current scheme. Appellants outline several alternatives that the City could have pursued or investigated instead of its presently planned bird deterrence measures such as (1) conducting rookery management measures that exclude cormorants; (2) completing construction within the four-month period between mid- to late-October and February when no migratory birds are present; (3) starting construction within that same four-month period, pausing while migratory birds nest, and resuming when the migratory birds leave; (4) completing construction within the six-month period between mid- to late-October and March or April before the cormorants begin to arrive;[28] or (5) conducting rookery management measures and completing the construction within the eight-month period between mid- to late-October and June, when cormorants may still arrive and nest. However, the proposed means must not only be conceivable but must be (1) in the context of the compelling governmental interest and (2) be the least restrictive of the proffered choices to achieve that governmental interest. *See* TEX. CIV. PRAC. & REM. CODE § 110.003(a)–(b).

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

Here, the City successfully rebuts each of Appellants' proposed alternatives. *See Merced*, 577 F.3d at 595. The record indicates that no other means exists to deploy deterrent efforts aimed only at egrets and herons but not cormorants. As discussed, Alderson provided technical guidance to the City related to the egret and heron rookery located at the Park and offered recommendations on how to deter birds from "an undesired location and encourage them to go to an area where they would be more desirable." She testified that, in her experience as an urban wildlife biologist and working with urban rookeries, there is no way (1) to sequence deterrence efforts to deter egrets and herons from nesting in a site but not deter double-crested cormorants or (2) to utilize noise deterrents that would deter egrets and herons but not cormorants. Essentially based on her experience and expertise, she testified that she is not aware of any kind of deterrent measure that would work on egrets and herons but not disturb cormorants because "the deterrent techniques are going to impact other species than the ones that you're specifically targeting." She testified that the difficulty lies in these species being colonial nesting birds.[29]

In evaluating the relative restrictiveness of the bird deterrence plans, the record shows that the City's activities are the least restrictive means to advance the compelling governmental interests presented. Limited by the predictability of migration and habitat patterns of colonial nesting birds, start and stoppage

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

periods of construction at four-month, six-month, or eight-month intervals, as suggested by Appellants, would not achieve the compelling goals of adhering to the Migratory Bird Treaty Act. Moreover, they certainly would not achieve the goal of mitigating bird excrement. Alderson maintained that she "bas[ed] [her] technical guidance [related to bird deterrence] on the biology behind everything." Since the deterrent methods are targeted at nesting and not a species, at times birds of any species can—despite the deterrent efforts and unbeknownst to the program managers—enter the deterrence area and nest. Once any species nests, the program administrators must stop work in that area and notify the respective regulatory agencies. Once deterrent efforts have been halted, this invites all different migratory birds to enter and nest in the area. As such, the district court posited, and we agree that the record shows that there could not be an eight-month window of opportunity to accomplish the bond project improvements. Even more, given this credible testimony regarding the different species' migration patterns and coverage of the Migratory Bird Treaty Act, Appellants' arguments that the bond project improvements could have been completed during various periods when migratory birds are not present do not sufficiently refute that the City's bird deterrence satisfies the least restrictive means to advance its compelling governmental interests.

Similarly, Pennell testified that based on his knowledge of the area and the birds' migratory patterns, the double-crested cormorants arrive around the same time, or within the same period, as the cattle egrets and snow egrets. Thus, he too confirmed there is not a way to time the bird deterrence

activities so that only double-crested cormorants can nest in the deterrent zone but not allow egrets and herons to nest there. Additionally, Pennell confirmed that no separate or additional study needed to be commissioned to answer the question of whether it is possible to utilize deterrent methods that are effective *only* against egrets and herons but do not disturb cormorants. Furthermore, he confirmed that no additional or separate study needed to be commissioned to understand the migratory and habitat patterns of these birds. These conditions have been uniformly observed and widely accepted.

Likewise, the record shows that the City applies deterrence efforts only to the extent required to achieve the goal of relocating the targeted species—and no further. As the City avers, "[the] bird deterrence policy does not prohibit migratory birds from visiting, roosting, or foraging in the Project Area," and the deterrent activities are deployed only within the two-acre Project Area and only to persuade the birds to nest elsewhere.

As it relates to the bird excrement, the record provides information pertaining to the remedial measures the City has previously instituted in the Park to curtail human exposure. The record indicates that the City has implemented various bird deterrent techniques to prevent mass congregation of birds and limit the accumulation of the excrement. At times, the City has closed the playground areas and restricted access to other facilities due to the excrement. Other times, these amenities are simply "removed." Still, Pennell noted that the Park's ability to clean the amenities depends on the material that the excrement is

on. For example, fecal matter can absorb into plastic and "eat away" at metal paint. As such, the record shows that the rookery management program is the least restrictive means to advance the City's interest in mitigating the hazardous effects of bird guano to make the Park safe for visitors. Throughout the record, Pennell reiterates the City's stance: bird mitigation is important for the safety of park-goers. In his opinion, the bird deterrence policies have been effective to reduce and more effectively manage the migratory bird rookeries in the Park.

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

As the dissent notes, the voluminous record in this case also contains a few statements from City officials asserting that (1) the City could have sought an exemption from federal guidelines as to the retaining walls; (2) the City's engineering design "was chosen without any consideration of [Appellants'] free exercise request" for financial reasons; and (3) "the City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [Appellants'] religious exercise." But

those select statements pale in comparison to the wealth of evidence outlined above demonstrating that the City considered and ultimately pursued the least burdensome method of achieving its development plans. Indeed, each of the statements highlighted in the dissent were considered by the district court in its four-day preliminary injunction hearing. The district court ultimately concluded, as we do here, that the weight of the evidence supports a holding that the City's development plans are the least restrictive means of furthering its compelling government interests. Further, in this preliminary posture, our review of the facts ascertained below is for clear error. *Scott*, 28 F.4th at 671. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (citation omitted). We cannot say, on the record before us, that the district court clearly erred.

In short, even if the City's tree removal plan and rookery management plans substantially burden Appellants' religion, they appear to be the least restrictive means to advance the City's compelling governmental interests. Thus, Appellants failed to establish a likelihood of success on their argument that the City's plans violate TRFRA.

*ii. First Amendment Free Exercise*

The parties' dispute under the Free Exercise Clause centers on which standard of constitutional review applies to the instant case, rational basis or strict scrutiny. Appellants argue that the City's plans for tree removal and rookery management measures are not neutral and generally applicable and, therefore, must

be analyzed under the more exacting strict scrutiny standard. The City contends that its planned Park improvements are neutral and generally applicable and that the more deferential rational basis standard of review applies. Assuming strict scrutiny applies, we conclude that the challenged government action in this case withstands Appellants' Free Exercise challenge, as illustrated *infra* in the TRFRA claim analysis.

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise Clause has been applied to the States through the Fourteenth Amendment. *Lukumi*, 508 U.S. at 531. Although the freedom to believe is absolute, the freedom to act on one's religious beliefs "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). Under strict scrutiny review, a challenged government action will be deemed invalid unless it is (1) justified by a compelling governmental interest[30]

[30] In this context, when considering whether the City has stated a compelling interest, we do not assess whether its development plan generally furthers a compelling governmental interest in safety or public health. Instead, the City must show that "the compelling[-]interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014)). This requires "scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants" and "'look [ing] to the marginal interest in enforcing' the challenged government action in that particular context." *Id.* (quoting *Hobby Lobby*, 573 U.S. at 726–27). Applied in this case, we consider compelling the City's

and (2) is narrowly tailored to advance that interest. *Lukumi*, 508 U.S. at 533. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest[.]" *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam). The government must also demonstrate that it "seriously undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494.

As discussed, the City has provided ample support demonstrating that it has compelling interests for its adoption of the tree-removal and bird deterrence plans and that it has pursued the least burdensome method of achieving its goals. Thus, Appellants have failed to establish a likelihood of success on the merits of their Free Exercise claim.

*iii. Texas freedom-to-worship provision*

Appellants also argue that the City's plan violates their freedom of worship under the Texas Constitution.[31] But because Appellants incorporate by reference their arguments on the Free Exercise and TRFRA claims, they similarly fail to establish a

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interests in rookery management and tree removal over the specific objections of Appellants.

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

likelihood of success on the merits of their claims under Article I, § 6 of the Texas Constitution.

*iv. Texas religious-service-protections provision*

Appellants initially asserted that the City's development plan violates the religious-service-protections provision of the Texas Constitution. Under that provision the state of Texas:

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

TEX. CONST. art. I, § 6-a. We certified a question regarding the scope of that provision to the Supreme Court of Texas. *Perez*, 115 F.4th at 428, *certified question accepted* (Sept. 6, 2024), *certified question answered*, No. 24-0714, 2025 WL 1675639 (Tex. June 13, 2025). The Supreme Court of Texas accepted and answered that question. *Id.* In doing so, it held that:

> When the Texas Religious Services Clause applies, its force is absolute and categorical, meaning it forbids governmental prohibitions and limitations on religious services regardless of the government's interest in that limitation or how tailored the limitation is to that interest, but the scope of the clause's applicability is not unlimited, and it does not extend to governmental actions for the preservation and management of public lands.

*Perez*, No. 24-0714, 2025 WL 1675639 at *13. In other words, the Supreme Court of Texas made it clear that the religious-service-protections provision of the Texas Constitution does not preclude the City's actions in this case. Because they challenge the City's preservation and management of its public lands, Appellants cannot demonstrate a likeliness of success on the merits of their claim under the religious-service-protections provision of the Texas Constitution. *See id.*

* * *

Accordingly, we conclude that the district court did not abuse its discretion in determining that Appellants failed to show a likelihood of success on the merits on any of their four claims—the TRFRA claim, the First Amendment Free Exercise claim, the claim under the freedom-to-worship provision of the Texas Constitution, or the claim under the religious-service-protections provision of the Texas Constitution. *See Scott*, 28 F.4th at 671. Thus, no additional analysis is required. "[F]ailure to show a likelihood of success alone is sufficient to justify a denial." C*AE Integrated, L.L.C. v. Moov Techs., Inc.*, 44 F.4th 257, 264 n.22 (5th Cir. 2022).

*C. Injunction Pending Appeal*

To obtain an injunction pending appeal, Appellants must satisfy each of the injunction elements. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). To determine whether to grant an injunction pending appeal, we consider: (1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the injunction; (3) the

potential harm to opposing parties if the injunction is issued; and (4) the public interest. *See Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. Unit B 1981); *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 939 (5th Cir. 1984) (per curiam). As the parties seeking the injunction, Appellants bear the burden of showing that they satisfy each of these elements. *See Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).

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

We have considered Appellants' arguments based on the parties' filings, the district court's opinion, and the relevant caselaw, and conclude that Appellants have failed to establish a likelihood of success on the merits of their claims that the City violated their rights under the federal Free Exercise Clause, the Texas Constitution, or TRFRA. The record evidence establishes that the City has compelling interests. And, in evaluating the relative restrictiveness of the tree-removal and rookery management plans, the record indicates that the City's activities are the least restrictive means to advance the compelling

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

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

preliminary injunction.[32] Because we have concluded that Appellants' have not made the requisite showing of the likelihood of success on the merits, they are not entitled to an injunction pending appeal. *Janvey*, 647 F.3d at 595. Thus, we do not analyze the other injunction elements here.

## IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment. Correspondingly, the appeal as to Appellants' access to the Project Area within the Park is DISMISSED AS MOOT. Because Appellants have failed to show a likelihood of success on the merits, we DENY their Emergency Motion for Injunction Pending Appeal.

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

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

Despite my respect for the majority's analysis, I continue to think that Appellants' religious exercise is substantially burdened and that the City of San Antonio (the "City") failed to accommodate Appellants' religious beliefs in the least restrictive manner. I would therefore hold that the Texas Religious Freedom Restoration Act ("TRFRA") requires the City to accommodate Appellants' religious beliefs across two "items of relief" requested in the complaint: the City's tree-removal ("Item 2") and anti-nesting ("Item 3") measures.[1]

## I

Appellants are descendants of the Indigenous peoples of North America and members of the Lipan-Apache Native American Church ("Church"). For centuries, Appellants' ancestors have gathered at a specific bend along the Yanaguana River to meditate, worship, and pray. Today, the Yanaguana is more commonly known as the San Antonio River, and the riverbend central to Appellants' religion is within Brackenridge Park and under the City's control.

Appellants' religious convictions and practices require full description. To start, Church members believe that a space becomes sacred when the "underworld," "middle world," and "upper world"

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[1] I agree with the majority that Appellants' religious access claim is moot and the voluntary-cessation exception is inapplicable.

connect. For Church members, "[t]he underworld is seen in water, night, and darkness. The middle world surrounds us as we walk about the earth. The upper world is seen in the sky and stars." As Appellants explain, "[t]he presence and connection of these three worlds establishes a 'spiritual ecology,'" which, in turn, "enables [Appellants] to identify themselves in the physical world and commune with the spiritual world." Indeed, "[m]any of the [Lipan-Apache] Church's offerings, services, and ceremonies center around experiencing the three worlds together to locate oneself."

Though the riverbend has been a site of "religious significance" for various Indigenous communities across "multiple generations," it is particularly sacred to Church members because its resemblance to the constellation Eridanus bridges "the physical and the spiritual worlds." For Appellants, the riverbend is more than a morphological feature—it is "a place of birth[,] . . . rebirth[,] . . . [and] the afterlife."

Consistent with their ancestors' centuries-old tradition, Appellants and other Church members congregate at the riverbend to participate in "necessary" religious practices that cannot be performed anywhere else. These practices depend on the riverbend's spiritual ecology, which is sustained by the trees and cormorants that occupy a twenty-foot by thirty-foot area located by the river and within Brackenridge Park's 343 acres. According to Appellant Gary Perez, the trees are the "axis mundi"—the center of the world—because their "roots go into the underworld, underneath the earth and even touch[] the water down below," before "ris[ing] to our level of existence as human beings and then . . . continu[ing] to

rise all the way up into the heavens." The trees also provide nesting for cormorants, migratory birds that hold unique, spiritual significance for Church members, who believe that life in the region began when a "spirit in the form of a double-crested cormorant . . . scattered life-giving water across the San Antonio River Valley."

As Appellants' testimony makes clear, this genesis story involving the trees and cormorants is integral to the Church practices that take place at the riverbend. According to Perez, "every time [the cormorants] return and they nest there [among the trees] and we hear the little chicks, that tells us that everything's going to be all right for the future," and that the "next generation, including our children, will come back and revisit the moment again and again and again."

Indeed, Appellant Matilde Torres testified that without the trees or the cormorants religious services at the riverbend would be "meaningless."

Appellants' testimony also shows that preserving the riverbend's spiritual ecology is delicate and vital. Perez likened the riverbend's spiritual ecology to a "tapestry," testifying that "if you go and . . . pull a thread off"—be it the river, the trees, or the cormorants—then it all "begins to unravel." And for Torres, cormorants must nest in the trees by the riverbend otherwise the Church's "creation story" will not "survive for the next generation."

Appellants' religious beliefs and practices put into context the City's plans for Brackenridge Park, which include redevelopment of Church members' sacred land. Two imminent actions are particularly salient. First, the

City intends to remove nearly all trees in the area—around sixty-nine of the eighty-three. And second, the City will use "pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, explosives, and drones" to prevent cormorants from nesting by the riverbend. *Ante*, at 5 n.2.

Despite Appellants' "participat[ion] in many private and public meetings," *ante*, at 24, related to the redevelopment of Brackenridge Park, ample evidence from the preliminary injunction hearing shows that the City chose to redevelop Church members' sacred land without even considering, let alone accommodating, their religious beliefs and practices. Shanon Miller, the City's historic preservation officer, acknowledged that the City did "not study whether it could achieve its governmental purposes while accommodating [Appellants'] religious exercise." Bill Pennell, the City's assistant capital programs manager, confirmed that "the City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [Appellants'] religious exercise." Jessica Alderson, who provided the City with "technical guidance" concerning "bird deterrence," testified that she only discovered the cormorants' religious significance "[a]s a result of this case." And Jamaal Moreno, the City's project manager, testified that he "didn't know [Appellants'] religion [] at the time we were doing design" or "that [Appellants'] religion required that we try to save more trees." Once Moreno discovered "there was an issue from [Appellants'] perspective," the design "choice was already approved by the Texas Historical Commission." According to Moreno, "revisit[ing] that choice . . . would take time and money," whereas the City wanted to "proceed with the

project."

The City notes that it held meetings to "solicit comments in opposition or in favor of the project." *See ante*, at 26. And the director of the City's Parks and Recreation Department asserted broadly that the City hosted "public meetings . . . to get public input," adding that the City "took all those comments into consideration." But with respect to Appellants' specific religious beliefs and practices, copious evidence shows that the aggrieved Church community was not considered, consulted or accommodated.

II

TRFRA "prevents the state and local Texas governments from substantially burdening a person's free exercise of religion unless the government can demonstrate that doing so furthers a compelling governmental interest in the least restrictive manner." *Merced v. Kasson*, 577 F.3d 578, 581 (5th Cir. 2009). The statute's "express terms . . . require strict scrutiny of '*any* ordinance, rule, order, decision, practice, or other exercise of governmental authority.'" *Barr v. City of Sinton*, 295 S.W.3d 287, 305 (Tex. 2009) (quoting TEX. CIV. PRAC. & REM. CODE § 110.002(a)).

Contrary to the majority, I would hold that the City's proposed tree-removal and anti-nesting measures likely violate TRFRA because they (1) substantially burden Appellants' religious exercise and (2) fail to accommodate Appellants' religious beliefs in the least restrictive manner.

A

The majority mistakenly concludes that Appellants "plainly failed to establish a likelihood of success on their position that the burden is real and significant under this circuit's case law." *Ante*, at 15.

Interpreting TRFRA in *A.A. ex rel. Betenbaugh v. Needville Independent School District*, we explained that "[w]hen a restriction is not completely prohibitive, Texas law still considers it substantial if 'alternatives for the religious exercise are severely restricted.'" 611 F.3d 248, 265 (5th Cir. 2010) (quoting *Barr*, 295 S.W.3d at 305). Thus, "a burden imposing a less-than-complete ban is nonetheless substantial if it curtails religious conduct and impacts religious expression to a 'significant' and 'real' degree." *Id.* (quoting *Barr*, 295 S.W.3d at 301). The question, then, is whether the alleged burden is "real vs. merely perceived, and significant vs. trivial." *Barr*, 295 S.W.3d at 301. "These limitations leave a *broad* range of things covered." *Id.* (emphasis added).

Crucially, in this "case-by-case" and "fact specific" inquiry, we measure "the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression" from the "'the person's perspective, not from the government's." *Needville*, 611 F.3d at 264 (first quoting *Merced*, 577 F.3d at 588; then quoting, *Barr*, 295 S.W.3d at 301).

According to the majority, the burden on Appellants' religious exercise is trivial as a matter of law because "the City's development plan only indirectly impacts Appellants' religious conduct and expression," Appellants "continue to have virtually unlimited access to the Park for religious and cultural purposes," and the "cormorants are not specifically

targeted nor dissuaded from nesting nearby or elsewhere in the 343-acre Park." *Ante*, at 15–16.

With respect for my colleagues, the majority's conclusion, resting on a single paragraph of analysis, is undermined by binding caselaw, record evidence, and its own factual premises.[2]

1

The majority misreads *Needville* and, through this error, ignores *Merced*'s controlling interpretation of TRFRA.

Contrary to the majority's analysis, our court in *Needville* did not hold that a burden is only significant when the challenged actions have a direct *and* indirect effect on religious exercise. *See ante*, at 15 ("In *Needville*, we determined that the challenged exemptions placed a significant burden on the plaintiff's religious conduct because the burden was both indirect and direct. . . . Here, the City's development plan only indirectly impacts Appellants' religious conduct and expression."). Rather, we held that the exemptions at issue significantly burdened the plaintiff in two discrete ways—one direct and the other indirect. *See Needville* 611 F.3d at 265–66. We recognized that a "direct[] regulat[ion]" affecting the

[2] The majority intimates that Appellants did not raise their "substantial burden" argument in their opening brief. *See ante*, at 15. I disagree. Citing *Merced*, Appellants contended that "there is no serious dispute that the City's current and intended actions substantially burden [their] religious exercise. The City literally bars them from worshipping in the Sacred Area and proposes to destroy it altogether." Appellants' Br. at 32.

"body" may "arguably" pose an "even more intrusive" burden on religious expression than a direct burden on a mere "personal effect," *id.* at 266, but we did not imply, much less state, that a direct burden on religious exercise is necessary under TRFRA *or* that an indirect burden is trivial as a matter of law. *See id.* at 265–66.

Furthermore, the majority's directness requirement contravenes our comprehensive opinion in *Merced*.[3] Construing TRFRA in *Merced*, we *rejected* the argument that "a burden is not substantial if it is incidental by way of a law of general application." 577 F.3d at 591. We held that "TRFRA applies to '*any* [ordinance,] rule, order, decision, practice, or other exercise of governmental authority'" and that such "broad language does not permit this court to read an exception into the statute for generally applicable laws that incidentally burden religious conduct." *Id.* (quoting Tex. Civ. Prac. & Rem. Code § 110.002(a)). I do not think that *Merced*'s careful analysis, and this precise instruction, can be squared with the majority's reasoning, which discounts Appellants' burden because

[3] According to the majority, today's holding "do[es] not suggest that directness is dispositive" under TRFRA. *Ante*, at 15. But there is no other way to interpret the majority's substantial-burden analysis. After all, the majority does *not* reason that the City's redevelopment plan has *no* impact on Appellants; rather, the majority deems Appellants' burden trivial as a matter of law just because the City's "plan *only indirectly* impacts Appellants' religious conduct and expression." *Id.* (emphasis added). Thus, as the majority reads TRFRA, and incorrectly extends *Needville*, directness would be necessary to show a substantial burden. *Contra Merced*, 577 F.3d at 591 (rejecting the argument that "a burden is not substantial if it is incidental by way of a law of general application.").

they are "only indirectly impact[ed]" by "the City's development plan[.]" *Ante*, at 15.

2

The majority's analysis is also contradicted by record evidence and its own factual premises.

Crucially, again, viewed from Appellants' "perspective, not from the government's," *Needville*, 611 F.3d at 264 (internal quotation marks omitted), the City's actions will desecrate the riverbend's spiritual ecology. Appellants' testimony shows that services at the riverbend would be "meaningless" without the trees or the cormorants, and that disruption to either will "unravel" the land's spiritual ecology—a *sine qua non* for Church members' religious exercise. Just as importantly, Appellants' testimony confirms that these services cannot "be performed anywhere else." Torres put it plainly—no "acceptable substitute" area exists.

"[O]ne court after another has held that preventing a religious exercise is, necessarily, a 'substantial burden' on that religious exercise. . . ." *See Apache Stronghold*, 145 S. Ct. at 1488 (2025) (Gorsuch, J., dissenting from denial of certiorari) (citing *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 555–56 (4th Cir. 2013); *West v. Radtke*, 48 F.4th 836, 845 n.3 (7th Cir. 2022); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996); *Thai Meditation Assn. of Ala., Inc. v. Mobile*, 980 F.3d 821, 830–31 (11th Cir. 2020)). Precisely because of the City's plans, "[Appellants] cannot perform the ceremonies dictated by [their] religion. This is a burden, and it is substantial." *Merced*, 577 F.3d at 591.

Our analysis should end here. *See Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting from denial of certiorari) ("As a matter of ordinary meaning, after all, an action that prevents a religious exercise does not just burden that exercise substantially, it burdens it completely.").

Though its conclusion is erroneous, the majority seems to recognize Appellants' burden in its description of the factual background. There, the majority observes that Appellants "require certain religious ceremonies to be performed *only* at this riverbend" and, moreover, that the riverbend's "capacity to function as a holy place *relies* on the presence of trees, birds, and other natural features, which are all part of its 'spiritual ecology.'" *Ante*, at 3 (emphases added). Moreover, the majority understands that "certain religious ceremonies [at the riverbend] cannot be properly administered without specific trees present and cormorants nesting." *Id.*

But despite its acknowledgement of Appellants' religious beliefs and practices, the majority concludes that their burden is trivial as a matter of law because, the majority asserts, cormorants can "nest[] nearby or elsewhere in the 343-acre Park" and, separately, because the Church community "continue[s] to have virtually unlimited access to the Park for religious and cultural purposes." *Id.* at 15–16.

This logic is mistaken. First, the cormorants' ability to nest "elsewhere" is legally irrelevant given that we assess religious curtailment from Appellants' perspective. *See Needville*, 611 F.3d at 264. And according to Perez, even if cormorants "nest[] nearby"—rather than on—Appellants' sacred land, that is still not "close enough" to sustain the "spiritual ecology" necessary

for Church practices. Regardless, "virtually unlimited access" to *other* parts of Brackenridge Park means nothing for Appellants, who "require certain religious ceremonies to be performed *only* at th[e] riverbend."[4]

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[4] The arguments made by *amici curiae*—the International Council of Thirteen Indigenous Grandmothers and Carol Logan of the Confederated Tribes of Grande Ronde—cast further doubt on the majority's substantial-burden analysis. *Amici* explain that, "[f]or many Native peoples, . . . *particular* places [are] inextricably tied to spiritual and cultural rites and identity." International Council of Thirteen Indigenous Grandmothers and Carol Logan Amicus Br. at 19–20 (emphasis added). Thus, "[t]o deprive tribal people of access to certain sites, or to compromise the integrity of those sites, is to effectively prohibit the free exercise of their religion. There is no adequate substitute and no adequate compensation for the deprivation." *Id.* at 20. This warning echoes scholarship concerning Indigenous peoples' sacred sites and religious exercise. *See* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 271 (2012) ("Native American religions are land based. There are certain geographical sites or physical formations that are held to be 'sacred' as an integral part of the religion. Religious practitioners therefore hold certain ceremonies, collect plants, or make pilgrimages to such places on recurring bases."); Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1305 (2021) ("Without access to particular sites, essential practice of native religion may not be merely burdened, but effectively prohibited altogether. For many tribes, their particular rituals may not be performed elsewhere, so central is a particular place, feature, or landscape to the religious rite." (footnote omitted)); Patrick E. Reidy, C.S.C., *Sacred Easements*, 110 VA. L. REV. 833, 849 (2024) ("[Native American] religious practice at sacred sites thus forms a communal sense of memory, identity, and destiny for Native peoples who understand themselves as people of a particular place. Because their particular homelands and landscapes are inexplicably tied to their identity as peoples, their sacred places are inextricably tied to their spiritual practices and cultural rituals."

*Ante*, at 15 (emphasis added); *see also Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("[T]raditional Indian religious practices . . . are intimately and inextricably bound up with the unique features of the Chimney Rock area[.]").

To the extent the majority suggests that Appellants can obtain spiritual fulfilment by exercising their religious beliefs in a manner contrary to their testimony, such reasoning is forbidden. *See Thomas v. Review Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."); *Ferguson v. Comm'r*, 921 F.2d 588, 589 (5th Cir. 1991) ("[C]ourts may not evaluate religious truth."); *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1213 n.20 (5th Cir. 1991) ("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection[.]" (quoting *Thomas*, 450 U.S. at 714–15)).

B

Contrary to the majority, I separately conclude that the City failed to consider Appellants' religious burden, *Merced*, 577 F.3d at 591, much less accommodate their beliefs in the least restrictive manner, *id.* at 594–95.

"To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests

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(footnote omitted)).

of the highest order and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotation marks omitted). As the Supreme Court explained in *Fulton v. City of Philadelphia*, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." 593 U.S. 522, 541 (2021).

Extensive record evidence shows that the City failed even to consider Appellants' religious exercise despite their presence at public meetings. Miller admitted that the City "did not study whether it could achieve its governmental purposes while accommodating [Appellants'] religious exercise." Likewise, Pennell acknowledged that "the City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [Appellants'] religious exercise."

Even more starkly, City witnesses integral to the project testified that they only learned about Appellants' religious beliefs *after* plans to redevelop the riverbend were set in stone—like Alderson, who provided the City with "technical guidance" concerning "bird deterrence" but discovered the cormorants' religious significance "[a]s a result of this case;" or Moreno, the project manager, who "didn't know [Appellants'] religion at the time we were doing design" and instead realized the "issue" once the design "choice was already approved by the Texas Historical Commission," by which point the City wanted to "proceed with the project" because accommodating Appellants "would take time and money."

Indeed, the City's own litigation position confirms

that it *never* actually considered Appellants' religious beliefs and practices. Through its answer to Appellants' complaint, the City "admit[ted] that it never commissioned a study that aims to achieve its governmental purposes while accommodating [Appellants'] religious exercise . . . and denie[d] that any such study is required." The majority relies on the City's averment that it "did, however, study viable alternatives to design the Bond Project to achieve the governmental goals of public health and safety with the least adverse impact," *see ante*, at 23, but the City's answer—coupled with the testimony of multiple witnesses—show that the City did not contemplate "adverse impact" as it relates to Appellants' religious beliefs. Accordingly, the City failed to adhere to *Fulton*'s command that "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *See* 593 U.S. at 541.

The Supreme Court has clarified that, "[t]o survive strict scrutiny, a government must demonstrate that its policy 'advances interests of the highest order and is narrowly tailored to achieve those interests.'" *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 (2025) (quoting *Fulton*, 593 U.S. at 522)). Yet Appellants highlight that the City could have sought an exemption from U.S. Department of the Interior guidelines as to the retaining walls but instead obtained a zoning variance to remove more trees. Or, alternatively, the City could have investigated whether the six-month period prior to the cormorants' arrival is suitable for anti-nesting measures. *See Merced*, 577 F.3d at 595.

But instead of considering less restrictive alternatives, the City pressed ahead with its approved

design to save "time and money." Through this course of action, the City turned a blind eye to a lesser-known religious community—likely in violation of TRFRA. Native American "history and religious practices may be unfamiliar to many. But that should make no difference. 'Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to . . . religious freedom.'" *Apache Stronghold*, 145 S. Ct. at 1489 (Gorsuch, J., dissenting from denial of certiorari) (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 649 (2018) (Gorsuch, J., concurring))).

* * *

For the foregoing reasons, I would reverse and enjoin the City as to Items 2 and 3, and further require the City to accommodate Appellants' religious beliefs in the least restrictive manner.

**United States Court of Appeals**
**for the Fifth Circuit**

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No. 23-50746

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GARY PEREZ; MATILDE TORRES,

*Plaintiffs—Appellants*,

*versus*

CITY OF SAN ANTONIO,

*Defendant—Appellee*.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:23-CV-977
August 28, 2024

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ON PETITION FOR PANEL REHEARING

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

CARL E. STEWART, *Circuit Judge*:

The original opinion in this case was filed on April 11, 2024. *Perez v. City of San Antonio*, 98 F.4th 586 (5th Cir. 2024). There we held that "[b]y way of their sparse briefing on the question, Appellants fail to establish a likelihood of success on the merits of their

claims under Article I, § 6-a of the Texas Constitution." Because Appellants did not adequately brief that issue, and because their other arguments lacked merit, we affirmed the district court's judgment and denied Appellants' Emergency Motion for Injunction Pending Appeal. Appellants then submitted a petition for panel rehearing and a petition for rehearing en banc, which are now pending before the court. In their petitions, Appellants requested, in the alternative, that we certify a question to the Supreme Court of Texas on grounds that the scope of Article I, § 6-a of the Texas Constitution is a significant issue of first impression.

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

## I. Factual and Procedural History

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

planned tree removal and rookery management measures.

### *A. The Lipan-Apache Native American Church*

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

The district court determined that Appellants' religious beliefs are sincerely held. According to their complaint, Appellants believe that life in the region of San Antonio began at a spring called the Blue Hole. Specifically, a spirit in the form of a blue panther lived in the Blue Hole. And when a spirit in the form of a cormorant visited the Blue Hole, the blue panther scared the bird. As the bird fled, water droplets from its tail scattered across the San Antonio River Valley, including the Park, spurring life in the region. The San Antonio River flows through the northern portion of the Park. Appellants also believe that a riverbend, located within the Lambert Beach area of the Park, mirrors the celestial constellation Eridanus and bridges the physical and spiritual worlds. Appellants require certain religious ceremonies to be performed only at this riverbend located within the Lambert Beach area. Moreover, they proclaim that this space's capacity to function as a holy place relies on the

presence of trees, birds, and other natural features, which are all part of its "spiritual ecology." Appellants also proclaim that certain religious ceremonies cannot be properly administered without specific trees present and cormorants nesting.

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

The Park is a public park in the City, consisting of approximately 343 acres. The Park contains various features and attractions including paths, sports fields, the San Antonio Zoo, the Japanese Tea Garden, the Sunken Garden Theater, and the Witte Natural History Museum. The Park has also been inhabited and utilized by indigenous peoples for thousands of years. Appellants and other members of the Native American Church believe that a specific area within the Lambert Beach section of the Park is a sacred location where they must gather to worship and conduct religious ceremonies. This area is also the site of the City's planned reformation efforts, which include repairing retaining walls along the San Antonio River. In this litigation, Appellants refer to this area as the "Sacred Area" and the City refers to it as the "Project Area." Appellants define the Sacred Area as the twenty-foot by thirty-foot area between two cypress trees on the southern riverbank of the Lambert Beach area. Within the Project Area, the City developed plans to repair the retaining walls along the San Antonio River, repair the historic Pump House, and construct a handicap-accessible ramp.

In May 2016, San Antonio citizens voted in favor of a $850 million bond package for public improvements. Proposition 3 of the bond package—dedicated to

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

Additionally, the City's plan for the Bond Project

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

To complete the Bond Project, the City must comply with local, state, and federal regulations. Locally, with the San Antonio Development Services Department, the City applied for and received a variance from a City Unified Development Code ("UDC") provision that

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

[2] 16 U.S.C. § 703 *et seq*.

requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-year floodplain. Moreover, state and federal regulations govern the preservation of the Lambert Beach retaining walls. As historic structures, the retaining walls contribute to the Park's designation as a City Historic Landmark and as a State Antiquities Landmark and its placement on the National Register of Historic Places. Because of this historic designation, construction is regulated by the Texas Historical Commission and the United States Army Corps of Engineers ("USACE"). The City must submit a final treatment plan and obtain a permit from USACE before repairing the retaining walls or removing or relocating trees within the Lambert Beach area. Once USACE approves the final treatment plan, a thirty-day comment period will begin to solicit feedback from stakeholders, including local indigenous tribes. Lastly, the Secretary of the Interior's Design guidelines, the Americans with Disabilities Act, and Occupational Safety and Health Administration regulations are all applicable to the bond project improvements.

From roughly February 2023 to November 2023, the City temporarily prevented Appellants, Native American Church members, and peyote pilgrims from entering the Lambert Beach area. Appellants filed the instant suit on August 9, 2023, alleging that the City's bird deterrence activities, temporary closure of the Project Area, and proposed removal or relocation of trees in the Project Area place a substantial burden on their religious beliefs in violation of the First Amendment of the U.S. Constitution, the Texas Constitution, and TRFRA. They sought a preliminary

injunction, which itemized the relief requested as (1) access to the Sacred Area for religious services, (2) preservation of the spiritual ecology of the Sacred Area by minimizing tree removal, and (3) preservation of the spiritual ecology of the Sacred Area by allowing cormorants to nest. As to the preservation of the spiritual ecology, Appellants requested that the district court order the City to "reevaluate the Bond Project to develop alternative plans that will accommodate [their] religious beliefs."

### *C. The District Court's Decision*

After holding a four-day preliminary injunction hearing, the district court adopted the parties' stipulated facts[3] and determined that the City's plans did not burden Appellants' free exercise of religion. The district court concluded that Appellants held a sincere religious belief and had met their burden to prove the four elements for injunctive relief as to "access for religious services in the Sacred Area." It thus granted access for religious services involving fifteen to twenty people for approximately an hour on specified astronomical dates coinciding with Appellants' spiritual beliefs.[4] The district court also ordered the City to immediately remove the broken limb that the City maintained "pose[d] a risk of injury or death" in the

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

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

Project Area. As to their request for "access for individual worship," the district court held that Appellants had waived this request but also noted that the balance of equities supported the conclusion that unplanned, unsupervised individual access was impractical. Following expert testimony, the district court concluded that the bird deterrent operation was in the realm of public health and safety.[5] It also determined that the City had met its burden of proving "a compelling government interest for public health and safety, and the [balance of] equities favor[ed] the City on" Appellants' requested relief regarding minimizing tree removal and allowing cormorants to nest.

### *D. Appellants' Emergency Motion for Injunction Pending Appeal*

After the district court denied Appellants access for individual worship and declined to enjoin the City's planned tree removal and rookery management measures, Appellants filed with this court an Emergency Motion for Injunction Pending Appeal and

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

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

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

## II. Discussion

Appellants have raised four claims for relief—(1) a TRFRA claim, (2) a First Amendment Free Exercise claim, (3) a claim under the freedom-to-worship provision of the Texas Constitution, and (4) a claim under the religious-service-protections provision of the Texas Constitution. Appellants argue that they are likely to succeed on the merits of each claim because the City previously barred them from worshipping in the Sacred Area, seeks to permanently prevent them from performing religious services by destroying the area's spiritual ecology, and has never attempted to

accommodate their religious exercise. Those arguments, and each of Appellants' claims for relief, were addressed in the original panel opinion filed in this case. We pretermit further consideration of those claims pending resolution of the Texas constitutional issue we now certify.

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

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

TEX. CONST. art. I, § 6-a.

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

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

because they would "prohibit and limit [Appellants'] future religious services by irreparably destroying the very aspects of the Sacred Area that make it a living place of worship for [Appellants]."

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

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independently violate Section 6-a."

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

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

## III. Question Certified

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

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

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

**United States Court of Appeals**
**for the Fifth Circuit**

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No. 23-50746

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GARY PEREZ; MATILDE TORRES,

*Plaintiffs—Appellants*,

*versus*

CITY OF SAN ANTONIO,

*Defendant—Appellee*.

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

Gary Perez and Matilde Torres (together "Appellants") brought action against the City of San Antonio (the "City") alleging that the City's development plan for Brackenridge Park (the "Park") prevented them from performing ceremonies essential to their religious practice. Appellants sued the City under

the First Amendment Free Exercise Clause, the Texas Religious Freedom Restoration Act ("TRFRA"), and the Texas Constitution and sought declaratory and injunctive relief to require the City to (1) grant them access to the area for religious worship, (2) minimize tree removal, and (3) allow cormorants to nest. Following a preliminary injunction hearing, the district court ordered the City to allow Appellants access to the area for religious ceremonies but declined to enjoin the City's planned tree removal and rookery management measures. The parties appealed. We AFFIRM. Also before us is Appellants' Emergency Motion for Injunction Pending Appeal. Because we conclude that Appellants have failed to show a likelihood of success on the merits, we DENY the Emergency Motion.

## I. Factual and Procedural History

### *A. The Lipan-Apache Native American Church*

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

The district court determined that their religious beliefs are sincerely held. According to their complaint, Appellants believe that life in the region of San Antonio

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

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would (1) interfere with the construction, (2) be irreparably damaged by the construction, or (3) damage the repaired retaining walls and historical structures in the future. Thus, the City developed plans to (1) completely remove 46–48 trees, (2) relocate 20–21 trees to other areas of the Park, (3) preserve about 16 trees in place, and (4) plant at least 22 new trees in the Project Area. The City held public meetings to receive community input regarding repairs of the original walls. Appellants, and other citizens, expressed concern with the removal and relocation of trees in the Project Area and a desire for the City to consider alternative plans that would preserve more trees in place.

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

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To complete the Bond Project, the City must comply with local, state, and federal regulations. Locally, with the San Antonio Development Services Department, the City applied for and received a variance from a City Unified Development Code ("UDC") provision that requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-year floodplain. Moreover, state and federal regulations govern the preservation of the Lambert Beach retaining walls. As historic structures, the retaining walls contribute to the Park's designation as a City Historic Landmark and as a State Antiquities Landmark and its placement on the National Register of Historic Places. Because of this historic designation, construction is regulated by the Texas Historical Commission and the United States Army Corps of Engineers ("USACE"). The City must submit a final treatment plan and obtain a permit from USACE before repairing the retaining walls or removing or relocating trees within the Lambert Beach area. Once USACE approves the final treatment plan, a thirty-day comment period will begin to solicit feedback from stakeholders, including local indigenous tribes. Lastly, the Secretary of the Interior's Design guidelines, the Americans with

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### *C. The District Court's Decision*

After holding a four-day preliminary injunction hearing, the district court adopted the parties' stipulated facts[3] and found that the City's plans did

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

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

### *D. Appellants' Emergency Motion for Injunction Pending Appeal*

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

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

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

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

## II. Standard of Review

"We review a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *Tex. All. for Retired Ams. v. Scott*, 28 F.4th 669, 671 (5th Cir. 2022) (citation omitted). To obtain the "extraordinary remedy" of a preliminary injunction, the movant must show he is likely to prevail on the merits and also "demonstrate a

substantial threat of irreparable injury if the injunction is not granted; the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and the injunction will not disserve the public interest." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 696 (5th Cir. 2018) (citation omitted).

## III. Discussion

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

### *A. Access*

The City contends that Appellants' request for additional injunctive relief to restore their access to the Sacred Area for routine personal worship is moot. We agree. At the start of this suit, fencing prevented Appellants from physically accessing the Sacred Area for religious exercise. But, immediately following the

injunction hearing, the district court held that Appellants were entitled to access the Sacred Area for ceremonies on two specific astronomical dates, November 17 and December 21, 2023, as prescribed by the hearing.[5] To comply with the court order, the City was also ordered (1) to immediately remove the hazardous broken limb posing risks to visitors of the Sacred Area and (2) to ensure that the fencing was unlocked and accessible for Appellants on the designated dates and any additional proposed dates of religious ceremonies. Even more, as of early November 2023, the City had removed the fencing and broken limb ahead of Appellants' scheduled ceremonies.

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

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

2003). When a claim becomes moot on appeal, as is the case here, the appeal must be dismissed. *Church of Scientology*, 506 U.S. at 12.

Still, Appellants urge this court to apply the voluntary cessation exception to mootness. The Supreme Court has held that a party's voluntary cessation of an unlawful action will not moot an opponent's challenge to that practice. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." (internal citation omitted)). Regardless, an exception to the mootness doctrine declares that "[v]oluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203).

While this appeal was pending, the City removed the dangerous limb that previously made the Sacred Area inaccessible. Moreover, the City affirmed that it undertook several additional efforts "going beyond what

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

### *B. Tree-removal Plan and Rookery Management Measures*

#### *i. TRFRA*

Turning to Appellants' claims pertaining to the City's tree-removal plan and rookery management measures, "we begin by analyzing [their] statutory claim under TRFRA, which, if successful, obviates the need to discuss the constitutional questions." *Merced v. Kasson*, 577 F.3d 578, 586 (5th Cir. 2009); *see, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."). Appellants

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

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

sincere religious practices.

*a. Substantial Burden*

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

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

court had determined that these measures *did not* substantially burden their religious exercise. The district court determined that "[Appellants] have not shown that the City's bird deterrence program [or] the removal and relocation of trees in the Project Area . . . place a substantial burden on their religious exercise."[6]

However, Appellants do not attempt in their briefing to rebut the district court's judgment that they failed to show that either the City's bird deterrence program or its removal and relocation of trees in the Project Area placed a substantial burden on their religious exercise. Appellants have the initial burden of establishing a substantial burden upon religion. *See Barr*, 295 S.W.3d at 307. Only if a substantial burden is proven does it become necessary to consider whether the City's interests served are compelling or whether the City has adopted the least burdensome method of achieving its goals. *Id.* Instead, Appellants maintain that the City expressly waived any argument that its actions do not substantially burden Appellants' religious exercise.[7] It is in their reply brief

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

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

that Appellants attempt to address the substantial burden element. There, they argue that they did not fail to brief substantial burden arguments and contend that "[t]he destruction of the tree canopy [where] cormorants need to nest—and the driving away of the cormorants themselves—will end Appellants' ability to conduct religious services." Since establishing a substantial burden is an essential element of which Appellants bear the burden to prove, any purported waiver of arguments by the City is inconsequential. And because these arguments were first mentioned in their reply brief, Appellants have forfeited this argument. *See Guillot*, 59 F.4th at 754. Still, we opt to consider Appellants' substantial burden arguments submitted in reply because we have discretion to consider a forfeited issue if "it is a purely legal matter and failure to consider the issue will result in a miscarriage of justice." *Rollins*, 8 F.4th at 398 (quoting *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 453 (5th Cir. 2008)).

Nevertheless, even if we were to consider their arguments, Appellants did not sufficiently establish a substantial burden. Appellants emphasize that if the City were permitted to proceed with its tree removal and rookery management procedures, the measures would irreversibly destroy the Sacred Area and their ability to practice their religion there.[8] To

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requirement to provide Appellants" access to the Sacred Area. The City's response goes on to state expressly that "[t]he City does not, however, waive the 'substantial burden' issue for trial."

[8] Notably, these proffered arguments are Appellants' pleas as to the irreparable harm factor of the preliminary injunction inquiry. Because these assertions are as close to an argument in

bolster these contentions, they cite caselaw analyzing governmental actions that involve complete bans or prohibition of religious exercise. As is the case here, "[w]hen a restriction is not completely prohibitive, Texas law still considers it substantial if 'alternatives for the religious exercise are severely restricted.'" *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 265 (5th Cir. 2010) (quoting *Barr*, 295 S.W.3d at 305). This court has held that according to *Barr*'s prescriptions, "that means a burden imposing a less-than-complete ban is nonetheless substantial if it curtails religious conduct and impacts religious expression to a 'significant' and 'real' degree." *Needville*, 611 F.3d at 265.

The City contends that "[w]hen analyzing whether a governmental body's activities on its *own land* impose a substantial burden on a plaintiff's religious beliefs, courts agree that the activity does not impose a substantial burden where it affects only the subjective religious experience of the plaintiff." The City argues "that a government's use of its own land does not substantially burden religious beliefs if the conduct is not coercive and impacts the subjective religious experience only." The City is correct to pinpoint that the proposed construction is indeed occurring on its own land. Still, Appellants are not merely alleging subjective religious experiences here. Moreover, because we are analyzing Appellants' claims under TFRA, not the Religious Freedom Restoration Act ("RFRA"), the correct standard for evaluating substantial burden is not "coercion" but whether the

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support of the substantial burden element of the strict scrutiny inquiry for which the briefing offers, we consider them here.

burden is "real" and "significant." *Compare Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) ("Where, as here, there is no showing the government has coerced the Appellants to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Appellants' religious beliefs, there is no 'substantial burden' on the exercise of their religion.") and *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."), *with Barr*, 295 S.W.3d at 301 ("Thus defined, 'substantial' has two basic components: real vs. merely perceived, and significant vs. trivial. These limitations leave a broad range of things covered.").

In analyzing Appellants' contention that the destruction of the tree canopies, where cormorants nest, and the driving away of the cormorants themselves will burden their religions, we consider whether the presupposed burden is real and significant. Under TRFRA, a burden is substantial if it is "real vs. merely perceived, and significant vs. trivial"—two limitations that "leave a broad range of things covered." *Barr*, 295 S.W.3d at 301. The focus of the inquiry is on "the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression," as "measured . . . from the person's perspective, not from the government's." *Id*. This inquiry is "case-by-case" and "fact-specific" and must consider "individual circumstances." *Merced*, 577 F.3d at 588; *Barr*, 295

S.W.3d at 302, 308. "Federal case law interpreting RFRA and [the Religious Land Use And Institutionalized Persons Act ("RLUIPA")] is relevant." *Merced*, 577 F.3d at 588 (citing *Barr*, 295 S.W.3d at 296).

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

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

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

Equally, the Ninth Circuit's analysis in *Navajo Nation* is persuasive here as to the City's development plan. The Ninth Circuit held that "a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what [the legislature] has labeled a 'substantial burden'. . . on the free exercise of religion." *Navajo Nation*, 535 F.3d at 1063. The Ninth Circuit cautions that defining "substantial burden" otherwise would give "one religious sect a veto over the use of public park land" and "deprive

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

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

others of the right to use what is, by definition, land that belongs to everyone." *Id.* at 1063–64. Thus, any, and all, government action, "including action on its own land, would be subject to the personalized oversight of millions of citizens" if each citizen could "hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires." *Id.* at 1063.

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

*b. Compelling Interest*

The City argues that it has a compelling governmental interest in repairing the crumbling retaining walls on the northern bank of the riverbend, and as a result tree removal and tree relocation are an integral part of that repair plan. It further avers that the bird deterrence activities are

necessary to protect the health and safety of citizens who visit the Park. The City avers that the purpose of the rookery management program is twofold: (1) to mitigate the health and safety hazards arising from the bird guano[11] that dense bird colonies produce and (2) to ensure no migratory birds are nesting in trees within the Project Area such that work can begin under the Migratory Bird Treaty Act and the bond project improvements can proceed without delay.

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

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[11] Guano is the accumulated excrement of birds.

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

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

Here, the district court complied with *Barr*'s directive. It did not assume that the City's bond project improvements inherently served a compelling interest. Rather, it conducted an injunction hearing over several days in which litigants interrogated the interests served by the Bond Project. In its Memorandum Opinion and Order, the district court determined that "[w]ith reference to [tree removal rookery

management measures] of [Appellants]' requested relief, the court finds the City has met its burden of proving a compelling government interest for public health and safety[.]"

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

The record indicates that various areas of the Park "become nearly unusable for 10 months of the year due to the bird density/habitat." The resulting feces causes damage to various park amenities, including picnic tables, water fountains, playground equipment, restrooms, and sidewalks. The record provides a variety of pictures illustrating the volume of excrement affecting these facilities. The record also indicates that the excrement could harm humans and

other wildlife. The 2022 Draft Rookery Management Plan noted: "When rookeries establish near playgrounds, infrastructure, or other recreational areas, the risk of zoonotic disease transmission (i.e., histoplasmosis, psittacosis, and salmonellosis) increases substantially." The Draft Rookery Management Plan further observed that "the magnitude of fecal contamination, high likelihood of human contact with fecal matter, and limited ability to perform effective environmental decontamination make rookery management crucial to disease risk mitigation in urban areas."

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

The record also includes the expert opinions of Dr. J. Hunter Reed, a state wildlife veterinarian and health specialist, and Jessica Alderson, an urban wildlife biologist. Alderson[13] provided technical guidance to the City related to the egret and heron

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

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

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

Migratory Bird Treaty Act—which prohibits interference with or disturbance of nests already present in trees—is equally a compelling interest.

*c. Least Restrictive Means*

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

to achieve those interests . . . Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 593 U.S. at 541. Thus, the *Fulton* Court proclaimed that a government action subject to strict scrutiny must achieve its interests in a narrowly tailored manner that would not burden religion. We continue this analysis here.

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

> The City denies [the Complaint's allegations], including without limitation the following: (a)

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

> [Appellants'] characterization or summary of the "study" to determine the impact of the Bond Project on [Appellants'] religious beliefs; (b) that the City was required to "commission a design firm" to "creat[e] a plan to preserve the walls and the double-crested cormorant's presence and habitat"; and (c) that the Bond Project, as proposed, does not sufficiently address tree preservation, wildlife protection, and safe access to the Park.

And, while the City admitted that it did not commission the studies as described by the Appellants, it averred that "the City did, however, study viable alternatives to design the Bond Project to achieve the governmental goals of public health and safety with the least adverse impact." When questioned about the City's answer to the complaint, Shanon Miller[15] testified that "the City did look at viable alternatives." She further clarified that "the City received feedback from many stakeholders, and considered all of it. It wasn't just one particular interest or stakeholder interest that was examined." According to Miller, considering the many interests and stakeholders prompted the City to "change[] the project as a result."

This is a far cry from an overt admission by the City that "it has not considered—and it refuses to consider—[Appellants'] religious exercise" as Appellants allege. Rather, the City's answer declares that "[t]he City denies that it has not attempted 'to accommodate [Appellants'] constitutional and statutory religious freedom rights' . . . [and] also denies that it 'is willing

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

to adjust its plans under its favored causes . . . but not to protect the rights of its citizens.'" The City's answer continues that "[t]he City admits that [Appellants] requested access to Lambert Beach to perform a religious ceremony on August 12, 2023 . . . [and] the City offered various reasonable accommodations that balanced the [Appellants'] asserted religious interest with the governmental goal of public safety (including the safety of [Appellants] and any other participants in the ceremony), but the [Appellants] declined those accommodations."

The record does not support Appellants' allegations that the City has refused to try to accommodate [Appellants'] religious exercise. Rather, the record illustrates that many entities were involved in approving the bond project improvements, and at various stages in the public comment and meeting process, stakeholder interests were considered and incorporated in the development plan's design. Moreover, Appellants participated in many private and public meetings with the City's employees related to the Bond Project.[16]

Relevant here, the City's Public Works Department operates as the project manager for bond projects and facilitates with the Bond Project owner, Homer Garcia III.[17] In 2022, the Public Works Department

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

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

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

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

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

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

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

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

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

on April 27, 2023, the OHP issued the certificate of appropriateness consistent with the HDRC recommendation to move forward with improvements to the Lambert Beach area in the Park. At each level of the application process—the Planning Commission approval, HDRC recommendation, and the OHP issuance of the certificate—public meetings were held to solicit comments in either opposition or in favor of the project. Appellants acknowledge that they testified at the March 3, 2023 Texas Historical Commission meeting, the April 19, 2023 HDRC hearing, and the August 3, 2023 City Council hearing.

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

The City contends that it cannot accomplish its compelling governmental interest in making the Project Area safe for visitors, preserving historic structures, and making Park amenities accessible and available to the public by any less restrictive means than the bird deterrence program and the removal and relocation of the designated trees in the Project Area. Foremost, the City maintains that it analyzed engineering options and selected the method to repair the retaining walls that it

determined would save the greatest number of large trees. From an engineering standpoint, the City contends that the pier-and-spandrel method,[22] submitted by Appellants, did not entail a "markedly reduced amount of excavation required"—a necessary condition in order to save additional trees. Moreover, the City argues that the bird deterrence activities are limited in scope as they do not harm or prevent birds, including the double-crested cormorants, from entering the Park or the Project Area. Since the implementation of the bird deterrence measures, the City avers that double-crested cormorants have been observed in the Park, including in the Project Area.

Appellants contend that "the City [] has an insurmountable narrow-tailoring problem: Its witnesses candidly testified that the City selected the cantilever plan requiring tree removal 'without any consideration' of [their] religious exercise." Citing *Fulton*, they maintain that the City must pursue "viable, less-restrictive alternatives [to repair the retaining walls] that would save more trees" because "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." Appellants also argue that "the City runs into a similar narrow-tailoring problem," in regard to the rookery management program, because there are a "number of [alternative] less-restrictive means that the City easily could have considered." They argue that rookery management measures are not narrowly tailored because the City has not tried to accommodate

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

Appellants' religious exercise in crafting the bird deterrence plan. They pinpoint that the City proffered no testimony addressing narrowly tailored alternatives to the planned bird deterrence measures. We disagree.

The City has demonstrated that it "seriously undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *See McCullen*, 573 U.S. at 494. The City commissioned a team of various professionals, which ultimately decided on the cantilevered design after considering the proposed pier-and-spandrel method and analyzing its potential efficacy to save more trees. At the injunction hearing, the City articulated that, during the course of the bond project design, City personnel, engineers, and arborists, met to examine "the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, [and] that [it was] saving as many trees as possible."

Miller and Bill Pennell[23] both testified that they met with the Tree Assessment Committee[24] in March

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

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

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

Following the meeting, City personnel accompanied Cruz to the Project Area "to talk specifically about specific trees." Still, according to Miller, "[t]he consensus in the meeting with the arborists was that no additional trees would be saved because they would still be impacted by the construction, regardless of the

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

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

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

[28] Cruz is a volunteer engineer.

methodology." The City maintains, and presented evidence at the hearing, that in evaluating the alternative engineering methods it sufficiently balanced engineering challenges and safety considerations.

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

As it relates to the City's bird deterrence measures, Appellants primarily rely on *Merced* to

argue that the City has not pursued the least restrictive means. Notably, the *Merced* panel acknowledged that:

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

*Merced*, 577 F.3d at 595. So, too, Appellants here attempt to enumerate a list of *possibly* less restrictive alternatives to the City's current scheme. Appellants outline several alternatives that the City could have pursued or investigated instead of its presently planned bird deterrence measures such as (1) conducting rookery management measures that exclude cormorants, (2) completing construction within the four-month period between mid- to late-October and February when no migratory birds are present, (3) starting construction within that same four-month period, pausing while migratory birds nest, and resuming when the migratory birds leave; (4) completing construction within the six-month period between mid- to late-October and March or April before the cormorants begin to arrive;[29] or (5) conducting rookery management measures and completing the construction within the eight-month period between mid- to late-October and June, when cormorants may still arrive

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

and nest. However, the proposed means must not only be conceivable but must be (1) in the context of the compelling governmental interest and (2) be the least restrictive of the proffered choices to achieve that governmental interest. *See* TEX. CIV. PRAC. & REM. Code § 110.003(a)–(b).

In the instant case, the City rebuts all of Appellants' proposed alternatives. *See Merced*, 577 F.3d at 595. The record indicates that no other means exists to deploy deterrent efforts aimed only at egrets and herons but not cormorants. As discussed, Alderson provided technical guidance to the City related to the egret and heron rookery located at the Park and offered recommendations on how to deter birds from "an undesired location and encourage them to go to an area where they would be more desirable." She testified that, in her experience as an urban wildlife biologist and working with urban rookeries, there is no way (1) to sequence deterrence efforts to deter egrets and herons from nesting in a site but not deter double-crested cormorants or (2) to utilize noise deterrents that would deter egrets and herons but not cormorants. Essentially based on her experience and expertise, she testified that she is not aware of any kind of deterrent measure that would work on egrets and herons but not disturb cormorants because "the deterrent techniques are going to impact other species than the ones that you're specifically targeting." She testified that the difficulty lies in these species being colonial nesting birds.[30]

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

In evaluating the relative restrictiveness of the bird deterrence plans, the record shows that the City's activities are the least restrictive means to advance the compelling governmental interests presented. Limited by the predictability of migration and habitat patterns of colonial nesting birds, start and stoppage periods of construction at four-month, six-month, or eight-month intervals, as suggested by Appellants, would not achieve the compelling goals of adhering to the Migratory Bird Treaty Act. Moreover, they certainly would not achieve the goal of mitigating bird excrement. Alderson maintained that she "bas[ed] [her] technical guidance [related to bird deterrence] on the biology behind everything." Since the deterrent methods are targeted at nesting and not a species, at times birds of any species can—despite the deterrent efforts and unbeknownst to the program managers—enter the deterrence area and nest. Once any species nests, the program administrators must stop work in that area and notify the respective regulatory agencies. Once deterrent efforts have been halted, this invites all different migratory birds to enter and nest in the area. As such, the district court posited, and we agree that the record shows that there could not be an eight-month window of opportunity to accomplish the bond project improvements. Even more, given this credible testimony regarding the different species' migration patterns and coverage of the Migratory Bird Treaty Act, Appellants' arguments that the bond project improvements could have been completed during various periods when migratory birds are not present do not sufficiently refute that the City's bird deterrence satisfies the least restrictive means to advance its compelling governmental interests.

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

Likewise, the record shows that the City applies deterrence efforts only to the extent required to achieve the goal of relocating the targeted species—and no further. As the City avers, "[the] bird deterrence policy does not prohibit migratory birds from visiting, roosting, or foraging in the Project Area," and the deterrent activities are deployed only within the two-acre Project Area and only to persuade the birds to nest elsewhere.

As it relates to the bird excrement, the record provides information pertaining to the remedial measures the City has previously instituted in the Park to curtail human exposure. The record indicates that the City has implemented various bird deterrent techniques to prevent mass congregation of birds and

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

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

As stressed, the burden is on the City to establish that its proposed measures advance a compelling

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[31] *Supra* note 14.

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

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

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

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise Clause has been applied to the States

through the Fourteenth Amendment. *Lukumi*, 508 U.S. at 531. Although the freedom to believe is absolute, the freedom to act on one's religious beliefs "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). Under strict scrutiny review, a challenged government action will be deemed invalid unless it is (1) justified by a compelling governmental interest and (2) is narrowly tailored to advance that interest. *Lukumi*, 508 U.S. at 533. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest[.]" *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam). The government must also demonstrate that it "seriously undertook [consideration] to address the problem with less intrusive tools readily available to it" and "that it considered different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494. The City has provided ample support demonstrating that it has compelling interests for its adoption of the tree-removal and bird deterrence plans and that it has pursued the least burdensome method of achieving its goals. Therefore, Appellants have failed to establish a likelihood of success on the merits of their Free Exercise claim.

Additionally, Appellants argue that the City's plan violates their freedom of worship under the Texas Constitution.[32] Because Appellants incorporate

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

by reference their arguments on the Free Exercise and TRFRA claims, they similarly fail to establish a likelihood of success on the merits of their claims under Article I, § 6 of the Texas Constitution.[33]

*iii. Texas religious-service-protections provision*

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

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

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

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

future religious services by irreparably destroying the very aspects of the Sacred Area that make it a living place of worship for [Appellants]."

Whether this provision of the Texas Constitution imposes a complete bar on all restrictions to religious services or invokes a strict scrutiny inquiry is a determination best left to the Texas Supreme Court to decide,[36] and a determination we need not reach in the instant case. Even accepting that the "relatively new provision bars any government action that prohibits or limits religious services," Appellants do not sufficiently brief the question of whether a compelled "preservation of spiritual ecology" was envisioned in the statute's definition of a "religious service" protected from state-sanctioned prohibitions or limitations. *See* Tex. Const. art. I, § 6-a. Appellants contend that the City's planned changes to the Sacred Area's spiritual ecology amounts to a limitation of their religious services.[37] They have not sufficiently established that this statute compels the relief that they seek. By way of

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

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

their sparse briefing on the question, Appellants fail to establish a likelihood of success on the merits of their claims under Article I, § 6-a of the Texas Constitution.

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

*C. Injunction Pending Appeal*

To obtain an injunction pending appeal, Appellants must satisfy each of the injunction elements. *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). To determine whether to grant an injunction pending appeal, we consider the four elements typically used to determine whether to grant injunctive relief: (1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the injunction; (3) the potential harm to opposing parties if the injunction is issued; and (4) the public interest. *See Fla. Businessmen for Free*

*Enter. v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. Unit B 1981); *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 939 (5th Cir. 1984) (per curiam). As the parties seeking the injunction, Appellants bear the burden of showing that they satisfy each of these elements. *See Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982).

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

We have considered Appellants' arguments based on the parties' filings, the district court's opinion, and the relevant caselaw, and conclude that Appellants have failed to establish a likelihood of success on the merits of their claims that the City violated their rights under the federal Free Exercise Clause, the Texas Constitution, or TRFRA. The record evidence establishes that the City has compelling interests. And, in evaluating the relative restrictiveness of the tree-removal and rookery management plans, the record indicates that the City's activities are the least restrictive means to advance the compelling governmental interests presented. The evidence supports that the City's design of the project was a

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

Based on our review, we conclude that Appellants have not demonstrated that they are likely to prevail on their claim that the district court abused its discretion in only partially granting their motion for a preliminary injunction.[38] Because we have concluded

[38] Appellants sought injunctive relief to require the City to grant them unfettered access to the fenced Project Area for religious worship, minimize tree removal in the Project Area,

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

## IV. Conclusion

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

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

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

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

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

Plaintiffs contend that "the City never tried to accommodate" Plaintiffs' religious exercise, and the record—which includes concessions from City officials that (1) they could have sought an exemption from U.S. Department of the Interior guidelines as to the retaining walls but instead obtained a zoning variance to remove more trees; (2) their engineering design "was chosen without any consideration of

[P]laintiffs' free exercise request" because "[i]t would take time and money" to try to accommodate Plaintiffs' requests and "[the City] would like to proceed with the project"; and (3) "the City never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [P]laintiffs' religious exercise"—on the whole bears out Plaintiffs' assertion.

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

**Supreme Court of Texas**

No. 24-0714

Gary Perez and Matilde Torres,

*Appellants*,

v.

City of San Antonio,

*Appellee*

On Certified Question from the
United States Court of Appeals for the Fifth Circuit

**Argued December 4, 2024**

JUSTICE BOYD delivered the opinion of the Court, in which Chief Justice Blacklock, Justice Lehrmann, Justice Devine, Justice Busby, Justice Bland, Justice Huddle, and Justice Young joined.

JUSTICE SULLIVAN filed a dissenting opinion.

The people of Texas voted to amend the Texas Constitution in 2021 by adding a new clause that forbids their government from enacting a rule that "prohibits or limits" certain "religious services." TEX.

CONST. art. I, § 6-a. The United States Court of Appeals for the Fifth Circuit has asked this Court whether this new clause imposes "a categorical bar on any limitation of any religious service, regardless of the sort of limitation and the government's interest in that limitation." Addressing the question as containing two parts, we answer: (1) when the clause applies, its force is absolute and categorical, meaning it forbids governmental limitations on religious services regardless of the government's interest in the limitation or how tailored the limitation is to that interest, but (2) the scope of the clause's applicability is not unlimited. Without attempting to precisely or comprehensively define that scope today, we conclude it does not extend to the government's preservation and management of publicly owned lands.

## I.
## Background

Gary Perez and Matilde Torres (collectively, Perez) are members of the Lipan-Apache Native American Church. The Church believes that life on earth began at a spring along the Yanaguana, which is now known as the San Antonio River. A particular bend in the river, which resembles the shape of the constellation Eridanus, serves in the Church's faith as a sacred connection between the physical and spiritual worlds. According to the Church's teaching, the spring created the Blue Hole, in which a spirit in the form of a blue panther resided. Another spirit, taking the form of a cormorant, appeared at the Blue Hole, but the panther spirit startled the bird spirit and caused it to flee, dropping water from its tail that produced life throughout the San Antonio River Valley. Church

members believe that at certain times throughout the year they must participate in certain religious services in the "Sacred Area"—a twenty-by-thirty-foot space among cypress trees on the south shore of the river bend—facing north so they can observe the trees and the cormorants nesting and flying within the "spiritual ecology."[1] Evidence exists that indigenous peoples have conducted similar religious services in and around the Sacred Area for thousands of years. Perez has worshipped and led religious ceremonies there for at least twenty-five years, and Torres has worshipped and participated in religious ceremonies there for at least ten years. No one disputes that they and the Church sincerely hold these religious beliefs.

For over 125 years, the Sacred Area has existed within Brackenridge Park, a popular public park located in and owned by the City of San Antonio. Recognized as a local, state, and national historic landmark, the sprawling park contains numerous amenities including picnic areas, hiking paths, sports facilities, a zoo, a tea garden, a theater, a golf course, and a natural-history museum. More than one hundred years ago, the City constructed a public recreation area at the riverbend called Lambert Beach. Through the years, the City has accommodated the Church's religious gatherings in the Sacred Area while also constructing retaining walls and other improvements to promote public health and safety and to preserve the beach area for public use. Over time, retaining walls have eroded and failed, trees have weakened and died, and bird excrement has greatly

[1] The Church performs ceremonies at the Sacred Area at particular "holy moments" on specific dates throughout the year.

increased, creating health and safety issues.

In 2016, City voters approved a bond package that included nearly $8 million for park improvements, and the City contracted with a design team that developed a plan to address issues in the Lambert Beach area. The improvement plan includes repairing retaining walls, removing and replacing most of the trees, and deterring migratory birds—including cormorants—from nesting nearby. Various city, state, and federal government agencies must approve and permit the improvements. The parties dispute the extent to which the proposed measures are necessary for public health and safety and the extent to which the City has attempted to accommodate the Church's religious services as part of the improvement plan.

In 2023, a retaining wall failed, and a large tree branch fell near the Sacred Area. When the City temporarily blocked all access to the area, Perez sued the City in federal court. The district court granted immediate relief requiring the City to remove the tree branch and grant the Church access to the Sacred Area, and the City complied with that order. Perez sought additional relief, however, asserting that the City's improvement plan will destroy the Church's sacred worship space by eliminating trees and deterring cormorants, both of which are "necessary components" of the Church's religious services.

Perez contends that the City's removal of the trees and deterrence of the birds will violate his rights (1) to the "free exercise" of religion under the First Amendment to the United States Constitution, (2) to the "freedom of worship" protected under Article I, Section 6 of the Texas Constitution, (3) to be free from

governmental action that "substantially burdens" his "free exercise of religion" under the Texas Religious Freedom Restoration Act (the Texas RFRA), and (4) to be free from governmental action that "prohibits or limits religious services" under the new clause, Article I, Section 6-a of the Texas Constitution. Perez requests injunctive and declaratory relief to require the City to minimize any tree removal in or near the Sacred Area, to allow the cormorants to nest in and around the Sacred Area, and generally to revise the improvement plan to accommodate the Church's religious-service requirements.

The district court declined Perez's request for a temporary restraining order but later partially granted a preliminary injunction, ordering the City to allow the Church to have access for religious ceremonies involving limited-sized groups on certain dates but declining to enjoin the City's tree-removal and bird-deterrence plans. Perez appealed, and the Fifth Circuit initially affirmed. *Perez v. City of San Antonio*, 98 F.4th 586, 614 (5th Cir. 2024). The court rejected Perez's claims under the First Amendment, the Texas Constitution's Freedom of Worship Clause, and the Texas RFRA, *id.* at 596–611, and concluded that Perez did "not sufficiently brief the question of whether" the new Texas Religious Services Clause provides him with additional protections, *id.* at 612. The court thus concluded that Perez failed "to meet [his] burden to show a likelihood of success on the merits" of that claim. *Id.*

After granting Perez's rehearing motion, the Circuit panel withdrew its opinion and certified to this

Court the following question:[2]

> 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). We accepted the certified question, received briefing from the parties, and held oral arguments in which Perez, the City, and the State of Texas—acting as an amicus and represented by the Attorney General—participated. We also received helpful amicus briefs from (1) the State, (2) First Liberty Institute,[3] (3) the International Council of Thirteen Indigenous Grandmothers and Carol Logan,[4] (4) the

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[2] *See* TEX. CONST. art. V, § 3-c(a) ("The supreme court [has] jurisdiction to answer questions of state law certified from a federal appellate court."); TEX. R. APP. P. 58.1 ("The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent.").

[3] First Liberty Institute describes itself as "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."

[4] The International Council describes itself as "a global alliance of indigenous elders who come together in prayer, education, and healing for Mother Earth . . . to protect indigenous ways of life from destruction and to preserve the lands where Indigenous peoples live and upon which their cultures depend." Ms. Logan describes herself as "an elder from the Confederated Tribes of Grande Ronde and a lineal descendant of the Clackamas

Texas Catholic Conference of Bishops,[5] and (5) the Baptist General Convention of Texas.[6]

## II.
## The Texas Religious Services Clause

The certified question requests that we interpret and construe the new Religious Services Clause. Ultimately, our "bottom-line task is to identify what" this Clause "would have meant to those who ratified it" in 2021. *Hogan v. S. Methodist Univ.*, 688 S.W.3d 852, 857 (Tex. 2024) (citing *In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021)). To accomplish this, we must "rely heavily on the literal text," *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009), presuming that "the framers carefully chose the language," *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 594 S.W.3d 309, 313 (Tex. 2020), and interpreting it to mean what the voters who ratified the amendment would have understood it to mean, *see Abbott*, 628 S.W.3d at 293. We focus on the voters' contemporaneous understanding because—as we have long confirmed—"[t]he meaning which a constitutional

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People."

[5] The Catholic Conference describes itself as "an ecclesiastical unincorporated consultive nonprofit association [that] furthers the religious ministry of Roman Catholic bishops and archbishops in this State, particularly through advocacy for social, moral, and institutional concerns of the Catholic Church."

[6] The Baptist Convention describes itself as a "nonprofit corporation in Texas" that serves and operates "in harmonious cooperation" with "over two million congregants in more than 5,300 churches" that "participate in worship services through the week."

provision had when adopted, it has to-day; its intent does not change with time nor with conditions; while it operates upon new subjects and changed conditions, it operates with the same meaning and intent which it had when formulated and adopted." *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011 (Tex. 1934).

To determine the ratifiers' contemporaneous understanding, we must consider not only the words in the immediate text but also their "historical and linguistic context"—that is, the "full context of the constitutional language and history." *In re Dallas County*, 697 S.W.3d 142, 157–58 (Tex. 2024).[7] When construing the Constitution, we "'resist rulings anchored in hyper-technical readings of isolated words or phrases,' because 'the meaning of words read in isolation is frequently contrary to the meaning of words read contextually in light of what surrounds them.'" *Id.* at 158 (quoting *In re Off. of Att'y Gen. of Tex.*, 456 S.W.3d 153, 155 (Tex. 2015)). That is, we must not "simply open a dictionary" and "ignore the historical traditions and legal foundations upon which [our founding documents] were constructed." *Hogan*, 688 S.W.3d at 857, 859. Instead, we may consider evidence of the contemporaneous explanations and

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[7] Consideration of the linguistic context involves reading the Constitution "as a whole," focusing on all provisions that relate to the same subject matter, giving meaning and effect to each. *In re Nestle USA, Inc.*, 387 S.W.3d 610, 619–20 (Tex. 2012) (quoting *Collingsworth County v. Allred*, 40 S.W.2d 13, 15 (Tex. 1931)). The historical context includes factors such as "the history of the legislation, the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished." *Harris Cnty. Hosp. Dist.*, 283 S.W.3d at 842 (citations omitted).

understandings of the legislature that proposed the language and the electorate that voted on its ratification. *Degan*, 594 S.W.3d at 313.[8] This evidence

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[8] *See also Abbott*, 628 S.W.3d at 293 ("The legislature's mid-nineteenth century view that article III, section 10 authorized it to take absent members 'into custody' is therefore particularly compelling evidence of the original understanding of the provision."); *Am. Indem. Co. v. City of Austin*, 246 S.W. 1019, 1023 (Tex. 1922) ("Legislative construction and contemporaneous exposition of a constitutional provision is of substantial value in constitutional interpretation."). When interpreting Article XVI, Section 66 of the Texas Constitution, for example, we noted that "its impetus was a Depression-era decision from this Court." *Degan*, 594 S.W.3d at 313. We concluded that "[l]egislative history . . . confirms that Section 66 was added to the Constitution to overrule our decision." *Id.* And in *Edgewood Independent School District v. Kirby*, we looked to records from the Constitutional Convention of 1875 and "the structure of school finance" at the time of ratification to interpret Article VII, Section 1. 777 S.W.2d 391, 396 (Tex. 1991); *see also Marshall*, 76 S.W.2d at 1024 (analyzing "the history of the adoption of the contract clause in the Federal Constitution, its incorporation in the organic laws of the several states, and the long judicial interpretation thereof by the Supreme Court of the United States, by the Supreme Courts of the several States, and by the Supreme Court of Texas prior to 1876 (the date of the adoption of our present Constitution)").

We certainly adhere to our view that, when interpreting and construing a *statute*, "[*l*]*egislative* history is generally useless to courts—indeed, it can be worse than useless because it is manipulable and relies on what *never* was the law." *Brown v. City of Houston*, 660 S.W.3d 749, 755 (Tex. 2023) (citing *In re Facebook, Inc.*, 625 S.W.3d 80, 88 n.4 (Tex. 2021)). But in the context of *constitutional* interpretation, statements made by the legislature that proposed amendments to the people can be relevant, even though they lack any presumption of binding effect and are no more relevant than many other sources that can address the larger context in which the people considered ratification. Similarly, while the U.S. Supreme Court has turned away from ordinary legislative history in statutory construction,

may shed helpful light on what the text meant to those who ratified the amendment, but it "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).

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

TEX. CONST. art. I, § 6-a. The parties and amici generally treat the certified question as inquiring about both (A) the "force" of the Clause when it applies (that is, whether it imposes "a categorical bar . . . regardless of . . . the government's interest in [the] limitation") and (B) the "scope" of its application (that is, whether it imposes a bar "on any limitation of any religious service, regardless of the sort of limitation"). Perez argues that the Clause's force is "absolute" and categorical, but he concedes that its scope is limited by

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in constitutional interpretation it routinely cites the Records of the Federal Convention (a sort of "legislative history"), *see, e.g.*, *Rucho v. Common Cause*, 588 U.S. 684, 695, 697–98 (2019), as well as the Federalist Papers, *see, e.g.*, *SEC v. Jarkesy*, 603 U.S. 109, 121–22, 127 (2024), and many other sources to help show how the proposed text would have been understood by the ratifying public.

its own terms and by certain "longstanding interpretive principles of Texas constitutional law." The City, by contrast, argues that the Clause's force is limited in that it does not bar prohibitions or limitations that are narrowly tailored to promote a compelling governmental interest and its scope is limited to laws that subject religious services to "unequal treatment" compared to secular gatherings and activities.

We agree with Perez that the Clause's force is categorical when it applies, and we agree with both parties that its scope is not unlimited. But we reject both parties' proposed descriptions of the Clause's scope. We need not—and, therefore, should not and do not—attempt to exhaustively or precisely define the Clause's scope to answer the certified question in a way that assists the federal courts in deciding this case. We conclude only that its scope does not reach the type of governmental actions about which Perez complains.

**A. The "force" of the Religious Services Clause**

Perez argues that, when the Clause applies, it applies with "absolute force" and "categorically bars" a prohibited limitation on religious services regardless of the government's interest in that limitation. All the amici who address the issue agree. But the City disagrees, arguing that the Clause does not forbid laws that are narrowly tailored to promote a compelling governmental interest. The City, in other words, urges us to import into this new Clause the "strict scrutiny" standard that the U.S. Supreme Court has imported

into the First Amendment's Free Exercise Clause[9]

[9] Since the early 1960s, the U.S. Supreme Court has held that the Free Exercise Clause prohibits the government from restricting religiously motivated conduct *unless* the restriction promotes a "compelling state interest" and "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963). The Court has described this "strict scrutiny" standard—permitting governmental restrictions only if they are narrowly tailored to promote a compelling governmental interest—as "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see Cath. Charities Bureau, Inc. v. Wis. Labor & Indus. Rev. Comm'n*, 605 U.S. ___, 2025 WL 1583299, at *9 (2025) (referring to this standard as "the highest level of judicial scrutiny"); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (describing strict scrutiny as "our most rigorous and exacting standard of constitutional review").

We have also applied strict scrutiny to the Texas Constitution's Freedom of Worship Clause, which is original to the 1876 Texas Constitution and provides in part: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences," and "No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion." TEX. CONST. art. I, § 6. For want of arguments to the contrary, we have assumed that the Freedom of Worship Clause provides protection that is "coextensive" with the federal Free Exercise Clause and thus requires a strict-scrutiny analysis. *See HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 649–50 n.87 (Tex. 2007) (citing *Tilton v. Marshall*, 925 S.W.2d 672, 677 n.6 (Tex. 1996) ("Because Tilton has not argued persuasively for a different application of the provisions of the First Amendment and Article I, Section 6 as they pertain to the free exercise of religion, we assume without deciding that the state and federal free exercise guarantees are coextensive with respect to his particular claims.")); *see generally In re Commitment of Fisher*, 164 S.W.3d 637, 645 (Tex. 2005) ("Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the United States Constitution

and that the Texas Legislature has expressly included in the Texas RFRA.[10] Based on the Clause's text and context, we agree with Perez.

Turning first to the Clause's text, we agree with Perez and the amici that its plain language imposes a categorical bar. Without identifying or acknowledging any caveats or exceptions, it states that the government "may not" impose a requirement "that prohibits or limits religious services." The phrase "may not" in this context states a direct prohibition, synonymous with "shall not," declaring what the government "is not permitted to do." TEX. GOV'T CODE § 311.016(5); BRYAN A. GARNER, *Garner's Dictionary of Legal Usage* 568, 954 (3d ed. 2011). By contrast, numerous other constitutional and statutory provisions state that the government "may not" or "shall not" do something "unless," "until," or "except" in particular circumstances.[11] The Texas RFRA, for

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and assume that its concerns are congruent with those of the Texas Constitution.").

[10] The Texas RFRA provides that "a government agency may not substantially burden a person's free exercise of religion" unless "the government agency demonstrates 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(a)–(b).

[11] *E.g.*, TEX. CONST. art. III, §§ 48-f ("An ad valorem tax may not be levied . . . until approved by the qualified voters . . . ."), 49(d) ("Except as provided by law under Subsection (f) of this section, the amount of debt stated in the proposition may not be exceeded and may not be renewed after the debt has been created unless the right to exceed or renew is stated in the proposition."); art. VII, § 5(c) ("Except as provided by this section, the legislature

example, states that the government "may not substantially burden a person's free exercise of religion" but expressly makes that prohibition "[s]ubject to" the government's ability to demonstrate that the imposition of the burden passes strict scrutiny. TEX. CIV. PRAC. & REM. CODE § 110.003(a)–(b). The Religious Services Clause contains no similar qualifying language.

The Clause's linguistic context also supports this construction. As explained, the federal Free Exercise Clause, the Texas Freedom of Worship Clause, and the Texas RFRA all protect religious freedoms, but they each—either expressly or as judicially construed—have been understood to permit laws they would otherwise prohibit if the law satisfies strict scrutiny. The Free Exercise Clause and the Freedom of Worship Clause (as often judicially construed) already forbid laws that target the free exercise of religion (which generally would include religious services) *unless* the law survives strict scrutiny, and the Texas RFRA expressly forbids laws that substantially burden the exercise of religion unless the law survives strict scrutiny. Construing the Religious Services Clause to

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may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose."); art. IX, § 9B ("A district may not be created or a tax levied unless the creation and tax are approved by a majority of the registered voters who reside in the district."); art. XVI, §§ 40(b) ("State employees or other individuals may not receive a salary for serving as members of such governing bodies, except that . . . ."), 59(c-1) ("The Legislature may not authorize the issuance of bonds or provide for indebtedness under this subsection . . . unless a proposition is first submitted to the qualified voters of the district and the proposition is adopted.").

also permit laws that prohibit or limit religious services *if* the law survives strict scrutiny provides no meaningful protection that the Free Exercise Clause and Freedom of Worship Clause do not already provide. We must construe the Clause so that it produces an independent meaning and operative effect. *Doody v. Ameriquest Mortg. Co.*, 49 S.W.3d 342, 344 (Tex. 2001).

The Clause's historical context also supports this construction. As the parties acknowledge and agree, the Legislature proposed and the people ratified the Religious Services Clause in response to governmental shut-down orders that prohibited and limited religious services when the COVID-19 pandemic struck in 2020. Attempting to "slow the spread," governments around the country, including in Texas,[12] issued "lock-down" orders and "social-distancing" requirements that arguably imposed "the greatest intrusions on civil liberties in the peacetime history of this country." *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1314 (2023) (GORSUCH, J., statement). As many turned to their religious faith amid the growing fear and anxiety, their

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[12] *See, e.g.*, The Governor of the State of Tex., Exec. Order GA-08 (issued Mar. 19, 2020), 45 Tex. Reg. 2267, 2271 (2020) (restricting social gatherings of ten or more people); Travis Cnty. Judge, Order No. 2020-04 (issued Mar. 21, 2020), https://www.traviscountytx.gov/images/docs/covid-19-order-4.pdf (prohibiting gatherings of ten or more people unless social distancing "can be maintained and controlled"); Tarrant Cnty. Judge, Second Amended Declaration of Local Disaster Due To Public Health Emergency, https://www.tarrantcountytx.gov/content/dam/main/global/Covid-19/Declaration_of_Local_Disaster_2nd_Amendment.pdf (issued Mar. 21, 2020) (requiring essential business to "enforce social separation").

governments barred them from gathering with fellow believers or worshipping in accordance with their religious beliefs. Some jurisdictions prohibited all religious services anywhere, both indoors and outdoors; some restricted all in-person services and permitted only services by video, teleconference, or other remote proceedings; some barred gatherings beyond individual households; some limited the size of religious gatherings to as few as ten; some prohibited particular activities like singing or chanting; and some prohibited religious leaders from ministering to adherents except in individual settings following social-distancing requirements.[13]

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[13] *See Mayorkas*, 143 S. Ct. at 1314–15 (GORSUCH, J., statement); *see also, e.g.*, Mass. Exec. Order No. 13 (Mar. 24, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download/ (limiting services at "[c]hurches, temples, mosques, and other places of worship" "in any confined indoor or outdoor space" to ten people); *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (*S. Bay II*) (denying injunctive relief against California's "prohibition on singing and chanting during indoor services"); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 15–16 (2020) (per curiam) (enjoining enforcement of Governor of New York's executive order restricting religious services to ten or twenty-five people); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 343 (7th Cir. 2020) (citing Executive Order 2020-32 § 2(3) (Apr. 30, 2020), the Governor of Illinois's executive order limiting all "public and private gatherings" to ten people); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (granting injunction to allow "drive-in service" in church parking lot despite Governor's order prohibiting "[a]ll mass gatherings"); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758, 764 (E.D. Cal. 2020) (noting that "[f]aith based services that are provided through streaming or other technology" were exempt from Governor's stay-home orders, but not in-person services); Tyler Shannon, *Texas Proposition 3: A*

Yet many of these same governmental orders permitted other activities or imposed lesser limitations, including for schools, restaurants, bars, liquor stores, dry cleaners, plumbers, real-estate transactions, electricians, exterminators, meat-packing plants, distribution warehouses, marijuana dispensaries, firearm stores, and casinos.[14] Many governmental orders deemed these secular entities and activities to be "essential" while refusing the same status to religious organizations and practices.[15] In Texas, most of the orders that concerned religious gatherings were issued by local governments like cities and counties. Three days after the federal Department of Homeland Security released its Guidelines, the Texas Governor issued an executive order defining "essential services" as consisting of "everything listed

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*State Constitutional Response to Restrictions on Religious Gatherings*, 55 TEX. TECH L. REV. 559, 563–66 (2023) (discussing COVID-19 restrictions on religious gatherings nationwide, including in Texas).

[14] *See, e.g.*, *Mayorkas*, 143 S. Ct. at 1314 (GORSUCH, J., statement); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (ALITO, J., dissenting from denial of application); *Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 832 (D. Colo. 2020).

[15] *See* U.S. DEP'T OF HOMELAND SEC., ADVISORY MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE (Mar. 28, 2020), https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_1.pdf.

by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, *plus religious services conducted in churches, congregations, and houses of worship*." The Governor of the State of Tex., Exec. Order GA-14 (issued Mar. 31, 2020), 45 Tex. Reg. 2361, 2369–70 (2020) (emphasis added).

People of faith filed numerous lawsuits challenging various COVID lock-down orders under both the Free Exercise Clause and the RFRA statutes. None reached this Court, and the results in courts in other jurisdictions were mixed. The U.S. Supreme Court, for example, initially denied two emergency applications to enjoin such orders, concluding that the orders did not target or discriminate against religious beliefs and practices and granted more lenient treatment only to "dissimilar" (secular) activities.[16] Later in 2020, the Court granted an injunction, concluding that the orders at issue *might* violate the Free Exercise Clause because they treated religious entities and activities more strictly than similar secular organizations and activities.[17] The Court again granted limited relief in four cases in 2021.[18]

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[16] *Sisolak*, 140 S. Ct. at 2603; *S. Bay United Pentecostal Church v. Newsom* (*S. Bay I*), 140 S. Ct. 1613, 1613 (2020).

[17] *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 21.

[18] *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289, 1290 (2021) (granting relief as to capacity limitation on indoor worship services but denying relief, without prejudice, as to prohibitions against singing and chanting); *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (vacating and remanding in light of *S. Bay II*,

Early in 2021, while many of these lawsuits were pending, the Texas Legislature responded to these events by proposing in Senate Joint Resolution 27 to amend the Texas Constitution by adding the Religious Services Clause as Article I, Section 6-a.[19] Ultimately, the Senate passed the resolution on a vote of 28–2,[20] and the House passed it on a vote of 133–3 (with three present not voting).[21] Over sixty-two percent of Texas voters supported ratification of the Clause, and it became effective near the end of

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141 S. Ct. at 716 (granting relief as to blanket prohibition on "indoor worship services")); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam) (holding that "government regulations are not neutral and generally applicable" if "they treat *any* comparable secular activity more favorably than religious exercise," even if they treat "some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue"); *see generally* Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 683–701 (2021).

[19] Texas Senate Joint Resolution 27 was not the Legislature's only action responding to pandemic-related limitations on religious liberties. It also passed, for example, House Bill 525, adding chapter 2401 to the Texas Government Code. *See* TEX. GOV'T CODE §§ 2401.001–.005. Chapter 2401 declares that religious organizations are "an essential business" in this State and that their activities are "essential activities" even during a declared state of disaster, regardless of what any disaster order may say, and provides that governmental entities may not "prohibit a religious organization from engaging in religious and other related activities." *Id.* § 2401.002(a). We are not asked to address this new statutory provision in this case.

[20] S.J. of Tex., 87th Leg., R.S. 409 (2021).

[21] H.J. of Tex., 87th Leg., R.S. 2816 (2021).

November 2021.[22]

This historical context confirms that those who voted to ratify the Religious Services Clause understood that it would provide *greater* protection for religious services than they understood the Free Exercise Clause or the Texas RFRA provided during the COVID-19 pandemic. As the House Resolution Analysis explains, the Legislature proposed the amendment to address concerns "over 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 to "do more to protect this right for all Texans and ensure that religious liberty is not abridged in the future."[23]

The historical context also confirms that those who proposed and approved the Clause understood that it would provide greater protection by categorically forbidding certain prohibitions and limitations on religious services regardless of the government's interest in those prohibitions and limitations. During the legislative debates, one House member proposed that the resolution be revised to include the "normal language" that permits a regulation that is "narrowly tailored to serve a compelling state interest," but the proposal failed after the resolution's House sponsor

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[22] *See* TEX. SEC'Y OF STATE, TEXAS ELECTION RESULTS, https://results.texas-election.com/races (Election: 2021 November 2nd Constitutional Amend.); *see generally* Shannon, *supra* note 13, at 574.

[23] House Comm. on State Affs., Resolution Analysis, Tex. S.J. Res. 27, 87th Leg., R.S. (2021), available at https://capitol.texas.gov/tlodocs/87R/ analysis/pdf/SJ00027H.pdf.

replied that "there is a reason we have left that language out."[24] Even legislators who opposed the amendment understood that, if it passed and was ratified, the government "could never restrict capacity in a church service for any reason."[25] And evidence supports that the public understood this as well, including an editorial in the Houston Chronicle that opposed the amendment because, if it were adopted, "no state interests can ever justify limiting religious services."[26]

In support of its argument that the Clause does not forbid laws that pass strict scrutiny, the City argues that *every* constitutional right is and must be subject to *some* limitation.[27] The City contends that, just as the Free Exercise Clause and the Freedom of

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[24] Debate on Tex. S.J. Res. 27 on the Floor of the House, 87th Leg., R.S. (May 11, 2021), available at https://house.texas.gov/videos/10097.

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

[26] The Ed. Bd., *Vote no on Proposition 3. 'Religious freedom' amendment goes too far.*, HOUS. CHRON. (Oct. 14, 2021), https://tinyurl.com/y8cje5b5.

[27] *See Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) ("All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." (quoted in *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 147 (Tex. 2010))).

Worship Clause are qualified by strict scrutiny even though, textually, they appear to be categorical and absolute, the Religious Services Clause must also be qualified by strict scrutiny. But this argument ignores the Clause's linguistic and historical context. The U.S. Supreme Court has applied the strict-scrutiny test to implement its understanding of the original meaning of the Free Exercise Clause based on that Clause's linguistic and historical context. As we have explained, the linguistic and historical context of the Religious Services Clause is dramatically different.

The City argues that the Clause must be subject to strict scrutiny, else the government will be forced to favor individual religions over others and over the public interest in violation of the federal Establishment Clause. We agree with Perez, however, that this concern relates to the *scope* of the Clause's applicability, not to its *force* when it does apply.[28]

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[28] The City relies in part on the Supreme Court's recent decision in *Catholic Charities Bureau*, in which the Court reaffirmed that a "law that differentiates between religions along theological lines is textbook denominational discrimination" that violates the First Amendment's Establishment Clause. 605 U.S. ___, 2025 WL 1583299, at *6. As the City sees it, construing the Clause's force to be categorical "risks violating the Establishment Clause by favoring one religious group over all other religious and secular interest." Unlike the laws at issue in *Catholic Charities Bureau* and the decisions it reaffirms, however, the Clause in no way permits a law or governmental decision that "grants a denominational preference by explicitly differentiating between religions based on theological practice." *Id.* at *7. To the extent the Clause permits the City to make park improvements that uniquely affect Perez's religious practices, those effects result from "'secular criteria' that happen to have a 'disparate impact'

Based on the Clause's text and context, we conclude that, *when it applies*, it categorically bars a governmental prohibition or limitation on religious services without regard to whether it passes strict

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upon different religious organizations.'" *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982)).

The City also expresses some resistance to this distinction between the Clause's "force" and "scope," noting Justice Kavanaugh's observation that the question of the extent to which a constitutional provision may permit governmental regulation of a right it otherwise guarantees can be framed as either an "exception" or a "limitation" to the right and "[e]ither way, the analysis is the same—does the constitutional provision, as originally understood, permit the challenged law?" *United States v. Rahimi*, 602 U.S. 680, 717 n.1 (2024) (KAVANAUGH, J., concurring). Noting that Perez himself concedes that the Religious Services Clause does not forbid *every* law that prohibits or limits religious services, the City suggests that the limitations Perez himself accepts are actually limitations to the Clause's force, which must be recognized because of the government's compelling interests that support those limitations under the strict-scrutiny standard. We need not thoroughly engage with the City on this issue to answer the question certified, however. We agree with Perez that the certified question asks about both the Clause's force ("a categorical bar") and its scope ("any limitation . . . regardless of the sort"), and we answer the question accordingly. Based on the arguments presented by both parties and amici, and considering the Clause's text, linguistic context, and historical context, we perceive a meaningful distinction *in this case*, at least, between limitations on the types of governmental orders to which the Clause applies and the power the government retains to deny the right in the future. We identify the limits of the Clause's scope based on the intent of its drafters and ratifiers as exhibited through its text and context, not based on how important the government (including the judiciary) may think a governmental interest becomes in the future.

scrutiny or any other test that balances the right against the government's interests.

### B. The "scope" of the Religious Services Clause

We turn now to the second part of the certified question: Whether the Religious Services Clause forbids "*any* limitation of *any* religious service, regardless of the sort of limitation." Every party and amici agrees that the answer to this question is "No." The difficulty, however, is in identifying the boundaries of the Clause's scope. As explained, we need not and will not attempt to comprehensively define those boundaries in this case. Notwithstanding the potential benefits of certified questions,[29] we must always remain alert to their risks. A case that comes to us through a certified question does not arise from the normal litigation process in Texas courts, and we often lack the benefit of careful consideration of the issues by our lower courts. Indeed, we lack subject-matter

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[29] Certified questions permit this Court and the federal courts to engage in a "cooperative effort" that is "in the best interests of an orderly development of our own unique jurisprudence, and to the bar, as well as in the best interests of the litigants we concurrently serve." *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 n.9 (Tex. 1992). Certification can be "a valuable tool for promoting the interests of cooperative federalism." *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997). By "allow[ing] a federal court faced with a novel state-law question to put the question directly to the State's highest court," certification can "reduc[e] the delay, cut[] the cost, and increas[e] the assurance of gaining an authoritative response." *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 76 (1997). It is especially "imperative that any state constitutional law issues . . . be decided by the state supreme court." *Nielsen*, 116 F.3d at 1413.

jurisdiction in the usual sense, and we can entertain the certified question *only* because the people of Texas gave us that ability through a constitutional amendment. *See* TEX. CONST. art. V, § 3-c(a). Certified questions thus create the risk that we might answer a question in the abstract, divorced from a factual record to illuminate the legal question by grounding it in a real-world dispute.

As occurred here, the Fifth Circuit routinely "disclaim[s] any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified." *Perez*, 115 F.4th at 428 (quoting *Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015)). It is therefore unsurprising that we have restated a certified question when appropriate. *See Sims v. Carrington Mortg. Servs., L.L.C.*, 440 S.W.3d 10, 15 (Tex. 2014). This certified question asks simply whether the Religious Services Clause forbids "*any* limitation of *any* religious service, regardless of the sort of limitation"—a question to which, as everyone agrees, the answer is "No." But the question inherently asks us to define the Clause's scope in a way that will give "guidance" to the federal courts as they resolve the underlying case. *Janvey v. GMAG, L.L.C.*, 592 S.W.3d 125, 126 (Tex. 2019). Here, we are asked to give guidance regarding the scope of a constitutional provision that Texas adopted just a few years ago and that no Texas appellate court has yet interpreted. The potential ramifications of our answer are unknown but vast. However, we need not endeavor to comprehensively define the Clause's scope to provide a helpful answer here—nor should any court undertake to make such comprehensive pronouncements about the contours of a provision such

as the Religious Services Clause beyond those that are necessary to decide the case before it.

For purposes of answering this certified question, we need only explain the boundaries the Clause's text expressly lays out, reject the boundaries the parties and amici propose, and address a single limitation that may be helpful to the Fifth Circuit in resolving this case, leaving further construction and application for future cases.[30] Endeavoring to provide a helpful

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[30] Our dissenting colleague would refuse to answer the certified question, reading it narrowly to ask only whether the Religious Services Clause's scope is unlimited. *Post* at 4 (SULLIVAN, J., dissenting). We agree, of course, that we should only answer the question asked, but doing so requires providing at least a "general" answer that assists the federal court in resolving the case. *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 n.3 (Tex. 2019). Our role—our authority, even—in answering a certified question is not to resolve the underlying case by applying our answer to the facts presented. *Amberboy*, 831 S.W.2d at 798. But to answer the question in a way that helps the federal courts resolve the case, we must consider the facts the Fifth Circuit provides us and answer the question within the context of those facts. *Id.* at 793 (answering whether a promissory note is a negotiable instrument when it requires "interest to be charged at a rate that can be determined only by reference to a bank's published prime rate"). So, for example, when the Fifth Circuit asked "whether a transferee on inquiry notice of fraudulent intent can achieve good faith without investigating its suspicions," we answered that question, not "comprehensively," but more specifically than merely addressing "what constitutes good faith." *Janvey*, 592 S.W.3d at 126. At times, providing a helpful answer necessarily requires us to address whether a party possesses the right it asserts. *See, e.g.*, *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 777 (Tex. 2007) (holding party in underlying case had "no right of reimbursement through subrogation" because insured had no cause of action against third party); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 357 (Tex. 1990) (holding party's "constitutional attack on section

response to the Fifth Circuit while avoiding unforeseen collateral consequences, we answer the question by focusing on the facts presented in the record before us. Under those facts, the question, at a minimum, is whether the Clause's scope reaches governmental actions taken to preserve and maintain public property for the safety and enjoyment of the public. To that question, we answer, "No."

The text itself expressly limits the scope of the Clause's applicability in at least five ways. First, the Clause forbids only actions by "this state or a political subdivision of the state." TEX. CONST. art. I, § 6-a. Second, it forbids only actions through which the state or a political subdivision may "enact, adopt, or issue a statute, order, proclamation, decision, or rule." *Id.* Third, the Clause protects only "religious services"; it does not, for example, purport to protect the broader concept of the "free exercise of religion." *Id.*[31] Fourth, it

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16.003(b) is not premised upon restriction of a common-law cause of action, and, therefore, necessarily fails the first prong of the open courts test"). But even when that's the case, "how our answer is applied in the case before the Fifth Circuit Court of Appeals is solely the province of that certifying court." *Mid-Continent*, 236 S.W.3d at 777. Here, we provide a helpful—but certainly not comprehensive—explanation of the scope of the Religious Services Clause by holding it generally does not address actions the government takes in the preservation and management of public lands. It remains the role of the federal courts, however, to decide exactly how that answer applies in this case.

[31] As the parties note, the Clause expressly protects "religious services, *including* religious services conducted in churches, congregations, and places of worship." TEX. CONST. art. I, § 6-a (emphasis added). We agree with the parties that this language

protects only religious services "conducted . . . in this state by a religious organization established to support and serve the propagation of a sincerely held religious belief." *Id.* And fifth, it forbids only government actions that "prohibit[] or limit[]" such services. *Id.*

For the most part, these express limitations on the Clause's scope of applicability are not controversial in this case. The parties' debate focuses primarily on the fifth requirement, presenting contrasting views of what it means for a government rule or decision to "prohibit" or "limit" a religious service. Relying in part on these express limitations and, more so, on the Clause's linguistic and historical context, the parties and amici present various proposals to answer this question. We find none of them entirely persuasive.

The City asserts, for example, that the Clause applies only to government actions that subject religious services to "unequal treatment" as compared to secular activities and thus requires that religious services be deemed "essential" and "treated at least as favorably under the law as any secular activity." In support of this construction, the City relies primarily on the Clause's historical context, noting that the Legislature and the ratifiers were particularly concerned that COVID lock-down orders prohibited and limited religious services yet allowed many secular activities that were deemed "essential" to continue relatively unimpeded.[32] While we agree that

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provides *non-exclusive* examples of common religious services the Clause protects.

[32] The City notes, for example, that the resolution's sponsor in the House explained that the resolution was necessary because

the Clause forbids such unequal treatment of religious services, we conclude it obviously does more.

The text itself does not contain language that ties its protection to a comparison between religious services and secular activities or that refers to treating religious services as "essential."[33] Although some proponents expressed the desire that religious services be treated equally or as essential,[34] we find no support for the proposition that the ratifiers understood that the Clause would allow the government to restrict religious services so long as it also and equally restricted other types of activities. To the contrary, the historical context reveals that the Clause was adopted not only in response to orders that treated religious services less favorably than secular activities but in response to orders like Travis County issued, which prohibited all "public or private Community

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"[i]n many instances when liquor stores and casinos have been able to operate at full capacity, churches have been closed down." Debate on Tex. S.J. Res. 27 on the Floor of the House, 87th Leg., R.S. (Mar. 25, 2021) (Statement of Rep. Leach).

[33] By contrast, House Bill 525, which the Legislature also passed in 2021, added chapter 2401 to the Texas Government Code and declared that religious organizations are "essential business[es]" in this State and their activities are "essential activities" even during a declared state of disaster, regardless of what any disaster order may say. TEX. GOV'T CODE § 2401.002. The Religious Services Clause contains no such language.

[34] One witness stated, for example, that one purpose of the Clause was to ensure "that churches and places of worship are essential because faith itself is essential." Debate on Tex. S.J. Res. 27 in the Senate Comm. on State Affs., 87th Leg., R.S. at 2:06:27 (Mar. 8, 2021), available at https://tinyurl.com/bdjcusme.

Gatherings" including "religious services." *See* Travis Cnty. Judge, Order [on COVID-19], at §§ 2–3 (issued Mar. 17, 2020), available at https://www.traviscountytx.gov/images/docs/covid-19-order-2.pdf. We thus reject the City's proposed construction of the Clause's scope.

The State argues that the Clause protects only the right to "gather" for religious services. Noting that the text provides examples of services "conducted in churches, congregations, and places of worship," and that the historical context includes many statements that the Clause was adopted to address "government-mandated closure of churches and other houses of worship,"[35] the State suggests that the Clause forbids shut-down orders, capacity caps, and location restrictions that prohibit or limit religious "gatherings" but does not address restrictions on what adherents

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[35] *See*, *e.g.*, Tex. Leg. Council, Analyses of Proposed Constitutional Amendments 14 (Aug. 2021), available at https://tinyurl.com/4hd5vcxy (stating purpose was to forbid "limit[ing] in-person religious gatherings" or "[c]losing houses of worship" and preserve the "ability to meet in person" by "[a]llowing places of worship to remain open during public health emergencies"); H.J. of Tex., 87th Leg., R.S. 2815–16 (2021) (quoting state representative as saying purpose was to make clear that "the state cannot close down or limit our houses of worship" and to protect the right "to congregate with fellow believers, to attend church or mosque or synagogue, [and] to meet with fellow believers in prayer and worship"), 2816 (quoting representative as stating purpose was to ensure government cannot "keep you from going to church"); Debate on Tex. S.J. Res. 27 on the Floor of the House, 87th Leg., R.S. at 8:29:36–40 (May 11, 2021), available at https://tinyurl.com/yc8jvvpj (quoting House sponsor as stating purpose was to prevent government from "shut[ting] down" churches or keeping them from "gather[ing] to pray").

can do when they are gathered.[36] Like the parties and other amici, we disagree and conclude that the Clause protects not only the right to gather for religious services but also worship practices that are part of religious services. As the Senate and House sponsors insist in their amicus brief, the historical context demonstrates that the Legislature intended and the ratifiers understood that the Clause would "protect not only the gathering of congregants but their acts of worship which inherently comprise religious services."[37] We thus also reject the State's proposed

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[36] Confusingly, the State asserts in its brief that the Clause would prohibit "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].'" Debate on Tex. S.J. Res. 27 on the Floor of the House, 87th Leg., R.S. at 8:29:41–53 (Mar. 25, 2021), available at https://tinyurl.com/4tdaw5es. But the State insisted at oral argument that the Clause addresses only "closing church doors" and not "what goes on inside" and that laws prohibiting the taking of communion or singing of hymns are "not within the scope of the amendment." Oral Argument at 59:04–1:00:19; 1:01:50, *Perez v. City of San Antonio*, (Dec. 5, 2024) (No. 24-0714), https://www.youtube.com/watch?v=zUiYQdX_Bp8.

[37] As the Senate sponsor explained when addressing a meeting of pastors and adherents, the Clause was intended to address governmental orders that "tried to prohibit singing in places of worship." *See* 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. Hancock). The House sponsor similarly explained that the Clause would protect the freedom to both "assemble" and "worship." Comm. on State Affs., Tex, House of Representatives, 87th Leg., R.S. (Mar. 25, 2021) at 1:42:13, available at https://house.texas.gov/videos/7964 (bill layout of Rep. Leach). And the Clause was proposed in response, at least in part, to the U.S. Supreme Court's refusal to enjoin a shut-down order that

construction of the Clause's scope.

Perez agrees that the Clause's scope is limited, not only by the text's plain language imposing the five limitations described above, but also by what Perez refers to as "longstanding interpretive principles of Texas constitutional law." According to Perez, the Clause addresses more than just "unequal treatment" and religious "gatherings" but "does not protect religious services that long-existing background principles of law would have forbidden." Perez asserts that, just as the constitutionally protected right to work and earn a living does not encompass a right to engage in occupations "long deemed 'inherently vicious and harmful,'" *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 654–55 (Tex. 2022) (quoting *Murphy v. California*, 225 U.S. 623, 628 (1912)), and the Free Exercise Clause does not permit churches to commit tortious conduct "with impunity," *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 12 (Tex. 2008), the Religious Services Clause does not extend to long-recognized limitations on religious freedom. As examples, Perez asserts that the Clause does not extend to and protect a religious service that prevents the government from responding to a "true emergency" or "exigency,"[38] that violates otherwise applicable private property law,[39] that

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included a "prohibition on singing and chanting during indoor service." *S. Bay II*, 141 S. Ct. at 716.

[38] Perez asserts, for example, that the Clause does not forbid the government from interfering with a religious service if truly necessary to respond to an imminent flood or falling tree.

[39] Perez asserts, for example, that the Clause does not forbid the government from interfering with a religious service that

interferes with the rights of the government or the public to use public property,[40] or that violates well-established criminal law and procedure.[41]

Although we might agree in some cases that the Clause does not protect such religious services, we cannot accept Perez's amorphous description of the Clause's scope, for several reasons. First, nothing in the text or the context provides support for the limitation as Perez articulates it. Second, defining the scope as being limited by "longstanding interpretive principles" provides no adequate objective standard and instead leaves it in the hands of the government to decide in the future what the Clause protects, instead of honoring the decision the people already made in the past. And third, the standard provides no certainty or predictability on which the government may base its decisions, and on which religious organizations may assert their rights, in the future.

Having concluded that the scope of the Religious

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violates laws against trespassing or that creates a public or private nuisance.

[40] Perez asserts, for example, that the Clause does not forbid the government from interfering with a religious service in a public park if necessary to ensure other members of the public can also use and enjoy the park. He also asserts that the Clause would not require this Court to allow a religious organization to use its courtroom for its religious services.

[41] Perez asserts, for example, that the Clause does not forbid the government from prohibiting human sacrifices or imprisoning a convicted clergy member, even if such sacrifices or the clergy member's presence is essential to a religious organization's religious services.

Services Clause includes but is not limited to governmental orders that treat religious services unequally, or to orders that prohibit or limit religious gatherings, or by amorphous longstanding interpretive principles, we nevertheless agree with the parties and amici that its scope is not *un*limited. Because the Clause *supplements* and does not *supplant* the protections already provided by the Free Exercise Clause, the Freedom of Worship Clause, and the Texas RFRA, the linguistic context suggests that the Religious Services Clause does not attempt to independently and comprehensively address all governmental limitations on religious freedoms. And the historical context also confirms that those who drafted and proposed the amendment did not intend that its scope be unlimited.

The House sponsor, for example, stated during the floor debates that "existing local laws and ordinances and rules dealing with the fire code, with health and safety hazards, with zoning restrictions, those with criminal justice and public safety laws, those would still be able to be enforced and this constitutional amendment does nothing to affect those." Debate on Tex. S.J. Res. 27 on the Floor of the House, 87th Leg., R.S. (Mar. 25, 2021) (Statement of Rep. Leach). He went on to say he did not intend the amendment to address "every single instance where a fire code may be violated or where a police officer may need to enter a church to do his or her job." *Id.* As another House member told the committee, "I don't think there's anybody, any court, anywhere that would read this to say that if there's a true health and safety issue, that you cannot enforce that health and safety issue." *Id.* (Statement of Rep. King).

Although we need not address here whether the Clause reaches fire codes, police activity, or "true health and safety issue[s]," we can conclude with assurance, based on the Clause's text and historical context, that it generally forbids governmental enactments that prohibit people from gathering for a religious service (like the COVID lock-down orders), restrict the number or relationships of people who can gather for a religious service (like the COVID orders imposing capacity caps), or regulate the activities in which people may engage when they gather (like the COVID orders prohibiting singing, chanting, or communion). Beyond that, to provide a helpful answer to this certified question, we need only consider and address the facts as the Fifth Circuit presents them to us. The City's decision to remove and replace trees and deter migratory birds in a popular City park does not purport to prohibit the Church from gathering or regulate what the Church may do when it gathers. Instead, at most, it eliminates or reduces natural elements of *the City's* real property that the Church believes are necessary components of its religious services. This type of governmental conduct is indisputably different in character from the type of governmental conduct the people sought to proscribe by adopting the new Religious Services Clause.

Unlike the COVID orders that gave rise to the adoption of the Religious Services Clause, the governmental decisions at issue here involve the preservation and maintenance of public property that is owned and managed by the government, not by the Church or its members. Perez agrees that the Clause does not require the City to *provide* the Church with components that are necessary for its religious services

or to prevent limitations on those components caused by *other* sources. And Perez concedes the Clause does not prevent the City from selling this very property to a private developer[42] or from taking actions that are necessary to ensure that all members of the public can access and enjoy the Lambert Beach area equally with the Church. But in Perez's view, for as long as the City owns the property, the Clause at least forbids the City from taking any action that would deprive the Church of trees and birds that are necessary components of the Church's religious services.

These arguments implicate thorny issues that courts have previously addressed under the Free Exercise Clause and the federal RFRA. On the one hand, as Perez asserts, courts have recognized that governments hold public parks in trust for the benefit and use of the public and must make those spaces available to the public without discriminating against any who desire to use them. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). But as the City insists, the courts have also recognized that the public's right to use a public park "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order." *Id.* at 515–16.

Two cases particularly illustrate the tensions that can exist between religious liberties and the use of public lands. In the first, *Lyng v. Northwest Indian*

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[42] Although Perez asserts that original deed restrictions forbid the City from selling the property to a private developer, he concedes that the Religious Services Clause does not have that effect.

*Cemetery Protective Ass'n*, the U.S. Supreme Court held that the Free Exercise Clause did not prohibit the government from harvesting timber and constructing a road on publicly owned land even though doing so would cause "irreparable damage" to areas long considered by indigenous peoples to be "sacred" and would "have severe adverse effects on the practice of their religion." 485 U.S. 439, 447 (1988). The Court concluded that the Free Exercise Clause did not forbid the governmental actions because the plaintiffs would not "be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. Observing that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires," the Court reasoned that accommodating the plaintiffs' religious beliefs under these circumstances "could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." *Id.* at 452–53. "Whatever rights the Indians may have to the use of the area," the Court concluded, "those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453.

The second case that particularly illustrates the tensions that can arise between religious liberties and the use of public land is *Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024) (en banc), *cert. denied*, No. 24-291, 2025 WL 1496472 (U.S. May 27, 2025). In *Apache Stronghold*, the Ninth Circuit relied on *Lyng* to hold that neither the Free Exercise Clause nor the federal RFRA prohibits the government from

selling public lands to a mining company even though the sale will result in the destruction of an area indigenous peoples believe is a "'sacred place' that serves as a 'direct corridor' to 'speak to [their] creator,'" and at which they have engaged in "religious practices" for "at least a millennium." *Id.* at 1044. The Ninth Circuit reasoned that the Free Exercise Clause does not prohibit the sale because, as in *Lyng*, the sale will not "coerce" the adherents "into acting contrary to their religious beliefs" or "discriminate" against them or treat them unequally. *Id.* at 1051–52. And the court held that RFRA does not prohibit the sale for the same reasons, because the concept of a "substantial burden" on religious exercise under RFRA "must be understood as subsuming, rather than abrogating, the holding of *Lyng*." *Id.* at 1063.

Perez raises several arguments distinguishing *Lyng* and *Apache Stronghold* and explaining why those decisions do not support the City's position. But we need not address them here. When the Fifth Circuit panel withdrew its original opinion in this case, it elected to "pretermit further consideration" of Perez's claims under the Free Exercise Clause and the Freedom of Worship Clause "pending resolution of" this certified question asking only about the Religious Services Clause. *Perez*, 115 F.4th at 427. Expressing no opinions as to those claims, we observe only that although the Religious Services Clause forbids the government from prohibiting or limiting religious services, nothing in its text purports to address governmental preservation and management of public lands or the tensions between such activities and religious liberties. To whatever extent we could construe the text broadly to encompass Perez's claims,

the Clause's linguistic and historical context establishes that it does not encompass "limitations" on religious services that result from the government's preservation and maintenance of the natural features of public lands.

## III.

## Answer

For these reasons, we answer the certified question as follows: When the Texas Religious Services Clause applies, its force is absolute and categorical, meaning it forbids governmental prohibitions and limitations on religious services regardless of the government's interest in that limitation or how tailored the limitation is to that interest, but the scope of the clause's applicability is not unlimited, and it does not extend to governmental actions for the preservation and management of public lands. We express no opinion on whether the Free Exercise Clause or the Texas RFRA protect the religious liberties Perez asserts, and we leave it to the federal courts to apply our answer in the underlying case.

Jeffrey S. Boyd
Justice

**OPINION DELIVERED:** June 13, 2025