

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**

APPENDIX VOLUME II

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

Gary Perez and Matilde Torres,

Plaintiffs,

v.

City of San Antonio,

Defendant.

Case No. 23-cv-977

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

1. This lawsuit seeks to stop the City of San Antonio (the “City”) from desecrating a holy place. As members of the Lipan-Apache “Hoosh Chetzel” Native American Church, Plaintiffs Gary Perez and Matilde Torres believe that the land that includes Brackenridge Park (the “Park”), a 343-acre public park north of downtown San Antonio, is the site of the creation of life in this region. They and their ancestors have believed that long before the Park existed. Plaintiffs use sites within the Park for both routine worship services and special religious ceremonies. The double crested-cormorant nests around a specific bend in the river within the Park that is central to Plaintiffs’ beliefs about the creation of life and their spirituality. The birds’ presence in the Park is essential for Plaintiffs’ religious practice.

2. Yet the City is pursuing a plan that is driving

the birds away, destroying trees and other habitat, and compromising the Park's spiritual ecology, all of which is interfering with Plaintiffs' ability to practice their religion. On top of that, the City is preventing Plaintiffs from accessing their sacred area within the Park to worship according to their beliefs. On a half-dozen occasions, Plaintiffs asked the City to modify its renovation plans to preserve the ecology of the Park and Plaintiffs' ability to worship within it, but the City rejected those requests. Indeed, the City has *never* undertaken basic steps to see whether the proposed development of the Park could go ahead in a way that would preserve the cormorant's presence or habitat.

3. Plaintiffs now seek declaratory and injunctive relief to vindicate their rights protected by (1) the First Amendment of the U.S. Constitution, *see* U.S. Const. amend. I; (2) the Texas Constitution, *see* Tex. Const. art. I, §§ 6, 6-a; (3) the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"), *see* 42 U.S.C. § 2000cc, *et seq.*; and (4) the Texas Religious Freedom Restoration Act ("TRFRA"), Tex. Civ. Prac. & Rem. Code § 110.003(a), (b).

PARTIES

I. Plaintiffs

4. Plaintiff Gary Perez is a descendant of the indigenous people of North America, resident of the City, and member of the Lipan-Apache Native American Church. He 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. He has worshipped and led religious ceremonies in the Park for at least 25 years. Mr. Perez is also a published researcher who deciphered crucial elements of the Native American Church's theology and archaeology.

5. Plaintiff Matilde Torres is a descendant of the indigenous people of North America, resident of the City, and member of the Lipan-Apache Native American Church and the Pakahua Peoples of Mexico and Texas. She has worshipped and participated in religious ceremonies in the Park for at least 10 years. She is a respected leader in her religious community, and regularly organizes, leads, and serves as a water bearer for religious services.

II. Defendants

6. Defendant City of San Antonio is a municipal government entity in Bexar County, Texas, that is responsible for the policies developed and implemented through its officers, employees, agents, and departments, including the Department of Parks and Recreation and the Historic Design and Review Commission.

JURISDICTION AND VENUE

7. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983 because Plaintiffs allege violations of their rights under the United States Constitution and RLUIPA.

8. This Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C.

§ 1367.

9. This Court has authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act and this Court's equitable powers under 28 U.S.C. §§ 2201 and 2202. There is an actual controversy between Plaintiffs and the City within the Court's jurisdiction.

10. Personal jurisdiction is proper because the City is physically located and maintains offices in this district. Furthermore, the City has intentionally and repeatedly transacted business or engaged in acts in this district that go to the heart of the matters at issue in this lawsuit, including its ongoing efforts to remove birds and trees and prevent Plaintiffs from accessing the Park. The City's officials, employees, agents, and departments are located in this district, including individuals whose actions are at issue in this Complaint. Thus, the City is subject to general and specific personal jurisdiction in this district.

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to Plaintiffs' claims occurred in this district.

FACTUAL ALLEGATIONS

I. The Formation of Brackenridge Park

12. Indigenous peoples have lived on the land we now know as Texas for at least 16,000 years.¹

¹ See, e.g., Thomas J. Williams *et al.*, *Evidence of an early projectile point technology in North America at the Gault Site*,

13. The first Spanish settlers arrived in San Antonio around 1535. In the late-1600s, Catholic missionaries from Europe arrived and encountered indigenous Payaya villages along the San Antonio River.

14. During the Spanish colonization of San Antonio, a system of acequias (water channels) was built on lands that now comprise the Park to irrigate and provide potable water for the Spanish missions. These acequias functioned into the mid-1800s.

15. The Park officially was established and began to assume its current form in 1899 when George Brackenridge donated 199 acres of land to the City. The City bought or received bequests of additional acreage over the next two decades, which expanded the Park to its current size of 343 acres.

16. In the early twentieth century, various landmarks were built within the Park, including the San Antonio Zoo, the Japanese Tea Garden, the Witte Natural History Museum, and the Sunken Garden Theater. After 1950, few changes were made to the composition of the Park.

17. None of these developments have prevented the religious practices of indigenous peoples who held the land sacred.

18. The Park is a Texas State Antiquities

Texas, USA, 4 Science Advances, eaar5954 at 1 (July 11, 2018) (“The optically stimulated luminescence age estimates (~16 to 20 thousand years ago) indicate an early human occupation in North America before at least ~16 thousand years ago.”).

Landmark and is listed on the United States government's National Register of Historic Places. Upon information and belief, the State of Texas and United States government provide funding that is used to repair, enhance, maintain, and operate the Park. Upon information and belief, travel to the Park and commercial activity within the Park affects commerce with foreign nations, among the several states, or with Indian tribes.²

II. The Religious Significance of Brackenridge Park

19. Although the Park contains historical structures dating back to the City's first Spanish settlements, the land within the Park has a much longer history. Plaintiffs and other groups indigenous to North and Central America believe the Park is where life was created in the region.

20. According to their beliefs, the Park provides a special connection to the spiritual world. Plaintiffs and their fellow members of the Native American Church gather in the Park for personal and communal religious worship, following the traditions that their ancestors have observed for thousands of years. The shape of the San Antonio River within the park, the flora that surrounds the river, the constellations in the sky above—these come together to form a pilgrimage site for indigenous persons across North America. And they form one of the

² See *Brackenridge Park*, Visit San Antonio, <https://www.visitsanantonio.com/location/brackenridge-park/> (last accessed July 31, 2023).

holiest sites on earth for Mr. Perez and Ms. Torres.

A. The Creation Story of the Native American Church

21. According to Plaintiffs' beliefs and the Native American Church's teachings, the creation of life in the region began at a spring, now called Blue Hole spring, that sits just north of the Park.

22. A spirit in the form of a blue panther lived in Blue Hole spring. Another spirit in the form of a double-crested cormorant flew into the Blue Hole spring and was chased away by the blue panther.

23. As the cormorant fled from the spring, its tail feathers scattered life-giving water across the San Antonio River Valley, including the lands that comprise the Park, giving rise to life in this region.

24. Members of the Native American Church and other people indigenous to North and Central America recognize the Park's religious significance by referring to it by the ancient name of the San Antonio River—Yanaguana—which means "spirit waters" in the Pakahuan language.

25. The Park serves as the site for worship, critical religious ceremonies, and pilgrimages for Native American Church members and other indigenous religious groups.

B. The Spiritual Ecology of Brackenridge Park

26. For Plaintiffs, three points of reference establish a sacred space: underworld, middle world,

and upper world. The 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.

27. All three worlds are connected and experienced together through ceremonies performed in the Park by members of the Native American Church across the continent: for example, as explained in more detail below, in the Midnight Water ceremony, a celebrant views a reflection of the double-crested cormorant in the river (underworld), while surrounded by the bird on land and in the trees (middle world), underneath the stars that make up constellations reflecting the Yanaguana and the cormorant (upperworld). The presence and connection of these three worlds establishes a “spiritual ecology” that enables Plaintiffs to identify themselves in the physical world and commune with the spiritual world. Many of the Native American Church’s offerings, services, and ceremonies center around experiencing the three worlds together to locate oneself.

28. The sanctity of the Park is intimately connected to the spiritual ecology of the three worlds and the various connection points (*e.g.*, river, trees, birds) that are present there. Harming any one of the connection points disturbs the sanctity of the Park and its capacity to function as a sacred space for Plaintiffs’ religious practice. Completely removing the double-crested cormorant from the ceremony creates a type of spiritual crisis for adherents.

C. The Park’s Cosmological Significance to the Native American Church

29. Within the Park, an area called Lambert Beach juts out into the San Antonio River along Brackenridge Drive and north of Tuleta Drive.

30. The shape of the riverbend located at Lambert Beach mirrors, and Plaintiffs believe is spiritually connected to, a constellation of stars in the southern celestial hemisphere commonly known as Eridanus, which is often depicted as a celestial river flowing from the waters of Aquarius.

31. The image below shows the similarity between the riverbend at Lambert Beach and the Eridanus constellation:

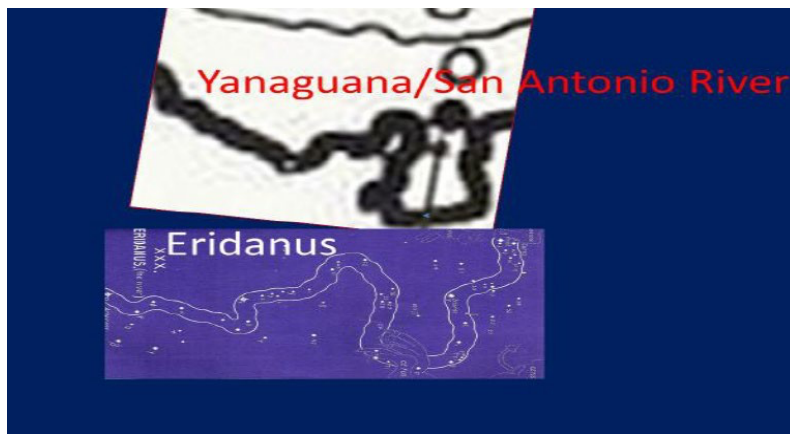


Figure 1 – This image compares the shape of the constellation Eridanus to the bend of the San Antonio River that is located in the Park.

32. According to Plaintiffs' beliefs, this connection between the riverbend and the constellation enables a bridge to open in the Park between the physical and the spiritual worlds. This connection is most visible during the winter solstice, when Eridanus and the

San Antonio River are physically aligned, although the location maintains its spiritual significance and power year-round.

33. During the winter solstice, members of the Native American Church throughout North America and other indigenous persons perform a religious ceremony called “Midnight Water.”

34. As part of this ceremony, participants gather in the Park at the riverbend to touch the San Antonio River with cormorant tail feathers and scatter droplets of water. They also gaze into the water to see the spirit animal—the cormorant—in the underworld, while seeing themselves in the reflection, under the stars in the sky for that particular place and time.

35. For Plaintiffs and other members of the Native American Church, their sacred area within the Park is where the Midnight Waters ceremony and other religious rites should be performed.

D. The Park’s Historic Significance as a Holy Place and Pilgrimage Site

36. Members of the Native American Church and other indigenous groups have long revered and visited the Park to stand in its holy places, experience the spiritual ecology that exists there, and perform religious rites.

37. Archeological evidence shows that indigenous peoples have honored the San Antonio River, and the springs that feed it, for millennia. For instance, the White Shaman Mural—a 26-foot rock art painting that was discovered on the walls above the Lower

Pecos River and that dates back at least 2,500 years—portrays religious ceremonies of ancient indigenous peoples that occurred there.

38. The image below shows the White Shaman Mural.



Figure 2- The White Shaman Mural.³

39. Archaeologists and scholars have studied the White Shaman Mural for decades and identified Mesoamerican iconography in it.

40. In collaboration with archeologists and experts, Mr. Perez used Geographical Information Systems (“G.I.S.”) to match iconography in the White Shaman Mural rock art to geological features in the Texas

³ This image of the White Shaman Mural has been digitally enhanced for ease of review.

landscape, including the Blue Hole spring and other parts of the San Antonio River system. This is displayed in the two figures below.

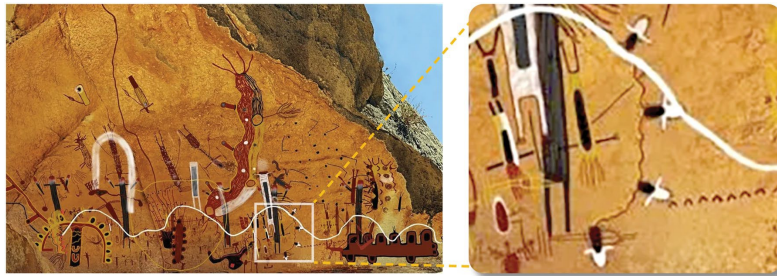


Figure 3 – This figure isolates iconography within the White Shaman Mural that has been shown to correspond with springs within the San Antonio River system.



Figure 4 – This figure shows a G.I.S overlay of the iconography that is isolated in Figure 3 onto a geographical map of the San Antonio River system.

41. Today, peyote pilgrims follow the same path as depicted in the White Shaman Mural by stopping at

each of the four springs. The Park is the final stop on this route. Pilgrims visit each of the four springs and perform a religious ceremony before continuing on their journey south to the peyote gardens.

42. Mr. Perez also has matched iconography in the White Shaman Mural with the Eridanus constellation that, as discussed above, is connected to the bend of the San Antonio River located in the Park.⁴ This is displayed in the two figures below.



Figure 5 – This figure isolates iconography within the White Shaman Mural that corresponds with key springs that feed the San Antonio River system.

⁴ Mr. Perez published these findings in the Bulletin of the Texas Archaeological Society. See Eric A. Schroeder, Gary R. Perez, and Joe R. Tellez, *Written on Stone and Practiced on the Landscape: Pre-contact Native American Cosmology and the Sacred Landscape of the Edwards Plateau*, 93 Bulletin of the Texas Archeological Society (2022).

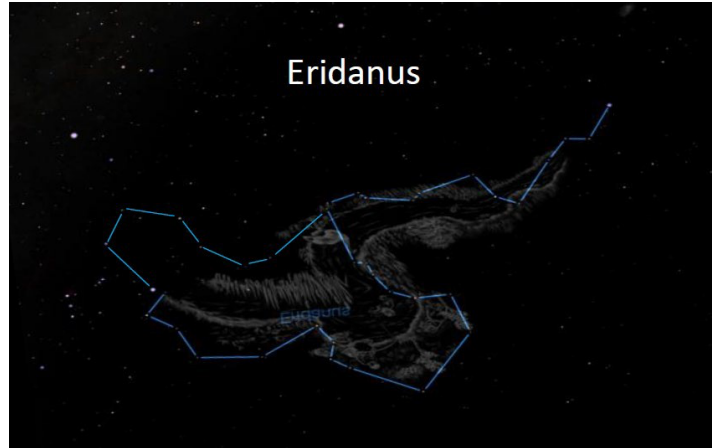


Figure 6 – This figure compares the iconography that is isolated in Figure 5 with the Eridanus constellation that is connected to the bend of the San Antonio River located in the Park.

43. The San Antonio River—and lands within the Park—are key religious sites for Plaintiffs and their fellow members of the Native American Church, as well as other indigenous people across Texas, the American Southwest, and Mexico.

44. Plaintiffs’ religious beliefs and practices are a continuation and outgrowth of the ancient practices depicted in the White Shaman Mural rock art that were practiced along the San Antonio River thousands of years ago.

III. The Bond Project

A. The Park Deteriorates from Neglect

45. Brackenridge Park has long been a cherished place for San Antonians. Concern about the future of the park led to the formation of the Brackenridge

Park Conservancy, a 501(c)(3) nonprofit, in 2008.

46. The Park's natural environment has ailed for many years and remains vulnerable today. Much of the Park's flora is unhealthy, overgrown, or threatened by invasive species. For instance, the natural groundcover and diverse vegetative buffers that should exist under the trees and throughout the Park are almost entirely gone.

47. Many of the Park's waterways are stagnant, algae prone, clogged with plant material, or buried altogether. The riverbanks within the Park are largely bare and eroded.

B. San Antonio Residents Vote to Make Improvements to the Park

48. On May 6, 2017, San Antonio voters approved an \$850 million bond package to fund numerous public improvements throughout the City, including streets, bridges, flood control infrastructure, libraries, parks, cultural facilities, and public safety buildings.

49. Most relevant here, the voters approved Proposition 3, which proposed to raise approximately \$187 million for "Parks, Recreation, and Open Space Improvements" and contemplated \$7,750,000 for general improvements and rehabilitation to the Park, including repairs or enhancements to restrooms, trails, and historic river walls and other structures.

50. That bond proposition made no mention of the religious interests at stake involving the San Antonio River or the Park. Nor did it specify the destruction of heritage trees or the double-crested cormorant's

habitat.

C. The City Develops the Bond Project

51. After voters passed Proposition 3, the City began developing the Brackenridge Park 2017 Bond Project (the “Bond Project”), which aims to establish how the City will use appropriated funds to make changes in the Park.

52. Six years and multiple iterations later, the Bond Project has still not been implemented at Brackenridge Park, largely due to intense public opposition to the Bond Project’s plan to destroy flora, including heritage trees, in the Park.

53. Time and again, San Antonians objected to the City’s development proposals in public hearings. One of the original proposals for the Bond Project called for removal of 105 trees, including many heritage trees. Such destruction of the Park’s trees would drastically alter the face of the Park and decimate the spiritual ecology that exists there and is so critical to Plaintiffs’ religious practice. Plaintiffs are unaware of any report the City commissioned to determine how the project could be designed if tree preservation were prioritized. Indeed, Plaintiffs are unaware of any studies or proposals the City created to reduce the harm to their religious practice, despite Plaintiffs’ voicing those concerns formally and informally on numerous occasions.

54. Another flash point in the Bond Project’s development and execution has been the City’s treatment of birds within the Park. As the City’s plans for the Bond Project began to coalesce, it began

driving migratory birds out the Park by removing them, placing obstructions in trees to prevent nesting, shooting “blanks” from firearms, placing a car alarm in their nesting area, and otherwise making the Park uninhabitable for them.

55. Euphemistically called “bird deterrence” or “bird mitigation,” the City’s Bond Project involves shooting pellets and pyrotechnic devices, such as “bird bangers,” at the birds. City employees or agents also use noisemakers to harass the birds in the hopes of deterring them from nesting within the Park. The City’s “bird deterrence” techniques also include tree pruning, removing nests, mylar balloons and streamers in trees, predator and distress noises, lasers, clapper boards, and pyrotechnics.

56. These “bird deterrence” measures are largely aimed at preventing the double-crested cormorant from nesting in the Park. On information and belief, the City knows that under its Migratory Bird Act obligations, it cannot remove birds in the process of nesting or trees housing those birds. Accordingly, it aims to prevent nesting before it can begin.

57. Based on the City’s latest proposal for the Bond Project, the City plans to continue “bird deterrence” efforts throughout the Park and to destroy or relocate 98 trees.

58. These plans would devastate the Park’s spiritual ecology by driving away birds and cutting down significant numbers of mature trees so that the City can repair secular historic features, including: a colonial canal, a pump house, a limestone wall along the riverbank, and a sculpture garden.

59. On information and belief, 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. On information and belief, the City has never commissioned a study that aims to achieve its governmental purposes while accommodating Plaintiffs' religious exercise.

D. The City Rejects Less Destructive Engineering Solutions for the Bond Project

60. The City was presented with at least three engineering solutions for the Bond Project: two that preserve the majority of tree and bird life but that the City rejected due to cost considerations, and a third—which the City ultimately chose—that requires extensive excavation necessitating significant loss of tree and bird life.

61. One engineering solution that the City rejected involves adding one or more concrete walls and piers to support the river walls. This solution minimizes the destruction of trees and the disruption to bird life in the Park, and the City has used it at other locations along the San Antonio River. On information and belief, certain engineers hired by the City proposed that this solution be used for the Park, but the City rejected it due to costs. On information and belief, a resident of San Antonio who is a structural engineer by trade offered to cover the additional cost that the City would incur to implement this alternative engineering solution, but the City refused.

62. A second engineering solution that the City rejected involves using a pier and spandrel system with drilled helical piers to fortify the river walls. This solution also requires little intrusion into the riverbank and will allow new canopy trees to grow on the riverbank to replace any removed trees. On information and belief, a San Antonio resident and structural engineer, different from the one who proposed the first solution described above, proposed this engineering solution, but the City refused to adopt this approach as well.

63. On information and belief, the City did not perform detailed studies or reviews of either the first or second engineering approaches that would save additional trees, birds, and habitat that is part of the Park's spiritual ecology.

64. The third engineering solution, which the City chose, involves a cantilever system that necessitates significant excavation to construct anchors that can be attached as support to the river walls. This requires excavation of trees and other plant material along the river walls and will destroy many more trees than the two rejected engineering solutions. In the long run, it will also prevent trees with large canopies from growing at or near the San Antonio River bank.

65. The City's preferred solution is harmful not just to the trees but also to the birds that nest in them. Trees close to the riverbank are ideal roosting locations for the birds within the Park's rookery. The City's current engineering plan, therefore, causes the most damage to the largest number of trees and birds of the known available alternatives. It is the most

damaging proposal to the Park's spiritual ecology of all the options that have been proposed to achieve the City's stated objectives.

66. Many more trees and birds could be saved if the City would agree to alter its current engineering approach to reinforcing river walls and other infrastructure. But the City has refused to alter its plans in a way that would protect additional birds and trees.

67. The City has been aware that the Project would violate Plaintiffs' religious rights since at least July 29, 2022, when Mr. Perez presented the Department of Parks and Recreation with his religious beliefs and practices. Plaintiffs sent the City a detailed demand letter, outlining the relevant facts and law, on May 23, 2023. Despite this, and despite specific requests for the City to undertake a study to determine how Plaintiffs' religious exercise could be accommodated, 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. And the plan approved by the City Council on August 3, 2023 included no improvements to the religious harms present in the prior plan—no improvements for tree preservation, no improvements for cormorant habitat, and no improvements for Plaintiffs' physical access.

IV. The City Prevents Plaintiffs from Accessing Holy Sites While it Develops the Bond Project

68. From approximately February 3, 2023, to the present, the City has prevented Plaintiffs from accessing the Park to engage in communal or

individual worship. Plaintiffs are unable to enter sacred locations within the Park to perform religious ceremonies or connect with the Park's spiritual ecology.

69. Much like Christian adherents may enter a church for private worship outside of scheduled sermons or liturgy, the Park is a critical site for the Native American Church's routine worship. Plaintiffs require general access to the Park for prayer, fellowship, and religious education, which are all critical to and compelled by their religious belief.

70. In addition, given their importance as pilgrimage sites, Mr. Perez and Ms. Torres regularly act as religious leaders and guides to individuals who have traveled to the Park, often unannounced. Their inability to minister to those pilgrims while the sacred locations are fenced off prevents them from exercising their religion. Plaintiffs are also often presented with requests from local adherents, such as a birthday blessing, that they are unable to perform at the desired location of the sacred riverbend.

71. If Plaintiffs are denied access to the Park or its spiritual ecology is damaged, then they will be unable to practice their religion and forced to significantly alter their religious practice forever.

72. On or about August 12, 2023, members of the Native American Church plan to have a water offering ceremony at the Park. This ceremony requires the presence of the trees and the double-crested cormorant. Indeed, the ceremony is being performed, in part, to atone for the harm presently being done to the double-crested cormorants in the

Park.

73. On July 26, 2023, Plaintiffs requested access to their sacred area within the Park—which is currently blockaded by the City with temporary fencing—to perform the August 12, 2023 water offering. The City initially responded on August 3, 2023, stating that it could accommodate Plaintiffs’ request. But that “accommodation” consisted of allowing Plaintiffs access to a *different* part of the Park that was already open to the public. After Plaintiffs reiterated that they wished to access their sacred area within the Park, which is currently not accessible to the public, the City refused to grant the Plaintiffs’ request to perform their ceremony in the Park on August 12, 2023.

74. On information and belief, the City plans to prevent Plaintiffs and other members of the Native American Church from accessing the Park during future ceremonies, including during the autumn equinox, the Leonids meteor shower (November 17-18), and the winter solstice, in addition to ceremonies that arise without forewarning.

V. The City’s Current and Planned Action Pursuant to the Bond Project Substantially Burdens Plaintiffs’ Religious Exercise

75. If the Bond Project and related bird deterrence efforts are left unabated, Plaintiffs will be unable to practice their religion and forced to significantly alter their religious practice.

76. The Bond Project imposes a substantial burden on Plaintiffs’ religious exercise because it authorizes

destruction of flora and fauna that make the Park a sacred, religious site for Plaintiffs and other members of the Native American Church. The double-crested cormorant's presence, in particular, is essential to the Plaintiffs' religious services. The City is also denying Plaintiffs access to the Park.

77. Perez and Torres have participated in routine worship and special ceremonies within the Park. Both would worship and perform important religious ceremonies in the Park now if the City would stop preventing them from entering the Park and experiencing the unique spiritual ecology that exists there.

78. Due to the City's refusal to permit them access to the Park, Plaintiffs have been forced to modify their religious practice and even forgo certain critical religious exercises altogether.

79. Furthermore, if implemented, the Bond Project would render certain of Plaintiffs' core religious practices impossible by destroying the spiritual ecology that must exist in the Park where certain ceremonies must be performed.

80. If the City moves forward with its plan to remove so many trees and birds from the Park, the burden on Plaintiffs' religious practice will be far more than "substantial;" it will be devastating.

VI. The City Refuses to Consider Narrowly Tailored Alternatives

81. Plaintiffs informed the City that the Bond Project infringes on their religious beliefs on multiple

occasions. Plaintiff Gary Perez spoke and gave a presentation to the Department of Parks and Recreation on July 29, 2022. Brackenridge Park Conservancy invited Plaintiff Gary Perez to give a presentation about issues with the Bond Project at its January 10, 2023 meeting. Plaintiffs testified at the March 3, 2023 Texas Historical Commission meeting, the April 19, 2023 Historic Design and Review Commission hearing (along with counsel), and the August 3, 2023 City Council hearing (along with a written objection from counsel).

82. On May 23, 2023, Plaintiffs sent a letter to the City explaining the effects of the City's current and proposed actions on the Park and Plaintiffs' religious exercise. Plaintiffs asked the City to halt actions that would damage the Park's spiritual ecology any further and requested that the City find a way to achieve its goals while still allowing Plaintiffs their religious practice.

83. When presented with the facts alleged in this complaint, the City said it did not know about the historical and religious significance of the Park to Plaintiffs and numerous indigenous groups in Texas and across the United States. The City also acknowledged that it had failed to consider Plaintiffs' religious liberty interests during its consideration and design of the Bond Project. The City nevertheless refused to stop or amend any of its actions or plans related to the Park. The plan approved by the City Council is materially identical in relevant respects to the plan as it existed when the City purported to be unaware of Plaintiffs' religious objections.

84. Despite raising their objection at numerous

hearings and meetings with the Brackenridge Park Conservancy, Mr. Perez and Ms. Torres are still unaware of any design proposal from the City that aimed to preserve the presence of the double-crested cormorant and maximize the number of trees while still achieving the City's stated interests in the Park.

85. The City's treatment of Mr. Perez's and Ms. Torres's religious exercise can be contrasted with how the City treats its favored causes. The City has stated that its interest in developing the Bond Project is the historical preservation of Lambert Beach; the City has made clear it affords no such value to Plaintiffs' religious exercise, despite it representing a far older history than the Park's hundred-year-old walls. Likewise, just this decade a San Antonio highway project increased its budget by \$30 million dollars to build an overpass, instead of an underpass, to preserve a spider protected by the Endangered Species Act.⁵

86. Likewise with the City's "bird deterrence," the City purports to act pursuant to the Migratory Bird Act, while not attempting to accommodate Plaintiffs constitutional and statutory religious freedom rights. The City is willing to adjust its plans under its favored causes—like the protection of spiders—but not to protect the rights of its citizens.

⁵ See John MacCormack, *Habitat plan aims to protect endangered species*, San Antonio Express-News (Nov. 15, 2014), <https://www.expressnews.com/news/local/article/Habitat-plan-aims-to-protect-endangered-species-5895373.php>.

CLAIMS FOR RELIEF

Count I

Violation of the First Amendment to the United States Constitution: Free Exercise Clause – (42 U.S.C. § 1983)

87. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

88. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land on which the Park now sits. Plaintiffs' performance and compliance with these beliefs is a religious exercise.

89. Through the Bond Project, the City is obliterating Plaintiffs' ability to practice their religion. By refusing Plaintiffs access to the Park, the City makes it impossible for them to practice core aspects of their religion. And by destroying trees and driving away birds from the Park, the City degrades and risks permanently destroying a sacred place for Plaintiffs, which would make core aspects of their religious practice impossible to perform.

90. The Bond Project is not neutral or generally applicable. The City has engaged in preferential treatment for secular values and activities that it has refused to Plaintiffs' religious exercise. Namely, the City seeks to preserve more-recent historical structures, such as walls, while destroying far-more-ancient historical fixtures that are sacred to Plaintiffs. Likewise, the City has undertaken significant plan alterations to preserve animal presence when those animals were valued under

secular statutes such as the Endangered Species Act or Migratory Bird Treaty Act.

91. The City's current and proposed conduct causes Plaintiffs to suffer a special disability on the basis of their minority religion status and especially burdens their religious exercise in the Park.

92. The City has no compelling interest for designing or implementing the Bond Project as it is currently iterated, for preventing Plaintiffs from accessing the Park, or for failing to accommodate Plaintiffs' religious exercise. When pressed, the City has asserted interests in aesthetics, historic preservation, and a vague conception of public safety focused on crumbling riverbank walls and falling trees.

93. The Bond Project is not narrowly tailored to achieve any compelling interest that the City may have for implementing it. Furthermore, the City refused to consider or implement alternatives that would accomplish the City's stated interest in the Bond Project while also preserving Plaintiffs' religious liberty rights. In fact, the City has never undertaken a study to see whether the development could proceed in a manner that protects the double-crested cormorant, whose presence is essential for Plaintiffs' religious exercise.

94. Absent injunctive and declaratory relief against the City with respect to Plaintiffs' rights under the Free Exercise Clause of the First Amendment, Plaintiffs have and will continue to be imminently and irreparably harmed.

Count II

Violation of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)

95. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

96. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land where the Park now sits. Plaintiffs’ performance and compliance with these beliefs is a religious exercise.

97. The City’s conduct affects commerce with foreign nations, among the several states, or with Indian tribes. Indigenous people across Texas, the American Southwest, and Mexico travel to the Park in order to worship and perform religious ceremonies. The City advertises Brackenridge Park to out-of-state tourists as a reason to visit San Antonio.

98. Upon information and belief, the City received federal financial assistance that is used to repair, enhance, maintain, and operate the Park. Upon information and belief, federal funds have or will be used related to the Bond Project.

99. The City has developed and implemented land use regulations in the Park in a manner that imposes a substantial burden on Plaintiffs’ religious exercise.

100. Through the Bond Project, the City is obliterating Plaintiffs’ ability to practice their religion. By refusing Plaintiffs access to the Park, the City makes it impossible for them to practice core aspects of their religion. And by destroying trees and

driving away birds from the Park, the City degrades and risks permanently destroying a sacred place for Plaintiffs, which would make core aspects of their religious practice impossible to perform. This places a substantial burden on Plaintiffs' exercise of their religion.

101. The City's current and proposed conduct causes Plaintiffs to suffer a special disability on the basis of their minority religion status and especially burdens their religious exercise in the Park.

102. The City has no compelling interest for designing or implementing the Bond Project as it is currently iterated, for preventing Plaintiffs from accessing the Park, or for failing to accommodate Plaintiffs' religious exercise. When pressed, the City has asserted interests in aesthetics, historic preservation, and a vague conception of public safety focused on crumbling riverbank walls and falling trees.

103. The Bond Project is not narrowly tailored to achieve any compelling interest that the City may have for implementing it. Furthermore, the City refused to consider or implement alternatives that would accomplish the City's stated interest in the Bond Project while also preserving Plaintiffs' religious liberty rights.

104. Absent injunctive and declaratory relief against the City with respect to Plaintiffs' rights under RLUIPA, Plaintiffs have and will continue to be imminently and irreparably harmed.

Count III

Violation of Article I, Section 6 of the Texas Constitution

105. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

106. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land where the Park now sits. Plaintiffs' performance and compliance with these beliefs is a religious exercise.

107. Through the Bond Project, the City is obliterating Plaintiffs' ability to practice their religion. By refusing Plaintiffs access to the Park, the City makes it impossible for them to practice core aspects of their religion. And by destroying trees and driving away birds from the Park, the City degrades and risks permanently destroying a sacred place for Plaintiffs, which would make core aspects of their religious practice impossible to perform. This places a substantial burden on Plaintiffs' exercise of their religion.

108. The City's current and proposed conduct causes Plaintiffs to suffer a special disability on the basis of their minority religion status and especially burdens their religious exercise in the Park.

109. The City has no compelling interest for

designing or implementing the Bond Project as it is currently iterated, for preventing Plaintiffs from accessing the Park, or for failing to accommodate Plaintiffs' religious exercise. When pressed, the City has asserted interests in aesthetics, historic preservation, and a vague conception of public safety focused on crumbling riverbank walls and falling trees.

110. The Bond Project is not narrowly tailored to achieve any compelling interest that the City may have for implementing it. Furthermore, the City refused to consider or implement alternatives that would accomplish the City's stated interest in the Bond Project while also preserving Plaintiffs' religious liberty rights.

111. Absent injunctive and declaratory relief against the City with respect to Plaintiffs' rights under Article I, Section 6 of the Texas Constitution, Plaintiffs have and will continue to be imminently and irreparably harmed.

Count IV

Violation of Article I, Section 6-a of the Texas Constitution

112. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

113. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land where the Park now sits. Plaintiffs' performance and compliance with these beliefs is a religious exercise.

114. Plaintiffs wish to conduct religious services in the Park. The City's physical barriers that prevent entry to their sacred space limit Plaintiffs' ability to conduct religious services.

115. Plaintiffs' religious services require the presence of double-crested cormorants, which nest in the trees surrounding the San Antonio River. The City's "bird deterrence" measures limit Plaintiffs' ability to conduct their religious services.

116. The Bond Project, which will destroy the habitat for the double-crested cormorant, will destroy, and therefore prohibit or limit, Plaintiffs' ability to conduct religious services in the Park.

117. Plaintiffs conduct their religious services as members of the Lipan-Apache Native American Church, a religious organization established to support and serve the propagation of sincerely held religious beliefs.

118. Absent injunctive and declaratory relief against the City with respect to Plaintiffs' rights under Article I, Section 6-a of the Texas Constitution, Plaintiffs have and will continue to be imminently and irreparably harmed.

Count V

Violation of the Texas Religious Freedom and Restoration Act ("TRFRA")

119. Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

120. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land where the Park now sits. Plaintiffs' performance and compliance with these beliefs is a religious exercise.

121. Through the Bond Project, the City is obliterating Plaintiffs' ability to practice their religion. By refusing Plaintiffs access to the Park, the City makes it impossible for them to practice core aspects of their religion. And by destroying trees and driving away birds from the Park, the City degrades and risks permanently destroying a sacred place for Plaintiffs, which would make core aspects of their religious practice impossible to perform. This places a substantial burden on Plaintiffs' exercise of their religion.

122. Plaintiffs have suffered harm and mental anguish because the City has denied Plaintiffs access to the Park, which they need to practice their religion, and also because the City has begun to execute plans to permanently destroy a place that Plaintiffs hold sacred.

123. The City's current and proposed conduct causes Plaintiffs to suffer a special disability on the basis of their minority religion status and especially burdens their religious exercise in the Park.

124. The City has no compelling interest for designing or implementing the Bond Project as it is currently iterated, for preventing Plaintiffs from accessing the Park, or for failing to accommodate Plaintiffs' religious exercise. When pressed, the City has asserted interests in aesthetics, historic preservation, and a vague conception of public safety

focused on crumbling riverbank walls and falling trees.

125. The Bond Project is not narrowly tailored to achieve any compelling interest that the City may have for implementing it. Furthermore, the City refused to consider or implement alternatives that would accomplish the City's stated interest in the Bond Project while also preserving Plaintiffs' religious liberty rights.

126. At least 60 days prior to filing this suit, on May 23, 2023, Plaintiffs gave notice to the City of its religious liberty claims against the City by certified mail, return receipt requested, pursuant to Tex. Civ. Prac. & Rem. Code § 110.006.

127. Absent injunctive and declaratory relief against the City with respect to Plaintiffs' rights under TRFRA, Plaintiffs have and will continue to be imminently and irreparably harmed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that judgment be entered in their favor and against Defendants as follows:

- A declaratory judgment that the City's actions violate Plaintiffs' rights under the First Amendment to the United States Constitution;
- A declaratory judgment that the City's actions violate Plaintiffs' rights under RLUIPA;
- A declaratory judgment that the City's actions

violate Plaintiffs' rights under Article 1, Section 6 of the Texas Constitution;

- A declaratory judgment that the City's actions violate Plaintiffs' rights under Article 1, Section 6-a of the Texas Constitution;

- A declaratory judgment that the City's actions violate Plaintiffs' rights under TRFRA;

- A preliminary and permanent injunction enjoining the City from implementing the Bond Project or otherwise removing trees from the Park until Plaintiffs and the City agree on a specific plan that preserves the Park's spiritual ecology;

- A preliminary and permanent injunction enjoining the City from implementing the Bond Project or otherwise engaging in "bird deterrence" within the Park in a way that violates Plaintiffs' religious rights;

- A preliminary and permanent injunction prohibiting the City from preventing Plaintiffs from accessing and performing religious ceremonies in the Park;

- An award of costs, attorneys' fees, and expenses pursuant to any applicable statute or authority, including 42 U.S.C. § 1988;

- Statutory damages as authorized by any applicable statute or authority, including the Texas Religious Freedom Restoration Act;

- Any such other and further relief as the Court

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deems just and proper; and

- Retention of jurisdiction by this Court after judgment for the purposes of issuing further appropriate injunctive relief if the Court's declaratory judgment is violated.

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Dated: August 9, 2023 Respectfully submitted,

/s/ Jonathan D. Guynn _____

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ATTORNEYS FOR PLAINTIFFS

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

Gary Perez and Matilde
Torres,

Plaintiffs,

v.

City of San Antonio,

Defendant.

Case No. 23-cv-977-
FB-rbf

**DEFENDANT’S ORIGINAL ANSWER TO
“COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF” [ECF. NO. 3]**

**TO THE HONORABLE FRED BIERY, UNITED STATES
DISTRICT JUDGE:**

The City of San Antonio (the “**City**”) files this its *Original Answer to “Complaint for Declaratory and Injunctive Relief [ECF No. 3]”* (the “**Complaint**”) filed by Gary Perez (“**Perez**”) and Matilda Torres (“**Torres**”, and together with Perez, the “**Plaintiffs**”). The City notes that, in many instances, the Complaint fails to comply with Fed. R. Civ. P. 8(d)(1), and the allegations are not “simple, concise, and direct.” Where necessary, the City has endeavored to respond to each portion of a particular paragraph of the Complaint in accordance with the City’s obligation under Fed. R. Civ. P. 8(b).

I. ANSWER

1. Paragraph 1 of the Complaint sets forth the Plaintiffs' summary of this lawsuit and does not require a response. To the extent a response is required, the City denies that its plans for rehabilitating and protecting Brackenridge Park (the "**Park**") would result in the desecration of a holy place. The City also denies that the double-crested cormorant nests in a specific bend in the San Antonio River in the vicinity of Lambert Park. The City lacks knowledge sufficient to admit or deny the balance of the claims in Paragraph 1 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

2. As to paragraph 2 of the Complaint, the City admits that it has prohibited all visitors to the Park – including Plaintiffs – from accessing Lambert Beach because it is unsafe. The City denies the remainder of the allegations in paragraph 2 of the Complaint and leaves Plaintiffs to their proof.

3. Paragraph 3 does not contain any factual allegations that require a response. The City denies that Plaintiffs are entitled to the relief they seek.

4. The City is without sufficient knowledge to admit or deny the allegations in paragraph 4 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

5. The City is without sufficient knowledge to admit or deny the allegations in paragraph 5 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

6. The City admits paragraph 6 of the Complaint, with the further assertion that the City is a home-rule municipality existing under the laws of the State of Texas, with a council-manager form of government.

7. The City admits to the Court's jurisdiction as alleged in paragraph 7 of the Complaint but denies that Plaintiffs are entitled to relief under any of the cited statutes.

8. The City admits to the Court's jurisdiction as alleged in paragraph 8 of the Complaint but denies that Plaintiffs are entitled to any relief.

9. The City admits to the Court's authority as alleged in paragraph 9 of the Complaint but denies that Plaintiffs are entitled to any relief.

10. The City admits that the Court may exercise personal jurisdiction over the City in connection with the case, but denies the Plaintiffs' characterization of the City's activities.

11. The City admits that venue is proper in this district, as alleged in paragraph 11 of the Complaint.

12. The City is without sufficient knowledge to admit or deny the allegations in paragraph 12 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

13. The City denies that the first Spanish settlers arrived in San Antonio around 1535, as alleged in paragraph 13 of the Complaint. The City admits that Catholic missionaries arrived in the vicinity of San

Antonio in the late 1600s but is without knowledge as to the remaining allegations in paragraph 13 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

14. The City admits that during the Spanish colonization of San Antonio, a system of acequias (water channels) was built to irrigate farmland and provide potable water to the Spanish Missions and that part of the acequia system was built on lands that now comprise the Park, as alleged in paragraph 14 of the Complaint. The City further admits that some of the Spanish colonial acequias functioned into the mid-1800s.

15. The City admits the allegations in paragraph 15 of the Complaint.

16. The City admits the allegations in paragraph 16 of the Complaint.

17. The City is without sufficient knowledge to admit or deny the allegations in paragraph 17 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

18. The City admits that the Park is a Texas State Antiquities Landmark and is listed on the United States government's National Register of Historic Places as alleged in paragraph 18 of the Complaint. The City further admits that the State of Texas and United States government provide *a portion of the* funding that is used to repair, enhance, maintain, and operate the Park. The final sentence of paragraph 18 is a legal conclusion that does not require a response.

19. The City is without sufficient knowledge to admit or deny the allegations in paragraph 19 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

20. The City is without sufficient knowledge to admit or deny the allegations in paragraph 20 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

21. The City is without sufficient knowledge to admit or deny the allegations in paragraph 21 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

22. The City is without sufficient knowledge to admit or deny the allegations in paragraph 22 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

23. The City is without sufficient knowledge to admit or deny the allegations in paragraph 23 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

24. The City is without sufficient knowledge to admit or deny the allegations in paragraph 24 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

25. The City is without sufficient knowledge to admit or deny the allegations in paragraph 25 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

26. The City is without sufficient knowledge to

admit or deny the allegations in paragraph 26 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

27. The City is without sufficient knowledge to admit or deny the allegations in paragraph 27 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

28. The City is without sufficient knowledge to admit or deny the allegations in paragraph 28 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

29. The City admits the allegations in paragraph 29 of the Complaint.

30. The City is without sufficient knowledge to admit or deny the allegations in paragraph 30 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

31. The City is without sufficient knowledge to admit or deny the allegations in paragraph 31 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

32. The City is without sufficient knowledge to admit or deny the allegations in paragraph 32 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

33. The City is without sufficient knowledge to admit or deny the allegations in paragraph 33 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

34. The City is without sufficient knowledge to admit or deny the allegations in paragraph 34 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

35. The City is without sufficient knowledge to admit or deny the allegations in paragraph 35 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

36. The City is without sufficient knowledge to admit or deny the allegations in paragraph 36 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

37. The City is without sufficient knowledge to admit or deny the allegations in paragraph 37 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

38. The City is without sufficient knowledge to admit or deny the allegations in paragraph 38 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

39. The City is without sufficient knowledge to admit or deny the allegations in paragraph 39 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

40. The City is without sufficient knowledge to admit or deny the allegations in paragraph 40 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

41. The City is without sufficient knowledge to

admit or deny the allegations in paragraph 41 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

42. The City is without sufficient knowledge to admit or deny the allegations in paragraph 42 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

43. The City is without sufficient knowledge to admit or deny the allegations in paragraph 43 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

44. The City is without sufficient knowledge to admit or deny the allegations in paragraph 44 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

45. The City admits the allegations in paragraph 45 of the Complaint.

46. The City admits that the Park's natural environment requires substantial rehabilitation and future protection, as generally alleged in paragraph 46 of the Complaint, hence the creation of the Brackenridge Park Conservancy in 2008, the passage of Proposition 3 in 2016, and the creation of the 2017 Bond Project. The particular allegations in paragraph 46 are too vague, however, for the City to be able respond specifically to the allegations as pleaded and, therefore, the City denies the same and leaves Plaintiffs to their proof.

47. The City admits that many of the Park's waterways require substantial rehabilitation and

future protection, as generally alleged in paragraph 47 of the Complaint, hence the creation of the Brackenridge Park Conservancy in 2008, the passage of Proposition 3 in 2016, and the creation of the 2017 Bond Project. The particular allegations in paragraph 47 are too vague, however, for the City to be able respond specifically to the allegations as pleaded and, therefore, the City denies the same and leaves Plaintiffs to their proof.

48. The City admits the allegations in paragraph 48 of the Complaint.

49. The City admits that the voters approved Proposition 3, as alleged in paragraph 49 of the Complaint, but objects to the Plaintiffs' summary and submits that the proposition speaks for itself.

50. The City admits that the bond proposition did not mention any "religious interests at stake involving the San Antonio River or the Park," nor did it "specify the destruction of heritage trees or the double-crested cormorant's habitat" as alleged in paragraph 50 of the Complaint, but specifically avers that no such disclosure was required. The bond proposition speaks for itself. The City further denies that the 2017 Bond Project, as presently constituted, involves the destruction of any healthy heritage trees or the destruction of the double-crested cormorant's habitat.

51. The City admits the allegations in paragraph 51 of the Complaint.

52. The City admits that the Bond Project has not been implemented at Brackenridge Park, as alleged

in paragraph 52 of the Complaint, but denies this is “largely due to intense public opposition to the Bond Project’s plan to destroy flora, including heritage trees, in the Park.”

53. The City admits that citizens of San Antonio submitted comments related to the Bond Project but denies Plaintiffs’ blanket characterization of these comments as “objections” as alleged in the first sentence of paragraph 53 of the Complaint. The City admits the second sentence of paragraph 53 of the Complaint. The City denies the allegations in the third sentence of paragraph 53 of the Complaint and leaves the Plaintiffs to their proof. The City further submits that the allegations in the third sentence of paragraph 53 of the Complaint are irrelevant or moot because the City is not proceeding with the proposed plan that would have removed or relocated 105 trees. As to the remaining allegations in paragraph 53 of the Complaint, the City is without sufficient knowledge to admit or deny what Plaintiffs are aware of, and, therefore, deny the same and leave Plaintiffs to their proof.

54. The City admits that it has received comments about the treatment of birds within the Park in connection with the Bond Project, as alleged in paragraph 54 of the Complaint, but denies Plaintiffs’ characterization of those comments as a “flash point.” The City admits that—since 2015, and as approved by the U.S. Department of Agriculture and/or the U.S. Fish and Wildlife Service—the City has undertaken various non-lethal methods to deter migratory birds from actively nesting in particular areas of the Park in order to protect the health and

safety of the migratory birds as well as humans and domesticated animals that utilize the Park and to preserve the cleanliness of the Park's waterways. The City denies the Plaintiffs' inflammatory description of the bird deterrence activities in the Park as alleged in paragraph 54 of the Complaint.

55. The City denies the allegations in paragraph 55 of the Complaint because it mischaracterizes the actions taken by the City to comply with the Migratory Bird Treaty Act. As set forth above, the City has—since 2015, and as approved by the U.S. Department of Agriculture and/or the U.S. Fish and Wildlife Service—undertaken various non-lethal methods to deter migratory birds from actively nesting in particular areas of the Park in the interest of health and safety for the Park's visitors, flora, fauna, and waterways.

56. The City denies that the “bird deterrence” measures are largely aimed at preventing the double-crested cormorant from actively nesting in the Park, as alleged in paragraph 56 of the Complaint. The City admits that under the Migratory Bird Treaty Act, certain birds cannot be removed or “taken” if they are actively nesting in the Park, as alleged in paragraph 56 of the Complaint. The City further admits that it aims to prevent birds from actively nesting in certain areas of the Park, in the interest of health and safety for the Park's visitors, flora, fauna, and waterways; to protect the birds themselves by encouraging nesting in other areas of the Park; and so that the Bond Project can proceed expeditiously once permits are received and the currently closed areas of the Park can be re-

opened to visitors, including Plaintiffs and other members of the Native American Church.

57. With regard to paragraph 57 of the Complaint, the City admits that during and after the completion of the Bond Project, it will continue bird deterrence in limited areas of the Park under programs coordinated with the U.S. Department of Agriculture and U.S. Fish and Wildlife Service in the interest of health and safety for the Park's visitors, flora, fauna, and waterways. The City denies that the current Bond Project proposes the destruction or relocation of 98 trees and leaves Plaintiffs to their proof. The City further avers that a number of the trees identified for removal are already dead or dying and could not be saved or relocated and also that the Bond Project proposes planting new trees.

58. The City is without sufficient knowledge to admit or deny the allegations in paragraph 58 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

59. The City admits that it did not "commission[] 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," as alleged in paragraph 59 of the Complaint, and denies that any such study is required. Furthermore, the City avers that the Bond Project, as currently proposed, will permit the double-crested cormorant to inhabit the Park during and after completion of the Bond Project. 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 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. The City further avers that the Bond Project, as currently proposed, will restore the area designated by the Plaintiffs as the Sacred Area to a condition that is (a) safe for public access (including access by Plaintiffs and other members of the Native American Church) and (b) suitable for the performance of Plaintiffs' religious observances.

60. The City admits that it considered several proposals for the Bond Project and ultimately chose one of those solutions, as alleged in paragraph 60 of the Complaint. The City objects to the characterizations of the proposals and the City's rationale for choosing the proposed Bond Project as set forth in paragraph 60 of the Complaint and leaves Plaintiffs to their proof.

61. The City admits that one proposal for the Bond Project, which was ultimately not selected involved the construction of piers to support the river walls, as alleged in paragraph 61 of the Complaint. The City denies the remainder of the allegations in paragraph 61 of the Complaint and leaves Plaintiffs to their proof.

62. The City admits that one proposal for the Bond Project, which was ultimately not selected involved the construction of a pier and spandrel system, as alleged in paragraph 62 of the Complaint. The City denies the remainder of the allegations in paragraph 62 of the Complaint and leaves Plaintiffs

to their proof.

63. The City denies paragraph 63 of the Complaint and leaves Plaintiffs to their proof.

64. The City admits that the Bond Project, as proposed, involves a cantilever system, as alleged in paragraph 64 of the Complaint. The City denies the remainder of the allegations in paragraph 64 of the Complaint, including the Plaintiffs' characterization of the cantilever system and the alleged impacts of the proposed Bond Project.

65. The City denies paragraph 65 of the Complaint and leaves Plaintiffs to their proof.

66. The City denies paragraph 66 of the Complaint and leaves Plaintiffs to their proof.

67. The City admits that it had communications with Plaintiffs regarding the Bond Project as alleged in paragraph 67 of the Complaint. The City denies the remainder of paragraph 67 of the Complaint, including without limitation the following: **(a)** Plaintiffs' characterization or summary of the "study" to determine the impact of the Bond Project on Plaintiffs' 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." Furthermore, the City avers that the Bond Project, as currently proposed, will permit the double-crested cormorant to inhabit the Park during and after completion of the Bond Project

and will restore the area designated by the Plaintiffs as the Sacred Area to a condition that is **(a)** safe for public access (including access by Plaintiffs and other members of the Native American Church) and **(b)** suitable for the performance of Plaintiffs' religious observances.

68. The City admits that limited areas of the Park have been closed to public access from approximately February 3, 2023, to the present, as alleged in paragraph 68 of the Complaint, due to safety concerns. The City denies the allegation that it has specifically excluded Plaintiffs for the purpose of preventing them from engaging in communal or individual worship or performing religious ceremonies.

69. The City is without sufficient knowledge to admit or deny the allegations in paragraph 69 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof. The City further avers that **(a)** the area of identified by Plaintiffs as the Sacred Area is currently closed to *all* Park visitors because it is unsafe; and **(b)** the Bond Project is intended to make that area of the Park safe and accessible to all visitors, including the Plaintiffs and other members of the Native American Church.

70. The City is without sufficient knowledge to admit or deny paragraph 70 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof. The City further avers that the area sometimes identified by Plaintiffs as the Sacred Area is currently closed to *all* Park visitors because it is unsafe and that the Bond Project is intended to make that area of the Park safe and accessible to all

visitors, including the Plaintiffs and other members of the Native American Church.

71. The City is without sufficient knowledge to admit or deny paragraph 71 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

72. The City admits that Plaintiffs requested access to Lambert Beach to perform a religious ceremony on August 12, 2023 as alleged in paragraph 72 of the Complaint. The City is without sufficient knowledge to admit or deny the remaining allegations in paragraph 72 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

73. The City admits that Plaintiffs requested access to Lambert Beach to perform a religious ceremony on August 12, 2023, as alleged in paragraph 73, of the Complaint. The City offered various reasonable accommodations that balanced the Plaintiffs' asserted religious interest with the governmental goal of public safety (including the safety of Plaintiffs and any other participants in the ceremony), but the Plaintiffs declined those accommodations.

74. The particular allegations in paragraph 74 are too vague for the City to be able respond specifically to the allegations as pleaded and, therefore, the City denies the same and leaves Plaintiffs to their proof.

75. The City is without sufficient knowledge to admit or deny the allegations in paragraph 75 of the Complaint and, therefore, denies the same and

leaves Plaintiffs to their proof.

76. The City denies the allegations in paragraph 76 of the Complaint. To the extent that Plaintiffs assert “[t]he double-crested cormorant’s presence, in particular, is essential to the Plaintiffs’ religious services,” the City is without sufficient information to admit or deny the allegations and, therefore, denies the same and leaves Plaintiffs to their proof.

77. The City is without sufficient knowledge to admit or deny the allegations in paragraph 77 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof. The City denies that Plaintiffs have been denied access to the Park, and reasserts that only limited areas of the Park are temporarily closed for safety concerns.

78. The City is without sufficient knowledge to admit or deny the allegations in paragraph 78 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof. The City denies that Plaintiffs have been denied access to the Park, and reasserts that only limited areas of the Park are temporarily closed for safety concerns.

79. The City is without sufficient knowledge to admit or deny the allegations in paragraph 79 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

80. The City is without sufficient knowledge to admit or deny the allegations in paragraph 80 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

81. The City admits that it has had communications with Perez about the Bond Project and has received written and oral testimony from him or on his behalf as alleged in paragraph 81 of the Complaint.

82. The City admits to receiving a letter from Plaintiffs dated May 23, 2023, as alleged in paragraph 82 of the Complaint. The City objects to Plaintiffs' summary or characterization of the letter and asserts that the letter speaks for itself.

83. The City denies the allegations of paragraph 83 of the Complaint and leaves Plaintiffs to their proof.

84. The City denies the allegations in paragraph 84 of the Complaint. The current proposal for the Bond Project does not preclude the presence of the double-crested cormorant in the Park and maximizes the number of trees designated for preservation/relocation as well as providing for planting a number of new trees in the Project Area.

85. Paragraph 85 of the Complaint consists largely of argument that does not require a response from the City. To the extent a response is required, the City denies the allegations and leaves Plaintiffs to their proof. The City admits that a portion of the Highway 1604 project had to be redesigned to comply with the Endangered Species Act, but denies the relevance of that fact to the Plaintiffs' claims.

86. Paragraph 86 of the Complaint consists largely of argument that does not require a response from the City. To the extent a response is required,

the City admits that its bird deterrence actions, undertaken in conjunction with the U.S. Department of Agriculture and the U.S. Fish and Wildlife Service, comply with the Migratory Bird Treaty Act, which the City is compelled to follow. The City denies that it has not attempted “to accommodate Plaintiffs’ constitutional and statutory religious freedom rights,” to the extent that such rights exist. The City also denies that it “is willing to adjust its plans under its favored causes—like the protection of spiders—but not to protect the rights of its citizens” and leaves Plaintiffs to their proof.

CLAIMS FOR RELIEF

Count I

Plaintiffs’ Alleged Violation of the First Amendment to the United States Constitution: Free Exercise Clause – (42 U.S.C. § 1983)

87. The City incorporates the preceding paragraphs as if fully set forth herein.

88. The City is without sufficient knowledge to admit or deny the allegations in paragraph 88 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

89. The City denies paragraph 89 of the Complaint.

90. The City denies paragraph 90 of the Complaint.

91. The City denies paragraph 91 of the

Complaint.

92. The City denies paragraph 92 of the Complaint.

93. The City denies paragraph 93 of the Complaint.

94. The City denies that Plaintiffs are entitled to injunctive or declaratory relief as alleged in paragraph 94 of the Complaint and leaves Plaintiffs to their proof.

Count II

Plaintiffs' Alleged Violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA")

95. The City incorporates the preceding paragraphs as if fully set forth herein.

96. The City is without sufficient knowledge to admit or deny the allegations in paragraph 96 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

97. The allegation in paragraph 97 of the Complaint that the City's "conduct affects commerce with foreign nations, among the several states, or with Indian tribes" is too vague for the City to be able to respond. The City is without sufficient information to admit or deny that indigenous people across Texas, the American Southwest, and Mexico travel to the Park to worship or perform religious ceremonies. Therefore, the City denies the same and

leaves Plaintiffs to their proof. The City admits that it promotes the Park to out-of-state tourists as a notable San Antonio landmark.

98. The first sentence of paragraph 98 of the Complaint is too vague for City to respond to at this time, and, therefore, the City denies and leaves Plaintiffs to their proof. The City denies that the Bond Project, or parts thereof, will be partially funded by federal funds, and leaves Plaintiffs to their proof.

99. The City denies the allegations of paragraph 99 of the Complaint and leaves Plaintiffs to their proof.

100. The City denies the allegations in paragraph 100 of the Complaint and leaves Plaintiffs to their proof.

101. The City denies the allegations in paragraph 101 of the Complaint and leaves Plaintiff to their proof.

102. The City denies the allegations in paragraph 102 of the Complaint and leaves Plaintiffs to their proof.

103. The City denies the allegations in paragraph 103 of the Complaint and leaves Plaintiffs to their proof.

104. The City denies the allegations in paragraph 104 of the Complaint and specifically denies that Plaintiffs are entitled to any relief under RLUIPA.

Count III

Plaintiffs' Alleged Violation of Article I, Section 6 of the Texas Constitution

105. The City incorporates the preceding paragraphs as if fully set forth herein.

106. The City is without sufficient knowledge to admit or deny the allegations in paragraph 106 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

107. The City denies the allegations in paragraph 107 of the Complaint.

108. The City denies the allegations in paragraph 108 of the Complaint and leaves the Plaintiffs to their proof.

109. The City denies the allegations in paragraph 109 of the Complaint and leaves the Plaintiffs to their proof.

110. The City denies the allegations in paragraph 110 of the Complaint and leaves the Plaintiffs to their proof.

111. The City denies the allegations in paragraph 111 of the Complaint and leaves the Plaintiffs to their proof. The City denies that Plaintiffs are entitled to any relief under Article I, Section 6 of the Texas Constitution.

Count IV

Plaintiffs' Alleged Violation of Article I, Section

6-a of the Texas Constitution

112. The City incorporates the preceding paragraphs as if fully set forth herein.

113. The City is without sufficient knowledge to admit or deny the allegations in paragraph 113 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

114. The City admits that the Plaintiffs have requested permission to enter a specific area of the Park for the reasons stated in paragraph 114 of the Complaint.

115. The City is without sufficient knowledge to admit or deny the allegations in paragraph 115 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

116. The City denies the allegations in paragraph 116 of the Complaint and leave Plaintiffs to their proof.

117. The City is without sufficient knowledge to admit or deny the allegations in paragraph 117 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

118. The City denies the allegations in paragraph 118 of the Complaint and specifically deny that Plaintiffs are entitled to relief under Article I, Section 6-a of the Texas Constitution.

Count V

Plaintiffs' Alleged Violation of the Texas

**Religious Freedom and Restoration Act
("TRFRA")**

119. The City incorporates the preceding paragraphs as if fully set forth herein.

120. The City is without sufficient knowledge to admit or deny the allegations in paragraph 120 of the Complaint and, therefore, denies the same and leaves Plaintiffs to their proof.

121. The City denies the allegations in paragraph 121 of the Complaint and leaves Plaintiffs to their proof.

122. The City denies the allegations in paragraph 122 of the Complaint and leaves Plaintiffs to their proof.

123. The City denies the allegations in paragraph 123 of the Complaint and leaves Plaintiffs to their proof.

124. The City denies the allegations in paragraph 124 of the Complaint and leaves Plaintiffs to their proof.

125. The City denies the allegations in paragraph 125 of the Complaint and leaves Plaintiffs to their proof.

126. The City admits paragraph 126 of the Complaint.

127. The City denies the allegations in paragraph 127 of the Complaint and leaves Plaintiffs to their proof. The City specifically denies that Plaintiffs are

entitled to any relief under TRFRA.

128. The City denies that the Plaintiffs are entitled to any relief pleaded for in the “Prayer for Relief.”

129. Any allegation not specifically responded to herein should be deemed denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs’ claims are barred, in whole or in part, because the Court lacks subject matter jurisdiction.

2. Plaintiffs’ claims are barred, in whole or in part, because Plaintiffs have failed to state a claim for which relief can be granted.

3. Plaintiffs’ claims are barred, in whole or in part, by the applicable statute of limitations.

4. Plaintiffs’ claims are barred, in whole or in part, because Plaintiffs lack capacity to bring the claims.

5. Plaintiffs’ claims are barred, in whole or in part, by the doctrine of sovereign or governmental immunity. The City was, at all times material to Plaintiffs’ claims, a municipality duly organized and existing as such under the laws of the State of Texas, acting in a governmental capacity. There has been no waiver of governmental immunity for the claims asserted by Plaintiffs.

6. In the alternative, and without waiving the foregoing, the City asserts that Plaintiffs’ claims are

limited by the Texas Tort Claims Act, § 101.002, et seq., Texas Civil Practice & Remedies Code. At all times material to the issues in dispute, the City of San Antonio was engaged in governmental functions.

7. For further answer, if required, the City would show that in essence, Plaintiffs seek to collaterally attack the collective wisdom of City leadership, management, consultants and experts in proceeding with the Bond Project.

8. For further answer, if required, the City has the municipal authority and police power to operate and maintain the Park, including the power to eliminate hazardous conditions. The City's 2017 Bond Project and Wildlife Management Plan involve legislative decisions that were and are substantially and directly related to the legitimate and compelling governmental interest of promoting public safety.

9. Plaintiffs have requested declaratory relief. The declaratory relief sought by Plaintiffs should be denied, and the Court should award the City its costs and reasonable and necessary attorney's fees as are equitable and just.

10. Plaintiffs have failed to plead their claims with specificity. Because Plaintiffs' Complaint as a whole is so vague, general and indefinite, the City is unable at this time to plead all defenses to which it is or may be entitled, and therefore reserves the right (and requests leave of Court, if necessary) to amend this answer to respond to any specific allegations that may be made by Plaintiffs.

WHEREFORE, PREMISES CONSIDERED,

Defendant City of San Antonio requests that this Court deny the relief and recovery sought by Plaintiffs; that the Plaintiffs' Complaint be dismissed and judgment rendered for the City; that the City recover its costs, attorneys' fees, and such other relief, general or special, at law or in equity, to which it may be justly entitled.

Dated September 1, 2023.

/s/ Fred R. Jones
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, I electronically filed the foregoing with the Clerk of the United States District Court for the Western District of Texas using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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ATTORNEYS FOR PLAINTIFFS

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/s/ Fred R. Jones
Fred R. Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

**GARY PEREZ and MATILDE TORRES,
Plaintiffs,**

VS.

**CIVIL
ACTION NO.
SA-23-CV-977-
FB**

**CITY OF SAN ANTONIO,
Defendant.**

**PARTIAL ORDER CONCERNING
PRELIMINARY INJUNCTION ISSUES**

After a four-day preliminary injunction hearing, the Court finds two issues which need to be addressed now due to time constraints. There will follow a more thorough and detailed analysis, opinion and order.

This case involves competing interests of constitutionally protected religious exercise and compelling government responsibilities to protect public health and safety.

Plaintiffs want to resume their historic access to a sacred site in Brackenridge Park which is presently fenced off in anticipation of restorative construction to begin as soon as all permits are obtained. The site is depicted in Plaintiffs' Exhibit 58 attached hereto and comprises an approximate 20-foot-by-30-foot rectangular plot out of two acres of land located between two bald cypress trees. Defendant City

contends that one of the trees, number 129, poses a risk of injury or death because of a large broken limb which the evidence showed can be removed quickly and must be done before the area can be reopened to the general public irrespective of the religious free exercise matter before the Court.

The immediate desire of the City is to resume bird deterrent operations to comply with the Migratory Bird Treaty Act and to prevent large amounts of foul fowl feces making the area unhealthy for humans, especially the Court notes for toddlers who put anything and everything in their mouths. Concerning access for Plaintiffs' religious exercise, the Court finds that Plaintiffs have a sincere religious belief and are entitled to be present at the site on the dates of November 17 and December 21, 2023. Plaintiffs, through their counsel, shall keep the City and the Court informed of other proposed dates. The Court will address other issues during construction and as is suggested later in this Order.

To comply with the Court's Order, the City shall:

1. Immediately remove the broken limb on Tree 129.
2. Install a gate in the fence depicted in Plaintiffs' Exhibit 58. The gate may remain locked except in the designated Plaintiffs' access time and dates.

As the construction time approaches, the City shall explore whether the sacred site can be separately fenced off with fencing from the street on the exterior side of the trunks of the two trees to the

riverbank, and if not, why not.

With regard to bird deterrence, the Court finds a serious public health risk exists which surpasses Plaintiffs' desire to have the double-crested cormorant present for their dropped feathers which no doubt Plaintiffs already have or can be found in other locations. Accordingly, the City may resume bird deterrent operations, except for the dates on which Plaintiffs religious ceremonies occur.

Finally, the Court makes this observation: Spiritual reflection and connection contemplate being done in the quiet of a forest or a traditional house of worship. Because of the publicity this matter has engendered, the Court predicts Plaintiffs' time in the sacred area will be disruptively accompanied by television camera crews, other members of the press and the general public who are also protected by the First Amendment of our Bill of Rights. Plaintiffs' religious experience may not be as satisfactory as hoped for.

Following the example of another individual who had to make difficult decisions, it is so ORDERED. 1 *Kings* 3:16-28.

SIGNED this 2nd day of October, 2023.



FRED BIERY
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GARY PEREZ and MATILDE TORRES,
Plaintiffs,

VS.

**CIVIL
ACTION NO.
SA-23-CV-977-
FB**

CITY OF SAN ANTONIO,
Defendant.

**OPINION AND ORDER GRANTING IN PART
AND DENYING IN PART PLAINTIFFS'
REQUEST FOR PRELIMINARY INJUNCTION**

“When asked by an anthropologist what the Indians called America before the white men came, an Indian said simply, ‘Ours.’”¹

“You can please some of the people some of the time, all of the people some of the time, some of the people all of the time, but you can never please all of the people all of the time.”²

¹ Quotation attributed to Vine Deloria, Jr.; *SEE VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (MacMillan, 1971).

² Quotation often attributed to Abraham Lincoln, though there is no verifiable historical source to support such attribution.

Plaintiffs seek a preliminary injunction requesting three items of relief:

1. Restore access for religious services in the Sacred Area, which is the northernmost point on the south bank of the San Antonio River.
2. Preserve the spiritual ecology of the Sacred Area by minimizing tree removal.
3. Preserve the spiritual ecology of the Sacred Area by allowing cormorants to nest.

To achieve the request, Plaintiffs ask the Court to “order the City to grant access to the plaintiffs to the Sacred Area and reevaluate the Bond Project to develop alternative plans that will accommodate our clients’ religious beliefs.”³

During and following a four-day preliminary injunction hearing, the Court thoroughly reviewed the testimony, exhibits, legal authorities and arguments of counsel.

Plaintiffs and Defendant have filed Proposed Findings of Fact and Conclusions of Law supporting their respective positions and the legal authorities and bases therefor. (Docket entries 31 and 32.) They are attached hereto and made a part hereof. *See also Partial Order Concerning Preliminary Injunction*

³ Plaintiffs’ Closing Argument, Realtime Unedited Transcript, September 29, 2023, at page 778, lines 4-7.

Issues at Docket entry 47.

Concerning the historical background facts included in both submissions, the Court finds them to be accurate and adopts them as its own.

With reference to Item 1, “access for religious services in the Sacred Area,” the Court finds that Plaintiffs have a sincere religious belief and have met their burden to prove the four elements for injunctive relief. The Court adopts as its own Plaintiffs’ Proposed Findings of Fact and Conclusions of Law and the legal authorities cited to support granting access for “religious services” involving 15 to 20 people for no more than an hour on specified astronomical dates coinciding with Plaintiffs’ spiritual beliefs. Plaintiffs shall provide those dates in advance to the City during the pre-construction and construction periods so that Plaintiffs may be accommodated for entry to the Sacred Area and appropriate security provided. Plaintiffs’ request for access in Item 1 is GRANTED.

The testimony also evidenced that there are other indigenous people who share Plaintiffs’ beliefs but reside far away from the Sacred Area. Nevertheless, they exercise the same religious ceremonies. Those facts support the City’s argument that Plaintiffs can temporarily be accommodated in other parts of Brackenridge Park. However, out of an abundance of legal caution and respect for Plaintiffs’ beliefs, the Court reaffirms its granting of Plaintiffs’ requested Item 1.

The Court also heard some testimony concerning all-night ceremonies involving consumption of peyote, which is a legal substance for indigenous people. The

Court will defer ruling on that issue while awaiting further advice from counsel whether that type of event has been allowed or occurred before the fencing was erected, it being the Court's recollection that there is some restriction of the Park's nighttime use.

To the extent there was some mention of access for individual worship during the construction period, it was not in Plaintiffs' Closing Argument request, is deemed waived and the equities support the conclusion that individual access at any time Plaintiffs desire is impractical and is DENIED. The Court notes that both Plaintiffs also practice Roman Catholicism whose places of worship provide numerous locations for individual meditation and worship. Moreover, Plaintiffs and the general public still have access to over 300 acres of Brackenridge Park for meditation in nature.

For the safety of Plaintiffs and the security of the City's property during the construction period, the City may, if it chooses, erect additional fencing perpendicular to the existing fencing at the Sacred Area.

Item 2 and Item 3 have to do with the spiritual ecology of the Sacred Area. Clearly the area does not look the same as it did thousands of years ago in the cave painting exhibit. Nor does it look the same as 100 years ago when there really was a beach as depicted in various exhibits. Nor will it look the same 100 years from now.

Central to Plaintiffs' spiritual ecology is the San Antonio River, also referred to by Plaintiffs as Mother Waters. Many religions see water as the wellspring of

life, as indeed it is, and incorporate water into their faith traditions: The Ganges River for Hindus, Roman Catholicism Holy Water, the mikveh bath in Judaism, water as a symbol of Allah paradise in Islam, baptismal immersion and sprinkling in Protestant ceremonies and water as symbols of purity and compassion in Buddhist thought.

The most important part of Plaintiffs' spiritual ecology is the confluence of the shape of the Mother Waters at the bend of the San Antonio River with the shape of the Eridanus constellation of stars.

Given the current extended drought, the lack of water flow from the Blue Hole Springs and other natural sources, there would be no San Antonio River/Mother Waters but for the City artificially assisting the river by pumping recycled waste water, presumably from the sewer reclamation system. It is not particularly holy water nor the purity of the spring water Plaintiffs would like, but better than a dry riverbed. This creates something of a secular/religious symbiotic relationship between Plaintiffs and Defendant until it rains, the springs come to life and until the reformation and resurrection of the Project Area is complete. Amen.

Regarding Plaintiffs' requested Item 3, the Court heard credible testimony of thousands of egrets, herons, and cormorants and their excrement nesting in the Project Area during their migrations at different times of the year. Once nested, the Migratory Bird Treaty Act precludes removal. The Court finds the bird deterrent operation is in the realm of public health and safety. To grant Plaintiffs' relief regarding Item 3 would effectively put the Project on

hold ad infinitum, given the different species' migration patterns and the Migratory Bird Treaty Act. There could not be an eight month window of opportunity to accomplish the Project.

With reference to Item 2 and Item 3 of Plaintiffs' requested relief, the Court finds the City has met its burden of proving a compelling government interest for public health and safety, and the equities favor the City on those two items. The Court adopts as its own the City's Proposed Findings of Fact and Conclusions of Law and the legal authorities cited regarding Plaintiffs' requested Item 2 and Item 3. Accordingly, those requests by Plaintiffs are DENIED.

Moreover, Plaintiffs desire possibly to save trees by ordering the City to "reevaluate the Bond Project to develop alternative plans" would, given the lengthy redesign and re-permitting processes, exponentially extend Plaintiffs' and the public's presently fettered ability to enjoy the area. The temporary closing becomes semi-permanent. Instead of months, access would likely remain limited for years, as is the case of the faithful who find the Notre Dame Cathedral to be their sacred place and who for several years will have to use alternative places of worship. By its Order, it is the Court's intent to make the fettered unfettered as soon as reasonably possible. It will be up to the parties to decide how long they wish to delay the unfettered with continuing litigation.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Preliminary Injunction (docket entry 5) is GRANTED IN PART and DENIED IN PART as set forth herein.

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No bond shall be required. It is so ORDERED.

SIGNED this 11th day of October, 2023.



FRED BIERY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GARY PEREZ and MATILDE TORRES,
Plaintiffs,

VS.

**CIVIL
ACTION NO.
SA-23-CV-977-
FB**

CITY OF SAN ANTONIO,
Defendant.

**PLAINTIFFS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW IN
SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I. Proposed Findings of Fact¹

A. The Parties

1. Plaintiff Gary Perez ("Perez") is a descendant of the indigenous people of North America, resident of the City, and member of the Lipan-Apache Native American Church ("Native American Church").

2. 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

¹ To the extent any of the following findings of fact constitute conclusions of law, they are adopted and treated as such.

of Coahuila Mexico.

3. Perez is a published researcher who deciphered elements of the Native American Church's theology and archaeology.

4. Perez has worshipped and led religious ceremonies in Brackenridge Park ("Park") for at least 25 years.

5. Plaintiff Matilde Torres ("Torres") (together with Perez, "Plaintiffs") is a descendant of the indigenous people of North America, resident of the City, and member of the Native American Church and the Pakahua Peoples of Mexico and Texas.

6. Torres has worshipped and participated in religious ceremonies in the Park for at least 10 years. She is a respected leader in her religious community, and regularly organizes, leads, and serves as a water bearer for religious services.

7. Defendant City of San Antonio (the "City") is a municipal government entity in Bexar County, Texas.

8. The City is responsible for the policies developed and implemented through its officers, employees, agents, and departments, including the Department of Parks and Recreation, Public Works Department, Office of Historical Preservation, Development Services Department, and Historic Design and Review Commission.

B. The Park

9. The Park exists on land that has been inhabited and utilized by indigenous peoples for thousands of years.

10. The Park officially was established and began to assume its current form in 1899 when George Brackenridge donated 199 acres of land to the City. The City bought or received bequests of additional acreage over the next two decades, which expanded the Park to its current size of approximately 343 acres.

11. The San Antonio River flows through the Park.

12. Approximately 83 trees currently exist in the Lambert Beach Area.

13. The Park contains manmade structures, including retaining walls along the San Antonio River. The retaining walls along the San Antonio River were constructed to protect trees that existed and grew on the bank of the San Antonio River.

14. An area within the Park is called Lambert Beach ("Lambert Beach Area"). The Lambert Beach Area is the location in dispute in this litigation. It is a place where Plaintiffs and other members of the Native American Church believe they must gather to worship and perform religious ceremonies. It is also the place where the City wishes to make extensive changes and renovations to the natural environment and manmade structures within the Park.

15. The Park is listed on the National Register of Historic Places and is a Texas State Antiquities

Landmark.

16. The State of Texas and United States government provide a portion of the funding that is used to repair, enhance, maintain, and operate the Park.

17. Travel to the Park and commercial activity within the Park affects commerce with foreign nations, among the several states, or with Indian tribes. Peyote pilgrims from around North and Central America visit the Park, as well as the nearby Blue Hole spring, to perform religious ceremonies on their way to the peyote gardens.

C. Wildlife Management in the Park

18. To deter migratory birds from feeding, roosting, nesting, or inhabiting the Lambert Beach Area, the City contracted with the U.S. Department of Agriculture (“USDA”) and coordinated with the Texas Parks and Wildlife Department and U.S. Fish and Wildlife Service.

19. The City and its agents have engaged in “habitat modification” within the Park, which included removing nests, clearing underbrush, and removing dead wood from the tree canopy to discourage nesting in the Lambert Beach Area.

20. The City uses bird deterrent techniques in the Lambert Beach Area, including pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, explosives, and drones.

21. The USDA holds wildlife take permits,

which authorize the use of lethal force to deter birds from nesting or inhabiting the Lambert Beach Area.

D. The 2017 Bond Project

22. In late 2016 and early 2017, the City engaged in public outreach regarding its desire to make changes to the Park, including the Lambert Beach Area. To that end, the City hosted several meetings with City residents and other stakeholders where the City tried to gain support to make certain changes in the Park.

23. As part of its promotional efforts, the City did not identify public health or safety as a reason for making changes in the Park.

24. On February 21, 2017, the City published the Brackenridge Park Master Plan, which synthesized the promotional messages and public feedback regarding the City's public outreach regarding the City's desire to make changes to the Park. The Brackenridge Park Master Plan does not identify public health or safety as a reason to make changes in the Park. Rather, the City distilled three "approved public strategies" as guideposts for the City's further efforts to secure funding and define a scope of work to achieve the City's desired changes within the Park: (1) restoration of natural park features; (2) restore, preserve, and articulate park cultural and historic features; and (3) increase visibility and pedestrian access to / within the park.

25. In May 2017, the citizens of San Antonio voted in favor of a \$850 million bond package for public improvements.

26. Proposition 3 of the bond package was dedicated to “improvements to parks, recreation, and open spaces,” including \$7,750,000 for use at the Park to make “[g]eneral park improvements and rehabilitation which may include historic river walls, restrooms, trails and historic structures.”

27. Consistent with the Brackenridge Park Master Plan that was published earlier in 2017, the City did not promote Proposition 3 to San Antonio voters by identifying public health or safety as a purpose for voting for this portion of the bond package.

28. After voters passed Proposition 3, the City began developing the Brackenridge Park 2017 Bond Project (the “Bond Project”).

29. The City requires a permit from the U.S. Army Corps of Engineers (“USACE”) before it can begin repairing or reconstructing walls, or removing or relocating trees within the Lambert Beach Area. The City has not submitted a final “Treatment Plan” to USACE, which is needed before the City can obtain a permit from USACE.

30. Once USACE approves the final Treatment Plan, which approval is not anticipated to be given until months after submission, a 30-day comment period will begin to solicit feedback from stakeholders, including local indigenous tribes.

31. The City’s plan for the Bond Project includes the repair or rebuilding of certain portions of retaining walls along the San Antonio River, including in the Lambert Beach Area.

32. The City's plan for the Bond Project includes the removal or relocation of 69 trees that currently exist within the Lambert Beach Area.

33. Of the 83 trees that currently exist in the Lambert Beach Area, only 14 trees will be preserved in place.

34. Of the 69 trees that the City currently plans to remove or relocate from the Lambert Beach Area, the City's "primary purpose" for removing 31 of the trees is because the City has concluded that removal is needed to address the requirements for heavy construction related to the City's chosen engineering solution to repair or rebuild retaining walls along the San Antonio River.

35. Of the 69 trees that the City currently plans to remove or relocate from the Lambert Beach Area, the City's "primary purpose" for removing 28 of the trees is because the City has concluded that removal is needed for trees (i) within a few feet of a historically significant structure that requires rehabilitation, (ii) that are causing or have caused damage to resources, or (iii) that will cause future damage if left in place.

36. Of the 69 trees that the City currently plans to remove or relocate from the Lambert Beach Area, the "primary purpose" for removing 4 of the trees is because the City has concluded that removal is needed because the trees are an invasive species.

37. The City applied for, and received from the Development Services Department, a variance from a City Unified Development Code provision that

requires 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-yr floodplain.

38. The Development Services Department granted that variance based on a discretionary, individualized assessment.

39. The City's current plan for the Bond Project includes bird mitigation and wildlife management measures within the Lambert Beach Area intended to deter migratory birds from feeding, roosting, nesting, or inhabiting the Lambert Beach.

40. Pursuant to the Migratory Bird Treaty Act, the removal or relocation of trees planned for the Lambert Beach Area cannot proceed if migratory birds, including cormorants, are nesting in the area.

E. Plaintiffs' Sincerely Held Religious Beliefs

41. Plaintiffs are practitioners of the Native American Church.

42. Members of the Native American Church, including Plaintiffs, believe in the teachings and perform the religious ceremonies of indigenous and Christian faith traditions.

43. Plaintiffs believe that life in the region of San Antonio began at a spring, now called Blue Hole, which is north of the Park and situated on the campus of the University of the Incarnate Word.

44. Plaintiffs believe that a spirit in the form of

a blue panther lived in the Blue Hole. Plaintiffs believe, a spirit in the form of a cormorant visited the Blue Hole. Plaintiffs believe that the blue panther scared the bird, and as it fled, water droplets from its tail scattered across the San Antonio River Valley, including the area that now comprises the Park, spurring life in the region.

45. Plaintiffs believe that a riverbend located in the Park, specifically within the Lambert Beach Area, mirrors the celestial constellation Eridanus and is where a unique connection exists between the physical and spiritual worlds.

46. Plaintiffs believe that this riverbend is sacred and that they are required to gather, worship, and conduct religiously important ceremonies there.

47. Plaintiffs believe that certain of the religious ceremonies that they are required to perform can only be accomplished at this riverbend that is located within the Lambert Beach Area.

48. Plaintiffs believe that a physical location's capacity to function as a holy place relies on the presence of trees, birds, and other natural features that are part of a "spiritual ecology" of the location, which enables people to commune with the spiritual world and orient themselves in reality when they are present at the location.

49. Plaintiffs believe that cormorants tell the life-creation story through their presence and nesting in the area of the river bend. Accordingly, Plaintiffs believe that certain religious ceremonies that must be performed according to their religious beliefs cannot

be properly administered without the presence of cormorant presence, nesting, and habitat.

50. Plaintiffs believe that the Park is a significant site for “peyote pilgrims” and they regularly act as religious leaders and guides to individuals who have traveled to the Park, often unannounced.

F. The City’s Bond Project Substantially Burdens Plaintiffs’ Religious Exercise

51. Since at least February 2023, the City has prevented Plaintiffs, Native American Church members, and peyote pilgrims from entering the Lambert Beach Area.

52. Because Plaintiffs have not been permitted to access the southern bank of the riverbend within the Lambert Beach Area, Plaintiffs have been unable to perform religious ceremonies that they believe are religiously necessary or Plaintiffs have been forced to perform religious ceremonies in a different location, which Plaintiffs believe is not religiously acceptable.

53. Due to their inability to enter the southern portion of the Lambert Beach Area, Plaintiffs have also been unable to minister fully to peyote pilgrims and members of the Native American Church. Plaintiffs are also often presented with requests from local adherents, such as a birthday blessing, that they are unable to perform at the Lambert Beach Area.

54. According to Plaintiffs’ beliefs, the City’s current plan to remove or relocate 69 trees from the Lambert Beach Area will permanently disrupt the

“spiritual ecology” of the riverbend within the Lambert Beach Area and render the area spiritually inert, making it impossible for Plaintiffs to perform religious ceremonies that they believe are religiously necessary.

55. According to Plaintiffs’ beliefs, the City’s current plan to deter migratory birds, especially cormorants, from feeding, roosting, nesting, or inhabiting the Lambert Beach Area will permanently disrupt the “spiritual ecology” of the riverbend within the Lambert Beach Area and render the area spiritually inert, making it impossible for Plaintiffs to perform religious ceremonies that they believe are religiously necessary.

G. The City’s Design and Implementation of the Bond Project Are Not Neutral or Generally Applicable

56. The City will not remove or relocate trees that have migratory or endangered birds nesting in them, but does not provide similar protection for trees that have cormorants nesting in them or that are otherwise essential to Plaintiffs’ religious practice.

57. The City has fenced off the southern portion of the Lambert Beach Area, where Plaintiffs must perform religious ceremonies, because of purported public safety risks from dead or dying trees or due to forthcoming construction, yet the City has failed to fence off many portions of the Park that contain trees posing as great a public safety risk, or greater public safety risk, as compared to the trees inside the Lambert Beach Area.

58. Homer Garcia, the City's head of Parks and Recreation, has sole discretion to allow or disallow access to the Lambert Beach Area. There is no formal criteria that Mr. Garcia utilizes to adjudicate requests to enter the Lambert Beach Area.

59. An examples of this discretion the City has permitted a San Antonio councilwoman to enter the fenced-in Lambert Beach Area without personal protective equipment for a thirty to sixty minute period during which the councilwoman and arborists walked on the south bank, but has refused to grant Plaintiffs the same access.

60. The City has also permitted Shanon Miller to enter the fenced-in Lambert Beach Area without personal protective equipment, and she walked the area freely accompanied by an arborist.

61. In contrast, the Plaintiffs offered to follow the same protocols in their requests to enter the Lambert Beach Area on August 12, 2023 and September 21, 2023. The City denied Plaintiffs's request to access the Lambert Beach Area on the same terms that the City permitted the councilwoman and Shanon Miller to enter the Lambert Beach Area.

62. Plaintiffs have participated in many private and public meetings with the City's employees and agents related to the Bond Project, including a July 29, 2022 meeting with the Department of Parks and Recreation, an April 19, 2023 Historic Design and Review Commission hearing, and an August 3, 2023 City Council hearing, in which they have explained their religious beliefs and practices and how the Bond Project burdens their religious practice.

63. On May 23, 2023, Plaintiffs sent the City a letter explaining their religious beliefs and practices and detailing how the current Bond Project proposal would prevent them from practicing their religion, and how the proposal violates their rights under federal and state law.

64. After learning of Plaintiffs' religious objections to the City's current plan for the Bond Project, the City did not commission a study to determine if the Bond Project could be completed if the priority was ensuring that the cormorants could inhabit the Park after the Bond Project was completed.

65. After learning of Plaintiffs' religious objections to the City's current plan for the Bond Project, the City did not commission a study to determine if the City could achieve its governmental purposes related to the Bond Project while also accommodating Plaintiffs' religious exercise.

66. One of the City's departments is the Office of Historic Preservation. The mission of the Office of Historic Preservation "is to safeguard the cultural, economic, and environmental sustainability that preserves San Antonio's unique sense of place, economic competitiveness, and authenticity."

67. To accomplish that mission, the Office of Historic Preservation investigates claims by San Antonio Residents regarding the historic or cultural significance of buildings or property within City limits. Yet, after learning of Plaintiffs' statements about the historic, cultural, and religious significance of the Lambert Beach Area, the Office of Historic

Preservation did not attempt to investigate or verify Plaintiffs statements.

68. The alleged risks present in the Lambert Beach area may also be present in other areas of Brackenridge Park that are not fenced off.

69. Going back to 2017, the City has made revisions to its plans for the Bond Project in response to comments received from the public. But the City has not made any changes to its plans for the Bond Project to accommodate Plaintiffs' religious exercise.

H. The City's Design and Implementation of the Bond Project Are Not Justified by a Compelling Governmental Interest

70. The City's employees are unable to articulate a non-generalized public safety justification, if any at all, for the City's decision to deny Plaintiffs access to the southern bank of the Lambert Beach Area.

71. The City is not performing construction on the overwhelming majority of the walls on the southern bank of Lambert Beach Area because they are not a threat to public safety. The limited construction that the City is performing on the southern bank of the Lambert Beach area is planned to occur in a small area on the east side of the southern bank of the Lambert Beach Area.

72. The City is removing small species trees, such as crepe myrtles, from the southern bank of the river that do not require large equipment to remove

and these trees do not pose a threat to public safety.

73. The City has been aware of a moderately-sized hanging branch from a bald cypress tree on the southern bank of the river since at least August 12, 2023, but has refused to remove the branch. Yet, the City has trimmed other areas of the Lambert Beach Area during this time.

74. The City has not attempted to request permission from the Historic Design and Review Commission to conduct tree risk mitigation work in the Lambert Beach Area that would eliminate the purported tree risk in the area.

75. The City erected fencing around the southern portion of the Lambert Beach Area in February 2023 to protect its bird deterrence equipment and staff, not to protect the public from any risk of zoonotic disease from birds or danger from trees or future construction.

76. The City did not task its Tree Assessment Committee with evaluating individual tree risk based on present conditions.

77. The City fenced off the southern portion of the Lambert Beach Area without any arborist conducting a risk assessment of any tree.

78. The City did not task its Tree Assessment Committee with evaluating individual tree risk based on present conditions.

79. The City has failed to demonstrate a substantial threat of zoonotic disease from

cormorants in the Lambert Beach Area. The City did not demonstrate that histoplasmosis, salmonella, or psittacosis pose substantial risk to humans if contracted. The City failed to demonstrate that those any such dangers could not be easily prevented.

80. The City relies solely on visual assessments to determine risk from bird feces on surfaces.

81. The City's water quality information does not indicate the source of problematic contributions to bacteria levels. The data does not distinguish avian from non-avian sources, does not distinguish cormorant from other bird sources, and does not identify what amount of contribution wildlife from Brackenridge Park Zoo contributes.

82. The City's internal documents discuss issues relating to feces with respect to egrets and herons, not cormorants.

83. The City's urban rookery management plan identifies egrets and herons, and not cormorants, as problematic bird species. The City's public statements have stated that the largest issues are caused by cattle egrets and snowy egrets.

I. The City's Design and Implementation of the Bond Project Are Not Adequately Tailored to Achieve a Compelling Governmental Interest

84. The City erected fencing around the entirety of the Lambert Beach Area, instead of around locations it deems hazardous. The enclosed project area includes areas that no qualified arborist or

engineer has deemed dangerous.

85. The City was presented with at least three engineering solutions that it could use to repair or reconstruct retaining walls within the Lambert Beach Area.

86. The City rejected two engineering solutions without performing detailed studies or reviews due to cost considerations and because the City believed that it would be more difficult to obtain approval from regulatory agencies to implement those two engineering solutions.

87. The City selected a third engineering solution that requires extensive excavation and, according to the City, necessitates significant loss of tree and bird life within the Lambert Beach Area.

88. One of the engineering solutions that the City rejected involves the construction of concrete piers to support the retaining walls. This solution reduces the amount of excavation required and thus reduces the destruction of trees and the disruption to bird life in the Lambert Beach Area.

89. Once completed, both of the engineering solutions that the City rejected are equally safe or more safe for the public as compared to the City's chosen engineering solution.

90. The City's chosen engineering solution causes the most damage to the largest number of trees and birds of the known available alternatives. It is the most damaging proposal to the Lambert Beach Area's spiritual ecology, and Plaintiffs' religious

exercise, of all the options that have been proposed to the City.

91. Alternative engineering solutions could preserve more trees and reduce the damage to birds at Lambert Beach.

92. The City did not task its Tree Assessment Committee with determining whether alternative plans could preserve more trees. Instead, it instructed the arborists to take the existing design plan for repairing or reconstructing retaining walls as a given.

93. The City knows that egrets nest earlier than cormorants, but has not tried to tailor deterrence activities to minimize the presence of egrets while allowing cormorants in the area.

94. The City acknowledges that a single nest does not present a health risk, but nonetheless has the bird deterrence goal of no nesting.

95. The City has the ability to deviate from the Secretary of the Interior's guidelines if it needs to in order to accommodate Plaintiffs' religious exercise, but it has chosen not to do so.

96. The City has been aware that the Bond Project would violate Plaintiffs' religious rights since at least July 29, 2022, when Perez made a presentation to the Department of Parks and Recreation regarding his religious beliefs and practices.

97. The City has been aware that the Bond Project would prevent the religious exercise of

members of the Native American Church since at least June 16, 2022, when City employees circulated a letter sent by the Comanche Nation objecting to Bond Project on religious grounds.

98. On May 23, 2023, Plaintiffs sent a letter to the City outlining the harm that the current plan for the Bond Project would do to their religious exercise.

99. The City has refused to accommodate Plaintiffs' religious exercise.

100. The City made no changes to its bird deterrence measures or the Bond Project in response to the religious objection letter from the Comanche Nation.

101. The City never requested that any arborist or engineer attempt to accomplish the City's goals with respect to bird deterrence, Bond Project construction, or safety fencing, while accommodating Plaintiffs' religious practice.

102. The City never informed the United States Department of Agriculture, the Texas Parks and Wildlife department, or the United States Fish and Wildlife Service of Plaintiffs' religious beliefs and practices.

103. The City never asked an employee arborist or independent arborist what safety measures could be taken to allow Plaintiffs' ceremonies on August 12, 2023 or September 21, 2023 to be performed safely.

104. The City has made no changes to its bird deterrence, fencing, or Bond Project design in

response to Plaintiffs' religious practice. .

II. Proposed Conclusions of Law²

A. Legal Standard for Granting a Preliminary Injunction

1. A party seeking a preliminary injunction must establish four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

2. Plaintiffs are substantially likely to succeed on the merits.

3. There is a substantial threat of irreparable injury to the plaintiffs if the injunction is not granted.

4. The threatened injury to Plaintiffs religious exercise if the injunction is denied outweighs any harm that will result if the injunction is granted.

5. Granting the injunction in Plaintiffs' favor will prevent the violation of constitutional rights and will serve the public interest.

B. Texas Constitution, Tex. Const. art. I, § 6-a & Tex. Civ. Prac. & Rem. Code § 110.0031

² To the extent any of the following conclusions of law constitute findings of fact, they are adopted and treated as such.

6. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land on which the Park and Lambert Beach Area now sits. Plaintiffs' performance and compliance with these beliefs is a religious exercise.

7. The Bond Project prevents, prohibits, and limits Plaintiffs' religious services.

8. Plaintiffs are members of a religious organization, the Native American Church, that was established to support and serve the propagation of sincerely held religious beliefs.

9. The southern portion of the Lambert Beach Area is the location on which Plaintiffs have and must gather to worship and conduct religious ceremonies.

10. The City's fencing off of the southern portion of the Lambert Beach Area has the effect of closing Plaintiffs' place of worship.

C. Texas Religious Freedom Restoration Act ("TRFRA"), Tex. Civ. Prac. & Rem. Code § 110.003(a), (b)

11. Plaintiffs have sincere religious beliefs and practices that originate and are related to the river bend located in the Lambert Beach Area, and the presence and nesting of cormorants in that area.

12. Plaintiffs perform ceremonies on the southern portion of the Lambert Beach Area that are motivated by sincere religious belief. Some of those ceremonies require the presence and nesting of cormorants for Plaintiffs to sufficiently perform their

ceremonies.

13. By fencing off the southern bank of the Lambert Beach Area, the City has substantially burdened Plaintiffs' religious exercise by prohibiting their exercise at risk of criminal and civil punishment for entering the area. By destroying the cormorants' habitat through excessive tree destruction and bird mitigation, the City has burdened Plaintiffs' religious exercise by forcing them to modify their religious ceremonies. Plaintiffs believe that the spiritual ecology of the Lambert Beach Area requires the presence and nesting of cormorants, and that without that presence and nesting, Plaintiffs must change their ceremonies and the meaning of their ceremonies to incorporate that degradation. The Bond Project as currently proposed and bird mitigation to eliminate cormorant presence and nesting would end the ability of Plaintiffs to perform religious ceremonies as they know them.

14. The City has no compelling interest for designing or implementing the Bond Project as it is currently iterated, for conducting bird mitigation that would completely eliminate the presence and nesting of cormorants in the Lambert Beach Area, for preventing Plaintiffs from accessing the southern bank of the Lambert Beach Area, or for failing to accommodate Plaintiffs' religious exercise. The City's has vague and general conception of public safety focused on crumbling riverbank walls and falling trees that is the type of "broadly formulated interest" that is insufficient to satisfy strict scrutiny. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). So too with the general interest

in “public health” the City generally associates with migratory birds.

15. The proper interest to analyze is “the asserted harm of granting specific exemptions to particular religious claimants.” *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021). Here, as to access, that means determining whether the City has a public safety interest in denying access to the southern bank of the Lambert Beach Area for 15 individuals for 15 minutes under the watch of a certified arborist. As to the bird mitigation, it means whether the City has demonstrated that its public health goals cannot be reached unless a zero-cormorant population is achieved in the Lambert Beach Area. As to the Bond Project, it means whether each tree that serves as a potential nesting location for cormorants poses an independent safety hazard or prevents a real safety hazard from being remedied.

16. TRFRA “places the burden of proving a compelling state interest on the government.” *Barr v. City of Sinton*, 295 S.W.3d 287, 307 (Tex. 2009). But the City must support its asserted interest by providing evidence “with respect to ‘the particular practice at issue.’” *Id.* “[S]peculation is insufficient to satisfy strict scrutiny.” *Fulton*, 141 S.Ct. at 1882.

17. The City has not only failed to meet its evidentiary burden; it has affirmatively disclaimed its burden altogether. As to access, City witnesses conceded that there would not be a safety risk of allowing Plaintiffs to perform a 15–20 minute ceremony in the southern bank of the Lambert Beach

Area. The City's own public documents identify egrets and herons—and not cormorants—as the potential health concerns (notwithstanding the City's failure to establish that birds pose any significant public health hazard in Brackenridge Park). As for the removal or relocation of trees pursuant to the Bond Project being necessary for public safety, the City did not assert that interest at any public point until this litigation commenced.

18. The Bond Project is not narrowly tailored to achieve any compelling interest that the City may have for implementing it. Furthermore, the City refused to consider or implement alternatives that would accomplish the City's stated interest in the Bond Project while also preserving Plaintiffs' religious liberty rights. In fact, the City has never undertaken a study to see whether the Bond Project could proceed in a manner that accommodates Plaintiffs' religious exercise.

D. First Amendment of the U.S. Constitution, *see* U.S. Const. amend. I

19. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land on which the Park and Lambert Beach Area now sits. Plaintiffs' performance and compliance with these beliefs is a religious exercise.

20. By fencing off the southern bank of the Lambert Beach Area, the City has substantially burdened Plaintiffs' religious exercise by prohibiting their exercise at risk of criminal and civil punishment for entering the Lambert Beach Area.

21. By destroying the cormorants' habitat through excessive tree destruction and unnecessary bird mitigation, the City has burdened Plaintiffs' religious exercise by forcing them to modify their religious ceremonies.

22. Plaintiffs believe that the spiritual ecology of this sacred area requires the presence and nesting of cormorants, and that without that presence and nesting, Plaintiffs must change their ceremonies and the meaning of their ceremonies to incorporate that degradation. The Bond Project as currently proposed and bird mitigation to eliminate cormorant presence and nesting would end the ability of Plaintiffs to perform religious ceremonies as they know them.

23. The City's design and implementation of the Bond Project is not neutral or generally applicable.

24. "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021) (internal quotation marks and alterations omitted). The City applied for, and received from the Development Services Department, a variance from a City Unified Development Code provision requiring 80% significant tree preservation and 100% heritage tree preservation for projects within the 100-yr floodplain, in a discretionary, individualized determination. That variance rendered the Bond Project and its implementation not generally applicable.

25. The City has engaged in preferential treatment for secular values and activities that it has refused to Plaintiffs' religious exercise. Namely, the City permits citizens to enter the Lambert Beach Area for secular reasons but denies Plaintiffs entry into the Lambert Beach Area to engage in their religious exercise. The City seeks to preserve structures, such as retaining walls that it believes have historic and cultural significance, while destroying trees and driving away birds that are historic, culturally significant and sacred to Plaintiffs. The City is apathetic to the burdens it has and continues to inflict on Plaintiffs' religious exercise and has not investigated or treated Plaintiffs' claims of historic and cultural significance in the way that it treats the claims of other City residents. Likewise, the City has undertaken significant plan alterations to other projects to preserve animal presence when those animals were valued under secular statutes such as the Endangered Species Act or Migratory Bird Treaty Act.

26. The City's implementation of the Bond Project is also not generally applicable because "the burden of the [implementation], in practical terms, falls on [Native American Church] adherents but almost no others." *Lukumi*, 508 U.S. at 536. Specifically, the City has fenced off the southern bank of the Lambert Beach Area, which contains Plaintiffs' sacred location necessary for performing religious ceremonies, despite that area posing little to no safety risk, and despite the City failing to fence off areas that present a similar or greater safety risk.

27. The City has no compelling interest for

designing or implementing the Bond Project as it is currently iterated, for preventing Plaintiffs from accessing the Park, or for failing to accommodate Plaintiffs' religious exercise. When pressed, the City has asserted a vague conception of public safety focused on crumbling riverbank walls and falling trees. But the City's purported interest in promoting public safety is a post hoc rationalization that appears nowhere in the volumes of printed and electronic materials the City used to promote the Bond Project with San Antonio residents or obtain permission for the Bond Project from relevant authorities.

28. The Bond Project is not narrowly tailored to achieve any compelling interest that the City may have for implementing it. Furthermore, the City refused to consider or implement alternatives that would accomplish the City's stated interest in the Bond Project while also preserving Plaintiffs' religious liberty rights. In fact, the City has never undertaken a study to see whether the Bond Project could proceed in a manner that accommodates Plaintiffs' religious exercise.

E. Texas Constitution, *see* Tex. Const. art. I, § 6

29. Plaintiffs have sincere religious beliefs and practices that originate and are related to the land on which the Park and Lambert Beach Area now sits. Plaintiffs' performance and compliance with these beliefs is a religious exercise.

30. Through its design and implementation of the Bond Project, the City is and will further substantially burden Plaintiffs' ability to practice

their religion. By refusing Plaintiffs access to the Lambert Beach Area, the City makes it impossible for them to practice core aspects of their religion. And by destroying trees and driving away birds from the Lambert Beach Area, the City degrades and risks permanently destroying a sacred place for Plaintiffs, which would make core aspects of their religious practice impossible to perform.

31. The City has no compelling interest for designing or implementing the Bond Project as it is currently iterated, for preventing Plaintiffs from accessing the Park, or for failing to accommodate Plaintiffs' religious exercise. When pressed, the City has asserted a vague conception of public safety focused on crumbling riverbank walls and falling trees. But the City's purported interest in promoting public safety is a post hoc rationalization that appears nowhere in the volumes of printed and electronic materials the City used to promote the Bond Project with San Antonio residents or obtain permission for the Bond Project from relevant authorities.

32. The Bond Project is not narrowly tailored to achieve any compelling interest that the City may have for implementing it. Furthermore, the City refused to consider or implement alternatives that would accomplish the City's stated interest in the Bond Project while also preserving Plaintiffs' religious liberty rights. In fact, the City has never undertaken a study to see whether the Bond Project could proceed in a manner that accommodates Plaintiffs' religious exercise.

DEFENDANT CITY OF SAN ANTONIO'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

On September 25, 2023, the Court commenced a hearing on the request for preliminary injunction filed by Plaintiffs Gary Perez (“**Perez**”) and Matilda Torres (“**Torres**”, and together with Perez, “**Plaintiffs**”) in the above-captioned case. For the reasons set forth below in the Findings of Fact and Conclusions of Law, the Court **DENIES** Plaintiffs’ Motion for Preliminary Injunction. The Findings of Fact and Conclusions of Law are related solely to the Motion for Preliminary Injunction and are not determinative of the final outcome of the above-captioned suit. To the extent any Finding of Fact should be deemed a Conclusion of Law, or vice versa, it shall be treated as such.

FINDINGS OF FACT

I. THE PARTIES

1. Plaintiff Gary Perez (“**Perez**”) is a resident of Bexar County, Texas.
2. Plaintiff Matilda Torres (“**Torres**”) is a resident of Bexar County, Texas.
3. Perez and Torres are members of the Lipan Apache “Hoosh Chetzel” Native American Church (the “**Native American Church**”). The Lipan Apache Tribe (of Texas) recognized by the State of Texas and is admitted to the National Congress of American Indians, but it is not a federally recognized tribe.

4. Defendant City of San Antonio (the “**City**”) is a home-rule municipal government in Bexar County Texas.

II. THE HISTORY OF BRACKENRIDGE PARK

5. Brackenridge Park (which may be referred to as the “**Park**”) is a public park in San Antonio, Texas, consisting of approximately 343 acres. It is roughly bounded by Hildebrand Avenue, Broadway, Avenue B, Josephine Street, US Highway 281, River Road, Alpine Drive, and N. St. Mary’s Street.

6. The Park was initially established in 1899 when George Brackenridge donated 199 acres of land to the City.

7. In the early 20th century, the City acquired additional land through purchases and donations, bringing the Park to its final area of approximately 343 acres.

8. The San Antonio River flows through the northern portion of Brackenridge Park.

9. Brackenridge Park contains various attractions including paths, sports fields, the San Antonio Zoo, the Japanese Tea Garden, the Sunken Garden Theater, and the Witte Natural History Museum.

10. The Park contains other manmade structures, including without limitation, retaining walls in the Lambert Beach area.

11. The Lambert Beach area of the Park was initially constructed in 1915 as a gravel-lined pool in

the San Antonio River. In 1925, concrete stairs and landings, and a stone bathhouse were added. The Lambert Beach walls are historic structures that contribute to the Park's designation on the National Register of Historic Places as well as a State Antiquities Landmark and a City of San Antonio Historic Landmark. Because of their historic designation, construction on the retaining walls is regulated by, *inter alia*, the Texas Historical Commission and the United States Army Corps of Engineers.

12. The retaining walls were built between the 1920s and the 1940s, and have fallen into disrepair. The original retaining walls are a gravity wall system. In part, the damage to the retaining walls has been caused by the presence of trees and/or their root systems, which are too close to the walls.

13. In their current state, the retaining walls present a safety hazard. Some portions of the walls have failed and others are at risk of failing. When a portion of the wall fails, it could cause the soil and/or trees to shift dangerously. These risks increase when there is substantial precipitation.

14. The Park is also a habitat for various wildlife, including, pertinent to this case, migratory birds such as the heron, egret, and double-crested cormorant.

15. The Park, and certain structures within the Park, are listed on the National Register of Historic Places and are also designated as having significant historical value by the applicable State and local government agencies.

III. PLAINTIFFS' ASSERTED RELIGIOUS BELIEFS

16. Perez and Torres are practitioners and leaders in the Native American Church.

17. Plaintiffs profess that according to their beliefs, life “in the region” began at a spring, now called Blue Hole, which is north of the Park, situated on the campus of the University of the Incarnate Word.

18. Plaintiffs profess to believe that a spirit in the form of a blue panther lived in the Blue Hole.

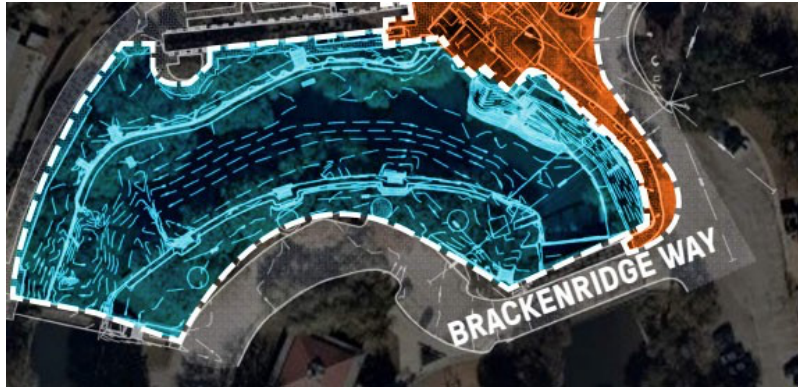
19. According to Plaintiffs' beliefs, a spirit in the form of a double crested cormorant visited the Blue Hole.

20. Plaintiffs believe that the blue panther scared the bird, and as it fled, water droplets from its tail scattered across the San Antonio River Valley, including the area that now comprises the Park, spurring life “in the region.”

21. As a result, Plaintiffs claim that the Park, or a certain area thereof, is a sacred site and that their religious beliefs require them to conduct religious ceremonies in specific locations within the Park.

22. Specifically, Plaintiffs claim that a specific area in the Park, in the approximate area known as Lambert Beach, is a particularly sacred area and the location at which they must conduct religious ceremonies. This area is referred to in this litigation as the “Project Area” and is depicted in blue below.

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23. The northern part of the Project Area is the Lambert Beach swimming area and its attendant structures. The southern portion of the Project Area is green space. The Project Area is generally bounded on the east by a vehicular bridge and on the west by a pedestrian bridge, as shown in the image below.



24. Plaintiffs claim that the Project Area is the location where the spirit in the form of the blue panther scared off the spirit in the form of the anhinga in their creation story.

25. Plaintiffs claim that when the constellation Eridanus aligns with the bend in the San Antonio River located in the Project Area, they are supposed to conduct a ceremony called “Midnight Waters.”

26. In the Midnight Waters ceremony, the participants dip the feathers of the double crested cormorant into the San Antonio River.

27. According to Plaintiffs the participant views a reflection of the double-crested cormorant (represented by the feather) in the River, representing the underworld. The participant is surrounded by the bird on land and in the trees, representing the middle world. The Eridanus constellation reflects the River and the bird in the upperworld. The Plaintiffs believe that the simultaneous presence and connection of the three worlds creates a “spiritual ecology” that allows them to locate themselves in the physical world and commune with the spiritual world.

28. Plaintiffs have not alleged that double-crested cormorants must be actively nesting in the Project Area in order for Plaintiffs to exercise their religious beliefs.

29. Plaintiffs have not alleged that any particular number of double-crested cormorants must be present in the Project Area in order for Plaintiffs to exercise their religious beliefs.

30. Plaintiffs have not alleged that any particular tree within the Project Area is necessary to the exercise of Plaintiffs’ religious beliefs.

31. Plaintiffs have not alleged that any particular number of trees within the Project Area is necessary to the exercise of their religious beliefs.

32. The Plaintiffs have previously modified their religious practices or ceremonies due to temporary, exigent circumstances. For example, during the COVID-19 pandemic, the Plaintiffs voluntarily limited the number of individuals who participated in a ceremony in person, and encouraged others to participate or worship remotely.

33. According to Plaintiffs, the use of peyote is part of their religious exercise and the Park is also significant site for “peyote pilgrims.”

34. Plaintiffs claim that peyote pilgrims visit Barton Springs, San Marcos Springs, Comal Springs, and finally, San Antonio Springs, performing religious rites at each stop. “San Antonio Springs” is not a single designated spot, but rather, a collection of springs in the general vicinity of the University of the Incarnate Word and the Park. The San Antonio Springs include the Blue Hole.

35. Peyote pilgrims may visit areas of the Park outside of the Project Area.

36. Peyote pilgrims may or may not contact Plaintiffs during their peyote pilgrimage.

37. Each peyote pilgrimage is unique to the pilgrim and does not require any particular observance in any particular location within the Park.

IV. THE 2017 BOND PROJECT

38. In May 2016, the citizens of San Antonio voted overwhelmingly in favor of a \$850 million bond package for public improvements.

39. Proposition 3 of the bond package was dedicated to improvements related to Parks, Recreation, and Open Spaces, including \$7,750,000 for improvements at the Park.

40. The improvements and repairs include, pertinently, repairs to retaining walls along the San Antonio River, including in the Project Area. The improvements planned for the Park that are the subject of this lawsuit are collectively referred to as the “2017 Bond Project.”

41. Within the Project Area, the City proposes to repair and rehabilitate the retaining walls along the River; repair and rehabilitate the historic Pump House; and construct a ramp to make the Lambert Beach area more easily accessible to visitors with physical disabilities or who use mobility aids.

42. The City anticipates that the 2017 Bond Project improvements in the Project Area will commence in the fourth quarter of 2023 and take approximately eight months to complete.

43. In connection with the 2017 Bond Project, including the construction with the Project Area, the City must comply with a number of local, state, and federal regulations. These include, but are not necessarily limited to, the City’s own design guidelines, State regulations related to the

preservation of historic structures and cultural resources, the Secretary of the Interior's Design Guidelines, U.S. Army Corps of Engineer regulations, the Americans with Disabilities Act, and OSHA regulations, to name a few.

44. The City evaluated and considered multiple different repair methodologies for the original retaining walls. Land, regulatory, and agency limitations exist for the repair of the original retaining walls.

45. The City utilized a team of design professionals, including architects, engineers, and historic preservation officials ("Design Team"), to determine the repair methodology to be utilized.

46. The Design Team retained by COSA recommended utilization of a cantilevered wall system to effectuate repairs of the original retaining walls.

47. The Design Team considered multiple factors in recommending a cantilevered wall system including, but not limited to:

- a. Tree density
- b. Tree location
- c. Topography
- d. Existing retaining wall stability
- e. Existing wall height
- f. Equipment accessibility
- g. Construction feasibility
- h. Legal compliance
- i. Regulatory compliance

48. The City held a number of public meetings to receive community input regarding repairs of the original walls. Plaintiffs participated in some of these meetings and submitted public comments. Plaintiffs, and other citizens, expressed their concerns that the City's initial proposal involved the removal and relocation of many trees in the Project Area. The Plaintiffs, and other citizens, expressed their desire that the City consider whether more trees in the Project Area could be preserved in place.

49. The City took these comments, including Plaintiffs' under consideration and evaluated whether more trees could be preserved in place in the Project Area. The City revised its plan for the work in the Project Area pursuant to the 2017 Bond Project in response to the public comments, including Plaintiffs' comments. Plaintiffs have not identified any statute, regulation, policy, or other law that would require the City to s evaluate Plaintiffs' comments based on the asserted religious rights separately from other comments that expressed similar concerns regarding bird deterrence and tree removal and relocation based on secular concerns.

50. After revising the initial proposal for the Bond Project to identify and save as many trees as possible, the City is unable to identify any additional trees that could be saved from removal in order to complete the 2017 Bond Project and prevent future degradation of the surrounding infrastructure in the Project Area.

51. The City's current proposal for the work in the Project Area pursuant to the 2017 Bond Project was developed to comply with all applicable local, state, and federal regulations, statutes, and laws.

52. The Plaintiffs do not dispute that the retaining walls and other historic structures in the Project Area need to be repaired or rehabilitated, or that, in and of itself, such construction would infringe on their religious rights. Rather, Plaintiffs complain about the manner in which the City intends to pursue the construction in the Project Area.

53. Specifically, the Plaintiffs claim that the City's plan to remove or relocate trees in the Project Area infringes on their religious rights.

54. In particular, the Plaintiffs object to the City's plans to remove or relocate certain trees within the Project Area to facilitate construction and prevent future damage to the re-built walls. The City has determined that the affected trees will interfere with the construction in the Project Area, will be irreparably damaged by the construction in the Project Area, or will damage the repaired and rehabilitated retaining walls and historical structures in the future, leading to the exact same problem the 2017 Bond Project is intended to fix. .

55. Under the City's current proposal for construction in the Project Area:

- a. 46 trees will be removed completely. Of these trees, 4 are dead or dying. Of the trees suggested to be removed, 4 are invasive species. The Plaintiffs do not object to the removal of the dead or dying trees or of the invasive species.
- b. 21 trees will be relocated to other areas of the Park.

- c. 16 trees will be preserved in place.
- d. At least 22 new trees will be planted in the Project Area, but in locations where they will not threaten the integrity of the retaining walls or other historic structures. The Plaintiffs do not complain about new trees being planted in the Project Area.

56. The removal and relocation of trees in the Project Area does not, on its face, discriminate against religion or religious practice.

57. The removal and relocation of trees in the Project Area is not aimed at any religion or religious practice.

58. The removal and relocation of trees in the Project Area does not treat religious practice different from secular activities.

59. The removal and relocation of trees in the Project Area does not prohibit religious conduct while allowing similar secular conduct.

60. There is no mechanism for individualized exemptions from the City's plan to remove and relocate trees in the Project Area.

61. There is no dispute that failing retaining walls present a significant danger to any member of the public who is visiting the Park, including visitors to Lambert Beach and the Project Area. Because of the hazardous conditions at the Lambert Beach Area, the City temporarily closed the northern portion of the Project Area in 2022. Plaintiffs do not allege the

temporary closure of the northern portion of the Project Area infringes on their religious rights.

62. The City determined that dead and dying trees in the Project Area present a significant danger to the public. Accordingly, the City temporarily closed the southern portion of the Project Area in February 2023.

63. The City's determination that dead and dying trees in the Project Area is underscored by two incidents. First, On March 15, 2023, the limb from a cedar elm fell on to a sidewalk at the San Antonio Zoo, allegedly injuring 7 individuals. Four of those individuals have filed a lawsuit claiming damages of \$1 million. Second, on or about September 9, 2023, a 20-30' Cedar Elm trunk in the Project Area failed during thunderstorms and a large portion of the tree fell into the River near the bend in the River where Plaintiffs claim they must conduct religious ceremonies.

64. There is a known "hanger branch" located in the canopy of a Cypress tree in the Project Area, in the immediate vicinity of the area in which Plaintiffs claim they must conduct religious ceremonies.

65. If the aforementioned hanger branch fell from the tree and struck a person, it could cause serious physical injury or even death to that person.

66. The City also determined that it was in the interest of public safety to temporarily close the Project Area so that the bird deterrence program (as described below in Section V) could be safely conducted. The bird deterrence efforts may present a

risk to individuals who are not wearing suitable personal protection equipment. For example, the bird deterrence efforts include techniques that utilize loud noises to dissuade the birds from actively nesting in the area, which could damage someone's hearing if they were close to the noise and not wearing hearing protection. Additionally, there were instances in which City contractors or employees were harassed by members of the public. Finally, when the construction commences, it will not be safe for the public to be in the Project Area among the construction equipment or close to the trenches necessary to shore up the retaining walls.

67. When the 2017 Bond Project improvements are complete and the area is safe, the Project Area will be reopened to all visitors, including Plaintiffs and other members of the Native American Church.

68. The City cannot accomplish its compelling government 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 removal and relocation of the designated trees in the Project Area, the bird deterrence program, and the temporary closure of the Project Area.

V. BIRD DETERRENCE AT THE PARK

69. Various migratory bird species populate the Park, including herons and egrets.

70. Double-crested cormorants are also migratory birds. They are attracted to the nesting sites of other colonial water birds, including those of egrets and

herons.

71. The large roosting colonies of egrets, in particular, adversely affected wildlife biodiversity, water quality, and park amenity access.

72. Areas of the Park where egret rookeries exist become unusable for 10 months of the year due to increased bird density.

73. Bird feces damage park amenities and equipment, including picnic tables, playground equipment, and sidewalks.

74. Bird feces adversely affect the quality of the water in the San Antonio River, contributing to elevated levels of E. coli.

75. Large populations of birds increase respiratory illnesses in humans resulting from avian diseases and uric acid in bird feces.

76. The chemicals in bird feces may increase the nitrogen in water, killing off aquatic life.

77. To address the adverse impacts of large rookeries and bird populations, the City contracted with the U.S. Department of Agriculture (“**USDA**”) and coordinated with the Texas Parks and Wildlife Department (“**TPWD**”) and U.S. Fish and Wildlife Service (“**FWS**”) to modify the bird habitats and deter the birds from nesting in highly urbanized areas of the Park, including the Project Area.

78. Habitat modification includes removing old nests, clearing underbrush, and removing dead wood

from the tree canopy to discourage nesting.

79. The City uses only non-lethal deterrent techniques that may include, pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, and drones.

80. The City does not utilize any population control techniques on active nests or viable eggs.

81. The bird deterrence activities are necessary to protect the health and safety of all members of the public who visit the Park, including visitors to Lambert Beach.

82. The bird deterrence activities are also necessary so that the 2017 Bond Project improvements can proceed without undue delay.

83. Pursuant to the Migratory Bird Treaty act, the proposed construction and removal/relocation of trees planned for the Project Area cannot proceed if migratory birds, including the double crested cormorant, are nesting in the area.

84. The bird deterrence activities are aimed at preventing birds from nesting in the highly urbanized areas of the Park, and particularly, in the Project Area.

85. The bird deterrence activities do not prevent birds, including the double crested cormorant, from entering the Park, including the Project Area.

86. Since the implementation of the bird deterrence measures, double-crested cormorants are

still observed to be present in the Park, including in the Project Area.

87. The City's bird deterrence program does not, on its face, discriminate against any religion or religious practices.

88. The City's bird deterrence program is not aimed at any religious practice.

89. The City's bird deterrence program does not treat religious activities differently from secular activities.

90. The City's bird deterrence program does not permit secular conduct while prohibiting similar religious conduct.

91. There is no scheme for individualized exemptions from the City's bird deterrence program.

92. The City cannot accomplish its compelling interest in public health and safety from the hazards posed by the large populations of egrets and herons by any least restrictive means that the current bird deterrence efforts.

VI. THE INSTANT SUIT

93. Plaintiffs filed the instant suit, alleging that the following plans or activities on behalf of the City place a place a substantial burden on their sincerely held religious beliefs, in violation of the First Amendment of the United States Constitution, Texas Constitution, Religious Land Use and Institutionalized Persons Act ("**RLUIPA**"), and Texas

Religious Freedom Restoration Act (“**TRFRA**”): (a) bird deterrence activities, (b) the temporary closure of Project Area, and (c) the proposed removal or relocation of trees in the Project area.

94. Plaintiffs sought a Temporary Restraining Order to be allowed access to the Project Area on August 12, 2023 to perform the Midnight Water ceremony.

95. The Court denied the request for Temporary Restraining Order.

96. Plaintiffs now seek a Preliminary Injunction enjoining the City from:

- a. “implementing the [2017] Bond Project or otherwise removing trees from the Park until Plaintiffs and the City agree on a specific plan that preserves the Park’s spiritual ecology”;
- b. “implementing the [2017] Bond Project or otherwise engaging in ‘bird deterrence’ within the Park in a way that violates Plaintiffs’ religious rights”; and
- c. “preventing Plaintiffs from accessing and performing religious ceremonies in the Park”.

97. Based on the Court’s findings above, and pursuant to the Conclusions of Law stated below, the Court finds that the Plaintiffs have not met their burden of showing they are entitled to preliminary injunctive relief.

CONCLUSIONS OF LAW

I. PRELIMINARY INJUNCTION STANDARD

98. To obtain a preliminary injunction,

First, the movant must establish a substantial likelihood of success on the merits. Second, there must be a substantial threat of irreparable injury if the injunction is not granted. Third, the threatened injury to the plaintiff must outweigh the threatened injury to the defendant. Fourth, the granting of the preliminary injunction must not disserve the public interest.

Allstars v. City of San Antonio, TX, No. CIV.A. SA-03-CA-356-, 2003 WL 21204471, at *2 (W.D. Tex. May 19, 2003) (citations omitted). “The third and fourth factors merge when, as here, the government is a party.” *Guajardo v. Kerry*, No. CV SA-13-CA-608-FB, 2014 WL 12538142, at *2 (W.D. Tex. May 2, 2014) (citing *Planned Parenthood v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013)). A preliminary injunction is an “extraordinary remedy,” that “should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements, and is treated as the exception rather than the rule.” *Malone v. CST Brands, Inc.*, No. SA-16-CA-0955-FB, 2016 WL 8258791, at *4 (W.D. Tex. Nov. 10, 2016) (quoting *Planned Parenthood v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005); *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997)) (internal quotation marks omitted); see also *35 Bar & Grille, LLC v. City of San Antonio*, 943 F. Supp. 2d 706, 711 (W.D. Tex. 2013) (quoting *Canal Auth. v. Callaway*, 489 F.2d

567, 569 (5th Cir.1974) (“In order to prevail, Plaintiffs must carry the burden on all four elements.”)). The Plaintiffs have not met their burden.

99. With respect to the first criterion of the preliminary injunction standard,

When determining the likelihood of success on the merits, courts look to the standards of the substantive law. To prevail on a preliminary injunction, the Plaintiffs likelihood of success must be more than negligible, and the preliminary injunction should not be granted unless the question presented by the litigant is free from doubts.

35 Bar & Grille, 943 F. Supp. 2d at 722 (internal quotation marks and citations omitted).

100. The second criterion of the preliminary injunction requires the Plaintiffs to show they have sustained an irreparable injury, defined as an injury that

cannot be remedied by an award of economic damages. It is well established that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction.

Id. at 724 (internal quotation marks and citations omitted). “As a matter of law, however, simply alleging some possibility of irreparable injury does not support the issuance of a preliminary injunction.” *Aquifer Guardians in Urban Areas v. Fed. Highway Admin.*, 779 F. Supp. 2d 542, 556 (W.D. Tex. 2011)

(citation omitted).

101. The third part of the preliminary injunction analysis requires the Plaintiffs to show that the threatened injury to them outweighs the potential injury to the City if the injunction is not granted. While the Plaintiffs claim they have been and will be prevented from practicing their religion, the issuance of the preliminary injunction would prevent the City from proceeding with measures it has determined are necessary to protect the health and safety of its citizens and its natural resources. “The City has an interest in promoting the health, safety, morals and general welfare of the citizens of the City.” *35 Bar & Grille*, 943 F. Supp. 2d at 725; *Houston Chronicle Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 622 (5th Cir. 2007) (city ordinance restricting the solicitation or distribution of any material to the occupant of a vehicle stopped at a traffic light served government’s compelling interest in public safety).

**II. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF
SUCCESS ON THE MERITS OF THEIR CLAIM UNDER
THE FIRST AMENDMENT TO THE UNITED STATES
CONSTITUTION: FREE EXERCISE CLAUSE (28
U.S.C. § 1983)**

**A. The Plaintiffs Lack Standing To Bring
Claims On Behalf Of Unknown “Peyote
Pilgrims”**

102. To establish Article III standing sufficient “to pursue an alleged violation of the Free Exercise Clause, a plaintiff must allege that his or her own ‘particular religious freedoms are infringed.’” *Patterson v. Def. POW/MIA Accounting Agency*, 343

F. Supp. 3d 637, 652 (W.D. Tex. 2018) (quoting *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 292 n.25 (5th Cir. 2001)).

103. Plaintiffs' allegations relating to peyote pilgrims or peyote pilgrimages do not meet this standard.

104. First, the Plaintiffs have not alleged that their own peyote pilgrimages have been or are being infringed upon by any of the City's actions related to bird deterrence, the 2017 Bond Project, or the temporary closure of the Project Area. Additionally, the Plaintiffs' presence (in their capacities as leaders of the Native American Church) is not a necessary component of any individual's peyote pilgrimage.

105. Second, there is no allegation that a peyote pilgrimage requires the presence of a double-crested cormorant. Thus, Plaintiffs have not asserted any injury to this aspect of their religious practice arising out of the bird deterrence program.

106. Third, there is no allegation that the removal or relocation of trees will have any impact on the conduct of peyote pilgrimages. Thus, Plaintiffs have not asserted any injury to this aspect of their religious practice arising out of the removal or relocation of trees in the Project Area.

107. Finally, there is no allegation that the peyote pilgrims must access the Project Area as part of their pilgrimage. Thus, Plaintiffs have not asserted any injury to this aspect of their religious practice arising out of the temporary closure of the Project Area.

108. Based on the foregoing, to the extent that Plaintiffs assert claims that the City's actions infringe on the conduct of peyote pilgrimages, the Plaintiffs are not likely to succeed on the merits of those claims because they lack standing to bring them.

B. The Plaintiffs Have Not Established Municipal Liability For Purposes of Section 1983

109. To prevail on their federal constitutional claim brough via 28 U.S.C. § 1983, the Plaintiffs must prove “(1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose moving force is the policy or custom.” *Horvath v. City of Leander*, 946 F.3d 787, 793 (5th Cir. 2020), *as revised* (Jan. 13, 2020); *see also Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 694 (1978).

110. Under *Monell*, as interpreted and applied by the Fifth Circuit, “municipal liability cannot be sustained under a theory of *respondeat superior*.” *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003). Nevertheless, the Plaintiffs have not alleged—or proven—the three *Monell* factors and, therefore, have not established that the City can be liable for the claimed violations of Plaintiffs' First Amendment Rights under section 1983.

111. Alternatively, and notwithstanding Plaintiffs' failure to satisfy *Monell*, Plaintiffs have not shown that they are likely to succeed on the merits of their claims because none of the City's actions **(a)** addresses Plaintiffs or their religion; or **(b)** violates the First Amendment Free Exercise Clause. *See Employment Div., Dept. of Human Resources of*

Oregon v. Smith, 494 U.S. 872, 877 (1990); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. ___, ___, 142 S. Ct. 2407, 2421 (2022)(*citing Smith*).

C. The Plaintiffs Have Not Shown A Likelihood Of Success On Their Claim That The City Violated Their Rights Under the Free Exercise Clause

112. Even if the Plaintiffs could establish municipal liability under section 1983, they have not shown that they are likely to succeed on the merits of their claim under the Free Exercise Clause of the First Amendment.

113. In *Smith*, the Supreme Court considered whether a law criminalizing the use of peyote interfered with the plaintiff's religious exercise in violation of the First Amendment. The Court held that "if prohibiting the exercise of religion . . . is not the object of the [conduct] but merely the incidental effect of a generally applicable and otherwise valid provision, ***the First Amendment has not been offended.***" *Smith*, 494 U.S. at 878 (emphasis added).

114. The City's bird deterrence efforts are neutral policies. The bird deterrence policy does not, on its face, discriminate against any religion or religious practice. The bird deterrence program is not aimed at any religion or religious practice. The bird deterrence program does not treat religious activities differently from secular activities.

115. The City's bird deterrence policy is generally applicable. The bird deterrence policy does not permit any secular conduct while prohibiting similar

religious conduct. There is no mechanism for individualized exemptions.

116. The City's plan to remove and relocate trees in connection with the 2017 Bond Project is neutral. It does not, on its face, discriminate against any religion or religious practice. The plan to remove and relocate trees is not aimed at any religion or religious practice. The City's plan to remove and relocate trees in connection with 2017 Bond Project does not treat secular and religious activities differently.

117. The City's plan to remove and relocate trees in connection with the 2017 Bond Project is generally applicable. The removal or relocation of trees does not permit any secular conduct while prohibiting similar religious conduct. There is no mechanism for individualized exemptions.

118. The City's decision to temporarily prohibit public access to the Project Area is neutral. It does not, on its face, discriminate against any religion or religious practice. The temporary prohibition of public access to the Project Area is not aimed at any religion or religious practice. The temporary prohibition of public access to the Project Area does not treat secular and religious activities differently.

119. The City's decision to temporarily prohibit public access to the Project Area is generally applicable. The temporary prohibition of public access to the Project Area does not permit any secular conduct while prohibiting similar religious conduct. There is no mechanism for individualized exemptions. Indeed, to the extent that any exemption *could* be allowed, it would favor religious exercise over secular

considerations. The City thoroughly considered Plaintiffs' requests to access the Project Area on August 12, 2023 and September 21, 2023, so that Plaintiffs could conduct religious ceremonies in the Project Area.

120. In this instance, the City's bird deterrence program, the removal and relocation of trees pursuant to the 2017 Bond Project, and the temporary closure of the Project Area are generally applicable laws. The effect – if any – on Plaintiffs' religious exercise is merely incidental to these generally applicable and otherwise valid governmental decisions and actions.

121. A different standard would apply if the City's bird deterrence program, the removal and relocation of trees pursuant to the 2017 Bond Project, and the temporary closure of the Project Area were deemed not to be neutral or generally applicable. As the Supreme Court recently explained. "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy*, __ U.S. at __, 142 S. Ct. at 2421–22 (citations omitted). If the policy at issue is not "neutral" or "generally applicable", the "Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* (citation omitted).

122. The Court explained further,

A government policy will not qualify as

neutral if it is specifically directed at ... religious practice. A policy can fail this test if it discriminates on its face, or if a religious exercise is otherwise its object. A government policy will fail the general applicability requirement if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way, or if it provides a mechanism for individualized exemptions. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny.

Id. (internal quotation marks, citations, and brackets omitted) (ellipses in original). Disparate treatment between secular and religious activities may indicate that a policy is not neutral. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, __ U.S. __, 141 S. Ct. 63, 66-67(2020) (occupancy restrictions related to COVID-19 emergency were not neutral because religious services were more strictly regulated than secular activities).

123. Although strict scrutiny should not apply in this case, the City's bird deterrence policy, the removal and relocation of trees in connection with the 2017 Bond Project, and the temporary closure of the Project Area to the public all pass strict scrutiny.

124. The City's bird deterrence policy serves its compelling interest in public health and safety. Large populations of migratory birds in highly urbanized areas of the Park contribute to unsanitary conditions in the Park, which can pose a risk of disease to humans and animals. Large populations of migratory

birds in highly urbanized areas of the Park also have an adverse impact on the water quality in the San Antonio River.

125. The City's bird deterrence policy is narrowly tailored to serve this compelling interest. The City's bird deterrence policy uses non-lethal methods to encourage the migratory birds to nest in less urbanized areas of the Park, where the birds' presence poses less risk of disease and contamination. The City's bird deterrence policy does not prohibit migratory birds from visiting, roosting, or foraging in the Project Area.

126. The City's plan to remove or relocate trees in connection with the 2017 Bond Project serves the City's compelling interest in public health and safety. Removing dead and dying trees prevents them from failing and injuring visitors to the Park.

127. Repairing the retaining walls in the Project Area also serves the City's compelling interest in public safety. Failing retaining walls pose a substantial risk to safety. The otherwise healthy trees that are scheduled to be removed or relocated from the Project Area would be damaged or compromised by the construction required to repair the retaining walls, rendering those trees a risk of failure in the future. The City has a compelling interest in removing or relocating trees that would become a risk to public safety because of the likelihood of future failure.

128. Similarly, the relocation and removal of trees that are too close to the retaining walls serves the City's compelling interest in public safety. Trees that

would compromise the integrity of the retaining walls present a serious risk of harm to the public.

129. The City's plan to remove or relocate trees in the Project Area is narrowly tailored to serve this compelling interest. There is no reasonable alternative to removing dead or dying trees. The City has limited the removal or relocation of otherwise healthy trees to preserve in place many of the trees. The City plans to plant at least 22 additional trees in the Project Area, in places where the trees do not pose the same risks to public safety as the currently-existing trees.

130. The City's temporary prohibition on access to the Project Area serves the City's compelling interest in public safety. The City's engineers and arborists, as well as independent engineers and arborists, have determined that unsafe conditions exist in the Project Area, including the potential for failing trees (trunks and limbs) and the potential for failing retaining walls.

131. The City's temporary prohibition on access to the Project Area is narrowly tailored to the City's compelling interest in public safety. The Project Area will be reopened to all members of the public, including Plaintiffs, when the construction is completed and the Project Area is once again safe for visitors. The temporary closure of a small portion of the Park while unsafe conditions persist is narrowly tailored.

132. Whether the Court applies a rational basis or strict scrutiny test, the Plaintiffs have failed to show that they are likely to prevail on their claim that the

City has violated the Free Exercise Clause of the U.S. Constitution.

D. The Plaintiffs Have Not Shown That They Are Likely To Succeed On The Merits Of Their Claim Under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)

133. Plaintiffs’ alleged claim under the federal Religious Land Use and Institutionalized Persons Act (“RLUIPA”), *see* 42 U.S.C. § 2000cc, *et seq.*, fails as a matter of law because RLUIPA applies only to land use regulations. The statute defines “land use regulation” as

a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

42 U.S.C. § 2000cc-5(5) (emphases added). The City’s actions and decisions at issue in this lawsuit are not zoning or landmarking laws.

134. Plaintiffs’ claims under RLUIPA also fail as a matter of law because RLUIPA applies to cases in which the plaintiff is complaining about a land use regulation as applied to the plaintiff’s property, not a land use regulation as applied to the government’s own property. *See, e.g., Lyng v. Northwest Indian*

Cemetery Protective Ass'n, 485 U.S. 439, 447-49 (1988)(rejecting Indian tribes' Free Exercise challenge to the United States Forest Service's approval of plans to construct a logging road in the Chimney Rock area of the Six Rivers National Forest (federal property), and finding that such conduct did not impose a burden "heavy enough" to violate the Free Exercise Clause); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008)(rejecting the claim of multiple Indian-tribe plaintiffs that use of artificial snow made from reclaimed water in a government-owned park on what the Navajo Nation considered a sacred mountain desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities, in violation of several federal statutes); *United States v. Means*, 858 F.2d 404 (8th Cir. 1988)(rejecting, on the basis of government's ownership, the Lakotas' claim that the United States Forest Service's denial of a permit for the use of an area in the Black Hills National Forest (federal property), as a religious, cultural, and educational community violated their free exercise rights); *Wilson v. Block*, 708 F.2d 735, 739-40 (D.C. Cir. 1983)(finding no impermissible burden on religious rights despite Navajo and Hopi plaintiffs' contentions that development of the Snow Bowl on the San Francisco Peaks (federal land) would be inconsistent with their First Amendment right to freely hold and practice their religious beliefs on the Peaks, which they believe to be sacred; that such development would be a profane act and an affront to the deities; and that, as a consequence of such acts, the Peaks would lose their healing power and otherwise cease to benefit the tribes; would seriously impair their ability to pray and conduct ceremonies

upon the Peaks, as well as to gather from the Peaks the sacred objects, such as fir boughs and eaglets, which are necessary to their religious practices); *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991)(rejecting, on the basis of government's ownership, a Havasupai free exercise violation claim involving the Forest Service's plan for a uranium mine in an Arizona national forest (federal property)); *Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989)(rejecting, on the basis of the government's ownership, a Navajo claim that relocation from the Hopi Reservation under the provisions of the Navajo-Hopi Land Settlement Act violated their free exercise rights).

135. The government's right to limit conduct on its own property is equally applicable to state park land. *See, e.g., Crow v. Gullet*, 541 F. Supp. 785, 794 (D. S.D. 1982), *aff'd, Crow v. Gullet*, 706 F.2d 856, 858 (8th Cir. 1983)(per curiam)(plaintiffs did not show that defendants' development, construction, and regulatory actions burdened plaintiffs' religious exercises in the Bear Butte area, and plaintiffs "failed to establish any infringement of a constitutionally cognizable first amendment right. To the extent their right of access was temporarily restricted at the ceremonial grounds, plaintiffs' interests were "outweighed by compelling state interests in preserving the environment and the resource from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark").

136. Even if RLUIPA could apply to a land use regulation imposed by the government on its own property (which it does not), it would not apply in this case. RLUIPA limits the definition of “land use regulation”—and, in the process, also limits who may be a claimant under RLUIPA—as follows:

The term “land use regulation” means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), ***if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.***

42 U.S.C. § 2000cc-5(5).

137. Plaintiffs have not shown any “***ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest***” in any property in the Park, as required by RLUIPA. Thus, Plaintiffs do not fall within the class of individuals granted cause of action under 42 U.S.C. § 2000cc-5(5).

138. Additionally, Plaintiffs’ claims under RLUIPA fail as a matter of law because they cannot prove the “substantial burden” element of 42 U.S.C. § 2000cc-(a)(1).

139. The Fifth Circuit has explained that

a government action or regulation creates a

“substantial burden” on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.

Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004); see also *Barr v. City of Sinton*, 295 S.W.3d 287, 302 (Tex. 2009)(following *Adkins* in declining to “craft a bright-line rule” or “one that will apply in every context,” and in finding that the inquiry as to whether a person’s religious exercise has been **substantially burdened** under the TRFRA “requires a case-by-case, fact-specific inquiry.”)

140. Here, even assuming the City’s bird deterrence program, 2017 Bond Project, and temporary closing of the Project Area are “land use regulations” for purposes of RLUIPA, they do not place a “substantial burden” on Plaintiffs’ religious practices.

141. There is no allegation—and thus, no proof—that any of the complained of actions force the Plaintiffs to choose between a benefit that is generally available and adhering to their religious beliefs and practices.

142. The Plaintiffs also have not shown that the complained of actions force them to act in a way that violates their beliefs.

143. As set forth above, Plaintiffs' religious beliefs do not require double-crested cormorants to be nesting in the Project Area. The City's bird deterrence program only aims to eliminate nesting. It does not prevent the double-crested cormorant from visiting, foraging in, or flying over the Project Area.

144. Plaintiffs' religious beliefs also do not require any particular tree or any particular number of trees to be present in the Project Area. The City's planned removal and relocation of trees in the Project Area therefore does not substantially burden the Plaintiffs' religious beliefs or practices.

145. Finally, the City's temporary closure of the Project Area does not rise to a "substantial burden" on Plaintiffs' religious exercise for purposes of RLUIPA because it prevents them only from "enjoying some benefit that is not otherwise generally available[.]" *Adkins*, 393 F.3d at 570; *see also Patterson*, 398 F. Supp. 3d at 122–23. Temporarily, access to the Project Area is not "otherwise generally available" due to safety concerns. The Plaintiffs have refused accommodations that would have allowed them to access certain areas of the Project Area that are less hazardous.

E. Plaintiffs Have Not Shown That They Are Likely To Succeed On The Merits Of Their Claims Under The Texas Constitution

146. TEX. CONST. art. I, § 6 provides:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, 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. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

147. Texas courts treat section 6 as “coextensive with the First Amendment, unless the plaintiff argues that the application of each is different,” which Plaintiffs have not done. *Tilton v. Marshall*, 925 S.W.2d 672, 677 n. 6 (Tex. 1996). Thus, for the same reasons that the Plaintiffs are unlikely to prevail on their claims under the Free Exercise Clause of the U.S. Constitution, they are unlikely to prevail on the merits of their claims under the Free Exercise Clause of the Texas Constitution. See *Smithback v. Texas*, No. 3-05-CV-0578-BD, 2007 WL 241376, at *3 (N.D. Tex. Jan. 29, 2007)(Texas courts have repeatedly refused to interpret the Texas Bill of Rights—including the free exercise clause—more broadly than the First Amendment), *aff’d sub nom Smithback v. Crain*, No. 07-10274, 2009 WL 552227 (5th Cir. 2009)(following *Adkins* and holding that “governmental regulation does not substantially

burden religious exercise “if it merely prevents the adherent from either enjoying some benefit that it not otherwise generally available or acting in a way that is not otherwise generally allowed”).

148. Plaintiffs’ failure to allege any viable violation of the First Amendment “Free Exercise Clause” means that they have also failed to allege any viable violation of the comparable provision of TEX. CONST. art. I, § 6. Similarly, to the extent that the conduct Plaintiffs advocate would violate the Establishment Clause of the First Amendment, such conduct would also violate the comparable language TEX. CONST. art. I, § 6 prohibiting the establishment of religion.

149. In addition, there is no statutory or common law cause of action for damages resulting from alleged violations of the Texas Constitution. *Smithback*, 2007 WL 241376, at *3 (citing *Williams v. Kaufman Co.*, No. 3-97-CV-0875-L, 1998 WL 34190569 at *6 (N.D.Tex. Sept.18, 1998)); *see also City of Beaumont v. Bouillion*, 896 S.W.2d 143, 150 (Tex. 1995)).

150. The Texas Constitution, however, was amended in November 2021 to provide broader protections to the exercise of religion than the U.S. Constitution. TEX. CONST. art. I, § 6-a provides:

This state or a political subdivision of this state may not enact, adopt, or issue a statute, order, proclamation, decision, or rule that prohibits or limits religious services, including religious services conducted in churches, congregations, and places of worship, in this state by a religious

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

151. The Texas Legislature did not define “places of worship” for purposes of this constitutional provision, nor have the Texas courts defined it.

152. In the context of the Texas Constitution exemption “places of worship” from taxation, the phrase has been defined to mean

a place where a number of persons meet together for the purpose of worshiping God. The Century Dictionary gives this definition: A building or part of a building set apart for any purpose—as a place of worship. The worship of God is not prohibited in any place, but we are of the opinion that the spirit of the Constitution would include any place at which the worship might be indulged in so continuously and in such a manner as to give it the character of a place of worship.

Kerrville Indep. Sch. Dist. v. Sw. Tex. Encampment Ass'n, 673 S.W.2d 256, 259 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (internal quotation marks omitted) (emphasis omitted). In that case, the Court of Appeals held that vacant lots that were not “used in any capacity other than to further the atmosphere of the rustic hill country” were not “an actual place of religious worship” exempt from taxation. *See id.* at 261.

153. Again in the context of tax exemptions for “places of worship”, the Supreme Court held that

while a property does not need to be used exclusively for worship in order to qualify for the exemption, it will not qualify if “the greater part” of the property is “used for purposes other than religious worship.” *Davies v. Meyer*, 541 S.W.2d 827, 830 (Tex. 1976) (citation omitted) (facility that was used primarily for religious education was not “an actual place of worship”).

154. The Park itself cannot be a “place of worship” under this definition. Even if once accepts, for the moment, that Project Area is sometimes used for worship activities, the vast majority of the Park’s 343 are not used for worship. And even the Project Area is most commonly used for activities other than worship.

155. Moreover, the Project Area does not qualify as a “place of worship” as interpreted by the Texas Courts. It is not a building or part of a building set apart for the conduct of worship. It is not so continuously used for religious purpose that it has acquired a “character of a place of worship.” The Project Area retains its character as an urban park, even if Plaintiffs occasionally conduct short ceremonies there.

156. The City’s bird deterrence program in the Project Area does not “prohibit[] or limit[] religious services” in violation of article I, section 6-a of the Texas Constitution. The bird deterrence program prevents only active nesting by migratory birds in the Project Area. It does not prohibit or prevent them from visiting, foraging in, or flying through the Project Area. There is no evidence that Plaintiffs’ religious ceremonies or beliefs require double-crested cormorants to be nesting in the Project Area.

157. The City’s plan to remove or relocate trees in the Project Area does not “prohibit[] or limit[] religious services” in violation of article I, section 6-a of the Texas Constitution. The Plaintiffs assert that their religious beliefs or ceremonies recognize the trees as an element that connects the “middle world” to the “upper world”. There is no evidence that the City’s plan to preserve in place 14 trees and plant at least 22 more trees in the Project Area will prohibit or limit this connection.

158. The City’s temporary closure of the Project Area also does not “prohibit[] or limit[] religious services” in violation of article I, section 6-a of the Texas Constitution. The 2021 amendment was passed in response to “restrictions put in place by state and local governments in response to the COVID-19 pandemic ...” Resolution Analysis, Committee Report (Unamended), S.J.R. 27.¹ The COVID-related restrictions specifically prohibited worship services except by video and teleconference. *See, e.g.*, City of Frisco, Ordinance No.: 2020-03-13 section 1.e.

159. Here, the temporary closure of the Project Area is not related to COVID-19 and does not specifically mention any prohibition or limits on religious practice.

160. For the foregoing reasons, Plaintiffs have not shown that the City’s bird deterrence program, the removal and relocation of trees in the Project Area, or

¹ Available at <https://capitol.texas.gov/tlodocs/87R/analysis/html/SJ00027H.htm>.

the temporary closure of the Project Area place a substantial burden on their religious exercise.

161. Therefore, they have failed to demonstrate that they are likely to succeed on the merits of their claims under the Texas Constitution.

G. Plaintiffs Have Not Shown That They Are Likely To Succeed On The Merits Of Their Claim Under TRFRA

162. A TRFRA claimant must establish that a government agency *substantially* burdened his free exercise of religion. TEX. CIV. PRAC. & REMEDIES CODE § 110.003(a). Thus, the previous discussion about “substantial burden” applies with equal force in the context of TRFRA, and Plaintiffs’ failure to establish a substantial burden in the context of RLUIPA applies with equal force here. As set forth above, Plaintiffs have not shown that the City’s bird deterrence program, its decision to remove and relocate trees in the Project Area, or the temporary closure of the Project Area imposes a “substantial burden” on their religious exercise. In any event, subsection (a) does not apply if the government agency can demonstrate that the alleged burden was the “least restrictive means of furthering” a “compelling governmental interest.” *Id.* § 110.003(b)(1)-(2). For all the reasons set forth above, the City has shown that its bird deterrence program, the current iteration of the 2017 Bond Project (*i.e.*, reducing the number of trees to be removed or relocated within the Project Area), and the temporary closure of the Project Area were the least restrictive means of furthering the compelling government interests in public safety and the preservation of the

Park and its amenities.

**III. THE PLAINTIFFS HAVE NOT SHOWN THE
LIKELIHOOD OF AN IRREPARABLE INJURY**

163. While any infringement on a constitutional right, even if it is *de minimis*, can constitute an irreparable injury for purposes of the Motion for Preliminary Injunction, Plaintiffs have not met their burden of showing such an injury.

164. The City's bird deterrence program in the Project Area does not infringe on Plaintiffs' religious rights, because their beliefs do not require double-crested cormorants to be nesting in the Project Area.

165. The City's plan to remove and relocate trees in the Project Area does not infringe on the Plaintiffs' religious rights, because their beliefs do not require the presence of any particular tree or a particular number of trees in the Project Area.

166. The City's temporary closure of the Project Area does not infringe on Plaintiffs' religious rights because the right of free exercise does not relieve individuals like Plaintiffs of their obligations to comply with valid or neutral laws of general applicability on the grounds that the law proscribes, or requires, conduct which is contrary to his or her religious practice. *Smith*, 494 U.S. at 878.

**IV. THE THREATENED INJURY TO PLAINTIFFS
DOES NOT OUTWEIGH THREATENED INJURY TO THE
CITY AND A PRELIMINARY INJUNCTION WOULD
DISSERVE THE PUBLIC INTEREST.**

167. The third and fourth criteria for obtaining a preliminary injunction merge in this instance, because the City is a governmental agency.

168. Even assuming that the Plaintiffs had shown that the City's bird deterrence program in the Project Area, the 2017 Bond Project, and the temporary closure of the Project Area constituted a threatened injury to Plaintiffs, such threatened injury does not outweigh the threatened injury to the City.

169. If the City is enjoined from pursuing the bird deterrence program in the Project Area, the public will continue to be exposed to the numerous health hazards posed by the large population of migratory birds in the Project Area, including, but not limited to: falling tree limbs, contaminated water, zoonotic diseases, regurgitated food, deceased birds, and bird feces. The City will be exposed to legal liability if the City is enjoined from pursuing the bird deterrence program to mitigate these health hazards.

170. Additionally, if the City is enjoined from pursuing the bird deterrence program in the Project Area, it will likely delay the 2017 Bond Project. Absent the bird deterrence measures, it is virtually certain that migratory birds will nest in the Project Area. The City will then be required to monitor those nests. As long as there are active nests in the Project Area, the City cannot proceed with the construction proposed under the 2017 Bond Project.

171. If the City is enjoined from completing the 2017 Bond Project then the public will continue to be endangered by the failing and collapsing walls and dead or dying trees within the Project Area. The City

will be exposed to legal liability if the City is enjoined from making the necessary repairs in the Project Area or will have to keep the Project Area closed to the public to prevent serious injuries.

172. If the City is not permitted to remove and relocate the trees as currently proposed in the 2017 Bond Project, visitors to the park may be exposed to unnecessarily hazardous conditions. Additionally, the City would be required to expend additional funds to re-evaluate the proposed bond project to address the same concerns that have already been addressed following the public comment period, *e.g.*, the public comments **(a)** objecting to the bird deterrence program and **(b)** advocating for the preservation of more trees in the Project Area. As the City has already evaluated alternative and adjusted its plans in response to those public comments, re-evaluating the same concerns under the gloss of Plaintiffs' religious beliefs would be duplicative and futile.

173. The injunctive relief that Plaintiffs seek would, paradoxically, enhance the injury that Plaintiffs allege. Until the 2017 Bond Project is complete, the City must continue deterring migratory birds—including the double-crested cormorant—from nesting in the Project Area, and the Project Area must remain closed to the public due to safety concerns.

174. Further, if Plaintiffs are permitted to access an area that the City has already deemed presents a safety hazard, the City (and ultimately, the taxpayers) are exposed unnecessarily to significant liability if Plaintiffs (or their co-religionists) were injured by, *e.g.*, falling trees or tree limbs.

175. Finally, granting a preliminary injunction would disserve the public interest. Granting a preliminary injunction to halt the bird deterrence efforts disserves the public interest in public health and safety as well as environmental quality. Granting a preliminary injunction to prohibit the City from performing the work pursuant to the 2017 Bond Project disserves the public interest in having safe and accessible public park spaces. Granting a preliminary injunction allowing the Plaintiffs to access the Project Area while unsafe conditions persist disserves the public interest in public safety.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GARY PEREZ and MATILDE TORRES,
Plaintiffs,

VS.

**CIVIL
ACTION NO.
SA-23-CV-
977-FB**

CITY OF SAN ANTONIO,
Defendant.

**ORDER ON PLAINTIFFS' EMERGENCY
MOTION FOR INJUNCTION PENDING
APPEAL**

Before the Court are Plaintiffs' Emergency Motion for Injunction Pending Appeal filed October 16, 2023 (docket entry 54); Defendant City of San Antonio's Response in Opposition to Plaintiffs' Emergency Motion for Injunction Pending Appeal filed October 19, 2023 (docket entry 56); the Court's Opinion and Order Granting in Part and Denying in Part Plaintiffs' Request for Preliminary Injunction filed October 11, 2023 (docket entry 52); and the entire testimonial record¹ and exhibits heretofore considered.

¹ Given the intersection of nature and religion in this case, the Court finds it interestingly ironic that the two expert arborists who testified bear the names of Old Testament prophets: Micah and Hosea.

The genesis of this religious free exercise case was the electoral passage by the citizens of San Antonio seven years ago of a bond package which included reformation and resurrection of a now dilapidatedly dangerous two-acre portion of Brackenridge Park, owned by the Defendant City which is responsible to the public for its upkeep, safety and public health. But of course the historical genesis was the forced exodus of indigenous people from their homelands.² The Court shares Plaintiffs' lamentation of how so-called "progress" has meant the developed ruination of Texas. *Aquifer Guardians in Urban Areas v. Federal Highway Admin.*, 779 F. Supp. 2d 542, 548 (W.D. Tex. 2011).

While Plaintiffs approve of the injunctive relief granted them concerning access to the Sacred Area, they have filed a notice of appeal regarding the "spiritual ecology" denial of relief wherein the Court declined to tell the property owner City how to engineer the project. Because of different migratory bird patterns and the Migratory Bird Treaty Act, the Court also denied Plaintiffs' desire to have the birds continue to nest in the sacred two acres. The Court allowed the City to resume bird deterrent operations

² See Ken Burns, *The American Buffalo: Blood Memory & Into the Storm* (PBS television broadcast Oct. 16, 2023), <https://www.pbs.org/kenburns/the-american-buffalo> (last visited Oct. 23, 2023); see also David Martin Davies, *The Source: Could San Antonio and Austin become a "combo loco" metro?* (TPR podcast published Oct. 18, 2023, 4:13 p.m.), <https://www.tpr.org/podcast/the-source/2023-10-18/could-san-antonio-and-austin-become-a-combo-loco-metro> which discusses among other subjects the Blue Hole and the route of Plaintiffs' peyote pilgrimages (last visited Oct. 23, 2023).

in those two acres, leaving 340 other acres of Brackenridge Park for bird nesting. Not to allow bird deterrence would effectively and permanently scuttle the project because of those differing migratory patterns which would preclude there ever being an eight-month construction period.

While the City has said it would not appeal the Court's ruling allowing Plaintiffs' access to the Sacred Area, further review of additional authorities cited in Defendant's Response strongly support an argument in favor of denying access or of an appeal by the City. This Court, however, will leave in place the access injunctive relief granted to Plaintiffs.

Plaintiffs assert matters of first impression, leaving open the possibility of Supreme Court review following a decision by the Fifth Circuit Court of Appeals, all of which would take years instead of completing the project in eight months and sooner returning the two acres for unfettered access for the Plaintiffs and the general public. Such delays would likely increase the costs to the City of interest on the bond, court costs and attorneys' fees and probable construction costs inflation, all of which would require Plaintiffs to post a bond to protect the City should it ultimately prevail.³ The word "compromise" has been used from time to time in the parties' pleadings and emails. For the foregoing reasons, the

³ The Court also observes that such a lengthy process would give the law students who observed the preliminary injunction hearing time to graduate, pass the Bar, practice law and establish families between the *alpha* and *omega* of this case.

parties may wish to explore those possibilities further. “The better part of valor is discretion.” WILLIAM SHAKESPEARE, PART ONE OF HENRY THE FOURTH act 5, sc. 4. The Court suggests “wisdom” may be added to “discretion.”

If the parties cannot come to a reasonable agreement, the Court will make its rulings as necessary based on the record and the law.

Concerning the immediate issue before the Court, the Court agrees with the City’s recitation of evidence supporting the Court’s ruling. Equally important, the Court finds the legal authorities relied upon by the City as owner of the property, responsible for public health and safety, strongly supports the denial of other injunctive relief sought by Plaintiffs pursuant to Federal Rule of Civil Procedure 62(d).

In adopting the City’s Proposed Findings of Fact and Conclusions of Law and the legal authorities cited therein with respect to Plaintiffs’ requested relief in Items 2 and 3, the Court agreed with the City that its conduct does not violate the First Amendment Free Exercise Clause or the co-extensive provision of the Texas Constitution and for purposes of this motion, the Court has not been persuaded to the contrary. Moreover, as the City points out in its Response, the “Free Exercise Clause of the First Amendment . . . is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the governments.” Docket entry #56, at page 10 (emphasis in original) (citing *Satanic Temple v. City of Belle Plaine*, 2021 WL 4199369, at *13 (D. Minn. Sept. 15, 2021)). Nor, as stated by the court in

Satanic Temple, does “the First Amendment . . . include a constitutional right to use public property as a place of worship or to erect a private structure.” *Satanic Temple v. City of Belle Plaine*, 2021 WL 4199369, at *13 (D. Minn. Sept. 15, 2021) (citing *Taylor v. City of Gary*, 233 F. App'x 561, 562 (7th Cir. 2007) (observing that “the Free Exercise Clause does not give [plaintiff] the right to demand that the City provide him with municipally-owned property as a place of worship” (citing *Prater v. City of Burnside*, 289 F.2d 417, 427–28 (6th Cir. 2002))), *aff'd sub nom. Satanic Temple v. City of Belle Plaine, Minnesota*, 80 F.4th 864 (8th Cir. 2023).

Based on several authorities provided by the City in its Response, is it also clear that First Amendment law provides the government with the right to limit conduct on its own property, even if such limitation may impose limits on the exercise of religion. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-49 (1988) (rejecting Indian tribes' Free Exercise challenge to the United States Forest Service's approval of plans to construct a logging road in the Chimney Rock area of the Six Rivers National Forest and finding that such conduct did not impose a burden “heavy enough” to violate the Free Exercise Clause); *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (rejecting the claim of multiple Indian-tribe plaintiffs that use of artificial snow made from reclaimed water in a government-owned park on what the Navajo Nation considered a sacred mountain desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities, in violation of several federal statutes); *United States v. Means*, 858

F.2d 404 (8th Cir. 1988) (rejecting, on the basis of government's ownership, the Lakotas' claim that the United States Forest Service's denial of a permit for the use of an area in the Black Hills National Forest (federal property), as a religious, cultural, and educational community violated their free exercise rights); *Wilson v. Block*, 708 F.2d 735, 739-40 (D.C. Cir. 1983) (finding no impermissible burden on religious rights despite Navajo and Hopi plaintiffs' contentions that development of the Snow Bowl on the San Francisco Peaks (federal land) would be inconsistent with their First Amendment right to freely hold and practice their religious beliefs on the Peaks, which they believe to be sacred); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1484-85 (D. Ariz. 1990) (rejecting, on the basis of government's ownership, a Havasupai free exercise violation claim involving the Forest Service's plan for a uranium mine in an Arizona national forest (federal property)), *aff'd sub nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991); *Manybeads v. United States*, 730 F. Supp. 1515, 1517-18 (D. Ariz. 1989) (rejecting, on the basis of the government's ownership, a Navajo claim that relocation from the Hopi Reservation under the provisions of the Navajo-Hopi Land Settlement Act violated their free exercise rights). This same analysis also has been applied to state-owned park land. *See Crow v. Gullet*, 541 F. Supp. 785, 794 (D. S.D. 1982) (plaintiffs did not show that defendants' development, construction, and regulatory actions burdened plaintiffs' religious exercises in the Bear Butte area, and plaintiffs "failed to establish any infringement of a constitutionally cognizable first amendment right." To the extent their right of access was temporarily restricted at the

ceremonial grounds, plaintiffs' interests were "outweighed by compelling state interests in preserving the environment and the resource from further decay and erosion, in protecting the health, safety, and welfare of park visitors, and in improving public access to this unique geological and historical landmark"), *aff'd*, *Crow v. Gullet*, 706 F.2d 856, 858-59 (8th Cir. 1983) (per curiam). The City contends and the Court agrees that there appears to be no reason that this same analysis also should be applicable to land owned by, and under the management of, a home rule municipality such as the City.

Interestingly, the Court staff found a case with similar issues involving access to government-owned Alamo grounds for religious purposes. *Tap Pilam Coahuiltecan Nation v. Alamo Trust, Inc.*, 489 F. Supp. 3d 611 (W.D. Tex. 2020). In that case, the Plaintiffs alleged the Defendants violated their First Amendment rights in two ways: (1) by failing to allow Plaintiffs to "conduct their Sunrise Memorial Ceremony in the Alamo Chapel in September of 2019" while allowing tourists to enter the Alamo Chapel on that same day; and (2) by excluding Plaintiffs from the human remains protocol which prevented them from performing their "forgiveness ceremony." *Id.* at 617. With respect to the forgiveness ceremony, the Plaintiffs explained that:

their core religious beliefs require that when a body is moved, they must perform a "forgiveness ceremony," seeking the deceased ancestor's forgiveness for disturbing their final resting place. Plaintiffs believe that these ceremonies are sacred

obligations, and that when they are performed, “the spirits will guide and heal and give blessings as a result of the practice.” And, “if the ceremonies are not performed, [Plaintiffs] believe that there will be spiritual repercussions and that evil will come their way.”

Id. (Citations to First Amended Complaint omitted). In finding no violation of the Free Exercise Clause and therefore granting Defendants’ motions to dismiss, the Court provided the following analysis which this Court finds instructive here:

“The Free Exercise Clause . . . protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status.” To state a claim under the Free Exercise Clause, Plaintiffs must plead they have a “sincerely held religious belief.” They then must prove that the government regulation “substantially burdens that belief.” To be a “substantial burden” under the Free Exercise Clause, the action or regulation must either “(1) influence the adherent to act in a way that violates the religious beliefs, or (2) force the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. Importantly, the regulation does not “rise to the level of a substantial burden on religious exercise, if it merely prevents the adherent from . . . enjoying some benefit that is not otherwise generally available.”

Id. at 622-23 (citations omitted). Relying on *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S.

439, 451 (1988), a case cited by the Defendant in its Response herein, the court explained Plaintiffs claims were foreclosed by *Lyng* as follows:

There, Native Americans challenged the state's construction of a road through sacred grounds, which the plaintiffs used for religious ceremonies that required "privacy, silence, and an undisturbed natural setting." The Supreme Court acknowledged that the "threat to the efficacy of at least some religious practices [was] extremely grave," but held that the Free Exercise Clause "simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." The Supreme Court reasoned that the "Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."

Likewise, here, Plaintiffs are seeking to gain participation in the human remains protocol and permission to conduct their ceremony in the Alamo Chapel. Indeed, as Defendants point out, inclusion in the human remains protocol and permission to enter the Alamo Chapel outside of operating hours to conduct a religious ceremony are both "benefit[s] that [are] not otherwise generally available[.] Rather, they are benefits Plaintiffs seek to exact from Defendants. Such relief is unavailable under *Lyng* [and] *Patterson*.

Id. at 623 (citations omitted). Similarly, Plaintiffs in the instant case are seeking the benefit of accessing the Sacred Area at any time during the construction

project, a benefit not otherwise generally available, and seeking to exact from the City the benefits of dictating which trees may be removed, the method to be used to construct certain improvements, and what species of birds may not be deterred in the “Sacred Area.” Even Plaintiffs’ own expert engineer, Sazzad Shafique, conceded that when presented with competing engineering methods, it is usually the landowner (in this case the City) who is allowed to make the decision.⁴ Whereas the Plaintiffs in the *Alamo Trust* case received an order of dismissal, Plaintiffs in the instant case have been granted some relief.

For the foregoing reasons⁵ and as the Court

⁴ Specifically, the colloquy was as follows:

THE COURT: If two competing engineering companies came up with these plans and we're presenting it to the owner of a property and there are arguably pluses and minuses either method, who gets to make that decision.

THE WITNESS: Usually the owner.

THE COURT: The owner. All right. In this case it appears, at least part of it, that one side is asking the Court to tell the owner which methodology to use, which is neither here nor there as far as your testimony, but it's an issue.

Recross of Sazzad Shafique, Realtime Unedited Transcript, September 27, 2023, at page 282, lines 24-25 and page 283, lines 1-8.

⁵ The City’s Findings of Fact and Conclusions of Law which the Court adopted as its own also confirm that

continues to observe the human condition, Plaintiffs' Emergency Motion for Injunction Pending Appeal (docket entry 54) is DENIED.

It is so ORDERED.

SIGNED this 25th day of October, 2023.



FRED BIERY
UNITED STATES DISTRICT JUDGE

Plaintiffs' alleged claim under RLUIPA fails as a matter of law because Plaintiffs admit they have no property interest in Brackenridge Park, and Plaintiffs' failure to even mention RLUIPA during the preliminary injunction hearing suggests that they have abandoned that claim. While Plaintiffs did not discuss RLUIPA in their Motion, they nevertheless rely upon RLUIPA cases in trying to support their argument for injunctive relief. *See e.g.* Dkt. 54 at page 9, 11 (citing *Opulent Life Church v. City of Holy Springs*, 697 F.3d 279, 295, 298 (5th Cir. 2012)).

Although all the points set forth in Defendant's Response and above are relevant in their own right, they are also relevant to the instant Motion because they confirm that Plaintiffs have not—and cannot—satisfy the “irreparable harm” element of a claim for injunction pending appeal by simply pointing to some alleged or feared—but never proven—Constitutional violation.

**HISTORIC AND DESIGN REVIEW
COMMISSION
April 19, 2023**

HDRC CASE NO: 2022-091
COMMON NAME: Brackenridge Park,
Lambert Beach
ADDRESS: 3700 N ST MARYS ST
LEGAL DESCRIPTION: NCB A49 PART OF A-2,
A-4, A-52 (208 AC)
ZONING: R-6,HS
CITY COUNCIL DIST.: 2
LANDMARK: Individual Landmark
APPLICANT: Jamaal Moreno/City of
San Antonio, PWD
OWNER: City of San Antonio
TYPE OF WORK: Phase 1 of FY17 Bond
Improvements to Lambert Beach Area
APPLICATION RECEIVED: April 04, 2023
60-DAY REVIEW: Not applicable due to
City Council emergency orders
CASE MANAGER: Cory Edwards

REQUEST:

The applicant is requesting a Certificate of Appropriateness for approval to construct improvements to the Lambert Beach area in Brackenridge Park as Phase I of the FY17 Bond Project. Request items include:

1. Stabilization and restoration of the historic stone walls that have not yet failed
2. Reconstruction of walls that have already failed to match existing
3. Stabilization and reconstruction of the Grand

- Staircase to improve safety and accessibility
4. Underpinning of the 1877 Pump House for foundation stabilization in preparation for Phase II improvements
 5. Selective removal of trees located within the project area. In accordance with the UDC, HDRC approval is required for removal of mature trees located on the banks of the San Antonio River.

APPLICABLE CITATIONS:

Sec. 35-451. - Certificate of Appropriateness.

(a) Applications proposing work or changes to the exterior of a landmark, in a historic district, in a river improvement overlay district, viewshed protection or mission protection overlay district, or a property identified as an eligible resource or recommended for historic designation in accordance [with] subsection 35-453(a) shall require review for appropriateness with the provisions of this article, and any adopted design guidelines. In addition, the demolition or relocation of any structure designated historic shall also require review for appropriateness in the same manner. Such applications may include, but are not limited to:

- (1) Construction and reconstruction,
- (2) Alteration, additions, restoration and rehabilitation,
- (3) Relocation,
- (4) Stabilization,
- (5) Signage,
- (6) Landscaping,
- (7) Construction or reconstruction of a parking lot,
- (8) Construction or reconstruction of an appurtenance,
- (9) Acquisition or deaccessioning of artwork,
- (10) Demolition, and

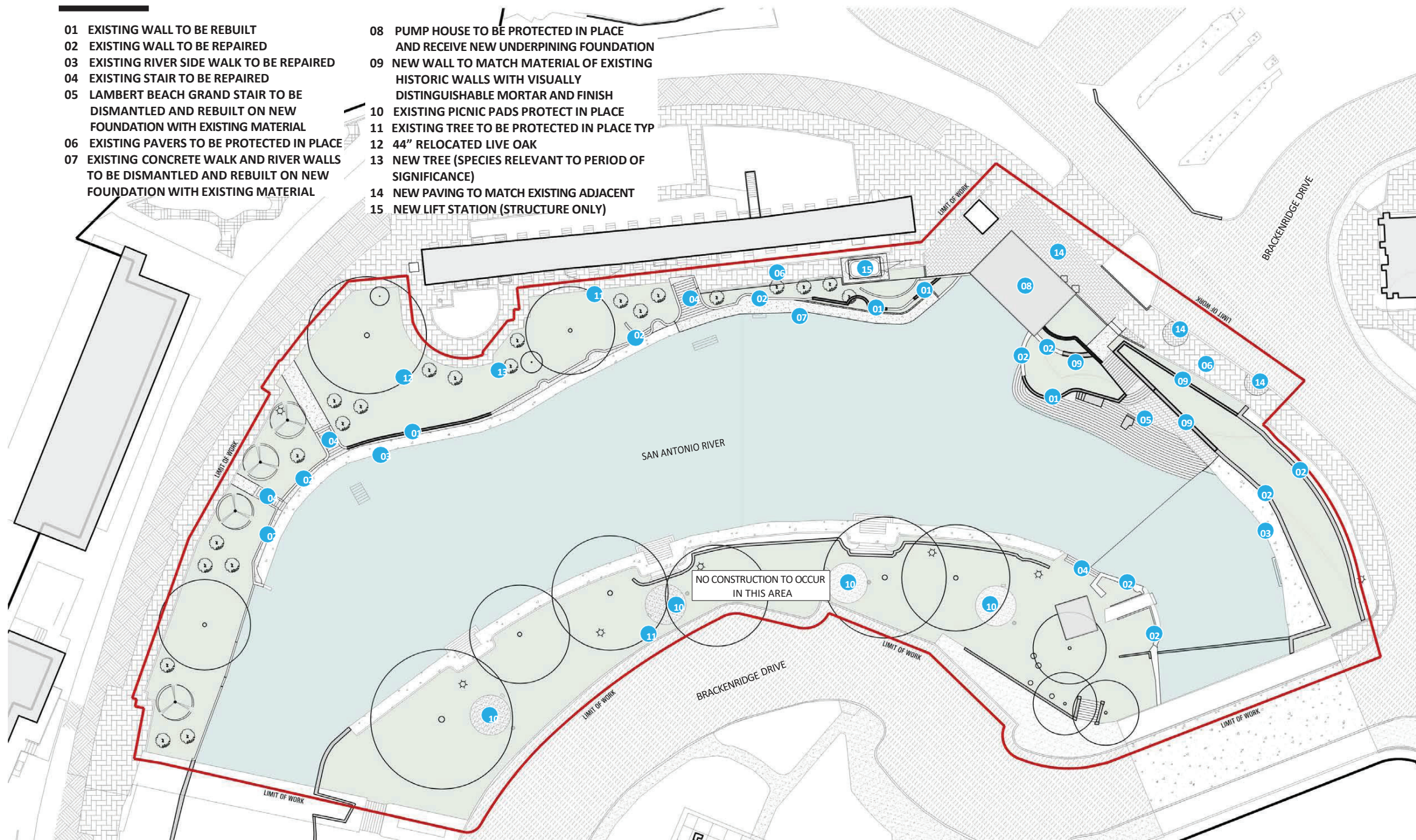
393a

(11) Lighting, furniture and seating plan, and awnings and umbrellas within the Riverwalk area and in the public right-of-way.

LAMBERT BEACH PLAN

- 01 EXISTING WALL TO BE REBUILT
- 02 EXISTING WALL TO BE REPAIRED
- 03 EXISTING RIVER SIDE WALK TO BE REPAIRED
- 04 EXISTING STAIR TO BE REPAIRED
- 05 LAMBERT BEACH GRAND STAIR TO BE DISMANTLED AND REBUILT ON NEW FOUNDATION WITH EXISTING MATERIAL
- 06 EXISTING PAVERS TO BE PROTECTED IN PLACE
- 07 EXISTING CONCRETE WALK AND RIVER WALLS TO BE DISMANTLED AND REBUILT ON NEW FOUNDATION WITH EXISTING MATERIAL

- 08 PUMP HOUSE TO BE PROTECTED IN PLACE AND RECEIVE NEW UNDERPINNING FOUNDATION
- 09 NEW WALL TO MATCH MATERIAL OF EXISTING HISTORIC WALLS WITH VISUALLY DISTINGUISHABLE MORTAR AND FINISH
- 10 EXISTING PICNIC PADS PROTECT IN PLACE
- 11 EXISTING TREE TO BE PROTECTED IN PLACE TYP
- 12 44" RELOCATED LIVE OAK
- 13 NEW TREE (SPECIES RELEVANT TO PERIOD OF SIGNIFICANCE)
- 14 NEW PAVING TO MATCH EXISTING ADJACENT
- 15 NEW LIFT STATION (STRUCTURE ONLY)



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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

GARY PEREZ and
MATILDE TORRES,

Plaintiffs,

v.

CITY OF SAN ANTONIO,

Defendant.

Case No. 23-cv-
00977-FB

San Antonio, Texas
September 25, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

**OPENING STATEMENT OF
CITY OF SAN ANTONIO**

MR. JONES: Good morning again, Your Honor.

I, too, went to Brackenridge Park as a youngster, and I have long been attracted to the park. Maybe it's last night when I went I got some more allergies from being outdoors. I don't know.

In any event, if you'll bear with me on that. Even my five-year-old grandson knows about the problem with the birds in the park, and that's not the only problem. But you take a five-year-old up to that park that we'll see as part of the evidence, and you can see why it's closed, and you can see the effect that it has.

But I'm -- I'm sort of a student of San Antonio history. And what I -- I'll go into some of that, but what I think the evidence is going to show is that the City of San Antonio owns this Brackenridge Park.

If you could pull up the D1, the slide that shows the whole park is 340 plus acres.

The part we're dealing with here, we call the project area, phase 1, you'll see from this exhibit, it's D1.3, you will see the entirety of the Brackenridge Park, all the sports fields and all the trails and all -- and the Japanese Tea Gardens. And you'll see that the project area is two acres out of the 343 acres in the park.

There's also going to be evidence that there are two miles of San Antonio River within Brackenridge Park, and there are plenty of locations that are suitable for ceremonies such as what the plaintiff -- plaintiffs propose.

The evidence is also going to show that the City is a home rule city. I should also mention one other thing before I go to that; that two miles of river that's in the park would have no water in it if the City was not pumping water into it. The Blue Hole is dry. The Blue Hole -- unless it got some rain last night. The Blue Hole springs, the San Antonio springs, are not producing water into the San Antonio River.

If -- there may be a negligible amount, but there -- there is an artesian well in the San Antonio Zoo that contributes to the flow, and then there's recycled water that is pumped into the river by the City. And that replaced the old artesian wells that were used back in the 1915 era.

When the -- when the river went dry and it became a muddy mess downtown, the City said, we've got to do something about this. So they -- they set up a pump at the Brackenridge Park to provide water for the -- for the river.

As a home rule city, San Antonio has the power and the police power to protect the health, safety and welfare of its citizens. And another thing that is unique about San Antonio perhaps is that -- my mouth is very dry, excuse me -- is that in 1924 -- I've given a copy of this to opposing counsel -- but the City has long accommodated --

THE COURT: Ms. Wilson. Just a moment. I think, Chris, is there water over there?

MS. WILSON: I've got another water bottle of water.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

GARY PEREZ and
MATILDE TORRES,

Plaintiffs,

v.

CITY OF SAN ANTONIO,

Defendant.

Case No. 23-cv-977-
FB-rbf

San Antonio, Texas
September 25, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

TESTIMONY OF GARY PEREZ

MR. GUYNN: Good morning, Mr. Perez.

THE WITNESS: Good morning, sir.

THE COURT: Is it Perez or Perez?

THE WITNESS: Perez.

THE COURT: Okay. Well, he's from Dallas. For example -- in Dallas it's Perez. Here, it's Perez.

MR. GUYNN: I'm actually -- I'm actually from Connecticut, which is even worse. So I'll do my best to go with Perez.

THE COURT: I met a lady one time years ago and somebody introduced her as Ms. So-and-so Ramos.

And I said: Where are you from?

She said: Dallas.

I said: How do you spell your name?

R-A-M-O-S.

I said: No. That's Ramos.

She said: Not in Dallas, it's not.

MR. GUYNN: Well, I'll -- I'll do my best to adjust to local practice.

MR. GUYNN: Mr. Perez, would you please state your full name.

THE WITNESS: My name is Gary Ray Perez.

MR. GUYNN: Mr. Perez --

THE COURT: Whoop. Whoop. Whoop. Try again. We'll have a --

MR. GUYNN: Mr. Perez.

THE COURT: There you go.

THE WITNESS: I can hear you now.

MR. GUYNN: Why did you bring this lawsuit?

THE WITNESS: Because the -- the actions that the City's taking with this bond '17 project was going to

destroy something very dear to us for the last 2000 years.

MR. GUYNN: Why are areas of Brackenridge Park so important to your religious exercise?

THE WITNESS: The areas in total are essential to our religious exercise because they're tied to the Blue Hole at Incarnate Word where we're told that that water sprung out from that spring and brought life to the region. But more specifically, that particular bend in the river, which is the nearest thing we have access to to connect to the constellation Eridanus in the sky, the river in the sky.

MR. GUYNN: And why is that connection point so important to your religion?

THE WITNESS: It tells us where we are in the universe, when we are in the universe, and it addresses -- that particular point in the river addresses the river itself, which is the underworld, the middle world, which is where we live and the upper world which is where the trees ascend to, including the -- the migratory birds that nest there.

MR. GUYNN: What effect will the City's plan for the Brackenridge Park 2017 bond project have on your ability to practice your religion?

THE WITNESS: It will be destructive, destructive to the point that we can never return back to that place and, indeed, begin to question whether or not that particular tenet in our ceremony is valid any longer.

MR. GUYNN: What effect will it have on your ability

to practice religious ceremonies that you think are necessary?

THE WITNESS: They're gone. It's over.

MR. GUYNN: Mr. Perez, during the remainder of this examination if I use the term "the bond project," will you understand that I'm referring to the Brackenridge Park 2017 bond project?

THE WITNESS: Yes, sir.

MR. GUYNN: Mr. Perez, where do you live?

THE WITNESS: I live at 1801 Santa Barbara, San Antonio, Texas, 78201.

MR. GUYNN: What is your race?

THE WITNESS: I am an indigenous person, what people in America call Native American or American Indian.

MR. GUYNN: From what group of indigenous people do you descend?

THE WITNESS: I descend from the Pakahua peoples who were present during the 1700s when the -- during the Colonial period, both on the Coahuila, Mexico side and the -- the Texas side, which was at one time Coahuila y Tejas. Those are my people.

MR. GUYNN: Please describe your role with the Pakahua people.

THE WITNESS: I'm the cultural preservation officer for the peoples themselves. I guide them through their

cosmological world view as a life coach.

MR. GUYNN: Do you wield any authority as a leader of the Pakahua people?

THE WITNESS: Of course, only the authority that my people allow.

MR. GUYNN: What is your title among the Pakahua people?

THE WITNESS: I am the principal chief of the Pakahua peoples of Coahuila and Texas.

MR. GUYNN: What parts of North America do the Pakahua people inhabit today?

THE WITNESS: Today it's Coahuila, Tamaulipas, Nuevo Leon, the state of Coahuila, in Mexico, and the state of Texas.

MR. GUYNN: What relationship do the Pakahua people have to the Coahuiltecan people?

THE WITNESS: The Coahuiltecan is an umbrella designation made a long, long time ago, I can't tell you when. But that specifically applies to our linguistic stock, which is called Hokan for the moment.

MR. GUYNN: Mr. Perez, what is your religion?

THE WITNESS: I am Christian.

MR. GUYNN: Are you a member of the Native American Church?

THE WITNESS: I certainly am.

MR. GUYNN: Mr. Perez, are you a descendant of the Lipan Apache?

THE WITNESS: My -- my adoptive parents were descendants of the Lipan Apache peoples of Texas, specifically the Rancheria Perez here in San Antonio.

MR. GUYNN: And are you a member of the Hoosh Chetzel Lipan Apache Native American Church?

THE WITNESS: Yes, sir, I am.

MR. GUYNN: Is the Native American Church a Christian church?

THE WITNESS: Yes, it is.

MR. GUYNN: Does the Native American Church practice ceremonies of the indigenous people of North America?

THE WITNESS: Can you ask me that question again?

MR. GUYNN: I can ask that question again.

Does the Native American Church practice ceremonies of the indigenous people of North America?

THE WITNESS: Yes, they do.

MR. GUYNN: What is your position within your congregation of the Native American Church?

THE WITNESS: My position is to guide the ceremony, whether I'm running it or not, to guide through it during the start/stop stations, timely moments in our ceremonies that reflect something that's going on in the sky and on earth at -- simultaneously.

MR. GUYNN: Where do you hold such worship services as a member of the Native American Church?

THE WITNESS: Anywhere where it's needed. But when it comes to specific moments, we go to that particular bend in the river. And that's -- the contention here is -- anyway, that location in the river. So directly facing north.

MR. GUYNN: In the Lambert Beach area?

THE WITNESS: In the Lambert Beach area, yes, sir.

MR. GUYNN: Mr. Perez, if I use the term "the park" during our examination, will you understand that I'm referring to Brackenridge Park?

THE WITNESS: Yes, sir.

MR. GUYNN: How long have you been performing religious ceremonies in the park?

THE WITNESS: I've been performing and/or participating in ceremonies in the Brackenridge Park for over 20 years.

MR. GUYNN: What is your religious belief regarding how life began in the San Antonio region?

THE WITNESS: The life began -- the life came here when one day, we are told the water bird flew into the Blue Hole and encountered the Blue Panther. The Blue Panther roared and chased the bird out of the Blue Hole, and water droplets from its tail feathers fell and nurtured the dry land and brought life to this region, from here all the way down to the Gulf of Mexico.

MR. GUYNN: Is the park related to that creation story?

THE WITNESS: Yes, sir, it is.

MR. GUYNN: How so?

THE WITNESS: Because it's directly tied to the Blue Hole at Incarnate Word where the Blue Panther exists, where we know that it exists in an image it's tied to. And then as the waters flow from the Blue Hole through Brackenridge Park, the bend in the rivers, the horseshoe shape and the bend in the rivers mirrors the constellation in the sky called Eridanus.

MR. GUYNN: What river runs through the park?

THE WITNESS: The San Antonio River.

MR. GUYNN: What importance does the shape of the San Antonio River have in your religious ceremonies?

THE WITNESS: It's -- it's identical form as a constellation of stars in the sky. So right at midnight -- or it happens all the time, every day. The constellation, Eridanus, is straight up and down in the sky. We just don't see it because the sun is out. So it's a constant, everyday constant. When those two rivers meet and end at the Gulf of Mexico, it creates an even longer river, Yanaguana, night -- sky river or spirit waters, all the way up to the constellation of Orion where our ancestors are in constant prayer for all of us here on earth.

MR. GUYNN: What is significant to you about that connection between the San Antonio River and the

constellation Eridanus?

THE WITNESS: It's -- it's where life sprung, where life continues to return, such as the migratory birds, and serves as a reminder that we are, indeed, going to pass one day. And it's there for us as a reminder that there will be a passageway back to heaven.

MR. GUYNN: And what connection, if any, between the physical and spiritual worlds does the similarity in shape of the San Antonio River and Eridanus have in your religion?

THE WITNESS: Well, the constellation of Eridanus when it rises in the east, and any particular time of the day, depending on the season, there's a place where both the river, the edge -- the very last star rising in the east touches on the horizon where we stand at that particular spot to pray. That is where the rubber meets the road, I guess, is an analogy. And it's just a brief moment called -- we call "liminal space," where we're standing in both worlds. And we make our prayers and petitions at that moment so that then the river carries -- starts moving upwards in the east, carrying our prayers with it.

MR. GUYNN: Carrying your prayers where?

THE WITNESS: Towards the constellation Orion or the heavens or the Milky Way, which you may -- whichever you prefer.

MR. GUYNN: Mr. Perez, I'm going to put in front of -- would you please open your binder to what's been marked as Plaintiffs' Exhibit 46?

And, Your Honor, you should have a notebook of exhibits as well.

THE COURT: Yes.

MR. GUYNN: And we've also provided one to opposing counsel.

THE WITNESS: Okay. I see it, 46.

MR. GUYNN: Mr. Perez, what is this document?

THE WITNESS: This is a map of the San Antonio River at the bend that we're talking about. Yeah.

MR. GUYNN: Have you seen this document before?

THE WITNESS: I've seen this document before.

MR. GUYNN: When -- sorry. Go ahead.

THE WITNESS: Yes. Yes. I've seen it in a PDF file.

MR. GUYNN: When did you see this document?

THE WITNESS: Maybe seven or eight months ago. Myself, me, personally, seven or eight months ago that I got access to this particular document.

MR. GUYNN: Do you see in the bottom right-hand corner it says COSA 1434?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: Do you understand that means that the City produced this document in this litigation?

THE WITNESS: What is that -- COSA, what is that

an acronym for?

MR. GUYNN: I believe it stands for City of San Antonio.

THE WITNESS: Okay, thank you.

MR. GUYNN: I'm asking you the questions here.

THE WITNESS: Right. I'm sorry.

MR. GUYNN: What does it say in the top left-hand corner of this document?

THE WITNESS: It says, Brackenridge Park work plan, reduced fencing area for May and June.

MR. GUYNN: Okay.

Your Honor, I'd like to move Plaintiffs' Exhibit 46 into the record.

THE COURT: Well, they're all admitted. So everything's admitted. It's non-jury. I'll disregard anything I shouldn't regard if there's an objection lodged. But everything is admitted right now.

MR. GUYNN: All right. So then -- well --

THE COURT: So you don't have to ask.

MR. GUYNN: At some other time, Your Honor, there will be some exhibits that the City has provided that we may have objection to.

THE COURT: Well, that's fine.

MR. GUYNN: When would you like us to lodge those objections?

THE WITNESS: If they -- if they come up during testimony. If not, you can lodge them after we finish and get the record complete so . . .

MR. GUYNN: Understood.

MR. GUYNN: Okay. So Mr. Perez --

THE WITNESS: Yes, sir.

MR. GUYNN: -- could you please look again at Plaintiffs' Exhibit 46?

THE WITNESS: Yes.

MR. GUYNN: What does this look like it's depicting to you?

THE WITNESS: Well, it looks like there's -- there's striata lines, these red lines, that tell us that something is about to happen in the park in that particular region by this plan. From what I understand, there are trees slated to be removed in that -- that particular part of the north bend of the river.

MR. GUYNN: Does this look like a bird's-eye view of a portion of Brackenridge Park?

THE WITNESS: Yes, sir, it does.

MR. GUYNN: Do you see there's a bottom -- on the bottom right-hand corner there's a legend that shows that there are markings for fence and there are

markings for area blocked from public use. Do you see that?

THE WITNESS: Yes, sir.

MR. GUYNN: Do you see that on the map that there are areas that are bounded by white lines and then have red crosshatching in them?

THE WITNESS: Yes, sir.

MR. GUYNN: What is your understanding of what those markings represent?

THE WITNESS: That -- well, here on the legend it says "area blocked from public use." But I also understand that there are trees in that area that are slated for removal.

MR. GUYNN: Mr. Perez, is the Sacred Area, as we've called it in this case, shown anywhere on this map?

THE WITNESS: Yes, sir, it is.

MR. GUYNN: Where is the Sacred Area on this map?

THE WITNESS: The Sacred Area, although it's difficult to see, is -- there are some steps. There are three steps of stairs that go down to the river. The -- what I can see from here is that the middle set of steps that go down to the river is where we go directly to stand and pray facing the north.

MR. GUYNN: So do you see that on -- in the right-hand corner, the top right-hand corner there's a little compass sign?

THE WITNESS: Uh-huh.

MR. GUYNN: And so that indicates where true north is on this map?

THE WITNESS: Yes, sir.

MR. GUYNN: Is it fair to say that what you are calling the Sacred Area is the most northernmost area of that southern bank of the San Antonio River?

THE WITNESS: Yes, sir.

THE COURT: Well, wait a minute. The most northernmost part of that area?

MR. GUYNN: Of the southern bank of the river.

THE COURT: Of the southern bank. Okay. All right. I didn't hear that part. Go ahead.

MR. GUYNN: That's the Connecticut coming out in me, Your Honor. I'll try to enunciate that more clearly as well.

MR. GUYNN: Okay. Mr. Perez, would you please set that aside for now and turn to what's been marked as Plaintiffs' Exhibit 9. So tab 9 in your binder.

THE WITNESS: I have 9.

MR. GUYNN: Do you have that in front of you?

THE WITNESS: 6?

MR. GUYNN: It's -- it's a tab that says "9" on the tab.

THE WITNESS: Right.

MR. GUYNN: And then in the bottom right-hand corner there's a yellow square that says "P-9" in it. Do you see that?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: Okay. Please take a brief moment to flip through this and then let us know once you've had a chance to look at the document.

THE WITNESS: It seems to be the plan to remove the trees --

MR. GUYNN: Have you --

THE WITNESS: -- from that area, Lambert Beach area.

MR. GUYNN: Have you seen this document before?

THE WITNESS: Not this closely. I know the document exists, but I -- but I've heard -- I've heard about it in -- from other folks that are concerned about these trees being removed.

MR. GUYNN: Understood.

Would you please turn to what's marked in the bottom right-hand corner COSA 0575.

As you're, I guess -- yeah. If you're holding it in landscape form, it's the bottom right-hand corner. If you're holding it in portrait, it's the top right. And it says COSA 5075.

THE WITNESS: Okay.

MR. GUYNN: Do you have that?

THE WITNESS: I gotcha.

MR. GUYNN: Mr. Perez, what does this look like to you?

THE WITNESS: That looks like a clear view of the area that we contend is sacred and must not be disturbed.

MR. GUYNN: Please describe for the Court which area on this map you claim is sacred for your religion.

THE WITNESS: So the area -- there's a center point and a periphery. The center point is the middle set of stairs in the -- where we want -- where we have been standing. And the periphery is just with -- inside the other sets of stairs, looking northward towards the trees over the -- across the river and to the trees north of where we're standing.

MR. GUYNN: So looking at this map, do you see there's a --

(Discussion off the record)

MR. GUYNN: Judge, are you able to see this document?

THE COURT: Yes. I just want to make sure we're on the same page. What is the right-hand corner numbered?

MR. GUYNN: 0575.

THE WITNESS: 0575. 0575.

THE COURT: 0575. Okay. Go ahead.

MR. GUYNN: So Mr. Perez --

THE WITNESS: Yes, sir.

MR. GUYNN: -- I want to make sure that we're looking at the same place. Do you see that there is a -- a yellow filled-in circle with a red dotted line around it that is marked with the number 125 on this map?

THE WITNESS: Yes, sir. I can see that.

MR. GUYNN: Where -- where in relation to that circle is the place that you claim -- that you believe is sacred for your religion?

THE WITNESS: Well, it's directly -- from what I can see, it's directly across -- it's directly across a set of stairs where we stand. Across the river, over in the direction of the trees, where I -- I believe are the trees being circled with white -- with red and yellow.

MR. GUYNN: So do you understand that on the right side of that riverbend, that is the northern side of the San Antonio River?

THE WITNESS: Yes, sir.

MR. GUYNN: You understand that?

THE WITNESS: Yes.

MR. GUYNN: And so the Sacred Area is on the

southern bank of the San Antonio River?

THE WITNESS: Yes, sir. The southern -- the Sacred Area of the southern bank, because it gives us a clear -- it directs us -- it points us directly north. Yeah.

MR. GUYNN: And do you see that -- that that circle that I pointed you to, 125, that's on the southern bank of the San Antonio River?

THE WITNESS: I beg your pardon. Let me take my glasses off. Yeah. Yes. One two -- our location is to the -- to the left of 125.

MR. GUYNN: And is that the area where plaintiffs believe they must perform religious ceremonies?

THE WITNESS: To the left of that tree.

MR. GUYNN: What -- so for the rest of this examination, Mr. Perez, if I use the term "the Sacred Area," will you understand that I'm referring to that location that you have just indicated as we reviewed Plaintiffs' Exhibit 46 and Plaintiffs' Exhibit 9 together?

THE WITNESS: Yes, sir.

MR. GUYNN: What religious ceremonies do you perform at the Sacred Area?

THE WITNESS: They are -- they are Christian in nature, and they are petitions for anything personal, visiting folks in the region. We have Comanches' and Apaches' and Kiowa's relatives that come through here, and they ask me to take them to the Blue Hole and bring them to the river because we go back and

review the spiritual ecology so that we understand the tenets in our ceremonies. They always want to reconnect to these places because they know that when they have their ceremonies, they know visually in their heads where that place is.

MR. GUYNN: Do you go to this sacred area when you're not performing a specific religious ceremony?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: Why?

THE WITNESS: Barbecue, Easter.

MR. GUYNN: Are there any other religiously related reasons that you go there besides performing ceremonies?

THE WITNESS: Yes. You know, for prayer, for -- for saying thank you, you know. For my birthday, my mother's -- meeting my mother for the first time, 30 years ago, just anything to be grateful, yes. But there -- but there are stop -- stop/start stations throughout the year, seasons where we're compelled to go and -- and pray there. That's what you're asking.

MR. GUYNN: You used the word "compelled." So to clarify, are these religious ceremonies necessary in your religion?

THE WITNESS: Yes, sir, they are. They're necessary.

MR. GUYNN: Where else can you perform these religious ceremonies that you just described?

THE WITNESS: To the effect -- nowhere else.

Nowhere else. We must return back to this space because it reminds us of the tenets we use in our ceremonies. It's a place where it represents a tenet.

And may I give you another example? The sunrise. The sunrise in our ceremonies, that takes place in San Angelo. We must be there in San Angelo at particular times of the year, too. So this is just another one of those very special places in the world where we go to refresh our minds and --

THE COURT: Somewhat like Stonehenge? You're familiar with Stonehenge?

THE WITNESS: Yes, sir.

THE COURT: Okay. Go ahead.

MR. GUYNN: You heard in the City's opening statement that it said that there's miles of a stretch of San Antonio River that would be suitable for your religious ceremonies. Did you hear that?

THE WITNESS: Yes, sir, I did.

MR. GUYNN: Do you agree with that statement?

THE WITNESS: I disagree, sir.

MR. GUYNN: Why?

THE WITNESS: Well, for number one, if they had given me a chance, I would have explained it to them.

Number two, that's like asking for somebody -- like when you walk into a Catholic church and you kneel before the altar and you make the sign of the

cross, there's no other place in or outside of that church where that is -- where you can do that. You must stand in front of creation or the creator and put your petitions down, you know. But yeah.

MR. GUYNN: That statement's like telling a Jew, there's plenty of mountains suitable for your religious worship, you don't need the Temple Mount, right?

THE WITNESS: Yeah. That's tantamount.

MR. GUYNN: Plenty of mountains are suitable for religious service, right?

What is your understanding of how long indigenous people have been performing religious ceremonies in the park?

THE WITNESS: Well, the particular songs that go with that particular time, when we pray there, we sing those Yanaguana songs, those songs or that language that it's tied to are Hokan linguistics of South Texas and northeast Mexico. It takes -- it's roughly about 5- to 7,000 years old, the language itself that we're using to perform those ceremonies.

MR. GUYNN: Besides the Native American Church here in San Antonio, can you please describe any other groups of indigenous persons who use this sacred area for religious reasons?

THE WITNESS: There are those who come and ask to be close to it, like from Mexico. They -- they know about this place in Mexico, tribes. But there are other tribes from as far away as Canada, adherents to the Native American Church and its auspices. They travel

through here, thousands of miles, in order to see the birthplace of this religion and -- and what -- what they understand is a tenet in their ceremonies.

MR. GUYNN: Mr. Perez, what is a "peyote pilgrimage"?

THE WITNESS: It's a pilgrimage towards the -- South Texas where the peyote grows, where I was once -- one time the caretaker of the peyote gardens. And those pilgrims come through this region, understanding that it's the old peyote road, the old people's road.

When they arrived at our grandmother's home, they performed the ceremonies in which the tenet I'm talking about is performed at midnight, called Midnight Water. And there's all kinds of things being said and being told about it. But primarily their journey culminates into that moment at midnight, all -- all the way to the following sunrise.

MR. GUYNN: And what area of the park are you describing where that religious service takes place?

THE WITNESS: That religious service takes place in the location we talked about, to the left of that tree, the southern -- southernmost bend of that part of the river.

MR. GUYNN: Have peyote pilgrims been able to reach that area since February of 2023?

THE WITNESS: No, sir.

MR. GUYNN: What role, if any, do you have in aiding

peyote pilgrims who visit the park?

THE WITNESS: I simply just hold their hand and guide them through the place and step aside and allow them their privacy.

MR. GUYNN: Is that act in aiding peyote pilgrims an important part of your religion to you?

THE WITNESS: Yes, sir. It's absolutely critical, critical.

MR. GUYNN: Why is that?

THE WITNESS: Well, it's critical to -- first of all, it's protected. Our Native American Church is protected by the federal laws, you know, guarding the use of peyote. And anything that we can do forward to continue to shore up the culture, especially cosmologically speaking, which is what this location serves, shores up and protects that -- that belief and that way of life that we share, from here all the way up to Canada.

MR. GUYNN: Are you familiar with -- you've used during your testimony the term "spiritual ecology." What does that term mean to you?

THE WITNESS: The spiritual ecology, especially in that area of Brackenridge Park, is a tapestry. If you can imagine a woven rug has -- rug has tension in it. And if you go and you pull a thread off of that tapestry, it becomes -- it begins to unravel.

MR. GUYNN: What -- what natural features within the Sacred Area affect its spiritual ecology?

THE WITNESS: The spiritual ecology represents, first of all, the bend in the river, the river itself, the water, of course, the trees and the birds that nest in it.

MR. GUYNN: And why is the spiritual ecology of the physical location important?

THE WITNESS: In this particular sense, because it represents the underworld, the middle world and the upper world in which -- where we go and we -- we go to that particular place to see that both -- all three worlds are intact. When we look in the water and we see our reflection, we saw our reflection, we see our reflection in the tree -- of the trees and the birds and the sky, everything is copasetic when we're standing there looking directly into the water.

MR. GUYNN: How does the presence of the San Antonio River affect the Sacred Area's spiritual ecology?

THE WITNESS: Well, the -- the San Antonio River, it affects it very much so. That water is life. Water provides sustenance. The -- the flora and the fauna, it provides sustenance for the other creatures, you know. It's just -- it's very life-giving. We call it "Mother Water" because it's -- yeah.

MR. GUYNN: How does the presence of trees affect the Sacred Area's spiritual ecology?

THE WITNESS: The trees are the axis mundi. Their roots go into the underworld, underneath the earth and even touches 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. And then that's where the birds come in. The migratory birds come in, then take our beliefs further into the future.

MR. GUYNN: And so please elaborate. How does the presence of birds affect the Sacred Area's spiritual ecology?

THE WITNESS: The migratory birds, which tail feathers we use in our ceremonies, they come -- they go and they come back. There's an ebb and flow with their migratory behaviors. 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. That next generation, including our children, will come back and revisit the moment again and again and again.

MR. GUYNN: So Mr. Perez, if you wouldn't mind going back to what was marked as Plaintiffs' Exhibit 46. You recall that in its opening statement the City said that plaintiffs say that trees and birds can't be removed from the entire park because that will affect the spiritual ecology of the Sacred Area?

THE WITNESS: That's not true.

MR. GUYNN: My next question was going to be, is that -- is that your belief, Mr. Perez?

THE WITNESS: Ask the question again, sir.

MR. GUYNN: Is it your belief that no birds or trees can be removed from the entire -- the entirety of Brackenridge Park?

THE WITNESS: No, sir. That -- I don't -- I don't believe that. I don't -- no.

MR. GUYNN: So please look at Plaintiffs' Exhibit 46. Which area shown on this map contributes to the spiritual ecology of the Sacred Area?

THE WITNESS: Well, the area marked in red, more specifically, the northernmost part of the southern bend of the river there. That's the -- unfortunately, that is the location.

MR. GUYNN: What about the northern bank of the San Antonio River that is shown also blocked from public use there?

THE WITNESS: The northern bank, as -- okay, ask me a question related to that.

MR. GUYNN: Sure. Does -- does the presence of trees and birds on the northern bank of the San Antonio River affect the spiritual ecology of the --

THE WITNESS: Yes, it does. Yes, it does.

MR. GUYNN: How so?

THE WITNESS: Because it's within our view, in the direction that we're facing, we're looking in a particular direction. We're standing over the river, and we saw our reflection. The reflection in the trees at that point where we stand and the birds in it tell us that everything's okay, you know, that everything is, you know, right with the world.

MR. GUYNN: Since February 2023, what level of access have you had to the Sacred Area?

THE WITNESS: We have not had none, sir.

MR. GUYNN: Why not?

THE WITNESS: Well, because the City tells us that it's dangerous to go into that location and -- yeah. And so that's why it's fenced off.

MR. GUYNN: So just to be clear, what is stopping you from entering the Sacred Area?

THE WITNESS: The very -- the fence itself, the physical fence, yeah.

MR. GUYNN: And what's your understanding of when those fences went up on the southern bank of the San Antonio River?

THE WITNESS: What -- can you rephrase that question?

MR. GUYNN: What is your understanding of when the fences went up that are preventing you from accessing the Sacred Area?

THE WITNESS: That they went up in February. They went up in February in order to -- well, they went up in February to -- to stop anybody from going in there, period.

MR. GUYNN: February of what year?

THE WITNESS: February of 2023. Beg your pardon.

MR. GUYNN: What effect has being denied access to this sacred area since February 2023 had on your religious practice?

THE WITNESS: On our religious practice it has been very, very sad. And I'll be -- I'll be very personal here right now. I know you're not expecting this. But my dear Aunt Cokoya (phonetic) and my grandniece Alicia, in March 13th, were killed on the highway in Ozona when an individual carrying illegal aliens ran into them at a hundred miles an hour and killed them instantly. And my immediate thought when I heard about it was to go to that place and ask God for mercy. And then I realized that I couldn't. Halfway through getting out of bed, I realized that I couldn't because I couldn't -- I couldn't go to that space.

And it was just -- it's a devastating moment for me, and it really would have been a comfort to myself and to our family if I'd been able to go there and represent our family and say a prayer on behalf of my aunt and my great niece.

MR. GUYNN: And what effect has being denied access to the Sacred Area had on your ability to perform religious ceremonies?

THE WITNESS: We don't. We can't. There's -- it's just -- it's not there.

MR. GUYNN: Why not?

THE WITNESS: Because there's a fence stopping us from going in there. It's affected us greatly in some instances.

MR. GUYNN: How have you performed those religiously necessary ceremonies without access to the Sacred Area?

THE WITNESS: We've had to stand elsewhere and as close as we can to that area. It's forced us to go as close as we can to that area and perform the ceremonies, which is unacceptable.

MR. GUYNN: Why is it unacceptable?

THE WITNESS: Because we're not at the very location where we need to stand in order to see our reflection in the water.

MR. GUYNN: And when you say it's not acceptable, do you mean it's not acceptable to you personally or it's not religiously effective?

THE WITNESS: It's not religiously effective. I must see my reflection in the water either way. You know, either way, it's -- I'm not there, you know. I'm not there standing where I need to stand to make my petitions to God almighty.

MR. GUYNN: And what effect has being denied access to the Sacred Area had on your ability to aid peyote pilgrims?

THE WITNESS: Well, most certainly, close -- we can get close, but close is not close enough. And I'm constantly making apologies about not being able to bring them to that very point. I know to bring them to that very point along -- along the river, that they identify it as something in the ceremony, even 3,000 miles away.

MR. GUYNN: What ceremony are you referring to?

THE WITNESS: The peyote ceremony.

MR. GUYNN: Where are those peyote ceremonies performed?

THE WITNESS: They're -- they're performed anywhere in the United States and Canada. Okay? But this particular location, this spiritual ecology that we're talking about, is the -- the inception, the inception of that particular part of the ceremony. Were it not for the spiritual ecology along that bend in the river, that tenet would not exist in the Canadian Native American Church.

MR. GUYNN: Have you asked the City for permission to enter the Sacred Area since those fences went up that have blocked access to the southern bank of the San Antonio River?

THE WITNESS: Yes, sir.

MR. GUYNN: When did you ask for such permission?

THE WITNESS: For August 12th, the water pilgrimage for August 12th, and for the September 21st spring equinox.

MR. GUYNN: And in what year were those requests?

THE WITNESS: Both in 2023.

MR. GUYNN: So August 12th, 2023?

THE WITNESS: Yes, sir.

MR. GUYNN: And September 21st, 2023?

THE WITNESS: That's correct.

MR. GUYNN: So let's take August 12th first. Why did you ask for permission to enter the Sacred Area on August 12th, 2023?

THE WITNESS: We needed to perform a service, a -- a religious act, on behalf -- first of all, because it's part of a water pilgrimage and because -- for some atonement, an act of atonement for what's happening. The birds by that time were gone. They had been entirely removed. And we had -- we have tail feathers on our -- on our fans that -- where we broadcast water to the trees and to that region in four directions. And in an attempt for atonement for what's happening, you know, to say we're sorry that things are the way that they are. They're pitiful. And that, yeah, we're sorry.

MR. GUYNN: And what portion of the fenced-in area did you request to access for that August 12th, 2023 ceremony?

THE WITNESS: The fenced-in area that -- there just south of where we need to stand, where we need to be to pray with that water. As a matter of fact, those bird feathers, had we had the chance, those bird feathers would have been dipped in the water rather than a bucket -- bucket of water that we brought along with us.

MR. GUYNN: Did the City allow you to enter the fenced-in area to stand in the Sacred Area --

THE WITNESS: No, sir.

MR. GUYNN: -- for that ceremony?

THE WITNESS: No, sir.

MR. GUYNN: What reason did they give you for refusing to allow you to enter the Sacred Area on August 12th, 2023?

THE WITNESS: That it was a safety hazard.

MR. GUYNN: Did you offer to be careful if you went inside the fences?

THE WITNESS: Yes, sir.

MR. GUYNN: Did you offer to allow someone from the City to observe you while you were in the Sacred Area?

THE WITNESS: Certainly.

MR. GUYNN: Did you offer to consult with the City to identify a safe place to stand in the Sacred Area?

THE WITNESS: Yes, sir.

MR. GUYNN: Did the City take you up on any of those offers?

THE WITNESS: No, sir.

MR. GUYNN: Why did you ask for permission to enter the Sacred Area on 25 September 21st, 2023?

THE WITNESS: It was the spring equinox and that – – the spring equinox is strange, so bear with me. It's the morning of the spring equinox that is identical to midnight winter in the winter solstice. And so we wanted to go in there to – – there's a young man that we needed to bring into that particular part of the

ceremony. That's -- midnight waters was where a male brings in water. And we wanted to bring this young man to take that place, to stand in that position, to bring that water so that we could dip our feathers into the water and then share it throughout, broadcast it throughout.

MR. GUYNN: What portion of the fenced-in area did you request to access for the September 21st, 2023 ceremony?

THE WITNESS: The southernmost bend of the river, the southernmost part of the bend of the river there, the fenced-in area.

MR. GUYNN: So do you mean the -- the area that we're calling the Sacred Area?

THE WITNESS: Yes, sir. Uh-huh.

MR. GUYNN: So the northernmost point of the southern bank of the San Antonio River?

THE WITNESS: Check.

MR. GUYNN: And for the September 21st, 2023 ceremony, was that to observe the spring equinox or the fall equinox?

THE WITNESS: I'm sorry. It's the fall equinox. If I said "spring," it's fall.

MR. GUYNN: Did the City allow you to enter the Sacred Area --

THE WITNESS: No. --

MR. GUYNN: -- for the September 21st, 2023 ceremony?

THE WITNESS: No, sir.

MR. GUYNN: What reason did they give you for refusing you to access the Sacred Area?

THE WITNESS: There was a safety hazard, and so the fence needed to remain closed. Access denied.

MR. GUYNN: Did you offer to be careful if you went in the Sacred Area?

THE WITNESS: Yes, sir.

MR. GUYNN: Did you offer to consult with the City to find a safe way for you to access the Sacred Area on September 21st?

THE WITNESS: Yes, sir.

MR. GUYNN: Did you offer to be supervised by somebody from the City who could make sure you stayed in a safe place?

THE WITNESS: Surely.

MR. GUYNN: How many people were you planning to bring into the Sacred Area for the August 12th, 2023 ceremony?

THE WITNESS: Anywhere between 15 and 20 people. But if I may, that's rare that we have that many, but yeah.

MR. GUYNN: How long would that ceremony have

taken you to complete?

THE WITNESS: 15, 20 minutes.

MR. GUYNN: How many people were you planning to take in for the September 21st, 2023 ceremony?

THE WITNESS: 15 to 20, the same.

MR. GUYNN: How long would that ceremony have taken?

THE WITNESS: About 15, 20 minutes.

MR. GUYNN: After you offered on September 21st to be careful and to be supervised by the City, did the City let you go in?

THE WITNESS: No, sir.

MR. GUYNN: Are you familiar with the bond project?

THE WITNESS: Yes, sir.

MR. GUYNN: What's your understanding of the bond project?

THE WITNESS: The bond project is to renew the Brackenridge Park and to rebuild the walls along that -- the northern part of the area that we're talking about. Unfortunately, also to remove trees and, you know, to just rejuvenate the area of the park.

MR. GUYNN: Mr. Perez, could you please turn to -- in your binder to tab 19, the document that's been marked as Plaintiffs' Exhibit 19? And please let me know once you have that in front of you.

THE WITNESS: Okay.

MR. GUYNN: What does this document say in the -- if you hold it in landscape view like this --

THE WITNESS: Uh-huh.

MR. GUYNN: -- what does it say in the top left-hand corner of that page?

THE WITNESS: It says, Brackenridge Park postcard, place lost in time, HDRC meeting.

MR. GUYNN: Is your understanding that this is a presentation that the City made at a meeting of the HDRC?

THE WITNESS: Yes, sir.

MR. GUYNN: What's your understanding of what the HDRC is?

THE WITNESS: The Historical Design Review Commission, I believe.

MR. GUYNN: What's your understanding of the date that this presentation was made?

THE WITNESS: What is -- okay, ask me that question again.

MR. GUYNN: Sure. Do you see -- there's a date right underneath the words "HDRC meeting."

THE WITNESS: Okay, yes. April 19th. Thank you.

MR. GUYNN: What year?

THE WITNESS: 2023.

MR. GUYNN: Do you know who created this document?

THE WITNESS: I believe it's the City of San Antonio.

MR. GUYNN: Would you please turn to the page that has the markings on it COSA 011 -- sorry -- sorry. It says -- it has 1117 on it. Scratch that zero. COSA 1117. Do you see that?

THE WITNESS: Okay. 1117. Yes, sir.

MR. GUYNN: What does it say in the top left-hand corner of that page?

THE WITNESS: "Tree removal, summary."

MR. GUYNN: Do you see that then there's a blue box on the right-hand side with the words "tree removal" on the top of that box?

THE WITNESS: Yes, sir.

MR. GUYNN: And then it says: Total trees within the project area, 83.
Do you see that?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: Do you see that two lines down from that it says "final proposed tree removal," and it says "48."
Do you see that?

THE WITNESS: Yes, sir, I see that.

MR. GUYNN: What's your understanding of what "final proposed tree removal" means?

THE WITNESS: That that's -- that's the amount of trees, indeed, they intend to remove from that area.

MR. GUYNN: Do you see, if you go five lines down, it says, "dead/dying trees to be removed: Four." Do you see that?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: So then the -- so of the 48 trees that are proposed to be removed, four of them are dead or dying, right?

THE WITNESS: That's correct.

MR. GUYNN: Do you see that underneath that it says, "relocated trees, 21"?

THE WITNESS: Yes, sir. I -- I see that.

MR. GUYNN: So if I'm doing my math correct, that means that there will be 69 trees removed or relocated from this area that's shown on the -- in the map?

THE WITNESS: Yes, sir.

MR. GUYNN: What area is shown on the map right there?

THE WITNESS: The area shown on the map is the Lambert Beach area where our sacred site is.

MR. GUYNN: What effect does that bounded area have on the spiritual ecology of the sacred grounds?

THE WITNESS: It's critical to the spiritual ecology of -- of our beliefs.

MR. GUYNN: So do you see at the bottom it says, "total trees preserved in place, 14"?

THE WITNESS: Uh-huh. Yes, sir.

MR. GUYNN: How many of the 83 trees that currently exist in the Lambert Beach area, that you say is critical to the spiritual ecology of the Sacred Area, how many of those trees will remain in that area after the bond project is completed?

THE WITNESS: Well, sir, if you're asking me to do the math, I can't do that right away in my head, but --

MR. GUYNN: Well, what does it -- what does it say total trees preserved in place --

THE WITNESS: Total trees --

MR. GUYNN: The bottom line.

THE WITNESS: Yeah. 14. 14 trees.

MR. GUYNN: 14. So 14 of 83 trees; is that right?

THE WITNESS: Yes. Unfortunately.

MR. GUYNN: What effect will the removal of 69 of the 83 trees in that area have on the spiritual ecology --

THE WITNESS: It would --

MR. GUYNN: -- of the Sacred Area?

THE WITNESS: -- threaten, threaten the spiritual ecology of that area.

MR. GUYNN: Would it have any effect on the spiritual ecology of the area?

THE WITNESS: It would have an immediate effect. It would create a cause for concern about an erasure.

MR. GUYNN: An erasure of what?

THE WITNESS: An erasure of the culture, of the spiritual ecology.

MR. GUYNN: What effect would the removal of so many trees have on your ability to perform ceremonies in the Sacred Area?

THE WITNESS: It would -- it would be devastating, especially if whatever was remaining, the birds are not allowed to come back and nest the following year. That -- that in itself is devastating.

MR. GUYNN: What effect would the removal of so many trees have on the spiritual power and vibrancy of that area?

THE WITNESS: It would remove it. It would --

MR. GUYNN: What effect would that have on your ability to perform religious ceremonies?

THE WITNESS: Devastating. It'd be the end.

MR. GUYNN: Mr. Perez, would you please turn to tab 45 in your binder. Please let me know once you've had

a chance to get there.

THE WITNESS: Okay. 45.

MR. GUYNN: Have you seen this document before? What does it -- strike that.

What does it say at the top of this document, the title of this document?

THE WITNESS: It's United States Department of Interior and National Park Service, National Register of Historic Places.

MR. GUYNN: What is the National Register of Historic Places?

THE WITNESS: Well, it is -- it's a register of places that historically, and you would hope prehistoric, that are protected under the National Park Service.

MR. GUYNN: And do you see that there's a line underneath that that says name of property?

THE WITNESS: Name of property. Yes, sir. Historic name is Brackenridge Park.

MR. GUYNN: And if you look, what is the location of this property which is shown in Part 2?

THE WITNESS: The street number? Street number? Roughly --

MR. GUYNN: What city is this in?

THE WITNESS: San Antonio.

MR. GUYNN: So this is referring to the park, right?

THE WITNESS: Yes, sir, directly.

MR. GUYNN: Who -- who prepared this -- well, if you look at state, federal agency certification. Do you see that?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: Do you see that it's been signed?

THE WITNESS: Yes, sir.

MR. GUYNN: What does it say to the right of that signature?

THE WITNESS: To the right of the signature? State historic preservation officer.

MR. GUYNN: What does it say below that signature?

THE WITNESS: The Texas Historical Commission.

MR. GUYNN: What is date of that signature?

THE WITNESS: It says June 15th, 2011.

MR. GUYNN: Okay.

THE WITNESS: Could be 1911, too, you know, but anyway.

MR. GUYNN: Would you please turn to Page -- what's marked in the bottom right-hand corner Brackenridge 006080.

THE WITNESS: 6080, sir?

MR. GUYNN: That's right.

THE WITNESS: Okay.

MR. GUYNN: Do you see that about a third of the way down there's a bolded heading that says Brackenridge Park in the 1930s, the depression era and the Texas centennial celebration?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: Would you read the first paragraph under that heading?

THE WITNESS: Certainly.

“Brackenridge Park, like many public facilities throughout the country, benefited from Depression-era programs carried out by the National Youth Administration and Works Progress Administration. San Antonio's representative from the 20th Congressional District, Maury Maverick” – – very famous person in San Antonio – – “assured substantial local funding for the projects during his tenure from 1935 to 1938. Approximately \$90,000 were earmarked for projects to improve the infrastructure of Brackenridge Park and Koehler Parks and – – and the zoo.”

MR. GUYNN: Would you please read the first sentence of the next paragraph?

THE WITNESS: “Rock retaining walls were constructed along the river to control erosion and threatened trees along the river bank.”

MR. GUYNN: Mr. Perez, do you know why the retaining walls in the Sacred Area were built?

THE WITNESS: Yes, sir. According to this document, and even common understanding, was to protect the trees that were there.

MR. GUYNN: What's your view of the City's plan to cut down nearly all of the trees in the Sacred Area in order to repair "rock retaining walls that were constructed along the river to control erosion that threatened trees along the river bank"?

THE WITNESS: That sounds to me, sir, like an oxymoron.

MR. GUYNN: Mr. Perez, would you please turn to Brackenridge 006110?

THE WITNESS: 06110. Yes, sir. Whoa.

MR. GUYNN: Do you -- what do you see in the bottom third of that page?

THE WITNESS: On 06 -- 06110, right?

MR. GUYNN: 006110.

THE WITNESS: And it's a map. We're looking at a map.

MR. GUYNN: On 06110?

THE WITNESS: 0 -- oh, I beg your pardon. 06110. I have -- am I looking at the right place? I have 006 --
--

THE COURT: It's two pictures.

MR. GUYNN: It should say Brackenridge 006110.

442a

THE COURT: Are you on --

MR. GUYNN: Are you on tab 45?

THE WITNESS: I'm on tab 45. Yes, sir.

THE COURT: Okay. What does that one say right there?

THE WITNESS: 006100.

MR. GUYNN: So we need 110.

THE WITNESS: One one. Okay. I beg your pardon.

MR. GUYNN: Bottom right-hand corner. 6110 would be the last four numbers.

Your Honor, would you mind if I assisted the witness getting to right page?

THE COURT: It's going to be two pictures. 6110.

THE WITNESS: 6112, 113.

MR. GUYNN: Go the other way.

THE WITNESS: Okay.

THE COURT: There you go.

THE WITNESS: 110. Okay. Whew.

THE COURT: That's it.

MR. GUYNN: All right. Do you see that at the bottom there's writing, "Figure 17, Lambert Beach"?

THE WITNESS: Yes, sir, I do.

MR. GUYNN: What does that image look like that's in the bottom third of this picture and of this page?

THE WITNESS: Trees. There's --

MR. GUYNN: How many trees do you see there?

THE WITNESS: It's hard to tell, they're so thick. It's the forest. It's -- can't see the trees through the forest or the other way around. There's a lot of trees, bunches.

MR. GUYNN: And is this a black and white photo?

THE WITNESS: Yes, sir, it is black and white.

MR. GUYNN: Do you know how old this photo is?

THE WITNESS: I don't see it here. I don't see the date here for the age of this photo.

MR. GUYNN: But if you turn the page -- would you turn to Page 6111?

THE WITNESS: Uh-huh.

MR. GUYNN: Do you see the pictures Figure 18 and Figure 19?

THE WITNESS: Oh, yes.

MR. GUYNN: Do those look like modern cars to you?

THE WITNESS: No, sir.

MR. GUYNN: Those look like pretty old cars, don't

they?

THE WITNESS: Yes, sir.

MR. GUYNN: So that -- the pictures in this document, they're pretty old, aren't they?

THE WITNESS: Yes, they are. Certainly way before my time.

MR. GUYNN: Okay. You can set that aside, Mr. Perez.

THE COURT: Before you move to the next subject, the picture you were just looking at of Lambert Beach and the trees that you were not able to tell how many, does it look that way now in terms of the number of trees? Are they that thick?

THE WITNESS: It was very thick. It was very thick. I can see -- but I can identify one of the cypress trees that's still there.

THE COURT: Okay. Go ahead.

MR. GUYNN: Does the spiritual ecology of the Sacred Area rely on old trees or just trees?

THE WITNESS: It all -- it relies on anything existing at the time, at the moment. It doesn't have to be the old ones, the old trees. But there are trees there old enough to where a generation before I came along, these pilgrimage that have been continuous for thousands of years, the previous generation would have identified those trees and said those are the trees.

MR. GUYNN: Okay. You can set aside this document for now.

Mr. Perez, could you please describe any communications that you've had with the City regarding how the bond project will affect your religious practice?

THE WITNESS: Well, I was -- I was silent in the beginning, but I decided that I needed to step up and share the information that we had directly to the City if that was possible, and then later with the Brackenridge Park Conservancy because I knew some of the folks in these positions. And I thought that if I didn't, that I didn't do my part to protect what was there and to let them know how very, very precious this place was to myself and to other adherents of the Native American Church.

MR. GUYNN: What changes did the City make to the bond project design in response to your concerns about how it would affect your religion?

THE WITNESS: None, sir.

MR. GUYNN: What meetings did the City request to have with you so that they could learn how to adjust the bond project design in order to accommodate your religious exercises?

THE WITNESS: There were none, sir.

MR. GUYNN: Your Honor, I have no further questions at this time.

THE COURT: All right. Cross?

MS. WILSON: Your Honor, I think is the best feature of the new courtroom. I'm glad I don't have to

ask for a box to stand on.

THE COURT: Yes. That's modern technology. The problem is if you have a really tall person and a really short person so -- but it's okay. Go ahead.

MS. WILSON: Your Honor, just as a -- kind of a housekeeping measure, Mr. Perez was on our witness list, too. So under Rule 611, we'd ask that you exercise your discretion to control the presentation of evidence in the interest of efficiency and allow us to do our direct and cross at the same time.

THE COURT: Yes.

MS. WILSON: I actually don't think there's much difference between the direct and cross.

THE COURT: Sure.

MS. WILSON: But that way, we only have to --

THE COURT: Sure.

MS. WILSON: -- subject him to this once.

THE COURT: That's fine.

MS. WILSON: Thank you, Your Honor.

Mr. Perez, I'm sorry you have to deal with the -- both the transplants this morning, but I think I can manage the inflection correctly, and we'll get through this.

MR. GUYNN: Objection, lack of foundation.

MS. WILSON: Wait until you hear me say the letter O sometime, and you will know exactly where I'm from. And it's not here.

CROSS-EXAMINATION

MS. WILSON: Mr. Perez, in the -- I'm going to refer to the Project Area, which is the area that you have previously been calling the Sacred Area, but the City calls it the Project Area. So if I use the term "Project Area," do you know what I'm talking about?

THE WITNESS: Yes, ma'am.

MS. WILSON: Okay. Sir, do your religious beliefs dictate that a certain number of trees must be present in the Project Area?

THE WITNESS: No, ma'am.

MS. WILSON: Do your religious beliefs dictate that a certain species of tree must be present in the Project Area?

THE WITNESS: No, ma'am.

MS. WILSON: And I think you testified earlier that your religious beliefs don't dictate that the trees in the Project Area must be a certain age in order to be spiritually vital; is that correct?

THE WITNESS: That is correct.

MS. WILSON: Are there any particular trees that you can identify within the Project Area that are considered sacred or especially sacred?

THE WITNESS: Two types of trees, the oak tree that hangs over the river bank on the north side of the bend that contains the rookery of the cormorant birds, and then there's a tree directly behind it which is a cypress tree, God knows how long that's been there, that is the tallest in -- in the direction that we're facing, it is the tallest tree in our -- from that point, our focus for our prayers.

MS. WILSON: Okay. Are invasive species like the chinaberry tree considered sacred under your religious beliefs?

THE WITNESS: No, ma'am.

MS. WILSON: Are invasive species like the Chinese tallow trees considered sacred under your religious beliefs?

THE WITNESS: No, ma'am.

MS. WILSON: Is it -- to the extent that the City's bond project plan involves the removal of invasive species, that does not create a substantial burden on your religious practice, correct?

THE WITNESS: No, ma'am, it doesn't.

MR. GUYNN: Objection, calls for a legal conclusion.

THE COURT: Overruled.

MS. WILSON: You'd agree with me that in the natural course of events trees sometimes die, correct?

THE WITNESS: Yes, ma'am.

MS. WILSON: Does the natural death of a tree within the Project Area adversely impact your religious practices?

THE WITNESS: No, ma'am, it does not.

MS. WILSON: Okay. If a large number of trees died at once, for example, if the river bank suddenly subsided, would that adversely impact your religious practices?

THE WITNESS: Yes, ma'am, it would.

MS. WILSON: How would you -- would you be able to remedy that situation in any way if a large number of trees died naturally at once?

THE WITNESS: No, ma'am. There would be no remedy for that.

MS. WILSON: Also, in the natural course of events, new trees sprout and grow, correct?

THE WITNESS: Yes, ma'am.

MS. WILSON: Are those trees considered sacred under your religious beliefs?

THE WITNESS: Not at -- those trees have to have been sprouted from the previous generation of trees that was there before. So no, ma'am.

MS. WILSON: So they're only sacred if they generate -- are generated from the existing trees?

THE WITNESS: Yes, ma'am.

MS. WILSON: Okay. So would it be your position and your religious belief that new trees planted by humans are less sacred or not sacred at all?

THE WITNESS: Not sacred.

MS. WILSON: Of the 83 trees in the Project Area are you able to tell the Court which were planted by humans and which grew there naturally?

THE WITNESS: I am not able to do that, ma'am.

MS. WILSON: Are you aware that the current iteration of the Project Area calls for the planting of at least 22 new trees in the Project Area --

THE WITNESS: Would you just -- I'm sorry. Would you describe the word "adoration"?

MS. WILSON: Oh, I'm sorry. "Iteration."

THE WITNESS: "Iteration." Beg your pardon.

MS. WILSON: No. Certainly, it's my fault.

Are you aware that the current iteration of the City's bond project calls for the planting of at least 22 new trees after the wall construction is complete?

THE WITNESS: I understand that that's what the City's proposing, if that's -- answers your question.

MS. WILSON: Okay. So you do have an understanding of that?

THE WITNESS: Yes, ma'am, I do.

MS. WILSON: Why will those trees not be sufficient to prevent the Project Area from becoming, as you alleged, quote, “spiritually inert”?

THE WITNESS: First of all, you -- the City proposes to remove trees and replace them with new -- replanted trees that aren't -- aren't going to -- certainly they didn't root from the previous trees that were there. So that's a transplant as far as I'm concerned. And they're never going to grow to the height and the strength and in our -- in my opinion the power that the trees presently have now, not to mention the -- the loss of shade.

MS. WILSON: Do you have an understanding of why the City proposes to remove or relocate trees within the Project Area?

THE WITNESS: Yes, ma'am. I have an understanding.

MS. WILSON: And what is that understanding?

THE WITNESS: The understanding is that in order to redo the walls at Lambert Beach made in the WPA time, that the trees are going to have to be removed because -- at least your engineer says that we can't fix the walls without removing the trees.

MS. WILSON: Okay. And if the engineer is correct and the walls can't be fixed without removing the trees, doesn't the preservation of the trees in place just shift this problem to your children or your grandchildren and your great-grandchildren?

THE WITNESS: Can you rephrase or reask that question?

MS. WILSON: Sure.

So you just explained that your understanding is that the City proposes to remove or relocate trees – –

THE WITNESS: Uh-huh.

MS. WILSON: – – within the Project Area because it's necessary to repair the walls.

THE WITNESS: I understand that.

MS. WILSON: Okay. And you don't dispute that the walls need to be repaired, correct?

THE WITNESS: I don't dispute that. No, ma'am.

MS. WILSON: Okay. So if the City cannot repair the walls without moving or – – I'm sorry – – without removing or relocating trees, won't we have the same problem with the walls in the next generation or in two generations or in three generations?

MR. GUYNN: Objection, calls for speculation.

THE COURT: Overruled.

THE WITNESS: If you're asking me about whether – – are you asking me about the walls themselves or the removal of the trees?

MS. WILSON: So the problem I was referring to was the need to do construction in this Project Area to repair walls.

THE WITNESS: I think that it's necessary, but not to the extent that the City's going to carry it out.

MS. WILSON: Okay. So in connection with this preliminary injunction that you've requested, you've alleged that there are trees outside of the area that pose as great a safety risk or a greater safety risk than those inside the Project Area. Do you understand that?

THE WITNESS: Say it again.

MS. WILSON: In connection with your request for a preliminary injunction, you've contended that there are trees within Brackenridge Park but outside of the Project Area that pose as great a safety risk or a greater safety risk to the -- to the public than those that are inside the Project Area?

THE WITNESS: Well, ma'am, if -- I'm not an arborist. I don't know where that's coming from. I'm not a tree arborist, so I couldn't tell you which ones are any more unsafe than others. My concern is for the direct -- where we stand and where we pray.

THE COURT: Hold on just a minute. What document are you referring to? Either the complaint or the petition or an affidavit or both?

MS. WILSON: It's -- that is from the plaintiffs' proposed findings of fact.

THE COURT: Okay.

MS. WILSON: You've asserted in your complaint, and I think you probably heard your attorney say, the City did not commission a study to determine if it could achieve its government purpose related to the bond project while also accommodating your religious exercise, correct?

THE WITNESS: Yes. That's correct.

MS. WILSON: Okay. Are you aware of any policy, regulation, statute or other law that requires the City to commission a separate study of those?

MR. GUYNN: Objection, calls for a legal conclusion. The First Amendment clearly calls for such a study.

THE COURT: Sustained.

MS. WILSON: I object to the sidebar and the coaching of the witness. And I just asked what he was aware of. I wasn't asking for a legal conclusion.

THE COURT: You may answer.

THE WITNESS: Yes, sir. Yes, ma'am. I'm -- I'm not aware of the goings on of the City's projects and so forth and so on. I do know that our team has its own expert that says that -- that this project can be handled in a different way --

MS. WILSON: Okay.

THE WITNESS: -- without affecting the trees or as many trees.

MS. WILSON: Okay. Do you contend that there are other areas in the totality of Brackenridge Park that present the same public safety risks as those within the Project Area that are not currently fenced off?

MR. GUYNN: Objection, calls for expert opinion.

THE COURT: Overruled.

THE WITNESS: You know, ma'am, I -- like I said, again, I'm not an arborist, and I don't go to every single part of the park. My only concern is for this particular -- that is -- presently under assault. I appreciate that the safety of the people that come to this park is paramount, but I'm talking specifically about this part of the park. Yeah.

MS. WILSON: Okay. Do your religious ceremonies require a live double-crested cormorant to be physically present within the Project Area while you're doing the ceremony?

THE WITNESS: Yes, ma'am, it does.

MS. WILSON: All of them or particular ones?

THE WITNESS: Any type of cormorant. There are two: Neotropic and the double-crested cormorant. The relationship they have is that they're similar in type, belong to the same genus and hunt underwater.

MS. WILSON: Okay. I think my question wasn't clear. I was --

THE WITNESS: Okay.

MS. WILSON: I meant to ask: Do all of your ceremonies require a live double-crested cormorant or only particular ones?

THE WITNESS: Only -- only the ones in the -- the double -- the cormorant double-crested -- either type is necessary at that particular part of the river. We need to be able to stand at the very edge, look in the water and see our reflection, first of all, to make sure

that we're present, that the tree's there, that the nesting birds are there, guaranteeing the next generation, and the sky's above and the trees. Everything needs to be present.

MS. WILSON: Okay. You testified earlier that these are migratory birds, correct?

THE WITNESS: Yes, ma'am.

MS. WILSON: And so they go away and they come back?

THE WITNESS: Yes, ma'am.

MS. WILSON: Aren't there times of the year where you're doing ceremonies and there's no -- there's no double-crested cormorants --

THE WITNESS: There are -- there are some younger crested -- neotropic cormorants that stay and some double-crested. They do stay throughout the year. They don't leave. The more younger ones stay so they can mature. And then the older -- the older ones come back and mate with those that -- females that stayed behind, from my understanding.

MS. WILSON: Mr. Perez, are you familiar with an area of Brackenridge Park that's called "the wilderness"?

THE WITNESS: No, ma'am. The wilderness? No.

MS. WILSON: Okay. If the cormorants are not permitted to nest in the Project Area but they are nesting nearby, is that presence close enough for the spiritual equality -- excuse me -- the spiritual ecology that you claim is present and necessary in the

Project Area?

THE WITNESS: No, ma'am, it isn't.

MS. WILSON: If the cormorants don't have nests in the Project Area but they are in the trees and permitted to come into the area and fish in the area –
–

THE WITNESS: Uh-huh.

MS. WILSON: – – hang out in the area, for lack of a better word, is that sufficient for the spiritual ecology of that Project Area?

MR. GUYNN: Objection to form.

THE COURT: Overruled.

THE WITNESS: No, ma'am, it's not. Like I said before, when the – – there is a generation after generation. Like us, we come to this – – generations of people have been coming to Brackenridge Park for hundreds of years now for a ceremony and now to celebrate Easter. It's the same thing with these birds. When they're there, they're there to nest. They're there to show us that things further down the road, the next generation, is going to return. We as human beings do the same thing.

MS. WILSON: And so in your opinion if the birds are present in the Project Area but their nests are elsewhere in the park, that is not showing you that the next generation comes back?

THE WITNESS: No, ma'am.

MS. WILSON: I'm sorry. Mr. Guynn covered a lot of what I was going to cover, so I'm just trying not to be duplicative.

MS. WILSON: You mentioned during your testimony that in March of 2023 you experienced a loss in your family and desired to visit the Project Area to pray, correct?

THE WITNESS: Yes, ma'am.

MS. WILSON: And you testified that you weren't able to do so because the southern bank of the Lambert Beach area had already been fenced off at that point, correct?

THE WITNESS: Yes, ma'am.

MS. WILSON: Did you request permission from the City to enter that area to pray in March of this year?

THE WITNESS: No, ma'am. Under the circumstances, it was sudden and difficult to think about the process of going through all that. It would have been -- it wouldn't have answered directly to my emotional needs, my spiritual needs at the time, not to mention I, after that, got up and rushed to Ozona, Texas to comfort my family.

MS. WILSON: Sure. I'm very sorry.

THE WITNESS: Thank you.

MS. WILSON: You're aware, of course, that the park closes every night between 11:00 p.m. and 5:00 a.m., correct?

THE WITNESS: Yes, ma'am.

MS. WILSON: So when members of the Native American Church perform the Midnight Water ceremony, do they have to ask for special permission to enter the park?

THE WITNESS: No, ma'am, they don't. They wouldn't even attempt. That ceremony, Midnight Water, still survives as a tenet in individual churches and chapters throughout the U.S. and Canada. They -- no one will ever come to you during the nighttime, when those ceremonies are being held and the park is closed, to ask you for access.

MS. WILSON: Okay. So I guess I'm -- so does that ceremony not have to take place at midnight, or do you -- it takes place during normal opening park hours?

THE WITNESS: It can -- yes. It can take place. It can, when necessary, and when -- when needed or when we -- when there's a certain time of the year where the ceremonies take part during the day. Because Eridanus touches the horizon at Brackenridge Park every day. We just don't see it because of daylight. Okay?

And so there are certain -- there are certain things that we do it during the daytime that certainly, if I may, because the sun -- because you can't see Eridanus when the sun is out and it's on the horizon, that's kind of a cover for what we're doing. We don't want people to know that we're there doing what we're doing. It's supposed to be private. But when we do -- when we do perform it, I mean, in a -- in a ceremony in Oklahoma or Canada or wherever, it's done at night.

But let me add to that. We take advantage of living in San Antonio and being close to the river. I -- my home is not even ten minutes from that spot, where I can just pick up and go stand there, roll a tobacco cigarette for myself and pray. You know? We -- we have that convenience here, and we're very -- we're very blessed and very happy to do that.

There are folks in Canada that don't. And so they have to settle for performing the ceremonies at midnight, wherever they are.

MS. WILSON: And so there are members of the Native American Church who might never in their lifetime get to come and perform or witness a ceremony at the exact spot in the river --

THE WITNESS: Sadly. Sadly.

MS. WILSON: So you talked a little bit about some adaptations that practitioners or members of the Native American Church who don't live or have the opportunity to visit San Antonio might make to their practices. Have the practitioners in San Antonio modified their practices in any way previously to February of 2023 when the area was fenced off?

MR. GUYNN: Objection to form.

THE COURT: Overruled.

THE WITNESS: I couldn't answer that. If I understand your question, the -- right now the problem that we're talking about affects me directly. I can't speak for other members of other Native American Church chapters in the state of Texas.

MS. WILSON: Okay. Do you remember when the northern bank of the Project Area was fenced off?

THE WITNESS: No, ma'am, not directly. But I would have to say it was February of this year, about the same time the southern part of it was fenced off.

MS. WILSON: Okay. Did the temporary closure of the northern bank of the Project Area adversely impact your religious beliefs or practices?

THE WITNESS: If it was done only on the north side, it wouldn't -- the fence was on the other side of the trees, it was on the inside, on the northern bank. It would not have affected anything, provided we had access to the southern bank.

MS. WILSON: Okay. I want to talk a little bit about the peyote pilgrims and the pilgrimages. Every peyote pilgrimage is unique, correct?

THE WITNESS: As different as the tribes are themselves and their language.

MS. WILSON: And how many stops are there on the peyote pilgrimage?

THE WITNESS: Depending on how far you had to travel, you know, really. But there are typically four stops that pilgrimages going down to the peyote gardens for hundreds or thousands of -- there are four stops that are critical to reaching that point.

That would be the four fountain springs along I-35, Barton Springs being one of them, San Marcos, Comal and then, finally, the Blue Hole at Incarnate Word,

where adherents say they must absolutely be pure before they go down to the -- to the gardens. And they know -- they know that the Blue Hole's connected to the rest of the river through the park, identical to the constellation of stars in the sky.

MS. WILSON: Okay. And the Blue Hole is located on the campus of the University of Incarnate Word, correct?

THE WITNESS: Yes, ma'am. It's -- yes, it is.

MS. WILSON: Okay. And closing the -- or excuse me. Temporarily closing the Project Area does not affect access to the Blue Hole, correct?

THE WITNESS: No, ma'am, it doesn't.

MS. WILSON: Okay.

THE COURT: Except it's dry. It's closed now to everybody because there has been no rain. Mother Nature is just knocking the heck out of us, including the Blue Hole.

MS. WILSON: Unfortunately, the City doesn't control the rain. Although, I'm sure we were all glad last night to --

THE WITNESS: But if I may, the Blue Hole is -- it is astronomically connected to the constellation of Eridanus and the sky, too. You know, every -- the areas we're all talking about has an analogous star in the sky and in a proper order to be able to tell a story. Everything else on earth associated with the Blue Hole and the San Antonio River as it flows through the park

and the cormorants are part of that story. As above, so below.

THE COURT: You know, the Lion King calls it the Circle of Life.

THE WITNESS: Yes, sir.

THE COURT: Okay. Go ahead.

THE WITNESS: Thank you for that color, sir.

MS. WILSON: Can -- can somebody complete their peyote pilgrimage without calling upon you for guidance?

THE WITNESS: Most certainly. I encourage it, because it needs to -- that needs to thrive on its own without myself having to hold people's hands, yeah.

MS. WILSON: Since February of 2023, has any peyote pilgrim called on you for guidance or assistance in their pilgrimage and you were not able to fully assist them?

THE WITNESS: Yes, ma'am.

MS. WILSON: How many?

THE WITNESS: Three.

MS. WILSON: And I -- if I understand your prior testimony, I believe what you said was that you got as close as you could to the spot?

THE WITNESS: Yes, ma'am.

MS. WILSON: The proposed findings of facts that your lawyers have filed in connection with this request for preliminary injunction mentioned birthday blessings. Can you describe what a birthday blessing is?

THE WITNESS: So a birthday blessing, if I can -- can I go through the ceremony itself?

MS. WILSON: Sure.

THE WITNESS: Sure. The tenets, approaching the water. First of all, making sure -- I'm standing there. I can see myself in the water. The trees and the birds are there. The sky is blue. Dipping the cormorant feathers in the water, in which case we would have a bucket full of clean water, not water directly from the river, because it's not clean.

And then we would broadcast it in all directions, first giving -- paying homage to God's creation and then one last dip in the water and then blessing that person with that water, which is done in any ceremony, any overnight ceremony anywhere in the U.S. and Canada. We just happen to be there at the spot. We can do it at our convenience for something as -- as a birthday. Yeah.

But my people -- my people don't subscribe to having peyote ceremonies around birthdays, you know, just to be -- just to let you know that we're very particular about how we hold -- first of all, we have direct access to these ecological spiritual places, and we consider that a great privilege.

MS. WILSON: Okay. So for people who don't have the privilege of being in San Antonio, they can still get an

effective birthday blessing in Oklahoma or in Mexico or in Canada?

THE WITNESS: Certainly, unless it's a pilgrimage. When it's time to come to the gardens -- when it's time to come to Texas, the ceremony performed in a microcosm back home suddenly becomes a pilgrimage to the holy places, you know, that they understand where these tenets come from.

MS. WILSON: Okay.

THE WITNESS: Uh-huh. Pilgrimage is critical.

MS. WILSON: Since February of 2023, have you been able -- I'm sorry. Have you been unable to give somebody a birthday blessing who asked for one?

THE WITNESS: At that particular spot I haven't been able to. I haven't been able to take them to the edge of the river so they themselves see themselves in the reflection in the water. No, ma'am.

MS. WILSON: Okay. So did you perform the birthday blessing somewhere else?

THE WITNESS: Yes. I had to.

MS. WILSON: Your Honor, I know we're coming up on our lunch break, and I'm at a good stopping place.

THE COURT: Okay. All right. While I'm thinking about it, we'll take a break here and then continue. But I eat lunch frequently where the river runs through King William. Are you -- and there's a little park there.

THE WITNESS: Yes, sir.

THE COURT: You familiar with that?

THE WITNESS: Yes, sir. Yes, sir.

THE COURT: I can't see myself in the -- that water. Is the water clearer at Lambert Beach than --

THE WITNESS: It's -- the water's actually shallower and there's chemicals in it. You can even smell the chemicals in it because it's been processed. The water is shallower, yes, sir, and you can see your reflection in it.

THE COURT: Okay. All right. And you mentioned oak trees and cypress trees. What other kinds are there?

THE WITNESS: There are pecan trees.

THE COURT: Okay. And you're familiar with the formula to measure the age of a tree, of circumference divided by pi?

THE WITNESS: By pi. Yes, sir.

THE COURT: Okay. Have you done that?

THE WITNESS: I have not done that, sir.

THE COURT: Okay. And I'm skipping around here. Was this particular -- just curiosity, because I have a personal interest. This particular religious practice was what you grew up with or in a more traditional protestant or Catholic tradition or not, just whatever your history is.

THE WITNESS: Yes, sir. Well, I grew up in South Texas, Pearsall. Grew up in Pearsall.

THE COURT: Oh, yeah.

THE WITNESS: And my grandmothers were from Monterrey, Mexico. And when they came over to the United States, they brought their -- their -- what's it called? Folk medicine --

THE COURT: Uh-huh.

THE WITNESS: -- teachings with them. Peyote was certainly part of one of them. And when I -- when I joined the Native American Church in my twenties, I rediscovered that relationship, emotional spiritual relationship with -- with the peyote, and stuck to the church. And as I grew within the church, about 20 something years later, I found myself as keeper of its knowledge and its holy and sacred places.

THE COURT: And before age twenty, did you have a religious practice?

THE WITNESS: I was practicing primarily my Catholic religion, which I still do. I do both.

THE COURT: Okay.

THE WITNESS: Yeah.

THE COURT: All right. The reason I ask, I grew up in a protestant denomination, that we were in church a lot.

THE WITNESS: Yes, sir.

THE COURT: But at a certain point in my life I was now able to live in a forest. And I measured -- I age the trees and plant acorns. But I'll get back to that in a minute.

And so Mother one time said: Son, I wish you'd keep -- just start going back to church with us.

And I said: Mother, I go to church every day.

THE WITNESS: Yeah.

THE COURT: You do? Yeah. It's right outside, the forest I live in.

THE WITNESS: Amen. Uh-huh.

THE COURT: But now let me go back to the arborist part. You talk about this generational thing of trees and they have to be from the ones that sprouted from the others. Nowadays, which is a problem, in terms of natural germination, we go in and we mow.

THE WITNESS: Uh-huh. Clearcut.

THE COURT: Right. And so if there are any acorns that germinate and sprout, they're going to get cut.

And then the other problem in that area, and I haven't been there, but I know a lot of that area, like the zoo, for example, but others, you've got pavement. There's not a whole lot of places for an acorn to fall and germinate by itself.

THE WITNESS: Yes, sir.

THE COURT: Right?

THE WITNESS: Yes, sir.

THE COURT: So do you actually see that generational evolution?

THE WITNESS: No. We don't get to see it. What we walk away from, from generation to generation, we call that "everlasting man" in our cultures --

THE COURT: Right.

THE WITNESS: -- the passing on of teachings. Those -- those teachings get passed on through and through. And it includes and involves the trees and the birds and the sky and the river. And yes, it involves all of those things. But we always come back to the same place, just like the birds do. You always go back to that place.

THE COURT: Okay. But so my point is --

THE WITNESS: Yes, sir.

THE COURT: -- if the trees end up -- well, first of all, as we -- think we've talked about, they have a life.

THE WITNESS: Yes, sir.

THE COURT: I lost a 240-year-old Texas red oak about three years ago now.

THE WITNESS: Uh-huh.

THE COURT: I've now planted another one.

THE WITNESS: Uh-huh.

THE COURT: But none of -- trees nor us are going to last forever.

THE WITNESS: That's correct.

THE COURT: So if the -- separate and apart from the involuntary replacement, if they were to die, you wouldn't have any objection -- an actual death, you wouldn't have any objection to mature trees being brought in of the same type, correct?

THE WITNESS: I wouldn't think there's anything I could really do about that, sir, honestly. I'm not -- with all due respect, I'm not the one planting the trees. I don't have any control over that --

THE COURT: Right.

THE WITNESS: -- if the trees do fall. But, however, if I may, please, sir, Your Honor, there are trees still within this region, ladies and gentlemen, that are dead and are laying there and have laid there for 200 years, 300 years, 400 years, that are still used as markers --

THE COURT: Right.

THE WITNESS: -- for pilgrimages through this region.

THE COURT: Okay. All right. Very well. We'll recess until noon. Thank you.

(Recess at 11:03 a.m. until 12:01 p.m.)

THE COURT: You may proceed.
Ms. Wilson, you may proceed.

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MS. WILSON: Thank you, Your Honor. I have just, I think, a very few additional questions.

MS. WILSON: Hello, Mr. Perez.

THE WITNESS: Hello.

MS. WILSON: Sir, you individually don't own or have an ownership interest in Brackenridge Park, correct?

THE WITNESS: That is correct.

MS. WILSON: And you don't have a lease on any area of Brackenridge Park, correct?

THE WITNESS: No, ma'am.

MS. WILSON: And the same is true for the Lipan Apache Tribe of Texas?

THE WITNESS: No, ma'am. That's true. Yes. Thank you.

MS. WILSON: Thank you. Sorry if the question was a little confusing.

And the same is also true for the Native American Church, correct?

THE WITNESS: That is correct.

MS. WILSON: Can we look at P45 again and the page designated Brackenridge 006110. It's going to appear on your screen, so you don't have to shuffle through.

THE WITNESS: Can you repeat that?

MS. WILSON: Yes. It's -- it's Brackenridge 6110. It should -- he's going to pull it up on the screen for you.

THE WITNESS: Okay. Okay. Thank you.

THE COURT: We have the paper copy.

MS. WILSON: Yes.

THE WITNESS: We'll be fine.

THE COURT: You have that, Mr. Perez?

THE WITNESS: Yes, sir. I have that -- I heard 46. I was -- I should be at 45.

THE COURT: The bathing beauty pictures.

MS. WILSON: Yes. And could we zoom in on that bottom picture?

THE COURT: Yeah. That's it. That's it.

MS. WILSON: You remember looking at this picture when Mr. Guynn was --

THE WITNESS: Yes. Yes, ma'am.

MS. WILSON: And during your testimony you said that you recognized at least one tree from this picture that is still present in the Project Area; is that right?

THE WITNESS: Yes, ma'am, that I -- yes, ma'am. Uh-huh. On the right-hand side, it's most obvious one to me.

MS. WILSON: Okay. Is it -- the tree that is the closest

to the foreground on the right-hand side is the one you believe is still there?

THE WITNESS: No. The one behind it, the cypress tree behind it.

MS. WILSON: Okay. I don't know if there's a good way in the record to describe --

THE COURT: Well, it's the -- for the record we're looking at Figure 17, Bates stamped 6110, tab 45. To the right-hand of the black and white photograph of the bathing area, the Court observes three trees, one in the foreground, which appears to be a larger circumference than the one behind it, which I think -- Mr. Perez, is that the one you identify as having -- believing it still to be there?

THE WITNESS: Yes, sir.

THE COURT: And it -- and it curves a little bit to the right, correct, for the record?

THE WITNESS: Actually, from my point of view, Your Honor, it goes -- it's -- it's straight up. There's another tree behind that it may give it that -- that view.

THE COURT: Okay. Well, I see -- of the two behind the foreground tree, there's one that has a little bit of a curvature and then one that's completely straight.

THE WITNESS: Yes, sir. The one that's completely straight is the one I'm talking about.

THE COURT: That's the one you recognize?

THE WITNESS: Yes, sir.

THE COURT: Okay. All right. And have you ever measured the circumference?

THE WITNESS: No, sir. I never have.

THE COURT: All right. Go ahead.

MS. WILSON: Thank you, sir. You can pull that one down.

MS. WILSON: Could you please turn to Plaintiffs' Exhibit 9. And we'll look at the second page of that exhibit, which is COSA 0562.

THE WITNESS: On the screen?

MS. WILSON: Yes.

THE WITNESS: Uh-huh.

MS. WILSON: Do you remember looking at this variance request during your direct examination of Mr. Guynn?

THE WITNESS: Yes. I've seen that.

MS. WILSON: And could we blow up the section that says "background information."

Can you tell us what the filing date of this variance request is?

THE WITNESS: January 4th, 2022.

MS. WILSON: Okay. And after January -- excuse me.

After January 4th, 2022, are you aware that the City made changes to the bond project plan?

THE WITNESS: Yes, ma'am, if you're talking regarding the trees.

MS. WILSON: Yes.

And if we could look at P18. And actually, might be better to pull out the document viewer.

THE COURT: I'm sorry.

MS. WILSON: It feels very much like elementary school with the transparency machine.

THE COURT: Okay.

(Discussion off the record)

MS. WILSON: I'm going to zoom out first --

THE WITNESS: Okay.

MS. WILSON: -- so we can get a look at what we have on the screen here.

THE WITNESS: Uh-huh.

MS. WILSON: And it is -- oh, the Bates number is minuscule. But for the record it's COSA 0614. And do you recognize this at all?

THE WITNESS: Yes, I do.

MS. WILSON: Can you tell us what it is?

THE WITNESS: It's the bond -- the project that we're

talking about, the first phase at Lambert Beach. And the trees -- noted the trees and numbers identifying the trees at Lambert Beach.

MS. WILSON: Okay. And I'm going to zoom in now. And on my version do you see the little kind of rectangular area that is highlighted?

THE WITNESS: There's -- I see -- okay. The rectangular area, are you talking about the stairs?

MS. WILSON: Yes.

THE WITNESS: Okay.

MS. WILSON: Are those the stairs where you perform religious ceremonies?

THE WITNESS: Yes, ma'am.

MS. WILSON: Okay. And the -- there are two circles next to it. Do you know what those represent?

THE WITNESS: Trees --

MS. WILSON: Okay.

THE WITNESS: -- I understand.

MS. WILSON: And can you read into the record the tree numbers that have been highlighted on this copy?

THE WITNESS: Number 129 and 126.

MS. WILSON: And can you tell from the tree removal key in the corner how those trees are being treated under the City's bond project plan?

THE WITNESS: No, ma'am. Can you zoom out? Are you asking me to see something on the page itself?

MS. WILSON: Oh, I can scooch my page. Do you see the tree removal key?

THE WITNESS: Tree to be preserved. I can see that. And then -- but that's a dot. You drew a circle highlighting those trees? Was that a dot or a circle I just saw?

MS. WILSON: What -- do you want me to show you the key again?

THE WITNESS: Yeah. Show me the key again, please.

MS. WILSON: Here. And I'll turn it so you don't have to tilt your head so much. Oh, not that way, though.

THE WITNESS: Okay. I see a dot. But if that circle, that tiny circle serves as a dot, then I understand what you're saying.

MS. WILSON: Okay. From what you can understand about this plan, does it appear that the two trees --

THE WITNESS: Uh-huh.

MS. WILSON: -- on either side of the stairs, where you perform your ceremonies, are being preserved in place?

THE WITNESS: Yes, ma'am. I can -- I understand that.

MS. WILSON: Thank you so much, sir.

MS. WILSON: Your Honor, I have no further questions for this witness, and I'll pass.

(Discussion off the record)

THE COURT: All right. Redirect.

REDIRECT EXAMINATION

MR. GUYNN: Mr. Perez, do you remember when the City's lawyer, Ms. Wilson, was just asking you questions about religious ceremonies that other groups of indigenous people perform?

THE WITNESS: Yes, sir.

MR. GUYNN: Are you aware that some indigenous people perform certain religious ceremonies in areas other than the park?

THE WITNESS: Yes, sir.

MR. GUYNN: Are you aware that some indigenous people perform religious ceremonies in areas other than the Sacred Area?

THE WITNESS: Yes, sir, including.

MR. GUYNN: Including what?

THE WITNESS: Okay. So they're performed in other areas including that location.

MR. GUYNN: Okay. Do you believe in your religious belief that certain ceremonies can only be performed in the Sacred Area?

THE WITNESS: Yes, sir.

MR. GUYNN: Can those ceremonies be performed anywhere else?

THE WITNESS: No, sir.

MR. GUYNN: Are you bringing this case to save trees on the basis of their species?

THE WITNESS: No, sir.

MR. GUYNN: Are you bringing this case to save trees on the basis of their age?

THE WITNESS: No, sir.

MR. GUYNN: You're bringing this case -- are you bringing this case to preserve trees in order to protect the spiritual ecology of the Sacred Area?

THE WITNESS: Certainly, sir, their presence in the spiritual ecology.

MR. GUYNN: Does the spiritual ecology of the Sacred Area depend on the species of tree that exists there?

THE WITNESS: No, sir.

MR. GUYNN: Does the spiritual ecology of the Sacred Area depend on the age of trees that exist there?

THE WITNESS: No, sir.

MR. GUYNN: Does the spiritual ecology of the Sacred Area depend on the ability of the trees to connect with the lower, middle and upper worlds?

THE WITNESS: Yes, sir, they do.

MR. GUYNN: Does the spiritual ecology of the Sacred Area depend on the trees' ability to sustain nesting of migratory birds?

THE WITNESS: Absolutely.

MR. GUYNN: Is it your understanding that newly planted trees can connect the lower, middle and upper worlds?

THE WITNESS: No, sir.

MR. GUYNN: Is it your understanding that newly planted trees are capable of sustaining nesting by migratory birds?

THE WITNESS: No, sir.

MR. GUYNN: You testified earlier about the loss of your aunt and your niece in a tragic car accident, right?

THE WITNESS: Yes, sir.

MR. GUYNN: And you talked about how you had wished that you could go to the Sacred Area to pray?

THE WITNESS: Yes, sir.

MR. GUYNN: Was that for a religious or an emotional need?

THE WITNESS: That was for a religious need.

THE COURT: Or both.

THE WITNESS: Yes. Thank you --

THE COURT: Okay.

THE WITNESS: -- for your consideration, sir. Thank you.

MR. GUYNN: In what way was it a religious need?

THE WITNESS: A religious need -- so when someone passes, we understand that this is the place to go and petition for their safe travels through the underworld via the river and the constellation of Eridanus.

MR. GUYNN: Do you believe that it's possible to repair the retaining walls and preserve the spiritual ecology of the Sacred Area?

THE WITNESS: Yes, sir. Absolutely.

MR. GUYNN: Has the City tried to accommodate you?

THE WITNESS: No, sir.

MR. GUYNN: I have no further questions.

THE COURT: Okay. All right. I have a few other questions. First of all, repeat Mr. Guynn's words in terms of those three levels. And how do you -- and that spiritual concept, the --

THE WITNESS: Yes, sir. Thank you. The spiritual concept. So our presence there and when we look in the water and we see our reflection, we -- please.

THE COURT: No. Go ahead.

THE WITNESS: Okay. First of all, there's an underwater world. Our world tells us, before the creation of the universe or anything, that there is an underworld where there is darkness and it's cold and it's wet, hence the water.

And then there's a middle world where human beings exist. And we relate to that world.

And then there's the upper world, up in the sky. And the axis mundi, the tree with its roots and then its trunk and then its branches and then its leaves, way up -- way up at the top and the birds' nest on top is the upper world.

THE COURT: Okay. So the lower, the middle and the upper?

THE WITNESS: Yes, sir.

THE COURT: All right. So somewhat conceptually like the Old Testament phrase, from earth to earth, dust to dust and the earth, from whence we came.

THE WITNESS: Yes, sir.

THE COURT: Okay. All right. Well, my plan -- I've told you about the forest that I live in.

THE WITNESS: Uh-huh.

THE COURT: And the birds there, the migratory birds are the red-tail hawks. Are you familiar with those?

THE WITNESS: Absolutely.

THE COURT: Beautiful birds.

THE WITNESS: Yes, sir.

THE COURT: So my plan is to be spread out there and then come back as a red-tail hawk and watch over my forest.

All right. But I do want to ask you a question. Some of the -- one of the pictures we saw there on the river where -- the wall and at least one, if not two, of the trees were what I call "leaners." You remember those?

THE WITNESS: Uh-huh.

THE COURT: They were leaning over.

THE WITNESS: Yes, sir.

THE COURT: And, of course, they have some source of moisture, although we're seeing -- with the drought and all, we're seeing those kind of trees pop out because they don't have any water.

THE WITNESS: Yes, sir.

THE COURT: Now, you opined that -- and you're not an engineer, correct?

THE WITNESS: No, sir.

THE COURT: Okay. But you opined, I think the last question, that you think the walls can be repaired, to which you have no objection, correct?

THE WITNESS: I have no objection to the walls' repair.

THE COURT: But the trees can be saved?

THE WITNESS: I understand that -- from the engineer, Mr. -- Dr. Shafique, that the six trees -- only six trees need to be removed. The rest can be saved.

THE COURT: Okay. All right. Now, you heard your counsel referring to the elements that you have to and Ms. Torres have to prove in order to get past this stage of the proceedings. One of those was substantial likelihood of success, emphasizing the word "success" on the merits. So how would you as the plaintiff bringing this case define "success"?

THE WITNESS: That success would include both sides working together to --

THE COURT: Well, okay. That takes two to tango, but --

THE WITNESS: Yeah.

THE COURT: -- but -- and that would be wonderful. I heartily agree, that I wouldn't have to make a difficult decision.

THE WITNESS: I appreciate that.

THE COURT: But that's, at this point, not likely to happen. So one side's going to prevail, and one side -- the other side will prevail. But if you prevail, then the Court has to enter a judgment or an order, preliminary injunction, and eventually a final judgment, if you prevail, defining what "success" is.

THE WITNESS: Success would have -- means

that we would have kept as many trees as possible and allowed the cormorants to nest in the trees once again, put the spiritual ecology back into place.

THE COURT: Okay. Let me read you something I found about -- “the double-breasted cormorants are colonial water birds that seek aquatic bodies big enough to support their mostly fish diet.”

Have you seen them diving in or retrieving fish?

THE WITNESS: Absolutely, sir. I’ve watched them. And they spend 20 -- exactly 20 seconds under water looking for their prey.

THE COURT: Okay. They may roost and form breeding colonies -- or smaller lagoons or ponds and so forth, fly up to 40 miles to a feeding area.

But then the last part, “They tend to form breeding colonies in clusters of trees” or near -- “in or near water. After a while, masses of cormorant guano may kill these trees, and the trees may topple, at which point the cormorants may switch to nesting on the ground.”

Have you ever observed that phenomenon?

THE WITNESS: At the park I’ve never seen -- and I’ve looked for cormorants nesting on the ground.

THE COURT: Okay. Well, have you ever seen any damage to the trees by their guano?

THE WITNESS: Not in the Lambert Beach area, sir, no.

THE COURT: Okay. Somewhere else?

THE WITNESS: Somewhere else.

THE COURT: You've seen that?

THE WITNESS: Yeah. Off of I-10 and in Seguin, off the highway.

THE COURT: Okay.

THE WITNESS: Yeah.

THE COURT: Because they're -- it's acidic stuff.

THE WITNESS: Uh-huh.

THE COURT: So would you say, to the extent that trees are damaged and they topple, as this said, that that could be a danger, public safety?

THE WITNESS: I don't -- I don't know, sir. I don't think I could answer that professionally.

THE COURT: Are you familiar with the cedar elm limb that fell at the zoo?

THE WITNESS: I heard about it.

THE COURT: Okay.

THE WITNESS: Yes, sir. I did hear about that.

THE COURT: And, of course, I have a bunch of cedar elms, compared to the oaks. And the cedar elm limbs, they're weaker trees and they --

THE WITNESS: Uh-huh.

THE COURT: – – and they fall. Fortunately, I haven't been under one yet.

Okay. Well, do you want to add anything else to what your definition of "success" would be?

THE WITNESS: No, sir. Not at this time.

THE COURT: All right. Well, let me ask you this. Now, another element is harm. But it's not just harm. You remember that element? The noun "harm" is modified by a word in front of that. Do you remember that.

THE WITNESS: A prefix? I don't remember.

THE COURT: Well, an adjective.

THE WITNESS: Or an adjective. Okay.

THE COURT: Irreparable.

THE WITNESS: Irreparable, yes.

THE COURT: Well, obviously you perceive, and the Court agrees, that you and your group have been harmed because, otherwise, we wouldn't be here and you would not be seeking relief.

THE WITNESS: Thank you, sir. Yes.

THE COURT: Okay. All right. But the keyword then is "irreparable."

THE WITNESS: Yes, sir.

THE COURT: All right. Are you familiar with what

happened to the people in Paris who found a place called the Notre-Dame cathedral, that they find that to be a sacred place, as you find this location to be for you?

THE WITNESS: Yes, sir. I understand that.

THE COURT: All right. And you understand that until that is repaired, those people have to find somewhere else to worship?

THE WITNESS: Yes, sir.

THE COURT: Okay. And so have they been -- well, and then that reconstruction is in the process. They are scouring the forests of France to find the exact same kind of trees to build the beams with the same kind of craftsmanship as was done 6-, 700 years ago. You know about that?

THE WITNESS: Yes, sir.

THE COURT: Okay. But they're not going to be the same beams that were there, right?

THE WITNESS: Uh-huh. Right.

THE COURT: Okay. So trees die, trees get replaced. As we spoke before lunch, there's little likelihood that the trees that are there now are going to drop their seeds and prevail against human foot traffic or mowing or that sort of thing.

THE WITNESS: Uh-huh.

THE COURT: So to the extent that Notre-Dame within -- I think it's still a long time to go, but is

reparable, have those people been irreparably harmed if they can eventually go back to their sacred worship place?

THE WITNESS: No, sir, they haven't, if I understand what you're telling me.

But this is different. This is not the same. These are indigenous places of value that we've held for 10,000 years, at the very least. This isn't something that western European culture created and then replaced just -- no offense to you, sir, just like that. These things take time. They're reflective -- their presence over the thousand of years is reflected in our ceremonies.

I give you one example. The birds that were nesting there a hundred years ago gave away their tail feathers somewhere along the ground, and someone picked them up and included -- incorporated it into their prayer fans. And so that -- some of those birds for some time were -- continued on living. And so when those heirlooms are passed on from one generation to the next, it's evidence through story and through ceremony that it has a -- that fan has a pedigree that only nature can provide.

THE COURT: Right.

THE WITNESS: Not human beings. And so there's a continuance of that pedigree from one generation to the next, along with the story and ceremony.

THE COURT: Okay. All right. Well, I understand that concept. But then the tree concept, that the trees that are there now go back hundreds and thousands of

years to their ancestors?

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: Uh-huh.

THE COURT: All right. Ms. Wilson, anything on recross based on redirect or what the Court asked?

MS. WILSON: No, Your Honor. Thank you so much.

THE COURT: Mr. Guynn, anything on redirect based on what the Court asked?

MR. GUYNN: Your Honor, there may be some points of law that we may wish to address with the Court at another time but not with this witness right now.

THE COURT: Okay. All right. Very well. Thank you, sir. You may step down.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

GARY PEREZ and
MATILDE TORRES,

Plaintiffs,

v.

CITY OF SAN ANTONIO,

Defendant.

Case No. 23-cv-
00977-FB

San Antonio, Texas
September 25, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

TESTIMONY OF MATILDE TORRES

MR. GREIL: Good afternoon, Ms. Torres.

THE WITNESS: Hello.

MR. GREIL: Could you give your name for the record,
please?

THE WITNESS: Yes. Matilde Torres. M-A-T – – yes.
Matilde Torres.

MR. GREIL: And your city and state of residence?

THE WITNESS: San Antonio, Texas.

MR. GREIL: Are you affiliated with an indigenous tribe?

THE WITNESS: Yes, I am. I am affiliated with the Pakahua/Coahuiltecos in Coahuila.

MR. GREIL: And are you a member of the Lipan Apache, Hoosh Chetzel, Native American Church?

THE WITNESS: Yes.

MR. GREIL: Okay. Do you lead religious ceremonies?

THE WITNESS: I do.

MR. GREIL: Do you lead them in San Antonio?

THE WITNESS: I do.

MR. GREIL: What kind of ceremonies?

THE WITNESS: I lead a water pilgrimage from San Antonio all the way to Barton Springs, Austin, Texas.

MR. GREIL: And can you explain what a water pilgrimage is?

THE WITNESS: What we do is we start here in San Antonio and we put our prayers in. And so after that, we collect water. But since there's no water here in a spring, what we do is offer waters from other areas or the rain water that we get or collect. We offer those waters. And then from the next stops at the springs, which is New Braunfels, we collect water from there, and then collect water from the next stop, which is San Marcos, and then Barton Springs. And so we collect those waters and use that for our ceremony.

MR. GREIL: And what is your role in that ceremony?

THE WITNESS: My role is a water bearer.

MR. GREIL: Can you explain what you do in that role?

THE WITNESS: Yes. So that was given to me by -- I was a part of a group in Austin, Texas, by -- the leader's name is Rosa Tupina, as Moon Dance. And so I was given that role as a water bearer to pray with the water. So that would be the element that was given to me.

MR. GREIL: Do you use feathers during your ceremony?

THE WITNESS: Yes, we do. We do -- we use the water -- the water bird, the cormorant's feathers, during that ceremony before sunrise, because that cormorant -- or it's identical to a constellation in the sky, which is Phoenix, is why we use those feathers. And then we put them away and then that's -- and then we continue with our -- with our journey.

MR. GREIL: And where in San Antonio do you perform the water pilgrimage?

THE WITNESS: So right there at Brackenridge Park, at the southern bend of that river.

MR. GREIL: Did you hear Mr. Perez identify and see him identify a location as the site of those ceremonies?

THE WITNESS: Yes, I did.

MR. GREIL: Is that the same site that is your location for performing these ceremonies?

THE WITNESS: Yes, sir.

MR. GREIL: Your Honor, I know that you said all of the exhibits are in the record, but I'm wondering if I can introduce the book --

THE COURT: Sure.

MR. GREIL: -- by opposing counsel.

THE COURT: That's fine.

MR. GREIL: May I approach the witness because -- you have a copy of this, right?

THE COURT: No. I don't need one. I can look over her shoulder, if necessary.

MR. GREIL: Okay.

MR. GREIL: Ms. Torres, have you seen this book before today?

THE WITNESS: I have. I have one at home as well.

MR. GREIL: I'm going to open up to Page 11. And do you recognize this image?

THE WITNESS: Absolutely.

MR. GREIL: Okay.

MR. GREIL: Opposing counsel, do you have a copy of the book?

MS. WILSON: Yes. We have a copy.

MR. GREIL: Great. Page 11.

MR. GREIL: And what is this image?

THE WITNESS: It is the White Shaman mural, where a lot of our ceremonies, information and where – – it depicts the area of Brackenridge Park.

MR. GREIL: And can you read this caption that describes the mural here?

THE WITNESS: Yes. “Hunter-gatherers like those staying in the future Brackenridge Park drew this mural some 4,000 years ago in the shelter – – in a shelter west of San Antonio.”

MR. GREIL: Okay. And can you read this paragraph that begins “by the early 18th century”?

THE WITNESS: “By the early 18th century the Spanish encountered Coahuiltecan tribes throughout South Texas and as far north as the Colorado River. These tribes were often found together with other non-Coahuiltecan groups in rancherias, areas where they gathered for mutual aid and protection from the Apache. Spanish missionaries brought many potential Catholics into mission complexes, five of which were built between 1718 and 1731 along nine miles of San Antonio River south of San Antonio.”

MR. GREIL: And are you a member of the Coahuiltecan people?

THE WITNESS: Yes, the Pakahua people.

MR. GREIL: You said that this mural depicts Brackenridge Park. Can you – – can you identify what you mean by that?

THE WITNESS: Yes. So here, Your Honor, this is the shape of the river, of the San Antonio River. That is your Eridanus river. And so --

MR. GREIL: And is the Blue Hole spring represented on that --

THE WITNESS: Yes, sir.

MR. GREIL: -- mural?

THE WITNESS: So that would be this first spring right here.

MR. GREIL: Uh-huh.

THE WITNESS: That is your -- your San Antonio Blue Hole. And so the other springs that we mentioned are also here, which is part of the water pilgrimage. And so that would be your New Braunfels Spring, your San Marcos Spring and Barton Springs right there. So those are your four springs that connect to this San Antonio River, which for us is Yanaguana spirit waters. But also there is a bird between the river and the Blue Hole.

MR. GREIL: And what type of bird do you believe that represents?

THE WITNESS: I believe it -- well, for us, you know, according to the creation story, you know, there is the cormorant, you know, the water bird that gave life to this region. So, again, we have cormorants. And then we also have the migratory birds that come, you know, all the way from South America, central Mexico, into, you know, United States and throughout.

MR. GREIL: And does the cormorant correspond to a constellation?

THE WITNESS: Yes. It's the Phoenix constellation.

THE COURT: Okay. And that mural is on a wall, or does it say where that is from or --

THE WITNESS: Yes. It's at the lower -- west lower Pecos, out in Comstock.

THE COURT: Right.

THE WITNESS: Yeah. Lower Pecos.

THE COURT: Okay. And the Devil's River and --

THE WITNESS: Right.

THE COURT: I've been out there.

THE WITNESS: Out that area.

THE COURT: Does that have a date on it?

MR. GREIL: The mural --

THE COURT: Well, I guess they could carbon date it.

MR. GREIL: -- is about 4,000 years old.

THE COURT: Okay. All right. So for the record then, we need to take a picture of that page and the mural.

And, Mr. Jones, given that you all brought this book, any objection to that?

MR. JONES: There's no objection to that. Or we can just tender a copy of the book.

THE COURT: Well, I don't want to keep -- put the whole book in there.

MR. JONES: Okay. Whatever your preference is, is fine.

THE COURT: Yeah. That's fine. Okay. Thank you, sir.

And so, Ms. Herndon, let's not forget to do that. So . . .

MR. GREIL: And I offer this as Plaintiffs' Exhibit 52, *Brackenridge: San Antonio's Acclaimed Urban Park* by --

THE COURT: And -- and the particular pages that we referenced?

MR. GREIL: Pages 10 and 11.

THE COURT: Okay. Very well.

MR. GREIL: Okay. Ms. Torres, why is the sacred location where you perform your ceremonies?

THE WITNESS: Where is it or --

MR. GREIL: Why -- why do you perform your ceremonies at the sacred location in Brackenridge Park?

THE WITNESS: Okay. Because it is connected to the Blue Hole and, also, there is a creation story that ties

in that area, but also where the shape of the river mirrors the constellation of Eridanus. So, you know, that spiritual connection is connected with our cosmology.

MR. GREIL: And did you hear Mr. Perez describe the concept of sacred ecology or spiritual ecology?

THE WITNESS: Yes.

MR. GREIL: Can you -- do you believe in a spiritual ecology of that area?

THE WITNESS: Yes, I do. So knowing that it's Yanaguana spirit water and it's being sung, you know, through many tribes, all the way to Canada, to central Mexico, to South America, and knowing that it's that location, but also where, you know, the birth of what makes our city, San Antonio. It's the birthplace of San Antonio, right?

And so we don't identify the San Antonio River as just San Antonio River. I think it's Yanaguana, you know, spirit waters. And so it's what gave birth. It's a place of birth. It's a place of rebirth, but it's also a place of the afterlife. And so when you see this taking place at the southern bend of the river, that some might say, oh, it's just a bent shape of the river.

But it's critical because that's where, as women, as a woman -- I'm going to speak on behalf -- that for me, it's a connection -- it's the umbilical. It's a birth canal, you know? It's what gave birth to these springs. And not just one spring. It's what gives birth to those four springs, you know.

MR. GREIL: And so is -- is it religiously significant where the cormorants are nesting in that area?

THE WITNESS: Yes, absolutely.

MR. GREIL: Why?

THE WITNESS: You know, the -- the water bird is what gave life, you know, to that region and it's what takes our prayers, you know, to the heavens, you know.

And one of the things that I like to also -- it's almost as, you know, you walk into a church, depending on your beliefs, you know, you have the doce, you know. Well, it's the same meaning for us, you know, this -- the water bird, right? It's part of the -- of life.

MR. GREIL: If the -- if the water bird is not nesting in that area, are you able to perform the ceremonies that you need to for your religion?

THE WITNESS: No.

MR. GREIL: Why not?

THE WITNESS: Because if we don't have the birds there, it's not something that continues. It's not surviving as a creation -- or the story being told. You know, it's important that that story continues to be told there at that location because that's where the water bird gave life. So it's important for it to nest.

MR. GREIL: And you mentioned Yanaguana earlier. Are you aware of other tribes that place a religious significance on Yanaguana?

THE WITNESS: Yes. My understanding, the Poncas still practice that way of life, the Comanches, the Canadians and, you know, others that, you know, perhaps we don't know about. But I mean, a lot of them sit up and still continue to worship that way. And, again, let's keep in mind, it's the song as well, Yanaguana. It's a place where we know it's at. It's here in San Antonio.

MR. GREIL: So do only indigenous persons in San Antonio sing Yanaguana songs?

THE WITNESS: No. It's -- it's being sung throughout.

MR. GREIL: Okay. Have you been prevented from participating in a ceremony?

THE WITNESS: Yes, I have.

MR. GREIL: When was that?

THE WITNESS: It was on August the 12th of this year and September the 21st.

MR. GREIL: Let's talk about the August the 12th ceremony. What kind of ceremony did you want to perform?

THE WITNESS: What we wanted to do is stand at the edge of the river and make our offerings and, you know, touch those water bird feathers or cormorant feathers with the water and, you know, bless the four directions. And so we were not able to stand at the edge of the river and, you know, stand there.

MR. GREIL: And about how many people would have

participated?

THE WITNESS: Between 15 and 20.

MR. GREIL: And about how long would that ceremony take?

THE WITNESS: No more than 25 minutes or so.

MR. GREIL: Did you inform the City that you wanted to perform this ceremony at this place and date?

THE WITNESS: Yes, I did.

MR. GREIL: Did they allow you to?

THE WITNESS: No.

MR. GREIL: Did they offer alternative locations?

THE WITNESS: Yes, they did. They offered, I believe, on each side of the bridge within that area.

MR. GREIL: Could you substitute those alternative areas for the Sacred Area?

THE WITNESS: No.

MR. GREIL: Why not?

THE WITNESS: You know, it's almost as if we're being asked to walk into the side of the door of a church and stand on the side of the building, you know, or the side of an altar. And so that would not have been the same, I think, for us. When we look and we stand at the southern bend -- bank of the river, it's because we're looking directly north. And so directly north for us,

some of the teachings that have been passed on is that it's where our ancestors have laid to rest.

And so one of the things that I like to point out is if we're looking north, we're looking towards, you know, the headwaters. We're looking towards the Olmos Basin where there is a gravesite there. So that is who we are connecting to, honoring the people that have passed, who are there, still buried.

MR. GREIL: So if you're located on a section of the river where, if you were looking into the water, you looked west, would that be an acceptable substitute --

THE WITNESS: No.

MR. GREIL: -- for your religious ceremony?

THE WITNESS: No.

MR. GREIL: Okay. Did you end up holding the ceremony or participating in a ceremony on August 12th?

THE WITNESS: Yes.

MR. GREIL: Was it -- where did you perform it?

THE WITNESS: About the same -- southern bank of the river but outside the fence where the fence is off -- I mean, where it's fenced off, we were standing outside that fence.

MR. GREIL: And were you okay with performing in that location?

THE WITNESS: No. But that's -- we need to still

stand there for that moment in time to, you know, have our ceremony.

MR. GREIL: As a religious matter, did it harm you to perform in a location that was not at the sacred site?

THE WITNESS: Spiritually it does, it does, because to see her -- and I say "her" because it is Mother Water, that location. It's -- you know, to see her in a fence or a cage, it's very hurtful, you know.

MR. GREIL: Is that an injury that can be fixed today? The injury that you suffered on August 12, is that something that can be fixed today to go back and take that harm away from you?

THE WITNESS: To access that area, to go inside that area, I mean --

MR. GREIL: That would allow future ceremonies to be performed?

THE WITNESS: Yes.

MR. GREIL: If you were able to perform future ceremonies at that site, would that make the past denials of access okay with you?

THE WITNESS: Not sure what your question is.

MR. GREIL: Would it have -- would it still cause you a religious harm -- okay. So on August 12 was your inability to perform the ceremony, did it cause you a religious harm?

THE WITNESS: Yes. Spiritually, yes.

MR. GREIL: Can we -- can we do anything today to put that toothpaste back in the tube?

THE WITNESS: To -- for us to allow to be in that area, it's -- it's how we would be okay, by allowing us to access that area again.

MR. GREIL: Okay. Do you have future ceremonies that you desire to perform at this sacred site?

THE WITNESS: We are having Indigenous Day again. So that would be October the 9th of this year that I --

MR. GREIL: Do you perform -- oh, sorry.

THE WITNESS: -- that I would like for that -- to access that area for, you know, for offerings and so forth.

MR. GREIL: Do you perform religious services during that -- during it --

THE WITNESS: The gathering on Indigenous Day?

MR. GREIL: Yes.

THE WITNESS: Yes. Yes.

MR. GREIL: Did you hear Mr. Perez refer to the Midnight Water ceremony?

THE WITNESS: Yes.

MR. GREIL: Do you intend to participate in a Midnight Water ceremony that's upcoming?

THE WITNESS: Absolutely.

MR. GREIL: Okay. If the City let you perform the Midnight Water ceremony at midnight, would you take them up on that offer?

THE WITNESS: Of course.

MR. GREIL: Are you Catholic?

THE WITNESS: Yes.

MR. GREIL: Have you -- are you familiar with Catholics having Midnight Mass for Easter?

THE WITNESS: Midnight Mass for Easter?

MR. GREIL: Or sorry. For Christmas.

THE WITNESS: For Christmas, yes.

MR. GREIL: Have you ever attended a Midnight Mass?

THE WITNESS: I have.

MR. GREIL: Does Midnight Mass have to start at midnight?

THE WITNESS: No. I mean, the way things are now, some things have been removed, you know. But, you know, when you want to compare either or -- I mean, our ceremonies for us as peyote ceremonies, we would start either 8:00 or 9:00, so not -- it doesn't always start at midnight. You know, there's other things that happen before --

MR. GREIL: Uh-huh.

THE WITNESS: -- for other alignments taking place.

THE COURT: How long do they last?

THE WITNESS: The ceremonies?

THE COURT: Uh-huh.

THE WITNESS: From sunset to sunrise, sir. I mean, peyote ceremonies, it's from sunset to sunrise. It's an all-night ceremony.

THE COURT: Okay.

MR. GREIL: And on the August 12th request, did you offer that the City could have an arborist accompany you during the ceremony to keep the area safe?

THE WITNESS: Yes.

MR. GREIL: Are you aware of the City taking you up on that offer?

THE WITNESS: No, they didn't.

MR. GREIL: Would you have a problem with the City removing a dead branch that was hanging and posed a danger to people within the fence area?

THE WITNESS: No.

MR. GREIL: If there were a dead tree that was -- that was dead and posed a danger to people within the fenced area, would you have a problem with the City removing a dead tree?

THE WITNESS: No.

MR. GREIL: Would you have a problem with the City repairing the walls if it were done in a way that preserved the spiritual ecology --

THE WITNESS: No.

MR. GREIL: -- of the area?

THE WITNESS: No.

MR. GREIL: We're going to talk a little bit about your interactions with the City. Before you filed this lawsuit, did you inform the City of your religious practices and how the bond project impacted them?

THE WITNESS: Yes.

MR. GREIL: Do you remember when you did that?

THE WITNESS: I began from last year of perhaps maybe January the 22nd, when we first had the meeting --

MR. GREIL: Uh-huh.

THE WITNESS: -- that was the first time I did share with them the creation story and so forth.

MR. GREIL: And did you testify at a April 19, 2023 Historic Design and Review Commission hearing?

THE WITNESS: Yes.

MR. GREIL: And did you testify at an August 3rd, 2023 city council hearing?

THE WITNESS: Yes.

MR. GREIL: Okay. Could you open the binder to tab 16, Plaintiffs' Exhibit 16?

THE WITNESS: 16, you said?

MR. GREIL: Yes.

THE WITNESS: Uh-huh.

MR. GREIL: And can you -- can you tell me what you see on that page?

THE WITNESS: It is a email sent to Jamaal Moreno about the opposition letters.

MR. GREIL: And did you send an email to the City involving opposition letters?

THE WITNESS: Yes, I did.

MR. GREIL: And if you review the next pages of this exhibit, on the next two pages do you see a page from the Lipan Apache Band of Texas?

THE WITNESS: Yes, I do.

MR. GREIL: Did you provide -- do you know what that letter is?

THE WITNESS: Yes. It's an opposition letter opposing to the 2017 bond project, their removal of the trees and so forth.

MR. GREIL: And did you provide that opposition letter to the City?

THE WITNESS: Yes.

MR. GREIL: And on the next page, this is Brackenridge 004991, there's a Comanche Nation letterhead dated March 21, 2022. Do you know what this document is?

THE WITNESS: Yes. It's also another opposition letter from the Comanche Nation opposing to the removal of the trees and birds and forth of Yanaguana.

MR. GREIL: And does this letter invoke the religious ceremonies that are associated with -- with the birds in that area?

THE WITNESS: Yes.

MR. GREIL: Did you provide this opposition letter to the City?

THE WITNESS: I did.

MR. GREIL: And on the next page, do you see a letter captioned "Lipan Apache Tribe" from the Lipan Apache Tribe of Texas, dated March 18, 2022?

THE WITNESS: Yes.

MR. GREIL: And do you know what this letter is?

THE WITNESS: Yes. It's another opposition letter opposing to the 2017 --

MR. GREIL: Did you --

THE WITNESS: -- bond project.

MR. GREIL: -- and did you provide that letter to the City?

THE WITNESS: Yes.

MR. GREIL: Are you aware of any changes that the City made to the bond project as a result of these opposition letters?

THE WITNESS: No.

MR. GREIL: Did you provide your personal religious objections to the bond project at these public hearings?

THE WITNESS: Yes.

MR. GREIL: Are you aware of any changes that the City has made to the bond project in response to your religious practices?

THE WITNESS: No.

MR. GREIL: When I use the phrase “bird deterrence measures,” do you know what I’m referring to?

THE WITNESS: The way that the birds were being harassed and displaced from the area? Yes.

MR. GREIL: Did you inform the City of your religious objections to the way in which they were performing bird deterrence?

THE WITNESS: Yes.

MR. GREIL: Are you aware of any changes that the City has made to its bird deterrence implementation as a result of your religious practices?

THE WITNESS: Not at all.

MR. GREIL: And are you able to access the southern portion of the Project Area right now?

THE WITNESS: No.

MR. GREIL: Why not?

THE WITNESS: It has -- it's been fenced off.

MR GUYNN: Are you aware of -- has the City made any changes to that fencing situation as a result of your religious practices?

THE WITNESS: No.

MR. GREIL: Did you hear the City counsel's opening statement this morning?

THE WITNESS: Yes.

MR. GREIL: And he presented some pictures of fallen or dangerous trees. Were any of those on the southern portion where you perform your ceremonies?

THE WITNESS: No.

MR. GREIL: Are you aware of any trees that have fallen in the area of where you perform your ceremony?

THE WITNESS: No, sir.

MR. GREIL: If a tree fell in the zoo, would it affect the safety of your ability to perform a ceremony in the site you need to perform it?

THE WITNESS: No.

MR. GREIL: Why did you send these opposition letters to the City?

THE WITNESS: One of the things, it was trying to, you know, tell them that there is still other tribes very connected to this area, you know, and wanting, you know, indigenous involvement in this project as well, you know. They failed to communicate or reach out to any of the tribes, you know, about this project or removal of the trees, everything that was going on.

MR. GREIL: And can you explain the connection between the presence of trees in the -- in the fenced-in area, the birds nesting, and how that impacts the spiritual ecology of the area?

THE WITNESS: Okay. Repeat that question.

MR. GREIL: Sure.

Why -- why do birds need to nest in the Project Area for you to be able to perform your religious ceremonies?

THE WITNESS: It's for that storytelling to continue to survive for the next future generations, you know. It has to continue. You know, it's where it began, again, telling that creation story, so it must continue and survive for the next generation.

MR. GREIL: And if the bond project was implemented in its current state, would you be able to perform that ceremony in light of the impact on the birds in the area?

THE WITNESS: Can you rephrase that --

MR. GREIL: Sure.

THE WITNESS: -- question --

MR. GREIL: If the bond project is implemented as the City has proposed it, will its impact -- will it have an impact on the cormorants, that would affect your ability to --

THE WITNESS: Yes.

MR. GREIL: And why would that affect your ability to perform religious services?

THE WITNESS: To not have the birds there or the trees, it's -- again, if you walk in an altar and you don't see that cross or you don't see that dove, you know, it would be meaningless, you know. It wouldn't have any meaning. It'd be gone forever. And that's what we have here. Everything that they want to do, it'd be gone forever. You can't replace that.

MR. GREIL: And when you describe -- when you experience the spiritual ecology, does the -- does the specific age of each tree determine whether the spiritual ecology is intact?

THE WITNESS: The age of the trees? I think, to my knowledge, it's what we have there, right? It's not, it has to be a hundred years, or we're not going to give it a specific age, but those trees have been there, and that is where the rookery is. And it's a tree canopy as well. And it's one of the last rookeries where the birds can continue to tell that story, you know. And, again, it's the shape of the river. It's what tells that story as well, you know, everything there.

MR. GREIL: And do you believe that your ancestors have placed religious significance on this area for multiple generations?

THE WITNESS: Yes.

MR. GREIL: Do you believe that it's for hundreds of years?

THE WITNESS: Yes.

MR. GREIL: Do you believe it's for thousands of years?

THE WITNESS: Yes.

MR. GREIL: Do you think that the same trees that were there a thousand years ago are the standing trees in that location today?

THE WITNESS: No. I wouldn't -- I wouldn't put it like that, you know. Again, we don't have an actual age of these trees. But it's -- I believe, like Your Honor said, you know, if the seeds fall, it continues, right? You get new trees. So I believe this is what's been taking place here, right? Those seeds keep falling, and those trees keep growing, right? And yes, based on what I, you know, see, I mean, trees do die, but it's still a continuation of what's there.

MR. GREIL: So if there was -- have you ever measured the circumference of a tree?

THE WITNESS: No, I haven't.

MR. GREIL: Why not?

THE WITNESS: I just -- I have to --

MR. GREIL: Yeah.

Are you objecting to the bond project because you don't like the way that it looks?

THE WITNESS: No.

MR. GREIL: Are you objecting to the bond project because it doesn't line up with the hundred-year-old history of Lambert Beach?

THE WITNESS: No.

MR. GREIL: Are you objecting to the bond project because of environmental reasons?

THE WITNESS: No.

MR. GREIL: Why are you objecting to the bond project as it's being implemented?

THE WITNESS: Because they're about to destroy the spiritual ecology that connects to our cosmology that's been there for thousands of years. And it's, you know, disrupting a tenet, you know, within our ceremonies. And the ceremony is how they survive.

MR. GREIL: Thank you.

No more questions, Your Honor.

THE COURT: Okay. While I'm thinking about it, and for everyone's interest, but when we -- when we break today, if you haven't noticed it, the mural in the atrium is abstract, obviously. But it's been explained by the artist -- and once you hear the explanation, you can see it. It has the waters of San Antonio

symbolized. It has the interstate or the roads -- the red lines are the roads. And then at the intersection of -- in the middle, I can't remember -- Yanaguana or the San Antonio River is one, and you've got the San Pedro Creek and all that sort of thing.

THE WITNESS: Uh-huh.

THE COURT: But then you have two symbols that are like this (indicating) to the -- just to the right of that north/south/east/west intersection --

THE WITNESS: Uh-huh.

THE COURT: -- and those are to symbolize the scales of justice. And then you'll also see at the outside, west side of the building, an artistic piece with balls. And then on the -- in the atrium there's one like this. And those are to symbolize the scales of justice, also.

All right. Cross-examination by the defense.

MS. WILSON: Thank you, Your Honor.

CROSS-EXAMINATION

MS. WILSON: Good afternoon, Ms. Torres.

THE WITNESS: Good afternoon.

MS. WILSON: I think we can maybe shortcut quite a bit of the cross-examination here this afternoon, if the Court will indulge us.

Did you hear Mr. Perez's answers to my questions earlier about the religious observations in the Project Area and the trees and the birds and the presence and

that line of questioning?

THE WITNESS: Yes.

MS. WILSON: Is there anything in Mr. Perez's answers that you would answer differently?

MR. GREIL: Objection, Your Honor. That's very vague.

THE COURT: Overruled. If she wants to. Go ahead.

MS. WILSON: So you may answer.

THE WITNESS: No. I wouldn't be able to answer that.

MS. WILSON: Okay. So -- and I'm just trying to give you the *Reader's Digest* and trying to get -- to avoid repetitive questions and repetitive answers.

THE COURT: Good. We like that.

MS. WILSON: I will ask you some -- some slightly repetitive questions, but I think they were less about general beliefs and rather more about experience.

Ms. Torres, are you ever called upon to give individuals birthday blessings in the Project Area?

THE WITNESS: No, I'm not.

MS. WILSON: Okay.

THE WITNESS: I'm not there yet. I'm not an elder.

MS. WILSON: Okay. And do you guide peyote pilgrims in the area when they come down to do their

pilgrimage?

THE WITNESS: No.

MS. WILSON: Okay. You talked a little bit about your -- the Indigenous Peoples' Day camp-out that you did, I think it was in 2022, correct?

THE WITNESS: Yes.

MS. WILSON: And you used the Joske area pavilion for that activity?

THE WITNESS: Yes, I did.

MS. WILSON: And did you receive a permit from the City to do that?

THE WITNESS: Yes, I did.

MS. WILSON: Okay. And you just went through the normal permitting process, just like everybody else would, right?

THE WITNESS: Yes. Well, I paid for the reservation. And so the permit was for the teepees to be allowed or for anybody that was coming in from out of town, that they would have a place to stay and camp out in the area.

MS. WILSON: Okay.

THE WITNESS: Uh-huh.

MS. WILSON: You don't have an ownership interest in Brackenridge Park in total or in the Project Area specifically, correct?

THE WITNESS: I don't have a -- what, ma'am?

MS. WILSON: An ownership interest.

THE WITNESS: No.

MS. WILSON: You don't have a lease for Brackenridge Park or the Project Area, correct?

THE WITNESS: No.

MS. WILSON: Can we look at Plaintiffs' 16, please, on the screen.

THE WITNESS: 16, you said?

MS. WILSON: Yes. And Mr. Kruger is going to pull it up on the screen as well.

THE WITNESS: Okay. Are we looking at the same -- the opposition -- okay.

MS. WILSON: Yes. And can we look at the second page, which is Bates labeled Brackenridge 004989 --

THE WITNESS: Okay.

MS. WILSON: -- see that on your screen? Can you tell us the date of this letter from the Lipan Apache Band of Texas?

THE WITNESS: Yes. That is May the 20th of 2022.

MS. WILSON: Okay. And if we turn to Brackenridge 004991 --

THE WITNESS: Uh-huh.

MS. WILSON: -- can you tell us the date of that letter?

THE WITNESS: Yes. March 21st of 2022.

MS. WILSON: And if we turn to the last page, Brackenridge 004992, can you tell us the date of that letter from the Lipan Apache tribe?

THE WITNESS: Sure. That's March 18, 2022.

MS. WILSON: And neither the Lipan Apache tribe, nor the Comanche tribe -- or I'm sorry -- the Comanche Nation, nor the Lipan Apache Band of Texas have joined this lawsuit, correct?

THE WITNESS: Have joined the lawsuit?

MS. WILSON: Yeah. They're not parties in the lawsuit, correct?

THE WITNESS: No. Because we are the indigenous people here in San Antonio as the Pakahua people.

MS. WILSON: I object. Nonresponsive.

THE COURT: Overruled.

MS. WILSON: You mentioned that you use cormorant feathers in your religious ceremonies. Do you have to have permits to possess those cormorant feathers?

THE WITNESS: No.

MS. WILSON: Okay. Professor Greil asked you some questions about the necessity of cormorants nesting in the area where you do your ceremonies. I just want to

drill down a little bit on that. For you to be able to perform ceremonies in the way you're telling the Court is necessary for your religious beliefs, do nests have to actually be present in the Project Area?

THE WITNESS: The birds have to be present.

MS. WILSON: Okay. So if the birds build their nest half a mile away in a different tree but are able to fly into the area, fly over the area, eat in the area, that is sufficient for your religious purposes?

THE WITNESS: I don't understand your question.

MS. WILSON: So we've -- we've looked at maps of the Project Area, correct?

THE WITNESS: Right.

MS. WILSON: And it is approximately two acres, a little bit less than two acres, correct?

THE WITNESS: Uh-huh.

MS. WILSON: So if the birds -- if the cormorants establish a rookery and build a nest half a mile away in trees that are outside of that Project Area, but they can still fly into the Project Area, they just don't build their nests there, is that presence of the birds sufficient for your religious purposes?

THE WITNESS: No. They must continue to nest in that area.

MS. WILSON: When you're saying "in the area," you're saying they have to nest in the Project Area?

THE WITNESS: Yes.

MS. WILSON: What if the birds naturally move their rookery on their own without deterrence efforts by the City. Would that destroy the spiritual ecology of the Project Area, in your opinion?

THE WITNESS: To my knowledge, I don't think that's what I'm looking at here. So the birds do have other areas to nest, but that is one of their areas that they have continued to nest and continue to tell that story.

THE COURT: Go ahead.

MS. WILSON: Can we look at -- excuse me -- Defendant's Exhibit 10, please.

Ms. Torres, have you ever -- oh, it's up on the -- it's not in your book because it's a defendant's exhibit. But it's up on the screen.

THE WITNESS: Uh-huh.

MS. WILSON: Have you ever seen this document before?

THE WITNESS: No.

MS. WILSON: Okay. Were you aware that the City composed a committee to evaluate its tree removal plans in May of 2022?

THE WITNESS: No.

MS. WILSON: Okay. And of the indigenous opposition letters we looked at, two of them were dated prior to this committee being formed, correct?

THE WITNESS: Yes. Two of them. Uh-huh.

MS. WILSON: Okay. Is there any -- oh, we can take that down. Thank you.

Is there any way that the City could perform its bird deterrence that would satisfy your religious concerns?

THE WITNESS: No.

MS. WILSON: I think in your testimony just a moment ago you talked about recently being invited or elevated to being a moon dancer; is that right?

THE WITNESS: Yes.

MS. WILSON: Okay. And you lead -- we can look at D50, five zero. You lead that moon dancer ceremony in 2020 correct?

THE WITNESS: It's not a moon dance ceremony.

MS. WILSON: Or -- I'm sorry.

THE WITNESS: It's a water pilgrimage.

MS. WILSON: Okay. I apologize.

THE WITNESS: Uh-huh.

MS. WILSON: So you led that ceremony in 2020 -- or that pilgrimage -- I'm sorry -- in 2020. And do you recognize the document that is on the screen in front of you?

THE WITNESS: Yes.

MR. GREIL: Your Honor, we're going to object to this exhibit.

THE COURT: Pull the mic closer.

MR. GREIL: Your Honor, I'm going to object to this exhibit because it appears to be just one part of a multipage post, and I don't see the full post on the second page.

THE COURT: Do you have -- optional -- I take it you object based on optional completeness. If -- do we have the whole document?

MS. WILSON: In production I'm sure we do. I mean, it was produced as separate screenshots so -- but if they want us to supplement with the rest of them, I have no problem with that under the rule of optional completeness.

THE COURT: All right. Well, the objection is sustained to the extent the defense can optionally complete the rest of the document. So that's fine. Go ahead.

MS. WILSON: Ms. Torres, do you recognize this document?

THE WITNESS: Yes, I do.

MS. WILSON: Okay. Can you tell us what it is?

THE WITNESS: It's on my -- the year that I first practiced or started my water pilgrimage in 2020 of August.

MS. WILSON: Okay. And can you -- can you please

read the two sentences starting about midway down the post that start with the word, “unfortunately”?

THE WITNESS: Uh-huh. “Unfortunately, due to COVID, we had to envision -- will not happen exactly that way. We want everyone to be safe and have decided to have moon dancers participate from home.”

MS. WILSON: Okay.

THE WITNESS: But just to -- just to make that clarification, we still had our water pilgrimage, but we had to minimize, you know, the group of women. Since it was moon dance, we didn’t want to -- you know, we were thinking about the safety of others. But that water pilgrimage still took place that year. And that was about 15 or 20 of us. We just didn’t want, you know, 40 women attending this water pilgrimage. But this water pilgrimage still took place even if COVID was -- was still taking place.

MS. WILSON: Okay. Well, and so the decision to limit participation, was that a voluntary choice, or was that because of any emergency orders that were in place at the time?

THE WITNESS: I’m sorry. Ask your question again.

MS. WILSON: Your decision to limit the number of participants --

THE WITNESS: Uh-huh.

MS. WILSON: -- in the water pilgrimage in August of 2020, was that a decision y’all made on your own, or was it because there were governmental restrictions in

place?

THE WITNESS: So this was made -- this was -- this decision came from my leader, Rosa Tupina.

MS. WILSON: Okay.

THE WITNESS: Uh-huh.

MS. WILSON: Your Honor, I'll pass the witness.

REDIRECT EXAMINATION

MR.GREIL: For the water pilgrimage that you just described, that occurred during COVID, did you go to the sacred site during COVID --

THE WITNESS: Yes.

MR.GREIL: -- to perform that ceremony?

THE WITNESS: Yes.

MR.GREIL: If the -- if the presence and nesting of cormorants was somewhat reduced because the City made more habitats available for cormorants in other parks, would you have a problem with that?

THE WITNESS: No.

MR.GREIL: For --

THE COURT: Professor Greil, you might want to push -- the button there under your left hand will raise the whole lectern so you don't have to -- it makes my back hurt --

MR.GREIL: This is exactly what you were talking about with the upper and lower. Fantastic.

THE COURT: Makes my back hurt having to watch you at this point --

MR.GREIL: Thank you.

THE COURT: -- because it already hurts. Go ahead.

MR. GREIL: For the Indigenous Peoples' Day event that you participated in 2022, was the fence up at that time?

THE WITNESS: No.

MR. GREIL: Were you able to access the sacred site at that time?

THE WITNESS: Yes.

MR. GREIL: Are -- have you seen statements from city officials saying that their goal is to have zero cormorants nesting in the Project Area so that they can get on with the construction?

THE WITNESS: Yes.

MR. GREIL: If the City worked with you to find a way that would solve its public health concerns with the cormorants, but to go about it in a way that aligned with your religious beliefs, would you be willing to work with the City?

THE WITNESS: Absolutely. Yes.

MR. GREIL: No further questions.

THE COURT: All right. Well, Professor, before you leave, we're going to have a Texas linguistic lesson here. I get to be the professor. Okay? Or at least a quiz. So I heard you refer to Mr. Perez as Mr. Perez, and that's fine. All right. But you live in Austin, I presume.

MR. GREIL: Yes, sir.

THE COURT: Alright. Well, there's a famous major thoroughfare in Austin that, unless it's been changed, it was spelled M-E-N-C-H-A-C-A. And years ago I went up there for a political event, trying -- and it was on that street, and I couldn't find it. I had a street map, and it said it's right here. And so, finally, I stopped at a service station and asked the guy.

I said: I'm looking -- it's dark and all. In the street is called Menchaca.

And he said: I've never heard of it.

I said: Well it's supposed to be a major street. And I showed it in writing.

He said: No. No. That's "Manchak." It's pronounced "Manchak" in Austin.

MR. GREIL: I -- I appreciate the lesson. I am still a new Austinite. I've only been there two months. So I appreciate being able to come to San Antonio and learn more about my home --

THE COURT: Where we -- where we speak correctly, so --

MR. GREIL: Absolutely, Your Honor.

THE COURT: There's also Guadalupe Street.

MR. GREIL: My daughter goes to school on Guadalupe Street, so I do know that one.

THE COURT: Which is incorrect, also.

MR. GREIL: When in Rome.

THE COURT: Right. But apparently that goes back to the first maps of Texas and Stephen F. Austin and they didn't -- you know, the spelling was different and so forth.

Alright. Thank you, sir.

MR. GREIL: Thank you, Your Honor.

THE COURT: All right. Ms. Torres --

THE WITNESS: Yes, sir.

THE COURT: -- I want to touch on a couple of things. You used the term, I think, about the cormorants nesting for years --

THE WITNESS: Uh-huh.

THE COURT: -- correct?

THE WITNESS: Right.

THE COURT: Okay. All right. And -- and this is all a part of that interrelationship in your faith/religion about all of these things being connected

together going back thousands of years, correct?

THE WITNESS: Right.

THE COURT: All right. Similarly, in the desert religions, there are stories and parables that some people take literally, some people take figuratively. Some of them were passed down into an oral tradition before the major books of the desert religions were written.

THE WITNESS: Right.

THE COURT: But there's no historical proof that the bush was burning or these sorts of things, but it is a matter of belief for some people, right?

THE WITNESS: Right.

THE COURT: That's right. And so there's a western theologian named Paul Tillich who wrote -- speaks of a leap of faith, so that we can't know these things, whatever our religion may be, but that some of it, you just have to say, "Okay, I believe," or the CS Lewis concepts. Is that -- you agree that that concept applies to this religious belief; that we can't prove it, but it's been passed down and we believe it? Is that accurate?

THE WITNESS: Not sure I follow your question. Like --

THE COURT: Well, that -- that I don't have any objective evidence that that creation story actually happened the way it did, the way we believe, but we believe it, right?

THE WITNESS: Sure. Sure.

THE COURT: Okay.

THE WITNESS: Well, we believe it because we can
-- we can see it, how it plays out --

THE COURT: Right.

THE WITNESS: -- in our cosmology.

THE COURT: Right.

THE WITNESS: That's why we believe it.

THE COURT: Okay. All right.

THE WITNESS: We don't look at those stars
anymore or we don't look up anymore, right, or we
don't go outside the building and, you know, watch
that sunrise, right? And I think for us, we still continue
to -- to live that way --

THE COURT: Right.

THE WITNESS: -- you know?

THE COURT: Okay. All right. And you referred --
you used the term "Mother Water." I use the term
"Mother Nature," but I think it's interchangeable.

THE WITNESS: Sure.

THE COURT: Both our mother.

THE WITNESS: Right.

THE COURT: Would you agree that Mother Water

and Mother Nature are not very happy with us right now?

THE WITNESS: Absolutely, yes.

THE COURT: Okay. And so to use a bird analogy, we have fouled our nest.

All right. Thank you ma'am. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Next witness.

MS. TORRES: Right.

THE COURT: So it's between a rock and a hard place.

MS. TORRES: Right.

THE COURT: And if -- and in order to save any trees, you can't do any construction. So, again, it's difficult choices. But I agree with you, I wish everybody could get along.

MS. TORRES: Right.

THE COURT: And I could go home.

MS. TORRES: Well, you know, it's like you said, you know. Notre Dame is getting, you know, reconstructed. Right at the end, you know, you're going to allow, right, that access to it. So I think here, I think we're saying that we don't want that spiritual ecology

gone forever, right? We don't want to erase that, knowing that it's a place, right, that -- where we continue, so. . .

(Unidentified speaking)

THE COURT: What was that?

Okay. All right, ma'am. Thank you.

MR. RASMUSSEN: Your Honor --

MS. TORRES: Thank you, Your Honor.

MR. RASMUSSEN: Before she leaves, could I ask --

THE COURT: I'm sorry. What?

MR. RASMUSSEN: May I ask her a followup question?

THE COURT: Sure. Sure.

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

GARY PEREZ and
MATILDE TORRES,

Plaintiffs,

v.

CITY OF SAN ANTONIO,

Defendant.

Case No. 23-cv-
00977-FB

San Antonio, Texas
September 27, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

TESTIMONY OF SAZZAD SHAFIQUE

MR. McCRAW: Dr. Shafique, do you mind introducing yourself to the Court.

THE WITNESS: Yeah. My name is Sazzad Bin-Shafique. I'm a professor at the Department of Civil and Environmental Engineering at the University of Texas, San Antonio.

MR. McCRAW: And how long have you been a professor?

THE WITNESS: For 20 years.

MR. McCRAW: And what are your general

responsibilities as a professor of civil engineering?

THE WITNESS: 40 percent is teaching, undergraduate and graduate courses, 40 percent is research, I try to attract external money for research and conduct research, and 20 percent is studies.

MR. McCRAW: So in the -- from the first picture to the last picture, the tree would have to go away?

THE WITNESS: Yes.

MR. McCRAW: Okay. And then you mentioned a little bit higher walls are going to require -- taller walls are going to require a larger footer?

THE WITNESS: Yeah. The City -- I see that the drawings, this one is only done for six-foot height walls, maximum six feet. Okay. I don't know -- this is 95 percent of the drawings. So maybe they'll change that one, because we see that there are higher walls there, like ten feet, 12 feet. So your footing could change significantly there.

MR. McCRAW: And by "change significantly," you mean it'll have to be significantly larger?

THE WITNESS: Yeah. Larger, yes.

MR. McCRAW: With more excavation required?

THE WITNESS: Yes.

MR. McCRAW: Okay. And then so let's go down to the second row. And is this the pier and spandrel system on the second row?

THE WITNESS: Yes.

MR. McCRAW: Okay. And then what is in the first image?

THE WITNESS: That's the existing condition.

MR. McCRAW: And then what about the second image?

THE WITNESS: The second one, the pier and the spandrel system, it's -- like have some, you know, like uncommon mobility here. But the system is very close to like your backyard, you know, like fence. You are just putting two posts, and then you connect that one at the fence. Okay?

So similar to that, you can see we are just drilling a hole here, and then we'll drill another hole maybe eight to ten feet from there or six feet from there. We'll just fill that one with reinforced concrete. And then basically in between the two posts we are going to fill it with concrete wall. So that's the way we can avoid lot of excavation from there and basically try to, you know, like interfere with the trees as little as possible.

MR. McCRAW: In this image we have a tree in the first, second, third and fourth image, correct?

THE WITNESS: Yes.

MR. McCRAW: So the tree would remain?

THE WITNESS: Uh-huh.

MR. McCRAW: So for the second image regarding excavation, how deep would that pier need to be drilled?

THE WITNESS: Usually 15 to 20 feet maximum.

MR. McCRAW: Okay. And how wide would the pier need to be in diameter?

THE WITNESS: That would be one foot to 1.5 feet.

MR. McCRAW: Okay. So we're talking --

Depends on the final design, but I'm just guessing.

THE WITNESS: Uh-huh. So we're talking 12 to 18 inches in diameter and then maybe --

MR. McCRAW: Not meters? It's not meters, correct?

THE WITNESS: Yeah. It's feet. Sorry.

MR. McCRAW: Yeah. All right. So -- so just to kind of summarize everything, the City's got -- under the City's diagrams, there are 83 trees within the Lambert Beach area of the park, correct? Correct?

THE WITNESS: Yes.

MR. McCRAW: Okay. And then under the City's cantilever wall design, they're requiring the removal of 69 of those 83 trees, correct?

THE WITNESS: Yes.

MR. McCRAW: And in your expert opinion, how many trees would need to be removed under the pier and spandrel system?

THE WITNESS: Almost ten. Like these are big trees.

MR. McCRAW: Uh-huh. So under your -- under the pier and spandrel system, in your expert opinion, only ten need to be removed?

THE WITNESS: Yes.

MR. McCRAW: Okay. And then so using -- in your expert opinion, if the City were to use the pier and spandrel system, they could preserve 59 more trees?

THE WITNESS: Yes.

MR. McCRAW: Okay. All right. Thank you, Dr. --

THE COURT: Just -- just a moment, before we leave that. Of the ten trees that you believe would have to be removed, I think you used the word "big." Would -- I mean, those are the so-called heritage trees, but they would have to be removed under either methodology?

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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Case No. 23-cv-
00977-FB

San Antonio, Texas
September 27, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

TESTIMONY OF JAMAAL MORENO

MR. GUYNN: Okay. Good morning, Mr. Moreno.

THE WITNESS: Good morning.

MR. GUYNN: My name's Jonathan Guynn. I represent the plaintiffs Gary Perez and Matilde Torres in this lawsuit. Do you understand that?

THE WITNESS: Yes, sir.

MR. GUYNN: Could you please tell us your full name.

THE WITNESS: Marcus Jamaal Moreno.

MR. GUYNN: Mr. Moreno, do you remember that I took your deposition earlier this month, on September 15th, 2023?

THE WITNESS: I do.

THE WITNESS: No.

MR. GUYNN: Okay.

THE WITNESS: Not intending to, no.

MR. GUYNN: Okay. If you tried to, you'd have to get another certificate of appropriateness, right?

THE WITNESS: We would -- that's a good question. We would probably have to notify OHP and the Texas Historical Commission.

MR. GUYNN: But you don't have permission to do that right now?

THE WITNESS: Currently, no.

MR. GUYNN: Okay. So I'm going to mark what we previously agreed is the Sacred Area -- ah, golly. I'm going to just go ahead -- let's just remember where that yellow line is and mark this in green. Do you remember that's the area just a moment ago we were talking about is the Sacred Area?

THE WITNESS: Yes.

MR. GUYNN: Do you understand that at this point that I've just marked in green, that's the only place

plaintiffs say they need to access for their religious worship, right?

THE WITNESS: Yes. I understand that.

MR. GUYNN: There's a little white box right next to that green mark I just made. Do you see it right here?

THE WITNESS: Yes, sir.

MR. GUYNN: What does it say in that box?

THE WITNESS: "No construction to occur in this area."

MR. GUYNN: So the entire Lambert Beach area on the southern bank that I had marked in yellow, including by the Sacred Area, there will be no construction there, will there?

THE WITNESS: No.

MR. GUYNN: But the entire Lambert Beach area within these red borders, this project area, it's currently fenced off from the public, isn't it?

THE WITNESS: To my knowledge, yes.

MR. GUYNN: And those fences have been up since at least February 2023, haven't they?

THE WITNESS: I believe that's correct.

MR. GUYNN: And the City has said that those fences need to be there to protect the public, hasn't it?

THE WITNESS: Yes.

MR. GUYNN: But you are not aware of any public safety risk to entering a project area at this -- at this sacred area, are you?

THE WITNESS: Say that again.

MR. GUYNN: Sure.

But you, Mr. Moreno, you are not aware of any public safety risk to somebody entering the Project Area and going to the Sacred Area, are you?

THE WITNESS: Specifically at that area? No.

MR. GUYNN: So the primary reason the City is removing or relocating trees from the Lambert Beach area is for a reason other than public safety, right?

THE WITNESS: Removing trees for a reason other than public safety?

MR. GUYNN: Okay. So all of the live oaks that are going in, all of the shade trees that are going in after you cut down trees, they're all going over here, aren't they?

THE WITNESS: Yes, they are.

MR. GUYNN: On the west side of the northern bank?

THE WITNESS: Correct.

MR. GUYNN: They are not going across the river from the Sacred Area, are they?

THE WITNESS: No. There's already shade trees over there that are in the way.

MR. GUYNN: Okay. You're also cutting down many shade trees across from the Sacred Area, aren't you?

THE WITNESS: We are cutting down some. We're also leaving others.

MR. GUYNN: Okay. But you're also not planting any new ones, are you?

THE WITNESS: Where those other shade trees are that we're -- that are staying there, no, it wouldn't be a good idea to try to plant a shade tree under another shade tree.

MR. GUYNN: And, in fact, what you're doing is you're planting ornamental trees along the northern end, aren't you?

THE WITNESS: In that area, yes.

MR. GUYNN: Okay. Let's look at some of those ornamental trees. So some of those ornamental trees -- and I'm not going to show you guys how little Latin I speak again. But some of those are -- ooh, I don't know if I can speak English either. Some of those are possumhaws, right?

THE WITNESS: Yes.

MR. GUYNN: Some of them are yaupon hollies?

THE WITNESS: Well, the trees primarily needed to be

removed for the construction project. And, you know, the construction project, the scope of work and even the construction documents were at some semblance of completion. They just weren't totally complete. And our schedule, we -- we project schedules for our project, and our projected schedule was to start construction in summer. So yes, if there had been birds roosting or nesting in those trees, we would not have been able to keep with our schedule.

MR. GUYNN: And so to prevent that, so you could stick with your schedule, you had to cut down the trees?

THE WITNESS: Yes.

MR. GUYNN: At least that was your view?

THE WITNESS: Well, remove the trees that -- yes. Correct. We didn't necessarily have to remove them all, but it didn't make sense to come back and do it again multiple times. So we decided, let's -- let's put in a variance request to do -- to remove all of the trees. So yes, that's what we asked for.

MR. GUYNN: Okay. So you testified earlier that you are the project manager for the bond project, right?

THE WITNESS: Yes.

MR. GUYNN: And so you understand the bond project design pretty well, don't you?

THE WITNESS: I do. I would say that's a fair assessment.

MR. GUYNN: Okay. So the bond project design

implements a reinforced shadow wall engineering approach that the City believes will require the removal or relocation of the trees that we looked at in that table earlier, right?

MR. GUYNN: So just to be clear, the variance that was reflected in Plaintiffs' Exhibit 9, Brackenridge Park bond project variance request, to mitigate for removal of significant trees in excess of 80-percent tree preservation requirements and below 100-percent preservation of heritage trees within the floodplain in environmentally sensitive areas in place of the 2010 tree preservation ordinance.

Did I read that correctly?

THE WITNESS: Yes. That variance was approved.

MR. GUYNN: In choose -- so let's go back then to the designs. In choosing one of the engineering designs, the City -- start over.

In its selection of an engineering design, the City has not accommodated plaintiffs' religious exercise, has it?

THE WITNESS: I'm sorry. Could you repeat that question?

MR. GUYNN: Sure.

In its selection on an engineering design, the City has not sought to accommodate plaintiffs' religious exercise, has it?

THE WITNESS: Yes. It was chosen well before we

understood there was an issue. But yes.

MR. GUYNN: And after you heard that there was an issue from the plaintiffs' perspective, did you revisit that choice?

THE WITNESS: The choice was already approved by the Texas Historical Commission at that point.

MR. GUYNN: So no?

THE WITNESS: And so no, we would -- we would have had to take several steps back and start over.

MR. GUYNN: You don't want to take those steps, right?

THE WITNESS: It would take time and money. That's -- but no. We would like to proceed with the project.

MR. GUYNN: Your Honor, I have no further questions at this time.

THE COURT: All right. Cross?

(Discussion off the record)

MR. McLIN: Judge, after briefly conferring with counsel, we want to make sure it's okay with the Court that we go ahead and proceed with our direct examination of this witness so he can be released once his testimony's complete.

THE COURT: Yes.

CROSS-EXAMINATION

MR. McLIN: Good afternoon, Mr. Moreno.

THE WITNESS: Good afternoon.

MR. McLIN: Where are you originally from?

THE WITNESS: San Antonio, Texas.

MR. McLIN: Go to high school here?

THE WITNESS: I did.

THE WITNESS: Okay.

MR. McLIN: Q. The first one is, how old were the trees that were found in age at Lambert Park?

THE WITNESS: They were anywhere between -- I believe the oldest one -- I'd have to go back to the report, but I want to say it was given a range of between 87 and 92 years old. All of the other trees were younger than that.

MR. McLIN: So all of the trees that were tested and identified were all younger than the historic walls?

THE WITNESS: Yes. Correct.

MR. McLIN: Okay. Now, the reason that the City undertook this project, did the City conduct any public meetings regarding the construction and design of the Lambert Beach renovations?

THE WITNESS: We did.

MR. McLIN: On how many occasions?

THE WITNESS: There were seven formal public meetings. There was one tour in the park that was open to the public, and then there was also a town hall which was hosted by Council District 1 and Council District 2. That was a virtual town hall.

MR. McLIN: And did the City take that public information into account when making further design modifications to the construction plan?

THE WITNESS: We did, yes.

MR. McLIN: Okay. I'm going to go back and finish up with the partners in the project, and then we may come back to that issue a little bit more.

**UNITED STATES DISTRICT COURT
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MATILDE TORRES,

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CITY OF SAN ANTONIO,

Defendant.

Case No. 23-cv-
00977-FB

San Antonio, Texas
September 27, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

TESTIMONY OF BILL PENNELL

MR. VILLARI: Good afternoon, Mr. Pennell. How are you today?

THE WITNESS: I'm doing well. Thank you.

MR. VILLARI: Mr. Pennell, I want to start just by making sure that we're on the same page, talking about the -- the relevant area. I believe in front of you, you have a binder of plaintiffs' exhibits. If you could turn to Exhibit 42.

THE COURT: Plaintiff or defense?

MR. VILLARI: Plaintiff.

THE COURT: Okay.

MR. VILLARI: And in particular the page labeled COSA 0293.

THE WITNESS: Can you say that one more time, please.

MR. VILLARI: COSA 0293. Try to get it on the screen as well.

Now, Mr. Pennell, can you tell me what this image represents?

THE WITNESS: This is the Lambert Beach area in Brackenridge Park.

MR. VILLARI: This is working well. Give me one moment. Okay. Sorry about that.

So, Mr. Pennell, just want to make sure, you understand that in terms of the Lambert Beach area, that the area the plaintiffs are requesting access to is this area here, correct?

THE WITNESS: Could you point to that again?

THE WITNESS: Yes.

MR. VILLARI: And it's the City's position that they are handcuffed by those guidelines, correct?

THE WITNESS: They're something we follow, yes. I mean, that's -- and In our own guidelines, yes. And so those are -- yes.

MR. VILLARI: And it's the City's position that they -- they have to do a project -- the bond project a certain way because of those guidelines, the Secretary of the

Interior's guidelines?

THE WITNESS: That's incorrect.

MR. VILLARI: Why? Why is that incorrect?

THE WITNESS: So the Secretary of Interior's guidelines is a guideline for how to do that. So you can submit to the Historic Commission a different design and have that approved. But that would require, you know, mitigation and other things to do that. So yes, that's a guideline that you try to stick to in most cases. And you can't always do that.

MR. VILLARI: So I just -- I want to be clear about this. Your testimony is that the City can opt not to follow the Secretary of the Interior's guidelines?

THE WITNESS: Anybody can opt not to when -- with justifications and reasons that have to be approved, correct.

MR. VILLARI: And if the City opts not to follow the Secretary of the Interior's guidelines, what does it do?

THE WITNESS: They would submit that to the Texas Historical Commission, who would go through a process, and/or the U.S. Corps of Engineers, depending on who's got jurisdiction over the project. And then they would have to evaluate and understand. Then we would have to go through a process of understanding what the penalty or mitigation would be required into having -- impacting a historic -- a historic or cultural feature.

MR. VILLARI: And I'm sorry. The term is "mitigation,"

correct?

THE WITNESS: Yes.

MR. VILLARI: Okay. So to be clear, the City, when it chooses not to follow the Secretary of the Interior's guidelines, sends notice to either the State or the United States Army Corps of Engineers, who then tells the City, here's what you do to mitigate for this deviation?

THE WITNESS: That's correct.

MR. VILLARI: And so the City, should it want to, can deviate from the Secretary of the Interior's guidelines?

THE WITNESS: Yes.

MR. VILLARI: And, Mr. Pennell, has the City attempted to submit a request to either the State or the U.S. Army Corps of Engineers to submit a plan deviating from the Secretary of Interior's standards?

THE WITNESS: For this project?

MR. VILLARI: Yes.

THE WITNESS: No.

MR. VILLARI: So it's accurate that the -- the City hasn't attempted to submit a project deviating for it on account of the plaintiffs' religious exercise, correct?

THE WITNESS: They very much appear to be planted by humans. They fall under the guidelines of design principles and where you would put them, where you would lay them. The spacing, the distance away from

the river, those are all very similar traits.

We also look at Mr. Lambert's design. And he did design in other locations as well. With the Tea Gardens, there are cypress trees there that were planted. Also, Woodlawn Lake Park, he did the restrooms and stuff along by the gym. And there are bald cypress trees that were added along there as well, we believe. Also, you have San Pedro Springs Park, which was around the time frame.

And then just north of Brackenridge Park you have Miraflores Park. And we know for sure that those cypress trees were planted and laid out -- they are laid out along the river, and there's a spacing that goes along with them. And then you have trees that are set up within the park itself that would have lined walkways and pathways. And, once again, there's a line and a spacing that goes with those that go -- based on design principles and how you would set up and lay out, you know, your trees.

MS. WILSON: And do you have any idea of how old those cypress trees are?

THE WITNESS: We did not sample those. But based on their size and knowing how they grow well there, we think they're around the same age as the trees at Miraflores, which we know were planted about in the 1930s.

MS. WILSON: And are you familiar with the middle staircase on the south bank?

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

GARY PEREZ and
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Defendant.

Case No. 23-cv-
00977-FB

San Antonio, Texas
September 28, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

TESTIMONY OF DAVID VAUGHAN

MR. VILLARI: Okay. Can we begin on page 6? The question:

“Can you – – can you tell us who you are?”

THE WITNESS: “My name is David Myron Vaughan. I’m a certified arborist.”

MR. VILLARI: We’ll next go to Page 23.

“How would you describe the trees that you looked at?”

THE WITNESS: “I described the trees as currently

healthy, attractive, but they were -- they are pushing -- some of them are pushing on the walls and causing some of the damage to the walls. But there was a dead cypress. So there were different stages of the trees, but in general I'd say fairly nice trees."

MR. VILLARI: Page 28.

"When you were asked to evaluate trees, were you asked to assume any plan, particular plan of construction?"

THE WITNESS: "Yes. We were asked to just use the plan that they had presented to us."

MR. VILLARI: "All right. Did -- did the committee study any alternative plans?"

THE WITNESS: "Not -- I don't recall any alternative plans that we studied, no."

MR. VILLARI: Page 38.

"If -- would there be a greater risk of failure of the tree and the falling of the tree if a wall failed?"

THE WITNESS: Yeah. It certainly can, especially if the roots are cut. So there's a zone around the tree that we call the "root plate," where those roots are heavily involved in keeping the tree upright. And somewhere in that root plate we have large diameter roots, and somewhere, four to five feet from the base of the tree, we'll have a first sinker root that comes off the bottom of those support roots

And then beyond that, we get into a zone that we call “rapid taper,” where the size of the roots rapidly tapers down to something smaller. So if – – if construction gets close enough to the base of the tree, within four to five feet, and removes that first sinker root, then we’ve destabilized the tree. And there’s a – – it’s more likely that that tree, the whole tree, is going to fail.

Removing the roots on one side of the tree generally from a standpoint of the tree living or dying, it doesn’t kill the tree, but it will destabilize the tree and increase the risk.

MR. VILLARI: During the process of your evaluation of these trees, did you come to form an opinion as to how old these trees are?

THE WITNESS: I formed an opinion on the trees that were at Lambert Beach in Phase 1, yes.

MR. VILLARI: And what was the age of the trees, in your opinion?

THE WITNESS: We thought they were about 75 to 85 years old.

MR. VILLARI: Are they younger or older than the walls?

THE WITNESS: They’re younger than the wall.

MR. VILLARI: When you went out and walked the area just a few days ago, did you note any public safety concerns at Lambert Beach?

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THE WITNESS: Yes. I mean, the dead – – the dead cypress is still there and hasn't been removed, that's on the north bank of the river. And I saw a couple of trees that had broken branches that were still up in the canopy.

**UNITED STATES DISTRICT COURT
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**TRANSCRIPT OF PRELIMINARY INJUNCTION
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UNITED STATES DISTRICT JUDGE**

TESTIMONY OF SHANON MILLER

MR. GUYNN: Good morning, Ms. Miller.

THE WITNESS: Good morning.

MR. GUYNN: My name's Jonathan Guynn. I represent the plaintiffs, Gary Perez and Matilde Torres, in this lawsuit. Do you understand that?

THE WITNESS: Yes.

MR. GUYNN: Ms. Miller, could you please tell us your full name.

THE WITNESS: Sure. It's Shanon Miller.

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MR. GUYNN: Ms. Miller, do you remember that you were deposed in this matter earlier this month, on September 15th, 2023?

THE WITNESS: I do.

MR. GUYNN: Correction. Do you remember that that occurred on September 18th, 2023?

THE WITNESS: I do. I -- I just took your word for it, I guess.

MR. GUYNN: I don't know if your lawyer wants you to do that.

Okay. Ms. Miller, you're an employee of the City of San Antonio, correct?

THE WITNESS: I am.

MR. GUYNN: And isn't it true that you are the historic preservation officer for the City of San Antonio?

THE WITNESS: That is true.

MR. GUYNN: And you're also the director of the Office of Historic Preservation?

THE WITNESS: Yes.

MR. GUYNN: And you've been in that role since November of 2008?

THE WITNESS: Correct.

MR. GUYNN: In fact, both of those roles since two thousand -- November of 2008?

THE WITNESS: Yes.

MR. GUYNN: And is that when you were first hired by the City of San Antonio?

MR. GUYNN: Did I also -- "The Cirty also. . ." and then ellipses -- "The City also. . . denies that any such study is required."

Did I read that correctly?

THE WITNESS: Are you reading that from the fourth line down?

MR. GUYNN: I can read the whole thing.

THE WITNESS: No. If you just answer --

MR. GUYNN: Does the City deny that any such study is required?

THE WITNESS: Yes.

MR. GUYNN: So the City has -- denies that it even needs to study whether it can achieve its governmental purposes while accommodating plaintiffs' religious exercise, right?

THE WITNESS: Well, but to be clear, 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. It was many, and -- and changed the project as a result. So I think that's an important part of what the City did do to look at viable alternatives.

MR. GUYNN: Thank you.

But one of the things that it did was it did not study whether it could achieve its governmental purposes while accommodating plaintiffs' religious exercise, right?

THE WITNESS: Right.

MR. GUYNN: Okay. No further questions.

THE COURT: All right. Cross.

Have you ever testified before?

THE WITNESS: One time.

THE COURT: How do you like it?

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

GARY PEREZ and
MATILDE TORRES,

Plaintiffs,

v.

CITY OF SAN ANTONIO,

Defendant.

Case No. 23-cv-
00977-FB

San Antonio, Texas
September 28, 2023

**TRANSCRIPT OF PRELIMINARY INJUNCTION
HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE**

TESTIMONY OF JESSICA ALDERSON

MS. WILSON: Ms. Alderson, for the record can you please state your full name.

THE WITNESS: My name is Jessica Lyn Alderson.

MS. WILSON: And, Ms. Alderson, where are you currently employed?

THE WITNESS: I am with Texas Parks and Wildlife.

MS. WILSON: And what is your job title?

THE WITNESS: I am an urban – – the urban wildlife technical guidance program leader.

MS. WILSON: And what are your general job duties in that position?

THE WITNESS: In my current role, I oversee the urban wildlife biologists stationed across the state for Texas Parks and Wildlife.

MS. WILSON: And how many urban wildlife biologists are in the state of Texas?

THE WITNESS: Nine.

MS. WILSON: And are you aware of the plaintiffs, Mr. Perez' and Ms. Torres' religion?

THE WITNESS: I am now.

MS. WILSON: And you were as of your deposition?

THE WITNESS: Yes.

MS. WILSON: And then your -- whenever the City discussed possibly having you testify as a witness before that, you were made aware of their religion?

THE WITNESS: (No audible response).

MS. WILSON: And do you know what birds are religiously significant to them?

THE WITNESS: I do not know.

MS. WILSON: But you -- but you do know now?

THE WITNESS: I do know now.

MS. WILSON: And you learned that at the deposition, at least?

THE WITNESS: Yes.

MS. WILSON: Okay. And did you learn that before that, in your discussions with the City?

THE WITNESS: Yes.

MS. WILSON: So the City informed you of the religious significance of those birds, correct?

THE WITNESS: As a result of this case, yes.

MS. WILSON: Now, are you aware of any studies showing someone has fallen ill from bird feces they contacted in this specific project area?

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TESTIMONY OF SHAWN FRANKE

MR. McLIN: Before we get too deep into the weeds, how do you pronounce your last name?

THE WITNESS: It is officially Franke, if you're from west Texas. But I gave up with San Antonio, and it's primarily Franke. Just don't say Frank.

MR. McLIN: I'm trying to write it down to make sure I at least get close to the proper pronunciation of your name, sir.

THE COURT: What is the ethnic derivation?

THE WITNESS: German. So it would be Franke.

MR. McLIN: And he looks a wee bit German, Your Honor, if you take judicial notice of the resemblance.

MR. McLIN: Sir, if you'd go ahead and give me your full name.

THE WITNESS: Shawn Jerome Franke. Franke. You got me going now.

MR. McLIN: And, Mr. Franke, what do you do for a living?

THE WITNESS: I'm a structural engineer.

MR. McLIN: Are you a registered professional engineer in the state of Texas?

THE WITNESS: Yes, sir. And 20 other states.

MR. McLIN: So a grand total of 21 states?

THE WITNESS: Yes, sir.

MR. McLIN: Would that create a dangerous condition for individuals who happen to be pedestrians in the south area?

THE WITNESS: It is my opinion, yes.

MR. McLIN: Is there any danger from tree breakage, branch dropping or tree failure to those individuals on the south side of the river?

THE WITNESS: I think so, yes.

MR. McLIN: And looking at the methodologies available to make the repairs, were anything other than a pier and spandrel or a cantilever wall system evaluated?

THE WITNESS: Yes, sir.

MR. McLIN: Did any of those systems permit the ability to save more trees than any other system?

THE WITNESS: They did. But they were not really feasible systems because either they did not meet the Secretary of Interior's requirements or the Corps of Engineer's requirements. We -- our hands are basically tied by a series of legal issue -- or regulatory restrictions.

MR. McLIN: Are there other factors, practical factors that affect the options available to the engineers to make these repairs?

THE WITNESS: Yes, sir.

MR. McLIN: Does tree density affect it?

THE WITNESS: It does when it comes to some of the construction techniques, because we've got to look at -- when we're thinking about this, we're looking at everything. We've got to look at, can you actually get into the project site to do the work?

I just left a job site a few months ago where the first thing I asked the contractor was, "How are you going to get a drilling rig in here," because we needed to get a drilling rig in. It will require removing a whole series of canopies.

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**CONSTITUTIONAL AND STATUTORY
PROVISIONS**

**First Amendment to the United States
Constitution**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Texas Religious Freedom Restoration Act
("TRFRA")**

TEX. CIV. PRAC. & REM. CODE §§ 110.003(a)–(b)

(a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.

(b) Subsection (a) does not apply if 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.

(c) a government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental

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authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.