

No. 26-15

IN THE
Supreme Court of the United States

GARY PEREZ, *et al.*,
Petitioners,

v.
CITY OF SAN ANTONIO, TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL
RELIGIOUS BROADCASTERS IN SUPPORT OF
PETITIONERS

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INTEREST OF *AMICUS CURIAE*

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,035 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.¹

Since its founding in 1944, NRB has worked to protect its members against efforts to support its members' efforts to spread the Gospel and freely and fully exercise their religion. NRB believes that religious liberty is paramount to a free society. Courts' ability to manipulate balancing tests, coupled with the temptation these tests afford to rely on overbroad state interests to justify unnecessary encroachments on fundamental rights, threatens religious liberty.

SUMMARY OF ARGUMENT

Strict scrutiny requires courts to examine the government's interests with a narrow focus, not a broad brush—particularly where fundamental rights like religious liberty, the cornerstone of our Nation, are at stake. An interest in presenting visitors with a

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than NRB furnished any monetary contribution for the preparation of this brief. Counsel further certifies that counsel of record were timely notified of the intent to file this brief pursuant to Supreme Court Rule 37.2.

clean house does not, without more, justify focusing all of one's efforts on a single dusty upstairs closet corner. But that is the justification for its corner-dusting the City gave. Instead of focusing its compelling interest analysis on its reasons for encroaching solely on the two-acre sacred Project Area, it provided broad-brush justifications for doing work throughout the 383-acre Brackenridge Park (the "Park").

To justify its bird deterrence project, it cited a need for public safety where people congregate and maintenance of amenities. But the amenities in need of protection exist in areas of the Park far away from the wooded Project Area, and the attractions where people are most likely to congregate likewise lay acres away. The City provided no compelling reasons for its improper focus, nor for its hasty dismissal of certain alternative approaches to bird deterrence and retaining wall repair that would have preserved the sacred nature of the Project Area. Such shortcuts pose an existential threat to the preservation of Appellants' religious liberty and other fundamental rights and must be corrected.

ARGUMENT

The City and courts below painted the City's compelling interests with a broad brush, looking at the Park as a whole, rather than at the two-acre "Project Area" at issue. This was error. Strict scrutiny requires the government's interests to be narrowly focused. Broadly sweeping interests that are not tailored to the specific encroachment do not justify

infringement of a right of such paramount importance as religious liberty. Rather, this Court’s jurisprudence requires courts to focus on whether the encroachment on the two-acre Project Area itself is necessary. Here, the City failed to show that its goals for the 343-acre Park could only be achieved by encroaching on the two-acre sacred portion. Thus, the courts below erred by holding that the City’s plans satisfied strict scrutiny. Reversal is necessary.

I. BACKGROUND: AN OVERVIEW OF THE PARK AND THE CITY’S PLANS.

A. A Bird’s-Eye View of the Park

A bird’s-eye view of the Park provides helpful context. The Park is expansive, spanning 343 acres, App.157a, with trails, public bathrooms, playgrounds, buildings, and the San Antonio River throughout. *See* Brackenridge Park Conservancy, “Brackenridge Park,” https://brackenridgepark.org/wp-content/uploads/2025/07/BrackenridgePark_Map_2025.pdf (accessed July 27, 2026) (providing approximate locations of various amenities). A golf course covers the southern end, flanked by the main playground on the southeast side, south of Mulberry Avenue. A historic amphitheater and the San Antonio Zoo occupy the western portion. *Id.* The Kiddie Park is far west in the Zoo portion of the Park. *Id.* The center mass of the Park is occupied by walking trails, picnic tables, and a scenic train. *Id.*

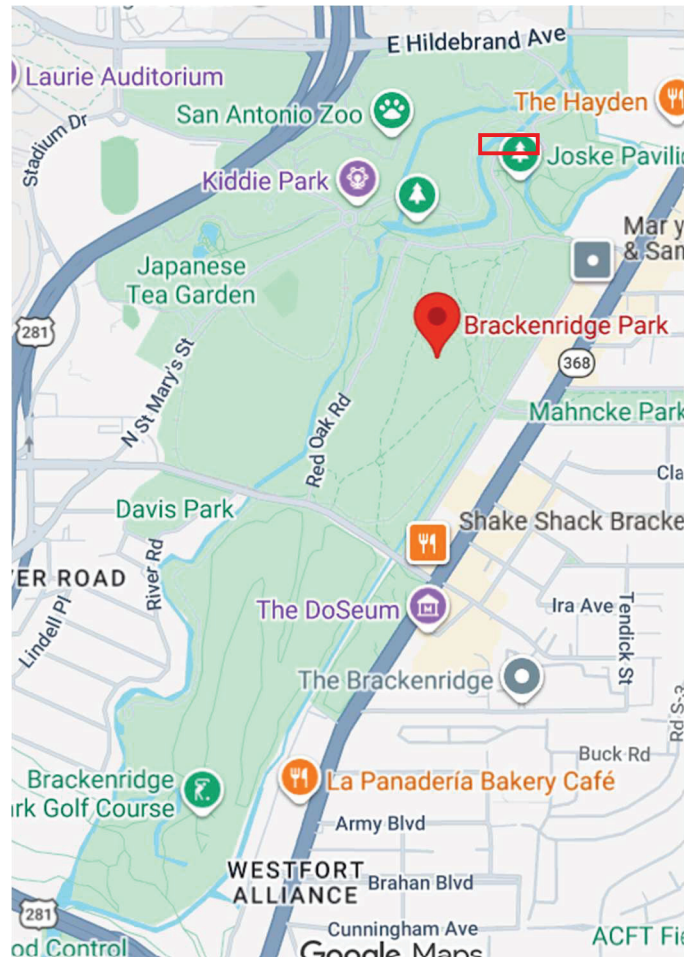


Figure 1. Map of Brackenridge Park,
https://www.google.com/maps/place/Brackenridge+Park/@29.4579837,-98.4813188,15z/data=!4m6!3m5!1s0x865c5f5686d8fb83:0xfadf15b1534e688e!8m2!3d29.4591001!4d-98.4714912!16s%2Fm%2F09v2jt?entry=tту&g_ep=EgoyMDI2MDcyMi4wIKXMDSOASAFAQAw%3D%3D
 (accessed July 25, 2026) (red box added to show approximate location of Project Area).

The Project Area, by contrast—the sacred space at issue—covers just two acres of the Park, tucked away toward the northeast corner.² Br. of Appellants at 9 n.18, *Perez et al. v. City of San Antonio*, No. 24-0714 (Tex. Oct. 14, 2024). One bend of the San Antonio River accounts for much of those two acres; wooded beaches account for nearly all of the rest.



Figure 2. App.339a (second image); *see also* App.339a (first image) and App.394a.

Notably, the two-acre Project Area does not appear to include picnic areas, public restrooms, water fountains, playgrounds, or much in the way of

² The parties' naming conventions may account for some of the conflation of spaces present in the decisions below. In earlier stages of the litigation, Appellants referred to a smaller twenty-foot-by-thirty-foot area within the Project Area as the "Sacred Area" in order to distinguish the specific place where they stand to conduct certain ceremonies. The Fifth Circuit understood the City to sometimes refer to this smaller area as the Project Area, even though Appellants used that term to refer to the entire two-acre sacred space. *See* App.4a; Br. of Appellants at 9 n.18, *Perez et al. v. City of San Antonio*, No. 24-0714 (Tex. Oct. 14, 2024).

buildings. The Park Conservancy’s own amenities map, read in the context of satellite images which more precisely show certain amenity locations, indicate that nearly all Park amenities fall outside the Project Area, with the majority of the Park’s amenities far away in entirely different sections of the 343-acre Park.

B. The City’s Plans

The City’s desired encroaching activities fall into two main categories: bird deterrence and retaining wall repair.

Bird deterrence. The City allegedly seeks to deter egret and heron nesting to mitigate accumulation of bird droppings. Specifically, the City’s stated goal is to deter nesting “in highly urbanized areas of the Park, including”—but not limited to—“the Project Area.” The City also acknowledged that the adverse effects it wishes to mitigate are caused by *multiple* “large roosting colonies of egrets” and herons. City’s Proposed Findings of Fact and Conclusions of Law Denying Plaintiffs’ Motion for Preliminary Injunction at ¶¶ 71, 77, *Perez et al. v. City of San Antonio*, No. 5:23-cv-00977-FB (W.D. Tex. Sep. 22, 2023); Memorandum Opinion and Order at 5, *Perez et al. v. City of San Antonio*, No. 5:23-cv-00977-FB (W.D. Tex. Oct. 11, 2023) (adopting the City’s Proposed Findings of Fact and Conclusions of Law on this point).

The City rationalized its bird deterrence plans with broad Park-wide justifications. Both the district court and the Fifth Circuit relied heavily on the City’s claims that “various areas of the Park “become nearly

unusable for 10 months of the year due to the bird density/habitat,” see App.82a. The City further alleged, and the courts below agreed, that “[t]he resulting feces causes damage to various park amenities, including picnic tables, water fountains, playground equipment, restrooms, and sidewalks.” App.82a. And the Fifth Circuit quoted the 2022 Draft Rookery Management Plan’s concern that “When rookeries establish near playgrounds, infrastructure, or other recreational areas, the risk of zoonotic disease increases substantially.” App.83a. These sorts of broad assertions formed the basis for the lower courts’ decision that the City had compelling interests in public health and safety which justified bird deterrence efforts in the Park. *See* App.81a–84a.

Unfortunately, the proposed deterrents deter other birds in addition to the problematic egrets and herons, including the cormorants Appellants hold sacred and whose presence is necessary for the exercise of their faith in the sacred Project Area. And the Fifth Circuit observed that “the deterrent activities are deployed *only* within the two-acre Project Area,” not within the other 341 acres of the Park, “and only to persuade the birds to nest” outside of the sacred Project Area. App.40a (emphasis added).

Retaining walls. The City also seeks to repair some retaining walls in or near the portion of the San Antonio River that runs through the Project Area. The City plans to use a cantilever system to reinforce the retaining walls, requiring removal of dozens of sacred trees, which is forbidden by Appellants’ religious beliefs. App.31a; App.33a. The City considered moving the retaining walls further into the river to avoid moving trees, but “rejected” that

solution “because it would have required a floodplain mitigation project.” App.36a.

II. NARROW TAILORING REQUIRES NARROW FOCUS ON THE INTERESTS FURTHERED BY THE INFRINGEMENT, NOT THE STATE’S INTERESTS GENERALLY.

“Broadly formulated interest[s]” alone do not justify infringement of a fundamental right. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006). Satisfying strict scrutiny requires the state actor to prove that its desired actions are narrowly tailored to advance its compelling interest. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Narrow tailoring, in turn, requires that the government demonstrate that “measures less restrictive of the First Amendment activity *could not* address its interest[.]” *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam) (emphasis added).

To ensure that the state meets its burden, courts must “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants” and “look to the *marginal interest* in enforcing the challenged government action in that particular context.” *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014) (cleaned up and emphasis added). Put differently, the government must have not only a broadly compelling government interest, but a compelling government “interest in denying” the comparatively narrow relief requested by the party whose rights are in jeopardy. *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 541 (2021).

Three cases highlight the height of this bar. First, in *Lukumi*, this Court struck down ordinances that “restrict[ed] only conduct protected by the First Amendment” and failed to “restrict other conduct producing substantial harm or alleged harm of the same sort,” reasoning that the state’s interest in such an underinclusive statute could not possibly be “an interest of the highest order.” 508 U.S. at 547 (internal quotation marks omitted).

Justice Blackmun, joined by Justice O’Connor, concurred and expanded on this point, explaining that “[a] State may no more create an underinclusive statute . . . than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal.” 508 U.S. at 578. An overinclusive statute’s “broad scope . . . is unnecessary to serve the interest” claimed. *Id.* An underinclusive statute’s failure to capture all “allegedly harmful conduct . . . belies a governmental assertion” that its interest is sufficiently compelling to justify the infringement. *Id.* See also *Mahmoud v. Taylor*, 606 U.S. 522, 566 (2025) (ruling that “the Board’s conduct undermines its assertion that its no-opt-out policy is necessary to serve” its compelling educational interests).

Second, *Holt v. Hobbs* emphasized the targeted nature of the inquiry and the high level of persuasive reasoning needed for the state to dismiss workarounds. In striking down a prison grooming policy that prohibited beards beyond a certain length, the Court explained that the government must “demonstrate that the compelling interest test is satisfied *through application of the challenged law ‘to the person’*—the particular claimant whose sincere

exercise of religion is being substantially burdened.” 574 U.S. at 363. The Court thus required the government to explain not just why it was concerned about beards generally, but why a half-inch beard was contrary to the proffered compelling interest in security, while a quarter-inch beard was permissible. *Id.* at 365, 368. It also noted that the prison could implement additional safety measures in the form of a dual-picture identification policy, a countermeasure used successfully in other, similar contexts, and found the government’s objections failed to provide “persuasive reasons why” “it *must* take a different course.” *Id.* at 365–67, 369 (emphasis added).

Finally, *Wisconsin v. Yoder* exemplifies the necessary marginal benefit analysis. 406 U.S. 205 (1972). There, the Court held that the First and Fourteenth Amendments required the state to exempt Amish children from a compulsory school attendance law. While recognizing the state’s “paramount” interest in education, the Court nonetheless held it necessary to “searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.” *Id.* at 213, 221 (emphasis added). And the Court ultimately held that the State had not shown with sufficient “particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish.” *Id.* at 236. Rather, the Court decided that the state’s interest in “compelling the school attendance of Amish children to age 16,” the part of the policy which violated their fundamental rights, was “somewhat less substantial than requiring such attendance for children generally.” *Id.* at 228–29.

Because the interest in denying the exemption was not strong enough, it failed strict scrutiny.

III. THE CITY FAILED TO PROVE THAT DESTROYING THE SACRED NATURE OF THE TWO-ACRE “PROJECT AREA” IS NECESSARY TO ACHIEVE ITS BROADER GOALS OF PRESERVATION AND PUBLIC SAFETY IN POPULATED PARK AREAS.

Here, the City failed to prove that destroying the sacred nature of the two-acre “Project Area” is necessary to achieve its broader goals of preservation and public safety in the populated and developed areas of the Park. The City proved that work needed to be done in the Park. It did not prove that work needed to be done (a) in the Project Area and (b) in the particular manner proposed. Applying the appropriate narrow focus to the Project Area indicates that the City’s broad-brush interests could be satisfied—and would in fact be better served—by efforts in other parts of the Park, or different approaches altogether that do not harm the sacred nature of the Project Area.

Bird deterrence. The City, and courts below, failed to narrow its focus to the Project Area at issue, painting the general need for heron and egret deterrence with too broad a brush. Bird guano does not harm nonexistent picnic tables, water fountains, playground equipment, and restrooms. It can only harm those items where they exist—acres away from the Project Area. Likewise, the most frequented areas, where public health protection would be paramount—the Zoo, golf course, Park train, and public walking trails—are in entirely different parts

of the Park. Yet the City has apparently only sought to deter birds from nesting in the two-acre Project Area, leaving the other colonies throughout the Park undisturbed and apparently encouraging them to nest in those other areas. App.40a (“[T]he deterrent activities are deployed *only* within the two-acre Project Area[.]”) (emphasis added); *see generally* Section I, *supra*.

If the City truly had a compelling interest in deterring birds from park amenities and populated areas, it would make more sense to target those other areas. The fact that the City is only deterring nesting in the Project Area, App.40a, not the other more populated and “urbanized” areas that it claims are particularly harmed by egret and heron nesting, makes its approach underinclusive, calling into question whether its interests, though important, are of the highest order necessary to justify depriving Appellants of their religious rights. *Lukumi*, 508 U.S. at 547.

The City provided no compelling interest why it could not focus its strongest efforts elsewhere in the Park and use a more minimal, less invasive approach in the Project Area, such as those proposed by Appellants, much less justify targeting only the two-acre sacred Project Area. But claiming interests in the Park as a whole does not satisfy strict scrutiny’s narrow tailoring requirement. The City needed to narrowly focus its rationale on the small Project Area. It did not. That is error.

Retaining walls. The City’s justification for adopting its preferred approach to retaining wall repair over all others also fails strict scrutiny, because

it dismissed at least one alternative without an adequate basis. As the Fifth Circuit noted in passing, the City rejected a solution that would have allowed it to avoid moving trees, simply “because it would have required a floodplain mitigation project.” App.36a.

But the courts below did not cite any analysis from the City explaining why a floodplain mitigation project was unworkable. As in *Holt*, without “persuasive reasons why” the City “*must* take a different course,” it does not and cannot satisfy strict scrutiny. 574 U.S. at 369. Even if the floodplain mitigation project was inconvenient, mere inconvenience of workaround countermeasures is not enough. *Id.* This too is reversible error.

The City’s allegedly compelling interests focused broadly on changes needed for the Park as a whole instead of focusing narrowly on what the Project Area might require, and dismissed alternatives without providing persuasive reasons for doing so. It therefore failed to prove that encroachment on the sacred Project Area was necessary to accomplish compelling government interests. These broad-brush end-runs around strict scrutiny ignore decades of precedent and threaten religious liberty.

Such error cannot be allowed to stand. The functional erosion of religious liberty occurs when the mechanisms that protect it are minimized or disregarded outright. Rigid adherence to the requirements of strict scrutiny is a key mechanism for the preservation of this fundamental right, and this

Court stands as the last defense for that mechanism, ensuring that lower courts do their part to protect the freedoms that form the fabric of our Nation. If misapplications of strict scrutiny such as those below are allowed to remain in place, religious liberty faces death by a thousand cuts.

CONCLUSION

The Supreme Court should grant the petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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