No. 26-15

In The
Supreme Court of the United States

GARY PEREZ; MATILDE TORRES
Petitioners,
v.
CITY OF SAN ANTONIO
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case arises from the denial of a preliminary injunction against a City project in a public park to (i) repair failing retaining walls on the San Antonio River and (ii) mitigate health hazards from migratory bird guano near playgrounds and picnic areas. Petitioners hold sacred a twenty-by-thirty-foot area on the river's south bank, called the "Sacred Area." The project involves no construction in the Sacred Area, preserves the trees that frame it, and keeps access open apart from temporary closures for safety during the work. Petitioners agree that the walls must be repaired and that some trees must be removed. The court of appeals held that Petitioners had not shown a likelihood of establishing a substantial burden and that the City's plan satisfies strict scrutiny under both state law and the Free Exercise Clause.

The questions presented are:

1. Whether the court of appeals correctly held that, under the Texas Religious Freedom Restoration Act, Petitioners did not show a likelihood of proving a substantial burden on their religious exercise, where the City's project leaves the Sacred Area and Petitioners' access to it intact and preserves as many trees as possible.

2. Whether the court of appeals correctly held that the City's plan is the least restrictive means, where the City evaluated alternative designs—including the engineering method Petitioners favor—and revised its plan to save additional trees before this suit was filed.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT 8
A. Factual Background 8
1. Crumbling walls in Brackenridge Park 8
2. Hazards from migratory birds 9
3. The City's remediation plan 11
4. Continued access to religious practices in the Sacred Area 13
B. Proceedings Below 14
REASONS FOR DENYING THE PETITION 17
A. The decision below is correct 17
1. The substantial burden ruling correctly applied the Texas standard Petitioners endorse. 17
2. The alternative strict-scrutiny holding rests on well-supported findings. 22
3. The judgment is independently correct under *Lyng*. 24
B. Courts do not conflict on the first question presented. 26
1. Every decision accepts the claimant's religious beliefs. 27

2. The decisions apply different sources of law. 28

3. The decisions involve different burdens in different settings. 29

4. The list's age and instability confirm that no enduring conflict exists. 32

C. Courts do not conflict on the second question presented. 33

D. This case is a poor vehicle to decide either question. 36

1. The decision below does not implicate the questions presented. 36

a. The court of appeals did not override Petitioners' theological judgment. 36

b. The City considered Petitioners' alternatives before suit was filed. 37

2. Neither question presented can change the outcome. 38

3. *Lyng* would govern any remand. 38

4. The court of appeals decided substantial burden under TRFRA only. 39

CONCLUSION 40

TABLE OF AUTHORITIES

Cases

Abdulhaseeb v. Calbone,
600 F.3d 1301 (10th Cir. 2010)..... 30

Ali v. Stephens,
822 F.3d 776 (5th Cir. 2016)..... 35

Alsyrawan v. Dep't of Hum. Servs.,
___ A.3d ___, 2026 WL 3026487
(Pa. Oct. 5, 2026)..... 28, 32

Alsyrawan v. Dep't of Hum. Servs.,
316 A.3d 1076 (Pa. Commw. Ct. 2024),
rev'd, ___ A.3d ___, 2026 WL 3026487
(Pa. Oct. 5, 2026).....28, 30, 31, 32

Apache Stronghold v. United States,
145 S. Ct. 1480 (2025)..... 4, 5

Barr v. City of Sinton,
295 S.W.3d 287 (Tex. 2009)..... 7, 17, 28

Betenbaugh v. Needville Independent School District,
611 F.3d 248 (5th Cir. 2010)..... 16

Black v. Cutter Labs.,
351 U.S. 292 (1956)..... 22, 38

Bowen v. Roy,
476 U.S. 693 (1986)..... 19

Brady v. Dean,
790 A.2d 428 (Vt. 2001) 28, 30, 31, 32

Brush & Nib Studio, LC v. City of Phoenix,
448 P.3d 890 (Ariz. 2019) 28, 30, 31

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014).....30, 31, 32, 33

Civil Liberties for Urban Believers v. City of Chicago,
342 F.3d 752 (7th Cir. 2003)..... 31

Davis v. Davis,
826 F.3d 258 (5th Cir. 2016)..... 35

Fulton v. City of Philadelphia,
593 U.S. 522 (2021)..... 32

Greenhill v. Clarke,
944 F.3d 243 (4th Cir. 2019)..... 34

Hernandez v. C.I.R.,
490 U.S. 680 (1989)..... 20

Holt v. Hobbs,
574 U.S. 352 (2015)..... 33

Kaemmerling v. Lappin,
553 F.3d 669 (D.C. Cir. 2008)..... 20

Kennedy v. Bremerton Sch. Dist.,
597 U.S. 507 (2022)..... 32

Korte v. Sebelius,
735 F.3d 654 (7th Cir. 2013).....28, 30, 31, 32

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,
591 U.S. 657 (2020)..... 31

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988)....24, 25, 26, 31, 32, 38, 39, 40

Mahmoud v. Taylor,
606 U.S. 522 (2025)..... 24, 26, 32

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,
584 U.S. 617 (2018)..... 22

McCullen v. Coakley,
573 U.S. 464 (2014)..... 13

Merced v. Kasson,
577 F.3d 578 (5th Cir. 2009)..... 21, 36

Missionaries of Saint John the Baptist, Inc. v. Frederic,
No. 25-1131 (U.S. cert. granted Oct. 1, 2026).... 31

Navajo Nation v. U.S. Forest Serv.,
535 F.3d 1058 (9th Cir. 2008)..... 31

Priests for Life v. U.S. Dep't of Health & Hum. Servs.,
772 F.3d 229 (D.C. Cir. 2014).....28, 30, 31, 32

Ramirez v. Collier,
595 U.S. 411 (2022)..... 33

Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.,
867 F.3d 338 (3rd Cir. 2017) 28, 30, 31, 32

Thomas v. Review Bd. of Ind. Emp. Security Div.,
450 U.S. 707 (1981)..... 27

Trinity Lutheran Church of Columbia, Inc. v. Comer,
582 U.S. 449 (2017)..... 24

Walker v. Beard,
789 F.3d 1125 (9th Cir. 2015)..... 34

Warsoldier v. Woodford,
418 F.3d 989 (9th Cir. 2005)..... 34

Westchester Day Sch. v. Village of Mamaroneck,
504 F.3d 338 (2d Cir. 2007) 31

Yellowbear v. Lampert,
741 F.3d 48 (10th Cir. 2014)..... 28, 30, 31

Zubik v. Burwell,
578 U.S. 403 (2016)..... 31

Statutes

42 U.S.C. § 1997e(a)..... 34

42 U.S.C. § 2000cc-5(5) 38

Tex. Civ. Prac. & Rem. Code § 110.001(a)(1) 21

INTRODUCTION

The Court should deny the petition. The questions presented rest on a premise the record refutes: that the City's project will permanently destroy Petitioners' sacred site. The court of appeals correctly applied settled law to that record. The asserted circuit splits stitch together decisions from different settings, under different statutes, addressing different burdens. The petition does not identify a square, well-defined conflict. In any event, this case is a poor vehicle. The court of appeals decided substantial burden only under Texas law, its strict-scrutiny holding independently supports the judgment, and both questions rest on case-specific factual findings.

Petitioners bring free exercise claims challenging a City public-works project at a bend in the San Antonio River in Brackenridge Park. To address undisputed dangers to public health and safety within the City-owned park, the project calls for remediating failed retaining walls and falling trees on the northern riverbank:



ROA.2269.[1] The dangers are not theoretical. In 2023, a large limb fell at the adjacent San Antonio Zoo, allegedly injuring seven people, Pet.App.347a (FOF.63), and a large pecan tree fell into the river:



ROA.2355-69.

These hazards lie across the river from a spot Petitioners consider sacred. Petitioners "define the Sacred Area as the twenty-foot by thirty-foot area between two cypress trees on the southern riverbank," Pet.App.4a; *see* Pet.9 n.4 (defining the Sacred Area), including a concrete slab and steps to the river:

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[1] The Petition Appendix includes only short excerpts from the four-day evidentiary hearing. This brief therefore cites the Fifth Circuit record ("ROA") for testimony and exhibits omitted from the Appendix. When referencing a Finding of Fact adopted by the district court, this brief uses the abbreviation "FOF."



Pet.App.299a (Sacred Area between two cypress trees, viewed from the north).

The Petition's premise is that the City's project will permanently destroy the Sacred Area. The record shows otherwise: "[A]ll of the big bald cypress on the south bank are being preserved in place, not removed," ROA.4648-49, and "there will be no construction" within "the Sacred Area," Pet.App.542a; *see* Pet.9 (acknowledging project calls for "repairs to retaining walls...near but not on the sacred site"). The City does not "plan[] to uproot most of the trees in the sacred area," and the project does not involve "bulldozing a sacred site." Pet.App.55a, 60a (Oldham, J., dissenting from denial of rehearing). Petitioners' amici repeat this error. *E.g.*, CatholicVote Br.1 (plan "would remove trees from the Sacred Area").

Nor will the City's rookery-management measures "*permanently* drive off" the cormorants. Pet.App.57a (Oldham, J., dissenting from denial of rehearing) (emphasis in original). Those measures—needed to control "fecal contamination" of nearby playgrounds

and Park amenities and to comply with the Migratory Bird Treaty Act, Pet.App.23a, 25a—"do not harm the birds or keep them from reproducing." Pet.App.6a n.2. Cormorants remain free to—and, in fact, do—"forage, feed, and rest" in and around the Sacred Area. Pet.App.48a. As the panel earlier observed, "whether birds decide to migrate and nest in the Park based on natural occurrences or designed measures—is a thing of chance and neither chance occurrence seems to be as definite or permanent as [Petitioners] allege." Pet.App.183a n.37 (withdrawn op.).

Stating these record facts is not the same as questioning Petitioners' sincere religious beliefs. Instead, the facts clarify how the project will impact the Sacred Area and the birds. Analyzing Petitioners' claims requires an accurate description of the City's planned project—alongside a faithful and specific recitation of Petitioners' beliefs as they were articulated on the record.

The Petition gets the facts wrong. Petitioners urge the Court to act "before a sacred site is permanently destroyed," Pet.37—rhetoric that invites comparison with *Apache Stronghold v. United States*, 145 S. Ct. 1480 (2025), in which this Court recently denied review. The comparison fails, but instructively. In *Apache Stronghold*, it was "undisputed" that the government's plan would "'permanently destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise' at Oak Flat." *Id.* at 1480 (Gorsuch, J., dissenting from denial of certiorari) (citation omitted). The government acknowledged that its plan would "permanently damage[]" Oak Flat and "cause 'indescribable hardship.'" *Id.* at 1483.

This case comes nowhere close to *Apache Stronghold*. The City here engaged in a "thorough, comprehensive, and complex process involving experts in many disciplines, including arborists, civil engineers, architects, landscape architects, wildlife biologists, and scientists." Pet.App.47a. During the City's extensive "public comment and meeting process," Petitioners "participated in many private and public meetings with the City's employees." Pet.App.28a. The "City took these public comments, including [Petitioners'], under consideration," then "revised its plan," reducing the number of affected trees from 70 to 48, with 21 of those to be relocated. Pet.App.31a. As the Supreme Court of Texas recognized, the City seeks only the "preservation and maintenance of the natural features of public lands." Pet.App.229a.

Rather than a "permanent destruction" case, the record reflects a dispute over engineering methodologies to serve undisputed compelling interests.[2] "There is no dispute that failing retaining walls present a significant danger to any member of the public who is visiting the Park" and must be repaired. Pet.App.346a (FOF.61); *see* Pet.App.483a (Gary Perez: "I have no objection to the walls' repair."). "[P]retty much everybody"—Petitioners

[2] The court of appeals identified three compelling interests: repairing walls and removing trees that "pose dangers to visitors in a public park," Pet.App.22a; mitigating the dangers "posed by amassed bird guano in highly urbanized areas of the Park," Pet.App.24a; and complying with the Migratory Bird Treaty Act, which bars disturbing nests already in trees, Pet.App.24a-25a. As the court noted, the parties agree that repairing the walls requires removing or relocating at least some trees. *Id.*

included—"concedes that some trees are going to have to be removed." ROA.4648. Petitioners' beliefs do not "dictate that a certain number of trees" or "certain species of tree must be present" for worship. Pet.App.447a; Pet.App.340a-41a (FOFs.30-31). Nor do Petitioners object to the removal of invasive species and dead or dying trees. Pet.App.345a (FOF.55); Pet.App.507a; ROA.4053. The dispute, then, is over how many trees a given engineering method removes.

The choice between the two methods is not a choice between preservation and permanent destruction. Ultimately, Petitioners hope that "as many trees as possible" are preserved. *Id.* In this contested, fact-bound case, the record reflects that the City's plan accomplishes that goal.

These factual realities, resolved after a four-day evidentiary hearing, are reason enough to deny review. But the Petition suffers from more fundamental defects:

- Neither question presented is outcome-determinative. The court of appeals held that Petitioners did not establish that the City's plan substantially burdens their religious exercise under the Texas Religious Freedom Restoration Act (TRFRA), but noted that, "[e]ven if they did, that would not change the outcome of this appeal because the City's plan advances a compelling interest through the least restrictive means." Pet.App.19a.
- The court of appeals did not analyze substantial burden under the First Amendment. For that part of the inquiry, the court applied state law, distinguishing the

federal standard from the controlling Texas case. *See* Pet.App.17a (citing *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009)).[3] The court looked to the Free Exercise Clause only for its strict scrutiny analysis. Pet.App.42a.

- Neither question presented reflects a well-formed split. For the first question, the decisions address different types of burdens in different settings, and no court rejects Petitioners' rule. For the second question, Petitioners conflate two issues: *when* the government must consider alternatives, and *which* alternatives it must address. No court has rejected a policy shown to be the least restrictive means simply because the government considered it later in time.
- The second question presented assumes a fact—that the City "failed to consider any workable alternatives prior to litigation," Pet.ii—that the courts below soundly rejected. The panel held that a "wealth of evidence" showed "that the City considered and ultimately pursued the least burdensome method of achieving its development plans" and that the selected method was "the least restrictive means." Pet.App.41a.

Stripped of the "permanent destruction" framing, the Petition seeks review of a fact-bound ruling about competing engineering methods for necessary repairs in a public park. The City has spent years working to

[3] Petitioners did not even address substantial burden in their principal brief below. Pet.App.18a.

repair a failing riverbank while saving as many trees as possible, a goal Petitioners share. Petitioners do not identify any legal rule articulated in the decision below that warrants review. Instead, they invite the Court to second-guess the lower courts' record-backed factual conclusion that the City's plan "is narrowly tailored to achieve the City's compelling governmental interest of making the Project Area safe for visitors to the Park, including [Petitioners]." Pet.App.35a. The Petition should be denied.

STATEMENT

A. Factual Background

1. Crumbling walls in Brackenridge Park

Brackenridge Park is a large urban park on the San Antonio River. The City owns the Park. In the early 1900s, Lambert Beach was built at a bend in the river within the Park. The north-bank retaining walls have fallen into disrepair, in part due to encroaching trees and their root systems. Pet.App.337a (FOF.12). "There is no dispute that failing retaining walls present a significant danger to any member of the public who is visiting the Park." Pet.App.346a (FOF.61). The situation has deteriorated while this suit has been pending. In June 2024, a large section of a pecan tree adjacent to the Sacred Area failed, and, in September 2024, the unstable walls across from the Sacred Area collapsed during flooding caused by rainstorms:



If the walls are not repaired, they will fail, and the trees lining the bank will fall.

2. Hazards from migratory birds

Brackenridge Park is a seasonal home to migratory birds, including egrets, herons, and cormorants. The birds typically develop a rookery (a large colony of breeding birds) around Lambert Beach. The river there has elevated E. coli levels because of the birds' fecal bacteria. Pet.App.23a, 349a (FOF.74). The rookery presents health and safety issues, particularly to children, because of the significant accumulation of guano in areas in the Park where children play and families picnic:





ROA.2386, ROA.2399, ROA.2390, ROA.2393.[4]

[4] Pet.App.22a–23a ("The record indicates that various areas of the Park 'become nearly unusable for 10 months of the year due to the bird density/habitat.' The resulting feces causes damage to various park amenities, including picnic tables, water fountains, playground equipment, restrooms, and sidewalks. . . . The record also indicates that the excrement could harm humans and other wildlife.").

To address these dangers, the City coordinated with the Texas Parks and Wildlife Department to develop a rookery management program to "deter birds from nesting in highly urbanized areas of the Park." Pet.App.6a. The program includes trimming trees and brush to reduce nesting habitat as well as deterrent techniques including mylar balloons, pyrotechnics, and spotlights. *Id.* n.2. These measures "do not harm the birds or keep them from reproducing." *Id.* They just encourage the birds to nest elsewhere.

3. The City's remediation plan

Voters approved bonds for repairs to the Park, and the City spent several years developing its remediation plan. The City's plan calls for using a cantilever method to repair the north-bank retaining walls across the river from the Sacred Area. Pet.App.5a, 33a-34a. That repair will entail removing some trees on the north bank and relocating others that are close to the river. *Id.* The City will also remove dead and dying trees that present safety dangers. Pet.App.22a.

As part of the continuing iterative process for developing its plan for Park renovations, the City consulted arborists and engineers; held numerous hearings to consider public input; and adjusted plans in an effort to save the greatest number of trees. Pet.App.28a–31a, 33a, 47a–48a. With that specific goal in mind, on March 1, 2023—five months before Petitioners sued—City personnel, four arborists, and two engineers met to "really look at the alternatives and to figure out whether or not what was being proposed was the best solution moving forward, that

we were saving as many trees as possible." Pet.App.34a. The group evaluated the pier-and-spandrel method Petitioners favor, including during a site visit to assess the differences between the competing methods and whether "additional trees would be saved" by the pier-and-spandrel method. *Id.* Petitioners tout pier-and-spandrel as a "win-win," Pet.11, but the City presented evidence that Petitioners' method would not save additional trees: "The consensus in the meeting with the arborists was that no additional trees would be saved because they would still be impacted by the construction regardless of the methodology." Pet.App.35a.

The City also held ***seven*** formal public meetings and took that "public information into account when making further design modifications to the construction plan." ROA.4401. That included Petitioners' input, and the City modified its plan in response. Pet.App.30a-31a; *see* ROA.2324 ("In response to public input, the project has been updated to preserve 35 additional trees"). Despite Petitioners' repeated insistence that the City "refused" or "failed to consider any workable alternatives prior to litigation," *e.g.*, Pet.ii, 3, 4, 11–13, 29, & 31–36, the court of appeals emphasized that the "record does not support [Petitioners'] allegations that the City has refused to try to accommodate [Petitioners'] religious exercise," Pet.App.28a.

Petitioners seize on a few stray statements to misrepresent otherwise. The City admitted that it had not "commissioned a study" aimed specifically at accommodating Petitioners' religious exercise, Pet.3, while denying that "any such studies were needed," Pet.App.26a. A project manager, asked whether the

City had reconsidered its design after Petitioners objected, testified that it had not, because doing so "would take time and money." Pet.3. And a Texas Parks and Wildlife biologist who advised the City on rookery management testified that she learned of the cormorants' religious significance through this litigation. *Id.*

The court of appeals considered these statements and found them outweighed by the record as a whole: "The record establishes that the studies requested by [Petitioners] were not needed to ascertain the least restrictive means. Moreover, the record shows the City considered viable alternatives . . . before ultimately deciding on the 'less intrusive tools readily available to it.' Consequently, the City's tree removal and bird deterrence plans—which deter only to the extent required to dissuade the targeted species from nesting and remove minimal trees necessary to excavate—are the least restrictive means." Pet.App.40a-41a (citation omitted).

4. Continued access to religious practices in the Sacred Area

Petitioners' religion requires performing ceremonies at the riverbend in the Sacred Area. Pet.App.3a. One important ceremony takes place on the winter solstice in late December. Pet.App.429a. Petitioners testified that the religious effectiveness of their ceremonies turns on being able to see one's own reflection in the water, silhouetted against the cypress tree branches and cormorants above, while standing on the Sacred Area. Pet.App.455a-456a.

The City's rookery-management measures are "aimed at nesting, not preventing [the cormorants']

presence." Pet.App.48a. They "do not prevent birds, including the double crested cormorant, from entering the Park, including the Project Area," and cormorants are "still observed to be present" there. Pet.App.350a–51a (FOFs.85–86). And the migratory cormorants' presence is seasonal regardless of those measures. Pet.App.19a. They arrive in April or May, Pet.App.37a n.28, and leave at the "first cold snap" in mid-to-late October. ROA.4607, ROA.4623.

Moreover, the Park remediation project does not prevent Petitioners' access to the Sacred Area or their ability to conduct ceremonies there. After the City removed a dangerous limb, it restored public access to the entire area, mooting Petitioners' access claim. Pet.App.11a. Apart from temporary closures for safety during the work, that access will continue. Pet.App.12a-14a, 302a. The City's plans call for "no construction" in the Sacred Area, which Petitioners identified as "the only place" they "need to access for their religious worship." Pet.App.542a. Mr. Perez acknowledges that the two trees "on either side of the stairs, where you perform your ceremonies, are being preserved in place." Pet.App.477a. And Petitioners do not object to the removal of invasive species, Pet.App.448a, or of "dead or dying trees," Pet.App.345a (FOF.55); ROA.4053; *see* Pet.App.507a.

B. Proceedings Below

On August 9, 2023, Petitioners filed this suit in the Western District of Texas, alleging infringement of Petitioners' free exercise of religion in violation of the First Amendment, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and Texas statutory and constitutional provisions.

Pet.App.230a. The suit sought injunctive relief to prevent the City from "removing trees from the Park" and "engaging in 'bird deterrence'" as part of the Park remediation project. Pet.App.264a. After a four-day evidentiary hearing, the court ordered the City to remove a dangerous broken limb hanging over the Sacred Area that had prevented access, Pet.App.296a, but otherwise denied the preliminary injunction, concluding that the City's plan satisfied strict scrutiny. Pet.App.8a-9a, 305a. The City removed the hanging limb and restored access to the Sacred Area, mooting the access issue. Pet.App.11a-14a, 49a.

On appeal, a Fifth Circuit panel affirmed the district court's denial of the preliminary injunction. Pet.App.138a. The court determined that, by failing to raise the issue in their principal brief, Petitioners "have forfeited the argument" that the Park remediation substantially burdens their religious exercise. Pet.App.153a. The court nonetheless addressed the issue and concluded that Petitioners "did not sufficiently establish a substantial burden." *Id.* The court explained that substantial burden is "measured . . . from the person's perspective, not from the government's," and "this inquiry is 'case-by-case' and 'fact-specific' and must consider 'individual circumstances.'" Pet.App.155a (discussing *Barr*, 295 S.W.3d at 301). It cautioned that substantial burden cannot be defined to give "one religious sect a veto over the use of public park land" and to "deprive others of the right to use what is, by definition, land that belongs to everyone." Pet.App.157a-158a. Judge Higginson "wr[o]te narrowly" in dissent that the City "ought to have done more to accommodate [Petitioners'] religious beliefs." Pet.App.188a.

Petitioners moved for rehearing. In response, the panel certified a question to the Supreme Court of Texas involving the religious-services provision of the Texas Constitution, Tex. Const. art. I, § 6-a. Pet.App.125a. The Supreme Court of Texas held that nothing in the provision "purports to address governmental preservation and management of public lands or the tensions between such activities and religious liberties." Pet.App.228a.

The Fifth Circuit issued a second panel opinion, Pet.App.61a-108a, again holding that Petitioners had not shown a substantial burden under TRFRA, Pet.App.75a. The panel contrasted the substantial burden inquiry under TRFRA, as construed in *Barr*, with RFRA and the First Amendment. Pet.App.76a-77a. The opinion did not address substantial burden under the First Amendment; instead, it assumed that strict scrutiny applies and held that the City's plan satisfies it. Pet.App.101a–03a. Judge Higginson again dissented in part, addressing only TRFRA. Pet.App.109a.

Petitioners petitioned for rehearing en banc. Treating it as a petition for rehearing, the panel withdrew its previous opinion and substituted a third opinion. Pet.App.1a. The third opinion is largely identical to the second, except that it revised its discussion of *A.A. ex rel. Betenbaugh v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010). *Compare* Pet.App.19a *with* Pet.App.78a; *see* Pet.App.116a n.3 (Higginson, J., concurring and dissenting) (critiquing the panel's application of *Needville*). As it had in the second opinion, the panel again held that Petitioners had not shown a substantial burden under TRFRA. Pet.App.15a-19a.

And, as in the second opinion, it assumed that strict scrutiny applies and held that the City's plan satisfies it. Pet.App.42a-44a. Judge Higginson again dissented in part. Pet.App.50a.

Petitioners sought rehearing en banc for a second time, which the court denied by a vote of 11-6. Pet.App.51a-52a. Judges Ho and Oldham authored dissents. Pet.App.53a-60a. Judge Oldham's dissent addresses substantial burden under TRFRA. Pet.App.56a ("[T]he City's plan substantially burdens religious conduct under any reading of TRFRA."). Respectfully, that dissent's premise—that the City is "bulldozing a sacred site and artillery-blasting the cormorants," Pet.App.60a—is contrary to the record, *see supra* pp. 2-3, 13-14.

REASONS FOR DENYING THE PETITION

A. The decision below is correct.

The lower courts correctly declined to enjoin the City's project. That result follows from the factual record, the district court's fact findings, and a proper application of TRFRA.

1. The substantial burden ruling correctly applied the Texas standard Petitioners endorse.

The substantial burden holding rests on TRFRA, a state statute, as construed by the Supreme Court of Texas in *Barr*. Pet.App.17a–19a. The principal dissent from denial of rehearing en banc also analyzed substantial burden under TRFRA. Pet.App.56a. Petitioners do not argue that *Barr* is wrong. They place Texas on what they describe as the correct side of their asserted split, because *Barr*

requires that burden be "measured . . . from the person's perspective, not from the government's." Pet.20–21 (quoting 295 S.W.3d at 301). The court of appeals applied that standard. Pet.App.17a.

Petitioners endorse *Barr*, Pet.20–21, and acknowledge that "[c]ourts decide the legal question of whether a burden is substantial," provided they do so "by accepting the claimant's sincere account of what the religious exercise requires." Pet.17. The court of appeals did what Petitioners say a court should do.

The court of appeals applied those settled principles to the record and the district court's fact findings and concluded that the City's proposed Park remediation project would not substantially burden Petitioners' religious exercise. Among other things, the court observed that, "as the record reflects, regardless of the rookery management program, no cormorants, due to their migration patterns, inhabit the area for extended periods of time each year." Pet.App.19a. The court concluded that Petitioners had "plainly failed to establish a likelihood of success on their position that the burden is real and significant under this circuit's case law." Pet.App.18a.

The court did not second-guess Petitioners' sincerely-held religious beliefs. On the contrary, the court of appeals prefaced its analysis by noting that "the district court determined the existence of the [Petitioners'] sincere religious beliefs and the City does not dispute this finding," thus cabining its substantial burden assessment to the question of "whether the City's development plans substantially

burden [Petitioners'] sincere religious practices." Pet.App.15a.

Petitioners cherry-pick the opinion to suggest that the court of appeals relied "on its own theological judgment over Petitioners'." Pet.2. In reality, the court of appeals deftly handled a nuanced factual record, which, as often happens, provided some support for both sides. For instance, Petitioners selectively quote the panel's observation that cormorants can still "nest nearby" to imply that this remark invalidated Petitioners' belief in the importance of the presence of cormorants. Pet.i. But the court of appeals recognized that "the City's bird deterrence measures are aimed at nesting, not preventing [the cormorants'] presence. The migratory birds are still allowed to forage, feed, and rest in the Project Area." Pet.App.48a. These statements do not second-guess Petitioners' sincerely-held religious beliefs. The court did not hold that visiting cormorants are a religious substitute for nesting ones. *Cf.* Human Rights Def. Ctr. Br.12–13. Rather, in evaluating the complex legal question of substantiality, it assessed whether, and how predictably, the program would affect the conditions Petitioners identified—and found that Petitioners "plainly failed to establish a likelihood of success on their position that the burden is real and significant." Pet.App.18a.

There is a profound difference between assessing religious beliefs (impermissible) and assessing *a legal position* (proper role of the court). The substantiality of an asserted burden is a *legal* question appropriately addressed to the courts. *Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) ("[F]or the adjudication

of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference."). And courts are fully capable of evaluating the substantiality of a burden without questioning the *substance* of religious beliefs. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (although it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith," the court must determine "whether the alleged burden imposed by" the government "is a substantial one"); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (court must "[a]ccept[] as true the factual allegations that [Appellants'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened").

Petitioners' amici agree that courts may assess the facts bearing on burden, and "[t]he government may contest facts, prove that the challenged action does not cause the alleged injury, or satisfy the applicable level of scrutiny." Religious Freedom Inst. Br.11; *see id.* at 18 ("Government then receives a full opportunity to contest causation, severity, and—where applicable—to justify the burden under strict scrutiny."). That is what happened here. The City has never disputed the sincerity or content of Petitioners' beliefs. Pet.App.15a. It disputed the facts: whether the project would remove trees from or alter the Sacred Area (it will not), whether it would block access to the Sacred Area (it will not), whether the pier-and-spandrel method would save more trees than the cantilever method (it will not), and whether the project would eliminate the conditions Petitioners

described (the courts determined it would not, or that any such effect was uncertain).

Barr, the leading case interpreting TRFRA, also recognized this distinction. It noted that the "substantial burden" inquiry may not question "whether the person's [religious] conduct that is being burdened is compelled by or central to his religion," because that would impermissibly stray into theological matters. *Barr*, 295 S.W.3d at 301–02. But "[t]hese problems are avoided if the focus is on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression." *Id*. The facts recited by the court of appeals demonstrate that the project would not "curtail" Petitioners' religious conduct. Petitioners retain access to the Sacred Area; the cypress trees that frame it remain; cormorants will continue to come to the bend; and whether the deterrence measures will affect where migratory cormorants nest in any given season is, as the courts found, uncertain. Pet.App.19a, 48a, 183a n.37.

Petitioners do not identify any instance where the opinion impermissibly "opine[d] on theological matters," *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009), or questioned whether any particular tenets are "central" to Petitioners' religion, Tex. Civ. Prac. & Rem. Code §110.001(a)(1). Nor does the Petition assert that the panel incorrectly stated a legal principle. Ultimately, Petitioners do not agree with how the panel viewed the factual record, but that disagreement is no basis for granting review.

Nor does the record reflect hostility toward Petitioners' faith by the City. *Contra* Pet.26–29. The

City has never questioned the sincerity of Petitioners' beliefs. Pet.App.15a. Its evidence about the river's flow, the trees' ages, and the cormorants' migration goes to the physical facts on which Petitioners' burden claim depends—the kind of factual contest Petitioners' amici agree is proper. Religious Freedom Inst. Br.11. Unlike "official expressions of hostility to religion" evidencing "clear and impermissible hostility toward the sincere religious beliefs," *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 634–40 (2018), here the Petition attacks legal arguments advanced by the City in adversarial litigation—arguments that the government is entitled to make under the applicable framework. Religious Freedom Inst. Br.11 ("The government may contest facts, prove that the challenged action does not cause the alleged injury, or satisfy the applicable level of scrutiny."). And the district court's remarks—including its references to *The Lion King*, the Notre Dame Cathedral fire, and King Solomon, Pet.26; Several Religious Orgs. Br.14—are not the judgment under review. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). In any event, the district court credited Petitioners' sincerity as well. Pet.App.296a, 302a.

2. The alternative strict-scrutiny holding rests on well-supported findings.

Independent of the court of appeals' conclusion regarding substantial burden—and even if that conclusion were wrong—the decision below was proper because the factual record demonstrates that the City's Park remediation project is the least

restrictive means to advance compelling governmental interests.

The opinion discusses at great length the City's efforts to repair the falling riverbank and accomplish bird deterrence in the least restrictive manner. Pet.App.19a-42a. The discussion is highly detailed regarding the City's efforts that, at every step in the iterative process of developing its Park remediation plan, sought to save as many trees as possible and disturb birds as little as possible. The actual record belies Petitioners' contention that the City "failed to consider any workable alternatives prior to litigation." Pet.ii; *see also* Pet.App.28a ("The record does not support [Petitioners'] allegations that the City has refused to try to accommodate their religious exercise.").

To the contrary, the opinion explains that the few "select statements" in the "voluminous record" implying that the City did not consider Petitioners' beliefs "pale in comparison to the wealth of evidence . . . demonstrating that the City considered and ultimately pursued the least burdensome method of achieving its development plan." Pet.App.41a. The court of appeals also correctly deferred to the district court's fact findings regarding the City's efforts to accommodate, which are well-supported by the record and not clearly erroneous. Pet.App.41a (explaining that, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"); Pet.App.344a (FOF.48-49).

3. The judgment is independently correct under Lyng.

The court of appeals affirmed the district court's order denying a preliminary injunction because it determined that the City's proposed Park remediation project did not infringe on Petitioners' free exercise rights in violation of TRFRA or the First Amendment. But the result is independently proper under this Court's decision in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

Lyng "held that the Free Exercise Clause did not prohibit the Government from timber harvesting or road construction on a particular tract of federal land, even though the Government's action would obstruct the religious practice of several Native American Tribes that held certain sites on the tract to be sacred." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017). This Court has since designated the government's "use of its own land," *Lyng*, 485 U.S. at 454, as "a matter of 'internal affairs'" that the Free Exercise Clause does not require it to conduct "in ways that comport with the religious beliefs of particular citizens, even when the conduct of such internal affairs might result in incidental interference with an individual's spiritual activities." *Mahmoud v. Taylor*, 606 U.S. 522, 557 (2025) (cleaned up). "And, we emphasized, that conclusion was appropriate because the government actions at issue did not 'discriminate' against religion or 'coerce individuals into acting contrary to their religious beliefs.'" *Id.* (quoting *Lyng* at 450, 453).

Applying that rule, the Court in *Lyng* rejected free exercise challenges to activities on government-

owned lands notwithstanding that the "logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices." 485 U.S. at 451.

Although the court of appeals here did not rest its holding on *Lyng*, and the Petition does not cite *Lyng*, the judgment is correct under *Lyng* because the Park is city-owned property, the project does not discriminate against religion or coerce conduct, and the Free Exercise Clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 448 (citation omitted). Petitioners' free exercise rights "do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453 (emphasis in original).

Petitioners' amici seek to distinguish *Lyng* on the ground that it involved land "used by the government for its internal purposes" rather than land "intended for public use." Sikh Coal. Br.8. But *Lyng* involved a national forest open to the public, and its reasoning applies with even greater force to a public park, where giving one group's religious practices control over how the land is managed necessarily limits everyone else's use of it. *See* Pet.App.157a–58a. If the City halted rookery management to accommodate Petitioners, for example, harmful guano would reaccumulate on nearby playgrounds and picnic tables, making them unusable by other parkgoers. *See* Pet.App.22a–23a.

Lyng also confirms that rejecting such a claim requires no theological judgment: the Court rejected a test that would require courts to rule on the "centrality" of particular practices, 485 U.S. at 457–58, even as it held that the government's management

of its own land did not violate the Free Exercise Clause. And whatever the merit of amici's criticisms of *Lyng*, *e.g.*, Human Rights Def. Ctr. Br.7, this case would be a poor vehicle for revisiting it. Unlike the projects in *Lyng*, which the government conceded could devastate the religious practices at issue, the City's project leaves the Sacred Area intact. And, again, the Petition does not mention *Lyng* at all.

B. Courts do not conflict on the first question presented.

The eight cases Petitioners assemble do not conflict on the question presented. No court of appeals or state high court has held that it may "determine the accuracy of a religious belief when interpreting secular law." Pet.18. Every court accepts the rule Petitioners invoke: judges may not question the accuracy of a claimant's religious beliefs. Results vary because the governing laws and the burdens at issue differ. That is not a split. It is what happens when courts apply a standard as "fact-intensive" as substantial burden. *Mahmoud*, 606 U.S. at 550.

The list's instability confirms the point; many of the decisions are stale, and several have been vacated, overtaken, or reversed. The cases lack all the hallmarks of a well-defined split.

Four defects run through Petitioners' list. Every decision accepts Petitioners' rule. The decisions apply different sources of legal authority. They address different types of burdens in distinguishable settings. And the list's age and instability confirm that no enduring, well-defined conflict exists.

1. Every decision accepts the claimant's religious beliefs.

Any appearance of a split is an artifact of Petitioners' framing. No court rejects *Thomas v. Review Bd. of Ind. Emp. Security Div.*, 450 U.S. 707, 716 (1981). In each case, including the decision below, the court accepted the claimant's beliefs and then decided, as a legal matter, whether the government's action imposed a substantial burden.

The Petition seizes on a single sentence to suggest that the Fifth Circuit acted as an "arbiter[] of theological truth." Pet.2. One line cannot bear that weight. *See* Part D.1 *infra*. The majority opinion did not engage with, let alone reject, Petitioners' rule.

Petitioners treat the other cases in the same way, relying on isolated quotes to suggest that some courts second-guess claimants' theology. They do not. Each case on the inaptly-named "objective test" side of the split expressly accepted the claimant's sincere religious beliefs. *Priests for Life v. U.S. Dep't of Health & Hum. Servs.*, 772 F.3d 229, 240, 247 (D.C. Cir. 2014); *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 356 (3d Cir. 2017); *Brady v. Dean*, 790 A.2d 428, 434 (Vt. 2001). And the decisions on the other side ask the same legal questions about the degree of the burden. They examine "the degree to which a person's religious conduct is curtailed," *Barr*, 295 S.W.3d at 301, and the "intensity of the coercion applied by the government," *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). They recognize that "[n]ot every burden is substantial." *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, ¶131 (Ariz. 2019). And they

inquire, when needed, "into the degree of the government's coercive influence." *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014).

These cases do not diverge on the first question presented. As Judge Rovner observed, courts "have always considered the nature and degree of the burden imposed by government action." *Korte*, 735 F.3d at 709 (Rovner, J., dissenting) (collecting cases). That inquiry "is not a test of the orthodoxy, consistency, or theological merit of a plaintiff's stated religious beliefs." *Id.* at 710. Any differences lie in the application of law to particular facts, which does not warrant review.

2. The decisions apply different sources of law.

Petitioners claim a split over what the First Amendment permits. Pet.18. Yet seven of their eight cases decided no federal constitutional question. Four applied federal statutes: RFRA in *Korte*, *Priests for Life*, and *Real Alternatives*, and RLUIPA in *Yellowbear*. Two applied state statutes: TRFRA in *Barr* and Arizona's Free Exercise of Religion Act in *Brush & Nib*. *Brady* applied the Vermont Constitution. Only *Alsyrawan*[5] addressed the First Amendment, and the Pennsylvania Supreme Court has since reversed that holding. *Alsyrawan v. Dep't of Hum. Servs.*, ___ A.3d ___, 2026 WL 3026487 (Pa. Oct. 5, 2026).

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[5] *Alsyrawan v. Dep't of Hum. Servs.*, 316 A.3d 1076 (Pa. Commw. Ct. 2024), *rev'd*, ___ A.3d ___, 2026 WL 3026487 (Pa. Oct. 5, 2026).

Petitioners concede that their cases "arise under different sources of law," but say "the constitutional limits on judicial action remain the same." Pet.19. True, but irrelevant. That a federal outer bound exists does not mean the courts addressed it. None of these courts considered, much less rejected, an argument that its approach violated the Religion Clauses. Each applied a statutory or state-constitutional standard. Any stray language in those opinions was not essential to the reasoning and does not create a conflict over what the Constitution requires. Petitioners' amici attempt the same move, relying on decisions under RFRA and RLUIPA. *E.g.*, Jewish Coal. for Religious Liberty Br.11–14; Sikh Coal. Br.9–12.

3. The decisions involve different burdens in different settings.

Like religious beliefs, substantial burdens come in many forms, and the inquiry is not context-agnostic. Burdens differ in type and in setting, and courts have developed context-specific reasoning along both lines. A genuine conflict would require decisions involving the same type of burden and the same or a similar setting. Petitioners instead conscript cases that differ on both axes into a "split." In doing so, they treat context-specific reasoning as error.

Start with *type*. A burden may be substantial when "the government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held

religious belief." *Yellowbear*, 741 F.3d at 55 (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). The first category includes complicity claims, in which the claimant objects not to his own conduct but to facilitating the conduct of others, raising questions of attenuation. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723–26 (2014).

Petitioners' cases span these categories. Some claimants were prevented from practicing their faith (*Barr, Yellowbear*). One was pressured through the conditions of a government benefit (*Alsyrawan*). One objected to compelled participation (*Brush & Nib*). Half objected to complicity in the conduct of others (*Korte, Priests for Life, Real Alternatives, Brady*), including three of the four cases on the "objective" side of the purported split. It is no wonder these decisions do not line up neatly.

The complicity cases illustrate the point. In each, the claimant objects to facilitating someone else's conduct: arranging insurance coverage that employees might use, signing a form that would trigger coverage by a third party, or appointing an assistant to issue licenses. Where facilitation becomes wrongdoing can implicate "a difficult and important question of religion and moral philosophy." *Hobby Lobby*, 573 U.S. at 724. Courts in these cases must assess attenuation, deciding as a legal matter whether a claimant's connection to an objectionable act imposes a substantial burden—undoubtedly a difficult task. But this case presents no such difficulty. Petitioners do not claim the City's project makes them complicit in anyone's conduct. The question is how much the project affects their practice at the Sacred Area. This case would not resolve

Petitioners' "split," nor would it resolve Petitioners' amici's versions of the split, which rest on the same complicity cases. *See* Several Religious Orgs. Br.10–12; Human Rights Def. Ctr. Br.15–17.

Burdens also differ in *setting*. Courts have developed more specific legal standards for recurring settings. The government's management of its own land is one. *See Lyng*, 485 U.S. at 449–51; *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc). Zoning is another. *See Barr*, 295 S.W.3d at 297–99, 303–05; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003); *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 348–49 (2d Cir. 2007). Indeed, this Court recently granted certiorari to address substantial burden in a zoning case. *Missionaries of Saint John the Baptist, Inc. v. Frederic*, No. 25-1131 (U.S. cert. granted Oct. 1, 2026).

Petitioners' cases again span several settings: zoning (*Barr*), prison administration (*Yellowbear*), benefits programs (*Alsyrawan*), public accommodations (*Brush & Nib*), the federal contraceptive mandate (*Korte*, *Priests for Life*, *Real Alternatives*), and the duties of public officials (*Brady*). These lines of authority do not conflict. Each setting has its own body of precedent. The contraceptive-mandate cases, for example, form a distinct line that this Court addressed in *Hobby Lobby*, *Zubik v. Burwell*, 578 U.S. 403 (2016) (per curiam), and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657 (2020). Courts have developed context-specific modes of reasoning suitable for different cases. This analytic diversity is a feature; Petitioners treat it as a bug.

Importantly, none of Petitioners' cases emerges from the setting that matters here: the government's management of its own property. There, the law is settled. The Free Exercise Clause does not require the government to manage its own land to suit a citizen's religious practice. *Lyng*, 485 U.S. at 448–53. And *Lyng*'s holding is not among the questions presented.

4. The list's age and instability confirm that no enduring conflict exists.

Petitioners' opinions span a quarter century, and all but one predate this Court's recent Free Exercise decisions in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), and *Mahmoud*, 606 U.S. 522. Many no longer stand as decided. *Priests for Life* was vacated by *Zubik* and has no precedential effect. *Korte* predated *Hobby Lobby*, which resolved the same question the same way. *Real Alternatives* addressed a regulatory framework that has changed repeatedly since. *Brady* concerned a civil-union scheme that Vermont replaced when it enacted same-sex marriage in 2009. And *Alsyrawan*'s First Amendment holding was recently reversed. *Alsyrawan*, 2026 WL 3026487.

Whatever tension these decisions once reflected, they shed little light on how courts approach the question today. Petitioners cobbled together decisions spanning decades, ranging across factual contexts, and emerging from different sources of legal authority. None of these decisions addresses the question presented. A conflict meriting this Court's intervention requires settled, opposing lines of decisions addressing a well-defined legal question. That does not exist here.

C. Courts do not conflict on the second question presented.

Petitioners say six circuits require the government to show that it considered less restrictive alternatives before litigation, while five accept justifications offered for the first time in litigation. Pet.30–34. That split rests on stray language rather than conflicting law. This Court routinely evaluates alternatives raised during litigation. Petitioners' leading case has since been narrowed, and Petitioners' count conflates two distinct questions.

To start, this Court has never required the government to show that it considered alternatives at any particular time. In *Holt v. Hobbs*, the Court weighed alternatives the prisoner pressed in litigation and asked whether the State had shown they would not work. 574 U.S. 352, 365–69 (2015). Nothing in *Holt* "intimate[s] that officials must prove that they considered less restrictive alternatives at a particular point in time." *Id.* at 369–70 (Sotomayor, J., concurring). In *Ramirez v. Collier* and *Hobby Lobby*, the Court evaluated alternatives without asking when the government first considered them; indeed, the Court even generated its own hypothetical alternatives. 595 U.S. 411, 428–33 (2022); 573 U.S. at 728–31. None of the lower-court decisions Petitioners cite rejected a policy simply because of when the government considered an alternative.

Petitioners' leading authority does not support the rule they attribute to it. Petitioners trace their rule to *Warsoldier v. Woodford*, which said the government must show it "considered and rejected the efficacy of less restrictive measures before adopting the

challenged practice." 418 F.3d 989, 999 (9th Cir. 2005); *see* Pet.30–31. *Warsoldier* is a RLUIPA prison case. In that setting, prisoners must press their requests through a grievance process before suing, 42 U.S.C. § 1997e(a), so courts naturally ask what officials considered during that process. That process has no counterpart for a city park project. And the Ninth Circuit has since narrowed *Warsoldier*, holding that the government "is under no obligation to dream up alternatives that the plaintiff himself has not proposed." *Walker v. Beard*, 789 F.3d 1125, 1137 (9th Cir. 2015).

Additionally, the split mixes up two different questions. The question presented asks *when* the government must consider alternatives: whether it must do so before litigation. But Petitioners describe the split in terms of *which* alternatives the government must address: whether it need only refute those the claimant proposes, or must also investigate others on its own. Pet.33. Courts can, and do, answer those questions differently. The Fourth Circuit, which Petitioners place on the "deferential" side, Pet.33, looks to whether the government considered the claimant's alternatives "both prior to litigation as part of the prison grievance process and through the course of litigation." *Greenhill v. Clarke*, 944 F.3d 243, 251 (4th Cir. 2019). The Ninth Circuit, which Petitioners place on the other side, held that the government need not address alternatives the claimant never proposed. *Walker*, 789 F.3d at 1137. And the Fifth Circuit has adopted no timing rule at all. The government's burden "is not to show that it considered the claimant's proposed alternatives but rather to demonstrate those alternatives are

ineffective." *Davis v. Davis*, 826 F.3d 258, 264 (5th Cir. 2016) (quoting *Ali v. Stephens*, 822 F.3d 776, 786 (5th Cir. 2016)). Petitioners' six-to-five count depends on treating these two questions as one.

Petitioners identify no decision rejecting a policy shown to be the least restrictive means merely because the government considered an alternative too late. There is a reason no court has adopted that rule: it cannot be squared with what the least-restrictive-means inquiry asks. That inquiry asks whether a less restrictive alternative would achieve the government's interest. Whether an alternative works depends on its merit, not on when the government first considered it.

Petitioners' rule would produce absurd results. A court could invalidate the least restrictive means because the government rejected alternatives too late—only for the government to reconsider them, reject them again, and readopt the same policy. And the rule would penalize governments for responding to concerns raised as a project develops. That is what the City did here. It held public meetings, considered comments from many stakeholders, including Petitioners, and revised its plan in response. Strict scrutiny does not punish that kind of responsiveness. Petitioners' amici agree that the inquiry does not "impose a free-standing administrative-procedure code on every public project," and that "[a] contemporaneous record of consultation, alternatives analysis, and reasoned rejection may strongly support the government." Religious Freedom Inst. Br.20. That describes this record.

D. This case is a poor vehicle to decide either question.

Even if the questions presented warranted review (and they do not), this case would be a poor vehicle for deciding them.

1. The decision below does not implicate the questions presented.

a. The court of appeals did not override Petitioners' theological judgment.

Petitioners build the first question around a single observation. The court of appeals noted that Petitioners retain "virtually unlimited access to the Park" and that cormorants are not dissuaded from nesting "nearby or elsewhere in the 343-acre Park." Pet.App.18a–19a. That observation does not question Petitioners' beliefs. The court accepted their sincerity, which the City did not dispute. *Id.* at 3a, 15a. It then asked how much the City's plan would affect Petitioners' practice, in the "case-by-case" and "fact-specific" inquiry Texas law requires. *Id.* at 18a (quoting *Merced*, 577 F.3d at 588). Asking what remains available is not a ruling on theology. Nor did the court tell Petitioners that worship "elsewhere" would suffice, *cf.* Ass'n on Am. Indian Affairs Br.3, as their access to the Sacred Area remains intact. Nor was the observation decisive. The court also noted that Petitioners "did not even address this issue in their principal brief." *Id.* at 18a & n.8.

b. The City considered Petitioners' alternatives before suit was filed.

The court of appeals found that the City "considered viable alternatives" before choosing the "less intrusive tools readily available to it." Pet.App.41a. The City considered Petitioners' comments, evaluated whether more trees could be preserved, and revised its plan in response. *Id.* at 305a, 343a–344a.

Petitioners' own filings confirm this. Their complaint alleged that the City was presented with the pier-and-spandrel design and "refused to adopt this approach." Compl. ¶62 (Pet.App.248a). It alleged that "engineers hired by the City proposed" a concrete-pier alternative and that "the City rejected it." Compl. ¶61 (Pet.App.247a). And the petition acknowledges that the City rejected "a similar design" for regulatory reasons. Pet.12 (citing Pet.App.568a). Petitioners recast the same design as a proposal they offered "[d]espite the City's silence." *Id.* Their own pleading says otherwise.

Petitioners' only support for a contrary premise is a supposed admission that the City "refused to consider least-restrictive alternatives before litigation." Pet.3. The City admitted no such thing. It admitted only that it did not commission a study designed around Petitioners' religious exercise. But the next sentence states that it "did . . . study viable alternatives to design the Bond Project to achieve the governmental goals of public health and safety with the least adverse impact." Answer ¶59

(Pet.App.278a–279a). The record thus refutes the premise of the second question presented.

2. Neither question presented can change the outcome.

Two holdings independently support the judgment. The panel held that Petitioners "did not sufficiently establish a substantial burden," Pet.App.15a-16a, and, independently, that the City's plan "advances a compelling interest through the least restrictive means—and thus survives strict scrutiny." Pet.App.19a. Petitioners could obtain a different result only if the Court granted both questions and ruled for them on both. Any other result would leave in place an independent legal holding supporting the judgment, and this Court "reviews judgments, not statements in opinions." *Black*, 351 U.S. at 297.

Nor is there reason to hold this petition for *Missionaries*, No. 25-1131. That case asks whether a zoning restriction on a religious institution's use of its own property is a substantial burden under RLUIPA's land-use provision. RLUIPA does not apply here: that provision reaches only laws restricting a claimant's use of land in which it has a property interest, 42 U.S.C. § 2000cc-5(5), not a city's management of its own park. And a decision construing RLUIPA cannot disturb the independent strict-scrutiny holding below.

3. Lyng would govern any remand.

Even if the Court ruled for Petitioners on the first question, the free exercise claim would return to the lower courts to face a threshold issue they never resolved: whether *Lyng* forecloses it. *See* Part A.3,

supra. Whatever rights religious claimants may have to use an area, "those rights do not divest the Government of its right to use what is, after all, *its* land." *Lyng*, 485 U.S. at 451–53 (Court's emphasis).

The courts below did not decide this case under *Lyng*. The court of appeals acknowledged that the project "is indeed occurring on [the City's] own land," but cited *Lyng* only to distinguish the federal standard from TRFRA's regarding substantial burden. Pet.App.16a–17a, 42a–44a. In the certified question proceeding, the Texas Supreme Court noted Petitioners' arguments distinguishing *Lyng*, but found it unnecessary to address them. Pet.App.226a–228a. On any remand, *Lyng* would govern the free exercise claim, and the outcome would not change.

4. The court of appeals decided substantial burden under TRFRA only.

The first question asks what the Religion Clauses require when a court assesses burden. The court of appeals never assessed burden under the Religion Clauses. On the First Amendment claim, the court noted that the parties disputed whether rational basis or strict scrutiny applied, presumed strict scrutiny applied, and held that the City's plan satisfies it. Pet.App.42a-44a.

The panel addressed substantial burden only in its analysis of Petitioners' state-law TRFRA claim. Pet.App.15a–19a. The court explained that "because we are analyzing [Petitioners'] claims under TRFRA, not the Religious Freedom Restoration Act," the governing standard "is not 'coercion' but whether the burden is 'real' and 'significant.'" Pet.App.17a

(*quoting Barr*, 295 S.W.3d at 301). It contrasted that standard with federal decisions, including *Lyng*. *Id.* Petitioners gloss over the fact that burden is addressed only in the context of TRFRA. Amici go even further, arguing that the "Panel's 'Real' and 'Significant' Test Required a Forbidden Theological Judgment," Comanche Nation Br.16, even though that is the precise test Texas's highest court adopted for a Texas statute.

To reach the first question, then, the Court would have to review a federal court's application of a Texas statute, or decide a constitutional question the court below never addressed. Neither is a sound use of the Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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