

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

**BRIEF OF ASSOCIATION ON AMERICAN INDIAN
AFFAIRS AS *AMICUS CURIAE*
SUPPORTING PETITIONERS**

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STATEMENT OF INTEREST¹

The Association on American Indian Affairs is the oldest national nonprofit protecting the sovereignty of Native Peoples. The Association was formed to change federal policy from the destructive path of assimilation, termination, and allotment to the path of sovereignty, self-determination, and self-sufficiency. Throughout its more than 100-year history, the Association has provided national advocacy on watershed issues that support sovereignty and culture, while doing grassroots work with Native Nations to implement programs that support Native Peoples and revitalize culture. The Association's programs are designed to empower Native Peoples by reclaiming and preserving what defines them, while fostering understanding, healing, and allyship.

The Association believes that strengthening cultural connections and advocating for Native sovereignty will create a more equitable and accountable world for all. Protecting Native sacred sites benefits those who live near them by protecting the plants, air, birds, insects, and all living things that make up an ecosystem. Native worship recognizes the importance of other living beings and thanks them in accordance

¹ No part of this brief was written by any party's counsel, and no person or entity other than *amicus curiae* funded its preparation or submission. Counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief.

with our co-dependence with the natural world. These practices are not just sacred to Native Peoples but also protect the collective health of all.

SUMMARY OF THE ARGUMENT

The Fifth Circuit held that destruction of a sacred site at which Petitioners' religion required them to worship was not a substantial burden because they could worship "elsewhere." By doing so, the court stepped outside its civil jurisdiction into matters of faith to decide what religious practice could satisfy Petitioners' spiritual obligations.

This misconstruction of the First Amendment would be plain if applied to the familiar practice of a well-known religion. And Native Peoples are unequally burdened by inadequate protections for site-based worship because it is their religion and not others that depends on sacred sites in the United States, most of which are on government-owned land. Native worship is often centered on sites the sacredness of which is inextricably tied to natural features and living beings, such as plants, animals, birds, fish, and water. The Fifth Circuit's rule would permit the destruction of Native Peoples' worship, and, if extended beyond site-based worship, would interfere with other religions in ways this Court has always understood to be unconstitutional.

ARGUMENT

I. Applying the Lower Court’s Reasoning to Other Religious Practices Would Be Plainly Unconstitutional.

A. The lower court told Petitioners that worship “elsewhere” was sufficient for their religion.

Sometimes the details of religious practice can seem needlessly specific to outsiders. An observer might assume that certain elements could be swapped for others without consequence. But to the believer, the details are critical to the practice itself.

In the Judeo-Christian faiths, the Bible story of Naaman illustrates the point. Naaman was a commander of the Syrian army who suffered from leprosy. 2 Kings 5:1. He traveled to Israel seeking a cure and was directed by the prophet Elisha to go and wash seven times in the Jordan River. *Id.* 5:10.

Naaman was furious at what seemed like an arbitrary instruction. Why the Jordan? “Are not Abana and Pharpar, rivers of Damascus, better than all the waters of Israel? May I not wash in them, and be clean?” *Id.* 5:12. By any objective measure, the rivers of Damascus were better—cleaner, closer to home, more impressive, and more familiar. But Naaman relented, dipped himself seven times in the Jordan, and was healed. *Id.* 5:14.

What mattered was obedience to the specific instruction—not the quality of the water. Had Naaman bathed once in the Abana, or five times in the

Pharpar, he would have followed the general spirit of the directive while missing the point of it entirely.

The court below made this mistake. Its ruling amounts to the government—an outsider—standing on the banks of the Jordan and telling the believer “just use the other river,” or “surely five washings will do.” That is not a judgment courts are constitutionally permitted to make. *See Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (courts may not dissect religious beliefs or demand they be “acceptable, logical, consistent, or comprehensible”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (whether a belief is “mistaken or insubstantial” is “not for [courts] to say”); *Holt v. Hobbs*, 574 U.S. 352, 361–62 (2015) (availability of alternative means of practicing religion does not defeat a substantial-burden showing).

Like Naaman, Petitioners’ religious beliefs require them to perform a ceremony at a specific *place*, with specific *elements*, at specific *times*:

- The place is *that bend* in the river. Pet. App. 3a, 405a.
- The specific elements are the *cormorants and the trees at that bend*. *Id.* at 404a, 421a.
- The specific times are dictated by the *migration patterns* of the cormorants. *Id.* at 422a.

Without any one of those, the ceremony would be impossible and their religious practice destroyed. *Id.* at 111a, 514a.

Despite this, the lower court substituted its own judgment to decide that a ceremony *nearby* satisfied Petitioners’ religious obligations: “Appellants continue to have virtually unlimited access to the Park for religious and cultural purposes.” *Perez v. City of San Antonio*, 163 F.4th 110, 122 (5th Cir. 2025) (“*Perez IV*”). This is the linchpin of the dispute—the lower court told Petitioners that another *place* was the functional equivalent for their religious practice. But “[t]hese are judgment calls [courts] simply do not make.” *Perez v. City of San Antonio*, 168 F.4th 345, 348 (5th Cir. 2026) (“*Perez V*”) (Oldham, J., dissenting from denial of rehearing en banc).

The lower court also told Petitioners that other, nearby *elements* were sufficient: “Further, cormorants are not specifically targeted nor dissuaded from nesting nearby or elsewhere in the 343-acre Park.” *Perez IV*, 163 F.4th at 122.

And to support its conclusion, the lower court reasoned that because the ceremony was not *always possible*, it did not matter that government action would make it *forever impossible*: “And 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.” *Perez IV*, 163 F.4th at 122. In other words, the lower court construed against Petitioners the very thing that dictates the time of their worship.

In short, the lower court reasoned that because Petitioners do not worship at all *times*, it was not a

substantial burden on their religious practice to force them to also change the *location* and *elements* of their practice. As explained below, the opinion should not stand.

B. Changing the location, elements, or time of familiar religious practice is a substantial burden.

The lower court’s flawed reasoning would be obvious if extended to more familiar religious practices.

For example, going “elsewhere” would destroy more well-known sacred sites. A well-marked path with fourteen stations of the cross in another city in Israel would not be the Via Dolorosa, because Jesus did not walk there.² Asking a Muslim to make their Hajj pilgrimage to a nearby city other than Mecca would not satisfy their religious duties.³ Preventing ten Jewish men from gathering to pray in person because videochat is available would not satisfy the requirements of a minyan for Conservative Jews.⁴

² *The fourteen stations of the Via Dolorosa*, TERRA SANCTA MUSEUM, <https://www.terrasanc-tamuseum.org/en/discover-more/the-fourteen-stations-of-the-sorrowful-way/> (last visited Aug. 28, 2026) (detailing path Jesus took on Good Friday from sentencing to tomb).

³ MINISTRY OF JAHH & UMRAH, *Hajj is a pillar of Islam*, <https://haj.gov.sa/en/Hajj> (last visited Aug. 28, 2026).

⁴ Rabbinical Assembly, *Constituting a Minyan* by

Changing the *place* of each of these sacred practices would substantially burden that practice.

Changing the *elements* of religious practice—even to something that seems similar or perhaps even better to an outsider—also constitutes a substantial burden. Courts do not decide for a Roman Catholic that taking the Eucharist at another Christian church is doctrinally sufficient.⁵ Nor does U.S. Customs bar Hindus from bringing water back from the Ganges because domestic water is readily available and cleaner.⁶ Nor would the government ever withstand scrutiny for requiring Muslims to pray to the west because they still “face” Mecca, just the long way around the globe.

Lastly, the infrequency of the *time* of religious ceremonies does not diminish their importance. Good

Means of Virtual Technology, <https://www.rabbinicalassembly.org/professional-development/constituting-minyan-means-virtual-technology> (last visited Aug. 28, 2026).

⁵ CODE OF CANON LAW 844 § 1 (“Catholic ministers administer the sacraments licitly to Catholic members of the Christian faithful alone, who likewise receive them licitly from Catholic ministers alone . . .”).

⁶ *The Garuda Purana*, Ch. IX, verse 23 (Ernest Wood & S.V. Subrahmanyam trans., 1922), <https://www.sacred-texts.com/hin/gpu/gpu11.htm> (last visited Aug. 28, 2026) (prescribing the Rite of Dying: “Then one should give him the water of the Ganges, which is the effacer of great sins . . .”).

Friday and Christmas Eve services cannot be banned merely because churches that hold them do not regularly conduct services on Fridays or the 24th of each month. Nor could Passover and Yom Kippur ceremonies be barred simply because they happen only once a year. Ramadan is not optional simply because its occurrence is determined by the phase of the moon.⁷

To someone unfamiliar with the faith, each of these examples might seem like an immaterial alteration. But for followers of that faith, the burden is obvious and real. Just so here.

II. Native Peoples' Worship at Sacred Sites Is Treated Unequally.

A. Courts routinely reject Native Peoples' claims seeking to protect sacred areas.

This case is not an aberration. Instead, lower courts have repeatedly applied a “worship elsewhere” rationale this Court has never sanctioned, and the question will keep recurring because Native sacred sites sit overwhelmingly on land the government owns and manages.

Lower courts regularly hold that our laws do not protect Native sacred sites. *See* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1342

⁷ Islamic Heritage Center, *How to Determine the Beginning of Ramadan*, <https://www.ihcproject.com/howisramadandetermined> (last visited Aug. 28, 2026).

(2021) (“Native American sacred sites are often treated differently than other religiously significant sites.”); Jessica M. Wiles, *Have American Indians Been Written Out of the Religious Freedom Restoration Act?*, 71 MONT. L. REV. 471, 501 (2010) (“With *Navajo Nation*, American Indian religious practitioners have been effectively written out of RFRA.”). This problem is compounded by the fact that Native religions’ sacred sites are often on government-owned land. As a result, “religious individuals are unable to voluntarily perform their desired religious practices unless the government affirmatively acts to lift its coercive power through a religious accommodation.” Barclay & Steele, *Rethinking Protections*, *supra*, at 1333.

Cases denying protection abound. For example, the Ninth Circuit recently held in *Apache Stronghold v. United States* that destroying Native sacred sites and preventing the exercise of their religion was *not* a substantial burden on their religious exercise when the government’s act causing the destruction was the mere disposition of its property. 605 U.S. ___, 145 S.Ct. 1480, 1484–85 (2025) (Gorsuch, J., dissenting from denial of certiorari).

In *Lyng v. Nw. Indian Cemetery Protective Ass’n*, the Court held that, even assuming the proposed logging road would “virtually destroy . . . the Indians’ ability to practice their religion,” the suit must fail because the “rights the Indians may have to the use of the area . . . do not divest the Government of its right

to use what is, after all, *its* land.” 485 U.S. 439, 451–53 (1988) (emphasis in original).

And the Tenth Circuit—relying on reasoning like the Fifth Circuit’s here—has affirmed that intermittent use diminishes the burden of the destruction of a sacred site. See *Badoni v. Higginson*, 455 F. Supp. 641, 646 (D. Utah 1977), *aff’d*, 638 F.2d 172 (10th Cir. 1980) (declining to prevent the destruction of Navajo Peoples’ sacred sites on the ground that plaintiffs’ periodic use did not establish a sufficient religious interest, despite their explanation that “navajo ceremonies are not periodic ceremonies but are performed when needed, and requested by an individual or family.” (citation modified)).

Accordingly, this case is an excellent vehicle for review because it is *not* unique. Instead, it is representative of the message lower courts have sent to Native Peoples for nearly half a century: that the destruction of their sacred sites is no substantial burden because worship can occur “elsewhere”—a rationale this Court has never endorsed. The question presented has recurred from *Badoni* to *Lyng* to *Navajo Nation* to *Apache Stronghold*, and now to *Perez*. And it will continue to recur, because the sacred sites of Native religions sit overwhelmingly on land the government owns and manages. Each new land-use decision—a road, a mine, a rookery-management program—presents the same question. And each time the lower courts answer it by deciding for the believer what his

religion requires. Only this Court can correct that course.

B. Native sacred sites possess distinctive qualities derived from the spiritual and cultural significance of the land.

For Native Peoples, the sacred nature of their worship at specific sites is deeply intertwined with specific stories and physical characteristics that render the worship immovable and irreplaceable.

For the Choctaw People, the Nvnih Waiya Mound near Choctaw, Mississippi is the place where they were created.⁸ There, the Creator (Hvshtahli) gathered clay from the nearby Nvnih Waiya Creek and formed people underground. *Id.* They emerged from the Nan Awaya Cave, with the Muscogee, Cherokee, and Chickasaw departing to other lands, while the Choctaw—the last to emerge—“decided to remain at their place of creation.” *Id.* In their Migration Story, a prophet carried the sacred pole, the Iti Favvssa, which the Creator tilted each evening to guide the people’s journey eastward; only at Nvnih Waiya did the pole stand upright, signaling that “the long-sought-for land was found.” *Id.* The Choctaw then built the Mother Mound at that site approximately 1,400 to 1,700 years ago. *Id.* To destroy this site or tell the

⁸ *Nvnih Waiya: Mother of the Choctaw People*, Choctaw Nation of Okla. (Apr. 1, 2024) (last update May 7, 2025), <https://www.choctaw-nation.com/news/iti-favssa/nvnih-waiya-mother-of-the-choctaw-people/>.

Choctaw to worship “elsewhere” would be to sever them from the soil the Creator used to create them—a place no other location on earth can replicate.

Oak Flat, the sacred site at issue in *Apache Stronghold*, is one of the places “Western Apaches believe that the site is the dwelling place of the Ga’an—‘saints’ or ‘holy spirits’ that lie at ‘the very foundation of [their] religion.’” 145 S.Ct. at 1480 (Gorsuch, J., dissenting from denial of certiorari) (alterations in original). They have been worshipping there for centuries.

Chimney Rock in southwestern Colorado was inhabited by the Ancestors of the Taos Pueblo Indians as long ago as A.D. 925.⁹ The moon rises between the two rock spires every 18.6 years and the site remains sacred to Taos Pueblo People this day. *Id.*

These sacred sites are the locations of Native Peoples’ stories of Creation, of birth, and of guiding spirits. Worship ceremonies are inherently tied to sites, immovable. Destruction of these sites would forever terminate worship.

⁹ *Chimney Rock Archaeological Area*, History Colorado (Mar. 1, 2001), <https://www.historycolorado.org/story/preservation/2001/03/01/chimney-rock-archaeological-area>. This is a different sacred site named “Chimney Rock” than was at issue in *Lyng*.

The error of the lower court's decision is at least partially due to unfamiliarity with Native Peoples' religious practices.

Widely practiced religions reflexively receive accommodations. For example, communion wine was exempted from Prohibition. Volstead Act, ch. 85, tit. II, § 6, 41 Stat. 305, 311 (1919). Even today, clergy are not prosecuted for providing alcohol to minors via communion.

These legal exceptions are obvious. But to someone with limited exposure to Christianity, grape juice might seem to be the functional equivalent of wine as many Christians use it for communion and believe the consumption of alcohol to be a sin. The phenomenon of treating religious practices differently depending on how widespread they are is divorced from the First Amendment.

The hypotheticals in Section I are just that—hypothetical. No American court will ever be asked to approve paving the Via Dolorosa or rerouting the Hajj, because the sacred sites of the world's major religions lie overseas, beyond the reach of any government land-management decision.

Native sacred sites are different. They are less commonly understood by American courts. And they are uniquely and overwhelmingly at risk because they are often on government land. In contrast, international jurisdictions that contain the birthplaces of

major world religions have more fully grappled with site-based worship. *See, e.g.*, United Nations, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, art. 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (“Indigenous peoples have . . . the right to maintain, protect, and have access in privacy to their religious and cultural sites . . .”).

Consequentially, the “worship elsewhere” reasoning of the lower court—though facially neutral—operates as a rule for Native religions alone. Other faiths rarely if ever encounter it; Native Peoples encounter little else. A doctrine whose burdens fall on one set of religions exclusively is not a neutral doctrine. *See Apache Stronghold*, 145 S.Ct. at 1488 (Justice Gorsuch noting that the Ninth Circuit’s rule will have an outsized impact on Native Peoples as that circuit encompasses 74% of federal lands and a third of the Native population); Barclay & Steele, *Rethinking Protections*, *supra*, at 1326 (“tribal members are not on the same footing with those whose voluntary worship is predominantly accomplished in private space.”). And “respecting sacred sites—and recognizing the substantial burdens that attend their destruction—would not privilege Native American religions. Rather, it treats them equally.” *Perez V*, 168 F.4th at 348 (Oldham, J., dissenting).

CONCLUSION

For these reasons and those in Petitioner's brief, the petition should be granted and the lower court opinion reversed.

August 31, 2026 Respectfully submitted,

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