

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 CATHOLICVOTE.ORG
EDUCATION FUND AS *AMICUS CURIAE* IN
SUPPORT OF THE PETITIONERS**

WILLIAM J. BROWN, JR.

Counsel of Record

BROWN WEGNER LLP

2010 Main Street, Suite 1260

Irvine, California 92614

bill@brownwegner.com

(949) 705-0081

*Counsel for Amicus Curiae
CatholicVote Education Fund*

QUESTIONS PRESENTED

The questions presented are:

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

2. Whether the government can satisfy its burden to prove that its action is the least religiously restrictive means available when, after notice that its action would burden religious exercise, the government admits that it failed to consider any workable alternatives prior to litigation.

The Court should grant the Petition, issue the Writ requested by Petitioners, and reverse the judgment of the court of appeals.

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INTEREST OF *AMICUS CURIAE*¹

CatholicVote.org Education Fund (“CatholicVote”) is a non-profit organization of patriotic Americans who believe the timeless truths of the Catholic faith are good for America. Its mission is to inspire Catholics across the country to live out those truths in public life. Founded in 2005 as the Fidelis Center, CatholicVote is a 501(c)(3) organization. CatholicVote has an acute interest in this case that arises from the cavalier manner in which the Fifth Circuit Court of Appeals dismissed the substantial burden that would be imposed on Petitioners’ practice of sincerely-held religious beliefs by the government’s planned destruction of uniquely sacred religious land.

Petitioners are leaders of the Lipan Native American Church. As part of a strict requirement in the practice of their religion—the sincerity of which is uncontested—members of their faith must perform solemn ceremonies in the presence of certain trees and nesting cormorants at a specific location they refer to as the “Sacred Area” along the San Antonio River. The Sacred Area sits in a City park between two cypress trees on a particular bend of the river. It is a mere twenty-two by thirty-two square feet. For perspective, that is about the size of a typical three-car garage, or less than five typical parking spaces in a parking lot. The government adopted a tree removal plan that would remove trees from the Sacred Area and a bird deterrent plan that would drive the

¹ No party, and no party’s counsel, authored this brief in whole or in part. No person, other than amicus curiae and its counsel, paid for or made a monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of Amicus’s intent to file this brief.

cormorants to a distant part of the 343 acre park. But the government never specifically evaluated how its plan restricted Petitioners' exercise of their religion. Nor did it consider alternative plans that would be the least restrictive on the sacred rituals of Lipan Native American Church. Instead, as the multi-day hearing at the trial court showed, the government evaluated and studied numerous other considerations, including balancing "engineering challenges and safety considerations," which the Fifth Circuit later deemed to be least restrictive.

Like the Petitioners, numerous Catholic dioceses across the United States were stung by the heavy hand of government that prohibited the practice of their faith. Restrictions imposed during the coronavirus pandemic showed governments will run roughshod over the faithful's ability to gather and commune with God in the very clear manner prescribed by their beliefs. State and local governments imposed restrictions as to the number of worshipers who could gather together to celebrate the Sacraments—restrictions that were not similarly imposed on secular and business gatherings. To vindicate the right to communal worship, the dioceses were forced to seek judicial relief from these discriminatory restrictions, with one such diocese ultimately obtaining emergency relief from this Court. *Tandon v. Newsom*, 593 U.S. 61 (2021), held that strict scrutiny under the Free Exercise Clause is triggered whenever government treats any comparable secular activity more favorably than religious exercise.

CatholicVote sees in the Respondent's proposed plans a fate that Catholic worshipers could all too easily suffer. Respondent's proposal would destroy essential elements of Petitioner's Sacred Area. The protection secured in the Free Exercise Clause of the Constitution—on which both Catholic and Lipan worshipers rely—would provide no protection at all unless this Court makes crystal clear that government action that significantly burdens worship must be evaluated under the strict scrutiny standard. This requires an honest and thorough evaluation of the restriction on the religious practices themselves, and explicit consideration of the accommodations necessary to have the least restrictive impact on religious exercise.

CatholicVote acknowledges that had the government properly evaluated the impact of its plans, including the various options that would entail the least restrictions on the rituals of Petitioners, that certain measured restrictions could be found acceptable under the Free Exercise Clause. However, the trial court and Fifth Circuit failed to require this evaluation. The Fifth Circuit's refusal to recognize this destruction as a "substantial burden" threatens the Free Exercise of Religion of the Roman Catholic faithful that CatholicVote represents. Therefore, this Court should grant the Petition for Writ of Certiorari in this case and reverse the decision of the Fifth Circuit Court of Appeals, lest governments shut down religious worship for the purported "health, safety, and welfare" of the general public without having to even consider the burden it places on the Free Exercise of religion.

SUMMARY OF ARGUMENT

The Constitutional guarantee of Free Exercise of religion is just that: the ability to undertake worship in the manner, form, and place prescribed by the religion. Those seeking to practice their faith may not be relegated to “making do” by government fiat that is not justified—after careful examination of all relevant factors—by substantial government interests, imposed through the least restrictive means.

Moreover, in evaluating the “least restrictive means,” the government must consider the specific burdens on the religious exercise itself and affirmatively explore accommodation to eliminate or at least minimize the burden on the specific practice of religion that is impacted.

It is not the place of any government entity—or the courts—to pass judgment or opine on the value or necessity of any particular religious practice.

The Fifth Circuit’s decision got it wrong on each of these critical points by 1) dismissing out of hand the burden created by the destruction of the Sacred Area where Petitioners worship; 2) relieving Respondent of its duty to examine what specific steps it could take to avoid, or at least minimize, the destructive effects on Petitioners’ ability to conduct their religious rituals; and 3) failing to accord Petitioners’ religious practices the same respect accorded to “main stream” religions.

ARGUMENT

- I. ***Requirements of religious worship are not optional for the faithful. Government efforts to alter, restrict, or prevent them from occurring create a substantial burden on the First Amendment right to Free Exercise of Religion.***

—It is true that in your house you celebrated the meeting in spite of the edict of the Emperor?

—Yes, in my house we celebrated the day of the Lord.

—Why did you allow so many people to participate?

—Because they are my brothers and sisters and I couldn't refuse them.

—You should have refused them.

—No, I couldn't have done that because we had to celebrate the liturgy of the day of the Lord."

Purported modern translation of testimony of the Catholic Martyrs of Abitene before the Roman Proconsul Anulinus, 304 A.D., "Acts of the Martyrs, Ch. XI." Patrologia Latina 8, col. 710-711 (Migne ed.)
<https://catholiclibrary.org>

Roman Catholicism is a communal religion that expects the baptized to fully participate in the Sacraments. Reception of the Eucharist at Holy Mass

and Reconciliation (colloquially known as “confession”) are paramount among them. These religious obligations are central to the practice of the Roman Catholic faith and to the salvation of souls, which is the primary purpose of the Roman Catholic Church. These Sacraments are not solitary exercises; they are celebrated by a congregation.

The Catechism of the Catholic Church (“CCC”) teaches: *Sunday is the pre-eminent day for the liturgical **assembly**, when the faithful **gather** “to listen to the word of God and take part in the Eucharist, thus calling to mind the Passion, Resurrection, and glory of the Lord Jesus, and giving thanks to God who ‘has begotten them again, by the resurrection of Jesus Christ from the dead’ unto a living hope.”* Catechism of the Catholic Church (“CCC”) ¶ 1167 (2d ed. 2000 https://www.vatican.va/archive/ENG0015/_INDEX.HTM) (emphasis added).

Additionally, the assembly or gathering must occur in a sacred place. The Code of the Canon Law, Canon 932 §1 requires: *The eucharistic celebration is to be carried out in a sacred place unless in a particular case necessity requires otherwise; in such a case the celebration must be done in a decent place.*

The General Instruction of the Roman Missal specifies that the sacred place should be a church, stating, at Chapter V, § 288: *“For the celebration of the Eucharist, the People of God are normally gathered together in a church,”* with the church having been *“dedicated with a solemn rite.”* Chapter V, § 290.

But during the coronavirus pandemic, many state and local governments closed Catholic Churches

and other places of worship, prohibiting in-person activities or, where allowed, limited the number participants (e.g. 10 in a church built to hold 500) or manner of participation (e.g. prohibition of singing). Despite these draconian restrictions, other public entities, such as gyms and big box warehouse stores, among others, were allowed to remain open for large public gatherings. Those facilities were deemed “essential services” and were not subject to the same restrictions imposed on the Roman Catholic Church and other houses of worship.

Religious institutions across the country challenged these restrictions on the basis that they violated the free exercise of religion enshrined in the First Amendment. As written and applied, the restrictions on religious institutions were harsher without any justification. *See Tandon v. Newsom*, 593 U.S. 61 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020).

These coronavirus cases were decided on disparate treatment grounds. But the cavalier way in which numerous state and local governments completely closed Catholic Churches—thereby preventing access to and participation in Holy Sacraments—exposed a misunderstanding of the religious necessity for these in-person Sacraments, if not outright disdain for them. In either event, government action substantially burdened Roman Catholics’ free exercise of their religion because they were prevented from coming together in a church to worship and participate in the Sacraments in accordance with their faith. CCC ¶¶ 1180-81, 1185.

The Covid-era-lessons learned by CatholicVote are resurrected by the decision of the Fifth Circuit Court of Appeals in the case at bar. Whether by ignorance of the importance of the essential place of worship at a river bend—the Sacred Area—or by essential features of worship—the nesting cormorants among the trees—the City of San Antonio simply ignored Petitioners’ Free Exercise claim. The City admitted that it refused to evaluate the degree to which its tree removal plans and rookery management plans restricted the ability of Petitioners to practice their deeply held religious beliefs in the manner prescribed by the religion.

Despite Petitioners’ demonstrable claim that their unique place of worship was destined for destruction under the City’s plan, the Fifth Circuit boldly concluded, App.18a-19a, 163 F.4th at 122 (citations and footnotes omitted):

“Moreover, the record does not support Appellants’ argument that the plan constitutes a substantial burden on their religious exercise. . . . Appellants continue to have virtually unlimited access to the Park for religious and cultural purposes. 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. Further, cormorants are not specifically targeted nor dissuaded from nesting nearby or elsewhere in the 343-acre Park.”

But, as noted by the dissenting opinion to the Fifth Circuit denial of re-hearing *en banc* :

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

App.56a, 168 F.4th at 347 (Oldham, J., dissenting from denial of rehearing en banc)(emphasis added).

The Petitioners note the split among the Circuit Courts of Appeal on this issue and correctly cite the dissent to the denial of a previous Petition for Writ of Certiorari that stated: “[O]ne court after another has held that preventing a religious exercise is, necessarily, a ‘substantial burden’ on that religious exercise.” *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1488 (2025) (Gorsuch, J., dissenting from denial of certiorari).

II. *It is impossible to determine the “least restrictive means” of a prohibition if the state—and the courts—do not genuinely evaluate the specific impact on religious exercise and how the restrictions can be reduced.*

In finding that the government’s efforts to rehabilitate the park employed the “least restrictive means,” the Fifth Circuit acknowledged Petitioners’ argument, that the government “never commissioned a study that aims to achieve its governmental purposes while accommodating [our] religious exercise.” App.26a; 163 F.4th at 125 (quoting ¶59 of Petitioners’ Complaint). The Court immediately thereafter dismissed Petitioners’ concerns based on the generic, blanket testimony of the City’s director of the Office of Historic Preservation, stating: “the City did look at viable alternatives.’ She further clarified that ‘the City received feedback from many stakeholders, and considered all of it. It wasn’t just one particular interest or stakeholder interest that was examined.’ According to Miller, considering the many interests and stakeholders prompted the City to ‘change[] the project as a result.’” *Id.* at 27a; 163 F.4th at 126. Conspicuously missing from both the Director’s testimony, and the Fifth Circuit’s evaluation, was any analysis *specific to the Petitioners’ First Amendment request for a religious accommodation.*

The Fifth Circuit’s acceptance of an omnibus review of what accommodation could and should be implemented, without specific consideration of Petitioners’ needs and how they could be accommodated (if at all), denied Petitioners any

genuine evaluation—or protection—of their First Amendment right to the Free Exercise of Religion. This approach was wrong and out of step with applicable precedent.

This Court reiterated the fundamental tenet underlying the government’s responsibility, stating in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981): “The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that “[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.”

Building on this foundation, and providing what this Court should adopt here as the Respondents’ obligation, this Court stated in the context of a claim for religious accommodations under the *Religious Land Use and Institutionalized Person Act*, 42 U.S.C. §§ 2000cc, et seq. (“RLUIPA”):

RFRA, and the strict scrutiny test *it* adopted, contemplate an inquiry more focused than the Government’s categorical approach. *RFRA* requires the Government to 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. RFRA expressly adopted the compelling

interest test “as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).” In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and *scrutinized the asserted harm of granting specific exemptions to particular religious claimants*.

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 430-31 (2006) (emphasis added and citations omitted); *see also Yellowbear v. Lampert*, 741 F.3d 48, 63 (10th Cir. 2014) (“But the government’s burden here isn’t to mull the claimant’s proposed alternatives, *it is to demonstrate the claimant’s alternatives are ineffective to achieve the government’s stated goals*.”(emphasis added)); *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (holding government must “refute” burdened parties proposed alternatives and show inadequacy).

Like Petitioners, the Catholic faithful are required to participate specific acts—the Sacraments—in a specific place—the church. The Sacraments require specified conduct, such as the consumption of specified food and drink. And just like Petitioners’ religious practices, Catholics’ religious acts could likewise be subject to government restrictions. CatholicVote therefore respectfully urges this Court to grant the Petition for Certiorari in this case and find, unequivocally, that any government restriction on religious practice must be evaluated with the specific religious need at the forefront, and

with full consideration given to alternatives that could lessen or eliminate such restrictions.

III. *Neither a religion’s popularity nor the number of its adherents nor the “unusual” nature of its beliefs has a place in Free Exercise jurisprudence.*

In *Thomas*, this Court observed: “The determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. [Footnote omitted.] However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” The Court has recognized that courts lack the “understanding and appreciation of the role played by every person who performs a particular role in every religious tradition,” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 757 (2020).

In a similar vein, the Court in *Yellowbear* opined, “in RLUIPA Congress made plain that we also lack any license to decide the relative value of a particular exercise to a religion. That job would risk in the attempt not only many mistakes—given our lack of any comparative expertise when it comes to religious teachings, perhaps especially the teachings of less familiar religions—but also favoritism for religions found to possess a greater number of ‘central’ and ‘compelled’ tenets.” 741 F.3d at 54.

Regrettably, the Fifth Circuit appears to have engaged in judging just how important, or unimportant, it was as a matter of Petitioners' faith that they worship in their Sacred Area and in the presence of cormorants nesting among the sacred trees.

The Fifth Circuit's cold and dismissive treatment of the central tenets of Petitioners' faith is troubling, to say the least. Little known religious practices that challenge the status quo of established religions (and power structures) have been persecuted to the point of death. *See Acts of the Apostles*, 7:54-8:3. Persecution of minority faiths continue to this day. *See The Catholic World Report, Christian Persecution in Nigeria*, September 26, 2025 <https://www.catholicworldreport.com/2025/09/26/christian-persecution-in-nigeria-1200-churches-destroyed-annually-hundreds-killed/>; EWTN GB Global Catholic Television Network, *Persecution of 10 Catholic Bishops in China Intensified after Vatican-China Deal, Report Says*, October 21, 2024, <https://ewtn.co.uk/article-persecution-of-10-catholic-bishops-in-china-intensified-after-vatican-china-deal-report-says/>.

And while less violent, the not-so-farfetched restrictions that could be placed on Catholic worship practices—like those placed on Petitioners'—under the guise of “neutral laws of general applicability” are equally important. A clear example is a government restriction on consumption of wine, a fundamental drink used during the Liturgy of the Eucharist of the Mass. Catholics believe that, during the consecration, through the change worked by “transubstantiation,”

bread and wine become the “body and blood, together with the soul and divinity of our Lord Jesus Christ.” CCC ¶1374; CCC ¶1376. Indeed, the belief in transubstantiation differentiates Catholicism from most other Christian denominations.

Thus, as Petitioners’ beliefs have been dismissed, and perhaps even denigrated, for their appearance as peculiar to non-believers, so have the beliefs of the Catholic faithful. The bulwark against the loss of religious freedom is the respect for all sincerely held beliefs, particularly by the courts. For, as the court in *Yellowbear* stated: “But in suggesting we may ask whether a claimant truly holds a religious belief isn’t to suggest we may decide whether the claimant’s religious belief is true. After all, ‘Faith means belief in something concerning which doubt is still theoretically possible.’ William James, *The Will To Believe* 90 (1897). And even if it were otherwise, federal judges are hardly fit arbiters of the world’s religions.” 741 F.3d at 54.

CONCLUSION

For the reasons stated in this brief and by Petitioners, this Court should issue a Writ of Certiorari in this matter and reverse the decision of the Court of Appeals.

Respectfully submitted,

WILLIAM J. BROWN, JR.
Counsel of Record
BROWN WEGNER LLP
2010 Main Street, Suite 1260
Irvine, California 92614
bill@brownwegner.com
(949) 705-0081

Counsel for Amicus Curiae
CatholicVote Education Fund