

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

**BRIEF OF AMICUS CURIAE
THE COMANCHE NATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

The Comanche Nation is a federally recognized Indian tribe governed by a constitution approved by the Secretary of the Interior in 1967. It holds roughly seven thousand acres of trust land in southwestern Oklahoma—all that remains of a reservation once exceeding three million acres. Its history is bound up with the Lipan-Apache people, with whom it shares an interest in preserving their culture, their history, and their religion.

The Comanche people were gifted ceremonial songs from the Lipan-Apache during travels from Comanche territory in Texas and Oklahoma to Mexico, and like the Lipan-Apache, the Comanche people sing ceremonial songs that invoke the Yanaguana—the “Spirit Waters,” now known as the San Antonio River—and worship at the sacred riverbend at the heart of this case. Pet. App. 418a, 501a. When San Antonio moved to raze that sacred riverbend—clearing its trees and displacing nesting cormorants to construct a retaining wall—the Comanche Nation submitted letters objecting on religious grounds. *Id.* at 509a–11a. The City made no changes in response.

The Comanche Nation has itself successfully litigated cases similar to the case at hand. In 2008, it sued to halt construction of a military training support center that would obstruct the Medicine Bluffs sacred viewscape. The Comanche prevailed in obtaining an injunction because the government failed to show that

¹ Counsel notified counsel of record for all parties of its intention to file an amicus brief ten days prior to the deadline to file the brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus and its counsel, made any monetary contribution toward the preparation or submission of this brief.

it had chosen the least restrictive means of furthering the government's interests. *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sep. 23, 2008).

Amicus has an interest in ensuring that the same result is achieved here. The decision below—which absolves governments from conducting rigorous analyses of least restrictive means and which impermissibly allows judges to resolve theological questions—threatens to significantly erode religious protections for Native American sacred sites across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of San Antonio plans to destroy a sacred site. It will remove or relocate 83% of the 83 trees that ring a bend in the Yanaguana River, and its chosen design requires a twelve-foot excavation behind the retaining walls. Pet. App. 435a–37a. To keep cormorants from nesting there, the City deploys “pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, explosives, and drones.” *Id.* at 55a (internal quotation marks omitted). The destruction will erase the “spiritual ecology” where Petitioners and other Native peoples have worshipped for generations. *Id.* at 4a. Six judges of the Fifth Circuit put it plainly: “The burdens on plaintiffs’ religious freedoms are undeniable.” *Id.* at 54a (Oldham, J., dissenting from denial of reh’g en banc) (internal quotation marks omitted). Yet the panel held that this destruction works no substantial burden at all, and that the City may raze the site without ever proving that it could not repair the walls and spare the sacred riverbend. *Id.* at 18a–19a. That decision was wrong.

The Comanche Nation offers a distinct perspective on why. Like Petitioners, its members sing religious songs that name the Yanaguana, worship at this riverbend, and objected when the City acted to destroy it. Pet. App. 501a–02a, 510a. They also know the stakes firsthand. When the Army sought to build atop the sacred Medicine Bluffs viewscape, the Comanche Nation went to court and won—not because the project was unimportant, but because the government had never looked for a less restrictive path. *Comanche Nation*, 2008 WL 4426621. That experience shows that protecting sacred sites need not halt public projects. It simply requires the government to pursue them without needlessly destroying religious exercise.

The contrast with the decision below is stark. First, strict scrutiny requires the government to prove that it could not achieve its ends in a way that preserves religious exercise, and it must carry that burden with evidence. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021); *Ramirez v. Collier*, 595 U.S. 411, 432 (2022). The City never tried.

The City invoked vague regulatory prohibitions but never identified the controlling provision, showed that it applied, or asked whether a waiver, exemption, variance, or alternative approval was available. The contrast is telling. For its own plan, the City sought a variance to remove more trees. It sought no comparable relief to preserve the sacred site. Pet. App. 545a–46a. The panel nonetheless accepted the City’s untested regulatory rationale, despite the City’s admission that it never studied how to accommodate Petitioners’ religious exercise. *Id.* at 36a, 121a–22a. That record cannot satisfy strict scrutiny.

Second, the Comanche Nation’s experience proves that accommodation works. When governments first analyze less restrictive means, they can often find

alternatives that accomplish the government's goals while still preserving sacred sites. Sacred sites often sit on land the government now controls, leaving no other place for that worship to go. Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 Harv. L. Rev. 2103, 2110 (2021). That is why the least-restrictive-means inquiry matters, and precisely why *Comanche Nation* is instructive. The court there credited the Army's compelling interest but enjoined construction at the chosen site because an alternative 2,500 feet away, outside the sacred viewscape, satisfied every one of the Army's own criteria. 2008 WL 4426621, at *10, *17. The sacred site was preserved and the mission proceeded. From Medicine Bluffs to Bear Lodge to Medicine Wheel, good-faith coordination has served both the public and the sacred. San Antonio can repair its walls and still preserve the riverbend. It simply refused to try.

Third, the panel impermissibly discounted Petitioners' sincere beliefs by answering a theological question no court may decide. The panel accepted that Petitioners' ceremonies "cannot be properly administered without specific trees present and cormorants nesting," Pet. App. 139a, yet found no substantial burden because worshippers retain "virtually unlimited access" to the rest of the park and the sacred birds *might* nest "elsewhere." *Id.* at 189a, 199a. That reasoning treats worship at the riverbend as interchangeable with worship somewhere else, which is a theological judgment the First Amendment reserves to the believer alone. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981). Worse, it writes a denominational preference into the law, sheltering the worshipper in the pew while abandoning the worshipper at the riverbend. The

Constitution forbids that choice. *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953). A sacred space built in nature is entitled to no less protection than one built by human hands.

Each error independently warrants review. Together they leave Native peoples whose faith is bound to particular lands without meaningful protection at the very moment they need it most. The Court should grant the petition.

ARGUMENT

I. GOVERNMENT REGULATIONS DO NOT EXCUSE A FAILURE TO CONSIDER LESS RESTRICTIVE MEANS

Strict scrutiny places the burden on the government, and it keeps it there. A law that burdens religious exercise survives only if the government proves that its policy “advances ‘interests of the highest order’ and is narrowly tailored to achieve those interests.” *Fulton*, 593 U.S. at 541 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). Put directly, “so long as the government can achieve its interest[] in a manner that does not burden religion, it must do so.” *Id.* Narrow tailoring “requires the government to show that measures less restrictive of the First Amendment activity could not address its interest.” *Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (per curiam).

That inquiry is exacting, and claimant-specific. The government must “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants” and “look to the marginal interest in enforcing” its chosen course in that particular context. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682,

726–27 (2014) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). And it must show that it “seriously undertook to address the problem with less intrusive tools readily available to it” and “considered different methods that other jurisdictions have found effective.” *McCullen v. Coakley*, 573 U.S. 464, 494 (2014).

What the government may not do is shift that burden onto the believer. In *Ramirez v. Collier*, this Court rejected the argument “that it is [the plaintiff’s] burden to ‘identify any less restrictive means,’” explaining that approach “gets things backward” because “it is *the government* that must show its policy” is the least restrictive means. 595 U.S. at 432 (emphasis added). Justifications manufactured for the courtroom will not do, because they must be “genuine, not hypothesized or invented *post hoc* in response to litigation.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

Against that settled framework, the City’s refrain that regulation tied its hands cannot carry the day. Regulations may constrain a government’s choices. But the government must still prove that the asserted constraint applies, forecloses the proposed accommodation, and cannot be avoided through a less restrictive means such as an exemption, waiver, variance, or alternative approval process. Merely invoking regulatory compliance does not satisfy that burden. The court below nonetheless excused the City from making that showing, letting unidentified, untested, and avoidable regulatory obstacles satisfy strict scrutiny. That error warrants review.

A code enacted by a city, a State, or Congress does not set the outer boundary of federal religious liberty. The Texas Supreme Court made that point clear in

Barr, instructing courts and litigants not to “assume that ... codes inherently serve a compelling interest,” and to “focus on real and serious burdens” rather than presume that every “incremental gain” produced by a municipal code is compelling. *Barr v. City of Sinton*, 295 S.W.3d 287, 306–07 (Tex. 2009) (quoting Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 784 (1999)).

This Court has said the same about the relationship between a subordinate law and the First Amendment. When a court is “called upon to apply” a rule of law in a manner the First Amendment forbids, “it [is] obligated by the Federal Constitution to reject the invitation.” *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 487–88 (2020). A government actor asked to apply a regulation in a constitutionally impermissible way labors under the same obligation. See, e.g., *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) (“[P]ublic officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy.” (citation omitted)).

Two consequences follow. First, the government cannot satisfy strict scrutiny without evidence that it actually considered and rejected less restrictive alternatives. It instead must show that it “seriously undertook to address the problem with less intrusive tools readily available to it,” *McCullen*, 573 U.S. at 494, and offered “genuine, not hypothesized or invented *post hoc* in response to litigation” justification. *Kennedy*, 597 U.S. at 543 n.8. Second, invoking a regulation does not discharge that burden. To show that a cited regulation foreclosed a less restrictive plan, the government must identify the provision, show it applies to the project, and establish that no exemption, waiver, variance, or alternative

approval is available. Anything less leaves the asserted obstacle untested. The City made none of those showings.

Start with the City's admissions. It "never commissioned a study that aims to achieve its governmental purposes while accommodating [Petitioners'] religious exercise," and "denie[d] that any such study is required." Pet. App. 278a; *Id.* at 121a–22a. (internal quotation marks omitted). Its project manager agreed that the design "was chosen without any consideration of [Petitioners'] free exercise request." *Id.* at 41a. Asked whether the City reconsidered after learning of Petitioners' religious objections, he answered: "The choice was already approved . . . [a]nd so no." "It would take time and money." "We would like to proceed with the project." *Id.* at 547a. And the City witness who designed the anti-nesting regime testified that she learned of the cormorants' religious significance only as a result of this litigation. *Id.* at 564a–65a.

The City's treatment of others sharpens the point. The City considered a secular neighborhood association's alternative design, Pet. App. 248a, 279a, but never tried to meet with Petitioners to discuss a religious accommodation. *Id.* at 445a. Whatever drove the City's design choice, it was not a regulation that applied equally. Cf. *Fulton*, 593 U.S. at 534 (explaining the government may not "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way").

The City nevertheless maintained that regulation left no room to accommodate Petitioners. Not so. Petitioners' front-anchored pier-and-spandrel system would have avoided the City's twelve-foot excavation corridor behind the retaining wall and required removal of only about ten trees. Pet. App. 536a–37a.

The City's engineer acknowledged that the front-anchored alternative "would save more trees." *Id.* at 568a. Yet the City analyzed only a different, rear-anchored configuration instead.

Asked why it rejected front anchoring, the City's engineer testified its "hands [we]re basically tied by a series of legal issue[s]—or regulatory restrictions" *id.*, without identifying a single regulation prohibiting this design. In litigation, the City recharacterized the obstacle as "applicable standards promulgated by the Secretary of the Interior," *Id.* at 35a, 95a, 174a, again without citing them.

The City's regulatory theory also fails on its terms. A City witness admitted that, even if the Interior's guidelines applied, "the City, should it want to, can deviate from" them. Pet. App. 553a. The City nevertheless declined to seek a waiver, though its own employee testified that the City knew it could likely obtain one. *Id.* at 552a.

The contrast with the City's own tree-removal choices is telling. The City's Unified Development Code required preservation of all heritage trees and eighty percent of significant trees within the floodplain, yet the City sought and obtained a variance allowing it to remove more trees. Pet. App. 545a–46a. Its project manager put it plainly, testifying that "[w]e didn't necessarily have to remove them all," but "[w]e decided . . . let's put in a variance request to . . . remove all of the trees." *Id.* at 545a. The City was willing to pursue regulatory relief to destroy more of the sacred site. It never sought comparable relief to save it.

Those admissions defeat the City's least-restrictive-means claim. It never identified the governing regulation. It never established that the regulation applied. It never sought an exemption, waiver, or

variance to save the sacred site, though it sought one to remove more trees. And it never studied whether it could repair the walls and preserve Petitioners' religious exercise. The burden was the City's alone. It did not carry it.

The panel accepted the City's legal conclusion without ever identifying the specific controlling regulatory standards. Pet. App. 35a. It stated that the pier-and-spandrel system "required drilling through the face of the historic walls, in violation of applicable standards promulgated by the Secretary of the Interior" *Id.* It said so even while recognizing the record evidence that "the City could have sought an exemption from federal guidelines," that the "design 'was chosen without any consideration of [Petitioners'] free exercise request,'" and that the City never investigated an accommodation. *Id.* at 41a (quoting record). Crediting an unproven regulatory rationale in the teeth of those admissions is antithetical to strict scrutiny.

The panel went astray at both steps of strict scrutiny. First, it substituted general project review for the particularized inquiry *O Centro* and *Hobby Lobby* require. The question was not whether the City ran a thorough public process, but whether the "asserted harm of granting specific exemptions to" Petitioners and the City's "marginal interest in enforcing" its chosen course survive strict scrutiny. *Hobby Lobby*, 573 U.S. at 726–27 (quoting *O Centro*, 546 U.S. at 431). The panel credited the City's design process as "thorough, comprehensive, and complex," Pet. App. 47a, without ever asking whether the City's marginal interest in denying these claimants an accommodation was itself compelling. Thoroughness is not tailoring. The panel also acknowledged the record statements that the City could have sought an

exemption from federal guidelines, that its design “was chosen without any consideration of [Petitioners’] free exercise request,” and that the City “never actually investigated whether it could alter the timing of its bird deterrence” to accommodate Petitioners’ religious exercise, but concluded that those statements “pale in comparison” to the City’s other evidence. *Id.* at 40a–41a. Under strict scrutiny, such admissions are not outweighed by the volume of the government’s process; they are dispositive of its failure to carry its burden.

Second, the panel shifted the practical burden onto Petitioners. It reasoned that the City “successfully rebut[ted] each of [Petitioners’] proposed alternatives.” Pet. App. 37a. But *Ramirez* dictates that placing the least-restrictive-means burden on the claimant “gets things backward.” 595 U.S. at 432. The City had to prove that no less restrictive means exist; Petitioners did not. The City’s refusal to even look cannot make that proof, and a court cannot make it for the government by pointing to a regulation the government never identified, never invoked when it acted, and could have waived.

The stakes of that error reach well beyond this case. Sacred sites often sit on public land layered with federal, state, and local regulation. If “regulatory compliance” were a talismanic answer to strict scrutiny, governments could erase those sites without ever asking whether a waiver, variance, or different design would honor both the public interest and the faith. *Fulton*, *Ramirez*, and *Kennedy* require the opposite: The government must do the work before it acts, not invent reasons after it is sued. This Court’s review is needed to enforce that rule.

II. THE COMANCHE NATION'S EXPERIENCE SHOWS THAT ACCOMMODATION CAN PRESERVE SACRED SITES WITHOUT HALTING PUBLIC PROJECTS

A ruling for Petitioners would not hand any tribe a veto over public projects. As Judge Oldham explained, “respecting sacred sites—and recognizing the substantial burdens that attend their destruction—would not privilege Native American religions. Rather, it treats them equally.” Pet. App. 59a. The Comanche Nation’s own experience proves the point. When a government does the work that strict scrutiny demands, it can accomplish its objectives and spare religiously sacred sites. The failure in this case was the City’s refusal to try.

For many Native Americans, religious exercise is inseparable from a particular place, often in a location the government now owns. Indigenous sacred sites now sit on public land “because the United States took those sites from Indian tribes long ago,” so “[t]here is no ‘private’ place for those religions to go.” Carpenter, *supra*, at 2110. A People whose sacred riverbend is bulldozed cannot rebuild the riverbend. That is why destroying a sacred site ends the religious exercise itself.

Far too often, that is exactly what happens. See *id.* at 2103–06 (arguing that “[i]n recent years. . . Cases expanding the scope of free exercise . . . have favored religious belief and practice, even when arguably pitted against core concerns about public health” but that “the Court’s precedents still deny religious freedom to American Indians.”); see generally *id.* (collecting cases). Courts have protected Native American religious exercises “[a]t the edges” in prisoner cases, but they “have yet to step in and say Native Peoples have religious freedom rights to the

protection of sacred lands and waters.” Michael McNally, *Defend the Sacred: Native American Religious Freedom*, *Berkley Forum* (Oct. 21, 2020) <https://berkeleycenter.georgetown.edu/responses/defend-the-sacred-native-american-religious-freedom>.

Comanche Nation v. United States shows a better path. There, the Army planned to build a 43,000-square-foot Training Support Center about 1,600 feet south of Medicine Bluffs, a landform on the National Register of Historic Places since 1974 and sacred to the Comanche people since long before Fort Sill existed. 2008 WL 4426621, at *1, *6. The southern approach to the Bluffs is the traditional route Comanches take to ascend for prayer, and an unobstructed view of all four Bluffs is central to that spiritual experience. *Id.* at *7. The chosen construction site sat squarely on that sightline, at the very spot a Comanche practitioner stands to center himself on the gap the Comanche call “Sweet Medicine.” *Id.* at *17.

The court did not doubt the Army’s objective. It credited testimony that the center was “essential to the training mission at Ft. Sill” and it found a compelling governmental interest in building the facility. *Id.* It enjoined construction at the chosen site anyway, because the government had never pursued a less restrictive alternative. The record was “utterly devoid . . . of facts tending to demonstrate that the construction of the TSC in its current location is the least restrictive means of furthering the compelling government interest.” *Id.* at *18 A different site sat about 2,500 feet west, outside the sacred viewscape, and satisfied each of the Army’s own siting criteria. *Id.* at *10. The Army never seriously considered it, for the same reason the City never studied Petitioners’ design: it “did not consider Plaintiffs’ religious practices at all.” *Id.* at *18. The court’s injunction

protected “sacred lands and centuries-old religious traditions” while leaving the Army free to build on another site.

Comanche Nation shows that sustained, good-faith coordination can preserve both religious exercise and public objectives at sacred sites across the country, from Bear Lodge to Medicine Wheel, where government-to-tribe engagement produced management agreements that protected the sites and allowed public use to continue. See, e.g., *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 819, 822 (10th Cir. 1999) (detailing coordination between the National Park Service and Native American religious practitioners on a final management plan that was designed “to eliminate barriers to American Indians’ free practice of religion”); *Wyo. Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1244–45 (10th Cir. 2004) (detailing coordination between the Forest Service and Native American religious practitioners on a memorandum of agreement that provided for “protection and continued traditional cultural use” at a sacred site). Strict scrutiny requires the government try to use the least restrictive means before destroying a sacred site. Experience shows that this usually succeeds.

The Comanche’s experience answers the objection the City and the panel pressed below. Requiring the government to investigate accommodations before acting does not grind public projects to a halt. It channels them toward designs, sites, and schedules that serve the public and the sacred alike. In *Comanche Nation*, the Comanche Nation preserved its sacred site and the Army got its training center. San Antonio can repair its retaining walls and still leave the riverbend intact. All the law requires is that the

City do what the Army was made to do in *Comanche Nation*, and what it refused to do below.

III. THE FIFTH CIRCUIT’S SUBSTANTIAL-BURDEN ANALYSIS IMPERMISSIBLY SUBSTITUTED ITS OWN THEOLOGICAL JUDGMENT FOR PETITIONERS’ SINCERE BELIEFS.

Despite acknowledging that Petitioners “require certain religious ceremonies to be performed only at this riverbend,” and that those “ceremonies cannot be properly administered without specific trees present and cormorants nesting,” the court below held that removing those trees and driving off those birds imposes no “real” and “significant” burden on Petitioners’ religious exercise. Clarifying Petitioners’ religious views for them, the court informed Petitioners that because they retain “virtually unlimited access” to the rest of the park, and because the sacred birds may “nest nearby or elsewhere in the 343-acre Park,” their faith wasn’t really burdened. Pet. App. 3a, 16a, 19a, 118a. That decision is wrong.

First, the manner in which the panel assessed the “real” and “significant” burden on Petitioners’ religious exercise depended on theological judgments that the First Amendment forbids. While courts may test the sincerity of a religious claim, they may not evaluate its correctness or determine how central it is to what the believer professes to hold sacred. See *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699 (1989); *Thomas*, 450 U.S. at 715–16. By treating access to other land as an answer to the destruction of this sacred land, the panel substituted its own judgment of religious sufficiency for Petitioners’.

Second, the panel’s underlying logic writes a denominational preference into the law of religious

liberty. No court would hold that razing a church imposes no burden if doing so would leave the congregation without a “physical space adequate to their needs and consistent with their theological requirements.” *Int’l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011) (citation omitted); see *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007). Yet under the decision below, a faith whose sanctuary lies in nature forfeits the protection a faith with walls and a roof would receive. But the First Amendment mandates neutrality among religions and among their understandings of the holy. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792 (1973). It thus must be applied to shelter sacred places in nature no less than sanctuaries of brick and timber.

Each error warrants this Court’s review. Left uncorrected, the panel’s reasoning would deny meaningful protection to Native peoples precisely because their sacred spaces and forms of worship are unfamiliar.

A. The Panel’s “Real” and “Significant” Test Required a Forbidden Theological Judgment.

No court may decide whether worship at the remainder of the park is religiously equivalent to worship at the riverbend. “Courts are not arbiters of scriptural interpretation,” and the “narrow function of a reviewing court” is to determine whether the claimant sincerely holds the belief, not whether the belief is sound. *Thomas*, 450 U.S. at 716. When a believer draws a line as to what his faith requires, “it is not for us to say that the line he drew was an unreasonable one.” *Id.* at 715.

Accordingly, this Court has “[r]epeatedly and in many different contexts . . . warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.” *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990). “It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” *Hernandez*, 490 U.S. at 699. And a court has “no business addressing” whether a claimant’s understanding of what his religion demands is “reasonable” because “it is not for us to say that [the claimant’s] religious beliefs are mistaken or insubstantial.” *Hobby Lobby*, 573 U.S. at 724–25.

The decision below cannot be squared with these established principles. The panel accepted that Petitioners sincerely believe their ceremonies must “be performed only at this riverbend” and “cannot be properly administered without specific trees present and cormorants nesting.” Pet. App. 3a–4a. It then held there was no substantial burden because Petitioners retain “virtually unlimited access” to the rest of the 343-acre park and because cormorants might nest “nearby or elsewhere.” *Id.* at 18a–19a. But access to the rest of the Park is relevant only if worship elsewhere is a religious substitute for worship at the riverbend—and whether one sacred place is interchangeable with another is a quintessentially theological question. By resting its judgment on the availability of other land, the panel necessarily decided that Petitioners’ worship is portable. That is precisely the line the believer alone may draw. *Thomas*, 450 U.S. at 715.

In *Hobby Lobby*, the government argued that the connection between the contraceptive mandate and

the owners' religious objection was too attenuated to constitute a substantial burden, and the Court declined even to engage the contention, explaining that it "dodges the question that RFRA presents" and instead presses "a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." 573 U.S. at 724; see *id.* at 725 (explaining that the judiciary's "narrow function" is confined to testing for "an honest conviction.") (citation omitted).

Judge Higginson's dissents below made the same point: the majority's conclusion that the burden is "trivial or mere perception now rests on ipse dixit, not analysis rooted in law." Pet. App. 50a (Higginson, J., concurring in part and dissenting in part). And, as his dissent to the original panel opinion highlighted, the record reflects Petitioners' sincere understanding that the riverbend services "cannot be performed anywhere else" and would be rendered meaningless if the trees and cormorants—the "spiritual ecology"—were removed. *Id.* at 110a–13a (Higginson, J., concurring in part and dissenting in part) (withdrawn).

Once Petitioners established that the ceremonies depend on that specific sacred place and its features, the court could not treat access to other land as an adequate substitute without impermissibly second-guessing Petitioners' understanding of their own faith. See *Hobby Lobby*, 573 U.S. at 724–26. But the panel did exactly that, recasting a religious necessity as a matter of mere convenience. In so doing, it rested its decision on a theological judgment the First Amendment forbids a court from making.

**B. The First Amendment Protects Sacred
Spaces Built in Nature No Less Than
Those Built by Human Hands.**

The decision below carries a still deeper flaw, and it is one the First Amendment condemns in the plainest terms. “A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion.” *Nyquist*, 413 U.S. at 792–93; see *Larson*, 456 U.S. at 244; *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Much of our law of religious land use is framed around buildings and structures—the church, the synagogue, the mosque, the temple. See 42 U.S.C. §§ 2000cc(a), (b). For example, RLUIPA protects “religious exercise” in large part through the vocabulary of land “use” of “structures.” 42 U.S.C. § 2000cc(a)–(b). No one doubts that a government would substantially burden religious exercise by razing a house of worship to build a recreational park if the congregation would be left with no adequate alternative. Yet the reasoning of the decision below does exactly that to Petitioners, holding that access to the balance of the park defeats any substantial burden, see Pet. App. 18a–19a.

The First Amendment does not protect the worshipper in the pew while abandoning the worshipper at the riverbend. See *Larson*, 456 U.S. at 246 (“The First Amendment mandates governmental neutrality between religion and religion.” (citation omitted)). This Court has consistently recognized that the rituals of a minority religion must receive the same protections as more conventional forms of worship. In *Fowler v. Rhode Island*, for example, a city let mainstream congregations hold services in a public park but prosecuted a Jehovah’s Witness minister for preaching there. This Court rightly reversed, holding that “it is no business of courts to say that what is a

religious practice or activity for one group is not religion under the protection of the First Amendment,” and that treating one sect’s worship differently from another’s is “merely an indirect way of preferring one religion over another.” 345 U.S. at 69–70.

The Free Exercise Clause extends to the unfamiliar and the unpopular, and it is not “limited to beliefs which are shared by all of the members of a religious sect,” *Thomas*, 450 U.S. at 708, nor confined to those familiar faiths whose practices a court finds congenial. See, e.g., *Church of the Lukumi Babalu Aye*, 508 U.S. 520. The decision below fits an unfortunate pattern in which the distinctive qualities of Indigenous, place-based worship become the reason to withhold protection rather than to extend it.

There is little doubt that the First Amendment protects the sanctification of time and man-made space. *Frazee v. Ill. Dep’t of Emp. Sec’y*, 489 U.S. 829, 834 (1989) (holding that a petitioner refusing to work on Sundays “was entitled to invoke First Amendment protection”). It protects the believer who will not work on Saturday or Sunday, *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963), and the believer who will not labor on armaments against his conscience, *Thomas*, 450 U.S. at 717–20. It protects churches and temples, 42 U.S.C. §§ 2000cc (a), (b), but it also protects those who believe their house of worship lies in nature. Yet the message of the decision below is that unless a faith’s convictions about the holy are enshrined in sacred time or sacred man-made space, the government may extinguish religious practices without triggering scrutiny. That’s not only wrong, but also constitutionally infirm. It is a preference for some theologies over others, and the First Amendment forbids it. See *Larson*, 456 U.S. at 245 (“[E]quality

would be impossible in an atmosphere of official denominational preference.”).

Only last Term, Justice Gorsuch made this exact point with force and clarity. Dissenting from the denial of certiorari in a case permitting the destruction of the Western Apache’s Oak Flat—a site considered a “direct corridor to the Creator” where “religious ceremonies . . . cannot take place elsewhere,” and which the government’s plan would replace with “a crater perhaps 1,000 feet deep and nearly two miles wide”—he observed that Native Americans “may live far from Washington, D.C., and their history and religious practices may be unfamiliar to many. But that should make no difference.” *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1480–82, 1489 (2025) (Gorsuch, J., dissenting from denial of certiorari) (calling the denial “a grievous mistake—one with consequences that threaten to reverberate for generations”), *reh’g denied*, 146 S. Ct. 285 (2025). The Ninth Circuit ruled in that case that the government’s management of its own land cannot substantially burden religion. *Apache Stronghold v. United States*, 101 F.4th 1036, 1114 (9th Cir. 2024) (en banc) (holding that the government’s “use of its own property has never been understood to impose a constitutionally cognizable burden on someone’s religious freedom—even when such governmental decisions incidentally have ‘devastating’ and ‘severe adverse effects on the practice of a religion’” (citation modified)), *cert. denied*, 145 S. Ct. 1480 (2025). The decision below suffers from the same fundamental defect.

As six judges recognized in dissenting from the denial of rehearing en banc, “[t]he City of San Antonio plans to destroy a sacred Native American religious site,” and “[t]he burdens on plaintiffs’ religious freedoms are undeniable.” Pet. App. 54a–60a

(Oldham, J., joined by Elrod, C.J., and Smith, Higginson, Willett, and Ho, JJ., dissenting from denial of reh’g en banc). “[V]irtually unlimited access to the park’ is useless if the park’s Sacred Area is destroyed.” *Id.* at 57a. One would not deem insubstantial “a ban on accessing the Lord’s Table because congregants can still sit in the pews,” nor a padlock on a church “on the theory that Christians could worship elsewhere.” *Id.* at 57a–58a. The First Amendment is denominationally neutral. It prefers no religion, no dogma, and no architecture of the holy. It protects the holy spaces built in nature no less than those built by human hands. This Court should intervene to reaffirm that foundational First Amendment principle.

CONCLUSION

The Court should grant the Petition and make clear that government regulations do not defeat free-exercise claims, and that courts may not override claimants’ sincere theological judgments.

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