

No. 26-15

In the Supreme Court of the United States

GARY PEREZ; MATILDE TORRES,

Petitioners,

v.

CITY OF SAN ANTONIO,

Respondents.

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

**BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS DEFENSE
CENTER IN SUPPORT OF PETITION FOR CERTIORARI**

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INTEREST OF THE *AMICUS CURIAE*

The Human Rights Defense Center (“HRDC”) is a nonprofit dedicated to protecting the civil rights and civil liberties of individuals who are marginalized, incarcerated, or otherwise vulnerable to the exercise of unchecked government power.¹ Founded in 1990, HRDC publishes *Prison Legal News*, a monthly journal reporting on criminal justice issues, and *Criminal Legal News*, covering broader legal developments. HRDC has appeared as *amicus curiae* in numerous cases before federal and state courts involving constitutional rights, religious freedom, and access to justice.

HRDC has a substantial interest in this case because the protection of minority religious exercise within and outside of custodial settings has been central to HRDC’s mission since its founding. More than half a century ago, this Court recognized in *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam), that a Buddhist prisoner who was denied access to religious services comparable to those afforded Christian inmates stated a viable claim under the Free Exercise Clause. *Cruz* established a principle at the core of HRDC’s work: that the government may not privilege majority faiths over minority ones, whether inside prison walls or outside them. The religious rights of incarcerated and marginalized individuals have been a

¹ No party or counsel to a party has authored this brief in whole or in part. Furthermore, other than *Amicus* and its counsel, no person or entity has made any monetary contribution toward the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

Pursuant to Rule 37.2, counsel of record for all listed parties received notice at least 10 days prior to the due date of the *Amicus Curiae*’s intention to file this brief.

longstanding battleground, and HRDC's decades of advocacy have confirmed that the theological-substitution problem at issue in this case—government officials deciding for believers what their religion “really” requires—is a recurring threat to religious liberty wherever the government exercises custodial or regulatory power.

HRDC's experience further demonstrates that government officials' beliefs about majority faiths should not be imposed against minority faiths. As Judge Posner observed in *Sasnett v. Litscher*, 197 F.3d 290, 293 (7th Cir. 1999), prison authorities who told Protestant inmates to use a rosary showed “a complete ignorance of religious feeling. One might as well tell Anglicans to kiss the Pope's ring but pretend he's the Archbishop of Canterbury.” The same dynamic is at work in this case: a secular authority, here, the Fifth Circuit, has told members of the Lipan Native American Church that visiting cormorants are theologically indistinguishable from nesting cormorants, in the same way that prison authorities have told Protestant inmates that a rosary is an adequate substitute for their own religious devices. Government institutions must be content-neutral with respect to religious belief; they may not substitute majoritarian assumptions about what faith “should” look like for the sincere beliefs of the adherent.

This case presents a question of profound importance not only for the Petitioners but for all individuals whose religious practices are subject to government interference: whether secular courts may make theological judgments about what a claimant's religion requires. HRDC respectfully submits this brief to urge the Court to grant certiorari, to resolve the question left open in *Zubik v. Burwell*, 578 U.S.

403 (2016), and to give actual teeth to the constitutional protections that safeguard sincere religious exercise—protections that, as currently applied by the lower courts, lack enforceable remedies for those whose religious rights have been infringed.

SUMMARY OF ARGUMENT

The Free Exercise Clause protects the right of individuals to live according to their sincerely held religious beliefs. A necessary corollary of this protection is that *courts may not appoint themselves as theologians* and decide what a claimant’s religion truly requires, or substitute secular logic for religious conviction. This principle, first articulated in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), and reaffirmed in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), represents a bedrock limit on judicial authority in free exercise cases.

The Fifth Circuit violated this principle. Petitioners Gary Perez and Matilde Torres, leaders of the Lipan Native American Church, testified under oath that their religious ceremonies require cormorants to be *nesting* at a sacred site along the San Antonio River, not merely visiting or passing through. The panel rejected this sincere theological testimony, holding that there was no substantial burden on Petitioners’ religion because cormorants could still “visit” the area even if deterred from nesting. In so holding, the panel made a theological judgment: it decided, contrary to the adherents’ own sworn testimony, what Petitioners’ faith requires.

This decision provides a vehicle to address the unresolved question in *Zubik v. Burwell*, 578 U.S. 403 (2016). In *Zubik*, the government argued that its contraceptive-mandate accommodation did not burden the religious exercise of the Little Sisters of the Poor and other religious organizations because, in the government’s theological assessment, the accommodation was merely administrative—a form, not complicity. *Id.* at 405–406. The religious organizations disagreed,

sincerely believing that participation made them complicit in sin. *Id.* at 406–407. This Court vacated and remanded without resolving whether the government could substitute its own theological judgment for that of the believer. *Id.* at 408.

Just as the government told the Little Sisters that signing a form was not religiously significant, the Fifth Circuit told Perez and Torres that the difference between nesting and visiting cormorants was not religiously significant. In both instances, a secular authority has presumed to instruct believers on what their own faith means and dictated what does and does not constitute a burden upon it. This Court should grant certiorari to resolve this recurring constitutional question.

The danger of the Fifth Circuit’s approach extends far beyond this case. When courts arrogate to themselves the power to assess the theological significance of particular religious practices—to weigh whether a given government action “really” burdens religion—they inevitably import their own cultural and religious assumptions. Minority faiths, whose beliefs and practices may appear unfamiliar, counterintuitive, or even irrational to mainstream secular culture, are uniquely vulnerable to this kind of judicial theology. The Religion Clauses exist precisely to prevent the government from making such judgments. As Justice Gorsuch recently observed in *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1488 (2025) (dissenting from denial of certiorari), “[o]ne court after another has held that preventing a religious exercise is, necessarily, a ‘substantial burden’ on that religious exercise.” The Fifth Circuit’s approach is an outlier that calls for this Court’s correction.

ARGUMENT

I. Theological Determinations by Courts Are Particularly Dangerous to Minority Faiths.

The protection of minority faiths is a crucial goal of the First Amendment religion clauses. *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 fn. 4 (2002) (Thomas, J., concurring) (explaining that the protection of minority faiths inheres in the Free Exercise Clause, which safeguards individual liberties of religious worship, rather than in the Establishment Clause); *People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 217 (1948) (Frankfurter, J., concurring) (discussing the role of secular public education in protecting religious minorities from majoritarian pressures in the school system). “Indeed, it was ‘historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.’” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.) (additional citations omitted)). The Court’s role in upholding this Constitutional mandate has been recognized for decades:

A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

Goldman v. Weinberger, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting).

This recognized purpose of the religion clauses has guided the Court in its protection of religious minorities and development of law to protect these groups. See *Mahmoud v. Taylor*, 606 U.S. 522, 557–558 (2025) (cases considering the rights of smaller religious groups “cannot be breezily dismissed as a special exception granted to one particular religious minority” but should be treated “like any other precedent”); *Masterpiece Cakeshop v. Colorado C.R. Comm’n*, 584 U.S. 617, 649 (2018) (Gorsuch, J., concurring) (“Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country’s commitment to serving as a refuge for religious freedom.”) (citations omitted).

However, courts have not always fulfilled this constitutional duty to protect minority religions. See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 443, 458 (1988) (First Amendment did not preclude Government from constructing road or permitting timber harvesting in Chimney Rock area, despite “serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.”); *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1489 (Gorsuch, J., dissenting from denial of writ of certiorari) (recognizing that destruction of Apache worship site burdened minority faith).

Cases such as *Lyng* and *Apache Stronghold*—and now *Perez*—show why it is so essential that courts do not decide what religious practice entails. The prohibition on judicial theology is not merely a procedural nicety; it is a structural protection that is essential to the equal treatment of all religious traditions under

the Constitution. When courts are permitted to assess the theological significance of particular practices, they inevitably bring to bear their own cultural assumptions about what religion “looks like” and what kinds of burdens are “real.” These biases present a substantial risk to minority religions in particular, which may have practices that judges are less likely to recognize or protect. *See ibid.* (acknowledging that Apache faith deserved the same respect as mainstream religions, even if “their history and religious practices may be unfamiliar to many.”). Despite the greater risks to minority faiths, the rule Petitioners advance is simple and faith-neutral: once a court finds that a religious belief is sincerely held, the court must accept the believer’s own characterization of what faith requires and what constitutes a burden. This neutral principle will protect minority religions by removing a judge’s own, subjective judgments about what religious practice should look like or what a practitioner’s faith requires.

II. The Religion Clauses Should Be Clearly Interpreted to Prohibit Courts From Making Theological Judgments About What Religious Practice Requires.

The First Amendment’s Religion Clauses, both the Free Exercise Clause and the Establishment Clause, erect a constitutional wall between the province of religion and the province of civil government. The Fifth Circuit’s ruling in *Perez* bulldozed that wall.

The District Court acknowledged, and the Fifth Circuit, agreed that Petitioners “sincerely” believe “that life in the region of San Antonio began at a spring” referred to in the briefings as the “Sacred Area,” where “a spirit in the form of a cormorant” scattered water droplets from its tail spurring life in the

region, that the “riverbend, located within the [Sacred Area], mirrors the celestial constellation Eridanus and bridges the physical and spiritual worlds,” and that their faith “require[s] certain religious ceremonies to be performed only at this riverbend.” *Perez v. City of San Antonio*, 163 F.4th 110, 115 (5th Cir. 2025) (“*Perez I*”) (emphasis added).

Nevertheless, the Fifth Circuit proceeded to hold that the bulldozing of this Sacred Area, including the trees which house the sacred cormorants, and the installation of pyrotechnics and other means to permanently keep the cormorants away from the Sacred Area, *did not* constitute a substantial burden on the faith’s adherents.

In reaching this conclusion, the Fifth Circuit noted that “cormorants are not specifically targeted nor dissuaded from nesting nearby or elsewhere in the 343-acre Park” and that “Appellants continue to have virtually unlimited access to the Park for religious and cultural purposes.” *Id.* at 122. This ruling interpreted Petitioners’ religion rather than law, deciding for the faith that the Sacred Area was not that unique and that the requirements of their religion could just as easily be satisfied at any other location across the Breckenridge Parks’ 343-acre campus. *See Perez v. City of San Antonio*, 168 F.4th 345, 346 (5th Cir. 2026) (Ho, J., dissenting from denial rehearing *en banc*) (“*Perez II*”) (quoting *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984)) (affirming maxim that “[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”)

The Fifth Circuit’s theological pronouncement on this issue contradicts established precedent, oversteps the religious protections enshrined in the First

Amendment, and risks opening the door to future encroachments upon the practices of minority religions across the nation. Accordingly, it should be reviewed by this Court.

A. Courts Are Ill-Equipped to Make Theological Determinations.

This Court has recognized that the First Amendment guarantees religious organizations the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). This same principle applies equally to individuals when courts decide whether government action burdens religious exercise. In such a context, courts cannot supplant theological determinations made by an individual about their own faith without threatening the liberties protected by the First Amendment.

This principle was discussed in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981). There, Thomas, a Jehovah’s Witness, quit his job at a foundry when he was transferred “to a department that produced turrets for military tanks,” claiming that his religious beliefs prevented him from participating in the production of war materials. *Id.* at 709. In response, the review board “denied him unemployment compensation benefits,” concluding that his “termination was not based upon a ‘good cause arising in connection with his work,’ as required by the Indiana unemployment compensation statute.” *Id.* at 709, 712 (cleaned up).

The Indiana supreme court upheld the review board’s determination, finding that “[g]ood cause which justifies voluntary termination must be job-related and objective in character,” and that Thomas had quit “voluntarily for personal reasons.” *Id.* at 712–713 (internal citations omitted). In coming to that conclusion, the court considered that other Jehovah’s Witnesses had remained employed at the foundry in weapons-manufacturing positions and that Thomas himself “was not able to ‘articulate’ his belief precisely” because he would not object to work producing the “raw product necessary for the production of any kind of tank.” *Id.* at 715. The Indiana supreme court found Thomas’s position inconsistent, concluding that Thomas’ decision amounted to a “personal philosophical choice rather than a religious choice,” and did “not rise to the level of a first amendment claim.” *Id.* at 713 (citations omitted).

This Court rejected the Indiana court’s theological interpretation of Thomas’s faith. It recognized that “[c]ourts are not arbiters of scriptural interpretation” and that “the judicial process is singularly ill equipped to resolve” differences among how individuals of a particular creed “perceive[] the commands of their common faith.” *Id.* at 715–716.

Other Supreme Court decisions fortify this principle. In *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732 (2020), for example, the Court reiterated that “[t]he First Amendment protects the right of religious institutions ‘to decide for themselves, free from state interference, matters of . . . faith and doctrine’” and gives churches independence in the same. *Id.* at 737 (quoting *Kedroff*, 344 U.S. at 116).

And in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014), private store owners objected to

the Affordable Care Act’s (“ACA”) requirement that they provide “insurance that covers methods of birth control,” as well as the steep penalties the ACA threatened for non-compliance. This Court recognized that “it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction,’ and there is no dispute that it does.” *Id.* at 725 (quoting *Thomas*, 450 U.S. at 716)); *see also Watson v. Jones*, 80 U.S. 679, 728 (1871) (stating that “[t]he law knows no heresy” and “[i]n this country the full and free right to entertain any religious belief, to practice any religious principle . . . and which does not infringe personal rights, is conceded to all”).

These cases recognize the general principle that courts should not make theological determinations.

B. The Fifth Circuit Engaged in Theological Decision-making in This Case.

Against this doctrinal backdrop, the Fifth Circuit panel’s decision represents a textbook violation of the prohibition on judicial theology. The record in this case is unambiguous: both Petitioners testified, repeatedly and under oath, that their religious ceremonies require cormorants to be nesting at the sacred riverbend within the Lambert Beach Area. Not merely flying over it, not merely “visiting,” but actively nesting. The panel acknowledged Petitioners’ sincerity and then proceeded to override their theological testimony with the panel’s own assessment of what their religion should require.

The trial testimony on this point was emphatic, but the Fifth Circuit brushed this testimony aside. Rather than accepting Petitioners’ sincere

characterization of what their faith demands, the panel substituted its own theological judgment. It reasoned that “cormorants are not specifically targeted nor dissuaded from nesting nearby or elsewhere in the 343-acre Park,” *Perez I*, 163 F.4th at 122, and that Petitioners “continue to have virtually unlimited access to the Park for religious and cultural purposes,” *id.* In other words, the panel decided, contrary to the Petitioners’ own sworn testimony, that the difference between nesting and visiting was theologically insignificant, and that any location within the park’s 343 acres would serve just as well.

As six judges of the Fifth Circuit recognized in a dissent, this reasoning is untenable. “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.” *Perez II*, 168 F.4th at 347 (Oldham, J., dissenting from denial of rehearing en banc). Judge Oldham’s dissent likewise observed that the panel’s approach—suggesting the Petitioners could simply worship “elsewhere” in the 343-acre park—would not be tolerated if applied to a mainstream faith: “And if the government were to padlock a church on the theory that Christians could worship elsewhere, we would not hesitate to hold it unlawful.” *Id.* at 348.

The panel’s error is a paradigmatic example of the judicial theology that the reasoning in *Thomas* forbids. Rather than asking whether the Petitioners sincerely believe that cormorant nesting at the Sacred Area is essential to their ceremonies, a question answered conclusively by the undisputed record, the panel asked whether, in the panel’s own estimation, visiting cormorants are a sufficient substitute for nesting cormorants. That is a theological question, not

a legal one, and no court is competent to answer it. *See Thomas*, 450 U.S. at 716 (“Courts are not arbiters of scriptural interpretation.”).

Notably, the theological substitution was not limited to the Fifth Circuit; it began in the district court, demonstrating the need for clarification and instructions from the Supreme Court. The district court engaged in the kind of comparative religious analysis that *Thomas* forbids. In its preliminary injunction order, the district court observed that “both Plaintiffs also practice Roman Catholicism whose places of worship provide numerous locations for individual meditation and worship,” and that “Plaintiffs and the general public still have access to over 300 acres of Brackenridge Park for meditation in nature.” *Perez v. City of San Antonio*, No. SA-23-CV-977-FB, 2023 WL 6629823, at *2 (W.D. Tex. Oct. 11, 2023).

The implicit premise is that the Sacred Area is fungible, that any sufficiently natural setting will do, and that the Petitioners’ Catholic practices can substitute for their Native American ones. That is a theological judgment of the most dangerous kind: a secular court ranking one faith tradition against another and deciding which is dispensable.

III. This Case Provides an Ideal Vehicle to Answer an Important Unresolved Question from *Zubik v. Burwell* About Theological Assessments.

In *Zubik v. Burwell*, 578 U.S. 403 (2016) (per curiam), religious nonprofit organizations, including the Little Sisters of the Poor, challenged the Affordable Care Act’s contraceptive-mandate accommodation. The religious organizations sincerely believed that participating in the government’s accommodation

process made them complicit in providing contraceptive coverage, in violation of their religious convictions. The government disagreed, insisting that the accommodation was merely administrative, a matter of filling out a form, and therefore could not constitute a burden on the organizations' religious exercise. *Id.* at 407–408.

This Court vacated and remanded, instructing the lower courts to explore whether an accommodation could be reached that would satisfy both the government's interest in providing contraceptive coverage and the religious organizations' sincere objection. *Id.* at 408. Critically, the Court did not resolve the underlying constitutional question: whether the government may override a religious claimant's sincere characterization of what burdens their faith by substituting its own theological assessment that the alleged burden is not “really” a burden at all. That question has remained open for nearly a decade.

The Fifth Circuit's decision in this case presents that same unresolved question in a new form. The structural parallel is precise. In *Zubik*, the government told the Little Sisters that completing an opt-out form did not make them complicit in providing contraceptive coverage, even though the Little Sisters sincerely believed otherwise. Here, the Fifth Circuit told Perez and Torres that preventing cormorants from nesting at the Sacred Area did not burden their religious practice, even though both Petitioners testified unequivocally that it did. In both cases, a secular authority presumed to instruct believers on what their own faith means and dictated what does and does not constitute a burden upon it.

The mechanism of theological substitution is identical in both cases. In *Zubik*, the government argued

that the religious organizations' objection rested on a misunderstanding of how the accommodation worked; that the form merely triggered a separate obligation on the insurer, and the organizations bore no moral responsibility for what followed. The government, in other words, offered its own theological assessment of complicity and urged the courts to adopt it. Similarly, in this case, the Fifth Circuit offered its own theological assessment of what Petitioners' faith requires: that the physical presence of cormorants in the general vicinity of the park, even without nesting, should be religiously sufficient. The panel reached this conclusion not by crediting the Petitioners' testimony, but by applying secular logic to a question of religious doctrine.

The consequences of this substitution are also parallel. In the *Zubik* line of cases, the government's insistence that its accommodation did not burden religion threatened to establish a precedent under which courts could override any claimant's characterization of complicity, so long as the government could articulate a secular rationale for why the claimant's participation was "merely administrative." Here, the Fifth Circuit's reasoning threatens to establish a precedent under which courts can override any claimant's characterization of what their sacred practice requires, so long as the court can identify some secular substitute that, in the court's estimation, comes close enough.

The *Zubik* question has grown only more urgent in the decade since the Court left it unresolved. Lower courts continue to struggle with the boundary between assessing sincerity, which courts may do, and assessing theology, which they may not. *See, e.g., Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (confirming that only the sincerity test applies in light of

“the Supreme Court’s express disapproval” of the centrality test); *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (emphasizing that “[t]he inquiry here isn’t into the merit of the plaintiff’s religious beliefs or the relative importance of the religious exercise: we can’t interpret his religion for him.”); *Gaddy v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 551 F. Supp. 3d 1206, 1218 (D. Utah 2021) (“courts are required to evaluate the sincerity of religious beliefs as a threshold question for litigants and prisoners seeking to assert affirmative rights under the First Amendment and the Religious Freedom Restoration Act”).

The Fifth Circuit’s decision below collapses that boundary entirely, treating the substantial-burden inquiry as an occasion for the court to independently evaluate the religious significance of the claimed burden. If the Court does not intervene, other courts will take the Fifth Circuit’s approach as license to second-guess any religious claimant whose theology seems unfamiliar, disproportionate, or theologically “unnecessary” in the court’s secular estimation.

This case thus presents the Court with an ideal vehicle to resolve the question left open in *Zubik*. The factual record is fully developed, the theological substitution is undeniable, and the consequences of leaving the question unresolved are made vivid by the panel’s decision below. If courts may override a believer’s sincere testimony about what burdens their faith, whether the burden is complicity in providing contraceptive coverage or the destruction of a sacred site’s spiritual ecology, then the Free Exercise Clause’s protection of sincere belief is illusory. The Court should grant certiorari to establish, clearly and definitively, that once sincerity is established, the

believer's own characterization of the religious burden is conclusive and may not be displaced by a court's or the government's contrary theological assessment.

* * * *

The Fifth Circuit's decision below permits secular courts to substitute their own theological assessments for the sincere testimony of religious adherents, telling believers what their religion requires and what does or does not constitute a burden on their faith. This judicial arrogation of theological authority violates the core commitments of the Religion Clauses, threatens the religious liberty of all minority-faith practitioners, and perpetuates the unresolved constitutional question this Court identified but did not decide in *Zubik v. Burwell*.

Unless this Court intervenes, the protections of the Free Exercise Clause will remain, for minority-faith adherents, a promise without enforceable content—a standard with no teeth.

CONCLUSION

Amicus Curiae Human Rights Defense Center respectfully urges this Court to grant the petition for a writ of certiorari.

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