

No. 26-15

IN THE
Supreme Court of the United States

GARY PEREZ AND MATILDE TORRES,
Petitioners,

v.

CITY OF SAN ANTONIO, TEXAS,
Respondent.

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

**BRIEF OF *AMICI CURIAE* INDIGENOUS
RELIGION SCHOLARS IN SUPPORT OF
PETITIONERS**

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INTERESTS OF *AMICI CURIAE*¹

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Amici are scholars of Native American religious traditions who have dedicated their research and careers to understanding those traditions historically

¹ Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.2, *amici* notified all counsel of their intention to file this brief at least 10 days before the date of filing.

and theoretically, as living traditions, essential to the survival and thriving of Indigenous peoples. Some *amici* are experts on the specific place and tradition at the center of this case; others study how American courts have defined—and sometimes misunderstood—Indigenous traditions and the centrality of sacred places to their survival. *Amici* write to address two issues: (1) The legal error by the court below substantially burdens the practitioners’ sincere beliefs based on—and commitments to—the sacred ecology of the horseshoe bend in Yanaguana,² threatening the destruction of an entire religious tradition; and (2) The decision below threatens to allow courts to continue undermining the sincere beliefs of people of faith.

² Some sources use the terms “Yanaguana” and “Yana Wana” interchangeably; this brief standardizes to “Yanaguana.”

INTRODUCTION AND SUMMARY OF ARGUMENT

“The City of San Antonio plans to destroy a sacred Native American religious site.” Pet. App. 54a (Oldham, J., dissenting from denial of rehearing en banc). To the Lipan Native American Church and other Indigenous peoples, the San Antonio River is called “Yanaguana.” For centuries, worshippers have performed religious ceremonies at a particular bend of Yanaguana, in what is now generally known as Brackenridge Park. Without this Court’s intervention, those age-old ceremonies will end abruptly and forever.

Petitioners Gary Perez and Matilde Torres are ceremonial leaders of the Lipan Native American Church. They trace the origin of all life in the Yanaguana Valley to an encounter between two spirits at the spring known as the Blue Hole. According to Petitioners’ theology, the cormorant spirit descended into the Blue Hole, where it encountered the Blue Panther. As the Blue Panther roared, the cormorant took flight. During its escape, its tail feathers shed water droplets from the sacred spring across the dry Yanaguana Valley, and life itself was kindled.

Petitioners and their fellow worshippers honor that life-giving encounter through a ceremony—one of many for which the existence of Yanaguana is required—that is inherited from past generations and essential to their religious tradition. This ceremony involves standing on the south shore of the horseshoe bend of Yanaguana, surrounded by cormorants nesting in the adjacent trees, peering into Yanaguana to see the cormorants’ reflection, and observing the mirrored shape of the river and the constellation Eridanus overhead. Petitioners explain that this site

is the only place where their ceremony can unite the three worlds—the underworld reflected in the water, the middle world embodied in the nesting cormorants and trees, and the upper world traced in the constellation above—making it unique and irreplaceable for their religious tradition.

Unfortunately, the City plans to cut down most of the trees at this sacred site and deploy bird deterrent measures to prevent the cormorants from nesting. These actions, as a practical matter, will prevent Petitioners and other members of the Church from completing their sacred ceremonies. The resulting erasure of the site’s sacred ecology will effectively destroy this religious tradition.

The Fifth Circuit’s misguided “objective” approach to the substantial-burden test violates Petitioners’ free exercise rights. Rather than accept Petitioners’ sincerely held beliefs and religious traditions, the majority substituted its—incorrect—understanding of the Church’s religious traditions for Petitioners’ account of their own cosmology and ceremonial obligations. The result was that the Fifth Circuit held that the total destruction of Yanaguana’s sacred ecology, and the erasure of the Church’s ceremonies, somehow falls short of a substantial burden. This extends an already widespread circuit split that risks continued unconstitutional rejection of sincere religious beliefs.

ARGUMENT

I. THE FIFTH CIRCUIT’S “OBJECTIVE” SUBSTANTIAL-BURDEN APPROACH VIOLATES THE FREE EXERCISE CLAUSE BY OVERRIDING PRACTITIONERS’ SINCERE BELIEFS.

The Free Exercise Clause does not permit a court to tell religious believers they have misunderstood their own faith and its practices. Whether government action substantially burdens religious exercise is a legal question, but a court must resolve it on the believers’ own terms, crediting their sincere account of what the exercise requires. *See Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714-716 (1981). Interpreting religious doctrine falls outside the constitutional scope of the judiciary; the role of courts is to confirm that a belief is sincerely held. *Id.* at 716; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). When a court substitutes its own theological judgment for a claimant’s and concludes that government action does not burden religious exercise, it exceeds the constitutional protections of religious liberty.

The decision below did exactly that. The panel accepted that Petitioners can perform certain ceremonies only at the riverbend, and only with the trees and nesting cormorants present. Yet it concluded that eliminating those features imposed no substantial burden because Petitioners retain access to other parts of the park and the cormorants could nest elsewhere. Pet. App. 3a-4a, 18a-19a. These conflicting findings are irreconcilable, and their reasoning substituted the court’s judgment about which natural features a religion requires for the views of actual practitioners. As Judge Oldham observed in dissent from denial of rehearing en banc,

if being unable to practice one's faith once the City's plans proceed is not a substantial burden, it is difficult to say what would be. Pet. App. 56a.

That error is the predictable product of the "objective" substantial-burden test the Fifth Circuit embraced—a test now dividing federal and state courts nationwide.

A. The “Objective” Approach Impermissibly Merges The Analyses Of Substantial Burden And Sincerity Of Belief, To The Detriment Of Minority Religions.

Whether government action imposes a “substantial burden” is a legal question that courts must decide. But the answer turns on the claimants’ sincere understanding of what their religious exercise requires and how the challenged action interferes with it. *Thomas*, 450 U.S. at 714-716. Sincerity and content of belief define the religious exercise; the burden inquiry asks only whether the government has pressured, penalized, or prevented that exercise. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (en banc), *aff’d sub nom.*, *Burwell*, 573 U.S. 682. The “objective” test collapses the second inquiry into the first, permitting a court to deem a burden “insubstantial” by concluding that the claimant is simply mistaken about what their own religion really demands.

This error has percolated among the circuits, and it divides federal and state courts alike. On one side stand courts that remain within constitutional bounds by taking a religious claimant as they find him and measuring burden against religious exercise as the believer understands it. For example, the Tenth Circuit has explained that the Religion Clauses set the

bounds of the substantial-burden inquiry and that judges are not “arbiters of scriptural interpretation.” *Yellowbear v. Lampert*, 741 F.3d 48, 54-55 (10th Cir. 2014) (Gorsuch, J.) (quoting *Thomas*, 450 U.S. at 716). The Seventh Circuit similarly has refused to “ask whether the claimant has correctly interpreted his religious obligations.” *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013). State courts of last resort have taken the same view: The Arizona Supreme Court declined to “assess the reasonableness of [the claimants’] sincerely held religious beliefs,” *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 921 (Ariz. 2019), and the Texas Supreme Court has insisted that burden be measured “from the person’s perspective, not from the government’s,” *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009).

On the other side stand courts whose objective inquiry casts judges as the ultimate arbiters of whether, and how, government action interferes with a claimant’s faith. The D.C. Circuit found no substantial burden even though practitioners testified that the conduct at issue caused them “unease” or “anguish,” *Priests for Life v. U.S. Dep’t of Health & Hum. Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014), *vacated sub nom.*, *Zubik v. Burwell*, 578 U.S. 403 (2016), and the Third Circuit deemed a claimant’s connection to objected-to conduct too “attenuated” to be substantial even where the religiously objectionable conduct was compelled under threat of a tax penalty, *Real Alts., Inc. v. Sec’y, Dep’t of Health & Hum. Servs.*, 867 F.3d 338, 359-360 (3d Cir. 2017) (quoting *Burwell*, 573 U.S. at 760 (Ginsburg, J., dissenting)). State courts have done the same: A Pennsylvania court construed Islamic law to countenance conduct that a practitioner testified was

religiously forbidden, *Alsyrawan v. Dep't of Hum. Servs.*, 316 A.3d 1076, 1085, 1094-95 (Pa. Commw. Ct. 2024), and the Vermont Supreme Court required practitioners to accept a substitute they described as unduly burdensome, *Brady v. Dean*, 790 A.2d 428, 434-435 (Vt. 2001). The Fifth Circuit's decision below aligned with this second camp, deepening an entrenched split and standing in direct conflict with the First Amendment.

This blending of the substantial-burden and sincerity analyses is constitutionally intolerable. The Free Exercise Clause forbids courts from overruling a practitioner's sincere beliefs. *Thomas*, 450 U.S. at 714-716. When a judge concludes that a claimant's exercise is not substantially burdened because the disputed practice is theologically unnecessary—or may be replaced by alternatives the claimant deems ineffectual—the judge has waded into the waters of theological interpretation and beyond the constitutional bounds of judicial power. Religious beliefs “need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection,” and “it is not for [a judge] to say that the line [a claimant] drew was an unreasonable one.” *Id.* at 714-715.

The objective test falls very hard on religions that are less well-known, including Indigenous religious traditions. Asking judges to gauge religious impact invites “not only many mistakes—given [courts'] lack of any comparative expertise when it comes to religious teachings, perhaps especially the teachings of less familiar religions—but also favoritism.” *Yellowbear*, 741 F.3d at 54. A test that measures burden against a judge's own intuitions about what a religion ought to require systematically disadvantages

practices the judge does not share or even recognize. As *amici* can attest, the land-based practices of Indigenous peoples “may be unfamiliar to many,” but “that should make no difference.” *Apache Stronghold v. United States*, 145 S. Ct. 1480, 1489 (2025) (Gorsuch, J., dissenting from denial of certiorari).

That these Indigenous practices have been systematically suppressed throughout American history—including through decades of boarding schools, language erasure, removal from ancestral lands, and forced assimilation—only underscores why the objective test’s disparate impact on unfamiliar traditions is constitutionally intolerable. See Zara Surratt, “*That I Would Serve in a Good Way*”: *Boarding Schools, Tribal Colleges, and Dis/Connection*, in *Native American Religions: Teaching and Learning on Stolen Land* 236, 236-251 (Dana Lloyd ed., 2026); Bryan Newland, *Federal Indian Boarding School Initiative: Investigative Report* 7-8, 91-92, Bureau of Indian Affs., U.S. Dep’t of Interior (May 2022), <https://perma.cc/P629-P76D>; see generally David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience* (1st ed. 1995).

In addition to the placement of children at residential schools, Native peoples were often confined to reservations and thus constrained from the exercise of ritual and ancestral obligations at sacred places off reservation communities. See Tisa Wenger, *Fighting for Oak Flat: Western Apaches and American Religious Freedom*, 29 J.L. & Religion 247, 254 (2024). The cumulative effect of these policies was to disrupt the intergenerational transmission of traditions that were place-based, language-dependent, and communally

sustained. It is thus unsurprising that courts today may find these traditions unfamiliar.

Crediting the claimant’s sincere account—rather than an objective judicial reconstruction of it—is the only approach that treats all religions alike and adheres to constitutional guarantees.

**B. Native American Religions Rely Upon
Sacred Ecology Vulnerable To Judicial
Misinterpretation.**

Native American religious traditions are land-based: “There are certain geographical sites or physical formations that are held to be ‘sacred’ as an integral part of the religion,” and practitioners “hold certain ceremonies * * * [at] such places on recurring bases.” Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012). For many such traditions, “their particular rituals may not be performed elsewhere, so central is a particular place, feature, or landscape to the religious rite.” Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1305 (2021); *see also* Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 Harv. L. Rev. 2103, 2113 (2021) (describing the “inextricable connection among place, belief, and practice that characterizes” Indigenous religious traditions and distinguishing from rituals “that can be practiced equally well in any church, temple, or mosque”).

Indigenous relationships with land run both ways. A tribe’s connection to a sacred site obliges it to steward that place. This connection is so profound that Indigenous peoples tend to describe themselves

as being “of” a place rather than “from” a place. Being of a place confers kinship-based accountability exemplified by Petitioners’ relationship to the site here: a sacred ecology, an arrangement in which practitioner and site are interdependent. See Dana Lloyd, *Land Is Kin: Sovereignty, Religious Freedom, and Indigenous Sacred Sites* 80-108 (2024); Michael D. McNally, *The Sacred and the Profaned: Protection of Native American Sacred Places That Have Been Desecrated*, 111 Calif. L. Rev. 395, 405-408 (2023) (explaining that Indigenous peoples relate to sacred places as kin, with obligations that remain in force regardless of ownership or degradation); Abel R. Gómez, *What Does It Mean for an Indigenous Religion to Be “Place-Based?”*, in Indigenous Religious Traditions in 5 Minutes 137, 137-139 (Molly H. Bassett & Natalie Avalos eds., 2022).

For centuries, Indigenous worshippers have gathered at a particular bend of the river they call Yanaguana to participate in religious ceremonies, including a reenactment of their creation story featuring a cormorant. Pet. App. 54a (Oldham, J., dissenting), 404a-405a. Yanaguana is a network of sacred springs and relationships among lands, waters, flora, and fauna sustained across generations of practitioners in Central Texas. Marleen Villanueva, *Yana wana Practitioners: Indigenous Water Teachings and Kinship Responsibilities in Central Texas* 13-14, 84-85 (2025) (Ph.D. dissertation, University of Toronto) (on file with author). The water is no mere backdrop, but a living relative, a teacher, and a source of collective continuance. This specific riverbend echoes the constellation Eridanus overhead, and the riverbend, water, stars, trees, and nesting cormorants together form a sacred ecology found

nowhere else. Pet. App. 3a-4a. Petitioners' central ceremony depends on all of these at once: The practitioner sees a cormorant reflected in the water, stands among the nesting birds at the riverbend, and looks toward Eridanus, uniting the under, middle, and upper worlds. Pet. App. 421a, 500a. The trees serve as an anchor point, joining those worlds—their roots reach into the underworld and touch the water table below, their trunks rise through the middle world of human existence, and their branches extend into the heavens—and provide the cormorants their religiously essential nesting ground at the riverbend. Pet. App. 110a-111a (Higginson, J., concurring in part and dissenting in part), 421a-422a.

These features are not interchangeable but are interlocking parts of a single sacred whole. Mr. Perez compared the riverbend to a “tapestry” that “begins to unravel” if any thread—riverbend, river, trees, or cormorants—is pulled. Pet. App. 111a (Higginson, J., concurring in part and dissenting in part) (quoting Pet. App. 420a). Ms. Torres testified that services there would be “meaningless” without the trees or cormorants, Pet. App. 111a (Higginson, J., concurring in part and dissenting in part) (quoting Pet. App. 514a), and Mr. Perez explained that worshipping elsewhere in the park is not religiously effective because it is not where the exercise requires him to stand, Pet. App. 426a. Non-portability of this kind is characteristic of Native American religious traditions, and this Court has recognized that Native American traditional religious practices can be “intimately and inextricably bound up with the unique features” of a particular landscape. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988).

Describing religion solely through the lens of “belief” or “faith,” *see* Pet. App. 3a, 8a, already distorts Indigenous traditions like the one at issue here. Belief, unlike a riverbend, is portable—religious conviction can be carried across any ocean and affirmed anywhere. A doctrine that makes belief the singular substance of religion treats religion itself as portable. Such a framework would conclude that destroying a place cannot burden a religion that can be practiced elsewhere. But that inference holds only for traditions built to travel; applied to a practice in which the place is the *sine qua non* of the prayer, this inference deprives practitioners of their First Amendment free exercise protections, underscoring the objective test’s fatal constitutional flaw.

American law tends to characterize religion as private, voluntary, individual, and textual. *See* Michael D. McNally, *Defend the Sacred: Native American Religious Freedom Beyond the First Amendment* 15-16 (2020). That means religion is portable, as worship can happen anywhere. But Native traditions rest on a relation to a particular place. *See* Vine Deloria, Jr., *God Is Red: A Native View of Religion* 80-84 (updated ed. 1994). Judged against a portable standard, access to Yanaguana from any point in the park seems sufficient. But from Petitioners’ longstanding tradition and practice, the destruction of their sacred ecology and losing access to the horseshoe bend means the erasure of their practice altogether.

Indigenous religious traditions are not diffuse or unbounded. They are not defined by an individual’s experiences; instead, they have their own accountability systems and are thick with the regulation of conduct at sacred places. *See* McNally,

Defend the Sacred, *supra*, at 104-112 (2020); see generally Dana Lloyd, *Storytelling and the High Country: Reading Lyng v. Northwest Indian Cemetery Protective Association* (1988), 36 J.L. & Religion 181 (2021). Indigenous religious obligations to sacred places are inherited, communally regulated, and practiced by Indigenous communities in relationship to their lands. Practitioners do not claim religious significance in every river or every mountain, but *this* riverbend and *these* trees, identified by established tradition and reinforced through generations of ceremonial practice. See Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 Conn. L. Rev. 387, 393-394 (2012). The specificity is inherent in the tradition, not imposed by courts: Practitioners know which places demand ceremony and what those ceremonies require, just as Petitioners testified with precision about the southern bank, the nesting cormorants, and the Eridanus constellation above. See generally Dennis Kelley, *Tradition, Performance, and Religion in Native America: Ancestral Ways, Modern Selves* (2014).

These place-specific traditions may be unfamiliar, so they are particularly susceptible to misinterpretation. Here, the district court likened Petitioners' creation story to the "Circle of Life" from Disney's "The Lion King," Pet. App. 463a, and over Petitioners' objection, compared the deliberate destruction of their most sacred site to the accidental 2019 fire at Notre Dame Cathedral, Pet. App. 487a-489a. The panel, in turn, held that altering the cormorants' migratory rhythms meant Mr. Perez's ceremonies were not burdened, Pet. App. 18a-19a, even though he had testified that those very

rhythms—“every time they return and they nest there and we hear the little chicks”—are what “tell[] us that everything’s going to be all right for the future,” Pet. App. 422a. For Petitioners, this sacred place is not like a building that, however historically significant, could be rebuilt. It is a unique and irreplaceable site where upper (sky), middle (ground), and lower (water) worlds intersect via the cormorants and the trees. Petitioners’ accountability and ceremonial obligation is to this place, these trees, and this bend in the river. This place preserves the future, and Petitioners’ religious practice is impossible without it. The objective test fails to recognize these realities and substitutes a stranger’s surmise for the believer’s sincere belief.

**C. Disruption To The Sacred Ecology
Inherently Creates Substantial Burden.**

When the substantial-burden inquiry begins where it should—with the practitioners’ sincere accounts—the City’s plan to dismantle the sacred ecology of Yanaguana is not a trivial or incidental interference but a complete destruction of Petitioners’ religious practice. “[A]n action that prevents a religious exercise does not just burden that exercise substantially, it burdens it completely.” *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting from denial of certiorari). “[P]reventing a religious exercise is, necessarily, a ‘substantial burden’ on that religious exercise.” *Id.* at 1488.

The City’s plans would totally preclude Petitioners’ exercise. The City intends to remove or relocate roughly 83% of the trees surrounding the bend and to deploy “pyrotechnics, clappers, spotlights, lasers, distress calls, effigies, balloons, explosives, and drones” to prevent the cormorants from nesting. Pet.

10 (quoting Pet. App. 55a (Oldham, J., dissenting)). The City concedes that these measures are *designed* to prevent the cormorants from nesting at the bend. Pet. App. 55a (Oldham, J., dissenting). The result, Petitioners testified, would be the erasure of the sacred ecology, the permanent loss of their ceremonies, and the death of the creation story that these ceremonies carry forward to the next generation. Pet. App. 111a (Higginson, J., concurring in part and dissenting in part), 436a-437a, 513a.

The panel's contrary reasoning rested on non sequiturs that only the objective test could license. That Petitioners retain "virtually unlimited access" to the rest of the park is "useless if the park's Sacred Area is destroyed." Pet. App. 18a-19a (panel op.), 57a (Oldham, J., dissenting). That cormorants might nest elsewhere is irrelevant, because burden must be measured "from the person's perspective, not from the government's," *Barr*, 295 S.W.3d at 301, and Petitioners' uncontested testimony is that their ceremonies require these birds at this place, Pet. App. 455a, 457a. Judge Oldham explained that no court would "deem insubstantial a ban on accessing the Lord's Table because congregants can still sit in the pews." Pet. App. 57a-58a. True, but even that analogy rings hollow as applied to Indigenous traditions because it does not relate to portability. The burden here runs deeper: The Lord's Table sacrament can travel with the congregation, but Petitioners' ceremony can be performed nowhere but this unique bend of Yanaguana with its sacred ecology intact.

Recognizing this reality and the burden in this case would afford these Petitioners the same protections the Free Exercise Clause already extends to all other religions. Pet. App. 59a (Oldham, J., dissenting).

Courts routinely recognize substantial burdens when the government denies scented oils or sweat lodges to prisoners, turbans to service members, or zoning approval to congregations—even on land the government owns and controls. *See* Barclay & Steele, *supra*, at 1333-43 (collecting cases). The Free Exercise Clause promises no less to the Lipan Native American Church than it guarantees to any other religious tradition. Empowering judges to withhold protections from traditions they do not recognize or understand cannot be squared with the Free Exercise Clause.

II. FAILURE TO CORRECT THE “OBJECTIVE”

APPROACH CIRCUIT SPLIT WILL ALLOW COURTS TO UNDERMINE SINCERE RELIGIOUS BELIEFS.

The path forward is clear. The objective test perpetuates an affront to religious liberties. Fortunately, the “subjective” approach—which accepts, rather than redefines, sincere accounts of religious obligations—is the constitutionally correct standard, and this Court can definitively rule that such an approach is mandated by the Constitution. The result will be protection for all religions equally.

A. The Flawed “Objective” Approach Undermines Native American Religious Rights.

The objective test casts judges as arbiters of religious truth, empowering them to supplant their own understanding of a religion for that of its adherents. A sincere religious practitioner should not be forced to debate what their religious tradition requires in a judicial forum, nor to defend it against substitutes a court or opposing party deems adequate but which the sincere practitioner has explained are not. *See, e.g., Thomas*, 450 U.S. at 714-716. This

invites “impermissible hostility” to religion, encouraging officials to litigate the truth of a religious tradition. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 634 (2018); see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The test also heightens the risk of undue burdens to religious practices with which courts are unfamiliar, inviting both “many mistakes” and “favoritism.” *Yellowbear*, 741 F.3d at 54. This risk applies in the context of land-based Indigenous religious practices.

Because the objective test operates wherever a court applying it gauges a burden, it endangers any religion whose practices a judge may find unfamiliar. Courts have recognized substantial burdens where, for example, the government forbids a Sikh employee from wearing a kirpan, *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013); compels public-school instruction contrary to parents’ religious convictions, *Mahmoud v. Taylor*, 606 U.S. 522, 530 (2025); or penalizes Amish families for declining to send their children to public school, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Where the tradition at issue is familiar, courts have little trouble finding substantial burden; instead, they credit practitioners’ own account of what their religion requires. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam) (enjoining COVID-19 occupancy caps on houses of worship, and observing that caps would bar “the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat” and that “Catholics who watch a Mass at home cannot receive communion”); *Levitan v. Ashcroft*, 281 F.3d 1313, 1322 (D.C. Cir. 2002) (holding Catholic inmates’

consumption of Communion wine “has a readily identifiable basis in the practices of many Catholics and in church doctrine” and “cannot be viewed as a trumped-up practice that appellants have conveniently labeled ‘religious’”); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 911, 914 (W.D. Ky. 2020) (enjoining a COVID-19 ban on drive-in Easter services while drive-through liquor stores remained open, reasoning that “if beer is ‘essential,’ so is Easter”); *Weir v. Nix*, 890 F. Supp. 769, 778 (S.D. Iowa 1995) (finding a substantial burden where a prison conducted the immersion portion of baptism in private, because “[t]he baptismal ceremony is central to fundamentalist Christian belief as articulated by [the claimant], as it is for Christians generally”).

But an objective test empowers a court to withhold that same recognition whenever it is unpersuaded that the practice matters enough—exactly the judgment the Free Exercise Clause forbids courts to make. As Justice Gorsuch has explained, that the practices of less familiar religions “may be unfamiliar to many * * * should make no difference.” *Apache Stronghold*, 145 S. Ct. at 1489 (Gorsuch, J., dissenting from denial of certiorari).

Correcting the objective approach will advance the progress courts and federal law have made in protecting Indigenous religious traditions. Courts have recognized Indigenous relationships to land in the contexts of the treaty right to fish for salmon, see *United States v. Washington*, 384 F. Supp. 312, 332-333 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); or whitefish and lake trout, see *United States v. Michigan*, 471 F. Supp. 192, 276 (W.D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *modified in part*, 653 F.2d 277 (6th

Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); or to harvest wild rice, *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Congress also has recognized the importance of Native American connections to land with the Indian Reorganization Act. *See* Pub. L. No. 73-383, 48 Stat. 984 (1934). Alongside this Act, Commissioner of Indian Affairs John Collier rescinded the 1883 Code of Indian Offenses (known as the “Religious Crimes Code”), with its removal of Indigenous peoples from their land and suppression of religious practices like the Lakota Ghost Dance. *See* Kenneth R. Philp, *John Collier’s Crusade for Indian Reform* 135-159 (1977). In 1978, Congress passed the American Indian Religious Freedom Act (AIRFA), which specifically names access and protection of sacred sites as essential to Native American religious traditions. Pub. L. No. 95-341, 92 Stat. 469 (1978); *see generally* McNally, *Defend the Sacred*, *supra*. Applying the constitutionally mandated subjective approach will extend this recognition to land-based religious rights.

The protection of peyote—used ceremonially as part of Petitioners’ tradition—provides another example. The Indigenous peoples of southern Texas and northern Mexico have included peyote in their place-based traditions for many centuries. Although the practice was initially suppressed by the Bureau of Indian Affairs, practitioners incorporated as the Native American Church to achieve the protections Christian churches enjoyed. *See* Tisa Wenger, *Religious Freedom: The Contested History of an American Ideal* 121-128 (2017); *see generally* Thomas C. Maroukis, *The Peyote Road: Religious Freedom and the Native American Church* (2010); Omer C. Stewart, *Peyote Religion: A History* (1993). Although some

States began to recognize the importance of peyote as a Native American sacrament as early as the 1960s, *see People v. Woody*, 394 P.2d 813, 817, 820 (Cal. 1964), protection for its use was a patchwork until the 1994 Amendments to AIRFA. *See* Pub. L. No. 103-344, 108 Stat. 3125 (codified at 42 U.S.C. § 1996a). The law now protects the use, possession, or transportation of peyote for bona fide ceremonial purposes. *See* 42 U.S.C. § 1996a(b)(1). Petitioners belong to the Lipan Apache Native American Church, and their place-based practice includes peyote. *See* Pet. App. 426a-427a. Application of the objective substantial-burden approach has thus created unequal protection of their First Amendment rights even within the context of sacred ecology, protecting peyote use but not land. The law should honor all parts of the sacred ecology that is essential to Petitioners' practice.

Absent this Court's intervention, the structural error caused by the objective approach to substantial burden will continue to subject sincere religious practitioners to judicial encroachment upon their traditions. Courts will continue resolving burden questions by redefining the bounds of religious traditions in pursuit of compromise, trampling on the free exercise of religion that is protected by the First Amendment. Nothing short of a clear holding—that the burden inquiry must credit the claimant's sincere account of their faith—can arrest that trajectory. This case presents an opportunity to make the necessary correction.

**B. The “Subjective” Approach Accepts,
Rather Than Redefines, Practitioners’
Sincere Beliefs, Protecting All Religions
Equally.**

The alternative to the flawed “objective” approach is not judicial abdication but sound adherence to a constitutionally required standard. Under the “subjective” approach, a court takes a religious claimant as it finds him and measures the burden against the exercise as the believer understands it. *See Yellowbear*, 741 F.3d at 55. That approach honors the Free Exercise Clause’s bar on overruling sincere belief. It treats every faith alike, gauging the burden by the claimant’s own account rather than by how closely a practice resembles the religions with which courts are most familiar.

Crediting the claimant’s account does not collapse the substantial-burden inquiry into an automatic finding of burden, nor does it hand religious objectors a veto over public projects. The inquiry retains real content: A court still asks whether the government has in fact pressured, penalized, or prevented the exercise the claimant describes, and whether that burden is “real vs. merely perceived, and significant vs. trivial.” *Barr*, 295 S.W.3d at 301.

The subjective approach also leaves the government its full defense. Recognizing a substantial burden is only the threshold; the government may still prevail by proving that its action serves a compelling interest through the least restrictive means. *See Barr*, 295 S.W.3d at 307-308. As Judge Oldham explained, the burden inquiry “is not a high bar for religious observers,” precisely because “the government can still prevail if it can show that it’s using the least-restrictive means to pursue a compelling interest.”

Pet. App. 56a. The concern that honoring sincere belief would subject every government decision to “the personalized oversight of millions of citizens,” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc), *overruled in part*, *Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024), is thus answered through strict scrutiny—not by redefining a claimant’s religion.

Nor does the subjective approach require rubber-stamping a petitioner’s assertion of sincere belief. Religious practices are subject to their own limiting principles. For Indigenous religions, this includes the inherited, communal regulation of conduct at sacred places. The “sacred nature of place” includes “appropriate activities that occur in specific areas.” Kelley, *supra*, at 13; *see supra* Part I.B.

Leaving law to courts and religious interpretation to practitioners is precisely what the Constitution demands and what the subjective approach preserves. It asks courts to do only what they are competent to do: determine whether a sincere religious exercise has been burdened while leaving to the government the task of justifying any intrusion. Adopting it would not privilege the Lipan Native American Church or any other tradition. It would extend to Petitioners the same protection the Free Exercise Clause already guarantees every religious practitioner, and it would end the disparate treatment that the objective test has inflicted on Indigenous religious traditions.

CONCLUSION

This case lays bare the stakes of the question presented. Petitioners are ceremonial leaders of the Lipan Native American Church whose ceremonial obligation is to conduct religious ceremonies at the

Yanaguana riverbend—with the trees and nesting cormorants which the City intends to destroy. No one disputes that their beliefs and concomitant religious commitments are sincerely held, nor that their ceremonies “cannot be properly administered without specific trees present and cormorants nesting.” Pet. App. 4a. But by applying the objective substantial-burden test, the Fifth Circuit set that sincere account aside and declared the burden insubstantial because, in its view, Petitioners could conduct their religious ceremonies elsewhere. Pet. App. 18a-19a. The court told Petitioners, in effect, that they misunderstand their own religious obligations. Correcting the test corrects that error and others like it. By measuring burden from a practitioner’s perspective, as the Free Exercise Clause requires, the conclusion is inescapable: Erasing the sacred ecology on which Petitioners’ religion depends is a substantial burden, and the City must justify it under strict scrutiny rather than escape review at the threshold.

The need for this Court’s intervention extends beyond Petitioners. The decision below deepens an entrenched split over whether courts, in assessing a burden on religion, may reject a claimant’s sincere theological judgment. Only this Court can resolve that conflict and confirm that the burden inquiry credits the account of a religious practitioner, rather than the views of a judge.

For the foregoing reasons, and those provided by Petitioners, the Court should grant the petition.

Respectfully submitted,

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