

No. 26-15

In the
Supreme Court of the United States

Gary Perez, et al.,

Petitioners,

v.

City of San Antonio, Texas,

Respondent.

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

**BRIEF OF INTERNATIONAL COUNCIL OF
THIRTEEN INDIGENOUS GRANDMOTHERS
AND NOTRE DAME LAW SCHOOL
RELIGIOUS LIBERTY CLINIC AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS**

John A. Meiser
Counsel of Record
Meredith H. Kessler
LINDSAY AND MATT MOROUN
RELIGIOUS LIBERTY CLINIC
Notre Dame Law School
1338 Biolchini Hall
Notre Dame, IN 46556
574-631-3880
jmeiser@nd.edu

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief to highlight the lower court's troubling misunderstanding of both Indigenous spiritual practices and its own role in evaluating the requirements of Petitioners' faith. Left uncorrected, the decision below would continue a lamentable history of governmental disregard for Indigenous sacred sites and the centuries-old ceremonies that depend on them.¹

The International Council of Thirteen Indigenous Grandmothers is a global alliance of Indigenous elders who come together in prayer, education, and healing for Mother Earth. The members come together to protect Indigenous ways of life from destruction and to preserve the lands where Indigenous peoples live and upon which their cultures depend.

Notre Dame Law School's Lindsay and Matt Moroun Religious Liberty Clinic is an academic institution and teaching law practice that promotes and defends the freedom of religion for all people.² It advocates for the right of all people to live according to their beliefs, and it defends groups of all faiths against interference with these fundamental liberties across a variety of contexts.

¹ No party or counsel for a party wrote any part of this brief. No person other than *amici* and their counsel made any financial contribution to the preparation of this brief. Counsel for all parties were notified ten days in advance pursuant to Supreme Court Rule 37.2.

² The views expressed by the Clinic do not necessarily represent those of the University of Notre Dame or Notre Dame Law School.

SUMMARY OF ARGUMENT

This case concerns a site that has been uniquely sacred to generations of Indigenous people: a particular bend in the San Antonio River that mirrors the constellation Eridanus in the skies above. That riverbend is home to an ancient creation story. For these believers, it is a place where life sprang from droplets of water that fell to the earth from the feathers of a cormorant; a place where the lower, middle, and upper worlds come together. And, because of the confluence of these spiritual elements, it is the only place in the world where certain ceremonies involving the river, the cormorants, and the stars above may be performed.

Regrettably, the City of San Antonio has planned a construction project that would destroy the spiritual ecology of the site by cutting down its trees and preventing cormorants from nesting there. If this comes to pass, Petitioners stand to lose their ability to perform religious ceremonies that require the sacred convergence of the riverbend, the trees, and the birds that nest there.

And yet, the court below determined that the desecration of this site—and the attendant loss of these rituals—imposes no substantial burden on Petitioners’ religious exercise. In the court’s view, that religious harm is mitigated because they may still take advantage of other areas in the park “nearby.” Pet.App.19. That misunderstands Petitioners’ beliefs and it misconceives of the court’s own role in evaluating such matters of faith.

Petitioners’ religious needs cannot be satisfied by performing similar rituals “nearby.” For many Native

people, religious practice is inextricably tied to specific land. When that land or its sacred features are lost, so too are the rituals that depend on them. These are not fungible concepts; many Indigenous practices cannot simply relocate next door.

It is not a court's role to second guess any of this. It has long been clear that protections for religious exercise cannot depend on a court's own evaluation of the religious truth, importance, or necessity of a given practice. Courts may not gainsay a believer's sincere understanding of her faith. Nor may a court waive away burdens on that faith based on the availability of other practices that look "close enough" to its eyes. Judges lack both the competence and authority to weigh in on matters of such matters of faith.

The Fifth Circuit's error especially threatens Indigenous believers. Indigenous rituals look quite different from those of more mainstream religions—and thus are at special risk of being misunderstood. They are also uniquely susceptible to government suppression. Although Native rituals are tied to particular lands, Native people rarely own that land today. Instead, after centuries of dispossession, the government does. This leaves Indigenous religions both unusually dependent on the preservation of particular sites and unusually endangered by a variety of government actions that affect those sites.

Unfortunately, governments have long failed to protect these vulnerable sites. The City's project threatens to perpetuate those harms yet again. This Court should grant certiorari to correct the Fifth Circuit's misguided opinion and to help put an end to this ongoing pattern of abuse and ignorance regarding Indigenous sacred sites.

ARGUMENT

I. The Lower Court Improperly Substituted Its Own View of Petitioners' Religious Needs.

The lower court's conclusion that the City's actions will not substantially burden Petitioners' religious exercise rested on a fundamental misunderstanding of Petitioners' religious needs—and on a troubling misconception of the court's own role in assessing those needs.

As Petitioners detail, the City's threatened actions will effectively destroy the only setting in the world that satisfies the demands of certain religious rituals. Pet.8–11. Indeed, Petitioners' belief is that certain sacred ceremonies can be performed “only at this riverbend” and only in the presence of “specific trees . . . and cormorants nesting.” Pet.App.3–4. Yet the court below concluded that the destruction of trees and disruption of cormorants at that site did not pose a “real and significant” burden on that religious exercise because Petitioners continue to have access to the Park and “cormorants are not . . . dissuaded from nesting nearby or elsewhere.” Pet.App.18–19. That conclusion was wrong twice over.

First, the lower court misunderstands Indigenous religious practices. Unlike many religious traditions, Native American religious practice is inherently “land based” and closely connected to specific sites. *See* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012). Many Indigenous groups understand themselves as people of a particular place, and their homelands and landscapes are inextricably tied to their spiritual identities. *See*

Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1303–07 (2021). As Justice Brennan observed long ago, the “site-specific nature” of Indigenous religious practice derives from the belief that “land is itself a sacred, living being. . . . [And], like all other living things, is unique, and specific sites possess different spiritual properties and significance. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 460–61 (1988) (Brennan, J., dissenting) (citing Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth’s Caretakers*, 10 Am. Indian L. Rev. 1 (1982)).

Accordingly, many land-based practices cannot be substituted with something “nearby.” To be sure, many religions have sacred sites. But, the “inextricable connection among place, belief, and practice that characterizes many Indigenous Peoples’ religions” distinguishes Indigenous rituals from those that “can be practiced equally well in any church, temple, or mosque.” Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 Harv. L. Rev. 2103, 2113 (2021) (book review). Although the loss of a cathedral is undoubtedly a great tragedy to those who worship there, it rarely destroys their ability to continue those practices elsewhere. By contrast, the particular land tied to many Indigenous spiritual practices “is not fungible.” *Lyng*, 485 U.S. at 461 (Brennan, J., dissenting). Thus, when those sites are destroyed, the practices of Native religions that are tied to them are likely to be not just *burdened*, but may be *ended* altogether. See Anthony Thorley & Celia M. Gunn, *Sacred Sites: An Overview* 9–10 (2008), <https://bit.ly/4ekDife>; see also *Apache*

Stronghold v. United States, 145 S. Ct. 1480, 1488 (2025) (Gorsuch, J., dissenting from denial of certiorari) (discussing destruction of Apache sacred site that “will prevent them from conducting religious exercises that cannot take place anywhere else”).

As Judge Oldham wrote in his dissent from the denial of rehearing en banc below, the fact that Petitioners might still access *other* areas of the park essentially “misses the point entirely.” Pet.App.57; *accord* Pet.App.118 (Higginson, J., concurring in part and dissenting in part). Whatever religious exercise Petitioners might perform “nearby,” they will inescapably lose the ability to perform the ceremonies at issue in this case, which cannot occur anywhere else. The fact that other religious exercise still remains cannot erase the substantial burden of *that* religious loss. *See Holt v. Hobbs*, 574 U.S. 352, 361–62 (2015).

Second, and more fundamentally, it is not for the court to decide what Petitioners’ religious exercise does or does not require. Indeed, “the First Amendment forbids civil courts” from making their own determinations as to “the interpretation of particular church doctrines and the importance of those doctrines to the religion.” *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969). For more than 150 years, this Court has made clear that courts cannot decide questions “of discipline, or of faith, or ecclesiastical rule, custom, or law.” *Watson v. Jones*, 80 U.S. 679, 727 (1871).

These constraints reflect limits on both courts’ competence and authority to answer religious questions. This Court has observed that judges are

“singularly ill equipped” to decide whether a group has “correctly perceived the commands” of its faith. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981); *see also Watson*, 80 U.S. at 729 (“[T]he judges of the civil courts” cannot be “as competent in the . . . religious faith” as the members of that faith.); James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *The Separation of Church and State: Writings on a Fundamental Freedom by America’s Founders* 56, 64 (Forrest Church ed., 2004) (rejecting the suggestion that “the civil magistrate is a competent judge of religious truths”). It is therefore beyond “the judicial ken to question the centrality of particular beliefs or practices to a faith.” *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989). Indeed, such a power is denied to civil government in general: “[N]o official, high or petty, can prescribe what shall be orthodox in . . . religion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). That is because, at bottom, our civil “law knows no heresy, and is committed to the support of no dogma.” *Watson*, 80 U.S. at 728.

Judicial determination of such theological matters fundamentally threatens religious liberty. It would intrude upon religious groups’ “power to decide for themselves, free from state interference, matters of . . . faith and doctrine.” *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). And it “raise[s] serious concerns about state entanglement with religion and denominational favoritism,” especially threatening the rights of minority religions with which judges are less familiar—like the Indigenous beliefs at issue here. *Carson v. Makin*, 596 U.S. 767, 787 (2022). Civil resolution of these sorts of controversies would

undermine the core protections for liberty that the First Amendment is designed to afford. *Cf. Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

In short, courts must refrain from answering questions that go to the truth of religious belief. Questions at the heart of this case—like “whether any options left open by a law are as religiously valuable as the ones blocked by the law”—must be answered exclusively by reference to the “*claimant’s* views about relative religious value.” Sherif Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1801 (2022). When presented with such questions, the appropriate approach is to defer to the believer’s sincere determination of what her faith requires. *See, e.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 762–66 (2020) (Thomas, J., concurring) (courts should defer to religious organization’s “good-faith understandings” of religious tenets); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (“federal courts have no business addressing” the validity of a claimant’s sincerely held beliefs on “question[s] of religion and moral philosophy”).

The Fifth Circuit failed to heed these bedrock commands of the First Amendment. This Court should grant certiorari to correct its wayward course.

II. The Decision Below Perpetuates a Lamentable History of Disregard for Indigenous Spiritual Practices.

This Court's review is also needed to address a growing failure to provide meaningful protections against governmental destruction of Indigenous sacred sites.

Conflict over the preservation of Indigenous sacred sites is unfortunately common. This stems not only from the land-based nature of Indigenous religions but also the predominant government control of those lands. Although Native American spiritual practices are routinely tied to particular lands, Native groups seldom own those lands. Rather, after centuries of dispossession, the government does. The federal government alone holds approximately 56 million acres of land in trust for Native American tribes. Off. of Nat. Res. Revenue, *Native American Ownership and Governance of Natural Resources*, U.S. Dep't of the Interior, <https://bit.ly/4dhKBno> (last visited July 29, 2026); *see also* Brooke Nevins, *Preservation Without Reservations: Land Grabs of Past Rob True Native Texans of Indigenous History*, Reporting Tex. (Apr. 23, 2021), <https://bit.ly/4fn6xiE> (discussing historical dispossession of native lands in Texas and elsewhere).

Indigenous groups are thus often at the mercy of the government if they wish to continue centuries-old practices and ceremonies. But the government has often disregarded land-based claims of Native religious exercise, despite its "moral obligations of the highest responsibility and trust" in its relations with Native Americans. *Seminole Nation v. United States*,

316 U.S. 286, 296–97 (1942); *see also United States v. Mitchell*, 463 U.S. 206, 225 (1983) (“a general trust relationship between the United States and the Indian people” is “undisputed”). That same disregard persists today, as governments cause Indigenous sacred sites to be destroyed and desecrated. *See Barclay & Steele, supra*, at 1296.³

Unfortunately, courts have often failed to protect these sites from destruction. For example, in *Slockish v. U.S. Federal Highway Administration*, the government expanded a highway by bulldozing an Indigenous sacred site consisting of ancient burial grounds, an altar, and old-growth trees while leaving the other side of the highway untouched. No. 08-cv-01169, 2020 WL 8617636, at *17–18 (D. Or. Apr. 1, 2020), *report and recommendation adopted in relevant part sub nom. Slockish v. Fed. Highway Admin.*, No. 08-cv-01169, 2021 WL 683485 (D. Or.

³ Native communities in Texas contend with an additional challenge: Many lack federal recognition or federally reserved land. Currently, Texas is home to only three federally recognized tribes, partly because the federal government was largely unable to offer lands for reservations when Texas joined the Union. *See Nevins, supra*; *Bureau of Indian Affairs: Tribal Leaders Directory*, U.S. Bureau of Indian Affairs, <https://bit.ly/4g23kVK> (last visited July 29, 2026); Michael Barnes, *Texas History: What happened to the Native Americans in Texas?* AUSTIN AMERICAN-STATESMAN (Mar. 23, 2021), <https://bit.ly/48RJJoT>. Without federal recognition, tribes cannot access important federal resources that could help them sustain their religious practices. *See* 25 C.F.R. § 83.2(a) (2015). And the destruction of sacred sites further impairs the ability to *gain* federal recognition, which requires a demonstration of a longstanding community—such as through the very “ceremonies” and “religious beliefs or practices” that are being lost. *Id.* §§ 83.5, 83.11(b); 83.12(b)(1).

Feb. 21, 2021).⁴ The court determined that the government had not imposed a substantial burden because it had not withheld a benefit or imposed a sanction on religious exercise—even though the site had been completely destroyed. *Slockish*, 2020 WL 8617636, at *38.⁵ Remarkably, the government later admitted that the site’s destruction was completely unnecessary and eventually settled with the Indigenous plaintiffs before the case could come to this Court. Answering Br. for Fed. Appellees at 43, *Slockish*, 2021 WL 5507413 (No. 21-35220); *BREAKING: Feds Agree, supra*; *Slockish v. Dep’t of Transp.*, 144 S. Ct. 324 (2023) (mem.) (dismissing the petition for certiorari). That was cold comfort, of course, to the Indigenous people whose sacred burial ground had already been decimated.

A similar fate currently faces Oak Flat, sacred land in Arizona where Western Apaches have worshipped and conducted religious ceremonies for centuries. *See Apache Stronghold*, 145 S. Ct. at 1480–81 (Gorsuch, J., dissenting from denial of certiorari). Like so many other sacred sites, Oak Flat resides in the custody of the federal government, which has arranged to transfer the land to a mining conglomerate that intends to “turn Oak Flat into a massive hole in the ground” to “extract copper lying beneath the land.” *Id.* at 1480. *Apache Stronghold*, a

⁴ See also *BREAKING: Feds Agree to Repair Native American Sacred Site*, Becket (Oct. 5, 2023), <https://bit.ly/4ewmNgu>.

⁵ The Ninth Circuit dismissed the plaintiff’s appeal of this decision as moot because, after a state defendant was dismissed, the remaining defendants could not provide any effective relief. *Slockish v. U.S. Dep’t of Transp.*, No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021).

nonprofit organization devoted to preserving Oak Flat, sued to stop this destruction but, after years of litigation, had its challenge rejected on the “extraordinary conclusion” that demolition of Oak Flat would “not impose a substantial burden on religious exercise.” *Id.* (quotation omitted). In the words of Justice Gorsuch, that decision is unfortunately “one with consequences that threaten to reverberate for generations.” *Id.* at 1489.

And in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the government sought to grant an oil company an easement to land under a sacred lake. 239 F. Supp. 3d 77 (D.D.C. 2017). The flow of oil beneath the lake would desecrate the water for the Indigenous community that worshipped there, leaving them unable to practice their faith in the manner required by their beliefs. *Id.* at 93. Regardless, the court found no “substantial burden” because the government did not place “substantial pressure” on the tribe to “modify [its] behavior and to violate [its] beliefs.” *Id.* at 91 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)).

These are but a few examples from a regrettably long list of Native American religious practices that have been destroyed by government action.⁶ Many

⁶ See, e.g., *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214–15, 1219 (9th Cir. 2008) (operation of hydroelectric plant rendering Native religious practices impossible); *S. Fork Band v. U.S. Dep’t of the Interior*, 643 F. Supp. 2d 1192, 1203, 1207–08 (D. Nev. 2009), *rev’d in part on other grounds sub nom. S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 588 F.3d 718 (9th Cir. 2009) (mining on land used by multiple Native American tribes for prayer, healing ceremonies, vision quests, and other religious practices); *Fallon Paiute-Shoshone*

other sacred sites face similar threat. The list of endangered sites is unfortunately long. It includes:

- **Baaj Nwaavjo I'tah Kukveni:** Indigenous sacred sites within Grand Canyon National Park, threatened by uranium mining;⁷
- **Bears Ears & Grand Staircase:** National monuments in Utah containing land sacred to many tribes, at risk of destruction through mining operations after the protected land was shrunk by roughly 90% earlier this year;⁸
- **Chaco Canyon:** Indigenous ancestral lands in New Mexico sacred to many Native tribes, threatened by oil and gas drilling operations;⁹
- **Chuckwalla:** National monument in California that is part of Indigenous homelands with trails held sacred by several tribes, threatened by mining operations;¹⁰

Tribe v. U.S. Dep't of the Interior, Nos. 22-15092, 22-15093, 2022 WL 3031583, at *4 (9th Cir. Aug. 1, 2022) (geothermal project that would make tribal religious exercise impossible).

⁷ *Tribes Protect Baaj Nwaavjo I'Tah Kukveni Monument*, Native Am. Rts. Fund, <https://bit.ly/4g1Aibv> (last visited July 30, 2026).

⁸ Kerri J. Malloy, *The U.S. Has Acknowledged Bears Ears and Grand Staircase As Sacred for Over a Century, but Keeps Stripping Away Protections*, Religion News Serv. (July 27, 2026), <https://bit.ly/3TqX444>.

⁹ Cait Fallon, *Proposed Removal of Protections for Greater Chaco Canyon Region Demonstrates Continued Attacks on Sacred Indigenous Landscapes*, Nat'l Wildlife Fed'n (Apr. 1, 2026), <https://bit.ly/4gliclb>.

¹⁰ *Protecting Tribal Homelands and Sacred Places: Chuckwalla National Monument*, Native Am. Rts. Fund, <https://bit.ly/4h10bt9> (last visited July 30, 2026).

- **Ha’Kamwe’:** Naturally occurring hot spring sacred to the Hualapai Tribe, threatened by proposed lithium mine in Arizona;¹¹
- **Indian Pass:** Land in the California desert sacred to the Quechan Tribe, threatened by gold mining operations;¹²
- **Kuuchamaa Mountain or Tecate Peak:** Mountain in Southern California that is sacred to the Kumeyaay Nation, threatened by border-wall construction;¹³
- **Monument Hill and Quitobaquito Springs:** Burial and ceremonial grounds sacred to Tohono O’odham Nation, threatened by border-wall construction in Arizona;¹⁴
- **Peehee Mu’huh or Thacker Pass:** A Nevada landmark sacred to twenty-two Native American tribes, threatened by an ongoing lithium mining operation.¹⁵

¹¹ Maya L. Kapoor, *Mining for Lithium, at Cost to Indigenous Religions*, HighCountry News (June 9, 2021), <https://bit.ly/3XUdvW2>

¹² Debra Utacia Krol, *Quechan Tribe Seeks Protection of Sacred Lands with National Monument at Indian Pass*, AZCentral (Feb. 26, 2024), <https://bit.ly/3XGCSJI>

¹³ Julie Watson & Morgan Lee, *US-Mexico Border Wall Construction is Desecrating Sacred Sites, Indigenous Leaders Say*, Associated Press (May 17, 2026), <https://bit.ly/4wwap9S>.

¹⁴ Bonnie Povolny, *Tohono O’odham Nation: U.S. Blasts a Monument to Build a Wall*, Cultural Prop. News (Feb. 27, 2020), <https://bit.ly/47CsWp4>.

¹⁵ *Thacker Pass/Peehee Mu’huh*, Sacred Land Film Project (Apr. 18, 2023), <https://bit.ly/44S7U5w>; Amy Alonzo, *Nevada Lithium Mines Forges Ahead Despite Inflation, Policy and Legal Headwinds*, Nev. Indep. (June 7, 2026), <https://bit.ly/4xeEmla>.

The loss of these ancient sites and the spiritual practices that depend on them undoubtedly burdens religious exercise. Properly applied, federal law should thus stand in the way of tragedies like these. This Court's review is needed to correct the Fifth Circuit's disregard for these undeniable harms and its assumption that these religious losses can be replaced by something *close enough* instead. It is for a believer—not a court—to determine what practices her faith demands. This Court should reaffirm that bedrock principle, which must safeguard Indigenous and all other religious practices alike.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

John A. Meiser

Counsel of Record

Meredith H. Kessler

LINDSAY AND MATT MOROUN

RELIGIOUS LIBERTY CLINIC

Notre Dame Law School

1338 Biolchini Hall of Law

Notre Dame, IN 46556

574-631-3880

jmeiser@nd.edu

Counsel for Amici Curiae

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