

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 WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF OF ETHICS AND PUBLIC POLICY CENTER
AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae Ethics and Public Policy Center (EPPC) is a nonprofit research institution dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy, law, culture, and politics. EPPC’s programs cover a wide range of issues, including government accountability, judicial restraint, and religious liberty. EPPC regularly submits friend-of-the-court briefs in religious liberty cases and writes here to highlight limiting principles that allow courts to protect religious liberty and weed out unwarranted exemption claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal and state law promise “very broad protections for religious liberty” through the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), and state analogues like the Texas Religious Freedom Restoration Act (TRFRA). *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) (regarding RFRA). In the decades since Congress enacted RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), this Court has acted to fulfill that promise, vindicating the fundamental right to practice one’s faith free of government-imposed burdens that don’t meet a rigorous balancing test. See *ibid.*; *Gonzales v.*

¹ Rule 37 statement: All counsel of record were timely notified of the intent to file this brief. No counsel for any party authored any part of this brief, and nobody other than amicus and counsel for amicus contributed monetarily to this brief’s preparation or submission.

O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006). And this Court has applied the same demanding strict-scrutiny principles in Free Exercise cases. See, e.g., *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022); *Ramirez v. Collier*, 595 U.S. 411, 432 (2022).

Some worry, however, that the first step in the strict scrutiny test—the claimant’s burden to show a substantial burden on his or her religious exercise—“fail[s] to impose sensible limits on exemptions” and overprotects religious exercise at the expense of government objectives. See Sherif Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1762 (2022) (citing such critics); Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 356 (2018) (discussing and dispelling this “common narrative”).

Concerns like these have led some lower courts to narrow the substantial-burden inquiry through judge-made doctrines untethered to the governing text and inconsistent with Free Exercise Clause jurisprudence. This pattern is especially pronounced where Native Americans seek to continue centuries-old religious ceremonies on what is now government land.

Consider, for example, the Ninth Circuit’s recent decision in *Apache Stronghold v. United States*. Though the federal government’s plan would “result in the destruction of an ancient sacred site,” the court held that the plan does “not impose a substantial burden on religious exercise.” 145 S. Ct. 1480 (2025)

(Gorsuch, J., dissenting from denial of writ of certiorari) (quoting *Apache Stronghold v. United States*, 101 F.4th 1036, 1044 (9th Cir. 2024) (en banc)). As Justices Gorsuch and Thomas noted, “it seems the Ninth Circuit was concerned that a ruling for Apache Stronghold would effectively afford tribal members a ‘religious servitude’ on federal land at Oak Flat.” *Id.* at 1487 (quoting *Apache Stronghold*, 101 F.4th at 1055). It appears the court, absorbed by such policy concerns, “abandon[ed] the statutory text in favor of guesswork about unenacted congressional purposes.” *Ibid.*

This case closely tracks *Apache Stronghold*. Both were brought by Native Americans who seek to continue centuries-old religious ceremonies on land now controlled by government. Just as in *Apache Stronghold*, the petitioners here are seeking to enjoin a government plan that will physically alter the site in ways that would make petitioners’ religious use impossible. Yet, just as in *Apache Stronghold*, the court invoked *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988) and held that petitioners had not demonstrated any substantial burden on their religious exercise. Six of the Fifth Circuit’s seventeen active judges, including the Chief Judge, saw this as a serious error. They dissented from the denial of rehearing en banc, describing the “burdens on plaintiffs’ religious freedoms” as “undeniable.” Pet.App. 54a (Oldham, J., dissenting).

The fears and policy concerns that have led courts to throttle the “substantial burden” test are unfounded. Robust protection for religious liberty is indeed a thumb on the scale, but it is not an unconstrained liberty. Across the Free Exercise

Clause, RFRA, RLUIPA, and TRFRA, courts apply meaningful limiting principles that temper religious liberty claims and sensibly limit exemptions. At the threshold, a plaintiff must show a (1) substantial (2) burden on (3) sincere (4) religious (5) exercise. Only then must the government come forward with a compelling interest advanced by the least restrictive means. That threshold showing is not onerous, but it isn't toothless. These limiting principles do real work, even in hard cases. See *Goodrich & Busick, supra*, at 356 (concluding that “[c]ourts have had no problem weeding out weak or insincere RFRA claims,” and “[i]f anything, RFRA has been underenforced”).

Amicus urges this Court to grant review and clarify courts' important but limited role under the substantial burden inquiry. There is no Native American or government control exception to the substantial burden inquiry. And regardless of the law or provision under which a claim arises, courts may not deny substantial burdens by second-guessing the claimants' theological judgments.

ARGUMENT

The Free Exercise Clause, together with the Religious Freedom Restoration Act (RFRA), the Religious Land Use and Institutionalized Persons Act (RLUIPA), and state analogues like the Texas Religious Freedom Restoration Act (TRFRA) centrally command that government shall not substantially burden a person's exercise of religion unless doing so is the least restrictive means of furthering a compelling governmental interest. U.S. Const. amend. I; 42 U.S.C. § 2000bb-1(a); 42 U.S.C. §§ 2000cc et seq.;

Tex. Civ. Prac. & Rem. Code § 110.003.² But none of these protections for religious liberty create a “categorical strict scrutiny regime” that puts the government to the test just because a plaintiff claims her free exercise is burdened. Cf. *Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring) (“skeptical” about replacing *Smith* with a “categorical strict scrutiny regime” for Free Exercise claims). Rather, a claimant’s initial burden to show a substantial burden on religious exercise contains at least five meaningful limiting principles. At the threshold, a claimant must show a (1) substantial (2) burden on (3) sincere (4) religious (5) exercise. Taking these elements in reverse order facilitates the analysis.

First, the claim must seek to protect a specific religious “exercise”—an act or abstention rooted in religious belief. Mere subjective feelings of offense or sacrilege don’t qualify.

Second, the exercise must be “religious,” deriving in some sense from the “duty which we owe to our Creator.” James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785). Acts or abstentions rooted in personal, philosophical, or ideological opposition don’t qualify.

² The substantial burden test works the same under the Free Exercise Clause, RFRA, RLUIPA, and TRFRA. See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 (2006) (RFRA restored “the pre-*Smith* jurisprudence” under the Free Exercise Clause); *Holt v. Hobbs*, 574 U.S. 352, 355 (2015) (RFRA and RLUIPA are “sister statute[s]”); *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) (RFRA and RLUIPA are “germane in applying” TRFRA).

Third, the religious exercise must be “sincere”—a genuinely held, good-faith expression of religious conviction. Practices contrived for litigation don’t qualify.

Fourth, government action must “burden” a sincere religious exercise, meaning it must inhibit or penalize it in some way. Mere refusals to subsidize or support religious observance don’t qualify.

Fifth, the burden must be “substantial”—that is, of ample or considerable amount. Interference that is fleeting or de minimis, or that allows religiously acceptable alternatives, doesn’t qualify.

As demonstrated below, courts don’t always precisely distinguish these concepts, often simply lumping them into a conclusion about “substantial burden.” But these principles are in play in every case, even if not always disputed, and they help courts sift the wheat of religious liberty from the chaff of unwarranted exemption claims.

Further, even when a claimant satisfies this fivefold threshold showing, the government still has the opportunity to show it is furthering a compelling interest by the least restrictive means. This is a demanding and “focused” inquiry to be sure, but not insurmountable, and this Court has never “doubt[ed] that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws.” *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) (applying RFRA); see also *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014) (Gorsuch, J.) (“RLUIPA anticipates that its solicitude for religious

exercise must sometimes yield to other competing state interests.”).

I. The substantial burden test contains five threshold limiting principles.

A. Religious claimants must show a specific religious “exercise,” not mere subjective feelings of offense.

The “exercise” protected by the Free Exercise Clause and religious freedom statutes is an act or abstention rooted in religious belief. “Religious exercise necessarily involves an action or practice,” and to trigger these protections, government must pressure an adherent to “modify his religious behavior” or “interfere with [a] religious act in which he engages.” *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). By contrast, religious liberty protections offer nothing to those who merely take offense at something the government does.

Kaemmerling illustrates the point. The plaintiff there didn’t object to the government’s collection of his tissue sample. His objection, rather, was to the government’s later analysis of the sample to collect DNA information, which the plaintiff claimed to “kno[w]” was an “unholy act of an oppressive regime.” *Id.* at 678–679 (cleaned up). The plaintiff failed to “identify any ‘exercise’ which is the subject of the burden to which he objects.” *Id.* at 679. “*Kaemmerling* alleges no religious observance that the DNA Act impedes, or acts in violation of his religious beliefs that it pressures him to perform.” *Ibid.*

Bowen v. Roy, 476 U.S. 693 (1986), rests on the same principle. The plaintiff objected to two features

of a benefits law: (1) “the Government’s use” of a Social Security number to identify his daughter, and (2) the requirement that he himself “furnish” the government with her number to obtain benefits. See *id.* at 699–700. As to the first, his challenge failed. While this Court framed this aspect of the claim as an effort to “dictate the Government’s internal procedures,” *id.* at 700, rightly understood, it was about a lack of religious exercise at all. The relevant government action did not “inhibit the claimant’s religious conduct” in any way. See *Girgis, supra*, at 1806. But as to the second aspect, a majority of the Court ruled that Bowen had demonstrated a substantial burden because the government had “condition[ed] receipt of an important benefit” on his religiously forbidden conduct. See *Bowen*, 476 U.S. at 727, 731 (O’Connor, J., concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.) (“[F]ive Members of the Court agree that *Sherbert* and *Thomas*, in which the government was required to accommodate sincere religious beliefs, control the outcome of this case to the extent it is not moot.”).

Other cases likewise recognize that adverse effects on subjective feelings and experiences don’t clear the substantial burden threshold. *E.g., Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018) (subjective feelings of “guilt, shame, and ... fear” to presence of “In God We Trust” on U.S. currency not “substantial burden”).

Lyng and *Navajo Nation* should be understood in this light. See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 443, 448, 450 (1988) (no free exercise violation where plaintiffs had access to

site, though “sacredness” and “spiritual development” were “diminish[ed]”); *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (no burden where use of site not “physically affected” and “sole effect” was on “subjective spiritual experience”), *overruled on other grounds by Apache Stronghold*, 101 F.4th 1036. By contrast here, the City of San Antonio’s plans would not just diminish petitioners’ spiritual experience; “cut[ting] down the trees” and “driv[ing] away the nesting cormorants” would “destroy Petitioner’s religious exercise forever.” Pet. 1.

B. The exercise must be “religious” in nature, not personal, philosophical, or ideological.

“Courts are not arbiters of scriptural interpretation.” *Thomas v. Review Bd. of the Indiana Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981). But protection for “religious” exercise requires a threshold look at whether an objection has its source “in religious belief” as opposed to personal, philosophical, or ideological considerations. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). “A way of life, however virtuous and admirable, ... based on purely secular considerations” “does not rise to the demands of the Religion Clauses.” *Ibid.* Thus, for example, the Free Exercise Clause would not protect Thoreau’s decision to “reject[] the social values of his time,” given that his “choice was philosophical and personal rather than religious.” *Ibid.* RFRA, RLUIPA, and state analogues likewise protect “only” those convictions “motivated by religious faith—in recognition, no doubt, of the unique role religion, its free exercise, and its tolerance have played in the nation’s history.” *Yellowbear*, 741 F.3d at

53; see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1498 (1990) (“From the perspective of the advocates of religious freedom in 1789, the protection of private judgment (secular ‘conscience’) fundamentally differs from the protection of free exercise of religion.”).

That is why the court rejected the defendant’s RFRA defense in *United States v. Barnes*, 677 Fed. Appx. 271 (6th Cir. 2017). His admission “that marijuana was not a necessary part of his religion” supported the conclusion that the acts for which he was charged “were, in fact, based on his own personal belief or philosophy regarding marijuana.” *Id.* at 277; see also *United States v. Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (drawing on First Amendment precedents for definition of “religious” and rejecting RFRA defense because belief in “[m]arijuana’s medical, therapeutic, and social effects” was “secular, not religious”); *Friedman v. Southern Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 685 (Cal. App. 2002) (extensively discussing what counts as “religious” and concluding that “[w]hile veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy”).

C. Religious exercise must be “sincere,” not contrived for litigation.

Under the substantial burden framework, courts don’t ask whether a particular practice is a central to a religious faith or whether a litigant has understood her faith correctly. *Hobby Lobby*, 573 U.S. at 724–725; *Thomas*, 450 U.S. at 714–716. But they do ask

whether a plaintiff is “sincere.” Sincerity is a “threshold question” “in every case” because “[w]hile the truth of a belief is not open to question, there remains the significant question whether it is truly held.” *United States v. Seeger*, 380 U.S. 163, 185 (1965); see also *Thomas*, 450 U.S. at 715 (asking whether the claimant “drew a line” reflecting an “honest conviction”).

Sincerity “is a factual matter,” *United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010) (Gorsuch, J.), in which a court “seeks to determine an adherent’s good faith in the expression of his religious belief,” *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). Courts adjudicate religious sincerity just like “any other factual determination of a party’s mental state.” Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185, 1191 (2017); see *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (“Checking for sincerity ... weed[s] out sham claims.”).

In *Quaintance*, the Tenth Circuit rejected a RFRA defense because “numerous pieces of evidence” “strongly suggest[ed]” the defendants’ “marijuana dealings were motivated by commercial or secular motives rather than sincere religious conviction.” 608 F.3d at 722; see also *United States v. Martines*, 582 Fed. Appx. 768, 769 (9th Cir. 2014) (similar conclusion). The Eighth Circuit applied similar logic in *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996): “[W]e are skeptical that Ochs’s request to be racially segregated, first made in the midst of prison racial disturbances, reflected a sincerely held religious belief.” As numerous decisions attest, sincerity is a robust limiting principle in statutory and

constitutional religious liberty cases. *E.g.*, *Mahone v. Pierce Cnty.*, No. 10-5847, 2011 WL 2360354, at *7, 8 (W.D. Wash. May 24, 2011) (plaintiff was not “sincere in his profession that he is Jewish” because there was “no evidence that [he] ... ever engaged in the practices and tenets of Judaism other than his stated belief that he must eat kosher foods”); *United States v. Manneh*, 645 F. Supp. 2d 98, 111 (E.D.N.Y. 2008) (“[D]efendant’s religious beliefs relating to bushmeat are not the bona fide explanation for the criminal conduct she is charged with committing.”).

Sincerity analysis offers “a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud.” *Patrick*, 745 F.2d at 157. While it may sometimes “appear to overlap with the test for what is ‘religious,’” sincerity is “a discrete element in RFRA and Free Exercise analyses.” *Manneh*, 645 F. Supp. 2d at 111.

D. Failing to subsidize or support religious exercise is not a “burden,” but inhibiting or penalizing it is.

While many courts treat the concept of “substantial burden” as an undifferentiated whole, the question of whether there is a *burden* is analytically distinct from whether that burden is *substantial* enough to trigger strict scrutiny.

The General Rule. Usually, a burden arises based on something the government *does*, not what it fails to do. In most contexts of American life, “voluntary choice is the baseline.” *Lozano v. Collier*, 98 F.4th 614, 628 (5th Cir. 2024) (Oldham, J., concurring in judgment). People are free to make their own choices in religious

matters, and “government is generally under no legal compulsion to affirmatively subsidize or support those choices.” *Ibid.* Religious liberty “does not require the federal government to build churches or employ rabbis.” *Ibid.*

In voluntary-choice cases, government creates a burden when it “bring[s] to bear its sovereign power in a way that inhibits ... religious voluntarism,” thereby decreasing individuals’ ability to practice their faith “consistent with their own free self-development.” Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1325 (2021). Burden analysis thus begins with a “hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience,” then asks whether and to what extent a particular government action interferes with those decisions. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 169 (1992). The aim is to “ensure that religion remains a matter of voluntary choice by individuals and their associations.” *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 514 (2020) (Gorsuch, J., concurring) (cleaned up). And as long as government doesn’t interfere with voluntary choice, it doesn’t burden free exercise. See, e.g., *Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 172 (4th Cir. 1995) (RFRA and Free Exercise Clause do not “impose upon the government an obligation to subsidize” voluntary choices).

Exception One: Public Benefits. But there are at least two contexts where this general rule is altered. The first is public-benefit cases. When government

“makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured.” *Locke v. Davey*, 540 U.S. 712, 726–727 (2004) (Scalia, J., dissenting). At that point, the relevant question is not whether the religious adherent is “entitle[d] to a subsidy” but whether she has a “right to participate” in the benefit on “equal footing” without disavowing faith. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017) (cleaned up). Because denying that right “inevitably deters or discourages”—i.e., burdens—religious exercise, heightened scrutiny applies. *Ibid.*

Exception Two: Government-Occupied Fields.

The second exception is when “government so wholly occupies the field” that *government interference* rather than voluntary choice is the baseline. Barclay & Steele, *supra*, at 1333. Under this heading are prison facilities, military environments, zoning, and government-controlled sacred sites. In these contexts, religious observers are at the mercy of government. They can’t voluntarily practice their faith unless the government affirmatively permits access or “acts to lift its coercive power through a religious accommodation.” *Ibid.* In such cases, courts *usually* have no trouble recognizing a burden based on government’s denial of access or failure to accommodate. See *id.* at 1333–1342; e.g., *Mahmoud v. Taylor*, 606 U.S. 522, 556–557 (2025) (“direct, coercive” features of public school environment required religious accommodation); *Makin v. Colorado Dep’t of Corrs.*, 183 F.3d 1205, 1211 (10th Cir. 1999) (“failure to accommodate” Muslim inmate’s meal requirements violated free exercise rights); *Apache*

Stronghold, 101 F.4th at 1143 (Murguia, C.J., dissenting) (*Smith* and other cases recognize that “preventing a person from engaging in religious exercise implicates the Free Exercise Clause”).

Then-Judge Gorsuch’s opinion for the Tenth Circuit in *Yellowbear* is illustrative. There, a state correctional facility barred a Native American prisoner from accessing a government-owned sacred site, a sweat lodge on prison grounds. 741 F.3d at 56. The prisoner’s faith “require[d] at least *some* access” to the site but because prison policy “refuse[d] *any* access,” the court found a RLUIPA violation. *Ibid*. “[F]latly prohibiting” religious exercise “easily” qualified as a substantial burden. *Ibid*. This was true even though the prison had done nothing more than maintain its preexisting control over the prison yard. But that didn’t matter. “This isn’t a situation,” then-Judge Gorsuch wrote, “where the claimant is left with some degree of choice in the matter.” *Ibid*. So to ask about the government’s “coercive influence on” or interference with “that choice” would make little sense. See *ibid*.

This logic gets the burden analysis exactly right in cases of government control: when government “regulates the temporal and geographic environment of individuals,” it may have to take steps to “permit” religious exercise lest individuals be “unable to engage in the practice of their faiths.” *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 226 n.10 (1963); see Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, Cato Sup. Ct. Rev. at 33, 58 (2020–21) (“[T]he government, by seizing sacred lands, took control over the tribes’

ability to practice their traditions fully—in somewhat the same way that prisons control inmates’ ability to practice their faith.”).

While government generally is under no obligation to assume ownership or control of religious sites, once it does so, interference becomes the new baseline and the focus of the burden analysis shifts. The question then is not whether government has acted to interfere with a voluntary religious choice, but whether it has *failed to act* by refusing to alleviate some element of the omnipresent interference. Barclay & Steele, *supra*, at 1333. In other words, the question is not whether the government has *stepped in* but whether it has *failed to step out* in some way. In government-control cases, failure to accommodate itself creates the burden. See *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *3, *17 (W.D. Okla. Sep. 23, 2008) (construction of government building on federal land in “precise area” of plaintiff’s “traditional religious practices” was substantial burden because it would “significantly inhibit” and “deny reasonable opportunities” for religious exercise).

When it comes to government-controlled religious property, indigenous sites aren’t the only things at stake. “[T]here are around seventy churches within the national parks.” Barclay & Steele, *supra*, at 1341. Congress established a National Historical Park “around four of the Southwest’s famous Catholic mission churches,” and one—San Xavier del Bac—“remains an important pilgrimage site that thousands visit each year.” *Ibid.* The Ebenezer Baptist Church in which Martin Luther King Jr. preached is located on government-leased property. *Apache Stronghold*, 145

S. Ct. at 1488 (Gorsuch, J., dissenting). Under the Ninth Circuit’s approach in *Apache Stronghold* and the Fifth Circuit’s approach here, the government could close these places forever, or even raze them entirely, without ever undergoing strict scrutiny.

Unless checked, this logic would create perverse incentives for aggressive land acquisition and sweeping assertions of sovereignty over religious sites. If controlling land categorically eliminates substantial burden analysis, government gains power to evade review under the Free Exercise Clause and its statutory analogues simply by acquiring property—*precisely the pattern that characterized federal Indian policy for over a century*. See Cong. Rsch. Serv., R48452, *Indigenous Sacred Sites: Overview and Issues for Congress* 4–5 (2025) (“[M]any of the ancestral homelands previously occupied by Indigenous peoples, including lands containing Indigenous sacred sites, are now owned and managed by the federal government.... At the same time that Indigenous peoples were being removed from their ancestral homelands, the federal government was establishing formal policies aimed at curtailing or suppressing certain Indigenous religious practices ... including ... site-specific religious practices.”). A rule that rewards government expansion into domains of religious exercise, rather than constraining it, inverts the design of the Free Exercise Clause and the statutes enacted to reinforce it.

This logic extends beyond land to *any* field government regulates comprehensively. The City of Philadelphia already made this exact argument in *Fulton*: it claimed Catholic Social Services had no

religious liberty claim because foster care had become a comprehensively-regulated public function, “essentially a public service.” See *Fulton v. City of Philadelphia*, 922 F.3d 140, 160 (3d Cir. 2019).

This Court rightly rejected this argument. It cannot be that “an activity, traditionally undertaken by religious groups for religious reasons, loses all religious liberty protections as soon as government encompasses it within a regulatory framework.” Brief of *Amici Curiae* United States Conf. of Catholic Bishops and Pa. Catholic Conf. at 5, *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123), <https://bit.ly/4bjIb9H>.

Yet the Fifth Circuit’s decision below would seem to validate the City of Philadelphia’s reasoning. If the substantial burden test is watered down here because San Antonio presently has control over an ancient Native American pilgrimage site, why couldn’t Philadelphia curb Catholic Social Services’ religious exercise by overtaking foster-care licensing? The answer cannot be “this case is about land.” Refusing to recognize a substantial burden because the government comprehensively occupies the relevant domain—physical or regulatory—undermines *Fulton* and hands governments a blueprint for evading religious liberty protections: claim sovereignty over the field, then use that claim as a defense to avoid accountability under strict scrutiny.

E. A burden on religious exercise must be “substantial.”

Not “every infringement on a religious exercise will constitute a substantial burden.” *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316 (10th Cir. 2010)

(emphasis added). A court must examine “the nature and extent to which religious exercise is hampered or restrained by” government action. *Real Alternatives, Inc. v. Secretary Dep’t of Health & Hum. Servs.*, 867 F.3d 338, 365 (3d Cir. 2017). Substantial “doesn’t mean complete or total.” *Yellowbear*, 741 F.3d at 55. But the interference “must be more than incidental” and “more than an inconvenience”; it “must significantly hamper one’s religious practice.” *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) (cleaned up), *abrogated on other grounds by Sossamon v. Texas*, 563 U.S. 277 (2011). The substantiality requirement serves as “an imperative safeguard, else religious beliefs would invariably trump government action.” *Real Alternatives*, 867 F.3d at 365.

Courts have fleshed out the meaning of “substantial” in various contexts, clarifying that a burden is not substantial if it (a) is fleeting, (b) is de minimis, or (c) leaves adherents free to pursue a religiously acceptable alternative.

Fleeting. While religious prisoners generally must be furnished with a religiously compliant diet, in *Norwood v. Strada*, 249 Fed Appx. 269, 272 (3d Cir. 2007), the “short denial of such a diet during an emergency lock-down” was a “mere de minimis intrusion,” not a substantial burden. “[I]t is incredible,” the court wrote, “that in such a short time period Norwood would have been forced to abandon one of the precepts of his religion” or “felt substantial pressure to modify his beliefs.” *Ibid.*

De Minimis. Burdens that are de minimis or attenuated don’t qualify as substantial, particularly when adherents retain a significant element of choice.

Thus, in *Real Alternatives*, employees were not substantially burdened by the requirement that their employer’s health plan cover contraceptives. The requirement only “broaden[ed] the availability of services that an employee might or might not access” and it was “still up to the employee to decide what to do with those options.” 867 F.3d at 361.³

Similarly, in *United States v. Friday*, 525 F.3d 938, 948 (10th Cir. 2008) (McConnell, J.), requiring a religious adherent to obtain a permit before killing an eagle was not a substantial burden because the adherent’s religious tenets were not inconsistent with using the application process. And in *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004), requiring the college “to submit a *complete* [zoning] application, as is required of all applicants,” did not substantially burden religious exercise. In these cases, courts examine “the connection between the conduct and the religious belief” and do not countenance burdens that are “negligible.” *Real Alternatives*, 867 F.3d at 361.

Religiously Acceptable Alternatives. This Court “ha[s] not addressed” whether an available alternative that is religiously “indistinguishable from the prohibited practice” alleviates a substantial burden. *Murphy v. Collier*, 139 S. Ct. 1475, 1484

³ The situation in *Real Alternatives* was “[u]nlike *Hobby Lobby*” in which the employer had to “arrang[e] or provid[e]” the objectionable coverage. 867 F.3d at 362. Here, the employees didn’t arrange or provide anything. They simply “bec[ame] eligible”—passively—for a “service of [their] choosing.” *Ibid.* In this sense, *Real Alternatives* is as much a no-exercise case as a de-minimis-burden case.

(2019) (Alito, J., dissenting). But a number of cases have held that a burden isn’t substantial when adherents, *by their own admission*, have religiously acceptable alternatives for a particular faith practice. See also Girgis, *supra*, at 1795 (advocating an “adequate alternatives principle” for substantial burden analysis, which asks whether a claimant still has “another way” to exercise religion to “about the same degree” and at “not much greater cost” (emphases omitted)).

In *Thiry v. Carlson*, 78 F.3d 1491, 1495–1496 (10th Cir. 1996), the required relocation of a gravesite wasn’t a substantial burden because plaintiffs’ religious beliefs didn’t prohibit relocation and *they admitted they could voluntarily relocate*. In *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1017 (9th Cir. 2016), there was no substantial burden where an alternative means of sacramental practice was available: “We fail to see how prohibiting a substance that [plaintiffs] *freely admit* is a substitute would force them to act at odds with their religious beliefs.” (emphasis added). In *Henderson v. Kennedy*, 253 F.3d 12, 16–17 (D.C. Cir. 2001), plaintiffs’ beliefs didn’t require them to sell T-shirts in any particular place, so a ban on sales on the National Mall was “at most a restriction on one of a multitude of means” and “not a substantial burden.” It did not “prevent[] them from engaging in conduct their religion requires.” *Id.* at 17.

None of these cases authorized government or courts to second-guess a claimant’s religious beliefs about what counts as an adequate substitute. *Cf. Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (rejecting prison’s

assertion that “availability of alternative means of practicing [Islam]”—such as having a prayer rug and access to a religious diet—defeated a substantial-burden claim).

* * *

The substantial burden test’s five threshold elements—exercise, religiosity, sincerity, burden, and substantiality—play a gatekeeping role for claims. Though not onerous, each must be satisfied before a plaintiff can put the government to its burden of showing a compelling interest and least restrictive means. As limiting principles, they enable courts to fulfill the promise of broad religious liberty protection while screening out unwarranted exemption claims. And they preclude the need for courts to second-guess the policy choices embodied in the Religious Clauses and their implementing statutes by imposing extra-textual limits on the substantial burden test.

II. The Fifth Circuit misconceived the substantial burden analysis.

The Fifth Circuit’s decision in *Perez* misapplied the substantial burden inquiry’s well-established limiting principles.⁴ There is no question that *Perez* and *Torres* have satisfied the threshold requirements of exercise, religiosity, and sincerity. The only disputed questions are burden and substantiality. They and their ancestors have engaged in sincere religious exercise at this riverbend on the San Antonio River for centuries. Pet. 5; Pet.App. 54a (Oldham, J., dissenting). The

⁴ The Fifth Circuit presumed that the City’s plan was not neutral and generally applicable and therefore subject to strict scrutiny under both TRFRA and the Free Exercise Clause. Pet.App. 42a.

court acknowledged that “Appellants require certain religious ceremonies to be performed only at this riverbend” and that the City’s planned changes to this location “would irreversibly destroy the Sacred Area and their ability to practice their religion there.” Pet.App. 13a, 16a. Yet the Fifth Circuit—after citing this Court’s decision in *Lyng*—denied that appellants had shown a substantial burden because, in its view, they “have virtually unlimited access” to *other* parts of this municipal public park, and birds whose presence is essential to certain rituals “are not specifically targeted nor dissuaded from nesting *nearby or elsewhere*” in the park. Pet.App. 18a–19a (emphasis added).

As other Circuits have recognized, wholly “prevent[ing],” “flatly prohibiting,” and “refus[ing] ... access” to religious exercise—all of which would result from the City’s planned changes to the riverbend here—“easily” qualify as a substantial burden. *Yellowbear*, 741 F.3d at 55–56.

This is exactly the kind of government-control case where a failure to accommodate creates a burden on religious exercise. Because the government controls the park, its refusal to accommodate religious practice burdens religious exercise. That burden only magnifies—it does not lessen—if the site is destroyed, rendering the government’s interference permanent and irreversible. That is a substantial burden, and the Fifth Circuit was wrong to conclude otherwise. Six Fifth Circuit judges agreed, dissenting from the denial of rehearing en banc: “[V]irtually unlimited access to the park’ is useless if the park’s Sacred Area is destroyed.” Pet.App. 57a (Oldham, J., dissenting).

The Supreme Court recently corrected a similar mistake made by the Fourth Circuit, which held in *Mahmoud v. McKnight* that a religious burden was only cognizable if the government “coerces” religious practitioners “to *believe* or *act* contrary to their religious views.” 102 F.4th 191, 208 (4th Cir. 2024). This Court rejected as “alarmingly narrow” the notion that the right to religious liberty offers “nothing more than protection against compulsion or coercion to renounce or abandon one’s religion.” *Mahmoud*, 606 U.S. at 558.

Unlike here, the challenged government policy in *Mahmoud* did not make the plaintiffs’ religious exercise impossible—just more expensive and time-consuming. See *id.* at 561–562. Yet this Court had no trouble finding that this non-coercive burden on religious exercise was sufficient, as “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Id.* at 569 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam)). If a mere increase in cost and inconvenience was enough to establish a substantial burden in *Mahmoud*, the policy at issue here, which would render petitioners’ religious exercise permanently impossible, is a substantial burden *a fortiori*.

As with the Fourth Circuit’s decision in *Mahmoud*, the Fifth Circuit’s decision in *Perez* got the religious burden analysis wrong. This Court should take the opportunity to correct that error and clarify that making a religious practice impossible *always* constitutes a substantial burden, *even* when an ancient religious site now sits on government land.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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