No. 26-15

In the Supreme Court of the United States

GARY PEREZ; MATILDE TORRES,
Petitioners,
v.
CITY OF SAN ANTONIO,
Respondent.

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

PETITIONERS' REPLY BRIEF

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REPLY

The brief in opposition (BIO) confirms that both questions presented should be granted. The Fifth Circuit deepened a split among lower courts over whether a court can substitute its theological opinion for a religious believer's through an "objective" assessment of religious burden. The Fifth Circuit also weighed in on an acknowledged circuit split over whether a government can satisfy its least-restrictive-means burden when it admits that it refused to attempt religious accommodation before litigation.

The City tries to obfuscate those clear splits and related questions behind a smokescreen of factual allegations and clever case distinctions. Once the Court pierces through that, it will recognize that the City is defending the wrong side of the two splits presented.

Both questions are important to every religious free exercise dispute. This case, which can result in a win-win for both parties if the Constitution is properly applied, gives the Court a clean vehicle to address them.

ARGUMENT

I. The theological-substitution question warrants review.

State and federal courts have split on how judges should determine if government action burdens religious exercise. The City represents one side of the split by defending the Fifth Circuit's opinion, which deemed it acceptable to replace Petitioners' understanding of what constitutes a religious burden with the judges' views. BIO.19. The other side of the

split requires courts to accept the believer's account of what burdens her religious exercise. Pet.19–21.

Because First Amendment limits on civil adjudication govern *all* American courts, only this Court can resolve the split. The City's observation that this issue arises in both federal and state contexts, in both statutory and constitutional cases, and across diverse settings, confirms the breadth of the split and the importance of resolving the question. BIO.28–32.

A. The "objective" burden test applied below requires governments and courts to adjudicate theology.

Allowing courts to overrule and replace claimants' understanding of the burden on their religion invites governments to make theological arguments.

This case is a perfect example. The City avers that it "has never disputed the sincerity or content of Petitioners' beliefs." BIO.20. Yet its brief disputes what land Petitioners consider holy, BIO.2, the religious significance cormorant nesting plays in Petitioners' theology, BIO.19, the theological significance of sacred trees in Petitioners' spiritual ecology, BIO.20, the contents of a religiously effective Native American Church ceremony, BIO.14, and the theological impact the site's destruction will have on indigenous religious practice, BIO.20–21.

In the circuit court, the City attacked the theological truth of Petitioners' faith, asserting that past and present human impact means the site will "forever lack" the "spiritual ecology" that made the site sacred to Petitioners' ancestors. Br. of Appellee, Dkt. 120 at 22, *Perez v. City of San Antonio*, No. 23-50746 (5th Cir. Nov. 15, 2023).

Such arguments are "not within the judicial function and judicial competence." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). But the "objective" test the Fifth Circuit employed forces courts to make theological judgments, and therefore incentivizes governments to supply courts with theological arguments.

B. The City's characterization of the burden inquiry does not reflect the divergence in analytical approaches by the circuit courts.

The City insists that every court respects sincerely held beliefs, so no split exists among the lower courts when assessing burden. BIO.27. Not so. The existing split is not about sincerity. Too often, courts claim to accept a claimant's sincerity, only to decide on their own that no religious burden exists.

Under the "objective" approach, courts are free to override believers' understanding of how government action impacts their religious exercise. In *Real Alternatives*, the Third Circuit purported to accept plaintiffs' sincere religious objections to facilitating abortifacient use through insurance coverage, but found no burden based on the theological proposition that "[s]ubscribing to an insurance plan involves no real 'participation'" in prohibited conduct. *Real Alternatives, Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 359 (3d Cir. 2017).

The City tries to argue that the different types and settings of burdens on religious exercise somehow require courts to make objective assessments of whether a burden exists. BIO.30–31. Those differences do not resolve whether courts may reject claimants'

accounts of how government action burdens their religious exercise.

Lower courts acknowledge that they are still divided on that question. For one example, the Second Circuit vacated a ruling that a Jewish prisoner's accommodations sufficed on Shavuot because defining Shavuot's requirements is "beyond the competence of a federal court." *Kravitz v. Purcell*, 87 F.4th 111, 128–29 (2d Cir. 2023). The court noted that up until 2023, it had "persisted in the misguided enterprise of measur[ing] the devotional import of certain religious practices" in violation of First Amendment limits. *Id.* at 125 (internal quotation marks omitted). In doing so, it noted that the split persists with other circuits. *Id.* at 126 n.11.

That the question of First Amendment limits on adjudication arises in many different contexts demonstrates the importance of the question, not its inappropriateness for review.

C. First Amendment limits constrain the adjudication of all claims—state and federal, statutory and constitutional.

The Constitution constrains the adjudication of all sources of law. The City tries to create a smokescreen to hide the split in lower courts by pointing out the rather obvious fact that many lower court decisions apply different sources of law that protect religious exercise. BIO.28–29. As the City concedes, the cases raise the same fundamental burden question no matter whether they arise under state law, federal statute, or the Constitution. BIO.29. In every instance, the First Amendment constrains how judges answer

that question. Lower courts cannot agree on its demands.

II. The least-restrictive-means question warrants review.

A. Courts remain divided on how a government can satisfy its least-restrictive-means burden.

The City asserts that "Courts do not conflict on the second question presented." BIO.33. But its own authorities prove the City wrong.

In the Ninth Circuit, the government must show that it "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). The Fifth Circuit instead describes the burden as "not to show that it considered the claimant's proposed alternatives but rather to demonstrate those alternatives are ineffective." *Davis v. Davis*, 826 F.3d 258, 264 (5th Cir. 2016).

The circuit courts themselves acknowledge the split. *See Knight v. Thompson*, 797 F.3d 934, 946 (11th Cir. 2015) (collecting cases applying the *Warsoldier* rule but rejecting them as "not the law in this circuit").

The City suggests that the split has resolved itself because "the Ninth Circuit has since narrowed *Warsoldier*" in *Walker v. Beard*, 789 F.3d 1125, 1137 (9th Cir. 2015). *See* BIO.34. Hardly.

In *Walker*, a prisoner sought racially segregated housing and the court declined to require officials to devise accommodations he had never proposed. *Walker*, 789 F.3d at 1137–38. Faced with a similar

segregation request after *Ramirez v. Collier*, the Ninth Circuit recognized that government cannot shift responsibility for obvious alternatives onto the claimant. *Al Saud v. Days*, 50 F.4th 705, 712–13 (9th Cir. 2022) (citing *Ramirez v. Collier*, 595 U.S. 411, 432 (2022)). More recently still, its en banc court required evidence of pre-litigation consideration in a First Amendment challenge to school-club policies. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 694 (9th Cir. 2023) (en banc).

This Court's recent holdings do not resolve the circuit split on whether the government may wait to "consider" and reject less-restrictive means until litigation. The City is factually correct that this Court analyzed alternative means in some cases. BIO.33. What the City ignores is that each time, the Court used that analysis to explain why the government had *failed* its least-restrictive-means burden. *See Holt v. Hobbs*, 574 U.S. 352, 365–67 (2015); *Ramirez*, 595 U.S. at 430, 432; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014).

An identified circuit split remains, and only this Court can provide clarity for the courts of appeals.

B. The pre-litigation consideration requirement better implements this Court's precedent and protects religious exercise from avoidable harm.

This Court has emphasized that when defining a compelling interest, government may not define its objectives "at a high level of generality" but must state them as to a specific accommodation for a specific claimant. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021).

Requiring the government, once on notice of a religious burden, to seek alternatives prior to litigation implements this Court's doctrine: officials must ask whether they can achieve their goals while granting the requested accommodation; they must explore alternatives.

Advance consideration distinguishes genuine reasons for denying accommodation from governmental justifications "invented *post hoc* in response to litigation." *Kennedy v. Bremerton School District*, 597 U.S. 507, 543 n.8 (2022). Here, the City's project manager explained that the design was chosen without considering Petitioners' free-exercise request and was not revisited because doing so "would take time and money." App.547a.

The City equates allowing public comment with considering religious accommodations. BIO.35. Citizens speaking at a hearing can establish notice of a religious burden. The responsibility still must lie with the City to evaluate alternatives.

All the evidence proves the City never considered least-restrictive means until litigation commenced. The City cannot have seriously weighed and rejected an alternative it never considered. Therefore, the justification it now provides is necessarily invented *post hoc*. Practically, that means the City reviewed any proposals from the Petitioners with the goal of defeating them, not to determine if they could work. The City's own witness cited stakeholder input and design changes, then conceded that the City had not studied whether it could achieve its goals while accommodating Petitioners' religious exercise. Pet.12–13; App.561a–562a.

This case provides the Court an opportunity to clarify how *Kennedy*'s prohibition on *post hoc* justifications applies when there was no consideration of alternatives to restricting Petitioners' religious practice before litigation—a question on which the circuits themselves recognize they are divided.

III. Both questions are usefully and properly positioned for review.

A. This case is an excellent vehicle for the first question presented.

Nothing in the record impedes review of the first question. Sincerity is undisputed, App.15a, and the panel accepted that Petitioners' ceremonies must be performed "only at this riverbend" and "cannot be properly administered without specific trees present and cormorants nesting," App.3a–4a.

Despite that acceptance, the panel found no burden because Petitioners retain "virtually unlimited access to the Park" and the cormorants may nest "nearby or elsewhere in the 343-acre Park." App.18a–19a. The City tries to minimize this by calling it "a single observation," BIO.36, but it was the core of "the few sentences the majority devoted to substantial burden." App.57a (Oldham, J., dissenting from denial of rehearing en banc). As Judge Higginson explained, the birds' ability to nest elsewhere "is legally irrelevant given that we assess religious curtailment from [Plaintiffs'] perspective." App.118a–119a (Higginson, J., dissenting in part). *See* Part I.A, *supra*.

The alternative strict-scrutiny holding is also no obstacle. Once the Court recognizes the actual burden as understood by the Claimants, the City would be forced to rethink its strict-scrutiny justifications. It

would need to reframe its claims on compelling interest and least-restrictive means. The City's contrary argument, BIO.38, also overlooks the fact that the petition presents both questions, which together reach the entire judgment.

B. This case is an excellent vehicle for the second question presented.

The City claims this case is not a solid vehicle for the second question presented because "the City 'considered viable alternatives.'" BIO.37. This is an attempt to create a factual dispute where none exists. Helpfully, it illustrates why the question is cleanly presented.

Prior to the litigation, the City never considered whether it could reach a win-win solution, constructing its project *and* preserving indigenous religious practice. Once sued, the City dug in behind its chosen design, devoting its energy to justifying its decision instead of revisiting it. As Judge Higginson recognized, "the City's answer—coupled with the testimony of multiple witnesses—show that the City did not contemplate 'adverse impact' *as it relates to [Petitioners'] religious beliefs*." App.122a (Higginson, J., dissenting in part) (emphasis added); *cf.* CatholicVote.org Education Fund Br. 10–11 ("Conspicuously missing from both the Director's testimony, and the Fifth Circuit's evaluation, was any analysis specific to the Petitioners' First Amendment request for a religious accommodation.").

The City argues that its plan was the least restrictive means because it "adjusted plans in an effort to save the greatest number of trees." BIO.11. Yet it did so without differentiating trees valued for

their shade or aesthetics and trees used in a religious ceremony. It provided no evidence that its "efforts" addressed Petitioners' religious exercise.

The City claims that "the project has been updated to preserve 35 additional trees." BIO.12. The City uses the word "preserve" to include trees that are uprooted from the sacred riverbend and moved to other locations in the park. Under the City's original plan 13 trees were to be preserved in place at the riverbend. ROA.2324. The exhibit the City presents in its brief reveals that under the "revised" plan, only "*14 trees total will be preserved in place*." *See* BIO.12 (discussing ROA.2324). Relocated trees may suffice for dogwalkers seeking shade. For Petitioners, all that matters is that they will be removed from their religious ceremony.

Similarly, the City invokes "regulatory reasons" for rejecting Petitioners' alternative design, BIO.37, insisting that the question presented cannot "change the outcome," BIO.38. The City's engineering witness testified that an alternative design would "save more trees" and was only off the table because of "a series of legal issue[s]—or regulatory restrictions." App.568a. The City does not identify any regulations that prohibit drilling through the *front* of the walls. It has never identified them because no such regulations exist.

This Court therefore need not dive into engineering schematics to resolve the least-restrictive-means analysis. It can rely on the well-established legal principle that "in no world may a government entity's concerns about phantom [legal] violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 597 U.S. at 543 (collecting cases).

As to the cormorants' nesting, the City conceded that it "never actually investigated whether it could alter the timing of its bird deterrence specifically to accommodate [P]laintiffs' religious exercise." App.189a (Higginson, J., dissenting in part).

The City manufactured all these arguments after litigation commenced. None of them, including scary photos of egret and heron feces, answers the question of whether it needed to consider religious accommodations prior to litigation. The case presents the question cleanly: may the City make up rationales after litigation has commenced when it never considered alternatives prior to litigation?

Easy, workable solutions could accomplish the City's goals while preserving Petitioners' religious ceremonies. Its admissions that it made *no* modifications to accommodate Petitioners' religion cleanly present the second question.

C. *Lyng* does not control this case.

The City argues that *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), would govern any remand. BIO.24–26,38–39.

Lyng has no bearing on Petitioners' Texas RFRA claim. The panel applied Texas's "real and significant" standard for that question of statutory interpretation and expressly held that *Lyng* is irrelevant to the state statute. App.16a–17a.

Lyng also does not and would not apply to Petitioners' Free Exercise claim. This Court has never extended *Lyng* to municipal public parks. To the contrary, this Court has repeatedly protected religious exercise in public parks. *See Fowler v. Rhode Island*,

345 U.S. 67, 69 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951). The City cites *no* cases supporting its contention that *Lyng* "applies with even greater force to a public park." BIO.25.

This is not surprising. *Lyng*'s internal-affairs rationale makes no sense applied to a municipal park *dedicated to public use*. Whereas *Lyng* concerned federal forest land the government chose to use for timber logging, *Lyng*, 485 U.S. at 443, Brackenridge Park is a municipal park dedicated for the use and enjoyment of the public. It is the opposite of an internal affair. George Brackenridge donated the land on the conditions that "[t]he city was to use the property as a park and not 'convey, alienate or encumber' it." ROA.1896. The City is thus not in the shoes of an ordinary property owner; instead (unlike in *Lyng*), the park is "held in trust *for the use of the public*." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (emphasis added). That is anything *but* an "internal affair." *Cf. Mahmoud v. Taylor*, 606 U.S. 522, 556–57 (2025) (declining to extend the internal-affairs doctrine to the operation of public schools).

IV. In the alternative, the Court should hold this petition pending its decision in *Missionaries*.

At a minimum, the Court should hold this petition pending the outcome of *Missionaries of Saint John the Baptist, Inc. v. Frederic*, No. 25-1131 (U.S. cert. granted Oct. 1, 2026). In *Missionaries*, the Kentucky Supreme Court deemed a burden on religious exercise "a mere inconvenience" because the petitioner "could build a smaller shrine on a different plot." Petition for Writ of Certiorari at 1, 8, *Missionaries*, *supra* (No. 25-1131).

Here, the panel's theological substitution that Petitioners could use other parts of the park mirrors the *Missionaries* court's "smaller shrine" rationale.

The overlap between *Missionaries* and this case therefore supports holding this petition until *Missionaries* is resolved. *Cf. Mast v. Fillmore County*, 594 U.S. 946 (2021) (mem.) (granting, vacating, and remanding RLUIPA case "for further consideration in light of *Fulton v. Philadelphia*, 593 U.S. 522 (2021)," a Free Exercise Clause decision).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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