

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**  
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HEREDITARY CHIEF WILBUR SLOCKISH; CAROL LOGAN;  
CASCADE GEOGRAPHIC SOCIETY; MOUNT HOOD  
SACRED LANDS PRESERVATION ALLIANCE,

*Petitioners,*

v.

U.S. DEPARTMENT OF TRANSPORTATION, ET AL.,

*Respondents.*  
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**APPLICATION TO THE HONORABLE ELENA KAGAN  
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE  
A PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**  
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JULY 18, 2022

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To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Hereditary Chief Wilbur Slockish, Carol Logan, Cascade Geographic Society, and Mount Hood Sacred Lands Preservation Alliance (Plaintiffs) respectfully request that their deadline for filing a petition for writ of certiorari in this matter be extended by sixty days to and including October 3, 2022. The Court of Appeals issued its opinion on November 24, 2021. Plaintiffs filed a petition for rehearing on February 9, 2022, which the Court of Appeals denied on May 6, 2022. Without an extension, Plaintiffs' petition for certiorari would therefore be due on August 4, 2022. Plaintiffs are filing this application at least ten days before that date. See S. Ct. R. 13.5. This Court has jurisdiction over the judgment under 28 U.S.C. 1254(1).

### **BACKGROUND**

Plaintiffs are members of federally recognized tribes who long practiced their faith at a small sacred site called *Ana Kwana Nchi Nchi Patat*, or the "Place of Big Big Trees." The site has been used by indigenous peoples since time immemorial, and by Plaintiffs personally since the 1940s for core religious ceremonies that cannot take place anywhere else. In the 1980s, when the Government proposed widening a nearby highway and encroaching on the site, one of Plaintiffs' leaders informed the Government of the site's historic and religious significance. In response, the Government modified its project to protect the site. But in 2008, the Government widened the highway again to add a center turn lane. This time, it protected a nearby wetlands but completely destroyed the sacred site. It did this even though there were several

feasible ways to add the turn lane without harming the sacred site, as the Government acknowledged in its briefing before the Ninth Circuit. Gov't C.A. Answer Br. 1 (“On one issue, Plaintiffs and the government agree: ‘the destruction of Plaintiffs’ sacred site never had to happen.”); *id.* at 43 (“[T]he destruction of their sacred site could have been avoided[.]”).

Plaintiffs filed this lawsuit challenging the legality of the Government’s project under the Religious Freedom Restoration Act (“RFRA”), the Free Exercise Clause of the First Amendment, and environmental laws. At the trial level, four different district and magistrate judges, in five separate opinions, repeatedly rejected the Government’s argument that this case was moot, instead granting summary judgment to the Government on other grounds. The district court rejected Plaintiffs’ RFRA claim on the merits, ruling that it was applying “‘a narrower definition’ of what constitutes a substantial burden.” D. Ct. Doc. 312, at 2 (June 11, 2018). Because “Plaintiffs have not established that they are being coerced to act contrary to their religious beliefs under the threat of sanctions or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs,” the district court held that “Plaintiffs cannot establish a substantial burden under the RFRA.” *Ibid.* (cleaned up).

The Ninth Circuit, however, accepted the Government’s mootness argument, and in a four-page, unpublished opinion, dismissed Plaintiffs’ appeal. The Court of Appeals held that because Plaintiffs’ requested relief “implicate[d]” a limited easement granted to a State agency that was previously dismissed from the case, “none of the

Defendants ha[d] authority” to grant relief. *Slockish v. United States Dep’t of Transportation*, No. 21-35220, 2021 WL 5507413, at \*1-2 (9th Cir. Nov. 24, 2021).

### **REASONS FOR GRANTING AN EXTENSION OF TIME**

The time to file a petition for a writ of certiorari should be extended by sixty days for these reasons:

1. This case presents important mootness and RFRA issues warranting a carefully prepared certiorari petition. The Court of Appeals below declined to address the RFRA issue and dismissed this case on mootness grounds, reasoning that because the project was already completed and a third party’s rights could be affected, it could not order any relief. That holding conflicts with other Circuits’ precedents and this Court’s settled mootness doctrine, as Plaintiffs’ petition will explain.

2. The underlying merits issues also warrant review. This case raises similar RFRA questions as those in *Apache Stronghold v. United States*, No. 21-15295, 2022 WL 2284927 (9th Cir. June 24, 2022), in which a divided Ninth Circuit panel adopted the narrow understanding of RFRA also endorsed by the district court here. There, like here, the government plans to destroy a Native American sacred site, rendering important Native American religious practices impossible. The Court of Appeals nonetheless concluded that these actions do not impose a “substantial burden” on Native American religious exercise because the Government is not “denying a benefit or imposing a penalty,” the only actions that qualify as “substantial burdens’ under RFRA.” *Id.* at \*12; *but see id.* at \*23 (Berzon, J., dissenting) (“The majority’s flawed test leads to an absurd result \* \* \* .”); *see also Apache Stronghold v. United States*,

No. 21-15295, slip op. at 4 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting) (“This is an obvious substantial burden \* \* \*”).

The deadline for a petition for writ of certiorari in *Apache Stronghold* is September 22, 2022. Accordingly, granting this motion for extension of time would also permit this Court to consider both petitions simultaneously.

3. Plaintiffs’ counsel needs additional time to prepare its petition in this case. Plaintiffs’ counsel had substantial briefing and argument obligations from May through July of this year, including preparing for and presenting oral argument at the Seventh Circuit, *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 21-2524 (7th Cir.), filing a response brief at the Fifth Circuit, *Franciscan All., Inc. v. Becerra*, No. 21-11174 (5th Cir.), filing a motion for preliminary injunction in the Middle District of Alabama, *South Central Conf. of Seventh-day Adventists v. Alabama High Sch. Athletic Ass’n*, No. 22-274 (M.D. Ala.), filing a petition for rehearing en banc at the Tenth Circuit, *Faith Bible Chapel Int’l v. Tucker*, No. 20-1230 (10th Cir.), preparing for and presenting oral argument at the Indiana Supreme Court, *Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. \_\_\_\_ (Ind.), filing a supplemental brief at the Eighth Circuit, *Religious Sisters of Mercy v. Becerra*, No. 21-1890 (8th Cir.), and filing an amicus brief at the Eighth Circuit, *Holt v. Payne*, No. 22-1809 (8th Cir.). Plaintiffs’ counsel also have upcoming matters that conflict with the deadline for filing a petition. These include a reply brief in the Middle District of Alabama and an oral argument in the Fifth Circuit, both scheduled for August 4, the same date a petition for a writ of certiorari would be due.

## CONCLUSION

For the foregoing reasons, applicant requests that the time to file a petition for a writ of certiorari in this matter be extended sixty days, to and including October 3, 2022.

Respectfully submitted,

/s/ Luke W. Goodrich

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