No. 24-291

In the Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Apache Stronghold represents that it does not have any parent entities and does not issue stock.

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PETITION FOR REHEARING

Petitioner Apache Stronghold respectfully requests rehearing of this Court's May 27, 2025, order denying its petition for a writ of certiorari. The Court should instead hold the petition pending its decision in *Mahmoud* v. *Taylor*, No. 24-297 (argued Apr. 22, 2025), and, if the Court reverses in *Mahmoud*, grant the petition, vacate the judgment below, and remand for further proceedings in light of *Mahmoud*.

REASONS FOR GRANTING REHEARING

This case involves the federal government's plan to transfer an Apache sacred site to a mining company for the construction of a copper mine that will swallow the site in a crater, ending sacred Apache rituals forever. The en banc Ninth Circuit conceded that destroying the site would prevent the Apaches from continuing their longstanding religious ceremonies there, because the site will be obliterated. See Pet.i. Nonetheless, a fractured 6-5 majority held that the government's action did not "substantially burden" the Apaches' religious exercise, thus rejecting their claims under the Religious Freedom Restoration Act and the Free Exercise Clause. *Ibid.*

On May 27, the Court denied certiorari over the dissent of Justices Thomas and Gorsuch, who called this case "vitally important" and the Ninth Circuit's decision "extraordinary," an "outlier," and "highly doubtful as a matter of law." *Apache Stronghold* v. *United States*, No. 24-291 (May 27, 2025), slip op. 2, 16 (Gorsuch, J., joined by Thomas, J., dissenting from denial of certiorari) ("Gorsuch & Thomas Op.").

This Court should reconsider its denial of certiorari given "intervening circumstances of a substantial or

controlling effect," Sup. Ct. R. 44.2—namely, this Court's grant of certiorari and imminent decision in *Mahmoud* v. *Taylor*, No. 24-297. The Court granted certiorari in *Mahmoud* after briefing on the petition in this case was complete and is set to issue its decision by the end of this Term. *Mahmoud*, like this case, turns on what it means for the government to "burden" religious exercise for purposes of free-exercise protections. And in *Mahmoud*, the Fourth Circuit found no burden based on several of the same theories adopted by the Ninth Circuit here. Should this Court reverse in *Mahmoud*, then, that decision could substantially affect the burden analysis in this case, making it appropriate for this Court to GVR.

This Court has not hesitated to grant rehearing and GVR in situations like this one—where a subsequent decision in another case, issued after a denial of certiorari, calls into question the result below. That course is especially appropriate here, where the government's plan will "destroy an ancient site of tribal worship," ending centuries-old religious exercises forever. Gorsuch & Thomas Op.17. Before that irreversible harm comes to pass, the lower courts should at least be able to reconsider the substantial-burden question in light of fresh guidance from this Court addressing how courts should analyze burdens on religious exercise. Accordingly, the Court should hold this case for *Mahmoud* and, if the Court reverses in that case, GVR in light of *Mahmoud*.

I. The Court has on numerous occasions granted rehearing to GVR in light of intervening precedent.

Petitioner recognizes that rehearing is exceptional. But the Court has on numerous occasions granted rehearing in the same circumstances presented here—namely, where, shortly before or after denying a petition for certiorari, this Court (or a relevant lower court) has decided another case addressing overlapping issues in a way that may affect the result in the denied case. In that set of circumstances, this Court has in several recent cases granted rehearing, reconsidered the denial of certiorari, and GVR'd instead. See, *e.g.*:

- *Abdirahman* v. *United States*, 585 U.S. 1046 (2018) (granting rehearing to GVR initially denied petition in light of *United States* v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018));
- *Gonzalez-Longoria* v. *United States*, 585 U.S. 1001 (2018) (granting rehearing to GVR initially denied petition in light of *Sessions* v. *Dimaya*, 584 U.S. 148 (2018));
- *Kent Recycling Servs., LLC* v. *U.S. Army Corps of Eng'rs*, 578 U.S. 1019 (2016) (granting rehearing to GVR initially denied petition in light of *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590 (2016));
- *Johnson* v. *Alabama*, 136 S. Ct. 1837 (2016) (granting rehearing to GVR initially denied petition in light of *Hurst* v. *Florida*, 577 U.S. 92 (2016));

- *Liberty Univ.* v. *Geithner*, 568 U.S. 1022 (2012) (granting rehearing to GVR initially denied petition in light of *NFIB* v. *Sebelius*, 567 U.S. 519 (2012));
- *Melson* v. *Allen*, 561 U.S. 1001 (2010) (granting rehearing to GVR initially denied petition in light of *Holland* v. *Florida*, 560 U.S. 631 (2010)).

Nor is the practice new; the Court has engaged in it for decades. See, *e.g.*, *West* v. *Northwest Airlines, Inc.*, 505 U.S. 1201 (1992) (granting rehearing to GVR initially denied petition in light of recent Supreme Court decision); *California* v. *Howard*, 469 U.S. 806 (1984) (same); *United States* v. *Ohio Power Co.*, 353 U.S. 98 (1957) (same); *Baker & Pastry Drivers & Helpers Loc. 802* v. *Wohl*, 315 U.S. 769, 773 (1942) (granting rehearing and plenary review of initially denied petition in light of intervening state-court decision).

That practice is especially appropriate here. For one thing, in at least five of these cases (*Abdiraham*, *Gonzalez-Longoria*, *Liberty*, *West*, *Howard*) this Court had, at the time it initially denied the petition for certiorari, already issued the other decision that it later held to warrant a GVR—yet the Court rethought its denial anyway. In fact, in *Abdirahman*, the petitioner had explicitly sought a GVR in light of the other decision before this Court's initial denial. Pet'r's Supp. Br. at 2, *Abdirahman* v. *United States*, 585 U.S. 1046 (No. 17-243).

Here, by contrast, this Court had not yet decided *Mahmoud* when it issued the denial of certiorari in this case. Indeed, the Court did not grant review in *Mahmoud* until more than two months after briefing on Petitioner's petition for certiorari was complete—

and after the petition had already been distributed for conference five times.

For another, this case is of existential importance for Apache religious practitioners, with consequences that "threaten to reverberate for generations." Gorsuch & Thomas Op.17. Thus, the considerations of fundamental fairness underlying the GVR practice are at their apex here. See *Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2582-2583 (2022) (Sotomayor, J., joined by Breyer, Kagan, and Gorsuch, JJ., dissenting) (GVR can "alleviate the potential for unequal treatment" and be especially appropriate in contexts where "our legal traditions reflect a certain solicitude for [petitioner's] rights" (cleaned up)).

II. The Court should GVR in light of *Mahmoud*.

This is an appropriate case for the Court to follow the same practice. Rule 44.2 contemplates rehearing based on "intervening circumstances of a substantial or controlling effect or * * * other substantial grounds not previously presented."

Here, the certiorari grant and pending decision in *Mahmoud* are "intervening circumstances." The grant in *Mahmoud* came months after completion of certiorari briefing here, and the decision in *Mahmoud* will come after the denial of certiorari here. GVR is also a "ground[] not previously presented," since the certiorari briefing here did not raise that possibility, and the

dissent from denial of certiorari did not address it.[1]

Meanwhile, if this Court reverses in *Mahmoud*, that decision could be of "substantial or controlling effect" as to the proper disposition of the certiorari petition here. That is because new guidance from this Court on the meaning of a "burden" on religious exercise in *Mahmoud* could warrant a GVR.

A GVR is proper when "intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). For example, the Court often GVRs when it issues a decision that "change[s] or clarifie[s] the governing legal principles in a way that could possibly alter the [lower court's] decision." *Flowers* v. *Mississippi*, 579 U.S. 913, 916 (2016) (Alito, J., dissenting). As this language—"reasonable probability," "could possibly"—suggests, the Court needn't be certain the intervening decision will change the result; "[i]t is precisely because of uncertainty that we GVR." *Lawrence*, 516 U.S. at 172.

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[1] The only time *Mahmoud* came up post-grant was in a letter exchange that occurred after this case had already been distributed for conference thirteen times and in which Petitioner otherwise updated the Court on the timeline for the land transfer here. Pet'r Letter at 2 (Apr. 18, 2025); see also Gov't Letter at 2 (Apr. 21, 2025); Resolution Letter at 2 (Apr. 21, 2025) (asserting *Mahmoud*'s "irrelevance"). Petitioner sought plenary review because it believed that was the most appropriate course given the imminence of the transfer, though for the reasons below a GVR at minimum may be warranted if this Court reverses in *Mahmoud*.

Under any articulation of the standard, however, this case could warrant a GVR if this Court reverses in *Mahmoud*, for at least four reasons.

First, there is little doubt that a reversal in *Mahmoud* would clarify the governing legal principles: namely, what constitutes a "burden" on religious exercise. That question is at the heart of both cases. In both cases, the alleged lack of a "cognizable burden" was the sole basis for the lower courts to deny relief. *Mahmoud* v. *McKnight*, 102 F.4th 191, 209 (4th Cir. 2024); *Apache Stronghold* v. *United States*, 101 F.4th 1036, 1043-1044 (9th Cir. 2024) (per curiam); *id.* at 1061 (Collins, J.). And in both cases, the question presented focuses on the nature of a "burden" on "religious exercise." Pet.i; *Mahmoud* Pet.i.

To be sure, Petitioner's lead claim here asks whether the government has imposed a "substantial burden" under RFRA, while *Mahmoud* presents the "burden" question under the Free Exercise Clause. But the Ninth Circuit held that "the phrase 'substantial burden'" in RFRA is "bounded by what counts" as a burden under the Free Exercise Clause, and is therefore "govern[ed]" by this Court's Free Exercise Clause precedent. *Apache*, 101 F.4th at 1061, 1063. Thus, on the Ninth Circuit's own logic, this Court's decision in *Mahmoud* would likewise govern (or at least "could possibly alter") the Ninth Circuit's burden analysis under RFRA.

Moreover, this Court has previously GVR'd a case that "misinterpreted and misapplied" RFRA's sister statute, RLUIPA, in light of a decision clarifying related principles under the Free Exercise Clause. *Mast* v. *Fillmore County*, 141 S. Ct. 2430, 2430 (2021) (Alito,

J., concurring in GVR). In *Mast*, the lower court rejected a claim by Amish religious practitioners, concluding that requiring them to use a modern septic system satisfied strict scrutiny under RLUIPA. *Id.* at 2430-2433 (Gorsuch, J., concurring in GVR); see *Mast* v. *County of Fillmore*, No. A19-1375, 2020 WL 3042114, at *3-6 (Minn. Ct. App. June 8, 2020). While the *Mast* certiorari petition was pending, this Court decided *Fulton* v. *City of Philadelphia*, which clarified the "analysis" of strict scrutiny under the Free Exercise Clause. 593 U.S. 522, 541 (2021). The Court then GVR'd *Mast* "for further consideration in light of *Fulton*." 141 S. Ct. 2430. The analogous result would be appropriate here—especially since, unlike in *Mast*, Petitioner here has a Free Exercise Clause claim, too.

Second, the lower courts in both *Mahmoud* and this case found no burden for the same reason: because the challenged action allegedly did not "coerce [plaintiffs] into acting contrary to their religious beliefs." *Apache*, 101 F.4th at 1044; see *Mahmoud*, 102 F.4th at 216 (government action did not "coerce[] [plaintiffs] to believe or act contrary to their religious faith").

In *Mahmoud*, the parents' "faiths dictate that they shield their children from teachings that contradict and undermine their religious views on" sex and gender. 102 F.4th at 223 (Quattlebaum, J., dissenting). But the challenged government action—denying opt-outs from such instruction—"prevents the parents from exercising these aspects of their faith." *Ibid.* Nonetheless, the majority found no "cognizable burden" because the denial of opt-outs supposedly did not "coerce[] [the parents] or their children to *believe* or *act* contrary to their religious views." *Id.* at 208 (majority opinion).

Similarly, here, the Apaches' religious exercise consists of specific acts of worship at Oak Flat. But the challenged government action—destroying Oak Flat—"would 'prevent' them from conducting religious exercises, including ones they believe can occur nowhere else." Gorsuch & Thomas Op.9. Nonetheless, the majority below found no "cognizable burden" because destruction of the site supposedly would not "coerce [the Apaches] into acting contrary to their religious beliefs." *Apache*, 101 F.4th at 1060, 1062. The parallel is precise. So if this Court rejects the Fourth Circuit's narrow view of coercion in *Mahmoud*, a different result would seem to be required here.

Third, both the Fourth Circuit in *Mahmoud* and the Ninth Circuit here held that part of the reason "'preventing' a religious exercise" was "not enough" was because the cases involved the government's "management" of its "internal affairs." *Apache*, 101 F.4th at 1053; see *Mahmoud*, 102 F.4th at 212 (the government's "own internal affairs"). The Ninth Circuit said this special "internal affairs" rule applied in cases involving "a disposition of government real property." *Apache*, 101 F.4th at 1055. The Fourth Circuit said it applied to "curriculum choices" within a "public school." *Mahmoud*, 102 F.4th at 212.

But if this Court rejects such a special rule in *Mahmoud*, that would seem likely to alter the outcome here. Indeed, absent that special rule here, there would be nothing left of the decision below, since the Ninth Circuit *agreed* that *outside* the supposedly unique "internal affairs" context, "preventing access to religious exercise is an example of substantial burden." *Apache*, 101 F.4th at 1043; accord Gorsuch & Thomas Op.11.

Fourth, both the Fourth Circuit in *Mahmoud* and the Ninth Circuit here relied heavily on this Court's decision in *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Here, the Ninth Circuit viewed *Lyng* as "govern[ing]" this case. *Apache*, 101 F.4th at 1063. And in *Mahmoud*, the Fourth Circuit relied on *Lyng* for its key assertion that the parents there failed to identify the putatively necessary "direct or indirect pressure to abandon religious beliefs or affirmatively act contrary to those beliefs." *Mahmoud*, 102 F.4th at 209-210 (citing *Lyng*); see *id.* at 204-205 (additional *Lyng* citations); see also *Mahmoud* Resp.Br. 18, 20-21, 35, 38, 41, 44 (citing *Lyng* eleven times).

This Court has multiple ways of distinguishing *Lyng* in *Mahmoud*, each of which would cast into doubt the Ninth Circuit's reasoning below. For example, the Court could reaffirm its repeated characterizations of *Lyng* as involving a "neutral and generally applicable" law—and thus not turning on a "burden" inquiry at all. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 460 (2017); accord Gorsuch & Thomas Op.13-14; *Mahmoud* Reply Br.9. Or the Court could explain that in *Lyng*, the government action did not even have "the *effect* of" preventing religious exercise, *Mahmoud*, 102 F.4th at 209, since, as "the Court took pains to stress" in *Lyng* itself, the religious sites would remain "standing," and the plaintiffs would retain access. Gorsuch & Thomas Op.13. Either of these rationales (or several others) would eviscerate the key premise of the opinion below, in which the Ninth Circuit's overreading of *Lyng* "bore dramatically" on the result. Gorsuch & Thomas Op.10.

In short, if the Court reverses in *Mahmoud*, it could reject some or all of these theories relied on by both the Fourth Circuit in *Mahmoud* and the Ninth Circuit here. And if it does that, then the Ninth Circuit, "if given the opportunity for further consideration," would be bound to reject them too. *Lawrence*, 516 U.S. at 167. The majority below was already razor-thin, with the sixth and deciding vote expressing "reservations" about the court's reasoning. *Apache*, 101 F.4th at 1108, 1109 (R. Nelson, J., concurring). That makes for, "at least, a 'reasonable probability'" that the court below would reach a different result after *Mahmoud*—making this a paradigmatic case for a GVR. *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010).

CONCLUSION

The Court should grant rehearing, vacate the May 27, 2025, order denying the petition for a writ of certiorari, hold that petition pending *Mahmoud*, and, if the Court reverses in *Mahmoud*, grant the petition, vacate the decision below, and remand for further proceedings consistent with the Court's decision in *Mahmoud*.

Respectfully submitted.

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JUNE 2025

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

Luke W. Goodrich