

No. 24-291

In the Supreme Court of the United States

APACHE STRONGHOLD

Petitioner,

v.

UNITED STATES, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE
NINTH CIRCUIT COURT OF APPEALS

**BRIEF OF AMICI CURIAE
SAN CARLOS APACHE TRIBE,
CHAIRMAN TERRY RAMBLER, AND
VICE-CHAIRMAN TAO ETPISON
IN SUPPORT OF
APACHE STRONGHOLD'S
PETITION FOR A WRIT OF CERTIORARI**

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INTEREST OF *AMICI CURIAE*¹

The San Carlos Apache Tribe (“Tribe”) is a federally recognized Indian Tribe with over 17,000 members.

Serving his fourth consecutive term in an at-large, elected position, Terry Rambler is the Chairman of the San Carlos Council, the Tribe’s governing body. Chairman Rambler speaks Apache and has a deep, personal connection to *Chí’ch’il Bildagoteel* (“Oak Flat”), the sacred place at the center of this case. Chairman Rambler learned to cherish Oak Flat from his parents and traces his personal connection through his great-grandmother, Lide Pechuli of the *Tsēē Bénast’í’é* (“surrounded by rocks people”) clan and to the *Nádòts’ùs̀n, nádò·hò·’ts’ùs̀n* (“slender peak standing up people”) clan.

Tao Etpison, serving his third at-large term as Vice-Chairman, also has a deep connection to Oak Flat through his practice of traditional Apache religion. Vice-Chairman Etpison traces his connection through his great-grandmother, Susan Byrd Kindelay, a medicine woman who practiced at Oak Flat in the 1940s and 1950s.

Oak Flat lies within the Tribe’s ancestral territory and is central to traditional Apache religion as the home of Apache deities and the only place where Apaches can practice unique ceremonies. These practices remain deeply meaningful to tribal members,

¹Counsel of record for all parties received timely notice by email on September 27, 2024 of the Tribe’s intent to file this brief in support of Apache Stronghold’s petition for certiorari. See Sup. Ct. R. 37(2). No counsel for the parties authored the brief in whole or in part, and no party, counsel therefor, or any other person made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37(6).

including Chairman Rambler and Vice-Chairman Etpison.

In the Southeast Arizona Land Exchange and Conservation Act (16 U.S.C. § 539p; “SALECA”), Congress authorized a land exchange that would transfer Oak Flat to Resolution Copper Mining, LLC (“Resolution”). This government action will set in motion the inevitable, total, and permanent destruction of Oak Flat.² Oak Flat’s destruction will forever end important religious ceremonies, sever tribal members’ ties to Oak Flat’s deities, and substantially burden traditional Apache religion by irreversibly stripping tribal members of the right to freely practice their faith.

Nevertheless, a narrow majority of the *en banc* U.S. Court of Appeals for the Ninth Circuit ruled that the land transfer and destruction of Oak Flat does not impose an actionable burden on Apache religious exercise under the Religious Freedom Restoration Act (“RFRA”). *See* 42 U.S.C. § 2000bb *et seq.* Because the land transfer and Resolution’s mine will destroy this unique, irreplaceable, sacred place and forever prohibit traditional Apache religious practices, that ruling was in error. *Amici* ask this Court to grant certiorari and relief for Apache Stronghold.

SUMMARY OF ARGUMENT

This Court should grant certiorari and correct the Ninth Circuit’s erroneous determination that the complete physical destruction of Oak Flat will not substantially burden Apache religion. Further, this Court must provide guidance on when and how RFRA

²Resolution will mine the ore body beneath Oak Flat using a panel caving method that will create a 1000-foot deep subsidence area that will swallow Oak Flat.

and the First Amendment protect traditional Native religions, protection courts routinely fail to provide.

In traditional Apache religion, Oak Flat is integral and irreplaceable. Oak Flat's destruction will cause irreparable harm to Tribal members by preventing them from practicing the religion handed down to them from time immemorial. Accordingly, the land transfer constitutes a substantial burden under RFRA.

ARGUMENT

RFRA states that the government "shall not substantially burden a person's exercise of religion," unless it satisfies strict scrutiny. 42 U.S.C. § 2000bb-1. The question under RFRA's text is whether the government will substantially burden the religious exercise of Apache people by handing Oak Flat to Resolution for its certain destruction. Because the transfer will end traditional Apache religious exercises, the answer must be yes.

Nevertheless, Judge Collins' majority opinion³ determined that destroying Oak Flat posed no actionable burden on traditional Apache religion. Supplanting RFRA's text with pre-RFRA caselaw, the majority determined that Apache Stronghold could not rely on RFRA to enjoin the transfer and prevent Oak Flat's destruction. Instead, the Collins majority framed the issue as whether RFRA limits how the Government disposes of its property. Judge Collins' reduction of Oak Flat to mere "government property" grossly misrepresents Oak Flat's historical and religious significance, obfuscates how the government

³The decision below also included two *per curiam* majority opinions and several partial concurrences and dissents.

took title to Oak Flat, and reflects policy concerns beyond RFRA's text.

Contrary to the Collins majority, RFRA's provisions provide no exception for government-owned property. Instead, RFRA provides that before the government can substantially burden religious exercise, it must satisfy strict scrutiny. Chief Judge Murguia's dissent and Apache Stronghold's Petition for Certiorari correctly explain RFRA's text and its relationship to relevant case law. Building upon that analysis, this brief provides important religious and historical context establishing that the Tribe has a profound religious connection to Oak Flat and that destroying it will inflict a substantial burden on traditional Apache religion, something that RFRA and the First Amendment cannot tolerate.

I. OAK FLAT IS SACRED AND INTEGRAL TO TRIBAL MEMBERS' RELIGIOUS EXERCISE.

The Apache people⁴ have a vital relationship to their ancestral lands. Within a vast territory that includes parts of Arizona and New Mexico, Tribal members, like their ancestors, regard Oak Flat as irreplaceably sacred due to its role in tribal lore and

⁴The Tribe is one of several Western Apache tribes, which also include the White Mountain Apache Tribe, Tonto Apache Tribe, Yavapai-Apache Nation, and the Fort McDowell Yavapai Nation. The ancestors of these present-day tribes lived, hunted, gathered, and farmed in the areas that became the states of Arizona and New Mexico. To the extent this brief speaks authoritatively about traditional Apache religion, it does so with respect to the practices and beliefs observed by members of the Tribe and their ancestors. Although other Apaches and other Tribes including the Yavapai-Apache, O'odam, Hopi, and Zuni also consider Oak Flat sacred, this brief does not purport to speak for them.

use in unique religious ceremonies. This sacred connection to Oak Flat began in time immemorial, survived almost a century of government persecution, and continues to this day.

A. Oak Flat is Sacred in Traditional Apache Religion.

Oak Flat, included on the National Register of Historic Places,⁵ lies within the Tonto National Forest and encompasses 6.7-square-miles of plains, oak groves, rocky cliffs, and natural springs.⁶

Oak Flat is a sacred place of creation where the spirit world becomes physically manifest. Oak Flat is home to specific *Diyin* (Holy beings) and *Ga'an* (powerful mountain spirits) who are creators, saints, and saviors that bestow blessings on the Apache people.⁷ The *Ga'an* “are a people who resided on earth long ago, but departed in search of eternal life and now live in certain mountains[and] places below the ground”; they “liv[e] and travel[] in clouds and water.”⁸ The *Ga'an* inhabit Oak Flat and endow it

⁵See National Park Service, *National Register of Historic Places*, available at: <https://www.nps.gov/subjects/national-register/database-research.htm#table> (last visited Oct. 14, 2024).

⁶See Resolution Copper Project Map, available at <https://www.resolutionmineeis.us/sites/default/files/feis/resoluti-on-final-eis-map-package.pdf>.

⁷Testimony of T.J. Ferguson *et al.*, *Oak Flat is an Important Cultural Site for Nine Tribes – The Resolution Copper Mine Will Impact Hundreds of Tribal Traditional Cultural Properties*, before the U.S. House of Representatives Natural Resources Committee, Subcommittee on Indigenous Peoples of the United States, April 13, 2021.

⁸Grenville Goodwin, *White Mountain Apache Religion*, *Am. Anthropologist* 40:24, 27 (1938).

with sacred power, physical healing, and spiritual blessing.

Due to the presence of the *Diyin* and *Ga'an*, practitioners of traditional Apache religion hold unique ceremonies at Oak Flat that are integral to their identity as Apaches,⁹ including the Sunrise and Holy Ground Ceremonies.¹⁰ “For centuries, Apaches have maintained close ties to [Oak Flat] as a place to collect traditional foods and medicines, a place of ancestral origins, a place where holy beings reside, and the only place where certain prayers, offerings, and ceremonies can be conducted.”¹¹

To Apaches, flowing natural waters, which are rare in the arid West, carry religious power as a vehicle for the *Ga'an*.¹² Natural springs are “sources of power: they provide contact with the spiritual dimension inasmuch as the water has just emerged from within the earth.”¹³ This water carries “[p]ower from the spirit world . . . into the physical world by the flowing water.”¹⁴

Amicus Chairman Rambler testified before Congress:

⁹Rylan Bourke, *et al.*, *Conserving Sacred Natural Sites of Cibecue*, in *Landscape: Sacred Sites; Sources of Biocultural Diversity* 2:11 (Bas Verschuren *et al.* eds 2012), 31-32.

¹⁰Testimony of Naelyn Pike before House Natural Resources Committee, <https://www.youtube.com/watch?v=ZKmwSq0k-YY>.

¹¹Tisa Wenger, *Fighting for Oak Flat: Western Apaches and American Religious Freedom*, *J. L. and Religion*, 2 (2024).

¹²Keith H. Basso, *The Gift of Changing Woman*, *Bureau of American Ethnology Anthropological Papers*, 196:119-173, Smithsonian Institution (1997).

¹³David L. Carmichael, *Mescalero Apache Sacred Sites and Sensitive Areas*, in *Sacred Sites, Sacred Places*, 89-98. (David L. Carmichael, *et al.* eds. 1994).

¹⁴*Id.*

Springs and spring-fed streams are the basis for all life and for Apache spirituality. We pray to and through water. . . . We use only spring water straight from the Earth. We use it with ochre, to make the *leesh* [mixture of Holy Water and Minerals] in the painting ceremony that is important in the *Nah'ii'ez* [Sunrise Dance], where the girl is coated in a protective layer of Earth.¹⁵

The “everlasting water[s]” at Oak Flat are “medicine for the people” by which “the creator had blessed us.”¹⁶ Because these waters have religious power, worshippers use them to bless themselves by washing their faces and hair “or wher[e]ver [they] have pain.”¹⁷

Oak Flat has numerous springs, seeps and streams in and around it,¹⁸ and Resolution’s Mine will

¹⁵Testimony of Terry Rambler, Chairman, San Carlos Apache Tribe, Testimony before House Committee on Natural Resources Subcommittee on Energy and Mineral Resources, Legislative Hearing on H.R. 687, Southeast Arizona Land Exchange and Conservation Act of 2013, <https://naturalresources.house.gov/uploadedfiles/ramblertestimony03-21-13.pdf>.

¹⁶Bourke *et al.*, at 31-32.

¹⁷*Id.*

¹⁸Maren P. Hopkins, Chip Colwell, T.J. Ferguson, and Saul L. Hedquist, *Ethnographic and Ethnohistoric Study of the Superior Area, Arizona*. Prepared for Tonto National Forest and Resolution Copper Mining. Anthropological Research, LLC, 28 (2015). This original study includes detailed ethnographic and historical information about the Western Apache tribes, including the Tribe. Much of the information on religious practices and beliefs and on sacred locations was provided by Apache elders and is culturally sensitive. The Tribe will make this study available upon request and with conditions to be established.

All of these springs and other seeps, streams, and aquifers will be entirely consumed by the Resolution mine, which will

destroy each one. These include *Hashibi Bitu'é* (Quail Spring), where Apache men connect with the *Ga'an* and prepared for war, *Tú Eitsogí* (Yellow Water Spring), a place of healing and prayer, and *Tú Nahikaadi* (Changing Woman Spring), where girls become women.¹⁹

Dripping springs within caves, like Changing Woman Spring, are “especially powerful” because the dripping water is “alive and animated.”²⁰ Apache lore teaches that “Changing Woman survived a catastrophic flood in an earlier world and took refuge in a cave with a dripping spring” and “emerged alone into this new world.”²¹ Changing Woman conceived with the Sun, and her children found guidance from *Ga'an* on how to live in this land.²²

Consequently, Apache girls commune with Changing Woman by participating in the Sunrise Ceremony at Oak Flat for their coming of age to shape them into Apache women. “Joined by Crown Dancers [Apache people signifying and possessed by *Ga'an*], the girl dances her way to womanhood over a four-day ceremony.”²³ Watching the ceremony in the 1930s, one anthropologist noted that ceremonies “brought

drain the Apache Leap Tuff Aquifer. Further, to meet the mine’s water demand, Resolution will import 750,000 acre-feet of ground water from the Phoenix metropolitan area, devastating the region’s water supply and exacerbating existing mega drought conditions.

https://www.dropbox.com/scl/fi/423p2korqw5yon89862ae/JWells_2021_Hydro_Report-09-10-2021-2.pdf?rlkey=4p4ywwq5qmgg7k1b3nmsckvir&st=bb7wtvfo&dl=0.

¹⁹Hopkins *et al.*, at 28.

²⁰Hopkins *et al.*, at 93.

²¹Wenger, at 4.

²²*Id.* at 4-5.

²³*Id.* at 16.

together large crowds . . . irrespective of band and local group.”²⁴

The relationship an Apache woman forms with Changing Woman continues throughout her life. “One Apache elder explained the importance of visiting the spring, and ‘talking to her’ so she doesn’t get lonely. This tribal elder described the relationship with the spring as mutually beneficial; ‘we care for her and she cares for us.’”²⁵

Also present at Oak Flat is *Tséyaa Gogeschin*, a large rock overhang with ancient images carved into and painted on it, each with special meaning to and function for Apache medicine people.²⁶ When Apache people encounter the rock paintings in *Tséyaa Gogeschin*, their spiritual power connects them with the ancestors, their history, and their identity.²⁷ It too will be lost forever.

Oak Flat also hosts the Holy Ground ceremony, which traces to 1920 and the Apache prophet Silas John. This ceremony leans heavily on traditional religious beliefs and practices that “very clearly included ceremonies at [Oak Flat].”²⁸ By selecting an already sacred location, Silas John’s Holy Ground movement “secured credibility” and “deepened the sanctity of the places where its ceremonies were held.”²⁹ Through participating in the Holy Ground Ceremony, Apache devotees feel, hear, and experience the *Ga’an* and their ancestors.³⁰ Not only has the

²⁴Grenville Goodwin, *The Social Organization of the Western Apache* 160 (Chicago University Press 1942).

²⁵Hopkins *et al.*, at 93.

²⁶*Id.*

²⁷*Id.*

²⁸Wenger, at 11-14.

²⁹*Id.*

³⁰*Id.* at 16-17.

Holy Ground ceremony been performed at Oak Flat in its current form for over 100 years, it reflects and builds on much older religious practices performed at Oak Flat.

B. As a Land-Based Religion, Traditional Apache Ceremonies Performed at Oak Flat Cannot Be Practiced Elsewhere.

Many “Native American religions are land based,”³¹ including traditional Apache religion. Land-based religions attach unique significance to local plants, animals, and sacred places that inform a tribe’s identity as people of the land.³² By interacting with physical forms and places, worshippers commune with the land, one’s ancestors, and the divine.³³ Indeed, “what makes certain places sacred is the relationship between a community and their place.”³⁴ This is more than the sum of individual subjective experiences but arises through “established tradition” and is “reinforced” by experience and sets of ethical and ritual duties endemic to those places.³⁵

Thus, sacred places are not merely favored places. Rather, because tribes regard themselves as “people of a particular place, . . . their particular homelands

³¹Stephanie Hill Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, Harvard L. Rev. 134:1296, 1305 (2021), quoting Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012).

³²Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, Harv. L. Rev. 134:2103, 2113 (2021); Barclay *et al.*, 1304.

³³Wenger, at 5.

³⁴Michael D. McNally, *The Sacred and the Profaned: Protection of Native American Sacred Places that Have Been Desecrated*, Cal. L. Rev. 111:395, 405 (2023).

³⁵*Id.* at 406.

and landscapes are inextricably tied to their identity as peoples.”³⁶

Accordingly, many Native religions, including traditional Apache religion, are not “portable.” Unlike majority religions that are practiced worldwide, many Native religious rituals are exclusively associated with individual sacred places. That is, the same tribe or band will practice unique rituals at a sacred place and cannot perform ceremonies designed for one sacred place in another location.

In this manner, land-based Native religions shape a tribal member’s identity into the manner and custom of the tribe.³⁷ This transformative experience joins members to ancestors, to the land, and to the holy powers and deities unique and endemic to that place. Such land-based rituals often involve gathering specific plants for food and medicine as part of ritual prayers and ceremonies.³⁸ Foods and medicines gathered at Oak Flat have specific power because of their origin in this sacred place.

Consequently, losing a sacred place means losing a vital religious ancestral connection entirely.³⁹ For land-based Native religions, the erosion or loss of a sacred place—for example, the drying of a natural spring—is a “sign[] of social collapse.”⁴⁰ So strong is the connection between people, place, and these deities, that “[t]o deprive tribal people of access to certain sites, or to compromise the integrity of those

³⁶Barclay *et al.*, at 1304.

³⁷See Michael D. McNally, *Native American Religious Freedom as a Collective Right*, *BYU L. Rev.* 205, 224-26 (2019).

³⁸Wenger, at 15.

³⁹*Id.*

⁴⁰Jonathon Long *et al.*, *Cultural foundations for ecological restoration on the White Mountain Apache Reservation*, *Conservation Ecology* 8: 4 (2003), available at <http://www.consecol.org/vol8/iss1/art4/>.

sites, is to effectively prohibit the free exercise of their religion.”⁴¹

What makes Oak Flat sacred, in large part, is that it is home to Apache deities, like Changing Woman. For the Tribe, Changing Woman resides in a specific spring at Oak Flat. The protection, health, nourishment, and blessing that She offers cannot be found anywhere else on earth. A sacred place like Oak Flat is not merely a place of reverence and awe, but a place where worshippers gather to commune with Her and other deities, to practice specific religious rituals, and to obtain the blessing of these divine beings. Destruction of Oak Flat will mean the disappearance of the *Diyin* and *Ga'an* who live there, including Changing Woman, severing the ties between these deities and Apache worshippers forever. This loss will make it impossible to continue essential religious rituals, substantially burdening traditional Apache religion.

C. Oak Flat’s Sacred Role in Traditional Apache Religion Survives Government Seizure of Apache Land and Outright Persecution.

So strong is the connection between Oak Flat and the Tribe that traditional Apache worship has continued there despite the federal government’s seizure of Apache lands and its decades of outright persecution.

Western settlement in Apache territory led to decades of conflict, first with Spain and Mexico, then with the United States.⁴² Despite the federal

⁴¹Barclay, *et al.*, at 1305.

⁴²John Bret Harte, *The San Carlos Indian Reservation, 1872-1886: An Administrative History*, 15-19 (1972).

government's progressive seizure of Apache lands and its deliberate attempts to eradicate Apache religion and culture, the exercise of traditional Apache religion at Oak Flat survives to this day. Even during periods of imprisonment, suppression, and persecution,⁴³ Apache people lived, prayed, and died at Oak Flat.⁴⁴ As a result, the Tribe's documented connections to Oak Flat remain strong and intact thanks to the ancestors who passed their spiritual knowledge and practices to following generations.⁴⁵

In 1852, the Apache and United States entered the Apache Treaty of 1852, in which the federal government guaranteed that "perpetual peace and amity shall forever exist"⁴⁶ between them. Notwithstanding these promises, the federal government continued to seize Apache land, imprisoned the Tribe on its Reservation, and attempted to eradicate Apache religion and culture.

As recognized in the Apache Treaty of 1852, the Apache's aboriginal homelands in Arizona extended from Southeast to Northwest Arizona, bounded by the Santa Cruz River to the west, the Gila River to the

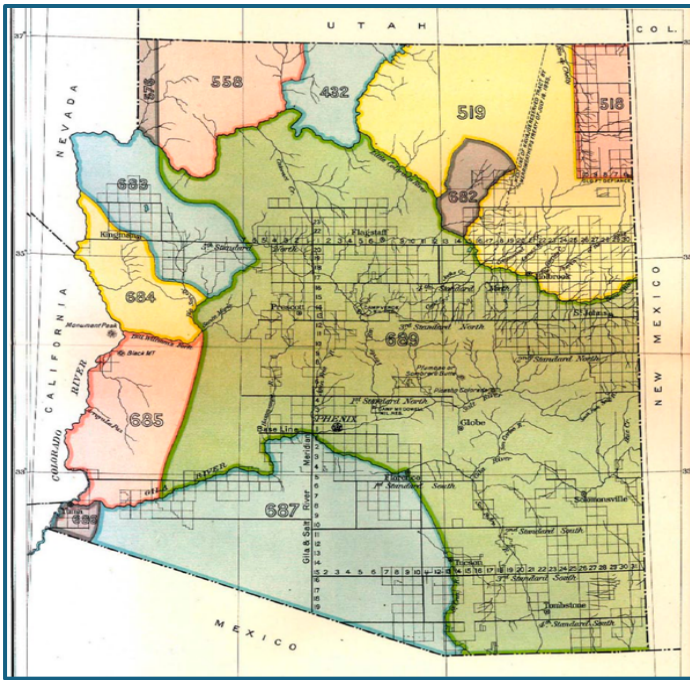
⁴³Welch, J.R., *White Eyes' Lies and the Battle for Dził Nchaa Si An*, *American Indian Quarterly* 27(1):75–109 (1997), <https://doi.org/10.2307/1185589>.

⁴⁴Ferguson *et al.* The escarpments surrounding Oak Flat were named Apache Leap in recognition of the Apache who leapt to their death rather than to become prisoners of war.

⁴⁵Hopkins, *et al.*, at 32-35.

⁴⁶This phrase appears in numerous treaties between the United States and tribes, which originally stems in part from the Treaty of Westphalia (1648) that maintained a balance of power among separate sovereign states through, *inter alia*, the guarantee of religious freedom to each prince within the Holy Roman Empire.

south, the Colorado River to the northwest, and the Little Colorado River to the northeast.⁴⁷



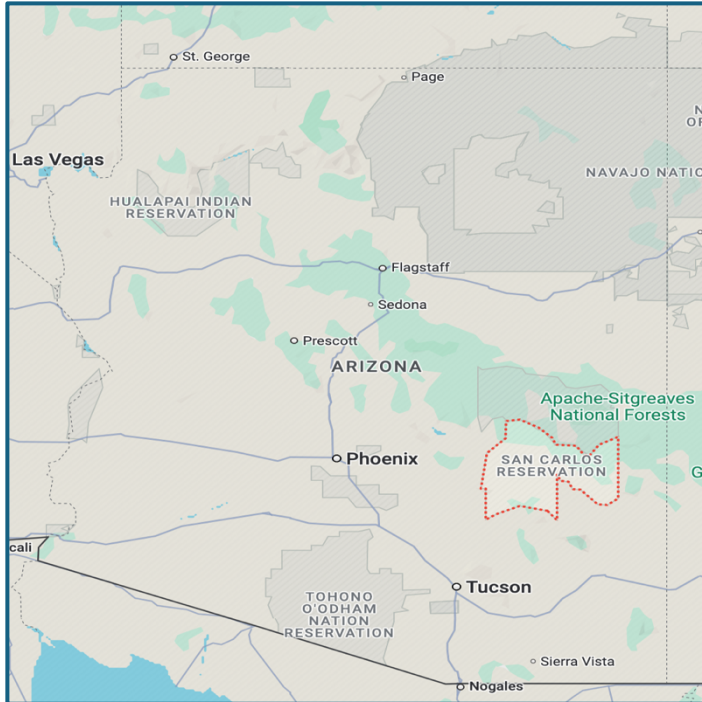
(Figure 1. Royce's 1899 Arizona Map No. 1, depicting Arizona portions of Western and Chiricahua Apache homelands in green).

In 1871 and 1872, the San Carlos Reservation was created by executive orders, consisting of a small fraction of that larger aboriginal territory and excluding Oak Flat. Some Apache lands went to economic interests, like mines, others were settled by White Americans, and many—like Oak Flat—became federal property.⁴⁸ Between 1873 and 1897, the

⁴⁷John R. Welch, “United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians”: Policy Implications of the Apache Nation’s 1852 Treaty, *Int’l Indigenous Pol. J.*, 12:5 (2021).

⁴⁸Barclay *et al.*, at 1311,

federal government seized more of the San Carlos Reservation, reducing its territory six times.⁴⁹



(Figure 2. Present San Carlos Reservation).

Consequently, even though members of the Tribe have always regarded Oak Flat as sacred, it was never included within the Reservation's boundaries. This simple fact presented a challenge to Apache worshippers when the federal government imprisoned them on reservations.

⁴⁹The Executive Orders of November 9, 1871, and December 14, 1872, established the Reservation, which was reduced by Executive Orders of August 5, 1873, July 21, 1874, April 27, 1876, October 30, 1876, January 26, 1877, and March 31, 1877, and the Act of June 7, 1897, 30 Stat. 64.

In October 1862, Brigadier General James H. Carleton of the United States Army declared a “war of extermination” ordering that Apache men be killed on sight.⁵⁰ The Army built forts in and around Apache territory including Camps Bowie, Goodwin, Grant, and McDowell to enforce restrictions on Apache movement.⁵¹ Likewise, Crook’s General Order No. 10 (Nov. 21, 1871) required all Apache people to remain within the boundaries of the San Carlos Reservation or be killed.⁵² Although Oak Flat lay outside those boundaries, Apache people continued their pilgrimages to Oak Flat, risking their lives to offer prayers, obtain blessings, and gather religiously significant materials.⁵³

The federal government also restricted Apache religion. From 1883 to 1934, federal law criminalized Native religion by prohibiting dances, prayers, feasts, and the practice of medicine men.⁵⁴ Implementing a policy of “Kill the Indian to Save the Man,” the federal government punished Native religion hoping tribal

⁵⁰Harte, at 26.

⁵¹*Id.* at 28-29.

⁵²John R. Welch, *Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874*, Sage Open (2017).

⁵³Hopkins, *et al.*, at 32-35; *Arizona Weekly Star* (August 14, 1879) (describing Apache harvesting in Oak Flat).

⁵⁴Code of Indian Offenses (1883); Letter from Henry M. Teller to Hiram Price, Rules Governing the Court of Indian Offenses, Dept. of Interior Office of Indian Affairs, March 30, 1883, available at: <https://commons.und.edu/indigenous-gov-docs/131/>; Indian Dancing, Segments from the Circular No. 1665 and Supplement to Circular No. 1665, Dept. of Interior Office of Indian Affairs, April 26, 1921, and February 14, 1923; Michael D. McNally, *Defend the Sacred: Native American Religious Freedom Beyond the First Amendment*, 19, 40-61 (2020) (*hereinafter* “*Defend the Sacred*”).

members would assimilate into Christian society.⁵⁵ This included kidnapping children and sending them to federally funded boarding schools that forbade Native religious practices, languages, hairstyles, and dress.⁵⁶ The Court of Indian Offenses imposed fines, forced labor, loss of rations, and imprisonment for any who used “the arts of a conjurer to prevent Indians from abandoning their barbarous rites and customs.”⁵⁷

Overcoming this era of religious persecution, Apaches maintained their relationship with Oak Flat, and since then have strengthened that bond.⁵⁸ This can be seen in the Holy Ground Movement that secured credibility in the 1920s through its connection with Oak Flat. Further, changing attitudes within the government in the mid-1960s allowed a resurgence in Native religious practice and more visible ceremonies at Oak Flat.⁵⁹ Activism in the 1960s and 1970s ushered in a “self-determination” movement in which spiritual leaders inspired young Apache people to rediscover sacred places important to their Native religion and identity.⁶⁰

The United States Advisory Council on Historic Preservation (“Advisory Council”) specifically acknowledges the religious significance of Oak Flat to the Apache. In a March 29, 2021, letter, the Advisory Council stated that Oak Flat “is a historic property of profound importance to multiple Indian tribes and plays a significant role in their religious and cultural

⁵⁵Michael D. McNally, *Defend the Sacred*, at 37-41.

⁵⁶*Id.*

⁵⁷Wenger, at 9-10.

⁵⁸*Id.* at 2.

⁵⁹*Id.* at 14; McNally, *Defend the Sacred*, at 26, 37-41.

⁶⁰*Carpenter*, at 2117.

traditions.”⁶¹ The Advisory Council further stated, “the historic significance of Oak Flat cannot be overstated, and neither can the enormity of the adverse effects that would result to this property from the [Resolution Mine] undertaking.”⁶² With this history in view, there can be no question that destroying Oak Flat will substantially burden traditional Apache religion.

II. DESTROYING OAK FLAT WILL SUBSTANTIALLY BURDEN APACHE RELIGION.

The destruction of Oak Flat will substantially burden the exercise of traditional Apache religion by bringing an end to the religious ceremonies and practices that are specific to Oak Flat and cannot be practiced elsewhere. Below, the Collins majority failed to apply the undisputed facts to RFRA’s plain text, instead resolving the case on policy grounds; namely, that RFRA does not apply when the government disposes of its own property. Additionally, by constraining RFRA to government actions discussed in *Lyng*, the Collins majority erroneously narrowed RFRA’s scope. RFRA, taken together with the First Amendment and relevant case law, protects the right of the Apache people to exercise traditional Apache religion at Oak Flat.

A. Destroying Oak Flat Will Prohibit Specific Rituals from Being Performed There,

⁶¹Advisory Council on Historic Preservation, *Letter to Tom Vilsac, U.S. Secretary of Agriculture*, March 29, 2021, <https://www.dropbox.com/s/wiw9j2kx6oohr9/Letter%20to%20Secretary%20Vilsack%20Resolution%20Copper%20Project%2020210329.pdf?dl=0>.

⁶²*Id.*

Substantially Burdening Traditional Apache Religion.

It is undisputed that Oak Flat is sacred to Apache plaintiffs and that Resolution's mine will annihilate it. Consequently, there should be no genuine dispute that the land transfer will substantially burden traditional Apache religion. Without Oak Flat, the spirits who live there will disappear, and Apaches will lose vital connections to those deities, the blessings they offer, and the communion they enjoy through the cherished rituals that can only take place there.⁶³ Even while denying legal protection, the district court found "the land in this case will be all but destroyed to install a large underground mine, and Oak flat will no longer be accessible as a place of worship." *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 608 (D. Ariz. 2021). There is no other place in the world that Tribal members can go that substitutes for Oak Flat. It is integral to Apache identity, culture, and religion.

B. The Collins Majority Improperly Nullified RFRA's Text on Policy Grounds.

Rather than squarely determine whether the destruction of Oak Flat will substantially burden traditional Apache religion under the plain text of RFRA, Judge Collins' opinion fundamentally turned on whether RFRA allows people to challenge how the government disposes of its property. *Apache Stronghold*, 101 F.4th 1036, 1055 (9th Cir. 2024) (*en banc*). RFRA's text does not carve out this exception; this framing is an extratextual, judicial policy determination. Worse, it fails to deal honestly with

⁶³Hopkins, *et al.*, at 52.

how Oak Flat, like so many other sacred places, came under federal control.⁶⁴

Contrary to Judge Collins' opinion, if courts must decide RFRA's reach on policy grounds rather than its text, they should consider how the federal government *took* title to sacred places from Indian tribes. Indeed, "tribes suffered the dispossession of a great many cultural, historical, and religious resources as a result of the legal doctrines giving the United States 'the exclusive right . . . to extinguish Indian title.'"⁶⁵ The doctrine of discovery (or conquest) was one such legal tool by which Christian nation-states asserted the right to acquire lands from Indian Tribes based on the fiction that they were voluntarily ceded.⁶⁶ Even when the United States entered treaties with Indian tribes, it invariably renegotiated or abrogated them to take more land, like it did with the Tribe.⁶⁷

By 1887, Indian tribes held 138 million acres of land (of almost 2 billion acres in the contiguous United States) (6.9%).⁶⁸ Now, the United States holds just 56 million acres in trust for Indian Tribes (2.8%).⁶⁹ The stark reality is that many, if not most, sacred places are in the federal government's exclusive control.⁷⁰

This dispossession of land has had disastrous consequences on Indigenous Peoples' ability to

⁶⁴Barclay, *et al.*, at 1309.

⁶⁵*Id.* at 1310, quoting *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941).

⁶⁶*Id.*, citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

⁶⁷*Id.* at 1311.

⁶⁸*Id.*

⁶⁹*Id.*, citing U.S. Dept. of the Interior *Native American Ownership and Governance of Natural Resources*, <https://perma.cc/N5YS-L5EZ>.

⁷⁰*Id.* at 1311.

exercise land-based Native religions—consequences that are still unfolding.⁷¹ While this history should require the government to consider tribes and their religious needs when disposing of sacred places, the Collins majority compounded the harm. The majority’s policy decision creates a unique threat to Native religious exercise and identity,⁷² especially when moneyed interests can easily lobby receptive representatives to attach land transfers to “must pass” legislation, as happened in this case. Contrary to Judge Collins’ reasoning, policy considerations—to the extent they are relevant at all—should run in favor of affected tribes.

Of course, policy should not drive the analysis of Apache Stronghold’s claims when the text of RFRA is unambiguous. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 167 (2012) (courts must interpret a statute’s plain language in context); *also* John O. McGinnis, *The Contextual Textualism of Justice Alito*, Harvard J. of L. & Pub. Pol., 46: 671-686 (2023). Under RFRA’s plain text, government action that will result in the complete, physical, and permanent destruction of a sacred place substantially burdens the ability of Native worshippers to exercise their religion.

C. The Collins Majority Improperly Limited RFRA to *Lyng*.

The Collins majority further erred by concluding that RFRA only recognizes the substantial burdens discussed in *Lyng* when the government’s use of its own land is at issue; namely, (1) coercion to “act[] contrary to [one’s] religious beliefs”;

⁷¹*Id.*

⁷²Carpenter, at 2117.

(2) “discriminat[ion] against religious adherents”; (3) penalties; and (4) denials of “an equal share of the rights, benefits, and privileges enjoyed by other citizens.” See *Apache Stronghold*, 101 F.4th at 1051 (discussing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988)). In doing so, the Collins majority overlooks that destroying a sacred place, thereby forever prohibiting worshippers from engaging in rituals essential to their religious identity, is a substantial burden as anyone would understand that term. It further overlooks that nothing in RFRA’s text excuses such incredible impositions merely because the government owns the property is at issue.

RFRA expressly states its purpose is to protect the “free exercise of religion” by requiring the government to meet “the compelling interest test set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*” before substantially burdening religious exercise. 42 U.S.C. § 2000bb(b). Read together with *Sherbert*, *Yoder*, and the First Amendment, RFRA protects the individual right to voluntarily act on one’s theological commitments.

In *Sherbert v. Verner*, this Court determined that a person could not be forced to choose between receiving unemployment benefits and following her religion’s prohibition of working on Saturdays. 374 U.S. 398 (1963). There, the Court held that the state may infringe on the right of free religious exercise only when “justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.’” *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The *Sherbert* Court further explained that religious conduct and actions that have been found to be properly regulated by the government “have

invariably posed some substantial threat to public safety, peace or order”; concerns not present here. *Id.* at 403.

In *Wisconsin v. Yoder*, this Court determined that the threat of criminal prosecution under truancy laws for withdrawing children from school after eighth grade was an unconstitutional violation of parents’ dual rights to exercise religion and parent their children. 406 U.S. 205 (1972). It did so after explaining the State could only “deny the free exercise of religious belief” where “there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.” *Id.* at 214. The *Yoder* Court also quoted *Sherbert*’s admonition that “invariably,” this balancing test has only been met when the regulated conduct “posed some substantial threat to public safety, peace or order.” *Id.* at 230 (quoting *Sherbert*, 374 U.S. at 402-03).

Thus, RFRA protects religious practice from government action that substantially burdens that practice, unless it meets strict scrutiny. This reflects the maxim in the history and tradition of this country that a threat to one religion is a threat to all religions. In advocating for the First Amendment, James Madison stated, “nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.”⁷³

Nowhere does RFRA say that *Lyng*—a case that predates it—limits the plain meaning of “substantial burden” to allow the government to end religious exercises by destroying a sacred place because the

⁷³James Madison, *Notes for a speech introducing the Bill of Rights* (June 8, 1789, Manuscript Division, Library of Congress (149)).

property at issue belongs to the government. The plain text of RFRA and the historical context of the First Amendment that it vindicates support protecting traditional Apache religion by enjoining the transfer of Oak Flat to Resolution who would completely, permanently destroy it.

Judge Collins' opinion erroneously restricted RFRA by limiting it to *Lyng*, a case, unlike *Sherbert* and *Yoder*, not mentioned in RFRA's text. The Collins majority improperly relied on *Lyng* and its interpretation of *Bowen v. Roy* to determine that RFRA does not protect religious exercise burdened by "the Government's management of its own land and internal affairs." *Apache Stronghold*, 101 F.4th at 1053 (discussing *Bowen v. Roy*, 476 U.S. 693 (1986)).

In *Bowen*, this Court determined that assigning a social security number to a child over a religious parent's objection was not a substantial burden because doing so was purely internal to the government. 476 U.S. at 699. Likewise, in *Lyng*, the government intended to construct a road within earshot of a sacred place. *See* 485 U.S. at 456. Setting aside that *Lyng* was wrongly decided, the point remains that neither *Bowen* nor *Lyng* involved a government action resulting in the complete physical destruction of a sacred place that will forever prohibit traditional religious practice. In relying on *Lyng*, the Collins majority failed to appreciate that destroying Oak Flat is a *de facto* prohibition on Apache religious exercise.

CONCLUSION

RFRA guarantees tribal members the right to worship at sacred places according to the traditions, customs, and rituals of their respective faiths, and to

do so without government interference. Because the destruction of a sacred place deprives Native worshippers of this right, it is a substantial burden. Oak Flat is home to unique Apache deities, and Apache worshippers perform unique rituals there like the Sunrise and Holy Ground Ceremonies. Because Oak Flat's destruction will mean the disappearance of the *Diyin* and *Ga'an* who dwell there, and because these losses will forever frustrate traditional Apache religious practice and identity, the land transfer will substantially burden traditional Apache religion under RFRA. Therefore, RFRA must prohibit SALECA's transfer of Oak Flat to Resolution unless the Government can show that the transfer satisfies strict scrutiny.

Amici seek nothing more than protection of Oak Flat under RFRA and the First Amendment. This is the peace and amity guaranteed by the Apache Treaty of 1852, which the United States has repeatedly failed to honor. Because SALECA's land exchange will destroy Oak Flat and prohibit these exercises of Apache religion forever, this Court should grant certiorari and recognize as a matter of law that the total, physical, and permanent destruction of this sacred place constitutes a substantial burden on the religious exercise of those who worship there in violation of RFRA and the First Amendment.

Respectfully Submitted,

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