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

BRIEF OF THE SIKH COALITION, THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM, AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Sikh Coalition is the largest community-based organization working to protect Sikh civil rights across the United States. The Sikh Coalition's goal is working towards a world where Sikhs, and other religious minorities in America, may freely practice their faith without bias and discrimination. Since its inception, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism.

The Islam and Religious Freedom Action Team for the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the Team engages in research, education, and advocacy on core issues including freedom from coercion in religious exercise and equal citizenship for people of diverse faiths. The Team explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and

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[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than amici curiae or their counsel contributed money intended to fund preparing or submitting this brief. All parties' counsel of record were notified of amici's intent to file this brief at least ten days before the filing deadline.

where they are a minority, and by partnering with the Institute's other teams in advocacy.

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to protect the ability of all Americans to practice their faith freely and to foster cooperation between Jews and other faith communities. Its founders have joined amicus briefs in this Court and lower federal courts, submitted op-eds to prominent news outlets, and established an extensive volunteer network to promote religious liberty for all.

Amici submit this brief to urge this Court to grant review in this case and read the "substantial burden" language in RFRA according to its plain meaning. By doing so, this Court will carry out Congress's intent to ensure the Apaches and other religious groups are not left out of RFRA's broad religious freedom protection.

INTRODUCTION

In its en banc decision, the Ninth Circuit imposed a specialized meaning on RFRA's ordinary language, becoming the first circuit to hold that, in government-land cases, the term "substantial burden" is defined by a pre-RFRA First Amendment case that neither used the term "substantial burden" nor involved the destruction of a sacred site. The decision misunderstands RFRA, sets a misleading precedent, and sanctions the utter destruction of a sacred site where the Apache people have worshiped for centuries.

The Ninth Circuit's reliance on old free exercise case law as a proxy for RFRA's meaning misreads the Act's text and misunderstands its purpose. The Act does not adopt pre-*Smith* free exercise jurisprudence in ossified, exception-riddled form. Instead, it applies strict scrutiny to *every* "substantial burden" on religion. It means what it says. This Court already takes a plain-meaning approach when it interprets the identical phrase in RFRA's sister statute RLUIPA. And other circuits do not hesitate to adopt the same approach in enforcing RFRA's straightforward text in every other context.

Here, the land transfer contemplated by the government is not merely burdensome; it is fatal to many of the Apaches' religious practices. But the Ninth Circuit's decision redefines "substantial burden" in terms that ignore this glaring hardship. Put simply, it is difficult to imagine any more substantial a burden than one that robs a plaintiff of his ability to practice crucial parts of his faith and literally pulls the ground from beneath worshipers. This Court should grant certiorari to prevent the obliteration of a centuries-old

religious site and to clarify that RFRA does not exclude federal land from its protections.

ARGUMENT

I. RFRA should be interpreted according to its plain meaning.

RFRA's text and purpose are clear: Congress sought to expressly enshrine religious freedom in statute and require strict scrutiny whenever the government substantially burdens the practices of religious believers. The Ninth Circuit's atextual reading of RFRA undermines that purpose and belies the Act's text and intended scope.

A. RFRA broadened religious protections beyond the limitations imposed by prior judicial decisions.

Congress passed RFRA following a string of Supreme Court decisions that had whittled down the protection afforded to religious claimants under the Free Exercise Clause. See *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (rejecting Native American's free exercise claim); *O'Lone* v. *Est. of Shabazz*, 482 U.S. 342 (1987) (rejecting prisoner's free exercise claim); *Goldman* v. *Weinberger*, 475 U.S. 503 (1986) (rejecting military service member's free exercise claim). That line of cases culminated in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that neutral and generally applicable laws that impose on religious practice aren't subject to strict scrutiny, no matter how severe the imposition. Denying meaningful scrutiny to even egregious burdens on religious exercise gutted widely relied-upon constitutional protections. See Steven D. Smith, *The Rise and*

Fall of Religious Freedom in Constitutional Discourse, 140 U. Pa. L. Rev. 149, 232 (1991) ("*Smith* reaches a low point in modern constitutional protection under the Free Exercise Clause."); Whitney Travis, *The Religious Freedom Restoration Act and* Smith*: Dueling Levels of Constitutional Scrutiny*, 64 Wash. & Lee L. Rev. 1701, 1706–07 (2007); Douglas Laycock, *The Supreme Court's Assault on Free Exercise and the Amicus Brief That Was Never Filed*, 8 J. L. & Religion 99, 99 (1990) ("[*Smith*] removes many of the issues [facing religious communities] from the scope of positive constitutional law.").

Congress responded swiftly. It passed RFRA to ensure "maximum religious freedom" for all, restoring—and expanding—the protections worshipers enjoyed before *Smith*. 139 Cong. Rec. H2356-03 (1993) (statement of Rep. Charles Schumer); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 n.3 (2014) (explaining that RFRA "provide[s] even broader protection for religious liberty than was available" before *Smith*). Accordingly, Congress broadly protected those who otherwise would have been left "largely * * * without recourse" under the weakened Free Exercise Clause regime. 139 Cong. Rec. H2356-03 (1993) (statement of Rep. Hamilton Fish).

As the House Report put it, RFRA requires strict scrutiny "whenever a law or an action taken by the government * * * burdens a person's exercise of religion." H.R. Rep. 103-88, at 6 (1993). Even more pointedly—and in clear distinction to both prior caselaw and the Ninth Circuit's test here—the Report explained that "to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by

denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen." *Ibid.*; cf. *Apache Stronghold v. United States*, 101 F.4th 1036, 1044 (9th Cir. 2024) (en banc). Rather, the Report explained (in language reminiscent of Justice Brennan's *Lyng* dissent), a "substantial external impact" on religion was all a plaintiff need show. *Ibid.*; see *Lyng*, 485 U.S. 439, 470 (Brennan, J., dissenting) (emphasizing the "substantial external effects" of government-land decisions).

B. The plain meaning of "substantial burden" covers Oak Flat's complete destruction.

RFRA's text reflects its purpose. In place of prior First Amendment precedents' weakened protections, RFRA adopted the strict scrutiny test that the Supreme Court had applied in two foundational religious liberty cases and extended that test to all government intrusions on religious practice. See *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205, 214–15 (1972); 42 U.S.C. § 2000bb(a)(4) (explaining that RFRA sought to correct *Smith*'s virtual "eliminat[ion of] the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion"). To do that, the Act requires strict scrutiny whenever the government "substantially burdens" religious exercise. 42 U.S.C. §2000bb-1(a).

The complete and irreversible destruction of a sacred Apache religious site is a substantial burden under any commonsense understanding of the term. To start, statutory terms are understood according to their ordinary meaning unless there's a reason to adopt a specialized meaning. Antonin Scalia & Bryan

A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). That means looking to how a "skilled, objectively reasonable user of words" would understand a term. *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (quoting F. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J. L. & Pub. Pol'y 59, 65 (1988)); see also *Tanzin* v. *Tanvir*, 592 U.S. 43, 46–47 (2020) (interpreting RFRA by "start[ing] with the statutory text" and concluding that "RFRA's text provides a clear answer").

As commonly understood, "substantial burden" covers any government action "that imposes a significantly great restriction or onus on any exercise of religion." *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1034–35 (9th Cir. 2004) (internal quotation marks omitted); accord *Sherbert*, 374 U.S. at 404 (1963) (holding that a law places an impermissible "burden" on religious exercise when the "effect of a law is to impede the observance of one or all religions"). And any substantial burden counts. Aside from requiring substantiality, Congress did not categorize or limit the kinds of burdens that trigger strict scrutiny.

With that ordinary understanding in mind, it verges on absurd to say that the government here isn't "substantially burdening" the Apaches by destroying Oak Flat. It's hard to imagine a restriction more significant than total destruction of an irreplaceable worship site. And there's no doubt that the government's actions here are affirmatively causing that restriction. The Apaches aren't asking for a handout, nor for the government to grant them a special benefit. Contra *Apache Stronghold*, 101 F.4th at 1110–12 (VanDyke,

J., concurring). They're simply asking the government not to destroy something they have used for centuries.

C. The Ninth Circuit misapplied the prior-construction canon to adopt a special meaning for "substantial burden" in federal-land cases.

The Ninth Circuit justified a departure from that ordinary meaning by invoking the prior-construction canon. *Apache Stronghold*, 101 F.4th at 1061 (citing Scalia & Garner, *supra*, at 322); *id.* at 1112 (opinion of VanDyke, J.). But that canon applies only when prior authoritative judicial opinions have given a term a technical term-of-art meaning. Scalia & Garner, *supra*, at 324. And this Court has never defined "substantially burden," either before or after RFRA's enactment.[2]

Indeed, this Court's pre-RFRA jurisprudence discussed the phrase only once—and then only in dicta. See *Hernandez* v. *Comm'r*, 490 U.S. 680, 699–700 (1989) (declining to decide whether a tax provision constitutes a substantial burden). Its other decisions employed myriad terms to describe the kind of imposition that would warrant First Amendment scrutiny. See, *e.g.*, *Sherbert*, 374 U.S. at 403–06 (using the terms "incidental burden," "burden," and "substantial

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[2] Perhaps recognizing that "substantial burden" can't be considered a term of art, the Ninth Circuit itself deliberately avoided characterizing it as one. See *Apache Stronghold*, 101 F.4th at 1108 (opinion of Nelson, J.) (defending majority's unwillingness to accept term-of-art reading); contra *Apache Stronghold*, 101 F.4th 1079–1083 (opinion of Bea, J.) (expressly adopting a term-of-art view). On the lower court majority's own theory, then, the term could not have acquired the kind of technical meaning necessary to invoke the prior-construction canon.

infringement" interchangeably); *Yoder*, 406 U.S. at 214, 218 ("impinges," "impact[s]," "substantially interfer[es]"); *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981) ("substantial pressure").[3]

What the Court addressed in pre-RFRA cases like *Lyng*—as the Ninth Circuit acknowledges—is the meaning of "prohibiting the free exercise thereof" in the First Amendment. *Apache Stronghold*, 101 F.4th at 1052. Had Congress sought to transpose this meaning into RFRA, it could have used that phrase instead of "substantially burden."

Indeed, in a different context, RFRA does just that. Elsewhere in RFRA, Congress used the phrase "under the color of law" as a term of art incorporating this Court's prior construction. See *Tanzin*, 592 U.S. at 48 (reading "under the color of law" in RFRA consistently with the Court's prior decisions interpreting that phrase).

Here, by contrast, Congress's use of a previously unspecialized and largely unused phrase cannot "subsume[] * * * [a prior case's] holding" construing a

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[3] For other variations, see *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) ("pressure") (quoting *Thomas*, 450 U.S. at 717); *Lyng*, 485 U.S. at 465–66 (Brennan, J., dissenting) ("governmental burdens," "religious burdens"); *Bowen* v. *Roy*, 476 U.S. 693, 706 (1986) ("governmental burden"); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) ("burden"); *Johnson* v. *Robison*, 415 U.S. 361, 387 (1974) (Douglas, J., dissenting) ("impermissible burden"); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940) ("forbidden burden"). The *Lyng* majority uses the word "burden" only once, and does so to admit that the challenged projects *do* constitute a "burden" on religion, only not a burden protected by the Free Exercise Clause. 485 U.S. at 448.

totally different phrase. *Apache Stronghold*, 101 F.4th at 1061.

II. Precedent, history, and context all confirm that RFRA's plain text should control.

The Ninth Circuit's departure from ordinary meaning to narrow RFRA's protections is especially troubling because other tools of statutory interpretation confirm that RFRA's text means what it says. This Court's precedents have repeatedly confirmed that RFRA's text controls. And the historical context of RFRA's enactment supports the text's broad protection of religious exercise.

A. This Court's precedents reaffirm that RFRA should be applied as written, not tied to pre-*Smith* cases.

This Court has consistently rejected atextual interpretations of both RFRA and its sister statute RLUIPA in favor of readings that maximize the statutes' protections for religious exercise. See, *e.g.*, *Holt* v. *Hobbs*, 574 U.S. 352, 361 (2015) (ruling that the lower court "improperly imported a strand of reasoning from cases involving prisoners' First Amendment rights," because "RLUIPA's 'substantial burden' inquiry" "provides greater protection"); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006) (applying RFRA's "to the person" language to require that courts fashion individualized exemptions from burdensome laws); *Tanzin*, 592 U.S. at 46–47 (interpreting RFRA by "start[ing] with the statutory text" and concluding that "RFRA's text provides a clear answer").

What's more, this Court explained in *Hobby Lobby* that "nothing in the text of RFRA as originally enacted

suggested" that the statute's text "was meant to be tied to th[e] Court's pre-*Smith* interpretation of th[e First] Amendment." 573 U.S. at 714. Indeed, when Congress later passed RLUIPA, it "deleted the prior reference to the First Amendment," suggesting it didn't want "to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Ibid.* In short, it "would be absurd if RFRA merely restored * * * pre-*Smith* decisions in ossified form." *Id.* at 715. Yet that is precisely what the Ninth Circuit did here.

B. The historical context of RFRA supports a broad reading.

RFRA's history and context only further demonstrate that Congress meant what it said. For one thing, Congress was especially concerned about a number of government impositions on religious practice that didn't amount to the type of coercion *Lyng* and other pre-RFRA cases focused on. For instance, Congress explicitly considered a federal-land issue in passing RFRA: members heard reports that veterans' cemeteries had refused to allow weekend burials, even when the beliefs of the deceased required them. See *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 562 n.26 (2021) (Alito, J., concurring). And as this Court recognized in *City of Boerne* v. *Flores* and again in *Tanzin*, RFRA was in part intended to address the non-consensual autopsies performed on Hmong individuals—autopsies that involved a forceful imposition on Hmong beliefs about the afterlife but not a coercive choice. See 521 U.S. 507, 530–31 (1994) (including extensive citations to legislative record); 592 U.S. 43, 50–51 (noting that RFRA included damages liability in part to redress violations like the Hmong autopsies); *Fulton*,

593 U.S. 522, n.26 (Alito, J., concurring) (describing background).

Further, RFRA is only one link in a long chain of similar legislative overrides. In *Goldman* v. *Weinberger*, this Court adopted a narrow view of the religious protections afforded by the Free Exercise Clause to members of the U.S. military. 475 U.S. 503 (1986). That case held that the First Amendment didn't protect an Air Force psychologist and ordained rabbi who sought to wear a yarmulke on duty. Instead, free exercise protections had to yield in favor of "great deference to the professional judgment of military authorities." *Id.* at 507.

Congress disagreed. As a direct response, it passed an Amendment to the National Defense Authorization Act for Fiscal Years 1988 and 1989 that restored to all military personnel the right to wear "neat and conservative" "religious apparel while wearing [their] uniform." Pub. L. No. 100-180 § 508. The amendment's Senate sponsor, who introduced it less than two weeks after the *Goldman* decision came down, said that such a "legislative solution" was "necessary" to "correct an injustice recently affirmed by the Supreme Court." 132 Cong. Rec. S6655 (daily ed. April 8, 1986) (statement of Sec. Alfonse D'Amato). And far beyond the specific "injustice" corrected by that amendment, courts have long agreed that RFRA now applies in the military context, refusing to import *Goldman*'s holding into RFRA and requiring courts to apply strict scrutiny to all substantial burdens on service members' religious exercise. See, *e.g.*, *U.S. Navy Seals 1-26* v. *Biden*, 27 F.4th 336, 350 (5th Cir. 2022); *Singh* v. *Berger*, 56 F.4th 88, 97 (D.C. Cir. 2022); *Singh* v. *Carter*, 168 F.Supp.3d 216 (D.D.C. 2016).

Similarly, a pre-*Smith* decision of this Court recognized limited First Amendment free exercise rights in the prison context. In *O'Lone* v. *Estate of Shabazz*, when Muslim inmates sought to attend weekly Friday prayer services, deference to the government's judgment in conducting its operations again won the day over religious freedom. 482 U.S. at 344–47, 348–49. But again, Congress balked. When passing RFRA, it declined to add an amendment preserving *O'Lone*, confirming that RFRA's broad text would apply in prisons. See 139 Cong. Rec. S14461-01 (daily ed. Oct. 27, 1993) (statement of Sen. Harry Reid); *ibid.* (statement of Sen. Mark Hatfield).

What's more, RFRA's sister statute RLUIPA applies the same test to state and local action in the prison context. See 42 U.S.C. § 2000cc et seq.; see also 146 Cong. Rec. E1563-01 (2000) (extension of remarks by Rep. Charles Canady) ("Section 3(a) [of RLUIPA] applies the RFRA standard * * * ."); *Hobby Lobby*, 573 U.S. at 695 ("[RLUIPA] imposes the same general test as RFRA * * * ."); *O Centro*, 546 U.S. at 436 (noting that RLUIPA uses "the same standard as set forth in RFRA"); *Holt*, 574 U.S. at 357 (same). And it is the consensus of courts across the country that RLUIPA uses the term "substantial burden" in its broad ordinary sense. *Holt*, 574 U.S. at 361–62 (using RLUIPA's text alone to interpret "substantial burden"); *San Jose Christian Coll.*, 360 F.3d at 1034; *Yellowbear* v. *Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.) (denying "any access" to a religious activity under RLUIPA "easily" constitutes a substantial burden); *Civ. Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (holding that, in the context of RLUIPA, a "substantial burden on religious exercise is one that necessarily bears direct, primary,

and fundamental responsibility for rendering religious exercise * * * effectively impracticable."). So in the prison context, "substantial burden" again means what it says.

Even *Lyng* itself involves a similar story of judicial limits and congressional disapproval. There, the government planned to construct a road through an area abutting Native American sacred sites. The road threatened to harm sacred areas and interfere with religious practice, so representatives of the affected tribes sued under the First Amendment. *Lyng*, 485 U.S. at 442–43. As in *Goldman* and *O'Lone*, this Court deferred to the government and carved out another domain—government disposition of its land—where free exercise rights would be diminished. *Id.* at 453. But also like those earlier cases, *Lyng* prompted a legislative response, even though it involved an imposition on Native American religious practice far less devastating than the one proposed here. *Id.* at 453–54; cf. *Apache Stronghold*, 101 F.4th at 1047. Congress passed the California Wilderness Act and the Smith River National Recreation Act, protecting the whole area, including the strip proposed for the road in *Lyng*, thus preserving it for "use * * * by Indian people for traditional cultural and religious purposes." Pub. L. No. 98–425, 98 Stat. 1619, § 307; Pub. L. No. 101–612, 104 Stat. 3209, § 5(b)(2)(H). As a result, the road was never built.

Thus, time and again, Congress has responded to this Court's efforts to carve out religious freedom exceptions—in the military, in prisons, and for Native Americans. Each time, Congress disapproved. Indeed, RFRA itself is widely understood to apply with its broad ordinary meaning in those first two categories:

prions and the military. And though Congress prevented the road in *Lyng* from being built, RFRA was intended as a general solution, so that religious groups—and religious minorities in particular—wouldn't have to rely on Congress' case-by-case intervention. To suppose instead, as the Ninth Circuit did here, that Congress silently grafted *Lyng*, and *Lyng* alone, onto the otherwise ordinary meaning of "substantial burden" would be incongruous with RFRA's text, purpose, and historical context.

* * *

In sum, nothing in RFRA suggests that Congress intended to adopt a specialized, term-of-art, or prior-construction meaning of "substantial burden," and prior and subsequent history confirm that the ordinary meaning should control.

III. An ordinary-meaning approach to RFRA would create a more workable regime than the en banc court's reading of "substantial burden."

Lyng should not have been used to settle the question in this case, as the strained conclusion the Ninth Circuit reached demonstrates. As a majority of the Ninth Circuit recognized, the utter destruction of the Apaches' only place for central worship is a "substantial burden" under any plain meaning of those words. See *Apache Stronghold*, 101 F.4th at 1135–36 (Murguia, J., dissenting); *id.* at 1092 (Nelson, J., concurring). The results of the Ninth Circuit's holding conflict with this commonsense understanding and will create similar confusion in future cases. An ordinary meaning approach, by contrast, would not only be

more faithful to the statute's text but also lead to more reasonable results in practice.

A. Reading *Lyng* into RFRA leads to absurd results.

The Ninth Circuit's decision adopts an ambiguous test for cases involving religious exercise on federal land that categorizes activities based exclusively on government motive. The decision cites *Lyng* to say that in the federal-land context, "substantial burden" should be read narrowly, covering only situations of targeted "prohibit[ion]" of a religious practice. *Apache Stronghold*, 101 F.4th at 1051–53 (citing *Lyng*, 485 U.S. at 456). Under this interpretation, a federal action may have profoundly negative impacts on a religious group's ability to practice, but as long as the government doesn't target a religious practice to stop it, RFRA doesn't apply. That sounds an awful lot like *Smith*'s neutrality framework that RFRA expressly rejected.

But RFRA's "substantial burden" language looks to the impact on religious exercise, not the government's intent or the type of government action. And for good reason. The destruction of Oak Flat will be total, rendering many religious practices utterly impossible. Yet to the Ninth Circuit, laying waste to a tribe's sacred property does not rise to the level of "prohibition" or "coercion"; the government's action was not of the right type. Presumably, the same impact would amount to a "substantial burden" if Congress, in authorizing the same land transfer, did so with the intent to stop tribal worship or limited access to Oak Flat for worship more than for other purposes. Because Congress didn't target the Apaches and required that "any post-transfer prohibitions * * * impose[d] on public

access to Oak Flat would be nondiscriminatory," the Ninth Circuit would say that its action is categorically permissible under RFRA, no matter the effect. *Id.* at 1055.

That result flies in the face of RFRA's core purpose: to protect religious practice against government impositions *regardless* of the motivations or purposes driving those impositions. See 42 U.S.C. § 2000bb(a) (finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that strict scrutiny "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests").

What's more, the en banc court's holding claws back religious freedom protections specifically in federal-land cases, leading to unequal results. For instance, imagine a local government that denied permitting to religious organizations, delaying the use of a church or temple—a burden significantly less severe than the irreversible destruction of the only site for worship practices. RLUIPA guards against many such "substantial burdens" imposed by state and local governments on religious groups, as the Ninth Circuit itself has recognized. See, *e.g.*, *Guru Nanak Sikh Soc. of Yuba City* v. *County of Sutter*, 456 F.3d 978, 987–89 (9th Cir. 2006) (finding a substantial burden when a county denied permitting for a Sikh group to construct a temple on their own land).

The destruction of Oak Flat means permanently ending a centuries-old aspect of the Apache religious practice—and, indeed, ending the tribes' traditions and way of life. In any other context, analogous burdens would be protected under either RFRA or

RLUIPA. The Ninth Circuit's holding thus reads a federal-land loophole into otherwise consistent religious freedom protections.

Indeed, if the Ninth Circuit's reasoning is upheld, the destruction of sacred religious sites on federal lands could become routine, leaving religious communities across the country vulnerable. That danger would disproportionately affect indigenous sacred sites. First, those sites are already vulnerable due to a long history of governmental seizures, destruction, and indifference to indigenous religious concerns. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred* Sites, 134 Harv. L. Rev. 1296, 1296–97 (2021). Second, indigenous religious practices are uniquely tied to specific lands. *Id.* at 1304–1307. If the destruction of Oak Flat does not qualify as a substantial burden under RFRA, other sacred sites may face a similar fate, with little recourse for affected religious communities.

But the harm from the Ninth Circuit's rule would not be confined to Native American places of worship. For instance, the Ebenezer Baptist Church, the Christian church where Dr. Martin Luther King, Jr. preached, sits within a national park. *Id.* at 1341–42. Under the Ninth Circuit's interpretation, the federal government could bulldoze this historically and religiously significant site—or, for that matter, any of the 70 churches located on federal lands—and RFRA would say nothing about it. *Id.* at 1341.

Other religious communities have practices that depend on government property too. For example, Orthodox Jewish communities frequently build *eruvs*, or ceremonial wires, around their communities. This practice typically involves placing strings on telephone

poles, and it allows Jewish community members to carry things outside on the Sabbath. Without an *eruv*, individuals may be unable to participate in religious requirements like attending synagogue. A mother, for example, wouldn't be able to carry her baby supplies, her stroller, or even her child to walk to synagogue. See, *e.g.*, *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenalfy*, 309 F.3d 144, 152 (3d Cir. 2002). In jurisdictions where telephone poles are on government-owned land, a rule like the Ninth Circuit's would allow the government to remove *eruvs* without any showing of its interests. Cf. *id.* at 168–69 (applying strict scrutiny to government's removal of *eruv*, even though "the utility poles are on [the government's] land").

Similarly, some Jewish and Muslim communities have religious beliefs that require particular orientations of headstones and other grave markers. See, *e.g.*, *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1279 (S.D. Fla. 1999), aff'd, 420 F.3d 1308 (11th Cir. 2005). If any of the 156 federally owned cemeteries pass policies that ban these practices, these religious communities would be left with no recourse, so long as the cemeteries didn't aim to target them. Nat'l Cemetery Admin., *List of all VA National Cemeteries*, https://www.cem.va.gov/find-cemetery/all-national.asp.

In short, the Ninth Circuit's rule would allow the federal government's land-management prerogatives to override RFRA's protections as long as the government's action is not overtly aimed at prohibiting religious practice. Such reasoning fundamentally undermines RFRA's purpose by allowing the government to cause profound harm to religious exercise. See Barclay & Steele, *supra*, at 1341, 1350.

B. Recognizing a substantial burden here would not prevent the government from carrying out its internal affairs.

On the other hand, an ordinary-meaning reading of RFRA's text would not impede the government's ability to carry out its internal affairs as the Ninth Circuit majority fears. See *Apache Stronghold*, 101 F.4th at 1051 (quoting *Lyng*, 485 U.S. at 450); *id.* at 1085 (Bea, J., concurring).

This case does not require any sweeping holdings about the nature of a "substantial burden," nor does it invite controversies over the meaningfulness, value, or necessity of a group's religious practices. All petitioners seek is a recognition of what should be evident from the plain terms of RFRA: that the destruction of a religious community's only place for many central worship practices is a "substantial burden." 42 U.S.C. § 2000bb-1; see also Michael D. McNally, *Native American Religious Freedom as a Collective Right*, 2019 BYU L. Rev. 205, 276–86 (arguing that *Hobby Lobby* has expanded the understanding of "substantial burden" within RFRA for tribal land and practices cases). Like every other religious group seeking RFRA's protection, those claiming a burden based on the federal government's disposition of its property must still defeat the government's claim that its action is the least restrictive means of accomplishing a compelling interest.

Indeed, the Ninth Circuit's reading flips the statutory test. Instead of asking whether a government action substantially burdens religious practice and then examining the government's interests, the Ninth Circuit held that there is no substantial burden at all when a strong government interest (disposing of

government land) comes into play. *Apache Stronghold*, 101 F.4th at 1051 (quoting *Lyng*, 485 U.S. at 450). It did so apparently to avoid religion run amok. *Ibid.* (warning against "'religious servitude[s]' that would 'divest the Government of its right[s]'"). But that concern is misplaced.

Other circuits' experience highlights that the en banc majority's concern is unwarranted. Many other circuits have embraced interpretations of "substantial burden" that more closely hew to the original text. See *Washington* v. *Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (interpreting RLUIPA's identical substantial burden provision); *Korte* v. *Sebelius*, 735 F.3d 654, 682 (7th Cir. 2013); *Doe* v. *Cong. of the United States*, 891 F.3d 578, 589–90 (6th Cir. 2018) (explaining that "substantial burden" includes "substantial pressure on a[religious] adherent to modify his behavior.") (quoting *Haight* v. *Thompson*, 763 F.3d 554, 565 (6th Cir. 2014)); *Doe* v. *United States*, 901 F.3d 1015, 1026 (8th Cir. 2018) (reading "substantial burden" to include anything that puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs") (quoting *Thomas*, 450 U.S. at 717–18); *Hobby Lobby Stores, Inc.,* v. *Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013) (holding that "substantial burden" includes anything that "requires participation" against religious belief, "prevents participation in conduct motivated" by religious belief, or "places substantial pressure on an adherent" to violate his beliefs) (quoting *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)), aff'd sub nom. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). And courts that have adopted these readings of RFRA haven't seen the floodgates open to excessive litigation or improper guesswork about religious practices—either in government-land cases or in

any other context. Compare *Comanche Nation* v. *United States*, No.CIV-08-849-D, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008) (Army construction on a sacred site "amply demonstrate[d]" a "substantial burden"), with *United States* v. *Grady*, 18 F.4th 1275 (11th Cir. 2021) (government satisfied strict scrutiny under RFRA in restricting access to a military base); see also 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 (2018). There is no reason to believe that recognizing a substantial burden here would have a different effect.

CONCLUSION

Lyng does not govern this case, nor should it. The substantial burden language in RFRA protects against more than just the indirect use of "carrots and sticks." *Apache Stronghold* v. *United States*, 38 F.4th 742, 780 (9th Cir. 2022) (Berzon, J., dissenting). When read according to its ordinary meaning, it encompasses more, at the very least including the evisceration of a religious group's worship site. This Court should take this case and clarify that RFRA's plain language applies.

Respectfully submitted,

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