No. 26A_____

In the Supreme Court of the United States

GOUYEN BROWN LOPEZ, SINETTA LOPEZ, on behalf of herself and her minor child L.B., NOMIE BROWN, AND ANGELA KINSEY, on behalf of herself and her minor children V.K. and M.K.,

Applicants,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; U.S. FOREST SERVICE; BROOKE ROLLINS, in her official capacity as Secretary of Agriculture; AND TOM SCHULTZ, in his official capacity as Chief of the U.S. Forest Service,

Respondents,

v.

RESOLUTION COPPER MINING, LLC,

Intervenor-Respondent.

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

RELIEF REQUESTED BY 9:00 AM ON MONDAY, MARCH 16, 2026

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Applicants (Plaintiffs-Appellants below) are Gouyen Brown Lopez, Sinetta Lopez, on behalf of herself and her minor child L.B., Nomie Brown, and Angela Kinsey, on behalf of herself and her minor children V.K. and M.K. Respondents (Defendants-Appellees below) are the United States of America, the United States Department of Agriculture, the United States Forest Service, Brooke Rollins, in her official capacity as Secretary of Agriculture, and Tom Schultz, in his official capacity as Chief of the United States Forest Service. Resolution Copper Mining LLC (RLMLF) is an additional Respondent (Intervenor-Defendant-Appellee below).

Related proceedings are:

In the United States Court of Appeals for the Ninth Circuit:

- *Lopez* v. *United States*, No. 25-5197 (Mar. 13, 2026) (denying injunction stay pending appeal and preliminary injunction), App.278a–314a.[1]

In the United States District Court for the District of Arizona:

- *Lopez* v. *United States*, No. 2:25-cv-2758-DWL (Aug. 17, 2025) (denying preliminary injunction and injunction pending appeal), App.1a–20a.

In the United States District Court for the District of Columbia:

- *Lopez* v. *United States*, 1:25-cv-02408-TJK (Aug. 1, 2025) (transferring case to the District of Arizona).

[1] The Ninth Circuit consolidated consideration of this appeal with No. 25-5185 (*Arizona Mining Reform Coalition* v. *United States Forest Service*) and No. 25-5189 (*San Carlos Apache Tribe* v. *United States Forest Service*) and decided all three appeals in the above referenced order.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants are natural persons and thus represent that they do not have any parent entities and do not issue stock.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

In just days or even hours, the federal government plans to complete an illegal land swap, setting in motion the irreversible destruction of a long-protected Native American sacred site that will end core Apache religious practices forever. Five dissenting judges of the Ninth Circuit, in a 6-5 en banc ruling, previously concluded that this land swap likely violates the Religious Freedom Restoration Act and should be enjoined. Two Justices also opined that the issue underlying this case "meets every one of the standards" for granting certiorari, and that the Court's failure to act would be a "grievous mistake" with "consequences that threaten to reverberate for generations." *Apache Stronghold* v. *United States*, 145 S. Ct. 1480, 1481, 1489 (2025) (Gorsuch, J., joined by Thomas, J., dissenting from denial of certiorari).

This Court now has an opportunity—likely its last—to prevent this generational tragedy. And the case for doing so has only grown stronger since *Apache Stronghold*: with this Court's decision in *Mahmoud* v. *Taylor*, 606 U.S. 522 (2025), eviscerating the Ninth Circuit's "no-burden" reasoning, and with additional claims based on the government's admitted refusal to consider viable alternative mining methods that would allow the profitable recovery of copper without cratering the sacred site.

At minimum, the Court should enter an administrative stay to preserve the status quo while it considers the merits of this emergency request—as every lower court to face the same situation in this case has already done. If the Court doesn't do so, the government stands ready to complete the illegal land swap immediately, potentially placing key remedies beyond the federal judiciary's reach.[2]

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[2] The government already appears to be trying to thwart this Court's review. The Ninth Circuit issued its ruling on Friday, March 13, at 7:34 p.m. ET. At 8:58 p.m., Applicants' counsel emailed the government's counsel, stating that "Plaintiffs intend to file in the Supreme Court an emergency application for injunction pending appeal," asking when the government planned to complete the land exchange, and asking if the government would agree to a brief

* * *

From time immemorial, Western Apaches have practiced their religion at *Chi'chil Biłdagoteel* or "Oak Flat." All parties and every court to consider the question agree that Oak Flat is sacred ground. There, Apaches engage in religious exercise that cannot be replicated elsewhere. For decades, the federal government recognized its singular significance—protecting Oak Flat from mining, preserving access for religious use, and placing it on the National Register of Historic Places. But now the government intends to transfer Oak Flat to a foreign-owned mining company, Resolution Copper, for a mine that will destroy it.

By the government's admission, the proposed mine will cause the "immediate," "permanent," and "irreversible" destruction of Oak Flat—forever ending Apache religious practices at the site. 3-EIS-892; see also 1-EIS-153, 327. The government's environmental impact statement (EIS) further admits that "alternative underground mining methods" are technically and physically feasible, would allow billions of pounds of copper to be profitably mined, and would preserve Oak Flat's surface. 4-EIS-F-3. But because Resolution Copper asserted that such methods would reduce its profits, the government dismissed the ready alternatives without detailed analysis. 4-EIS-F-3.

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stay of the exchange to allow this Court to review Applicant's forthcoming emergency application. To inform whether an immediate emergency application was needed, Applicant asked the government to respond to this inquiry by 10:00 a.m. on Saturday, March 14. The government first responded at 1:00 p.m. on March 14, stating "The land exchange has already been completed."

If true, this appears to be an effort to evade judicial action. However, the government has previously admitted that courts "ha[ve] found it appropriate to reverse federal land exchanges after they have occurred." Opp'n to Pls.' Emergency Mot. for Inj. Pending Appeal at 18–19, *Apache Stronghold*, No. 2:21-cv-50-SPL (D. Ariz. April 30, 2025), ECF No. 157 (collecting cases). The Court should do so here—ordering Respondents to take immediate steps to restore the pre-land-exchange status quo pending this Court's review or, at minimum, halt any further development of the mine.

Despite acknowledging the catastrophic harm Apaches will suffer, the Ninth Circuit denied a preliminary injunction, declined to issue an injunction pending appeal, and dissolved an administrative stay previously preventing transfer. The panel's decision clears the way for the government to transfer Oak Flat immediately.

The consequences of transfer are imminent and potentially irreversible. Once Oak Flat is privatized, it will be no longer subject to federal laws guaranteeing tribal access. Oak Flat will also "immediately start being laced with subterranean data-gathering tunnels," followed by further "surface disturbances"—and, eventually, complete obliteration. App.110a. And once Oak Flat passes into private hands, Resolution will have every incentive to make immediate investments and permanent changes to Oak Flat's surface to undermine any judicial attempt to unwind the transfer later, even if the government's actions are ultimately held unlawful.

In addition to the urgent need for relief, Applicants are likely to succeed on the merits because the transfer of Oak Flat violates federal law at every turn.

First, the transfer and planned destruction of Oak Flat violates the Religious Freedom Restoration Act. RFRA prohibits the federal government from substantially burdening religious exercise unless it proves that doing so is the least restrictive means of furthering a compelling governmental interest. RFRA applies "to all Federal law," including laws governing the disposition of federal property, and it expressly defines religious exercise to include the use of real property for religious purposes. Destroying Oak Flat—thereby forever preventing Apache worship there—imposes the most severe burden imaginable. Two Justices of this Court and six judges on the Ninth Circuit have already recognized as much.

Second, the destruction of Oak Flat violates the free-exercise right of Apache parents to direct the religious upbringing of their children—a claim not asserted in the prior *Apache Stronghold* case. As this Court held in *Mahmoud* v. *Taylor*, this right "would be an empty promise if it did not follow" children onto government property.

606 U.S. 522, 548 (2025). If even "subtle" governmental actions can pose "'a very real threat'" to parental religious formation, *id.* at 553, how much more here, where the government's actions will forever destroy an irreplaceable sacred site and prevent Apache parents like Applicants from initiating their children in Apache religious practices. This is nothing less than "'the destruction of [a religious] community,'" which every Justice in *Mahmoud* agreed was unconstitutional. *Id.* at 606, 611 (Sotomayor, J., dissenting).

Third, the destruction of Oak Flat violates the Free Exercise Clause because the government's actions are neither neutral toward religion nor generally applicable. Rather, the government has made a discretionary, individualized decision to favor copper mining over Apache religious practices on a particular piece of land. That decision to favor secular over religious conduct triggers strict scrutiny, which the government has never tried to satisfy.

Fourth, the government's EIS violates the National Environmental Policy Act. NEPA requires federal agencies to analyze all technically and economically feasible alternatives to a proposed agency action. But here, the Forest Service expressly declined to conduct any detailed analysis of alternative underground mining methods, despite admitting that those methods would preserve Oak Flat's surface, are "technically" and "physically feasible," and would allow billions of pounds of copper to be "profitably mined."

Fifth, the transfer violates the National Historic Preservation Act. The NHPA requires the government to identify historic sites that may be harmed by federal projects and seek to avoid or mitigate that harm. Here, it is undisputed that Oak Flat is historically significant. Yet the government neglected the NHPA's mandatory processes, ignoring the NHPA-created Advisory Council on Historical Preservation's recommendations and opposition.

Given these serious questions on the merits, an injunction pending appeal is warranted. If this Court pauses the transfer now but reverses course later, the government loses little. It can still proceed with the project—which it has voluntarily delayed for over a decade—and still mine every ounce of copper. But if this Court denies emergency relief now, it may never get the chance to reverse course later, and the Apaches lose everything. Oak Flat will be destroyed, and the Apaches will never again be able to worship at Oak Flat.

* * *

The United States Government has a tragic history of destroying Apache lives and lands for the sake of mining interests. The Apaches simply ask that the land not be transferred beyond federal control and destroyed before the courts (including this Court) resolve their claims. This Court can and should enter an injunction pending the timely filing and ultimate disposition of a petition for a writ of certiorari. Alternatively, this Court should treat this application as a petition for certiorari, grant plenary review, and set this appeal for expedited briefing and argument. In either case, Applicants request that this Court issue a temporary, administrative stay to allow for full consideration and briefing of this Application. *E.g.*, *Indiana State Police Pension Tr.* v. *Chrysler, LLC*, 556 U.S. 960 (2009) (Ginsburg, J., in chambers).

OPINIONS BELOW

The Ninth Circuit issued its order on March 13, 2026. It is reproduced at App.278a–314a. The District Court issued its opinion and order on August 17, 2025. It is reproduced at App.1a–20a.

JURISDICTION

This Court has jurisdiction over this application for an injunction pending appeal. 28 U.S.C. §§ 1254(1), 1651(a). The district court denied Applicants' motions for a preliminary injunction and injunction pending appeal on August 17, 2025. App.1a–20a. Applicants appealed the same day under 28 U.S.C. § 1292(a)(1), and requested an

emergency injunction pending appeal. The Ninth Circuit administratively stayed the land transfer in two companion cases on August 18, 2025, *San Carlos Apache Tribe* v. *United States*, No. 25-5189 (9th Cir. Aug. 18, 2025) (order granting a temporary administrative stay); *AMRC* v. *United States Forest Serv.*, No. 25-5185 (9th Cir. Aug. 18, 2025) (order granting a temporary administrative stay), but denied Applicant's request for an injunction pending appeal and preliminary injunction on March 13, 2026, App.278a–314a. This Court will have jurisdiction over that appeal under 28 U.S.C. § 1254(1), and an injunction pending further review is in aid of this Court's future jurisdiction given the irreparable harm, and potentially irreversible change to the status quo, that will occur if Applicants are not granted relief, *id.* § 1651(a).

BACKGROUND AND PROCEDURAL HISTORY

A. Oak Flat

For centuries, Western Apaches have worshipped at *Chí'chil Biłdagoteel*, or Oak Flat. See App.224a, 228a, 234a–242a, 245a–252a. Oak Flat occupies a unique place in Apache cosmology and history. App.228a. It is "the birthplace" of Apache religion and the Apaches' "spiritual" or "religious home." App.202a–203a, 205a, 207a–208a, 213a, 215a. In the Apache religion, Oak Flat is a dwelling place of powerful spiritual beings called Ga'an, who are messengers between the Creator and humans (App.207a–208a)—sometimes compared to angels in the Judeo-Christian tradition, but "bound up with a specific place" and unable "to exist without it." Tisa Wenger, *Fighting for Oak Flat: Western Apaches and American Religious Freedom*, 39 J.L. & Religion 247, 248, 267 (2024) ("Wenger"); App.245a.

As the dwelling place of the Ga'an, Oak Flat is a unique "source of supernatural power," known as *diyih*, and "the [Apaches'] direct corridor to the Creator." App.213a, 228a, 247a–248a; see also App.196a, 202a, 203a, 205a, 215a. As such, Oak Flat is the site of essential religious ceremonies that cannot be replicated elsewhere. App.202a–

203a, 209a, 212a–213a, 215a; see Wenger at 248 (Oak Flat is "the only place where certain prayers, offerings, and ceremonies can be conducted").

One example is the Holy Ground Ceremony. This is a blessing ceremony conducted by a medicine man for protection from sickness and perils. *Id.* at 259–260. It has been performed in its current form at Oak Flat for at least 100 years, and it reflects and builds on much older practices. *Id.* at 257–258.

Another ceremony uniquely tied to Oak Flat is the Sunrise Ceremony, a religious rite of passage for Apache girls marking their transition into womanhood. App.196a, 252a. To prepare for her Sunrise Ceremony, a girl uses materials from Oak Flat to build a traditional Apache house, called a wickiup, where she lives for the ceremony's duration. App.197a, 209a. She gathers the necessary materials from the holy ground at Oak Flat, thanking Mother Earth for her resources, App.197a, 202a, and tribal members surround her with singing, dancing, and prayer. App.198a–200a.

On the ceremony's second night, the Ga'an arrive. App.200a–201a. The Ga'an "come from the mountains, enter Apache men called crown dancers and bless the girl[s]." *Apache Stronghold*, 145 S. Ct. at 1481 (Gorsuch, J., dissenting) (cleaned up). On the last day, the girl is painted with white clay taken from the ground at Oak Flat. "The clay represents the Apache creation story, in which a white-painted woman came out of the earth [at Oak Flat], covered with white ash from the earth's surface." *Ibid.* (cleaned up). As the girl dances, she embodies the White Painted Woman. App.202a. And at the ceremony's end, when the girl's godmother wipes the clay from her eyes, she is a new Apache woman, forever connected religiously with Oak Flat. App.201a, 210a, 212a, 213a.

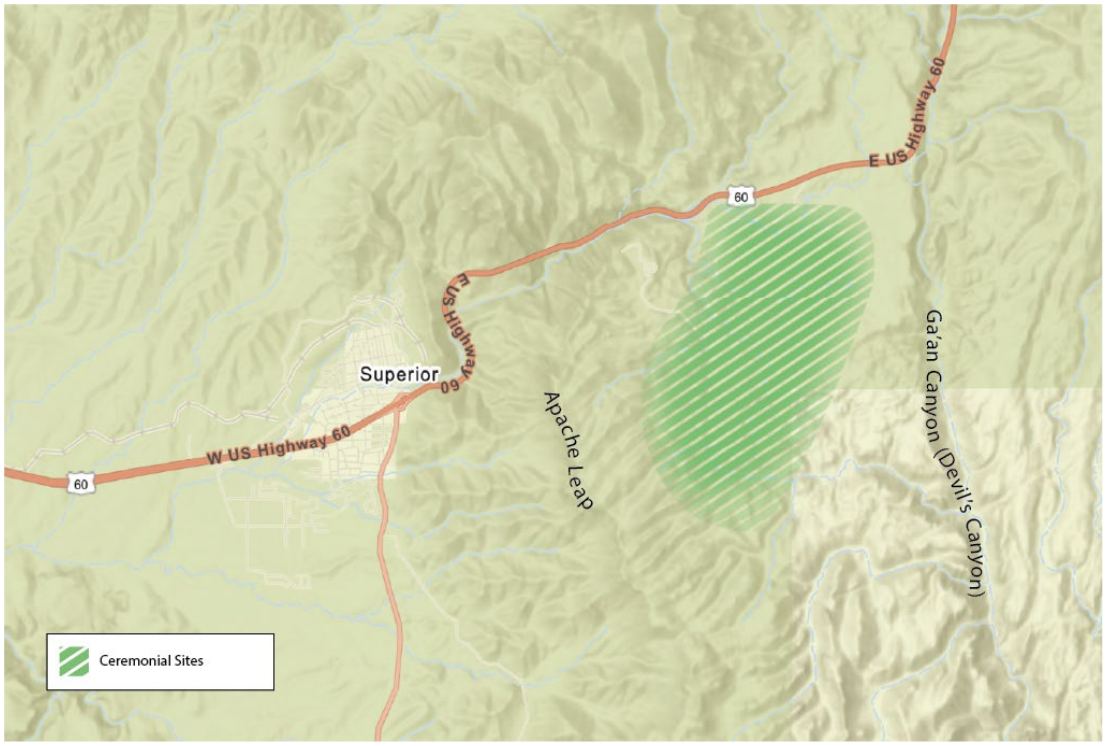
Apache Stronghold, 145 S. Ct. at 1481
(Gorsuch, J., dissenting)

Oak Flat is also the site of several natural springs, which are a source of spiritual power for Apaches. 1-EIS-ES-29; App.204a, 206a; Wenger at 252, 262–263. One example is *Tú Nahikaadi* ("Dripping Spring"), which according to Apache tradition is the place where the White Painted Woman took refuge after a great flood scoured the world. Wenger at 250–251; App.252a, 201a–202a. Apaches still visit Dripping Spring for sacred rituals today. Wenger at 262–263; App.252a.

As the federal government has pointed out, Oak Flat also features a singular concentration of "Apache [archaeological] sites located in one small area," attesting to the fact that Oak Flat "has been persistently utilized and occupied for the past 1,500 years." App.234a. One particularly revered site is *Tséyaa Gogeschin* ("Written or Painted under the Rocks"), a large rock overhang with ancient pictographs and petroglyphs—rock art that holds profound meaning for Apaches and provides an irreplaceable connection to Apache ancestors. App.252a; App.206a. The San Carlos

Apache Tribe's Chairman has described this artwork as "the footprints and the very spirit of our ancestors, hallmarks akin to the art found in gothic cathedrals and temples, like the Western Wall in Jerusalem [or] St. Peter's Basilica in Vatican City … This is why I call Oak Flat the Sistine Chapel of Apache religion." 6-EIS-U-9.

The shaded portion of the following map shows the area where the critical sites described above are located (App.204a–205a):



B. Applicants' Religious Exercise at Oak Flat

Applicants are Apache women and girls who worship at Oak Flat. Gouyen Brown Lopez had her Sunrise Ceremony at Oak Flat. App.196a, 197a–203a. There, she experienced a profound spiritual connection with Mother Earth and with her ancestors and became a new woman. App.202a–203a. She continues to return to Oak Flat to pray, gather medicine, and participate in religious ceremonies. App.202a–203a. She hopes and intends that her own daughters will be able to connect with the Creator at Oak Flat and have their Sunrise Ceremonies there. App.202a–203a.

Sinetta Lopez is an Apache woman and Gouyen's mother. App.206a. She grew up coming to Oak Flat with her mother and grandmother; Oak Flat is central to her religious practices and essential to how she raises her daughters in the Apache way. App.204a–208a. Sinetta's younger daughter, L.B., also grew up visiting Oak Flat. App.207a. She has had dreams and encounters with spirits at Oak Flat and was healed of an illness after drinking from a sacred spring at Oak Flat. App.207a. In October 2025—after the court below stayed the land exchange—L.B. had her Sunrise Ceremony at Oak Flat. App.207a. Oak Flat is essential to her identity as an Apache woman and her religious exercise for the rest of her life. App.208a.

Applicant Nomie Brown is an Apache woman who had her Sunrise Ceremony at Oak Flat. App.209a. That ceremony fundamentally changed her life, and she continues to return to Oak Flat to engage in prayer and religious ceremonies to this day. App.210a, 211a. Oak Flat is essential to her ongoing religious exercise and identity as an Apache woman. App.213a.

Applicant Angela Kinsey is an Apache woman and mother who worships at Oak Flat. App.214a, 215a. She has two minor daughters whom she continues to take to Oak Flat to pass on Apache religious ways. App.215a–217a. Angela's minor daughter, V.K., had her coming-of-age ceremony at Oak Flat. App.215a. Angela has participated in many ceremonies at Oak Flat, and doing so is an essential part of her religion and identity as an Apache woman. App.215a–216a. Angela's younger minor daughter, M.K., is four years old. App.217a. Angela hopes and intends that M.K. will be able to have her coming-of-age ceremony at Oak Flat. App.217a.

If Oak Flat is destroyed, Applicants can no longer freely exercise their religion.

C. Federal Interest in Oak Flat

Before the United States existed, Oak Flat was "part of the traditional territories of the Western Apache." 3-EIS-873. To make peace with the Apaches, the United

States entered the Treaty of Santa Fe in 1852, promising to settle the Apaches' "territorial boundaries." *Apache Stronghold*, 145 S. Ct. at 1482 (Gorsuch, J., dissenting).

Shortly after the 1852 Treaty, however, settlers and miners entered the area over Apache opposition. John R. Welch, *Earth, Wind, and Fire: Apaches, Miners, and Genocide in Central Arizona, 1859–1874*, 7 SAGE Open, Oct.–Dec. 2017, at 6–7, https://shorturl.at/5IdM6 ("Welch"). When miners discovered gold and silver nearby, U.S. Army General James Carleton ordered the Apaches' "'removal to a Reservation or … utter extermination'" to make way for the "'search of precious metals.'" Welch at 8. By 1874, the U.S. government had forced 4,000 Apaches onto the San Carlos Reservation, nicknamed "Hell's 40 Acres" because it was a barren wasteland. Dana Hedgpeth, *This land is sacred to the Apache, and they are fighting to save it*, Washington Post (Apr. 12, 2021), https://shorturl.at/rphxa. The government now acknowledges that Oak Flat is traditional Apache land, which the government took "by force 150 years ago"—depriving Apaches of "large portions of their homelands, including Oak Flat," and forcing them to "live on lands that do not encompass places sacred to their cultures." 3-EIS-873–875.

Beginning in the 1900s, the government took steps to protect Oak Flat. In 1905, the government created the Tonto National Forest, which includes Oak Flat. 2-EIS-823. In 1955, President Eisenhower reserved part of Oak Flat for "public purposes" to protect it from mining. 20 Fed. Reg. 7319, 7336–7337 (Oct. 1, 1955). President Nixon renewed the protection in 1971. 36 Fed. Reg. 18,997, 19,029 (Sep. 25, 1971). And in 2016, the National Park Service placed Oak Flat in the National Register of Historic Places, concluding "that *Chi'chil Biłdagoteel* is an important feature of the Western Apache landscape as a sacred site, as a source of supernatural power, and as a staple in their traditional lifeway." App.228a.

D. The 2014 Land-Exchange Rider

These protections came under pressure starting in 1995, when a large copper deposit was discovered beneath Oak Flat. 1-EIS-ES-l. In 2001, two of the world's largest mining companies, Rio Tinto and BHP, formed a joint venture called Resolution Copper, a Respondent here, and began lobbying Congress to transfer Oak Flat to Resolution. *Ibid.*; Lydia Millet, *Selling Off Apache Holy Land*, N.Y. Times (May 29, 2015), https://shorturl.at/NLbsv ("Millet").

From 2005 to 2013, Resolution's allies in Congress introduced at least twelve different bills to give Oak Flat to Resolution in a land exchange. Each failed to become law. See Katherine E. Lovett, Note, *Not All Land Exchanges Are Created Equal: A Case Study of the Oak Flat Land Exchange*, 28 Colo. Nat. Res., Energy & Envtl. L. Rev. 353, 366–367 (2017).

Lacking congressional support for a standalone bill, Resolution and its allies tried a different tack: appending a last-minute rider to must-pass national defense legislation. Each year, Congress passes the National Defense Authorization Act (NDAA), which is essential to fund the military. *Id.* at 368. In 2014, the NDAA was almost 700 pages long and authorized hundreds of billions in defense spending. See Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, 128 Stat. 3292. At the last minute, Arizona Senators McCain and Flake attached to the NDAA a land-exchange rider—called the "Southeast Arizona Land Exchange and Conservation Act"—without a separate vote or debate. Millet, *supra* at 13. The land-exchange rider then passed as Section 3003 of the NDAA. 16 U.S.C. § 539p.

Subject to various conditions, the rider authorizes the Secretary of Agriculture, a Respondent here, to transfer title to 2,422 acres of Forest Service lands, including Oak Flat, to Resolution, in exchange for other parcels owned by Resolution scattered elsewhere in Arizona. *Id.* § 539p(b)(2), (b)(4), (c)(l), (d)(l).

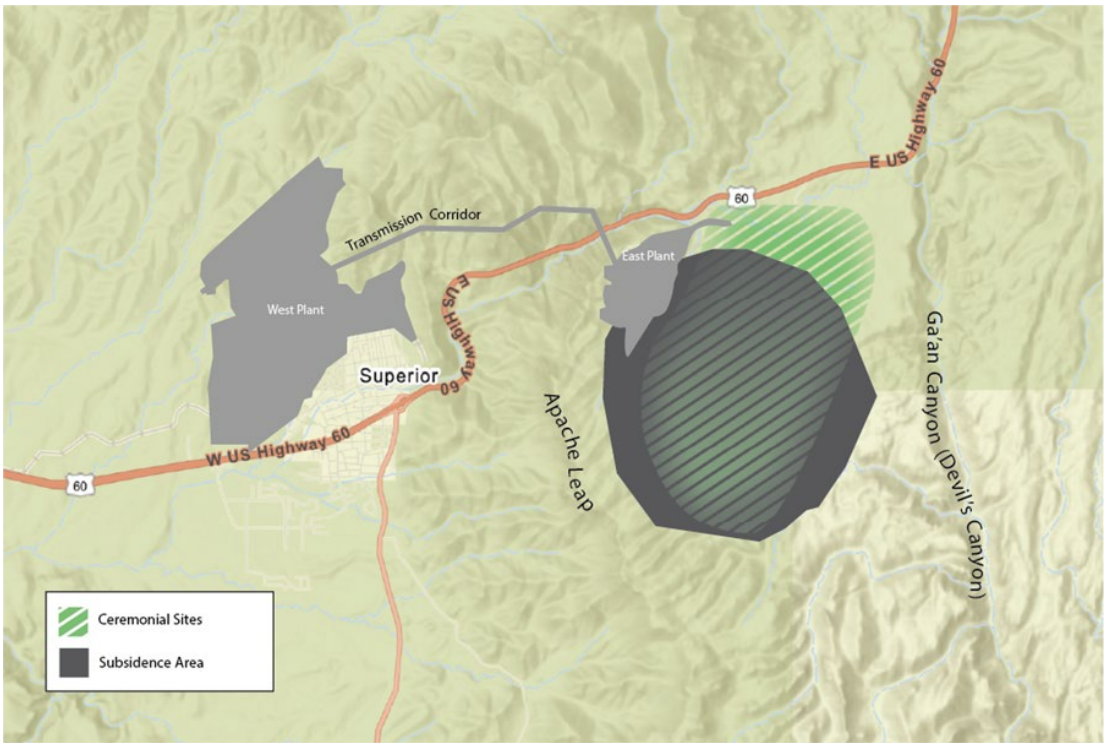
The rider also revokes the presidential orders protecting Oak Flat from mining. *Id.* § 539p(i)(l)(A). It instructs that, before conveying the federal land, the Secretary must "prepare a single environmental impact statement under [NEPA] which shall be used as the basis for all decisions under Federal law related to the proposed mine." *Id.* § 539p(c)(9)(B). The rider also requires the Secretary to "engage in government-to-government consultation with affected Indian tribes concerning issues of concern." *Id.* § 539p(c)(3)(A). Following that consultation, the Secretary must consult with Resolution "and seek to find mutually acceptable measures to (i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities." *Id.* § 539p(c)(3)(B). Once a NEPA-compliant EIS is published, the rider directs the Secretary transfer Oak Flat to Resolution within "60 days." *Id.* § 539p(c)(10).

E. The Mine and the EIS

The government originally published an EIS on January 15, 2021. 1-EIS-ES-3. But on March 1, 2021, the government withdrew that EIS, stating it needed additional "time" to "fully understand concerns raised by Tribes." *Ibid.* On June 16, 2025—over a decade after passage of the land-transfer rider—the government republished the EIS.

The EIS confirms that the mine will destroy Oak Flat. See generally C.A. Dkt. 25.1 at 99 (EIS excerpts). The copper exists between 4,500 and 7,000 feet below Oak Flat. 1-EIS-ES-1. To extract it, Resolution intends to use a technique called panel caving, which involves tunneling below the ore, fracturing it with explosives, and removing it from below. 1-EIS-13. After the ore is removed, approximately 1.37 billion tons of toxic waste ("tailings") will need to be stored above ground forever. 1-EIS-62. These tailings will permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, including human burials. l-EIS-44. As the ore is extracted, Oak Flat itself will collapse ("subside") into a crater almost 2 miles across and 800 to

1,115 feet deep. 1-EIS-ES-4. The following map shows the expected crater in relation to the ceremonial sites described above (see 1-EIS-65):



The EIS admits that "there are other underground … techniques that could physically be applied to" the deposit to preserve Oak Flat's surface. 4-EIS-F-3–F-5. These techniques, such as cut-and-fill or sublevel stoping, involve "backfilling tailings underground"—*i.e.*, filling the underground voids created by a mine with waste materials left over from the mining process. *Ibid.* These techniques would eliminate the need to store toxic tailings on the surface and would eliminate the "subsidence area" swallowing Oak Flat. 4-EIS-F-4; 1-EIS-50. They are also "technically" and "physically feasible," and would allow billions of tons of ore to be "profitably mined." 4-EIS-F-3–5; 1-EIS-50–51. But the government rejected any detailed consideration of these alternatives because they "would result in higher per-ton mining costs." 4-EIS-F-5.

The EIS further admits that the impacts of the mine will be "immediate, permanent, and large in scale" and that "public access" to the site will be "lost." 3-EIS-892; 1-EIS-327. Among other things, the mine will destroy the places used for the Sunrise

Ceremony, the Holy Ground Ceremony, and other sacred ceremonies; burial grounds; sacred springs, including *Tú Nahikaadi*; and ancient religious and cultural artifacts, including the revered petroglyphs of *Tséyaa Gogeschin*. l-EIS-ES-29; l-EIS-44, 160; 6-EIS-U-2-U-3, U-9-U-10. This destruction will make it physically impossible for the Apaches to ever again engage in their religious practices unique to the site. l-EIS-160; 3-EIS-867–871; App.203a, 209a, 213a, 217a.

F. Initial Lawsuits

When the government first published an EIS in 2021, three lawsuits were filed. See Compl., *Apache Stronghold* v. *United States*, No. 2:21-cv-50 (D. Ariz. Jan. 12, 2021), ECF No. 1; Compl., *San Carlos Apache Tribe* v. *U.S. Forest Serv.*, No. 2:21-cv-68 (D. Ariz. Jan. 14, 2021), ECF No. 1; Compl., *Ariz. Mining Reform Coal.* v. *U.S. Forest Serv.*, No. 2:21-cv-122 (D. Ariz. Jan. 22, 2021), ECF No. 1.

Two focused on the 2021 EIS's inadequacy and were stayed when the EIS was withdrawn. Order, *San Carlos Apache Tribe*, No. 2:21-cv-68 (D. Ariz. Mar. 23, 2021), ECF No. 47; Order, *Ariz. Mining Reform Coal.*, No. 2:21-cv-122 (D. Ariz. Mar. 16, 2021), ECF No. 35.

Apache Stronghold v. *United States* challenged the transfer under RFRA and the First Amendment and sought a preliminary injunction. 101 F.4th 1036 (9th Cir. 2024). The district court declined to enjoin the transfer, and the Ninth Circuit, by a 6-5 en banc vote, affirmed. *Id.* at 1043–1044. This Court declined to grant certiorari or rehearing, over dissent from Justice Gorsuch, joined by Justice Thomas. *Apache Stronghold*, 145 S. Ct. 1480 (2025).

G. The Decisions Below

Three weeks later, the government published its new EIS and announced plans to transfer Oak Flat to Resolution on August 19, 2025. USDA, *Final Environmental Impact Statement: Resolution Copper Project & Land Exchange* (June 16, 2025),

https://www.resolutionmineeis.us/documents/final-eis; see 90 Fed. Reg. 26,287 (June 20, 2025).

Shortly after the new EIS was published, Applicants sued, seeking a preliminary injunction and alleging that the government's actions violated RFRA and the Free Exercise Clause, and that the EIS fails to comply with NEPA and the NHPA. App.284a–285a. On August 17, 2025, after the case was transferred from the District of Columbia to Arizona, the district court denied Applicants' motions for a preliminary injunction and for an injunction pending appeal (App.1a–20a)—as it did two days earlier in the *San Carlos* and *Arizona Mining* cases, which had been amended to challenge deficiencies in the new EIS (App.114a).

Applicants appealed, as did the *San Carlos* and *Arizona Mining* plaintiffs. App.285a. The Ninth Circuit issued a temporary administrative injunction to preserve the status quo while the appeal was pending and consolidated the appeals. App.285a. As a result, the government was temporarily enjoined from conveying Oak Flat to Resolution. App.285a. On March 13, the Ninth Circuit affirmed. App.280a. As to Applicants' RFRA and Free Exercise claims, it held that it was bound by the circuit's earlier decision in *Apache Stronghold* and that this Court's recent decision in *Mahmoud* did not alter that conclusion. App.310a–311a. As for NEPA, the panel held that because the Forest Service lacks the ability to regulate mining operations on private property following the land exchange, the Forest Service was not required to provide any analysis of alternative methods in the EIS. App.302a–304a. It further held that the violation of NEPA's page limit was harmless. App.304a–305a. Finally, it held that, under the NHPA, the government adequately responded to ACHP's recommendation. App.306a–310a. Following the resolution of the appeal, the Ninth Circuit dissolved its temporary administrative injunction, leaving the government free to transfer Oak Flat to Resolution immediately. App.313a.

REASONS FOR GRANTING THE APPLICATION

This Court has granted injunctions pending further review when applicants show (1) they "are likely to prevail" on the merits, (2) "denying them relief would lead to irreparable injury," and (3) "granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 16 (2020) (per curiam); see also, *e.g.*, *Tandon* v. *Newsom*, 593 U.S. 61, 64 (2021) (per curiam) (same). While likelihood of success can "encompass … a discretionary judgment about whether the Court should grant review," *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring), in the context of "emergency relief," the ultimate inquiry is "equivalent to a fair prospect of success," *Labrador* v. *Poe ex rel. Poe*, 144 S. Ct. 921, 929 n.2 (2024) (Kavanaugh, J., concurring).

Here, the imminent transfer and destruction of Oak Flat is a paradigmatic example of critical and exigent circumstances that entitle Applicants to an injunction pending this Court's review. Absent this Court's intervention, Oak Flat will soon be transferred beyond federal control and irreversibly damaged, limiting the judiciary's power to order effectual relief. Because the transfer and destruction of Oak Flat flatly contradicts the text of RFRA, the First Amendment, and this Court's precedent—and "implicates both a vital question and a circuit split"—this Court should intervene before the government "end[s] Apache religious existence as we know it." *Apache Stronghold*, 145 S. Ct. at 1487–1488 (Gorsuch, J., dissenting) (quotations omitted).

I. Applicants are likely to succeed on the merits.

A. The government's actions violate RFRA.

RFRA is a "super statute" designed to "displac[e] the normal operation of other federal laws." *Bostock* v. *Clayton County*, 590 U.S. 644, 682 (2020). It applies "to all Federal law, and the implementation of that law, whether statutory or otherwise," 42 U.S.C. § 2000bb-3(a), and provides that the "Government shall not substantially

burden a person's exercise of religion" unless it satisfies strict scrutiny, 42 U.S.C. § 2000bb-1(a)–(b).

RFRA claims thus proceed in two steps. First, the plaintiff must show his "exercise of religion" has been "substantially burdened." *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006). Second, the government must prove that substantially burdening the plaintiff's religious exercise is "the least restrictive means" of furthering a "compelling governmental interest." *Id.* at 428–429.

Here, the government substantially burdens Applicants' religious exercise by physically destroying Oak Flat—preventing Apaches from ever again conducting religious practices tied to Oak Flat. And the government has never even attempted to satisfy strict scrutiny. That is more than enough to demonstrate a "fair prospect of success" under RFRA. *Labrador*, 144 S. Ct. at 929 n.2 (Kavanaugh, J., concurring).

1. The transfer and destruction of Oak Flat substantially burdens Applicants' religious exercise.

Neither Respondents nor the court below dispute that destroying Oak Flat substantially burdens Applicants' religious exercise under RFRA's ordinary meaning. Nor could they. "As a matter of ordinary meaning, after all, an action that prevents a religious exercise does not just burden that exercise substantially, it burdens it completely." *Apache Stronghold*, 145 S. Ct. 1480, 1486 (Gorsuch, J., dissenting).

Instead, the Ninth Circuit held that RFRA's ordinary meaning doesn't apply in one (and only one) context: a "disposition" of federal land. *Ibid.*; see also App.310a–311a. There, the court held, a substantial burden arises only when the government "coerces people into defying their religious beliefs or discriminates between religions." *Apache Stronghold*, 145 S. Ct. at 1487 (Gorsuch, J., dissenting). But as Justices Gorsuch and Thomas have explained, that "extraordinary" conclusion is supported by "[e]xactly nothing" in "RFRA's text," represents an "outlier" among circuits, and rests on reasoning this Court has "emphatically rejected" as "absurd." *Id.* at 1486–1488.

a. Start with RFRA's text. RFRA doesn't define what it means to "substantially burden" religious exercise. When a term is undefined, the "usual" rule is to apply "that term's 'ordinary, contemporary, common meaning,'" *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 433–434 (2019)—as this Court has already done when interpreting RFRA, see *Tanzin* v. *Tanvir*, 592 U.S. 43, 48 (2020) (interpreting RFRA's "appropriate relief" language according to "the phrase's plain meaning").

Here, the ordinary meaning produces an obvious result: destroying a unique sacred site necessary for specific religious ceremonies "substantially burdens" religious exercise. It "burdens" religious exercise by "restricti[ng]" it; and it does so "substantially" by restricting religious exercise not just by a "considerable amount" but completely. *Apache Stronghold*, 101 F.4th 1036, 1136 (9th Cir. 2024) (Murguia, C.J., dissenting) (quoting dictionaries).

Contrary to the decision below, App.310a–311a, "nothing in the phrase 'substantial burden'—or anything else in RFRA's text—hints that a different and more demanding standard applies when (and only when) the 'disposition' of the government's property is at issue." *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting). Rather, RFRA expressly defines the "exercise of religion" to include "[t]he use … of real property for the purpose of religious exercise." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(B). It expressly applies to "all Federal law, and the implementation of that law, whether statutory or otherwise"—with no carve-out for laws regarding property. *Id.* § 2000bb-3(a). And it provides that "[n]othing" in its provisions "shall be construed to authorize any government to burden any religious belief." *Id.* § 2000bb-3(c). "In each of these ways, RFRA's terms suggest that a law disposing of federal real property is to be treated like any other." *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting).

b. The Ninth Circuit's decision below also defies this Court's precedent. The Ninth Circuit purported to locate its special "property" rule in this Court's pre-RFRA

decision in *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), which the *Apache* majority declared was "subsume[d]" by RFRA. *Apache Stronghold*, 101 F.4th at 1043–1044 (per curiam); see also App.310a–311a. But as Justices Gorsuch and Thomas observed, this conflicts with and distorts this Court's precedents in several respects.

First, this Court has "emphatically rejected" the notion that RFRA "should be construed to 'subsume'" the Court's pre-RFRA jurisprudence. *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting) (cleaned up). The Court first rejected this notion in *Hobby Lobby*, where it said it was "absurd" to claim that "RFRA merely restored this Court's pre-*Smith* decisions in ossified form." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714–716 (2014). It did so again in *Holt* v. *Hobbs*, criticizing the lower court's narrow definition of "substantial burden" for "improperly import[ing] a strand of reasoning" from pre-*Smith* decisions "into a distinct statutory setting that guarantees 'greater protection'" for religious freedom. *Apache Stronghold*, 145 S. Ct. at 1486–1487 (Gorsuch, J., dissenting) (discussing *Holt*). Indeed, it is particularly counter-textual to interpret RFRA to subsume *Lyng* when RFRA expressly "restore[s]" two *other* pre-*Smith* decisions—"*Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)"—without ever mentioning *Lyng*. 42 U.S.C. § 2000bb(b)(1).

Second, "even taken on its own terms, it is hard to see how *Lyng* can be read as setting forth a special test for determining when a government's 'disposition' of land represents a 'substantial burden' on religion." *Apache Stronghold*, 145 S. Ct. at 1487 (Gorsuch, J., dissenting). The phrase "substantial burden" appears nowhere in *Lyng*. To the contrary, *Lyng* "stressed that the government's plan at issue there did not 'discriminate' against or among religions." *Ibid.* (quoting *Lyng*, 485 U.S. at 453). But this is the classic language of neutrality later adopted in *Smith*. Indeed, *Smith* invoked *Lyng* as support for the rule that the government doesn't violate the Free

Exercise Clause when its actions are "neutral" and "generally applicable," 494 U.S. at 881, 883—the very rule RFRA rejects, 42 U.S.C. §§ 2000bb(a)(4), 2000bb-1(a); see also *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 460 (2017) (citing *Lyng* as an "example" of a case "reject[ing a] free exercise challenge[]" where "the law[] in question [was] neutral and generally applicable"); *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 536 (2021) (*Smith* "drew support for the neutral and generally applicable standard from … *Lyng*"); Stephanie Hall Barclay & Matthew Krauter, *The Untold Story of the Proto*-Smith *Era*, 174 U. Penn. L. Rev. 435, 440–441, 532–536 (2026) (demonstrating how "*Lyng* is part of the proto-*Smith* era that RFRA was meant to replace").

That conclusion has been further strengthened by this Court's recent decision in *Mahmoud*—which post-dated the denial of certiorari in *Apache Stronghold*. There, the Court emphatically rejected the idea that showing a burden under the Free Exercise Clause requires "compulsion or coercion to renounce or abandon one's religion." 606 U.S. at 558–559. Thus, even if *Lyng* is (wrongly) understood as a burden decision and as "subsumed" by RFRA, it *still* could not stand for the proposition that has now twice driven the Ninth Circuit's remarkable "no-burden" reasoning with respect to the destruction of Oak Flat.

Third, *Lyng* is factually distinct. *Lyng* didn't involve a government plan to "destroy a religious site, as the government's plan for Oak Flat would," *Apache Stronghold*, 145 S. Ct. at 1487 (Gorsuch, J., dissenting); instead, it involved a plan to pave a road that was "removed as far as possible from [religious] sites," ensuring that "[n]o sites where specific rituals take place were to be disturbed," *Lyng*, 485 U.S. at 443, 454. Thus, the *Lyng* plaintiffs' substantial-burden claim rested solely on "subjective spiritual harm," which civil courts cannot weigh. *Apache Stronghold*, 101 F.4th at 1147 (Murguia, C.J., dissenting). Like the plaintiff in *Bowen* v. *Roy*, who claimed the government's using a Social Security number for his daughter would "rob [her] spirit,"

476 U.S. 693, 696 (1986), the *Lyng* plaintiffs did not assert an "objective" impediment to their performing any act that constituted their religious exercise, *Mahmoud*, 606 U.S. at 546 (emphasizing "objective danger" in burden inquiry). The *Apache* majority ignored these distinguishing facts—facts the *Lyng* Court itself "took pains to stress." *Apache Stronghold*, 145 S. Ct. at 1487 (Gorsuch, J., dissenting); see also Barclay & Krauter, *supra*, at 441–442, 500–503 (analyzing Justices' working papers saying *Lyng* would be "different" had the project been more destructive or "prevent[ed]" religious exercise).

c. Lastly, the decision below also "warrant[s] this Court's review." *Labrador*, 144 S. Ct. at 931 (Kavanaugh, J., concurring); see also *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting) ("this case meets every one of the standards we generally apply when assessing petitions seeking our review").

First, the Ninth Circuit's decision is an "outlier" that creates "a circuit split." *Apache Stronghold*, 145 S. Ct. at 1488 (Gorsuch, J., dissenting). As Justice Gorsuch explained, "[n]ot a single other Court of Appeals has suggested that the 'substantial burden' test in RFRA or its sister statute RLUIPA contains anything like the Ninth Circuit's special rule for the 'disposition' of government property." *Id.* at 1488. "To the contrary," at least six circuits have "held that preventing a religious exercise is, necessarily, a 'substantial burden' on that religious exercise." *Ibid.* (citing *Haight* v. *Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) (Sutton, J.) ("barring access to the practice" "necessarily place[s] a substantial burden on it"); *Yellowbear* v. *Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.) (preventing access to a sweat lodge "easily" qualifies as a substantial burden); *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 555–556 (4th Cir. 2013) ("preventing a religious organization from building a church" can be a substantial burden even if it does not "force the organization to violate its religious beliefs"); *West* v. *Radtke*, 48 F.4th 836, 845 & n.3 (7th Cir. 2022) (Sykes, J.) ("a substantial burden may arise" "when a prison

declines to provide an inmate access to something that will allow him to exercise his religion"); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (recovering tithing monies from debtors' church was a substantial burden because it "would effectively prevent the debtors from tithing"); *Thai Meditation Assn. of Ala., Inc.* v. *Mobile*, 980 F.3d 821, 830–831 (11th Cir. 2020) (Newsom, J.) (land-use regulation that "completely prevents" religious exercise "clearly satisfies the substantial-burden standard")).

Second, this "outlier" rule also has "outsized effects" on "a question of exceptional importance." *Apache Stronghold*, 145 S. Ct. at 1486, 1488 (Gorsuch, J., dissenting). That's because the Ninth Circuit "encompasses approximately 74% of all federal land and almost a third of the nation's Native American population." *Id.* at 1488. In part because of this, "every circuit decision over the last three decades addressing RFRA sacred-site claims has come from the Ninth Circuit." *Ibid.* "As a practical matter, then, if allowed to stand, the Ninth Circuit's holding below will govern most (if not all) RFRA sacred-site disputes in this country." *Ibid.*

And left uncorrected, the reasoning of this case and *Apache Stronghold* could metastasize even outside of the federal RFRA itself. In *Perez* v. *City of San Antonio*, for example, a city "plan[ned] to destroy a sacred Native American religious site" on municipal land, but the Fifth Circuit found no substantial burden under the Texas Religious Freedom Restoration Act. *Perez*, — F.4th —, No. 23-50746, 2026 WL 569944, at *1 (5th Cir. Feb. 27, 2026) (Oldham, J., joined by Elrod, C.J., and Smith, Higginson, Willett, and Ho, JJ., dissenting from denial of rehearing en banc). As Judge Oldham explained, this reflects "an unfortunate line of cases treating 'the distinctive qualities of Indigenous religious practices regarding sacred sites' as a reason to deny relief." *Id.* at *3. And the fact that "the government owns the place where individuals worship" should make no difference: "Courts routinely recognize substantial burdens in prisons, the military, and zoning decisions—even though the government has plenary power and coercive control over those areas." *Id.* at *3; see also *ibid.* ("As Justice

Gorsuch recently noted in *Apache Stronghold* … many American Indians 'live far from Washington, D.C., and their history and religious practices may be unfamiliar to many. But that should make no difference.'").

2. The government has never tried to satisfy strict scrutiny.

Because there is a substantial burden under RFRA's plain text, the burden shifts to the government to demonstrate that destroying Oak Flat "is the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The government has never made any effort to satisfy that demanding standard in the courts below. Perhaps that's because the government *concedes* there are alternative mining techniques that are "technically" and "physically feasible" at Oak Flat, would allow billions of pounds of copper to be "profitably mined," and would preserve Oak Flat's surface. 1-EIS-50–51; 4-EIS-F-3–5. Regardless, with no strict-scrutiny argument presently in the record or properly before the Court, this Court need go no further to find "a fair prospect of success" on the RFRA claim and grant emergency relief.[3]

B. The government's actions violate the Free Exercise Clause.

Oak Flat's destruction also violates the Free Exercise Clause in two ways. First, it violates Applicants' right to direct the religious upbringing of their children. Second, it is not generally applicable and fails strict scrutiny.

1. The government's actions burden parental rights under *Mahmoud*.

The government's actions first trigger strict scrutiny because they burden Applicants' right to direct the religious upbringing of their children. In *Mahmoud*—a case

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[3] While Resolution made a cursory strict-scrutiny argument below, statutory text and precedent alike are clear that the burden is on the "*Government*" to show a "compelling *governmental* interest." 42 U.S.C. § 2000bb-1(b) (emphasis added). The burden cannot be carried by private parties seeking to vindicate their financial interests in the government's stead. See *O Centro*, 546 U.S. at 429 ("the burden is placed squarely on the Government"); *Hobby Lobby*, 573 U.S. at 721 (refusing to "entertain" strict-scrutiny arguments raised by third parties).

decided after *Apache Stronghold*—this Court held that "regardless" of *Smith*, government actions are subject to strict scrutiny when they "'substantially interfer[e] with the religious development'" of children. 606 U.S. at 565 (alteration in original) (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972)). *Mahmoud* involved parents of public-elementary-school children who sought to opt their children out of lessons involving "'LGBTQ+-inclusive' storybooks." *Id.* at 528–530. Applying *Yoder*, this Court held that, where the burden the government places on religious exercise involves "the religious beliefs and practices that the parents wish to instill in their children," the usual free-exercise question of whether the burden is pursuant to a neutral and generally applicable law "d[oes] not apply." *Id.* at 565. Because the government's actions imposed an "objective danger" to, or a "very real threat of undermining," the parents' exercise of instilling their religious beliefs in their children, the denial of opt-outs burdened the parents' religious exercise, triggering strict scrutiny. *Id.* at 543, 553.

That same right is implicated here. The government's action here—transferring Oak Flat to a private copper-mining company to turn it into a crater—plainly poses an "objective danger" to Applicants' ability to instill their religious practices in their children. *Id.* at 554. Indeed, the government's action will not only "undermin[e]" that exercise but render it physically impossible forever. *Id.* at 553.

The government's actions will *eliminate* Applicants' ability to provide their children with the unique spiritual connection and religious practices available only at Oak Flat. See, *e.g.*, App.207a, App.217a. Their daughters will not be able to hold religious ceremonies transitioning them to womanhood. They will forever lose the special connection to the White Painted Woman. App.201a, 202a, 207a–208a; see also App.216a. They will lose access to the Ga'an residing there and the special connection to the Creator, Usen, that exists only there. See App.203a, 207a–208a, 215a. Without that experience, Applicants will be unable to pass their faith and religious practices on to their children. This undoubtedly poses "a very real threat of undermining the

religious beliefs and practices the parent wishes to instill in the child." *Mahmoud*, 606 U.S. at 556 (cleaned up).

If anything, "the intrusion on [Applicants'] free exercise rights here … is greater than the introduction of LGBTQ storybooks … in *Mahmoud*." *Mirabelli* v. *Bonta*, 607 U.S. ____, 2026 WL 575049, at **2 (U.S. Mar. 2, 2026) (per curiam). In *Mahmoud*, even the dissent agreed that a free-exercise burden would exist if the government's actions "would 'result in the destruction of [a religious] community as it exist[s] in the United States." *Id.* at 611 (Sotomayor, J., dissenting). That is this case.

Yet the Ninth Circuit rejected Applicants' *Mahmoud* claim because "*Mahmoud* centers on (1) the education context and (2) policies that directly coerce or indirectly compel behavior at odds with individual religious beliefs or practices, not involving the disposition of government property." App.312a. Thus, the court explained, since this case "involve[s] neither education nor an attempt by the government to affirmatively coerce or indirectly compel behavior at odds with the plaintiffs' religious beliefs," *Mahmoud* doesn't control. App.312a–313a.

But this sliced-and-diced Free Exercise Clause bears no resemblance to the real thing. First, *Mahmoud* isn't limited to a particular set of factual circumstances. Rather, it is a case about *burdens* of a particular "character"—government actions that "'substantially interfer[e] with the religious development' of the parents' children." 606 U.S. at 564–565 (alternation in original). Under *Mahmoud*, where a plaintiff shows an objective burden of that character—as Applicants have shown here—strict scrutiny applies. *Ibid.* In fact, the *Mahmoud* Court rejected precisely this sort of effort by "the lower courts" to "confine[] *Yoder* to its facts," calling it "an important precedent of this Court" that "embodies a principle of general applicability." *Id.* at 557–558. The same is true of *Mahmoud* itself.

In any event, the facts aren't even as distinct as the Ninth Circuit seemed to think. While the panel purported to distinguish this case from *Mahmoud* because it involves

a "disposition of government property," App.312a, *Mahmoud* likewise involved "government property": public school classrooms. And the Court emphasized that "the right of parents 'to direct the religious upbringing of their' children would be an empty promise" if it didn't carry over from private property "into the public school classroom." *Mahmoud*, 606 U.S. at 547.

Second, *Mahmoud* doesn't require "coercion" as a *sine qua non* of a burden. To the contrary, *Mahmoud* rejected this exact limitation in the strongest possible terms. The notion that the Free Exercise Clause is "nothing more than protection against compulsion or coercion to renounce or abandon one's religion," *Mahmoud* held, is "alarmingly narrow," "chilling," and contrary to "the fundamental values of the American people." 606 U.S. at 558–559.

Indeed, just days ago, this Court—acting on the emergency docket—rejected another effort by the Ninth Circuit to treat *Mahmoud* as limited to coercion. *Mirabelli*, 2026 WL 575049, at **2. *Mirabelli* involved California policies preventing schools from telling parents about their child's gender transition absent the child's consent. The Ninth Circuit distinguished *Mahmoud*, reasoning that these policies weren't coercive—they "apply only when a *student* makes the voluntary decision to share their gender nonconformity with the school." *Mirabelli* v. *Bonta*, No. 25-8056, 2026 WL 44874, at **3 (9th Cir. Jan. 5, 2026). But this Court vacated the Ninth Circuit's decision, criticizing the Ninth Circuit for "brush[ing] aside *Mahmoud* ... as 'a narrow decision focused on uniquely coercive "curricular requirements."'" *Mirabelli*, 2026 WL 575049, at **2.

As three Justices further explained, the Ninth Circuit had "significantly misunderstood *Mahmoud*" and thus exposed parents to "irreparable harm"—requiring a "general course correction" via the emergency docket. *Id.* at *4 (Barrett, J., joined by Roberts, C.J., and Kavanaugh, J., concurring). The course correction evidently didn't take. (While Applicants alerted the panel to *Mirabelli*, C.A. Dkt. 141.1, the panel

didn't acknowledge it.) And another intervention is necessary here.

Finally, the panel suggested *Mahmoud* had distinguished *Lyng* on the ground that *Lyng* involved only "'incidental interference with an individual's spiritual activities,' as opposed to coercion." App.312a (quoting *Mahmoud*, 606 U.S. at 557). But in fact, *Mahmoud* distinguished *Lyng* on the ground that *Lyng* addressed the government's "own internal affairs"—a category *Mahmoud* described as "akin to the administration of Social Security or the selection of 'filing cabinets.'" 606 U.S. at 557. The action challenged here—a land exchange with a multinational corporation aimed at collapsing an ancient sacred site into a crater—is not akin to those actions. Indeed, it is not "internal" at all—the government wants to *alienate* Oak Flat to an *external* entity.

In any event, the government's actions here likewise "implicate[] direct, coercive interactions between the State and its young residents." *Ibid*. When the government gives Oak Flat to Resolution, it will terminate Applicants' access to the site and turn their children into trespassers should they seek initiation into their ancestral faith. Surely government action that exposes a person to civil and criminal liability for practicing his faith has coercive effect. See *Trinity Lutheran*, 582 U.S. at 463 ("[T]he Free Exercise Clause protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" (quoting *Lyng*, 485 U.S. at 450)).

Mahmoud requires strict scrutiny under the Free Exercise Clause. And the land transfer fails this review. *Supra* Part I.A.2.

2. The government's actions are not neutral and generally applicable.

Mahmoud aside, under the Free Exercise Clause, any government action that burdens religion must survive strict scrutiny unless it is "neutral" and "generally applicable." *Employment Div.* v. *Smith*, 494 U.S. 872, 878–879 (1990); see *Fulton*, 593 U.S. at 533. That is, the law must apply "generally" and have only an "incidental effect" on religious activity. *Smith*, 494 U.S. at 878.

The government's actions are not generally applicable here. Just the opposite. Far from regulating "generally" and burdening religion only "incidentally," the government has made an individualized, discretionary, and intentional decision to favor maximally destructive mining methods over Apache religious practices on a particular piece of land. This sort of "individualized" decision about the use of particular "property" is not "generally applicable." *International Church of Foursquare Gospel* v. *City of San Leandro*, 673 F.3d 1059, 1066 (2011). Rather, it reflects "a value judgment in favor of secular motivations, but not religious motivations." *Fraternal Ord. of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

Even the *Apache Stronghold* decision, which the panel below relied upon, agreed that such "parcel-specific rigging of the statutory framework … manifestly would *not* fit the Court's current understanding of a case involving a neutral and generally applicable law." 101 F.4th at 1054–1055. Nonetheless, invoking *Lyng*, it declined to apply strict scrutiny, claiming the decision to destroy Oak Flat lacks "the central ingredient of a Free Exercise Claim—some 'tendency to coerce individuals into acting contrary to their religious beliefs.'" *Id.* at 1054 (quoting *Lyng*, 485 U.S. at 450).

But *Lyng* provides no support for declining to apply strict scrutiny to a law that is not neutral and generally applicable, since, as this Court has explained, the law in *Lyng* was (at least under then-prevailing standards) "neutral and generally applicable without regard to religion." *Trinity Lutheran*, 582 U.S. at 460 (discussing *Lyng*). And in any event, *Lyng* is distinguishable here, for the reasons already explained. *Supra* pp. 22–23.

To the extent *Lyng* isn't distinguishable and governs on the Ninth Circuit's "coercion" grounds, this Court should grant plenary review and revisit *Lyng*. Again, the notion that "the Free Exercise Clause's guarantee" is "nothing more than protection against compulsion or coercion to renounce or abandon one's religion" was already

forcefully rejected in *Mahmoud*, where this Court said it was "alarmingly narrow," "chilling," and contrary to "the fundamental values of the American people." 606 U.S. at 558–559.

C. The government's actions violate NEPA.

The government's actions also violate NEPA, which enshrines a "broad national commitment to protecting and promoting environmental quality." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). NEPA "prescribes the necessary process" agencies must follow before taking certain actions affecting the environment, ensuring they take a "hard look" at downstream "environmental consequences." *Id.* at 348, 352 (internal quotation marks omitted); accord *Seven Cnty. Infrastructure Coal.* v. *Eagle County*, 605 U.S. 168, 192 (2025) (Sotomayor, J., concurring). Recognizing the consequential environmental effects of sub-surface mining, the land-exchange rider expressly requires the Secretary of Agriculture, acting through the Forest Service, to "carry out the land exchange in accordance with the requirements of [NEPA]." 16 U.S.C. § 539p(c)(9)(A)–(B). But the Forest Service's EIS violated NEPA.

NEPA requires the Forest Service to consider and provide in the EIS "a reasonable range of alternatives" to a proposed project "that are technically and economically feasible." 42 U.S.C. § 4332(C)(iii), (F). The EIS here doesn't do that. Indeed, it wholly fails to analyze "technically and economically feasible" alternative mining methods that would recover copper without destroying Oak Flat. *Ibid.*

As mining experts explained in response to the draft EIS, feasible alternatives include mining techniques such as cut-and-fill or sublevel stoping, which would backfill tailings underground, reduce surface waste, and avoid cratering Oak Flat. App.176a–185a. Remarkably, the government conceded that these techniques "could physically be applied to" the deposit, are "technically" and "physically feasible," and would allow billions of pounds of copper to be "profitably mined." 4-EIS-F-3–5; 1-EIS-

50. It further admitted that these methods "could substantially reduce impacts on surface resources," 4-EIS-F-4, including by eliminating the "subsidence area overhead on Oak Flat," 1-EIS-50. Yet the government nonetheless "dismiss[ed] alternative mining techniques from detailed analysis." 1-EIS-50.

The Ninth Circuit ignored these concessions, see App.303a–304a, which demonstrate a NEPA violation. By requiring an EIS to "address the significant environmental effects of a proposed project and identify feasible alternatives that could mitigate those effects," NEPA mandates that an EIS "*must*" include adequate "predictive and scientific judgments in assessing the relevant impacts … and alternatives." *Seven Cnty.*, 605 U.S. at 172, 181 (emphasis added). The government included none.

The Ninth Circuit excused the omission by saying the government will lose authority to regulate the mining operations on private land following the land exchange. App.304a. But this is doubly wrong. The land-exchange rider tasks the Secretary with identifying "measures" that "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities"—including alternative mining measures. 16 U.S.C. § 539p(c)(3)(B). And the chosen mining measures will necessarily influence all future "decisions under Federal law related to the proposed mine," such as pipeline routing and permitting decisions, which is precisely what the EIS serves "as the basis for." *Id.* § 539p(c)(9)(B). Thus, it is impossible to produce a NEPA-compliant EIS without considering these alternatives.

The government's proffered excuses for its omissions are similarly unavailing. First, as the Ninth Circuit noted, the EIS says the government declined to consider alternative methods because they would "result in higher per-ton mining costs," which would remove an "estimated 80 percent of the tonnage of the deposit from consideration," relying on figures pulled without scrutiny from Resolution data. 4-EIS-F-5. But a "reasonable" alternative need not be one that is equally profitable, only one that still advances a project's purpose. *Western Watersheds Project* v. *Abbey*, 719

F.3d 1035, 1046 (9th Cir. 2013). And here, alternative mining methods would still allow billions of pounds of copper to be "profitably mined." 4-EIS-F-3–5. Indeed, the project's purpose is not to maximize Resolution's profits but "to authorize … the exchange of land" to make it "available" for "mining," 16 U.S.C. § 539p(a), (c)(8)—and to do so in a way that minimizes harm to Indian tribes, see *id.* § 539p(c)(3), (g)(5). Thus, alternative mining methods *better* advance the project's purpose. Cf. *Abbey*, 719 F.3d at 1053.

Second, the government refused to analyze alternative mining methods on the ground that "almost no alternative techniques … were identified as reasonable for an ore deposit with the characteristics of the Resolution deposit," 6-EIS-R-180, and "very few of these underground stoping methods" are "well suited to the Resolution copper deposit," 4-EIS-F-3. But this simply concedes that *some* alternative techniques *are* "reasonable" and "well suited" to the deposit.

Third, the EIS claims alternative mining methods are unreasonable because the proposed panel caving is a "standard mining method" "commonly used" to mine similar deposits and is thus the "appropriate method to be applied" here. 4-EIS-F-5. But this is merely an affirmative statement in support of the government's (and Resolution's) preferred, destructive method; it offers no reason for disqualifying the proposed alternatives. Simply being "standard" or "common" doesn't make an option the only reasonable one. To the contrary, this case's facts suggest this deposit is a uniquely *non*-standard site with uncommon conditions—namely an exceptionally deep deposit beneath an irreplaceable sacred site. 1-EIS-3–4.

Because the government failed to complete a reasonable-alternatives analysis, the EIS must be "set aside," 5 U.S.C. § 706(2), and the transfer must be enjoined pending the government's issuance of a NEPA-compliant EIS. 16 U.S.C. § 539p(c)(9); see, *e.g.*, *Standing Rock Sioux Tribe* v. *U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) (explaining that, in the NEPA context, "vacatur is the default response to

a fundamental procedural failure"); *Southeast Alaska Conservation Council* v. *Federal Highway Admin.*, 649 F.3d 1050, 1056, 1059 (9th Cir. 2011) (affirming injunction against "any activities dependent on the issuance of a valid EIS"); see also *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 156 (2010) ("assum[ing] without deciding that the District Court acted lawfully in vacating" an agency's "deregulation decision" because of the agency's failure to prepare a NEPA-complaint EIS).[4]

D. The government's actions violate the NHPA.

The government's actions also violate the NHPA by failing to consider and address the Advisory Council on Historic Preservation's (ACHP's) mitigation recommendations—further requiring that its actions be held unlawful and "set aside." *Friends of the Atglen-Susquehanna Trail, Inc.* v. *Surface Transp. Bd.*, 252 F.3d 246, 253 (3d Cir. 2001); 5 U.S.C. § 706(2).

Before the government effectuates any "undertaking on any historic property," the NHPA requires that it engage in a Section 106 process. 54 U.S.C. § 306108. Aimed at identifying "ways to avoid, minimize or mitigate any adverse effects" on historic sites, 36 C.F.R. § 800.1(a), this process requires that the government "take into account the effects of their undertakings," including "afford[ing] the [ACHP] a reasonable opportunity to comment," *id.* If adverse effects are identified, "the agency must continue consulting with the parties," *Friends*, 252 F.3d at 253, and "avoid or mitigate any adverse effects," *Muckleshoot Indian Tribe* v. *United States Forest Serv.*, 177 F.3d

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[4] The government's (and panel's) cavalier approach to NEPA is underscored by the fact that the over-1,000-page EIS here indisputably violates NEPA's express statutory page limit several times over—risking its inadequacies being drowned out in a sea of extraneous material. See 42 U.S.C. § 4336(a)(e)(1)(A)–(B) (150-page default limit; 300-page limit for projects "of extraordinary complexity"). As this Court recently recognized, NEPA's page limit "strongly reinforces [the statute's] basic principles," *Seven Cnty.*, 605 U.S. at 181 n.3, fostering the public's ability to understand and evaluate a project's environmental consequences. But the panel said this simply made the EIS more "thorough" and thus was harmless, App.304a-305a—a rationale that, of course, would nullify page limits in any context and is hard to describe as anything other than lawless defiance of Congress's contrary judgment.

800, 805 (9th Cir. 1999). And if the ACHP and responsible agencies cannot reach agreement on a mitigation plan, the government "must make clear in the record that the ACHP's comments were taken seriously." *Friends*, 252 F.3d at 265.

The government normally complies with Section 106 by negotiating a "programmatic agreement" with the ACHP, outlining steps to avoid or mitigate a project's adverse effects on historic properties. 36 C.F.R. § 800.14(b)(2)(iii). But here, the Forest Service declined to do so after the ACHP found its proposed mitigation measures "wholly inadequate." Letter from Rick Gonzalez, ACHP Vice Chairman, to Hon. Tom Vilsack, Sec'y of Agric., at 5 (Mar. 29, 2021), https://shorturl.at/vRZoz (ACHP Comments).

Due to the government's failure to address "the enormity of the adverse effects that would result to" Oak Flat, *id.* at 5, the ACHP concluded "that further consultation to reach an agreement [regarding means of preserving Oak Flat] would be unproductive," and therefore terminated the Section 106 consultation process, *id.* at 1. The termination triggered two additional duties under the NHPA: (1) the ACHP must provide the Secretary of Agriculture with final comments and recommendations on the project, and (2) the Secretary must respond to those comments in writing, showing they were seriously considered in reaching a decision. See 36 C.F.R.§ 800.7(a)(4), (c)(4).

While the ACHP satisfied its duty, the Secretary failed to satisfy hers. In its final comments, the ACHP emphasized that "[t]he historic significance of Oak Flat cannot be overstated and neither can the enormity of the adverse effects" of the mine—with "numerous historic properties that would be physically destroyed," including Oak Flat's destruction via "subsidence." ACHP Comments at 4–5. The ACHP specifically recommended that the government "develop and evaluate alternatives" (*e.g.*, "alternative and more sustainable mining techniques" that would "prevent subsidence at Oak Flat") and that the government "should employ all measures at its disposal to

incentivize the consideration of such alternatives." *Id.* at 7. Yet, in a terse letter in response, the Secretary entirely ignored the ACHP's recommendations to assess and incentivize alternative mining techniques. App.188a–189a. Indeed, the letter made no mention of alternative mining techniques at all. *Ibid.*

The Ninth Circuit did not identify any mention of the alternative mining methods in the government's response. Instead, it inferred a "good faith effort" to address the comments in the government's statement that its authority over the mine was limited because "the project will be almost entirely on private land." App.309a. But that is a non sequitur. The ACHP didn't recommend that the agency *compel* Resolution to utilize a particular mining method. It recommended that the agency *assess* and *incentivize* consideration of alternative methods. That is well within the government's authority. Indeed, much of the woefully inadequate mitigation measures the Forest Service *did* propose—like having Resolution fund tribal scholarships or plant oak groves elsewhere—consist of measures the Forest Service cannot compel Resolution to adopt. 2021 EIS at 5-EIS-98–99. This sloughing off responsibility for the mine does not demonstrate a "good faith effort to address possible mitigation." App.309a. It simply ignores changes the government could have made to prevent the permanent destruction of invaluable historical, cultural, and religious property—contrary to Congress's instruction.

The Secretary's failure to give "genuine attention" to the ACHP's recommendations and "make clear in the record that the ACHP's comments were taken seriously" is a straightforward violation of the NHPA. *Concerned Citizens All., Inc.* v. *Slater*, 176 F.3d 686, 696 (3d Cir. 1999). Accordingly, the Forest Service's actions must be "set aside" as unlawful. *Friends*, 252 F.3d at 262; 5 U.S.C. § 706(2).

II. Applicants will suffer irreparable harm—and lose the opportunity for meaningful judicial review—absent injunctive relief.

There is no serious dispute that without emergency relief, Applicants "will suffer irreparable harm." App.19a. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mahmoud*, 606 U.S. at 569 (cleaned up). Here, however, Applicants face not a temporary loss of their religious exercise, but the permanent destruction of an irreplaceable sacred site, ending certain religious practices forever. That is paradigmatic irreparable harm.

As Justices Gorsuch and Thomas already recognized, "it is undisputed that the government's plan will "destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise" at Oak Flat. *Apache Stronghold*, 145 S. Ct. at 1480 (Gorsuch, J., dissenting). That recognition was well founded: The government's own EIS acknowledges that the destruction will be "immediate, permanent, and large in scale," that "public access" to the site will be "lost," and that nothing can "replace or replicate the tribal resources and [traditional cultural properties] that would be destroyed." 3-EIS-892, 1-EIS-153.

And the panel below likewise "recognize[d] that this land transfer will fundamentally alter the nature of the land, including destruction of those sites sacred to the Tribe, the Lopez Plaintiffs, and similarly situated Native individuals." App.313a. This will result in "grave harms to Native religious practice." App.313a. Every other judge to consider an imminent transfer under the statute has concluded similarly. App.19a ("Plaintiffs will suffer irreparable harm"); accord App.110a ("irreparable injury"); *Apache Stronghold* v. *United States*, 782 F. Supp. 3d 756, 766 (D. Ariz. 2025) ("undisputed" that Applicants "will suffer irreparable harm"); see also *Apache Stronghold* v. *United States*, No. 21-15295, 2021 WL 12295173, at *5 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting) ("Western Apaches will suffer immediate, irreparable harm.").

Nor is the irreparable harm limited to completion of the mine. Rather, the transfer will immediately make Oak Flat "private property" that is "no longer … subject to [federal law] or Forest Service management that provides for Tribal access." 3-EIS-871. Applicants will have only "limited access to the post-land exchange version of Oak Flat." App.110a. Thus, "even if the site won't be entirely cratered immediately after conveyance," "[o]nce the land is transferred, the Western Apaches will suffer immediate, irreparable harm." *Apache Stronghold*, 2021 WL 12295173, at *5 (Bumatay, J., dissenting).

But the transfer won't come alone. Instead, upon transfer, Resolution can immediately begin activities that will degrade Oak Flat. 1-EIS-61, Fig. 2.2.2-3. As the government itself confirms, Resolution's activities will cause "'*immediate*, permanent, and large in scale' destruction of 'archaeological sites, tribal sacred sites, [and] cultural landscapes.'" *Apache Stronghold*, 101 F.4th at 1131 (Murguia, J., dissenting) (quoting 2021 EIS at 2-EIS-789, https://archive.ph/pksLH (emphasis added); see also App.110a (immediate creation of "subterranean data-gathering tunnels," followed by further "surface disturbances"). And once Oak Flat is irreparably damaged, courts may hold that "reversal of the transfer" is "futile." *Apache Stronghold*, 2021 WL 12295173, at *6 (Bumatay, J., dissenting) (citing *Kettle Range Conservation Grp.* v. *U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1087 (9th Cir. 1998) (declining to rescind land transfer where the land had already been "denuded" and it would "be impractical to attempt to unscramble the eggs")).

In short, without emergency relief, Applicants' sacred site will be irreversibly destroyed, their religious exercise extinguished, and the courts' ability to remedy the violation severely compromised. Preventing such devastating harm from bypassing review is precisely the purpose of this Court's interim relief powers. See *Mirabelli*, 2026 WL 575049, at **4 (Barrett, J., concurring).

III. The balance of hardships and public interest overwhelmingly favor injunctive relief.

What remains is the balance of the equities and the public interest. When the government is a defendant, these factors "merge." *Nken* v. *Holder*, 556 U.S. 418, 435 (2009). Here, those factors tilt dramatically toward pausing the transfer.

Absent temporary relief, the government can immediately transfer the land, changing the landscape of legal protection and initiating a path of complete destruction. Applicants face the permanent loss of an irreplaceable sacred site, which threatens to "end Apache religious existence as we know it." *Apache Stronghold*, 145 S. Ct. at 1488 (Gorsuch, J, dissenting). And this Court's ability to provide effective relief will be compromised without ever having the opportunity to hold the government to its commitments and review the critical religious liberty interests at issue.

By contrast, a temporary injunction causes defendants little, if any, harm. The government has already voluntarily delayed the transfer for over a decade—waiting *seven years* after the statute's passage to publish the first EIS, withdrawing it a few weeks later, and then waiting another *four years* to publish it again. During this decade and more, neither the government nor Resolution ever claimed this self-imposed delay caused any harm. As for Resolution, time and again, respondents have represented that *if* this transfer proceeds they would not have any salable copper for at least *ten years*, if ever. *E.g.*, C.A. Dkt. 61.2 at 7 (Peacey Decl.). And if the transfer and mine are eventually upheld, the government and Resolution can still mine every ounce of copper. As one judge has already recognized with this transfer, the error costs tip sharply in favor of granting relief until this matter can be resolved on the merits. *Apache Stronghold*, 782 F. Supp. 3d at 768. The remaining factors favor an injunction pending further review.

CONCLUSION

The Court should grant the requested injunction pending further disposition of a petition for a writ of certiorari. Alternatively, the Court should grant the injunction, treat this application as a petition for certiorari, grant plenary review, and set this appeal for expedited briefing and argument. At minimum, the Court should issue a temporary administrative stay allowing for consideration of this Application.

Respectfully submitted.

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