NO. 24-291

IN THE
SUPREME COURT OF THE UNITED STATES

APACHE STRONGHOLD,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF RELIGIOUS LIBERTY LAW SCHOLARS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici address this question:

Whether the government "substantially burdens" religious exercise under the Religious Freedom Restoration Act ("RFRA") when it singles out a sacred site for complete physical destruction, ending religious rituals forever.

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INTEREST OF *AMICI CURIAE*[1]

Amici are religious-liberty scholars who are familiar with RFRA's background and development and are concerned that the statute be read—according to its text and purposes—to provide meaningful protection for the religious exercise of all faiths. This includes Native Americans whose access to their historic sacred sites is at the mercy of the government, which owns the land.

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[1] Pursuant to Rule 37.2, all parties' counsel of record received timely notice of the intent to file this *amicus curiae* brief. In accordance with Rule 37.6, neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund its preparation or submission. No person (other than the *amici*, their members, or their counsel) made a monetary contribution intended to fund its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The federal government owns the land at Oak Flat, where Apache people have worshiped and conducted ceremonies for centuries. As the district court's findings show, "Apaches view Oak Flat as a 'direct corridor' to their Creator's spirit"—a place "'uniquely endowed with holiness and medicine'"—"and neither 'the powers resident there, nor [the Apaches'] religious activities . . . can be relocated.'" App. 201a (opinion of Murguia, C.J.) (quoting *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021)) (some quotations omitted). Oak Flat "serves as a sacred ceremonial ground, and these ceremonies cannot take place 'anywhere else.'" *Id.* If the government transfers the land to the Resolution Copper Company, the mine created at Oak Flat will blow a hole two miles long and more than 1,000 feet deep, destroying the sacred sites and completely preventing Apache worshipers from accessing them. As summarized in Chief Justice Murguia's en banc dissent:

> The impact of the mining activity on sacred sites will be immediate and irreversible. All that will be left is a massive hole and rubble, making the site unsuitable for religious exercise. Religious worship will be impossible,

> and the Apaches will be prevented from ever again worshipping at Oak Flat.

App. 235a (Murguia, C.J.).

The land transfer here is government action that will prevent and destroy Apache religious practices. Preventing and destroying religious practice is a "substantial burden"—by any ordinary meaning of that term—on the Apaches' religious exercise. And government action that substantially burdens religious exercise triggers the protections of RFRA.

Congress enacted RFRA in response to the Supreme Court's narrowing of Free Exercise Clause rights in *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA restored the requirement, applicable before *Smith*, that government demonstrate a "compelling interest" when it imposes a substantial burden on religion. 42 U.S.C. §§ 2000bb(b)(2), 2000bb-1. RFRA's purpose is to "guarantee its [the 'compelling interest' test's] application in *all* cases where the exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1) (emphasis added). That includes cases involving Native American sacred sites.

Nevertheless, the en banc court of appeals, in a splintered set of opinions, held that RFRA was inapplicable to this case. One majority of the en banc court—the "Murguia-/Nelson" majority[2]—held (6–5) held that "preventing access to religious exercise is an example of a substantial burden." App. 14a (per curiam opinion). That rule is correct as a matter of RFRA's text and purposes, and under it the

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[2] This majority reflected the combination of Chief Judge Murguia's dissent and Judge Ryan Nelson's opinion.

destruction of Oak Flat is clearly a substantial burden.

However, a different 6–5 majority—the "Collins-Nelson" majority—held that this rule does not apply when the burden that prevents religious exercise is imposed by "a disposition of government real property." *Id.* at 14a. In those cases, the Collins-Nelson majority said, government may entirely prevent religious exercise as long as it does not "'coerce individuals into acting contrary to their religious beliefs'" or "'discriminate' against" or "'penalize'" religious adherents. *Id.* at 14a–15a (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 449–50, 453 (1988)). The Collins-Nelson majority drew that standard, it asserted, from a pre-*Smith* decision, *Lyng*. See App. 58a ("RFRA's understanding of what counts as [a 'substantial burden'] must be understood as subsuming . . . the holding of *Lyng*."). The decisive sixth judge in the Collins-Nelson majority concluded that "[p]reventing access to religious exercise generally constitutes a substantial burden on religion"—but that the far narrower, coercion-based definition applies to government's use of its land. App. 119a (R. Nelson, J.).

Thus, the Ninth Circuit's controlling majority adopted a significantly narrower definition of burden for a single category of cases—government's use or disposition of real property—that overwhelmingly involves claims by Native Americans seeking to worship at their sacred sites. Under that narrower standard, the court of appeals held, the government may bring on the destruction of the Apaches' sacred site, preventing their worship, without having to

provide any justification for that action. Such a result will widely devastate Native American claims to worship at their sacred sites, because the government controls access to so many of those sites.

In this brief, *amici* show that the court of appeals' ruling conflicts with RFRA's text and with multiple decisions of this Court interpreting the statute. The court's narrow definition of "substantial burden" disregards this Court's repeated commands to follow the plain, ordinary meaning of a statutory text, including RFRA. The narrow definition also departs from the meaning of "substantial burden" in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*., which this Court has repeatedly held should be interpreted the same as RFRA.

Finally, the narrow definition, if applied in RFRA cases generally, would eliminate the statute's coverage in core cases that Congress intended to cover—most notably, in cases where a prison denies prisoners access to materials necessary for their religious exercise. And there is no reason to narrow the definition of "substantial burden" solely for cases involving government's disposition of its property. Native Americans with important sacred sites on government land are in the same vulnerable position as prisoners: they are dependent on the government to be able to exercise their religion, and they can suffer a substantial burden on religious exercise when government destroys their religious resources or prevents their access to such resources.

Amici are religious-liberty scholars who are familiar with RFRA's background and development and are concerned that the statute be read—according

to its text and purposes—to provide meaningful protection for the religious exercise of all faiths. That includes faiths whose religious exercise is at the mercy of the government because government controls access to the resources necessary for the practices of the faith. The Apaches and other Native American worshipers are in that position. This Court should grant review.[3]

ARGUMENT

The Court of Appeals' Decision, Which Holds that Government Action Destroying Apache Sacred Sites and Preventing Religious Exercise Imposes No "Substantial Burden" under RFRA, Conflicts with Multiple Decisions of this Court.

RFRA provides that the government may not "substantially burden" religious exercise unless it "demonstrates that application of the burden" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). The government's land transfer here will "substantially burden" Apache religious exercise, in any ordinary sense of that term, and thus it should trigger RFRA's protections. The transfer will bring about the substantial destruction of the Oak Flat sacred sites and thereby prevent Apache worshipers from engaging in their historic religious rituals. See *supra* pp. 2–3. In holding that the termination and

[3] *Amici* agree with petitioner that this case further calls out for review because the Ninth Circuit, whose jurisdiction "encompasses 74% of all federal land and almost a third of the nation's Native American population," is "the circuit with the most power over Native American lives and liberty." Pet. 35–36 (footnotes and citations omitted).

destruction of religious exercise did not trigger RFRA's protections, the court of appeals misconstrued the statute in violation of multiple decisions of this Court.

A. The Court of Appeals' Narrow Definition of "Substantial Burden" Conflicts with RFRA's Text and with This Court's Decisions Following RFRA's Plain, Ordinary Meaning.

The court of appeals' decision conflicts with the plain, ordinary meaning of RFRA's text—and thus with this Court's decisions under RFRA. This Court instructs that "[w]here Congress does not furnish a definition of its own, [courts should] generally . . . afford a statutory term 'its ordinary or natural meaning.'" *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Assn.*, 594 U.S. 382, 388 (2021) (quotation omitted). As both the majority and dissenting judges below recognized, RFRA's text provides no definition of "substantial burden." See App. 47a (Collins, J.); 213a–214a (Murguia, C.J.). Thus, the plain meaning governs.

Under the plain, dictionary meaning, a "burden" is "[s]omething that hinders or oppresses." *Black's Law Dictionary* (11th ed. 2019); see also *American Heritage Dictionary* (5th ed. 2022) (a "weight," or "something onerous or troublesome"). And a thing is "substantial" when it is "[c]onsiderable in importance, value, degree, amount, or extent." *American Heritage Dictionary*, *supra*. Therefore, RFRA is triggered by any government action that "hinders or oppresses" a person's religious exercise to a considerable degree or extent. There is no doubt that the destruction of Oak Flat—preventing the Apaches from worshiping at this

sacred site—would considerably hinder, i.e. "substantially burden," their religious exercise. See *supra* pp. 2–3.

The plain-meaning approach is not simply the general rule; this Court has twice applied it recently *under RFRA itself*. In *Tanzin v. Tanvir*, 592 U.S. 43 (2020), in ruling that damages awards against individual officials constituted "appropriate relief" under RFRA, this Court emphasized that "[w]ithout a statutory definition, we turn to the [relevant] phrase's plain meaning at the time of enactment." *Id.* at 48.

Likewise, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), this Court followed RFRA's plain meaning and rejected an argument that the statute was "limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Id.* at 706 n.18. There, the government asserted that it had a categorical compelling interest in overriding religious objections by actors who "choose to enter into commercial activity"; it relied on a statement in pre-*Smith* caselaw that a commercial actor's objections "'are not to be superimposed on the statutory schemes which are binding on others in that activity.'" *Id.* at 735 n.43 (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).

This Court held that the statement in *Lee* could not justify categorically excluding RFRA claims brought by commercial actors. The Court reasoned that "*Lee* was a free-exercise, not a RFRA, case" and that its statement excluding commercial actors' claims, "if taken at face value, is squarely inconsistent with the plain meaning of RFRA." *Hobby Lobby*, 573 U.S. at 734, 735 n.43 (explaining that under RFRA's text, "the Government does not have a free hand" in imposing

substantial burdens on religious exercise by commercial actors but may impose them "only if the strict RFRA test is met"). In short, *Hobby Lobby* refused to allow language from pre-*Smith* case law to justify excluding an entire category of claims that fell within RFRA's protections under the statute's plain meaning.

The court of appeals' decision here flatly violates *Hobby Lobby*. The en banc court gave government a "free hand" to destroy Native American sacred sites on government land even when that destruction imposes a "substantial burden" under the phrase's plain meaning. Instead the court adopted, for cases involving government's own land, the much narrower definition limiting "burdens" to cases where government imposes legal coercion or penalties on individuals. See *supra* p. 4. The court wrongly justified this departure from plain meaning by relying on *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439—which was "a free-exercise, not a RFRA, case" (*Hobby Lobby*, 573 U.S. at 734, 735 n.43).[4]

No other provision of RFRA's text can justify replacing the ordinary meaning of "substantial

[4] Reliance on *Lyng* is particularly inappropriate for RFRA because the Court there based its holding on the Free Exercise Clause's distinctive wording: "Congress shall make no law . . . prohibiting the free exercise [of religion]." In reasoning that the clause did not require government to give compelling justification for actions "which have no tendency to coerce individuals into acting contrary to their religious beliefs," *Lyng* emphasized that "[t]he crucial word in the constitutional text is 'prohibit.'" 485 U.S. at 450–51. But RFRA requires compelling justification not just when a law prohibits religious exercise, but whenever a law substantially burdens it.

burden" with a restrictive definition that limits the term to precise burdens involved in *Lyng* or in other free exercise decisions preceding *Employment Division v. Smith*. Judge Bea, concurring in the court of appeals, attempted to base such a restrictive definition on RFRA's statement of purpose, which says that the statute is meant "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1); see App. 88a–89a & n.12 (Bea, J.). But the purpose clause does not stop there; it states further that RFRA's purpose is "to guarantee [the compelling interest test's] application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). As other judges on the court of appeals recognized, the purpose clause by its terms "links *Sherbert* and *Yoder* to the 'compelling interest test'"—that is, to the test for justifying burdens on religious exercise—"*not* to the 'substantial burden' inquiry"—that is, the standard for triggering the compelling interest test in the first place. App. 216a (Murguia, C.J.) (emphasis in original); accord App. at 152a (R. Nelson, J.) (stating that the purpose clause "does not start and end with [the sorts of burdens on religion involved in] *Sherbert* and *Yoder*—it extends further to all substantial burdens").

For the same reason, a narrow definition of "substantial burden" incorporating language from *Lyng* finds no warrant in the provision of RFRA where Congress endorsed "the compelling interest test as set forth in prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5); see App. 86a (Bea, J.); App. 156a n.8 (R. Nelson, J.). If "the compelling interest test" in § 2000bb(b) means only the standard *justifying*

substantial burdens on religion—not the definition of such burdens—then its meaning in § 2000bb(a) is the same.

B. The Court of Appeals' Narrow Definition under RFRA Conflicts with This Court's Decisions Requiring that Identical Terms in RFRA and RLUIPA Be Defined the Same.

The court of appeals' restrictive coercion-based definition of "substantial burden" for some RFRA claims also departs from that court's interpretation of RLUIPA. The Ninth Circuit's RLUIPA cases follow the phrase's plain, ordinary meaning: any "'significantly great' restriction or onus on 'any exercise of religion'" triggers RLUIPA's application. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034–35 (9th Cir. 2004) (quotation omitted). But the court departed from that approach for cases involving government's use of its land.

By applying a different standard for some RFRA claims than for RLUIPA claims, the court of appeals again violated this Court's decisions. This Court has repeatedly made clear that courts should apply "'the same standard'" when analyzing RFRA and RLUIPA. *Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (quoting *Gonzalez v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006)). This is because RFRA and RLUIPA are "sister statute[s]" both enacted "'in order to provide very broad protection for religious liberty.'" *Holt*, 574 U.S. at 356–57 (quoting *Hobby Lobby*, 573 U.S. at 693); *see also Ramirez v. Collier*, 595 U.S. 411, 424 (2022). As explained in *Holt*, 574 U.S. at 356–58, both statutes were responses to this Court's narrowing of free exercise rights in *Smith*,

494 U.S. 872; and RLUIPA reimposed RFRA's standard in certain cases after this Court struck down RFRA's application to state and local laws in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In the light of that background, *Holt*, which interpreted RLUIPA, quoted and followed *O Centro* and *Hobby Lobby*, which interpreted RFRA. In turn, *O Centro*, 546 U.S. at 436, quoted and followed a decision interpreting RLUIPA, *Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005).

In short, this Court treats key terms as interchangeable when they appear in both RFRA and RLUIPA. The Ninth Circuit departed from that bedrock principle by holding that the destruction of Oak Flat and Apache worship was not a "substantial burden" under RFRA. The conflict with this Court's repeated decisions demands review and correction.[5]

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[5] We note that six other circuits likewise "recognize that a substantial burden plainly exists 'where the government completely prevents a person from engaging in religious exercise.'" Pet. 29 (collecting cases, and quoting App. 232a n.13, 236a) (Murguia, C.J.)). And "at least seven" circuits other than the Ninth Circuit agree "that [RFRA's and RLUIPA's] 'substantial burden' standards are one and the same." App. 223a (Murguia, C.J.) (collecting cases); accord *id.* at 136a–137a (R. Nelson, J.).

Thus, the court of appeals' decision conflicts with those of other circuits, and we agree with petitioner that this split is another reason for this Court to grant review. We simply focus on how the court of appeals' decision conflicts with this Court's decisions.

C. RFRA's Purposes Require that Native Americans Worshiping at Their Sacred Sites Have Protection, Like Other Claimants, Against Government Actions that Prevent or Destroy Their Religious Exercise.

As we have explained, one majority on the court of appeals, the Murguia-Nelson majority, held that government generally imposes a "substantial burden" when it prevents religious exercise or destroys the resources for such exercise. But a different majority, the Collins-Nelson majority, adopted a far narrower definition for cases involving government's disposition of its property. See *supra* p. 4. This *ad hoc* exception is unjustified and cannot withstand scrutiny under the method that this Court's decisions set forth for interpreting RFRA.

1. To begin with, the purposes of RFRA (and its sister statute RLUIPA) require that the term "substantial burden" extend beyond actions that coerce or penalize individuals, to encompass actions that prevent or destroy religious exercise. If "substantial burden" does not extend that far, RFRA (and RLUIPA) will be inapplicable in key cases where Congress meant for them to apply. And that result contravenes this Court's decisions.

The Court has made clear that RFRA must be interpreted to avoid interpretations that would prevent the statute from giving relief in certain important cases of religious exercise. For example, in *Tanzin v. Tanvir*, 592 U.S. 43, the Court unanimously held that money damages against federal officials were "appropriate relief" under RFRA in part because they were "the *only* form of relief that can remedy

some RFRA violations." *Id.* at 51 (emphasis in original). Because of that, the Court said, "[I]t would be odd"— indeed, erroneous—"to construe RFRA in a manner that prevents courts from awarding such relief." *Id.*

Here, RFRA and RLUIPA would fail to provide relief in core cases if the term "substantial burden" were defined to cover only coercion or penalties against believers, not all actions that prevent or destroy religious exercise. Most notably, the statutes would fail to provide protection in the core context of prisoners' religious exercise. In enacting RFRA and RLUIPA, Congress emphasized protection for the religious freedom of prisoners. As enacted, RFRA protected prisoners in both federal and state prisons. RLUIPA reinstated protections for state prisoners after the Court struck down RFRA's application to state and local laws; but even today RFRA provides the sole source of protection for federal prisoners. *Ish Yerushalayim v. United States*, 374 F.3d 89, 92 (2d Cir. 2004). Indeed, prison cases were among those this Court cited in *Tanzin* as examples for which RFRA should be construed to provide relief. See, e.g., 592 U.S. at 51 (citing *DeMarco v. Davis*, 914 F.3d 383, 390 (5th Cir. 2019)) (noting that *DeMarco* involved the "destruction of [a prisoner's] religious property").

Prison regulations can pervasively burden religious exercise because prisons control individuals' access to resources necessary to their religious practice. In prisons, the government exerts a degree of control "severely disabling to private religious exercise." *Cutter*, 544 U.S. at 720–21; see *id.* at 721 (noting that prisoners are "dependent on the

government's permission and accommodation for exercise of their religion").

As a result, prison officials can often make a prisoner's religious exercise impossible, without imposing sanctions on him, simply by declining the necessary resources for religious practice. For example, prisoners may need access to a particular space in order to worship or conduct rituals. The courts of appeals, including the Ninth Circuit, regularly hold that denial of such access is a substantial burden. See, e.g., *Yellowbear v. Lampert*, 741 F.3d 48, 53, 56 (10th Cir. 2014) (holding that it is a substantial burden when a prison declines to escort a Native American inmate to a sweat lodge); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988–89 (9th Cir. 2008) (holding the same when a prison declines to escort inmate to group worship services) (citing other cases involving communal worship in prisons); *Nance v. Miser*, 700 F. App'x 629, 632 (9th Cir. 2017) (same when prison declines to allow purchase of prayer oils).

Likewise, this Court held, before RFRA, that a Buddhist prisoner who alleged he was denied access to the prison chapel, among other things, stated a claim for a denial of free exercise under the First and Fourteenth Amendments. *Cruz v. Beto*, 405 U.S. 319, 319, 320 n.1, 322 (1972) (per curiam). The Senate committee report on RFRA cited *Cruz* as an example of prisoners' "right to freely exercise their religions," which the statute aimed to protect. S. Rep. No. 103-111, *Religious Freedom Restoration Act of 1993*, at 9 n.22 (1993).

Similarly, this Court recently held that a death-row inmate is entitled under RLUIPA to have a spiritual advisor pray aloud with him and touch him

during the lethal injection. *Ramirez v. Collier*, *supra*, 595 U.S. 411. In that case, only the spiritual advisor, not Ramirez, would have faced prison penalties or sanctions barring him from the chamber or penalizing him for misbehavior. *See id.* at 419. The only harm to Ramirez was that he was prevented from having his pastor pray and lay hands on him. Nevertheless, it was undeniable that "Texas's policy substantially burden[ed] [Ramirez's] exercise of religion" because "he will be unable to engage in protected religious exercise in the final moments of his life." *Id.* at 426, 433.

In none of the above cases are prisoners coerced into acting contrary to their religious beliefs or faced with penalties for acting on those beliefs. Rather, the government simply prevents the prisoner from practicing his faith because the relevant officials control the resources essential to the prisoner's practice and deny access to those resources. The definition of "substantial burden" must encompass such cases.

2. But the same principle encompasses Native Americans seeking to worship at their sacred sites on government property. These Native Americans share the key, "unique" feature of prison inmates: Government "'controls access to religious locations and resources'" necessary for these believers' religious exercise. App. 255a–256a (Murguia, C.J.) (quotation omitted) (citing Stephanie Hall Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301 (2021)). That is because "Native American religions are typically land-based" and "many traditional Native American religious sites are located exclusively on federal land."

Id. at 256a. Thus Native Americans "are 'at the mercy of government permission to access sacred sites.'" *Id.*

Unlike most believers, therefore, Native Americans and prisoners "must 'practice their religion in contexts in which voluntary choice is *not* the baseline.'" *Id.* (emphasis in original; quotation omitted). And government can prevent Native Americans' practice of religion by denying them permission to access resources, without imposing any direct penalty on them—in the same way that it can prevent prisoners' religious exercise. See *id.* (quoting Douglas Laycock and Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-21 Cato Sup. Ct. Rev. 33, 58 (government "took control over the tribes' ability to practice their traditions fully—in somewhat the same way that prisons control [incarcerated persons'] ability to practice their faith")).

The court of appeals nevertheless created an exception reading "substantial burden" narrowly in cases involving government's "disposition of its real property." App. 4a. The anomalous result is that law-abiding Native Americans get less protection for their religious exercise than do prisoners convicted of crimes.

Moreover, the category "disposition of [government] real property" does not distinguish sacred-sites cases from prison cases. The prison chapel or other meetings rooms for group worship are government's real property, and courts hold that denying access to them is a substantial burden. See *supra* p. 15.

The Collins-Nelson majority also erred in attempting to distinguish prison and sacred-sites cases on the ground that that prisons "inherently involve coercive restrictions" on inmates. App. 54a (Collins, J.); see also App. 192a (Van Dyke, J.) (asserting that prison restrictions "directly and immediately" coerce an inmates' religious exercise). As outlined above, some substantial burdens on prisoners' religious exercise do not involve direct or immediate coercion of the prisoner. They merely deny the prisoner access to religious exercise by denying meeting rooms, scriptures, worship items, or the assistance of clergy. See *supra* pp. 15–16.

Nor can the prison setting be distinguished on the ground that it involves a general form of coercion: i.e., that prisons' general control of prisoners' lives restricts their access to religious exercise. The same is true with respect to sacred sites on government land, such as Oak Flat. In the context of sacred sites as well as prisons, "the government has control over religious sites and resources, and religious adherents must 'practice their religion in contexts in which voluntary choice is *not* the baseline.'" App. 255a–256a (Murguia, C.J.) (emphasis in original; quotation omitted).

RFRA's purpose is to apply the compelling interest test in "all cases where free exercise of religion is substantially burdened," 42 U.S.C. § 2000bb(b)(1)—in other words, "[t]o assure that all Americans are free to follow their faiths free from governmental interference." S. Rep. No. 103-111, *supra*, at 8. By protecting all faiths even from facially neutral laws, the statute preserves government "neutrality in the face of religious differences." *Sherbert*, 374 U.S. at 409. Native American worshipers face the same sort

of government barriers to religious exercise as prisoners face. They too should enjoy RFRA's protections, in the light of the statute's text and purposes and this Court's decisions.

D. This Case Involves a Substantial Burden Even Under *Lyng*.

Finally, even assuming that *Lyng* controls on the meaning of "substantial burden" under RFRA, it does not require denying that a substantial burden on religious exercise exists here. This case is factually distinguishable from *Lyng*. It involves the physical destruction of a sacred site. *Lyng*, by contrast, involved mere disturbance to the peace of the site from a nearby logging road. In fact, *Lyng* emphasized that if the challenged action *had* involved the physical destruction of sacred sites and objects, the cases would have been quite different. *See Lyng*, 485 U.S. at 454 ("No sites where specific rituals take place were to be disturbed.").

Similarly, *Lyng* did not involve government actions blocking the access of Native worshipers to the sacred sites. Indeed, *Lyng* emphasized that if the challenged action "prohibit[ed] the Indian respondents from visiting" the sacred site, it "would raise a different set of constitutional questions." 485 U.S. at 453 (emphasis added). By contrast, "'[i]t is undisputed'" here that the copper mine, by turning the sacred site into a giant crater, "'will prevent the Western Apaches from visiting Oak Flat for eternity,' resulting in 'the utter erasure of a religious practice.'" Pet. 20 (quoting App. 237a, 240a–241a) (Murguia, C.J.)). That is a "substantial burden" under RFRA, even if RFRA takes guidance from *Lyng*.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted.

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