No. 24-291

In the
Supreme Court of the United States

Apache Stronghold,

Petitioner,

v.

United States of America, et al.,

Respondents.

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

BRIEF OF APACHE ELDER RAMON RILEY, PROFESSOR MICHALYN STEELE, AND SIX NATIVE AMERICAN RIGHTS AND CULTURAL HERITAGE ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN A. MEISER
Counsel of Record
MEREDITH H. KESSLER
LINDSAY AND MATT MOROUN
RELIGIOUS LIBERTY CLINIC
Notre Dame Law School
1338 Biolchini Hall of Law
Notre Dame, IN 46556
574-631-3880
jmeiser@nd.edu
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae are Apache Elder Ramon Riley, Professor Michalyn Steele, and six Native American rights and cultural heritage organizations.[1] *Amici* submit this brief to highlight the lower court's disregard for the drastic harms caused by the destruction of sacred sites and to ensure that the protections of RFRA and the First Amendment extend to the spiritual practices of all Indigenous people.

Ramon Riley is a respected Apache elder who serves as the White Mountain Apache Tribe's Cultural Resource Director, NAGPRA Representative, and Chair of the Cultural Advisory Board. Letters he sent to the U.S. government regarding Oak Flat are included in the record at Pet. App. 1167a–1175a. Riley has spent most of his life and career working to maintain Apache cultural knowledge and pass it down to future generations. He has spent the last two decades working to defend Oak Flat. He opposes the proposed mining project for Oak Flat because he believes it is wrong to "destroy sacred land that made us who we are." Pet. App. 1169a.

Michalyn Steele is the Marion G. Romney Professor of Law at Brigham Young University Law School. She is a federal Indian law scholar and tribal member of the Seneca Nation who has written about the legal and historical impediments to Indigenous people accessing sacred sites.

The members of the International Council of

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[1] No party or counsel for a party wrote any part of this brief. No person other than *amici* and their counsel made any financial contribution to the preparation of this brief. Counsel for all parties were notified ten days in advance pursuant to Supreme Court Rule 37.2.

Thirteen Indigenous Grandmothers come together to protect the lands where Indigenous peoples live and upon which these cultures depend.

The MICA Group (Multi-Indigenous Community Action) is a nonprofit organization that has worked with hundreds of Tribal Nations throughout the country on cultural revitalization and other projects.

Xanapuk Land Water and Culture Conservancy Inc., comprised entirely of citizens of the Fort Yuma Quechan Nation, fully supports the fight to protect all Tribal religious freedom and for protection of Tribal religious spaces.

American Indian Movement Cleveland Autonomous Network (Cleveland AIM) is an Ohio unincorporated nonprofit association that advocates for Indigenous rights, and strives to provide education and social services for Native Peoples in northeast Ohio.

Atsa Koodakuh wyh Nuwu, People of Red Mountain in the Paiute language, is an Indigenous-led grassroots organization representing tribal communities who are fighting to protect their sacred homelands from lithium mining in the McDermitt Caldera located in Northern Nevada.

Confederated Villages of Lisjan Nation, an Ohlone tribe, continues to inhabit its ancestral homeland, fight for its sacred sites, and revitalize its cultural practices.

SUMMARY OF ARGUMENT

Meaningful access to sacred sites such as Oak Flat is an indispensable part of many Indigenous tribes' religious exercise. Nonetheless, the government has repeatedly denied necessary access to these sites, and even destroyed them, thwarting the ability of tribal members to exercise core aspects of their spiritual practices. Regrettably, the Ninth Circuit's errant decision denies the Apache people critical legal protections against such destruction—and thus only invites the government to do more of the same. That decision not only gets the law wrong, but it threatens to continue a long and lamentable history of government disregard for Indigenous religious practices. It must be corrected.

In its fractured en banc opinion, the Ninth Circuit fashioned an erroneous and atextual definition of "substantial burden" under RFRA to arrive at the startling conclusion that the *complete* destruction of a person's ability to practice her religion does not qualify. That definition is nonsensical. It excludes situations where, like here, the ability to exercise one's religion is completely destroyed. When courts uniformly agree that even mere inconvenience or added expense may impose a substantial burden on religious exercise, it strains credulity to conclude that rendering a religious practice physically impossible cannot. The only justification the Ninth Circuit offered for doing so was its suggestion that RFRA ought to "subsume" a prior decision of this Court, *Lyng v. Northwest Indian Cemetery Protective Association*—a decision that RFRA does not mention, that does not itself use the phrase "substantial

burden," and that, if anything, RFRA was meant to *reject*.

But worse still, this misguided approach uniquely endangers land-based religions and Indigenous religious practices, which can never be reclaimed once the sacred sites on which they depend are lost. That danger is even more acute for practices that depend on the continued use of land under *governmental* control—as so many Indigenous sites are. And that, in turn, gerrymanders critical protections for religious exercise to leave Indigenous worshippers at a special disadvantage, perpetuating a long history of government callousness towards them.

To clarify the meaning of both RFRA and the First Amendment, and to ensure their critical protections for land-based faiths—and Indigenous people in particular—this Court should grant the petition for certiorari and reverse.

ARGUMENT

I. The Ninth Circuit's strained definition of "substantial burden" defies RFRA and idiosyncratically limits its protections.

In the decision below, the Ninth Circuit correctly dispensed with the unduly narrow definition of "substantial burden" it had previously set forth in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc). In its place, another splintered en banc panel has now imposed a modified but no less mistaken definition of "substantial burden."

In the Ninth Circuit's view, the "disposition of government real property does not impose a

substantial burden" on a claimant's "religious exercise" when it (1) has "'no tendency to coerce individuals into acting contrary to their religious beliefs'"; (2) "does not 'discriminate' against religious adherents"; (3) "does not 'penalize' them"; and (4) "does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" Pet. App. 14a–15a (per curiam) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449–50 (1988)); *see also* Pet. App. 40a (Collins Op.). This carve-out of "substantial burden" for cases concerning government property cannot be squared with the statute's text. And that invented definition would bizarrely exclude the *most* burdensome governmental actions from RFRA's protection, while offering relief from less consequential intrusions.

A. The Ninth Circuit's definition cannot be squared with RFRA's text.

First, the text of RFRA plainly encompasses the destructive action at issue here. RFRA generally prohibits the government from "substantially burden[ing] a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). Congress provided no definition of the term "substantial burden," but the plain meaning of that phrase unquestionably embraces situations where the government forever destroys individuals' ability to exercise their religious convictions.

"A 'burden' is '[s]omething that hinders or oppresses.'" *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 96 (1st Cir. 2013) (alteration in original) (quoting *Black's Law Dictionary* 223 (9th ed. 2009)). And "something is 'substantial' when it is 'important' or 'significantly great.'" *Id.* (quoting *Merriam-Webster's Collegiate*

Dictionary 1174 (10th ed. 1993)). It is true that "[a] burden does not *need* to be disabling to be substantial," *id.* (emphasis added), but no fair construction of the term "substantial burden" could exclude the destruction of the place where an individual must worship, *cf. San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) ("[F]or a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent.").

Numerous circuits have echoed this straightforward understanding: Individuals face the most extreme burden when they are required to forgo a religious practice entirely. As the Sixth Circuit has observed, "it is strange to think of this debate" over the definition of "substantial burden" when the prison "*barred* access to the [Native American religious] foods altogether." *Haight v. Thompson*, 763 F.3d 554, 564–65 (6th Cir. 2014). The Eleventh Circuit has held that "an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). And that circuit later clarified that complete prevention of religious exercise represents an *especially* severe burden. Complete prevention of religious exercise, the court explained, is an "example[] of the sort of conduct that *clearly satisfies* the substantial-burden standard—not . . . the standard itself." *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980

F.3d 821, 830 (11th Cir. 2020) (emphasis added). Other circuits agree.[2]

Perhaps unsurprisingly, the Ninth Circuit pointed to nothing in RFRA's text to justify its rule. The Ninth Circuit instead tied its atextual definition of "substantial burden" to this Court's decision in *Lyng*. But the statute does not mention *Lyng*—a case which itself does not mention the phrase "substantial burden." This Court has previously warned against importing "the specific holdings of our pre-*Smith* free-exercise cases" into RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014). And what the statute *does* say about this Court's precedents suggests that any test under *Lyng* was not meant to be incorporated.

RFRA explains Congress's finding that, in *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court had wrongly "eliminated the requirement that the government justify burdens on religious exercise imposed by" neutral laws. 42 U.S.C. § 2000bb(a)(4). And, Congress explained, the purpose of RFRA is "to restore" the test that existed prior to

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[2] *See C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("[A] land-use regulation that imposes a substantial burden on religious exercise is one that . . . render[s] religious exercise . . . effectively impracticable."); *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) ("[A] burden on a religious exercise rises to the level of being 'substantial' when (at the very least) the government . . . prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief." (citations omitted)); *Davis v. Wigen*, 82 F.4th 204, 212 (3d Cir. 2023) ("There can hardly be a more substantial burden on a religious practice or exercise than its outright prohibition. . . . [T]he more proximate the government action is to an outright bar, the more likely it is a substantial burden.").

Smith, as "set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." *Id.* § 2000bb(b)(1) (citations omitted). This test requires the government to demonstrate that its action is the least restrictive means of furthering a compelling interest when it substantially burdens religious exercise. *Id.* § 2000bb-1(b).

So RFRA requires the restoration of *some* pre-*Smith* case law. But not all—and not *Lyng*. Indeed, in *Smith* itself, this Court noted that several of its prior decisions—including *Lyng*—had "abstained" from applying the compelling-interest test from *Sherbert* and *Yoder*. *Smith*, 494 U.S. at 883–84. In other words, by this Court's own description, even before *Smith* certain cases did not reflect the *Sherbert* rule. According to this Court, *Lyng* specifically "declined to apply [the] *Sherbert* analysis." *Smith*, 494 U.S. at 883 (citing *Lyng*, 485 U.S. at 451); *see also Lyng*, 485 U.S. at 450–51; Pet. App. 244a, 247a–48a (Murguia Dissent). Rather, much like *Smith* itself, *Lyng* was a case where the Court "rejected [a] free exercise challenge[]" to a "neutral and generally applicable" law. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 460 (2017). It makes little sense to interpret the compelling-interest test that RFRA was specifically designed to restore by reference to cases that failed to apply that test at all—or worse still, a case that applied the very *Smith* rule RFRA supplants.

Interpreting RFRA to "subsum[e] . . . the holding of *Lyng*," Pet. App. 58a (Collins Op.), also runs counter to this Court's treatment of pre-*Smith* cases under RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA). In *Holt v. Hobbs*, 574 U.S. 352 (2015), a Muslim prisoner

claimed that a prison policy against growing beards substantially burdened his religious exercise in violation of RLUIPA, *id.* at 355–56. The lower courts rejected his claim by relying on pre-*Smith* cases, including *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), in which this Court had rejected a free exercise challenge to a law that incidentally burdened religion, *Holt*, 574 U.S. at 361. This Court reversed, concluding that Holt "easily satisfied [his] obligation" to show a substantial burden. *Id.* In concluding otherwise, the lower court had "improperly imported a strand of reasoning from cases [like *O'Lone*]," and, in doing so, "misunderstood the analysis that RLUIPA demands." *Id.* In those cases, questions like whether a law had only incidentally burdened religion or whether there were "alternative means of practicing religion" available might have been "relevant consideration[s]" in deciding whether the claimant's religious exercise had been impermissibly burdened. *Id.* But under RLUIPA's "greater protection," the policy substantially burdened Holt's religious exercise by requiring him to act in violation of his beliefs—notwithstanding anything that cases like *O'Lone* might suggest to the contrary. *Id.* at 361–62; *see also* Pet. App. 228a (Murguia Dissent) ("RFRA and RLUIPA later essentially codified Justice Brennan's [*O'Lone*] dissent.").

Like *O'Lone* and *Smith* itself, *Lyng* declined to apply the compelling interest test to a law that incidentally affected religious exercise. But RLUIPA and RFRA offer greater prohibitions against substantial burdens, specifically to override that watered-down approach to religious exercise claims. *Holt*, 574 U.S. at 357–58. RFRA should not be interpreted to somehow incorporate *Lyng* when it

undoubtedly rejects companion cases like *Smith* and *O'Lone*.

B. The Ninth Circuit's decision would idiosyncratically deny protection to the *most* egregious burdens on religion.

The Ninth Circuit's gerrymandered definition of religious burden also makes little sense. Any fair interpretation of substantial burden on religious exercise must include government action that prevents that exercise completely. Indeed, while courts, of course, disagree over exactly where the line for "substantial" burdens falls, *all* courts routinely find that burdens well short of rendering religious practices impossible count as "substantial." The Ninth Circuit, however, now holds that actions that go well beyond that do not count. That cannot be right.

In many cases, it is enough that the government's action has made religious activity more cumbersome, inconvenient, or expensive to constitute a substantial burden. For example, courts have repeatedly held that the government substantially burdens religious exercise when it requires Jewish or Muslim inmates to pay for kosher or halal meals while other prisoners receive food at no cost. *See Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 793–94 (5th Cir. 2012); *Jones v. Carter*, 915 F.3d 1147, 1150–51 (7th Cir. 2019); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317–18 (10th Cir. 2010). In the land-use context, the Seventh Circuit has held that requiring a church to expend considerable effort searching for other parcels of land or filing repeated additional applications with the city would have imposed "delay, uncertainty, and expense" on its ability to build a new church—a

substantial burden on its religious exercise. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005); *accord Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 352–53 (2d Cir. 2007). And this Court has recognized that imposing heavy fines for failing to comply with religiously objectionable regulations substantially burdens religious exercise, opining that "it would be hard to see what would" count as a substantial burden if such financial penalties did not. *Hobby Lobby*, 573 U.S. at 691.

If these actions impose substantial burdens, it should be obvious that destruction of religious exercise does too. Indeed, surely the "greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight*, 763 F.3d at 565. And although the government might not always be in a position to eliminate religious exercise entirely, when it does, other courts have found a burden. *See generally* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1333–43 (2021). This is often seen in the prison context, where courts have repeatedly held that the government imposes a substantial burden under RLUIPA when it prevents a prisoner from engaging in a particular religious practice.

For example, the Tenth Circuit concluded that the government substantially burdened a prisoner's religious exercise when the prison "flatly prohibit[ed]" him from accessing a sweat lodge needed for his religious practices. *Yellowbear*, 741 F.3d at 56 (Gorsuch, J.); *see also Davila v. Gladden*, 777 F.3d

1198, 1205 (11th Cir. 2015) (denying inmate beads and shells required by his religious beliefs was a substantial burden). The Fourth Circuit likewise recognized that the exclusion of a Muslim prisoner from a list of those approved to observe Ramadan imposed a substantial burden because he was left "[u]nable to fast," such that "he could not fulfill one of the five pillars or obligations of Islam." *Lovelace v. Lee*, 472 F.3d 174, 187–88 (4th Cir. 2006). And the Third Circuit recently determined that a prison substantially burdened claimants' religious exercise by "prohibit[ing] [them] from marrying throughout [their] four years at the prison." *Davis*, 82 F.4th at 213. Just recently, this Court ruled in favor of a death-row prisoner where no one disputed that a policy prohibiting his pastor from praying with him during his execution was a substantial burden, preventing him from "engag[ing] in protected religious exercise in the final moments of his life." *Ramirez v. Collier*, 595 U.S. 411, 426, 433 (2022).[3]

Here, the government's action will not merely inconvenience Apache Stronghold or make its particular beliefs more expensive to exercise. It will extinguish certain religious practices entirely. That

[3] To be sure, determining that the government has imposed a substantial burden is not the end of the inquiry. Rather, it triggers a strict-scrutiny analysis to find the "balance[] between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). In the prison context, for example, courts have not compelled prison officials to accommodate *every* request related to religious practice, as some restrictions might be justified even under this demanding standard. *See, e.g.*, *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008). As Petitioner explains, that means-end scrutiny—not the threshold burden inquiry—is the proper mechanism to address the interests that the government asserts here. Pet. 38–39.

surely imposes a "substantial burden" on those practices under any reasonable understanding of that term.

II. The Ninth Circuit's misguided approach uniquely harms Indigenous religious practices and perpetuates a lamentable history of government disregard for Indigenous people.

Failure to recognize the devastating (and indeed substantial) religious burden at issue here will uniquely harm Native Americans who practice land-based religions. Indeed, despite courts' otherwise generous protection for religious exercise under RFRA and the First Amendment, Native spiritual practitioners have often not received the same. That double standard should be rectified, not left in place to further a long and lamentable history of disregard for Indigenous religious rights.

Native American religious practice is inherently tied to the land on which that practice occurs. *See* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012); *see also Lyng*, 485 U.S. at 460–61 (Brennan, J., dissenting). To be sure, the importance of sacred sites is not unique to Native peoples. *See* Barclay & Steele, *supra*, at 1303. But what is unique to "Indigenous peoples in countries such as the United States is the extent of the obstacles that government has created and maintains to inhibit [their] use of these sacred sites." *Id.* at 1304. "These obstacles, both historic and contemporary, have resulted in catastrophic interference with Indigenous spiritual practices related to particular sites," and have "often operat[ed] as an effective prohibition on

[religious] practices." *Id.* And once that land is lost, the spiritual practices rooted there can often never be regained.

Conflict over access to sacred sites is unfortunately common for Native Americans because so many of their religious sites are located on property now controlled by the federal government. In fact, the majority of Native American lands are held in trust by the government—approximately 56 million acres in total.[4] And the government acquired much of this land—including, as Petitioner has alleged, Oak Flat—by ignoring treaties or simply confiscating it. *See* Excerpts from the Record at 2-ER-240–42, 256–57, *Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024) (No. 21-15295), ECF No. 34. The government forced out the Native inhabitants who once lived on the confiscated land, including the Apaches in the area of Oak Flat, often by violent means. As "settlers and miners entered the area [of Oak Flat,] . . . U.S. soldiers and civilians repeatedly massacred Apaches." Pet. 12; *see also* Pet. App. 858a. Indeed, in order to make way for mining interests, one of those soldiers, General James Carleton, ordered "'removal to a Reservation'" or "'utter extermination' of Apaches." Pet. at 12 (quoting John R. Welch, *Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859–1874*, SAGE Open, Oct.–Dec. 2017, at 1, 8).

Indigenous groups are thus often at the mercy of the government if they wish to continue centuries-old

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[4] *Native American Ownership and Governance of Natural Resources*, U.S. Dep't of the Interior, https://bit.ly/4dhKBno (last visited Sept. 19, 2024).

practices and ceremonies.[5] Indeed, the government's dispossession of Native lands is what made those groups dependent on legal protection to access these sites. *See* Joel West Williams & Emily deLisle, *An "Unfulfilled, Hollow Promise":* Lyng*,* Navajo Nation*, and the Substantial Burden on Native American Religious Practice*, 48 Ecology L.Q. 809, 814 (2021). But the government has often disregarded land-based claims of Native religious exercise, despite its "moral obligations of the highest responsibility and trust" in its relations with Native Americans. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942); *see also United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("a general trust relationship between the United States and the Indian people" is "undisputed"). The same callous disregard persists today, as the federal government continues to cause Indigenous sacred sites to be bulldozed, developed for commercial interests, and even blown up. *See* Barclay & Steele, *supra*, at 1296.

Unfortunately, courts have often failed to protect sacred sites from destruction. For example, in *Slockish v. U.S. Federal Highway Administration*, the government expanded a highway by bulldozing an Indigenous sacred site consisting of ancient burial grounds, an altar, and old-growth trees while leaving the other side of the highway untouched. No. 08-cv-

[5] To the extent the majority below purported to diminish the relevance of prison and land-use cases as situations in which government "coercion" is "already baked in," Pet. App. 54a, that could hardly distinguish cases involving the use of sacred Native lands which the government has actively taken from Indigenous groups for centuries. *See also* Barclay & Steele, *supra*, at 1320–43 (discussing "baseline of coercion" in these contexts). For a fuller account of the historic and ongoing failure to protect these sacred sites from destruction, see generally *id.*

01169, 2020 WL 8617636, at *17–18 (D. Or. Apr. 1, 2020), *report and recommendation adopted in relevant part sub nom. Slockish v. Fed. Highway Admin.*, No. 08-cv-01169, 2021 WL 683485 (D. Or. Feb. 21, 2021).[6] The court determined that the government had not imposed a substantial burden because it had not withheld a benefit or imposed a sanction on its religious exercise—even though the site had been completely destroyed. *Slockish*, 2020 WL 8617636, at *38.[7] Remarkably, the government later admitted that the site's destruction was completely unnecessary and eventually settled with the Indigenous plaintiffs before the case could be heard by the Supreme Court. Answering Br. for Fed. Appellees at 43, *Slockish*, 2021 WL 5507413 (No. 21-35220)*; BREAKING: Feds Agree*, *supra*; *Slockish v. Dep't of Transp.*, 144 S. Ct. 324 (2023) (mem.) (dismissing the petition for certiorari). That was cold comfort, of course, to the Indigenous people whose sacred burial ground had already been decimated.

Similarly, in *Standing Rock Sioux Tribe v. U.S. Army Corp of Engineers*, the government sought to grant an oil company an easement to land under a sacred lake. 239 F. Supp. 3d 77 (D.D.C. 2017). The flow of oil underneath the lake would spiritually desecrate the water for the Native American community that worshipped there, rendering their

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[6] *See also BREAKING: Feds Agree to Repair Native American Sacred Site*, Becket (Oct. 5, 2023), https://bit.ly/4ewmNgu.

[7] The Ninth Circuit dismissed the plaintiff's appeal of this decision as moot because, after a state defendant was dismissed, the remaining defendants could not provide any effective relief. *Slockish v. U.S. Dep't of Transp.*, No. 21-35220, 2021 WL 5507413 (9th Cir. Nov. 24, 2021).

practice impossible to perform in the manner required by their beliefs. *Id.* at 93. Regardless, the court found no "substantial burden" because the government's action did not place "substantial pressure" on the tribe to "modify [its] behavior and to violate [its] beliefs." *Id.* at 91 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)). In the court's view, RFRA posed no obstacle to the devastating oil project. *Id.* at 100.[8]

And in *Perez v. City of San Antonio*, the City of San Antonio, Texas, has barred the Lipan-Apache from a sacred bend in the river where they have performed religious ceremonies for centuries. No. 5:23-cv-977, 2023 WL 6629823 (W.D. Tex. Oct. 11, 2023). The district court appropriately recognized that blocking access to the site would substantially burden the plaintiffs' religious exercise. *Id.* at *1. But it failed to stop the City from its plan to destroy the spiritual ecology of the site by cutting down sacred trees and preventing cormorants from nesting there, although their presence is essential to Lipan-Apache religious rituals. *Id.* at *3. In that case, the City has argued the even the loss of these sacred rituals would not impose a "substantial burden" on the Lipan-Apache's religious exercise, *id.* at *26–27, 29,[9] a contention that

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[8] The tribe continues to litigate challenges under other federal laws. Shelia Hu, *The Dakota Access Pipeline: What You Need to Know*, Nat. Res. Def. Council (June 12, 2024), https://bit.ly/3MVqPTM.

[9] Although the Texas Religious Freedom Restoration Act was at issue in *Perez*, federal decisions on RFRA are persuasive for Texas courts. *See Merced v. Kasson*, 577 F.3d 578, 588 (5th Cir. 2009) (citing *Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009)).

the Lipan-Apache have continued to fight to stop that destruction from occurring.[10]

These are but a few examples from a regrettably long list of Native American religious practices that have been destroyed by government action.[11] And many other sacred sites face similar threat. Thacker Pass, or *Peehee Mu'huh*, is a Nevada landmark sacred to twenty-two Native American tribes. *Thacker Pass/Peehee Mu'huh*, Sacred Land Film Project (Apr. 18, 2023), https://bit.ly/3TFl8NI. The land has been used for thousands of years for various purposes,

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[10] On appeal, the Fifth Circuit initially opined that, although denying access to the site would substantially burden the plaintiffs' religious exercise, the destruction of the site's sacred ecology might not substantially burden the religious practice under Texas's analogue of RFRA. The court reasoned that the burden was only "indirect[]"—even though the spiritual elements needed for those practices would be destroyed. 98 F.4th 586, 599 (5th Cir. 2024), *opinion withdrawn and superseded on reh'g*, 115 F.4th 422 (5th Cir. 2024), *certified question accepted*, Docket, No. 24-0714 (Tex. Sept. 6, 2024). The Fifth Circuit has since withdrawn its opinion and certified a question of state law to the Texas Supreme Court, *Perez*, 115 F.4th at 423.

[11] *See, e.g.*, *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214–15, 1219 (9th Cir. 2008) (destructive operation of hydroelectric plant rendering Native religious practices impossible); *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1203, 1207–08 (D. Nev. 2009), *rev'd in part on other grounds sub nom. S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009) (destructive mining on land used by multiple Native American tribes for prayer, healing ceremonies, vision quests, and other religious practices); *Fallon Paiute-Shoshone Tribe v. U.S. Dep't of the Interior*, No. 22-15092, 22-15093, 2022 WL 3031583, at *4 (9th Cir. Aug. 1, 2022) (destructive geothermal project on government land that would make tribal religious exercise impossible because "spiritual desecration of a sacred area does not constitute . . . a substantial burden" (quotation omitted)).

including critical spiritual practices. *Id.* Tragically, it is also the site of two massacres at the hands of the United States government, and is therefore the final resting place of many Native Americans' ancestors. *Id.* But the sacred site is threatened by the impending construction of a large lithium mine. *Id.* Fast-tracked by the federal government along with the Oak Flat copper mine, the Thacker Pass mine would cause immense environmental harm and deface this sacred land. *Id.* The same disregard awaits those whose religious exercise depends on the existence and integrity of a multitude of other threatened sacred sites.[12]

Properly applied, RFRA should stand in the way of tragedies like these. Indeed, when interpreted as it is actually written, RFRA provides protections for exactly this kind of destructive activity. In *Comanche*

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[12] The list of endangered sites is unfortunately long: Indian Pass (an expanse of land sacred to the Quechan Tribe repeatedly threatened by gold mine construction in California), Debra Utacia Krol, *Quechan Tribe Seeks Protection of Sacred Lands with National Monument at Indian Pass*, AZCentral (Feb. 26, 2024, 6:01 AM), https://bit.ly/3XGCSJI; Monument Hill and Quitobaquito Springs (burial and ceremonial grounds sacred to Tohono O'odham Nation harmed by border wall construction in Arizona), Bonnie Povolny, *Tohono O'odham Nation: U.S. Blasts a Monument to Build a Wall*, Cultural Prop. News (Feb. 27, 2020), https://bit.ly/47CsWp4; Ha'Kamwe' (naturally occurring hot spring sacred to the Hualapai Tribe threatened by proposed lithium mine in Arizona), Maya L. Kapoor, *Mining for Lithium, at Cost to Indigenous Religions*, HighCountry News (June 9, 2021), https://bit.ly/3XUdvW2; and Bears Ears (national monument in Utah containing land sacred to many Native tribes that various federal administrations have shrunk and expanded), *Protecting Bears Ears National Monument*, Native Am. Rts. Fund https://bit.ly/4eAGTGi (last visited Aug. 15, 2024).

Nation v. United States, for example, the federal government attempted to build a training facility directly south of Medicine Bluffs, a Comanche sacred site. No. 08-cv-849, 2008 WL 4426621, at *3 (W.D. Okla. Sept. 23, 2008). The facility would have obstructed the last remaining viewscape of the sacred area—a feature which was "central to the spiritual experience of the Comanche people." *Id.* at *17. And the District Court for the Western District of Oklahoma, to its credit, correctly found that this obstruction would substantially burden the Comanche people's religious exercise, and ordered that the facility be built on another location. *Id.* at *17, *20. Unfortunately, other courts have failed to ensure that this result—the result that RFRA's text requires—is the norm.

Under the misguided approach adopted by a bare majority of the en banc panel below, the Apache people's centuries-old spiritual practices at Oak Flat will be lost forever. This Court's review is needed to correct the Ninth Circuit's disregard for these drastic harms, to revitalize the demands of RFRA's text, to protect the Apache's sacred exercise at Oak Flat, and especially to ensure the same protections for the spiritual practices of all Indigenous people across the country.

CONCLUSION

This Court should grant the petition for certiorari and reverse.

Respectfully submitted,

JOHN A. MEISER
Counsel of Record
MEREDITH H. KESSLER
LINDSAY AND MATT MOROUN
RELIGIOUS LIBERTY CLINIC
NOTRE DAME LAW SCHOOL
1338 Biolchini Hall of Law
Notre Dame, IN 46556
574-631-3880
jmeiser@nd.edu

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