# In the Supreme Court of the United States

APACHE STRONGHOLD,

*Petitioner,*

v.

UNITED STATES, ET AL.,

*Respondents.*

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

## BRIEF OF AMICI CURIAE OKLAHOMA, MISSISSIPPI, OREGON, AND SOUTH CAROLINA IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the government "substantially burdens" religious exercise under RFRA, or must satisfy heightened scrutiny under the Free Exercise Clause, when it singles out a sacred site for complete physical destruction, ending specific religious rituals forever.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**CASES**

**TABLE OF AUTHORITIES – Continued**

Page



**STATUTES**



**JUDICIAL RULES**

**TABLE OF AUTHORITIES – Continued**

Page

**OTHER AUTHORITIES**

## INTEREST OF THE AMICI CURIAE[1]

This case stands at the intersection of religious liberty, Native American issues, and governmental prerogative. *Amici curiae* are States invested in protecting and promoting all of these, in harmony, and for good reason. Oklahoma, for example, is home to 38 federally recognized Native American tribes. *See* U.S. Att'y's Off., N. Dist. of Okla., *Indian Country*, https://www.justice.gov/usao-ndok/indian-country. *Amici* States also welcome a great diversity of religious believers and communities of faith within their borders —including numerous minority religious groups. As such, they have a compelling interest in protecting the constitutional free exercise rights of all their citizens, tribal and nontribal alike. Those rights, profound and inviolate, are undermined by the Ninth Circuit decision here, which will effectively prohibit members of the Apache tribe from practicing their religion at their most sacred site, without subjecting the federal government's actions to heightened scrutiny.

*Amici* States believe that this outcome constitutes at least a "substantial burden" on the Apache tribe's religious exercise under the Religious Freedom Restoration Act (RFRA). Moreover, in part because of prior litigation involving a strikingly similar conflict between tribal religious traditions and federal land use, *Amici* States do not believe such a holding would compromise or cripple governmental functioning. In

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[1] *Amici* submit this brief pursuant to Sup. Ct. R. 37.2. *Amici* provided the respective counsels of record timely notice of the State of Oklahoma's intent to file this brief.

the 2008 case of *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), the court issued a preliminary injunction under RFRA, holding that the U.S. Army's proposed construction of a large warehouse near a sacred site would prevent Native American religious exercise. The animating principle of that case should guide this one as well: any governmental action that prevents sincere and substantial religious exercise is a substantial burden within the meaning of RFRA. As *Amicus* Oklahoma can attest, limitless RFRA litigation did not follow the ruling in *Comanche Nation*. The present decision of the Ninth Circuit, however, if left unchecked and uncorrected by this Court, will lead to the harms that Oklahoma has avoided: an imbalance between private religious belief and broad government power, the destruction of sacred places, and the extinguishment of timeless practices without significant scrutiny to ensure that such action is truly necessary.

## SUMMARY OF THE ARGUMENT

Congress enacted RFRA "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA safeguards the religious freedom of all Americans—including minority religious groups—by requiring the federal government to satisfy strict scrutiny when it imposes a substantial burden on their religious exercise. Yet here, the *en banc* Ninth Circuit reached the conclusion that the government can completely destroy a sacred site—forever snuffing out age-old religious rituals in the process—and still not impose a "substantial burden" on religious exercise within the meaning of RFRA. Why? Because, according to a fractured 6–5 majority, the plain meaning of "substantial burden" does not control in cases involving "the Government's management of its own land and internal affairs." *Apache Stronghold v. United States*, 101 F.4th 1036, 1053 (9th Cir. 2024) (en banc). Construing the inapposite pre-RFRA case of *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the majority held that government action does not trigger RFRA scrutiny unless it (1) "'coerce[s] individuals into acting contrary to their religious beliefs,'" (2) "'discriminate[s]' against" religious practitioners, (3) "'penalize[s]' them," or (4) "den[ies] them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Apache Stronghold*, 101 F.4th at 1055 (quoting *Lyng*, 485 U.S. at 449–50).

This interpretation of "substantial burden" is overly narrow. To begin, the Ninth Circuit misunderstands that the plain meaning of "substantial burden" easily

extends to government actions that prevent religious exercise. *See id.* at 1135–36 (Murguia, C.J., dissenting). By its terms, RFRA applies to "*all* Federal law"—that is to say, there is no carveout for the government's ownership of real property. 42 U.S.C. § 2000bb-3(a) (emphasis added). Accordingly, the destruction of the Apache's sacred site would impose a substantial burden on Apache religious exercise because that exercise is inherently and singularly tied to the specific holy place where it occurs—notwithstanding the fact of the government's property management thereon. Viewed in this light, the Ninth Circuit's conclusion "that the destruction of a sacred site cannot be a substantial burden" is untenable. *Apache Stronghold*, 101 F.4th at 1146 (Murguia, C.J., dissenting). So far, six other circuits—the Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh—have declined to adopt a similarly narrow view of "substantial burden," as did the Oklahoma federal district court in *Comanche Nation*.

The Ninth Circuit's legal error is compounded by the ramifications of its decision. By sanctioning the total and irrevocable degradation of a people's sacred land without at least putting the federal government to the task of meeting a heightened scrutiny review, it announces an almost unthinkable impairment of religious exercise. And the decision is hardly limited in scope, given that the federal government owns nearly one-third of the land in the United States, including parts of *Amici* States. If not overturned, people of other faiths would do well to take caution: "Like the miner's canary, . . . our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." Felix S. Cohen,

*The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

## ARGUMENT

### I. GOVERNMENT ACTION IMPOSES A SUBSTANTIAL BURDEN WHEN IT MAKES A PARTICULAR FORM OF RELIGIOUS EXERCISE IMPOSSIBLE BY DESTROYING A SACRED SITE.

This case asks whether the government substantially burdens religious exercise when it does something on its own property that renders the exercise impossible. Put differently, does "utter destruction" of a religious adherent's means and place of worship rise to the level of a substantial burden under RFRA? *Apache Stronghold*, 101 F.4th at 1128 (Murguia, C.J., dissenting). Contrary to the Ninth Circuit's reasoning, the answer should be yes.

"[S]ince time immemorial," the Western Apaches have worshipped and conducted ceremonies at a sacred site in Arizona called *Chí'chil Biłdagoteel*, also known as Oak Flat. *Id.* With the government's blessing, a foreign-owned mining company intends to excavate and extract massive amounts of copper ore from underneath Oak Flat, "causing the land to subside and eventually creating a crater nearly two miles wide and a thousand feet deep." *Id.* at 1129. "It is undisputed that this subsidence will destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise at their sacred site." *Id.* Because "the Apaches view Oak Flat as a 'direct corridor' to their Creator's spirit," it cannot be replaced

or relocated once it is destroyed. *Id.* at 1130. But the Ninth Circuit says this will not substantially burden the Apaches' religious exercise because the government is not, in a strict sense, penalizing them for exercising that right. This contravenes both the text and purpose of RFRA.

With the passage of RFRA in 1993, Congress created a statutory right providing that the federal government "shall not substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b). In other words, the only way that the government can justify a substantial burden is by demonstrating that the burden satisfies what is widely known as strict scrutiny. This makes sense because RFRA goes "far beyond what this Court has held is constitutionally required." *Hobby Lobby*, 573 U.S. at 706. Moreover, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). The statute also defines the "exercise of religion" to include "[t]he use . . . of real property" for religious exercise. *Id.* §§ 2000bb-2(4), 2000cc-5(7)(B).

To be sure, RFRA does not define what it means to "substantially burden" someone's religious exercise. But with RFRA, as with other statutes, this Court has emphasized that, "[w]ithout a statutory definition, we turn to the phrase's plain meaning at the time of enactment." *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020) (interpreting "appropriate relief" under RFRA and citing dictionary definitions). As the lead dissent in *Apache Stronghold* observed, "[a]t the time of RFRA's passage, a 'burden' was defined as '[s]omething oppressive' or

'anything that imposes either a restrictive or onerous load' on an activity." 101 F.4th at 1136 (Murguia, C.J., dissenting) (quoting *Burden*, BLACK'S LAW DICTIONARY (6th ed. 1990)). Likewise, "[a] burden is 'substantial' if it is '[o]f ample or considerable amount, quantity, or dimensions.'" *Id.* (quoting *Substantial*, OXFORD ENGLISH DICTIONARY 66–67 (2d ed. 1989)). And "[t]he term 'substantial' . . . doesn't mean complete or total, so a 'substantial burden' need not be a complete or total one." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.).

Guided by these plain definitions, then, "RFRA prohibits government action that oppresses or restricts any exercise of religion, whether or not compelled by, or central to, a system of religious belief, to a considerable amount." *Apache Stronghold*, 101 F.4th at 1136 (Murguia, C.J., dissenting) (quotations omitted). Indisputably, the Apaches have practiced their religion at Oak Flat for "at least a millennium." *Id.* at 1044. Government action that entirely forecloses this religious exercise by approving the destruction of the location where that exercise must necessarily occur imposes a substantial burden. The same holds true in other contexts where the government wholly prevents religious exercise from taking place. *See Ramirez v. Collier*, 595 U.S. 411, 426 (2022) (concluding prisoner was "likely to succeed" in demonstrating a substantial burden where pastor was barred from execution chamber and thus not permitted to lay hands on prisoner during execution). Put differently, this is not a fringe case where the parties are debating just how substantial a burden must be. Here, the total destruction of Oak Flat would obviously impose a substantial burden on Apache religious exercise.

In this regard, the decisions of numerous sister circuits make the Ninth Circuit's decision even more of an outlier. *See Yellowbear*,741 F.3d at 56 ("it doesn't take much work to see" that preventing access to a prison sweat lodge "easily" qualifies as a substantial burden); *Haight v. Thompson*, 763 F.3d 554, 564–65 (6th Cir. 2014) (Sutton, J.) ("barring access" to traditional foods during Native American religious ceremonies is "necessarily" a substantial burden); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 555–56 (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, C.J.) ("a substantial burden may arise" not only "when a prison threatens an inmate with some negative consequence" but also "when a prison declines to provide an inmate access to something that will allow him to exercise his religion"); *Christians v. Crystal Evangelical Free Church (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 Ass'n of Ala. v. City of Mobile*, 980 F.3d 821, 830–31 (11th Cir. 2020) (land-use regulation that "completely prevents" religious exercise "clearly satisfies the substantial-burden standard").

Writing for the Tenth Circuit in *Yellowbear*, then-Judge Gorsuch set forth the correct rule: whenever the Government "*prevents* the plaintiff from participating in [a religious] activity," giving the plaintiff no "degree of choice in the matter," that action "easily" constitutes a substantial burden on religious exercise. 741 F.3d

48, 55–56 (emphasis added). And although *Yellowbear* involved application of the Religious Land Use and Institutionalized Persons Act (RLUIPA), this Court regards RLUIPA as RFRA's "sister statute," which applies RFRA's "same standard" to prisons. *Holt v. Hobbs*, 574 U.S. 352, 356, 358 (2015). Put simply, the Ninth Circuit has misunderstood that, in Chief Judge Sutton's formulation, "[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight*, 763 F.3d at 565. There is also no cogent way to reconcile these statements with the Ninth Circuit's near-total reliance on the pre-RFRA decision of *Lyng*, which involved construction of a proposed road that "was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities." 485 U.S. at 443. Indeed, the Court in *Lyng* expressly observed that "a law prohibiting the Indian respondents from visiting the [sacred] area would raise a different set of constitutional questions." *Id.* at 453. That is exactly the situation we have here.

The government argued, and the Ninth Circuit found, that the substantial burden test simply does not apply here, to the government governing its own property. But again, RFRA employs sweeping language that applies to "all Federal law." 42 U.S.C. § 2000bb-3(a). "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws. . . ." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2020). The statute's text nowhere supports an exemption that makes government-owned lands a RFRA-free zone. *See also* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1322 (2021)

(observing that, in many cases, "this sacred land now belongs to the government only because it was taken from Indigenous peoples, often by coercive means"). The complete curtailment of a group's religious practice represents the most substantial of burdens, and certiorari is warranted.

This is not to say, of course, that the Apaches will automatically prevail. RFRA does not require ruling for religious practitioners, so much as it demands the federal government exercise the utmost care when substantially infringing upon religious beliefs and practices. *Amici* States take no position on the issue of whether the federal government's proposed actions here would survive strict scrutiny. Indeed, *Amici* States obviously would reserve the right to argue that the ability to dispose of their own property and holdings in various circumstances is a compelling interest. But the federal government should not be able to avoid that discussion entirely, in such an alarming scenario, through an overly narrow view of RFRA.

## II. *COMANCHE NATION* OFFERS THE CORRECT GUIDANCE FOR RESOLVING ISSUES OF TRIBAL RELIGIOUS EXERCISE ON FEDERAL LANDS.

Nearly two decades ago, an Oklahoma federal district court decided this identical issue on remarkably similar facts in *Comanche Nation*, reaching the correct result on the question of substantial burden of a tribe's religious exercise. There, the Comanche tribe challenged the U.S. Army's plan to construct a 43,000-square-foot warehouse on federal land in Oklahoma near Medicine Bluffs, a sacred site "of great cultural and religious significance to Native Americans in the area." 2008 WL 4426621, at *1, 6. The Comanches' RFRA allegations "emphasize[d] that Medicine Bluffs

has historically been the focus of sacred Comanche traditional religious practices, and it continues to have religious significance at the present time." *Id.* at *3. The Comanches argued that the warehouse would substantially burden their religious exercise because it would occupy "the precise location" where they stood for worship. *Id.* at *7. Noting that RFRA does not define "substantial burden," the court wrote that "[t]he Tenth Circuit has defined the term by stating that a governmental action which substantially burdens a religious exercise is one which must 'significantly inhibit or constrain conduct or expression' or 'deny reasonable opportunities to engage in' religious activities." *Id.* at *3 (quoting *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996)).

For its part, the government in *Comanche Nation* "urge[d] the Court to adopt a definition [of 'substantial burden'] applied by the Ninth Circuit." *Id.* at *3 n.5. But the court refused, stating "[t]he Tenth Circuit has not adopted that definition." *Id.* Instead, applying Tenth Circuit precedent, the court issued a preliminary injunction under RFRA, holding that permitting construction that would prevent Native American religious exercise on federal land "amply demonstrates" a "substantial burden." *Id.* at *17. In doing so, the court specifically found that Medicine Bluffs "has historically been, and is today, a sacred site of the Comanche people" and "the situs of traditional religious practices of numerous Comanches," that "[t]he practices engaged in by the Comanche people in this land area constitute the sincere exercise of religion as defined under the RFRA," and therefore the "[c]onstruction of the [] warehouse at its current location will impose a substantial burden on the traditional religious practices

of the Comanche people." *Id.* In sum, "an unobstructed view" of Medicine Bluffs "is central to the spiritual experience of the Comanche people." *Id.*; *see also Perez v. City of San Antonio*, No. SA-23-CV-977-FB, 2023 WL 6629823, at *11 (W.D. Tex. Oct. 11, 2023) ("fencing off" Native American sacred site "substantially burdened Plaintiffs' religious exercise" under state RFRA). The same principle that prevents the physical obstruction of a tribe's sacred space—as in *Comanche Nation*—should apply with no less equal force to that site's outright obliteration.

In the 16 years since *Comanche Nation* was decided in Oklahoma, that ruling has not led, so far as *Amici* States are aware, to any tribe's imposition of a "'religious servitude' that would 'divest the Government of its right to use what is, after all, *its* land.'" *Apache Stronghold*, 101 F.4th at 1051 (quoting *Lyng*, 485 U.S. at 449, 452–53). Rather, the decision strikes a workable, sustainable balance between tribal rights, individual conscience, and government interests. Oklahoma, that is, has yet to slide down any threatened slippery slope in regard to religious liberty and RFRA. *See Yellowbear*, 741 F.3d at 62 (courts must assess "requested exceptions . . . on a 'case-by-case' basis, taking each request as it comes: accommodations to avoid substantial burdens must be made until and unless they impinge on a demonstrated compelling interest"). Presumably, this is in part because (again) RFRA does not mean that every plaintiff wins automatically. Burdens must still be considerable and substantial. Religious beliefs must still be sincere. Governments can still protect compelling interests so long as the means are narrowly tailored. And so on.

For the Apaches, Oak Flat "embodies the spirit of the Creator." *Apache Stronghold v. United States*, 519 F.Supp.3d 591, 604 (D. Ariz. 2021). To them, Oak Flat is "like the Western Wall in Jerusalem, St. Peter's Basilica in Vatican City, or Ang[k]or Wat in Cambodia." App.893a–894a (quoting U.S. Dep't of Agric., U.S. Forest Serv., 3 *Resolution Copper Project and Land Exchange Environmental Impact Statement* 846 (Jan. 2021). It is "the Sistine Chapel of Apache religion." *Id.* Federal law requires viewing the destruction of that important a site as a substantial burden, regardless of whether it is governmentally owned land. To hold otherwise has immense implications, in no small part because the federal government owns nearly one-third of the land in the United States, and much larger portions of many of our Western States. To carve out such a large area as a no-RFRA zone should concern more than just the Apaches involved in this case; it should concern all Americans whose religious liberty is protected by one of the most monumental pieces of legislation Congress has ever enacted.

## CONCLUSION

For the reasons stated, this Court should grant the writ of certiorari.

Respectfully submitted,

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