No. 24-291

In the Supreme Court of the United States

APACHE STRONGHOLD, *Petitioner*,
v.
UNITED STATES, ET AL.

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

BRIEF OF SENATOR MIKE LEE AND PROTECT THE FIRST FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JAMES C. PHILLIPS
MEGAN SHOELL*
ANNIKA BOONE BARKDULL*
JUSTIN A. MILLER
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

This is a critical case for all people and communities of faith because it raises a fundamental question of what constitutes a "substantial burden" on the "exercise of religion" under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*. All agree that, for members of Apache Stronghold, Oak Flat is a space of paramount and unique religious importance where members of the community have worshipped for centuries. All further agree that the government's transfer of Oak Flat for mining operations will permanently destroy Oak Flat, effectively prohibiting the Apaches from engaging in religious worship there ever again. The question is whether these circumstances constitute a "substantial burden" on the Apaches' religious exercise. And the answer should be obvious—of course.

Yet, despite the obvious answer, a narrow majority of the *en banc* Ninth Circuit concluded that the Apaches will not be "substantially burdened" as defined by RFRA. In so doing, they adopted an erroneous and unduly narrow understanding of what a substantial burden is. That understanding cannot be squared with the text or purpose of RFRA or this Court's precedent and will undermine religious liberty in a host of other settings. Equally problematic, the

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amici curiae* or their counsel has made a monetary contribution toward the brief's preparation or submission. All parties were notified of the intent to file this brief at least 10 days prior to the deadline.

Ninth Circuit's decision improperly curtails Congress's legislative power by restricting its ability to set the presumptions and ground rules that govern the application of future statutes.

That is why this case is so important to *amici*. *Amici* Senator Mike Lee and Protect the First Foundation are deeply concerned, not only about the appropriate interpretation of RFRA—landmark legislation that passed unanimously in the House and 97-3 in the Senate—but also about aspects of the Ninth Circuit's decision that threaten to curtail Congress's legislative power. *Amicus* Protect the First Foundation (PT1) is a 501(c)(3) organization dedicated to preserving the religious freedoms that this case implicates. The *amici* believe it is important to defend the religious liberty of minority faiths and religious communities like Apache Stronghold—because the religious liberties of all rise or fall together.

STATEMENT

Since time immemorial, the Western Apache have worshipped at Oak Flat, a sacred place located on federally owned land in Arizona. Oak Flat serves as a "direct corridor" for the Apache to "speak to [their] creator," and it is the only place on earth with this connection. But in 2014, without exempting the law from RFRA, Congress directed the Secretary of Agriculture to transfer Oak Flat to a copper mining company. Absent judicial relief, Oak Flat will soon be a thousand-foot-deep crater.

Apache Stronghold sought an injunction prohibiting the land transfer. The district court denied that motion, holding that Petitioner had not

demonstrated a likelihood of success on the merits. A divided panel of the Ninth Circuit held that Apache Stronghold's RFRA claim was barred under that court's precedent in *Navajo Nation* v. *United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008).

The *en banc* Ninth Circuit split into two 6-5 majorities. One majority overruled *Navajo Nation* and held that preventing access to religious exercise constitutes a "substantial burden" under RFRA's "plain meaning." App. 209a-210a (Murguia, C.J.); *id.* at 118a-119a (Nelson, J.); *id.* at 3a (per curiam). But the other majority held that RFRA incorporated *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), and that, under that decision, a disposition of government real property does not impose a "substantial burden" unless it coerces, discriminates against, or penalizes religious believers or denies them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." App. 4a. Given that erroneous legal ruling, it held that Apache Stronghold is unlikely to succeed on its RFRA claim.

SUMMARY

The petition well explains several reasons this case merits the Court's review and, ultimately, reversal. *Amici* write separately to emphasize two additional reasons.

First, the Ninth Circuit erred—and contravened Congress's clear directive and intent—by failing to interpret RFRA's use of "substantial burden" consistent with its plain meaning. The *en banc* panel majority incorrectly held that RFRA implicitly incorporates the limits articulated in *Lyng*. But *Lyng*

merely interpreted what it means to "prohibit" free exercise, not what constitutes a "substantial burden." And, under RFRA's plain meaning, the complete destruction of a sacred site, which renders the Apaches' religious exercise impossible, manifestly imposes a substantial burden on the Apaches' religion. This Court's review is needed to ensure that the Ninth Circuit and other courts around the country interpret religious-liberty statutes passed by Congress according to their terms.

Second, the Ninth Circuit's interpretive approach contravenes and curtails Congress's essential ability to set presumptions and other ground rules governing the application of future statutes. Specifically, the *en banc* majority ignored the settled presumption of consistent usage in refusing to interpret RFRA consistently with the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. And at least one Ninth Circuit judge—at the behest of the United States—betrayed a serious misunderstanding of the "anti-entrenchment principle" that prevents one Congress from conclusively binding its successors. Both these assaults on Congressional prerogatives likewise merit the Court's review.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review To Establish That Government Actions that Make Religious Practice Impossible Create a Substantial Burden Under RFRA.

At bottom, this case asks whether—in a RFRA case—government action that makes the free exercise of a particular religious practice impossible substantially burdens religious exercise. The answer is plainly yes.

A. "Substantial Burden" Takes Its Plain Meaning.

Under RFRA (like RLUIPA), a claim for governmental interference with religious exercise has two steps. The first requires the plaintiff to show that the government's actions, even if implemented through a law of general applicability, create a "substantial[] burden" on the plaintiff's "exercise of religion." 42 U.S.C. § 2000bb-1(a). Once a plaintiff establishes a substantial burden, the burden then shifts to the government to show that its actions further a "compelling governmental interest" using the "least restrictive means." *Id.* § 2000bb-1(b).

Because the government has not even "attempted to satisfy the compelling interest test," App. 602a (Berzon, J., dissenting), this appeal turns on the first step. RFRA's text forbids the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The statute neither defines "substantial[] burden" nor enumerates (or limits) the ways in which a substantial

burden might arise. See *ibid.* This Court has repeatedly instructed that "[w]here Congress does not furnish a definition of its own, we generally seek to afford a statutory term its ordinary or natural meaning." *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 388 (2021) (cleaned up). RFRA is not exempt from that general instruction: This Court has applied that principle to undefined RFRA terms. See *Tanzin* v. *Tanvir*, 592 U.S. 43, 48-49 (2020) (interpreting RFRA's use of "appropriate relief").

Yet a narrow majority of the *en banc* Ninth Circuit here concluded that the destruction of Oak Flat, the most sacred site of the Western Apache and one where they feel compelled by their religious beliefs to worship regularly, would not substantially burden their religious exercise, rejecting the ordinary meaning of "substantial burden." App. 53a-58a. To reach that conclusion, the majority held that RFRA incorporated this Court's decision in *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). App. 47a-50a. *Lyng*, however, does not control here.

The *Lyng* majority was interpreting the text of the First Amendment, not RFRA. In response to Justice Brennan's claim that the First Amendment was "directed against any form of governmental action that frustrates or inhibits religious practice," *Lyng,* 485 U.S at 459 (Brennan, J., dissenting), the Court majority explained that the First Amendment "says no such thing" but instead forbids the government from "*prohibiting* the free exercise [of religion]," *id.* at 456.

Whatever *Lyng's* continuing validity as a matter of constitutional interpretation, its conclusions do not extend to RFRA because of the plain meaning of the text Congress used. Whereas *Lyng* turned on the First Amendment's use of the word "prohibiting," RFRA limits when the government may "substantially burden" religious exercise. This Court did not use the term "substantial burden" in *Lyng*. See 485 U.S. 439. And RFRA's use of that term imposes a far broader regulation of government activity. Indeed, as this Court has made clear, RFRA does not "merely restore[] this Court's pre-*Smith* decisions in ossified form" but rather goes "far beyond what this Court has held is constitutionally required." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706, 715 (2014). When interpreting RFRA, its plain, broader meaning—and not this Court's interpretation of different terms in *Lyng*—controls.[2]

B. The Destruction of Oak Flat Imposes a Substantial Burden.

Since RFRA does not define "substantial burden," the lower courts must follow this Court's guidance and apply the ordinary or natural meaning of that term. To do so here would naturally lead to only one

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[2] Furthermore, as Petitioner explains, Pet. 28-29, *Lyng* v. *Northwest Indian Cemetery Protective Association*—a case involving the development of government land around religious sites—did not involve the destruction of those sites. See 485 U.S. 439 (1988). To the contrary, the route chosen in *Lyng* did not disturb any sites at all, as it included "one-half mile protective zones around all the religious sites." *Id.* at 443. That difference alone should caution against using *Lyng* as a barrier to finding substantial burdens in cases where land used for specific religious practices is physically destroyed.

conclusion—that government action that makes a particular religious practice impossible, even in the land use context, imposes a substantial burden on religious exercise.

That conclusion is compelled, first, by RFRA's text. By its terms, RFRA's qualification that a "burden" must be "substantial" goes to the degree of the burden. Thus, when applying the identical term in an RLUIPA case, the Ninth Circuit correctly understood the modifier "substantial" to require merely that the government-imposed burden "be 'oppressive' to a 'significantly great' extent." *International Church of Foursquare Gospel* v. *City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (*ICFG*) (quoting *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). So too with RFRA. Beyond its requirement that a burden on religion be substantial, RFRA does not constrict the origins, forms, or categories of what constitutes a substantial burden.

To be sure, substantial burdens include both direct and "indirect" penalties—that is, putting the religious adherents to some choice as a price for their devotion. For example, in the First Amendment context, this Court has explained that, when the government puts a person "to a choice between being religious or receiving government benefits," the sovereign substantially burdens that person's religious exercise. *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 480 (2020). Similarly, when the government puts a Muslim prisoner to a choice between shaving his beard or facing discipline, the

government's action "easily" constitutes a substantial burden. *Holt* v. *Hobbs*, 574 U.S. 352, 361 (2015).

But those two examples are merely illustrative. They do not create an exhaustive list of ways the government can substantially burden religion. Sometimes the government—through its actions—makes the free exercise of a particular religious practice impossible. In such circumstances, resolution of the burden question should be even easier. Thus, substantial burdens also include "outright prohibitions" on particular forms of religious exercise. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 463 (2017) (quoting *Lyng*, 485 U.S. at 450). Justice Gorsuch—while serving on the Tenth Circuit—correctly stated the pertinent principle: 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" imposes a substantial burden on religious exercise. *Yellowbear* v. *Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014). Though *Yellowbear* was an RLUIPA case, nothing in RFRA's text compels a contrary conclusion in RFRA cases. With RLUIPA, as with RFRA, it takes a tortured interpretation of "substantial burden" to conclude that government action that makes an act of worship impossible fails to even implicate RFRA.

In similar settings, this Court's precedent recognizes as much. For example, in cases challenging COVID restrictions on religious exercise, this Court held that plaintiffs were likely to succeed in their claims that prohibiting in-person religious worship violated the First Amendment. See, *e.g.*, *Roman Cath.*

Diocese of Brooklyn v. *Cuomo*, 592 U.S. 14, 16-19 (2020); *Tandon* v. *Newsom*, 593 U.S. 61, 63-64 (2021). In one such case, this Court made clear that worshipping in person is a critical aspect of much religious worship, stating that "remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance." *Roman Cath. Diocese*, 592 U.S. at 19. The burden is even greater here: Unlike COVID restrictions, which were temporary violations of worshipers' rights, the destruction of Oak Flat will forever destroy a key site of worship for Native Americans.

Likewise, in *McDaniel* v. *Paty*, this Court recognized that a Tennessee law forbidding religious ministers from serving as delegates to the state constitutional convention imposed a substantial burden on the Free Exercise of a minister's religion. See 435 U.S. 618, 629 (1978). This was an outright ban on a particular aspect of the faithful's religious exercise, and this Court thus found that an outright ban on a particular religious practice constitutes a cognizable burden. *Id.* at 628-629.

Affording "substantial burden" its plain meaning, the government's proposed destruction of Oak Flat substantially burdens the free exercise of the Western Apache. The district court itself found that, to the Western Apache, "Oak Flat [i]s a 'direct corridor' to the Creator's spirit." App. 637a. This is because, in the district court's words, "Apache individuals pray at [Oak Flat] and speak to their Creator through th[ose] prayers." *Ibid.* Oak Flat, as the district court

acknowledged, "embodies the spirit of the Creator," a corollary of which is that, "without [Oak Flat and everything attending it], specifically [its] plants, because they have that same spirit," the land is "like a dead carcass." *Id.* at 637a-638a.

If Oak Flat were destroyed, moreover, the record is clear that the Western Apaches could not find a viable substitute in which to commune with the Divine. App. 17a-18a. It follows that a destroyed Oak Flat would devastate the Western Apache much like an obliterated Vatican for Catholics, a demolished Kaaba (in Mecca) for Muslims, or a dismantled temple for members of the Church of Jesus Christ of Latter-day Saints.

But the burden imposed on the Western Apache would be even worse than the destruction of religious buildings, because their religion is rooted in the land itself, not just buildings that have been erected there. As the district court acknowledged, "Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood." App. 638a.

If the burden that will be imposed on the Western Apache following the destruction of Oak Flat is not "a significantly great restriction or onus upon [religious] exercise," *ICFG*, 673 F.3d at 1067, then nothing is. Here, as is often the case, the most reasonable interpretation is also the correct one: By permanently, entirely, and irretrievably depriving the Western Apache of their key place of worship, the Government is substantially burdening their religious exercise.

II. The Court Should Grant Review to Vindicate Congress's Ability to Set Presumptions and Other Ground Rules Governing the Application of Future Statutes.

Review is also warranted to vindicate Congress's ability to set presumptions and other ground rules governing the application of future statutes. Here, the *en banc* majority ignored the well-settled presumption of consistent usage in refusing to interpret RFRA consistently with RLUIPA. And at least one Ninth Circuit judge—at the behest of the United States—betrayed a serious misunderstanding of the "anti-entrenchment principle" that prevents one Congress from conclusively binding its successors.

A. The Court Should Grant Review to Vindicate the Important Presumption of Consistent Usage.

Further illuminating the Ninth Circuit's error is its failure to follow precedent interpreting RLUIPA—and its consequent flouting of the well-settled presumption of consistent usage across statutes, particularly those dealing with similar subjects.

This Court has made clear that RFRA and RLUIPA should be interpreted consistently. See, *e.g.*, *Holt*, 574 U.S. at 356-357 (an RLUIPA case invoking RFRA cases to apply RLUIPA); *Hobby Lobby*, 573 U.S. at 695, 729 n.37 (a RFRA case invoking RLUIPA to apply RFRA). As Judge Nelson noted, seven circuits have thus "treated RFRA and RLUIPA as analogous statutes and define 'substantial burden' the same." App. 140a (R. Nelson, J., concurring). And indeed, a majority of the Ninth Circuit's *en banc* panel held that

RFRA and RLUIPA are "interpreted uniformly." *Id.* at 14a. Yet it refused to interpret "substantial burden" in this case consistent with its interpretation of that term in RLUIPA cases, asserting that RLUIPA cases "inherently involve coercive restrictions," while RFRA cases do not. *Id.* at 54a.

That holding was not only erroneous, it also threatens Congress's ability to legislate efficiently. As Chief Judge Murguia explained, "Under the majority's approach, dictionaries can supply the meaning of substantial burden in RFRA cases about zoning and confinement, but dictionaries appear to be irrelevant when a person challenges a different type of government action—as Apache Stronghold does here. Either the meaning of 'substantial burden' is the same under RFRA and RLUIPA, or the definition under RFRA is case dependent. It cannot be both." App. 254a (Murguia, C.J., dissenting).

RLUIPA cases make clear that the government's actions in this case constitute a "substantial burden." In *Ramirez* v. *Collier*, an RLUIPA case, this Court found a substantial burden on a prisoner's religious exercise when Texas denied his request to have his pastor place hands on him and pray vocally during his execution even though that situation did not involve either the denial of a benefit or the threat of a penalty. 595 U.S. 411, 424-426 (2022).

Despite *Ramirez*'s guidance, the Ninth Circuit here declared that these "sister statutes" should be interpreted differently. The *en banc* panel acknowledged that, in RLUIPA cases, "substantial burden" is interpreted according to its plain meaning. App. 54a. But for RFRA cases, it insists, the term

"must be understood as having *** adopted the limits that *Lyng* placed on what counts as a government imposition of a substantial burden on religious exercise." *Id.* at 53a. While RLUIPA does not reference *Sherbert* v. *Verner,* 374 U.S. 398 (1963) or *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), like RFRA does, neither statute defines "substantial burden" or provides any statutory text to limit the definition of "substantial burden" beyond its "plain meaning."

Even so, the panel implausibly concluded that, although Congress used the same term in each statute, the term has a different meaning in RLUIPA cases than in at least some RFRA cases. App. 54a. That conclusion departs from both this Court's precedent and the presumption of consistent usage, which "applies also when different sections of *** [a] code are at issue." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 172 (2012). And that presumption is particularly strong where, as here, there is a recognized "connection" between "the cited statute" and "the statute under consideration." *Id.* at 173. That connection is robust in the case of RFRA and RLUIPA, given that RLUIPA was passed in response to this Court's decision invalidating RFRA's application to the states. See *Hobby Lobby,* 573 U.S. at 695. Congress's swift response indicates that it intended to restore the same test in RLUIPA—including the same definition of substantial burden—that it enacted in RFRA. Under the settled presumption of consistent usage, it is implausible to read "substantial burden" more narrowly in RFRA cases than it is routinely read in RLUIPA cases.

The presumption of consistent usage, moreover, is important to Congress's ability to legislate efficiently and consistently. This Court should grant review to correct the Ninth Circuit's error and to vindicate that important presumption.

B. The Court Should Grant Review to Clarify the Anti-Entrenchment Principle.

Some of the judges below—though not the majority—also erred in their understanding of the so-called "anti-entrenchment" principle and did so at the behest of the United States. The text of RFRA plainly declares that it applies to federal statutes enacted after RFRA's adoption "unless such [later-enacted] law explicitly excludes such application." 42 U.S.C. § 2000bb-3(b). Below, the United States and some *amici* argued that this rule of construction conflicts with the anti-entrenchment principle, which says that no Congress can validly bind a future Congress. See Appellees' Suppl. Br. in Opp'n to Reh'g En Banc at 16-19, No. 21-15295 (9th Cir. Sept. 6, 2022), ECF No. 95; Appellees' Answering Br. at 16 n.3, No. 21-15295 (9th Cir. May 17, 2021), ECF No. 51; Br. of Am. Expl. & Mining Ass'n et al. as *Amici Curiae* at 6-11, No. 21-15295 (9th Cir. May 24, 2021), ECF No. 55. They also maintained that the land exchange is exempt from RFRA based on an implied conflict between them. And Judge Bea echoed these arguments in his concurring opinion. App. 108a-115a (Bea, J., concurring). But these contentions overread and misapply the anti-entrenchment principle. And this case gives the Court a good opportunity to correct the misunderstanding of

that principle by some of the judges below, and by the United States.

1. This Court has never applied the anti-entrenchment principle to block or curb RFRA's application. And it has consistently held that later-enacted statutes are subject to RFRA. For example, in *Little Sisters of the Poor*, this Court held that federal agencies properly considered RFRA when issuing a religious exemption from the Affordable Care Act's contraceptive mandate. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 680-681 (2020). The Court identified certain guideposts as decisive: (1) "RFRA specifies that it 'applies to all Federal law, and the implementation of that law, whether statutory or otherwise,'" *ibid.* (quoting 42 U.S.C. § 2000bb-3(a)); (2) "RFRA also permits Congress to exclude statutes from RFRA's protections," *id.* at 681 (citing 42 U.S.C. § 2000bb-3(b)); (3) "[i]t is clear from the face of the statute that the contraceptive mandate is capable of violating RFRA," *ibid.*; and (4) "[t]he ACA does not explicitly exempt RFRA," *ibid.* None of this reasoning makes sense if the anti-entrenchment principle impliedly nullifies the requirement for Congress to exempt RFRA expressly.

Or consider *Hobby Lobby*, 573 U.S. 682. It brushed aside as irrelevant a rejected amendment to the Affordable Care Act "because any Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law *explicitly excludes* such application by reference to [RFRA]." *Id.* at 719 n.30 (citation omitted). The Court explained that "[i]t is not plausible to find such an explicit reference in the

meager legislative history on which the dissent relies." *Ibid*. Once again, the Court accepted RFRA's command that later-enacted statutes can avoid applying RFRA only by saying so explicitly. Missing was any suggestion RFRA's express-statement provision somehow offends the anti-entrenchment principle.

Likewise, *Bostock* v. *Clayton County*, 590 U.S. 644 (2020), says that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." *Id*. at 682 (citing 42 U.S.C. § 2000bb-3). If the Court understood RFRA to be modified by the anti-entrenchment principle, surely it would have included some modifier before "federal laws" like "pre-RFRA" or "older." While Title VII pre-dates RFRA, *Bostock* implies that RFRA validly applies to statutes enacted after its adoption.

These decisions under RFRA are unsurprising since other federal statutes also direct Congress to apply a law unless expressly exempted. For example, the Administrative Procedure Act states that no later statute will "supersede or modify" certain provisions relating to administrative law judges "except to the extent that it does so expressly." 5 U.S.C. § 559. Likewise, the National Emergencies Act provides that no later-enacted statute "shall supersede this subchapter unless it does so in specific terms." 50 U.S.C. § 1621(b). RFRA is consistent with the standard legislative practice permitting prior statutes to apply to future legislation unless Congress explicitly provides otherwise, and there is no reason to disregard that practice here.

2. Even without contrary precedent, it is hard to see how RFRA could possibly violate the anti-entrenchment principle. Requiring Congress to state explicitly when RFRA does not apply does not subtract from Congress's authority. RFRA leaves Congress free to determine whether and how far RFRA applies to later-enacted statutes. See generally Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1697-1699 & n.94 (2002) (rejecting the anti-entrenchment principle as a reason to question rules like RFRA).

There is no express repeal of RFRA in this case. Nothing in the Oak Flat land-transfer rider (known as Section 539p) expresses an overt intent to disregard RFRA, since it says nothing about RFRA, religious liberty, religion, or sacred sites. See 16 U.S.C. § 539p. Nor does Section 539p's legislative history say anything about RFRA. None of this should be surprising because the rider was "jammed into th[e] defense bill *** without debate." 160 Cong. Rec. S6701, S6735 (Dec. 12, 2014) (statement of Sen. Ron Wyden).

Had Congress intended to repeal RFRA's application to Section 539p, it certainly knew how to do so. Indeed, it included an express exemption from another statute, the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1716(b). See 16 U.S.C. § 539p(c)(5)(B)(ii). That it did not include any similar language for RFRA indicates that Congress intended that statute to apply to the Land Transfer Act as it would to any other law. See App. 260a (Murguia, C.J., dissenting).

Lacking an express repeal, the government insists that any inconsistency with Section 539p

renders RFRA repealed by implication. But that argument offends the canon against implied repeals. See Scalia & Garner, *supra,* at 279. Under that canon, it is a "cardinal rule that repeals by implication are not favored." *Traynor* v. *Turnage*, 485 U.S. 535, 547 (1988) (cleaned up). This Court has expressed "'especially strong' aversion to implied repeals of standalone laws through appropriation riders." *Center for Investigative Reporting* v. *United States Dep't of Just.*, 14 F.4th 916, 932 n.7 (9th Cir. 2021) (quoting *Maine Cmty. Health Options* v. *United States*, 590 U.S. 296, 315 (2020)). This "especially strong aversion" makes good sense for land-transfer riders. Courts do not assume that members of Congress "review exhaustively the background of every [rider] before voting on [it]." *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 190 (1978). That assumption is spot-on here. Congress voted on the Oak Flat land transfer without debating its rationale and lawfulness. See 160 Cong. Rec. at S6735 (Dec. 12, 2014) (statement of Sen. Ron Wyden) ("Neither the Senate Energy and Natural Resources Committee nor the House of Representatives has approved that provision this Congress, yet it is being jammed into this defense bill today without debate.").

Settled rules for discerning an implied repeal are "extremely strict." *Ledezma-Galicia* v. *Holder*, 636 F.3d 1059, 1069 (9th Cir. 2010). Implied repeals "will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Hawaii* v. *Office of Haw. Affs.*, 556 U.S. 163, 175 (2009) (quoting *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007)). Finding a repeal by implication requires proof that "the later statute expressly

contradicts the original act." *National Ass'n of Home Builders*, 551 U.S. at 662 (cleaned up). Absent an express repeal, any conflict between the statutes must be "irreconcilable"—meaning "such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all"—to find an implied repeal. *Id*. at 662-663 (cleaned up).

To determine whether Congress expressed a clear and manifest intention to "repeal or modify" an earlier statute, courts "focus on the language of the [later] statute." *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians* v. *United States Dep't of Energy*, 232 F.3d 1300, 1307 (9th Cir. 2000). If that language is "ambiguous," courts also "consider the relevant legislative history." *Ibid*.

3. Construing the eleventh-hour appropriations rider embodied in Section 539p as an implicit repeal of RFRA—a statute that Congress adopted almost unanimously following intense congressional focus—would flout these principles. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) ("congressional silence" like this cannot be "read *** as effectuating a repeal by implication"); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 88 (1982) ("The statutory language provides no basis for implying such a repeal, and nowhere in the legislative history is there any mention that [the later statute] might conflict with other laws.").

Nor does the land-exchange rider pose an irreconcilable conflict with RFRA. A side-by-side comparison with Section 539p discloses no conflict at all, much less an irreconcilable one. As-applied conflicts like those identified by the government and

its *amici* fail the standard for an implied repeal. See*, e.g.*, *Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987) ("Nothing in the language of these two provisions suggest the existence of [an] irreconcilable conflict.") (cleaned up). Given the absence of an express repeal and no text in Section 539p evincing an implied repeal, it follows that Section 539p was adopted subject to RFRA—like every other statute adopted by Congress since it passed RFRA in 1993.

Even if Section 539p were ambiguous, the legislative history does not support that Congress intended an implied repeal of RFRA. Judge Bea asserts that "Congress knew the adverse effects that the Land Exchange Act would have upon the Indian tribes with respect to the planned excavation of the Oak Flat area," citing testimony before a House subcommittee in 2007. App. 109a (Bea, J., concurring) (citing *Se. Ariz. Land Exch. & Conservation Act of 2007: Hearing on H.R. 3301 Before the Subcomm. on Nat'l Parks, Forests & Pub. Lands of H. Comm. on Nat. Res.*, 110th Cong. 18 (2007)). But that iteration of the Land Exchange Act died in committee after that hearing.[3]

The Land Transfer Act did not pass until seven years later, when two senators with close ties to Resolution Copper attached it as a rider to a must-pass defense bill, with a government shut-down looming. As this Court has recognized, "excerpts from committee hearings" are "among the least illuminating forms of

[3] Southeast Arizona Land Exchange & Conservation Act of 2007, H.R. 3301, 110th Cong. (2007), available at https://tinyurl.com/4e2bfwse.

legislative history." *Advocate Health Care Network* v. *Stapleton*, 581 U.S. 468, 481 (2017). And it has particularly scorned "rel[ying] heavily on statements from witnesses in congressional hearings years earlier on a different bill." *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 437 (2019). Whatever value such legislative history might have under other circumstances is certainly diminished when nearly a decade passes between the hearing and the enactment of the statute in question.

In short, as Chief Judge Murguia explained, "for a statute to exempt itself from RFRA, a simple majority of Congress need only exempt" it. App. 260a (Murguia, C.J., dissenting). "Such a requirement does not require a 'magical password' to supersede RFRA, nor does it violate the legislative anti-entrenchment principle." *Ibid.* But Congress did not choose to exclude the Land Transfer Act from RFRA's reach. And this Court should make clear that the anti-entrenchment principle cannot be used to nullify "super-statute[s]" like RFRA. See, *e.g., Bostock*, 590 U.S. at 682.

CONCLUSION

Congress enacted RFRA to "provide very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693. The *en banc* Ninth Circuit, however, has substantially narrowed RFRA in a way that Congress never intended—and never wrote into the statute. In so doing, the Ninth Circuit has also improperly curtailed Congress's legislative power by limiting its ability to set the presumptions that will govern the application of future statutes. This Court should grant

review to resolve these serious problems with the Ninth Circuit's analysis.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
ERIK S. JAFFE
JAMES C. PHILLIPS
MEGAN SHOELL*
ANNIKA BOONE BARKDULL*
JUSTIN A. MILLER
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

*Not admitted in D.C.

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