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 IN OPPOSITION FOR RESPONDENT RESOLUTION COPPER MINING LLC

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QUESTION PRESENTED

In 2014, Congress passed the Southeast Arizona Land Exchange and Conservation Act (Land Exchange Act) "to authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States." 16 U.S.C. § 539p(a). Following "government-to-government consultation with affected Indian tribes," the Secretary of Agriculture "is authorized and directed to convey to Resolution Copper" 2,422 acres of U.S. Forest Service land in exchange for 5,460 acres of Resolution-owned land across Arizona. *See id.* § 539p(b)(2), (b)(4), (c)(1), (c)(3)(A), (d)(1). The land exchange will allow Resolution to build a mine with the potential to supply nearly 25% of U.S. copper demand. And the United States will acquire numerous culturally and ecologically valuable parcels from Resolution, including Apache Leap, a site that is sacred to many Western Apache people. *Id.* § 539p(d)(1).

The question presented is:

Whether the Land Exchange Act violates the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, or the Free Exercise Clause.

CORPORATE DISCLOSURE STATEMENT

Respondent Resolution Copper Mining LLC is a Delaware limited liability company that is 55% owned by Resolution Copper Company, an indirect, wholly owned subsidiary of Rio Tinto plc, and 45% owned by BHP Copper Inc., an indirect, wholly owned subsidiary of BHP Group Limited. Rio Tinto plc and BHP Group Limited are publicly traded companies. Upon information and belief, no publicly held company owns 10% or more of either company's stock. No other publicly held company owns 10% or more of the stock in Resolution Copper Mining LLC.

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INTRODUCTION

The en banc Ninth Circuit correctly determined that the Southeast Arizona Land Exchange and Conservation Act (Land Exchange Act), 16 U.S.C. § 539p, does not violate the Religious Freedom Restoration Act (RFRA) or the Free Exercise Clause. As the en banc court explained, this case is "indistinguishable" from *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), which held that the government does not impose a cognizable burden on religion when it disposes of its *own land*. Pet.App.32a. As the en banc court further explained, Congress in RFRA enshrined decisions like

Lyng, which elucidate the kinds of government actions that impose cognizable burdens on religion. Pet.App.52a-53a. That fact-bound application of settled Supreme Court precedent does not conflict with the decision of any other circuit and does not warrant this Court's review.

Petitioner Apache Stronghold virtually ignores the Ninth Circuit's narrow, land-use-specific holding. Petitioner (at 2) instead casts the decision below as broadly holding that "prevent[ing]" religious exercise never violates RFRA. But the Ninth Circuit held the opposite: "preventing access to religious exercise *is* an example of substantial burden." Pet.App.14a (emphasis added). The en banc majority merely concluded that, under *Lyng*, the government's disposition of its own land does not impose a cognizable burden under RFRA or the Free Exercise Clause. Petitioner identifies no court-of-appeals case holding otherwise.

Petitioner's real target is not the Ninth Circuit's analysis, but *Lyng*, which petitioner (at 34-35) asks this Court to overrule for the first time in this litigation. But no Justice has questioned *Lyng*, and petitioner offers no good reason to overrule that settled precedent now.

Even were this Court inclined to consider how RFRA and the Free Exercise Clause apply to federal land use, this case would be a manifestly unsuitable vehicle for doing so. Petitioner is a nonprofit organization with no religious claim of its own and thus no standing. Moreover, RFRA does not apply to the Land Exchange Act because Congress explicitly directed that the land exchange "shall" proceed, 16 U.S.C. § 539p(c)(10), abrogating any contrary suggestion in RFRA. And petitioner has continually shifted its ask, defining the land at issue at least four different ways and, remarkably, including in its petition a photograph from a different site entirely. Those pivots

leave the scope and consequences of the dispute deeply uncertain. Ten years ago, an overwhelming bipartisan majority in Congress determined that this land exchange is in the national interest, and three administrations have now defended it. This Court should deny the petition and allow this vital project to proceed.

STATEMENT

A. Factual and Statutory Background

1. The Constitution grants Congress the "Power to dispose of … Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, and thereby entrusts to Congress power over public land "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citation omitted). Pursuant to that power, in December 2014, Congress passed and President Obama signed the Land Exchange Act as part of a package of over two dozen land-conveyance provisions within a larger appropriations bill. Pub. L. No. 113-291, § 3003, 128 Stat. 3292, 3732-41 (2014) (codified at 16 U.S.C. § 539p); *see id.* §§ 2831-2841, 3001-3014, 128 Stat. at 3702-13, 3719-59. The Act "authorize[s] and direct[s]" the Secretary of Agriculture to convey to Resolution a 2,422-acre parcel in Arizona's Tonto National Forest, known as Oak Flat,[1] in exchange for 5,460 acres[2]

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[1] Consistent with petitioner's complaint, D. Ct. Dkt. 1, at 5, 14, Resolution uses "Oak Flat" to refer to the 2,422-acre parcel that Congress directed the Secretary to transfer to Resolution. As discussed, *infra* pp. 29-31, petitioner's definition of "Oak Flat" has shifted significantly during this litigation.

[2] The Act describes Resolution as transferring approximately 5,344 acres. 16 U.S.C. § 539(d)(1). Subsequent surveys increased the acreage. *See* 1 USDA, Final Environmental Impact Statement:

of Resolution-owned land. 16 U.S.C. § 539p(b)(2), (c)(1), (d)(1).

Arizona has been America's largest copper producer since 1910.[3] The state flag proudly features a copper star.[4] Oak Flat sits at the heart of Arizona's "Copper Triangle"—an area home to over 30 mines for copper, silver, gypsum, marble, and other minerals, 1 FEIS 7-8, with a history of mining since the 1870s, Pet. 12.

One of the oldest mines in the Copper Triangle is the Magma Mine, which dates to 1910. 1 FEIS 6-7. In 1995, Magma's operators discovered what is now the world's second-largest copper deposit. Pet.App.687a; *see World's Biggest Copper Projects*, Mining.com (Jan. 30, 2023), https://tinyurl.com/2b6cuxv2. That deposit lies up to 7,000 feet underground, mostly beneath private land that Resolution already owns or Forest Service land to which Resolution owns the mineral rights. Pet.App.687a-689a; 151 Cong. Rec. 11,180 (2005) (statement of Sen. Kyl). But a suspected portion of the deposit lies under a part of Oak Flat that is closed to mining and reserved for Forest Service use as "camp grounds, recreation areas, or for other public purposes." *See* 20 Fed. Reg. 7,336, 7,337 (Oct. 1, 1955).

2. Copper is "essential to electricity generation, distribution, and storage," making it "the mineral most

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Resolution Copper Project and Land Exchange, at ES-8 (Jan. 2021), https://tinyurl.com/5c7pvkjk (FEIS).

[3] Charles K. Hyde, *Copper for America* 129 (1998).

[4] Randy Howe, *Flags of the Fifty States* 191 (2009).

fundamental to the human future"[5] and a U.S. Department of Energy-designated "critical material[] for energy."[6] Electric vehicles, solar panels, wind turbines, nuclear reactors, geothermal and hydropower plants, as well as traditional power plants, all use vast amounts of copper to produce and store electricity.[7] As the world shifts to electrical power, "[t]he demand for copper is expected to increase by between 275 and 350% by 2050."[8] The United States dominated global copper production in the early 20th century, but now produces only half of its own copper.[9]

In May 2005, a bipartisan group of lawmakers, including Senators John McCain and Jon Kyl and seven of Arizona's eight congressmembers, introduced legislation to convey Oak Flat to Resolution in exchange for Resolution-owned land across Arizona. S. 1122, 109th Cong. (as introduced May 25, 2005); H.R. 2618, 109th Cong. (same). Over the next nine years, Arizona congressmembers introduced ten other bills to transfer Oak Flat to Resolution. Pet.App.19a n.1.

Native American interests were front and center in the debate over Oak Flat. Congress held six hearings on the land exchange, with tribal leaders testifying on both

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[5] Lawrence M. Cathles & Adam C. Simon, *Copper Mining and Vehicle Electrification*, Int'l Energy Forum 1 (May 2024).

[6] 88 Fed. Reg. 51,792, 51,792 (Aug. 4, 2023).

[7] *The Future of Copper: Will the Looming Supply Gap Short-Circuit the Energy Transition*, S&P Global 27, 33 (July 2022).

[8] Ayman Elshkaki et al., *Copper Demand, Supply, and Associated Energy Use to 2050*, 39 Glob. Env't Change 305, 313 (2016).

[9] *The Future of Copper*, *supra*, at 16, 59.

sides. Pet.App.19a-20a n.2.[10] Petitioner's cofounder Wendsler Nosie was among the witnesses in opposition. *Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing on H.R. 3301 Before the Subcomm. on Nat'l Parks, Forests & Pub. Lands of the H. Comm. on Nat. Res.*, 110th Cong. 18 (2007) (2007 Hearing). Between 2003 and 2014, the Forest Service undertook 85 consultations with 10 tribes potentially affected by the project. *See* 6 FEIS app. S.

3. The final 2014 Act reflects that sustained debate. The Act requires Resolution to transfer to the government 5,460 acres of land—double what Resolution is receiving. *Supra* p. 3 n.2. That land includes a 140-acre parcel that will complete federal ownership of Apache Leap, "a sacred landscape for the Apache … and other tribes." Pet.App.863a; *see* 16 U.S.C. § 539p(d)(1)(A)(v); 1 FEIS, at ES-8. In order "to allow for traditional uses of the area by Native American people," the Act instructs the Secretary to "protect the cultural, archaeological, or historical resources of Apache Leap" and permanently bans mining there. 16 U.S.C. § 539p(f), (g)(2), (g)(5)(B).

Resolution will convey other culturally and ecologically valuable parcels across Arizona. Those parcels include one of the Southwest's largest mesquite bosques, rare wetlands, proposed "critical habitat" for the threatened Mexican spotted owl, multiple migratory bird

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[10] *E.g.*, *Southeast Arizona Land Exchange and Conservation Act of 2011: Hearing on H.R. 1904 Before the Subcomm. on Nat'l Parks, Forests & Pub. Lands of the H. Comm. on Nat. Res.*, 112th Cong. 67 (2011) (2011 Hearing) (former San Carlos Apache Chairman Harrison Talgo supporting bill); *Southeast Arizona Land Exchange and Conservation Act of 2013: Hearing on H.R. 687 Before the Subcomm. on Energy & Min. Res. of the H. Comm. on Nat. Res.*, 113th Cong. 92-93 (2013) (Chairman Terry Rambler opposing bill).

flyways, rock-climbing areas, and Native American archaeological sites. 1 FEIS 51-53; *see* Victoria Peacey Decl. ¶¶ 53-60, *Ariz. Mining Reform Coal. v. U.S. Forest Serv.*, No. 21-cv-122 (D. Ariz. Mar. 2, 2021), Dkt. 25-3 (Peacey Decl.).

Congress directed the Secretary of Agriculture to conduct "government-to-government consultation with affected Indian tribes" to "address the[ir] concerns" and "minimize the adverse effects on the affected Indian tribes." 16 U.S.C. § 539p(c)(3). And Congress directed the Secretary to "assess the effects of the mining" on "cultural and archeological resources" and "identify measures … to minimize potential adverse impacts." *Id.* § 539p(c)(9)(C). The Act also requires Resolution to provide public access to a campground at Oak Flat for as long as possible, consistent with public safety. *Id.* § 539p(i)(3). Resolution expects that access to continue for decades. Peacey Decl. ¶ 48.

Resolution has worked for years to minimize the project's impact on cultural and environmental resources. With the Forest Service, Resolution commissioned an ethnographic study of traditional cultural properties, undertaking literature reviews, oral interviews, and field visits to inform the project. 3 FEIS 826, 1007. Resolution tailored the mine plan by forgoing over half a billion tons of copper ore to avoid nearby sites important to Native American tribes, including Apache Leap and Devil's Canyon. Peacey Decl. ¶ 72; *see* 1 FEIS 173, 188 (1.4 billion tons to be mined versus 1.97 billion tons available). Resolution will not build an open-pit surface mine—an option that would have removed Oak Flat, Apache Leap, and parts of Devil's Canyon. *See* Pet.App.929a. Instead, Resolution intends to use "a standard mining method" called "caving," using existing infrastructure from the old

Magma Mine. Pet.App.710a, 934a. And, in collaboration with Native American tribes, Resolution will collect and repatriate any artifacts found. Peacey Decl. ¶¶ 40-42.

After the Act's passage, the Forest Service conducted over 400 documented government-to-government consultations with Native American tribes as required by the Act. *See* 6 FEIS app. S. And the Forest Service undertook additional consultations—including eleven public meetings—and received nearly 30,000 public comments. Pet.App.529a-530a. The Forest Service also analyzed the project's economic impact, concluding that it will create 3,500 jobs and contribute $1.2 billion annually to Arizona's economy. 3 FEIS 802. The Forest Service then published its later-rescinded final environmental impact statement on January 15, 2021. Pet.App.530a-531a.

B. Proceedings Below

1. In January 2021, petitioner sued the federal government in the U.S. District Court for the District of Arizona to enjoin the land exchange. *See* D. Ct. Dkt. 1. Petitioner brought claims under the 1852 Treaty of Santa Fe between the United States and the Apache, the First Amendment's Petition and Free Exercise Clauses, the Due Process Clause, and RFRA. *Id.* at 23-30. RFRA provides that the federal government may not "substantially burden a person's exercise of religion" unless doing so is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Petitioner moved for a preliminary injunction, focused on its treaty claim. *See* D. Ct. Dkt. 7.

In February 2021, the district court denied an injunction because petitioner failed to "demonstrate[] a likelihood of success on, or serious questions going to, the merits of its claims." Pet.App.625a. On the treaty claim,

the district court held that petitioner lacked standing because any treaty rights belonged to the Apache tribes, not petitioner. Pet.App.625a-630a. Further, the treaty's text did not obligate the United States to hold Oak Flat in trust for the Apache. Pet.App.630a-634a.

Next, the court concluded, petitioner's RFRA and free-exercise claims failed because petitioner could not show a "substantial burden" on its members' religious exercise under *Lyng* and *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc). Pet.App.644a-645a. In *Lyng*, this Court held that the federal government did not violate the Free Exercise Clause by authorizing a road through a National Forest that would "virtually destroy the Indians' ability to practice their religion." 485 U.S. at 444, 451 (cleaned up). As this Court explained, the Free Exercise Clause cannot "divest the Government of its right to use what is, after all, *its* land." *Id.* at 453.

In *Navajo Nation*, the Ninth Circuit held that the government did not violate RFRA by authorizing the use of artificial snow made from reclaimed human wastewater at a ski area the plaintiffs considered sacred. 535 F.3d at 1062-63. *Navajo Nation* distilled only two kinds of substantial burdens under RFRA: (1) coercing plaintiffs to violate their beliefs, or (2) conditioning government benefits on conduct that would violate the plaintiffs' beliefs. *Id.* at 1069-70. Here, the district court held that petitioner failed to show either kind of burden. Pet.App.644a.

The district court also held that petitioner was unlikely to succeed on its claims that Congress intentionally discriminated against religion. Pet.App.646a-648a. And the court rejected petitioner's claims that the environmental impact statement's publication violated due process or the Petition Clause. Pet.App.648a-652a.

2. Petitioner sought an emergency injunction pending appeal, refocusing on its RFRA claim. C.A. Dkt. 6-1. In March 2021, following the change in administration, the Forest Service rescinded the environmental impact statement to provide time for the Forest Service "to fully understand concerns raised by Tribes and the public." USDA, *Project Update* (Mar. 1, 2021), https://perma.cc/W348-XUKH.[11] Citing the lack of imminent harm, the Ninth Circuit denied the emergency injunction over Judge Bumatay's dissent. Pet.App.604a-621a.

In June 2022, a different panel of the Ninth Circuit affirmed the denial of the preliminary injunction. Pet.App.525a-579a. Judge Berzon dissented, contending that petitioner was likely to succeed on its RFRA claim and urging the en banc court to overrule *Navajo Nation* if necessary. Pet.App.582a, 597a n.5. In her view, the majority's reading of *Navajo Nation* led to an "overly restrictive," "absurd" understanding of RFRA. Pet.App.580a.

3. The Ninth Circuit granted rehearing en banc and affirmed the denial of the preliminary injunction. Pet.App.1a-262a. Resolution intervened in support of the United States while the en banc decision was pending. C.A. Dkt. 172.

In a per curiam opinion, the en banc court explained that it had split into two majorities. Pet.App.14a-15a. The first—consisting of Judge Ryan Nelson, Chief Judge Murguia, and Judges Gould, Berzon, Lee, and Mendoza—agreed with petitioner's request to overrule *Navajo Nation*'s definition of "substantial burden." Pet.App.14a.

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[11] Separately, the government committed to giving 60 days' notice before publishing a new final environmental impact statement. Pet.App.26a.

The second majority—made up of Judges Collins, Nelson, Bea, Bennett, Forrest, and VanDyke—held that petitioner's claims were unlikely to succeed. Pet.App.14a-15a. Judge Collins' majority did not rely on *Navajo Nation*. Instead, in that majority's view, the land exchange is "indistinguishable" from the project in *Lyng*, foreclosing petitioner's free-exercise claim. Pet.App.32a.

Judge Collins' majority also held that *Lyng* foreclosed the RFRA claim. The court observed that RFRA codifies "the basic principles reflected in the pre-*Smith* framework for applying the Free Exercise Clause," including *Lyng*. Pet.App.50a; *see Emp. Div. v. Smith*, 494 U.S. 872 (1990). Congress did so by taking a phrase from this Court's free-exercise caselaw—"substantial burden"—and codifying it in RFRA. Pet.App.53a. Thus, *Lyng*'s pre-*Smith* free-exercise holding—that the federal government's decisions about how to use its own land do not impose a "burden on … religious practices [that] is heavy enough to violate the Free Exercise Clause," *Lyng*, 485 U.S. at 447—precluded petitioner's RFRA claim. Pet.App.58a.

Finally, the court rejected petitioner's treaty claim because the Act's specific mandate to transfer Oak Flat abrogated any contrary treaty obligation. Pet.App.58a-61a.

Three judges wrote concurrences. Judge Nelson explained why he joined both majorities. Pet.App.118a-158a. In his view, "en banc review was warranted to correct our faulty legal test (not the outcome) in *Navajo Nation*." Pet.App.118a. With that legal test "correct[ed]," Judge Nelson agreed with Judge Collins that Congress codified this Court's pre-RFRA understanding of a substantial burden without "implicitly revers[ing]" *Lyng*. Pet.App.118a, 120a.

Judge Bea highlighted "the serious practical problems" with petitioner's theory, which would impose religious "easements" on "vast expanses of federal land." Pet.App.64a, 99a-100a. Judge Bea also urged that RFRA could not prohibit a land exchange specifically mandated by a later statute. Pet.App.108a-115a.

Judge VanDyke wrote "to elaborate on why the alleged 'burden' in this case is not cognizable under" RFRA and why petitioner's theory "would inevitably result in religious discrimination." Pet.App.159a.

Chief Judge Murguia dissented, arguing that a "substantial burden" under RFRA includes situations that "prevent[] a person from engaging in sincere religious exercise"—even when a believer demands access to government land for that exercise. Pet.App.209a. Chief Judge Murguia would have found a substantial burden and remanded for further analysis of RFRA's compelling-interest and least-restrictive-means prongs. Pet.App.233a-235a. In her view, *Lyng* did not dictate a contrary result and, to the extent it did, RFRA overruled that decision. Pet.App.236a-253a.

Responding to Judge Bea, Chief Judge Murguia contended that RFRA applies to the Land Exchange Act. Pet.App.256a-260a. Judge Lee otherwise joined Chief Judge Murguia's dissent, but would not have reached this argument, which he thought the government waived. Pet.App.262a.

4. Petitioner sought rehearing en banc before the full Ninth Circuit, urging that the en banc decision was inconsistent with *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). C.A. Dkt. 184, at 6-8. The court issued an amended opinion explaining why its

analysis was consistent with *Trinity Lutheran*. Pet.App.11a-13a. No judge called for a vote.

REASONS FOR DENYING THE PETITION

This case is an unsuitable candidate for this Court's review. The en banc Ninth Circuit correctly held that, under *Lyng*, RFRA and the Free Exercise Clause do not limit the federal government's ability to dispose of its own land. The Ninth Circuit's RFRA holding is independently correct because RFRA cannot bar a land exchange unambiguously required by a later-in-time statute.

Far from creating a circuit split, the decision below significantly *expanded* the Ninth Circuit's definition of "substantial burden" to align with other circuits'. The en banc majority simply and correctly held that *Lyng* controls the outcome here. Tellingly, *none* of the cases in petitioner and amici's asserted circuit conflict involves federal land use.

Regardless, this case is riddled with vehicle problems that would impede resolution of the question presented. Petitioner is a nonprofit organization without standing to bring this case. Moreover, petitioner brings a highly unusual RFRA claim against another act of Congress, not Executive-Branch action. And petitioner has shifted its arguments and claims throughout this litigation. Petitioner has defined Oak Flat four different ways. And petitioner has continually pivoted on the law, now including (at 34-35) a thinly veiled request to overrule decades of free-exercise precedent, including *Smith*. This one-off case about the sui generis Land Exchange Act is not the place to consider the future of religious liberty.

I. The Decision Below Is Correct

The Ninth Circuit correctly held that petitioner is unlikely to prevail on its RFRA and free-exercise claims.

1.a. To start, RFRA cannot foreclose a land exchange specifically mandated by a later act of Congress. *See* Pet.App.108a-115a (Bea, J., concurring in part). "[S]tatutes enacted by one Congress cannot bind a later Congress." *Dorsey v. United States*, 567 U.S. 260, 274 (2012). Notwithstanding RFRA's statement that it applies to later-enacted statutes "unless [they] explicitly exclude[] such application," 42 U.S.C. § 2000bb-3(b), Congress is free to exempt later statutes from RFRA "either expressly or by implication." *See Dorsey*, 567 U.S. at 274. Petitioner ignores this critical threshold issue. And its one amicus to engage (Lee Br. 17) misstates that any exemption must be "explicit[]."

The Land Exchange Act provides a paradigmatic exemption by implication. After nearly a decade of study, Congress was well aware that the Act could affect Native American religious practices and expressly accommodated religious concerns by requiring "consultation with affected Indian tribes" to "minimize the adverse effects." 16 U.S.C. § 539p(c)(3). Congress also required Resolution to transfer Apache Leap, protecting that sacred Western Apache site "for traditional uses … by Native American people." *Id.* § 539p(g)(2)(B).

Congress then unambiguously mandated that the land exchange "*shall*" proceed. *Id.* § 539p(c)(10) (emphasis added). Yet petitioner reads RFRA to require that the land exchange *shall not* proceed. Because the two statutes "simply and clearly contradict[]" on petitioner's reading, the Land Exchange Act, as both the more specific and later-in-time statute, prevails. *See Lockhart v.*

United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring); Antonin Scalia & Bryan A. Garner, *Reading Law* 185-86 (2012). Petitioner cannot use RFRA to trump Congress' express judgment that this land exchange should go forward with alternative means of promoting and accommodating religion.

b. Regardless, petitioner's members have not suffered a cognizable "substantial burden" under RFRA.

Congress enacted RFRA "to restore the compelling interest test as set forth in" this Court's caselaw, overruling *Smith* by name. 42 U.S.C. § 2000bb(a)(4), (b)(1). In *Smith*, this Court held that neutral and generally applicable laws are exempt from free-exercise scrutiny. 494 U.S. at 878-79. RFRA now directs that the federal government not "substantially burden a person's exercise of religion" unless doing so is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Congress self-consciously lifted that text from this Court's pre-*Smith* caselaw, under which the Free Exercise Clause applied only when the government "substantial[ly] burden[ed]" religion—a point every Justice recognized in *Smith*. *See* 494 U.S. at 883 (Scalia, J., for the Court); *id.* at 894 (O'Connor, J., concurring in the judgment); *id.* at 907 n.1 (Blackmun, J., dissenting) (citation omitted). By adopting that terminology, Congress "unmistakably sought to enshrine, by statute, the basic principles reflected in the pre-*Smith* framework for applying the Free Exercise Clause." Pet.App.50a.

As noted, *Lyng*, a pre-*Smith* case, held that the government did not violate the Free Exercise Clause by authorizing a road near sacred tribal sites, notwithstanding the "devastating effects on traditional Indian religious

practices." 485 U.S. at 451. "Whatever rights the Indians may have to the use of the area," this Court reasoned, "those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453. Thus, "the burden on [the plaintiffs'] religious practices" was not "heavy enough" to trigger strict scrutiny. *Id.* at 447.

That holding forecloses petitioner's RFRA claim. As in *Lyng*, the government's land use may "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," but the challenged action would not "discriminate against," "coerce[]," or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449, 453. *Lyng* is therefore "indistinguishable," as the Ninth Circuit correctly held. Pet.App.32a.

RFRA's legislative history confirms that RFRA incorporates *Lyng*'s holding. "[F]or guidance in determining whether the exercise of religion has been substantially burdened," Congress expected courts to "look to free exercise cases decided prior to *Smith*." S. Rep. No. 103-111, at 8 (1993); *accord* H.R. Rep. No. 103-88, at 6-7 (1993). Those cases include *Lyng*, which the Senate Report cites by name to explain that "pre-*Smith* case law ma[de] it clear that strict scrutiny does not apply to … the use of the Government's own property." S. Rep. No. 103-111, at 9 & n.19. The reason: *Lyng* "held that the manner in which the Government … uses its own property does not constitute a cognizable 'burden' on anyone's exercise of religion." *Id.* at 9 n.19. Thus, as Judge VanDyke observed, "at the time of RFRA's enactment, *nobody* would have understood the government's decision about what to do with its own land to be a cognizable burden under RFRA." Pet.App.171a n.6. Or as Senator Hatch

unequivocally stated: "RFRA does not affect *Lyng*." 139 Cong. Rec. 26,193 (1993); *accord id.* at 26,416 (Sen. Hatch) (same); *see id.* (Sen. Inouye) (*Lyng* and the Senate Report "indicate[] that native American worship at sacred sites on Federal land will not be protected by the act.").

c. Petitioner's arguments for disregarding *Lyng* are unpersuasive.

Petitioner (at 21-24) urges that, as a matter of "ordinary meaning," the land exchange is an "obvious" substantial burden. And petitioner (at 21) notes that this Court has used dictionaries to define RFRA terms like "appropriate relief." *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020). But "substantial burden" clearly refers to, and incorporates, this Court's pre-*Smith* caselaw. And this Court ordinarily presumes that, when Congress uses a term with a settled meaning, Congress intends that meaning. *See George v. McDonough*, 596 U.S. 740, 746 (2022).

Petitioner (at 25) argues that *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), "rejected" the idea that RFRA incorporates pre-*Smith* "constraints" on free-exercise claims (emphasis omitted). *Hobby Lobby* required an exception to the government's contraception mandate under RFRA and stated that RFRA did not "merely restore[] … pre-*Smith* decisions in ossified form." *Id.* at 715. Thus, RFRA plaintiffs need not "f[all] within a category of plaintiffs" who successfully "brought a free-exercise claim … before *Smith*." *Id.* at 715-16. But as the en banc majority correctly observed, *Hobby Lobby* "does not stand for the … erroneous … proposition that RFRA is somehow exempt from the settled rule that Congress legislates against the backdrop of existing law." Pet.App.57a (citation omitted).

Petitioner (at 25-26) points to *Hobby Lobby*'s discussion of *United States v. Lee*, 455 U.S. 252 (1982). *Lee* rejected a free-exercise challenge to the obligation to pay social-security taxes. *Id.* at 254. *Hobby Lobby*, in turn, rejected any "analog[y]" between the contraception mandate and social-security taxes. 573 U.S. at 734. But this Court did not, as petitioner (at 26) contends, hold "that plain meaning, not the pre-*Smith* caselaw, controls" the substantial-burden inquiry. The cited portion of *Hobby Lobby* addressed narrow tailoring and simply rejected dicta in *Lee* suggesting that generally applicable regulations of commercial activity are exempt from free-exercise scrutiny. *Id.* at 735 & n.43.

This Court's Religious Land Use and Institutionalized Persons Act (RLUIPA) decision in *Holt v. Hobbs*, 574 U.S. 352 (2015), also does not "reject[] efforts to use pre-*Smith* caselaw to limit 'substantial burden,'" as petitioner (at 26) incorrectly claims. Before RLUIPA, this Court upheld prison regulations infringing religious rights "under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 349 (1987). In *Holt*, the Court held that the lower courts had erred in continuing to apply this lower, prisoner-specific standard rather than RLUIPA's compelling-interest test. 574 U.S. at 361. But *Holt* in no way suggests that RFRA overruled pre-*Smith* cases *not* involving prisoners.

Petitioner (at 23) notes that RFRA applies to "all Federal law[s]," even "neutral" ones, and defines "religious exercise" to include "[t]he use … of real property." 42 U.S.C. §§ 2000bb(a)(2), 2000bb-3(a), 2000cc-5(7)(B). But whether RFRA might conceivably apply to another land-use statute, and whether petitioner's members engage in "religious exercise," says nothing about whether

this statutorily mandated land exchange constitutes a "substantial burden."

In a different vein, petitioner (at 26-28) contends that RFRA, in superseding *Smith*'s holding that neutral and generally applicable laws do not trigger strict scrutiny, also superseded *Lyng*, which petitioner claims rested on an early version of that same rule. But as the Ninth Circuit majority recognized, *Lyng* "never mentioned or endorsed a *Smith*-style rule" about neutrality and general applicability. Pet.App.38a. *Lyng* instead addressed the separate issue of cognizable burdens, rejecting an argument that "the *burden* on [the plaintiffs'] religious practices is heavy enough to" trigger strict scrutiny. 485 U.S. at 447 (emphasis added). *Lyng* could not have rested on neutrality and general applicability because the law there was not generally applicable. Congress enacted an "explicit statutory gerrymander," Pet.App.39a, creating a protected wilderness area but "exempt[ing] a narrow strip of land" that perfectly coincided with the challenged road. 485 U.S. at 444.

Petitioner (at 27-28) claims that even if *Lyng* did not endorse a *Smith*-style rule about neutral and generally applicable laws, post-*Smith* cases read *Lyng* as doing so. But as the decision below explained, *Fulton v. City of Philadelphia* merely stated that *Smith* "drew support" from *Lyng*. Pet.App.38a (emphasis omitted) (quoting 593 U.S. 522, 536 (2021)). And *Trinity Lutheran* "[a]t most … suggested in dicta that *Lyng* fits a pattern of cases" where laws "were 'neutral and generally applicable without regard to religion' in the sense that they did not 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" Pet.App.38a (quoting 582 U.S. at 460). *Trinity Lutheran* did not suggest that the law in *Lyng* would

"qualify as 'neutral and generally applicable' under the details of *Smith*'s framework." Pet.App.38a-39a.[12]

Finally, petitioner (at 28-29) argues that *Lyng* involved a project that merely rendered religious practices "spiritually 'ineffectual,'" whereas the Land Exchange Act would make religious practices "physically impossible." But *Lyng* itself refutes that argument, as the en banc court explained. *Lyng* acknowledged that the proposed road would "*physically destroy* the environmental conditions" necessary for religious practices. Pet.App.33a (quoting 485 U.S. at 449). And the *Lyng* Court correctly rejected any standard that "depend[ed] on measuring the effects of a governmental action on a religious objector's spiritual development." 485 U.S. at 451. As Judge VanDyke warned below, distinguishing between spiritual and "physical" effects would "perver[t]" RFRA by "arbitrarily giv[ing] greater protection to burdens on religious exercise that are more physical in nature." Pet.App.183a-184a.

2. *Lyng* likewise forecloses petitioner's free-exercise claim. As the en banc majority explained, petitioner's attempt to "'divest the Government of its right to use what is, after all, *its* land'" is "indistinguishable" from the claim in *Lyng*. Pet.App.32a (quoting 485 U.S. at 453). Rejecting petitioner's RFRA claim should *a fortiori* require rejecting petitioner's free-exercise claim.

Petitioner never argues otherwise. Instead, petitioner (at 34-35) asks this Court to overrule *Lyng*—a challenge it did not press below. Petitioner neither addresses stare decisis nor develops this ask beyond

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[12] Petitioner (at 28) oddly faults the en banc Ninth Circuit for not addressing *Trinity Lutheran* in its initial opinion when neither petitioner's en banc brief nor the dissent cites the case.

declaring *Lyng* "subject to criticism on the same grounds *Smith* is." Pet. 34. But this Court has repeatedly declined to overrule *Smith*. *See Fulton*, 593 U.S. at 543-44 (Barrett, J., concurring); *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (limiting question presented to exclude whether to overrule *Smith*).

And for all the thoughtful debate over *Smith*, no Justice has suggested overruling *Lyng*, which involves the distinct issue of the government's control over its own land. Nor has any Justice suggested overruling *Goldman v. Weinberger*, 475 U.S. 503 (1986), *Bowen v. Roy*, 476 U.S. 693 (1986), or *O'Lone*, 482 U.S. 342, all of which petitioner (at 5, 34) apparently groups with *Lyng* as "example[s] of *Smith avant la lettre*." Indeed, Justice Alito—while urging reconsideration of *Smith*—has characterized *Lyng*, *Goldman*, *Bowen*, and *O'Lone* as part of "the substantial body of precedent that [*Smith*] displaced." *Fulton*, 593 U.S. at 555, 558 (Alito, J., concurring in the judgment). Petitioner offers no reason for discarding *Lyng* here—much less the "special justification" needed to overcome stare decisis. *See Allen v. Cooper*, 589 U.S. 248, 259 (2020) (citation omitted).

3. Petitioner's expansive theories would upend federal land management. Strict scrutiny would apply to *any* land-management decision that prevents access to religious exercise. The result, as the Ninth Circuit recognized, would be "extraordinary." Pet.App.56a-57a n.8. For example, petitioner's theory would cast a constitutional shadow over the 1848 Treaty of Guadalupe Hidalgo (in which Mexico ceded most of present-day Arizona, including Oak Flat, to the United States) and President Theodore Roosevelt's 1905 establishment of the Tonto National Forest, which both limited Apache access to Oak Flat.

Petitioner's interpretation would allow a single individual to use RFRA or the Free Exercise Clause "to exact what is in effect a government easement that entitles his access and use of that land, so long as that is what his sincere beliefs require." Pet.App.99a (Bea, J., concurring in part); *accord* Pet.App.56a-57a n.8 (Collins, J., for the court). If just one individual sincerely believed that some activity—be it camping, hunting, fishing, hiking, or mining—destroyed the land's sanctity, then any government decision permitting that activity would face strict scrutiny. Individuals could thus "exclude all human activity but their own" from public land. *See Lyng*, 485 U.S. at 452-53. Lawsuits could bar rock climbers from Devil's Tower, vehicles from Yosemite, or loggers from Alaska. And plaintiffs could block state or federal governments from using their own land to build a border fence, highway, pipeline, power line, military base, solar farm, college, or social-security processing center. Other RFRA plaintiffs have asserted that huge areas—including the Colorado River or all of Oregon and Washington—are sacred. Pet.App.100a n.18 (Bea, J., concurring in part).

Courts could even face competing demands to the same area. Here, other Western Apache might contend that the government's *failure* to complete the land exchange violates RFRA. The Land Exchange Act ensures the preservation and traditional use of Apache Leap—a site that petitioner's cofounder considers "sacred and consecrated ground for our People." 2007 Hearing, *supra*, at 19. Without the land exchange, portions of Apache Leap remain in private hands, open to mining or destruction. As Judge VanDyke observed, forcing courts to choose "between competing religious claimants" would "turn [RFRA] on its head, requiring instead of reducing religious discrimination." Pet.App.177a.

The Ninth Circuit rightly rejected such a profoundly unsettling interpretation of the Constitution and RFRA. Regardless of whether strict scrutiny is a workable rule for generally applicable laws, as petitioner (at 38-39) maintains, the government "simply could not operate" if believers could use the Free Exercise Clause or RFRA to claim "*de facto* beneficial ownership of" vast swaths of federal land. *See Lyng*, 485 U.S. at 452-53.

II. This Case Implicates No Circuit Split

A. This Case Creates No RFRA Split

Petitioner (at 29) asserts that the decision below splits with six other circuits, which hold that a substantial burden occurs "where the government completely prevents a person from engaging in religious exercise." But the en banc Ninth Circuit adopted that very standard: "A majority of the en banc court … concludes that … preventing access to religious exercise is an example of substantial burden." Pet.App.14a. Judge Collins' majority, Judge Nelson's concurrence, and Chief Judge Murguia's dissent all "readily agree[d] … that 'prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief' qualifies as prohibiting free exercise." Pet.App.34a (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.)); *accord* Pet.App.118a (Nelson, J., concurring); Pet.App.236a (Murguia, C.J., dissenting). The judges just disagreed about whether that test compelled reversal here.

In so holding, the Ninth Circuit *resolved* an asserted circuit split. In *Navajo Nation*, the en banc Ninth Circuit had limited "substantial burdens" under RFRA to two categories: when individuals are (1) "forced to choose between following the tenets of their religion and receiving a governmental benefit" or (2) "coerced to act contrary to

their religious beliefs by the threat of civil or criminal sanctions." 535 F.3d at 1070. It was *that* test that the Ninth Circuit panel asserted "conflict[ed]" with "out-of-circuit cases." Pet.App.556a n.13. And it was that test that petitioner, in urging en banc review, claimed "squarely conflict[ed]" with many of the same cases petitioner now cites. C.A. Dkt. 93, at 7-10. The Ninth Circuit granted rehearing en banc and overruled *Navajo Nation*, endorsing the legal rule petitioner now urges. Pet.App.14a.

Again, the decision below held only that, under *Lyng*, the "disposition of government real property" does not trigger strict scrutiny when not coercive or discriminatory. Pet.App.40a. *None* of the court-of-appeals cases cited by petitioner (at 29-30) or its amici addresses that land-management issue. Petitioner (at 30-31) identifies one unpublished district-court decision involving federal land use, *Comanche Nation v. United States*, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008). That decision held that construction on federal land constituted a substantial burden. *Id.* at *17. The court declined to apply the Ninth Circuit's (now-overruled) *Navajo Nation* decision but did not use petitioner's "prevents" test or cite *Lyng*. *Id.* at *3 n.5.

None of the cited court-of-appeals cases conflicts with the decision below. Petitioner (at 30) cites only one RFRA case, *Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997). There, the Eighth Circuit held that RFRA barred a bankruptcy trustee from avoiding debtors' pre-petition religious tithes. *Id.* at 1417. Petitioner never explains how that since-vacated bankruptcy decision conflicts with the Ninth Circuit's holding about the disposition of federal land.

Petitioner's other five court-of-appeals citations (at 29-30) are not RFRA cases. They instead involve RLUIPA, which applies only to institutionalized persons and local-government land-use regulation. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a). In these "two specific contexts," the Ninth Circuit recognized, the "crucial element" of coercion "is already baked in," so an action that might not be a substantial burden elsewhere could be a substantial burden in those settings. Pet.App.54a. For example, refusing to provide buffalo meat for religious ceremonies might be a substantial burden in prison. *See Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) (cited at Pet. 29). But no one thinks that RFRA would allow *non*-prisoners to demand buffalo meat from the federal government, even if every last buffalo lived in a national park.

Petitioner (at 31-32) analogizes Native Americans to prisoners because many sacred sites are on federal land. But no court has accepted that extraordinary analogy, which draws from a law-review article by petitioner's co-counsel that self-consciously "reconceptualized" RFRA to account for "the unique disadvantage[s]" facing Native Americans. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1343 (2021) (cited at Pet. 31); *see* Pet.App.190a-197a (VanDyke, J., concurring) (criticizing this "reparations version of RFRA"). Courts' general articulation of the "substantial burden" standard under RLUIPA does not conflict with the Ninth Circuit's limited holding about RFRA's application to federal land use.

B. This Case Implicates No Free-Exercise Split

Petitioner (at 32-33) asserts a 5-3 circuit split over whether free-exercise claimants must show a "substantial burden" or merely any "burden" when challenging laws

that are not neutral and generally applicable. That asserted split has nothing to do with this case.

All circuits agree that a free-exercise plaintiff must at least show "*a* burden on his sincere religious beliefs." *Kravitz v. Purcell*, 87 F.4th 111, 115 (2d Cir. 2023) (emphasis added) (cited at Pet. 33). And here, the Ninth Circuit did not hold that petitioner's members suffered a burden that was insufficiently serious. The Ninth Circuit held that "*Lyng* defines the outer bounds of what counts as a *cognizable* substantial burden imposed by the government." Pet.App.53a. In other words, the Ninth Circuit did not discount the *degree* of burden (the issue on which petitioner asserts a split); rather, it held that, under *Lyng*, petitioner's members had not suffered the right *type* of burden under pre-*Smith* caselaw and thus under RFRA.

Petitioner identifies no disagreement among the lower courts over how to apply *Lyng*—the sole free-exercise question decided below. Pet.App.27a-41a. Tellingly, none of petitioner's cited cases (at 32-33) even involves federal land use. Rather, petitioner offers far-afield cases that, *e.g.*, "deal[t] with the difficulty of analyzing constitutional rights claims by prisoners" under 42 U.S.C. § 1983, *Firewalker-Fields v. Lee*, 58 F.4th 104, 111 (4th Cir. 2023), or an Army program that prohibited religious practices during daycare, *Hartmann v. Stone*, 68 F.3d 973, 975-76 (6th Cir. 1995).

When actually faced with free-exercise challenges to the government's use of its own land, the circuits reach consistent results. The Sixth Circuit, for example, has relied on *Lyng* to reject a free-exercise challenge to a city decision to develop a roadway separating two church lots. *Prater v. City of Burnside*, 289 F.3d 417, 427-29 (6th Cir. 2002). Even though the development "prevented the

Church from following the 'will or calling of God,'" the First Amendment gave the Church no right to claim "special benefits" to block a government project. *Id.* at 427-28. Likewise, the Seventh Circuit rejected a free-exercise challenge to demolishing a former church on public land, because the plaintiff had no "right to demand that the City provide him with municipally-owned property as a place of worship." *Taylor v. City of Gary*, 233 F. App'x 561, 562 (7th Cir. 2007). And in a case strikingly similar to this one, the Eighth Circuit relied on *Lyng* to hold that a Forest Service land exchange did not violate the Free Exercise Clause even though it would allegedly harm "Indian religious practices." *Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir. 1991). There is no split on the free-exercise issues actually presented by this case.

III. This Case Does Not Warrant This Court's Review

Even were this Court inclined to resolve whether RFRA or the Free Exercise Clause restricts the federal government's use of its own land, this case's unusual facts and posture—and petitioner's shifting positions—make it an exceedingly poor vehicle to do so.

1. To start, two threshold barriers should preclude reaching the question presented. *First*, petitioner is a nonprofit association that does not assert any religious rights of its own and thus lacks standing. Petitioner asserts standing to litigate the religious rights of its individual members. But Justice Thomas has rightly questioned whether such third-party associational standing comports with Article III's case-or-controversy requirement. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 397-405 (2024) (Thomas, J., concurring). At common law, a plaintiff needed "to show a violation of his *own* rights." *Id.* at 399 (emphasis added). Article III does not allow plaintiffs "to seek to vindicate someone else's

injuries." *Id.* at 400. Yet petitioner seeks to do just that—pointing to its *members'* religious beliefs as the basis for *its* standing. That absence of a concrete plaintiff may have contributed to considerable confusion about what land is even at issue. *Infra* pp. 29-31. Reaching the merits would require this Court to overcome this threshold jurisdictional barrier. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

Second, as discussed, this case does not implicate RFRA because RFRA cannot prohibit action specifically mandated by a subsequent statute. *Supra* pp. 14-15. Regardless, this case's unique facts at minimum make it a strange vehicle to resolve RFRA's application to federal land use. Petitioner identifies no Supreme Court case (and Resolution is aware of none) where a plaintiff contended that an unambiguous congressional mandate *itself*, rather than Executive-Branch action, violated RFRA. Were this Court inclined to address RFRA's application to federal land use, the Court should await a more typical case without the confounding variable of the Land Exchange Act.

2. This is also a paradigmatic case for further percolation. In the Ninth Circuit, this was a case about *Navajo Nation*, 535 F.3d 1058. Petitioner's amici maligned that decision as imposing a "tragically abridged," "erroneous[,] and unduly narrow understanding of what a substantial burden is." LDS Br. 14, C.A. Dkt. 123; Protect the First Br. 2, C.A. Dkt. 122; *see* Barclay & Steele, *supra*, at 1344 (petitioner's co-counsel criticizing *Navajo Nation* as "extremely narrow"). In supporting rehearing en banc, petitioner thus urged the Ninth Circuit to "reconsider[]" *Navajo Nation* if needed. C.A. Dkt. 93, at 16.

The Ninth Circuit did just that, granting rehearing en banc and "overrul[ing] *Navajo Nation*" insofar as it

limited the types of "substantial burden[s]" under RFRA. Pet.App.14a. In its place, the Ninth Circuit adopted *petitioner's* preferred legal rule. *Supra* pp. 10-11. A majority just disagreed that that rule required reversal. Rather than immediately wade into that case-specific holding, this Court should allow the Ninth Circuit's new, RFRA-friendlier precedent to percolate in the lower courts.

3. This case is also a poor vehicle because petitioner's shifting factual and legal positions leave the scope of this dispute—and what the Court would even be deciding—highly uncertain.

a. In this Court, petitioner (at 6) describes Oak Flat as "a 6.7-square-mile sacred site," apparently referring to a 4,309-acre parcel that includes thousands of acres that will not be transferred to Resolution under the Act. *See* Pet.App.1065a & n.10. On that definition, petitioner's assertions (at 14, 24, 32, 35, 39) that the project will "destroy Oak Flat," "[s]wallow[] Oak Flat," "blast[] Oak Flat into oblivion," or cause the "destruction of Oak Flat" are, at best, hyperbolic. Almost half of what petitioner now calls "Oak Flat" will not be affected by this case. Indeed, petitioner's definition of "Oak Flat" includes portions of Apache Leap—land the Act affirmatively protects for traditional Native American use.

Perhaps recognizing that mismatch, petitioner (at 15) includes an extra-record map of the "Central Sacred Area," which closely mirrors the project's potential impacts.[13] That map—which does not match petitioner's 6.7-square-mile figure or any other known definition of Oak

[13] Petitioner depicts a projection of the "continuous subsidence limit"—an area "characterized by small rock deformations that can only be detected using high-resolution monitoring equipment." *See* 1 FEIS 190. The visible subsidence will be smaller. *Id.*

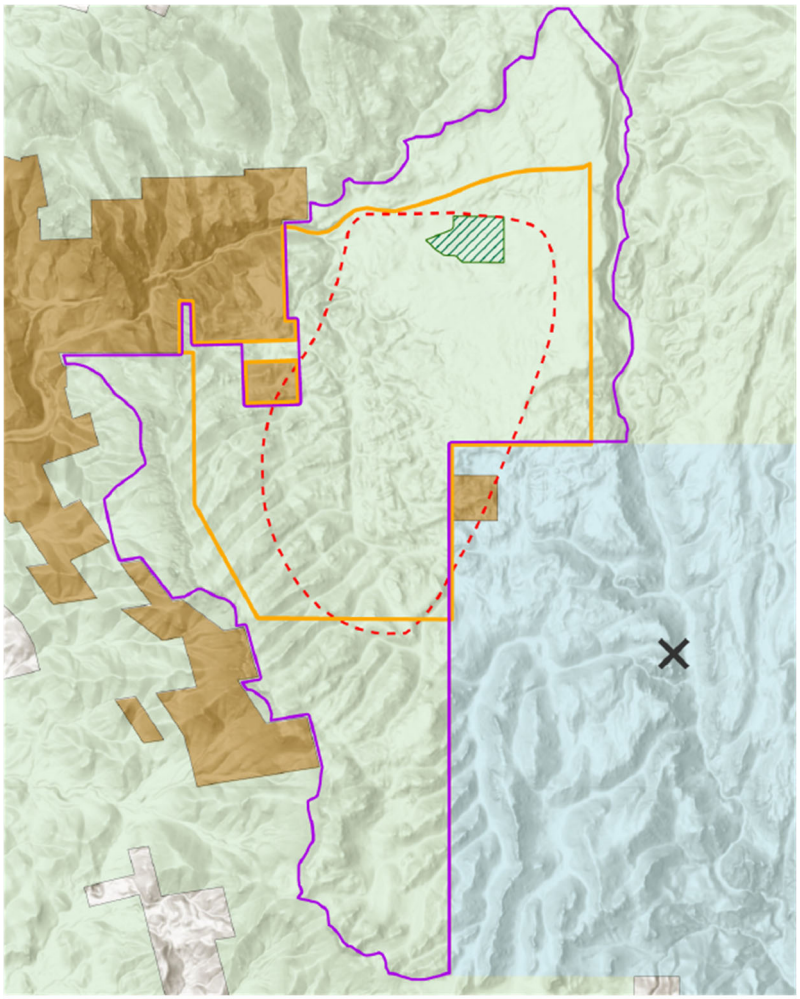
Flat—appeared for the first time in petitioner's Ninth Circuit briefs. C.A. Dkt. 6-1, at 13; C.A. Dkt. 33, at 21. Petitioner has never explained what defines the "Central Sacred Area" or why this Court should address an area not defined or mentioned in the complaint or record.

The complaint itself describes the "Oak Flat Parcel" as the 2,422 acres Resolution will receive in the land exchange. D. Ct. Dkt. 1, at 14; *see id.* at 11 ("Oak Flat would be swapped with private land owned by [Resolution]."). Petitioner's motion for a preliminary injunction narrowed Oak Flat *even further* to "a 40-acre area" of "sacred Western Apache religious grounds." D. Ct. Dkt. 7, at 5.[14]

Most inexplicably, when describing Oak Flat, the petition (at 7, bottom) includes a photograph of middle Devil's Canyon—land not covered by the Act, not part of the 6.7-square-mile parcel petitioner defines as "Oak Flat," not part of the Oak Flat campground, and not part of the "Central Sacred Area." That canyon will experience *no* physical effects from the project. Pet.App.692a. What that picture has to do with this case other than being attention-grabbing, petitioner never says. Yet petitioner has repeatedly included that image in its briefing. *E.g.*, D. Ct. Dkt. 1, at 19; C.A. Dkt. 6-1, at 5; C.A. Dkt. 33, at 8.

The following map depicts petitioner's shifting definitions and misleading suggestion that Devil's Canyon is part of the land exchange:

[14] The motion does not describe this parcel's location, but petitioner may be referencing part of the 50-acre campground at Oak Flat, depicted in the following map.



LEGEND

- Petition's 6.7-Square-Mile "Oak Flat"
- Land Actually Being Transferred
- Petition's "Central Sacred Area"
- Oak Flat Campground
- Site of Devil's Canyon Photograph (Pet. 7)
- U.S. Forest Service Land
- State Land
- Resolution Copper Land
- Other Private Land

Unsurprisingly given petitioner's shifting factual claims, its complaints about the Act's impact on Western Apache religious practice are also inconsistent. For example, petitioner (at 8-11) asserts this case's importance for the Apache sunrise ceremony, which petitioner suggests "cannot take place elsewhere." As the Ninth Circuit noted, however, sunrise ceremonies routinely occur elsewhere; in 2014, Oak Flat hosted a sunrise ceremony "for just the second time in 'more than a hundred years.'" Pet.App.527a. Petitioner's cited testimony (Pet.App.977a-978a) simply describes the witness's younger sister as having her sunrise ceremony at Oak Flat; that testimony does not suggest that the ceremony *only* happens at Oak Flat. The witness had her own ceremony at a different site, not Oak Flat, Pet.App.1034a, and told Congress that "Oak Flat is *one* of the sacred areas where Apaches hold the coming of age Sunrise Ceremony." Pet.App.882a (emphasis added).

Moreover, contrary to petitioner's suggestion (at 15), the project's impacts will not be "immediate." Even after the government completes the land exchange, additional analysis and preparation work may take up to six years, Pet.App.23a, and Resolution must obtain numerous permits from federal, state, and local regulators, 1 FEIS, at ES-5. Once mining begins, the subsidence will occur gradually over the course of 41 years. Pet.App.23a. Resolution anticipates that subsidence will not be seen for at least ten years. Peacey Decl. ¶ 49. Further, by statute, Resolution must provide access to the Oak Flat campground "to the maximum extent practicable." 16 U.S.C. § 539p(i)(3).

b. Petitioner's shifting legal positions add further uncertainty. In the district court, this was a case about the 1852 Treaty of Santa Fe. Petitioner's motion for a

preliminary injunction devoted two sentences to the RFRA claim. D. Ct. Dkt. 7, at 5. In the Ninth Circuit, petitioner refocused on its RFRA claim, asserting that *Navajo Nation* and *Lyng* did not apply to the "physical destruction of a sacred site." C.A. Dkt. 33, at 35. Without addressing *Lyng*, petitioner also contended that the Land Exchange Act violates the Free Exercise Clause. *Id.* at 44-47. In advocating en banc review, petitioner dropped its free-exercise argument and urged the Ninth Circuit to "reconsider[]" *Navajo Nation*, asserting a circuit split. C.A. Dkt. 93, at 7-9, 16. After the Ninth Circuit agreed with that request and overruled *Navajo Nation*, petitioner sought review from the full Ninth Circuit, dropping any assertion of a split. C.A. Dkt. 184.

The petition for certiorari offers a new menu of arguments. Petitioner's free-exercise claim returns for the first time since its 2021 panel-stage briefing. Petitioner (at 29-34) resurrects claims of a circuit split that it dropped before the full Ninth Circuit. And, petitioner (at 34-35) slips in a request to overrule *Lyng*—an ask never made (and thus forfeited) below.

That last request should give the Court particular pause. Petitioner (at 34-35) says that *Lyng* "is subject to criticism on the same grounds *Smith* is," alluding to unexplained "textualist" and "originalist" arguments (citation omitted). And petitioner (at 5) groups three other precedents—*Goldman*, *Bowen*, and *O'Lone*—which it says "culminated in" *Smith*. If petitioner's tacks below are any indication, merits briefing in this case would invite novel, sweeping claims challenging not just *Lyng*, but decades of free-exercise precedent, up to and including *Smith*. If this Court wants to address *Smith*'s vitality, it should take a case actually presenting that question—not invite

shadowboxing over the entire pre-*Smith* Free Exercise Clause edifice in a sui generis federal-land-use case.

Petitioner (at 37) also raises wide-ranging topics from abortifacient drugs to LGBTQ-themed books and condoms in schools. That this case implicates such issues would be news to the Ninth Circuit, which spent hundreds of pages analyzing a case about federal land use. If this Court wants to address those topics, there are other cases in the pipeline that actually present them. *E.g.*, *Mahmoud v. Taylor*, No. 24-297 (U.S. filed Sept. 12, 2024) (LGBTQ books); *Bella Health & Wellness v. Weiser*, 699 F. Supp. 3d 1189 (D. Colo. 2023) (abortion medications).

4. Given this case's unique facts, petitioner's argument for certiorari rests heavily on its contention that *this* case is inherently important. Petitioner (at 35) characterizes the decision below as greenlighting the "end [of] Western Apache religious existence as we know it." Petitioner's shifting theories offer serious reason to question that assertion, particularly when its allegations extend to large swaths of land that have nothing to do with the statute at issue. *Supra* pp. 29-31.

Regardless, at bottom, petitioner questions Congress' judgment when it enacted the Land Exchange Act. It was no secret that some Apache opposed the project. Petitioner's cofounder was among those who testified in opposition. 2007 Hearing, *supra*, at 16-18. Yet other Apache leaders adamantly supported the project, emphasizing their peoples' "desperate need of jobs and industry." 2011 Hearing, *supra*, at 68. And Congress saw the opportunity to acquire and protect Apache Leap "for traditional uses of the area by Native American people." 16 U.S.C. § 539p(g)(2)(B).

Congress spent nearly a decade debating the land exchange, holding six hearings and considering twelve bills. *Supra* pp. 5-6 & n.10. Along the way, Congress made numerous changes to the proposed legislation—reducing the amount of land transferred to exclude Apache Leap, expanding protections for that area, mandating consultation with affected tribes, and guaranteeing public access to the Oak Flat campground for as long as practicable. *Compare* S. 1122, 109th Cong. (as introduced May 25, 2005); H.R. 2618, 109th Cong. (same), *with* 16 U.S.C. § 539p (enacted version).

And Congress ultimately determined that the land exchange was in the national interest. The project will create 3,500 jobs in an economically depressed region of Arizona and add $1.2 billion annually to Arizona's economy. 3 FEIS 802-03. The project has the potential to supply 25% of U.S. copper over its lifespan—securing domestic control over a natural resource vital to the clean-energy transition and other national priorities. Peacey Decl. ¶ 11. And in exchange for Oak Flat, Congress secured the long-term preservation of ecologically, culturally, and spiritually significant sites like Apache Leap. Ten years ago, Congress overwhelmingly voted to proceed with the land exchange and "directed" the Executive Branch to "expedite" the transfer. 16 U.S.C. § 539p(a). This Court should deny certiorari and allow the Executive to carry out that command.

CONCLUSION

The petition for a writ of certiorari should be denied.

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