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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents don't dispute the exceptional importance of this case for Western Apaches, Native Americans, and all Americans who worship on federal land. Nor do they dispute that forever abolishing Apache rituals is a "substantial burden" under RFRA's ordinary meaning. Instead, offering legislative history and policy arguments, they claim that "substantial burden" must have a specialized meaning that incorporates *Lyng* in the "specific context" of "government real property."

That claim defies RFRA's text, which applies uniformly to "all Federal law" including laws governing "real property," and never mentions *Lyng*. It flouts this Court's cases, which hold that RFRA's coverage is not tied to the "holdings of our pre-*Smith* free-exercise cases." It misconstrues *Lyng*, which is part of the *Smith* framework that RFRA displaces, and didn't involve demolishing a site. And it conflicts with six circuits, which hold that preventing religious exercise is a substantial burden.

Alternatively, Respondents try to manufacture vehicle problems, claiming RFRA can't apply to later-enacted statutes. But RFRA commands the opposite, and this Court has twice followed that command without hesitation. Nor is there any "irreconcilable conflict" between the statutes here; they can be read harmoniously to authorize the land transfer *if* RFRA is satisfied.

The stakes here are clear: The Ninth Circuit has blown an unprincipled, atextual, and conspicuously Native American-shaped hole in RFRA. Absent this Court's review, the government will extinguish age-old

Apache rituals without meaningful judicial review. Native Americans will be stripped of RFRA's protection in the circuit where it is needed most. And the Nation will renege on its promise of religious liberty for all. The Court should grant certiorari.

ARGUMENT

I. The RFRA question warrants review.

1. Respondents don't dispute the simple textual proposition at the heart of this case: destroying Oak Flat would "substantially burden" religious exercise under RFRA's ordinary meaning. Pet.21-24. Instead, they claim "substantial burden" has a special meaning that "restore[s]" *Lyng* in the "specific context" of "federal lands." U.S.17-19.

That argument is foreclosed by RFRA's plain text. Far from carving out laws regulating federal lands, U.S.16, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a). Far from expressing any intent to "restore" *Lyng*, U.S.18-19, RFRA says that it seeks to "restore" only "the compelling interest test," "as set forth in" "*Sherbert*" and "*Yoder*." 42 U.S.C. 2000bb(b)(1) (emphases added). And far from asking whether claimants have been discriminated against or denied equal benefits, U.S.24, RFRA applies "even if" the challenged "burden results from a rule of general applicability." 42 U.S.C. 2000bb-1(a).

With no textual support, Respondents resort to legislative history. U.S.15-16; Res.16-17. But Respondents can't "alter [a statute's] plain terms on the strength only of arguments from legislative history." *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427,

436 (2019). Even the decision below eschewed this maneuver, Pet.App.16a-61a (no mention), flagging its "illegitimacy," Pet.App.152a-153a (Nelson, J.). And the history here, as usual, has "something for everyone." Scalia & Garner, *Reading Law* 377 (2012). While Respondents elevate the Senate Report, U.S.15-16, Res.16-17, they bury the House Report, which says RFRA is *not* limited to coercion, penalties, or denial of equal rights—language taken verbatim from *Lyng*—and instead tracks "Justice Brennan's *Lyng* dissent." Sikh.Br.5-6.

Respondents also ignore that RFRA was amended *after* this legislative history, further contradicting their theory. In 2000, Congress expanded the definition of "exercise of religion" to include the "use * * * of real property." P.L.106-274, §7(a)(3). It also deleted RFRA's reference to "the First Amendment," *ibid.*—which this Court has described as an "obvious effort to effect a complete separation from First Amendment case law" and "dispel" the notion that Congress wanted "to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases." *Hobby Lobby*, 573 U.S. at 696, 714.

Alternatively, Respondents claim "Congress explicitly incorporated into RFRA's text" a "requirement" of a "*cognizable* substantial burden." U.S.18, 23; Res.15-16. But "cognizable" appears nowhere in the statute. And far from saying some substantial burdens aren't "cognizable," RFRA says the opposite: strict scrutiny applies "*in all cases* where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1) (emphasis added).

2. Respondents' term-of-art theory is not just wrong, 85.Religious.Orgs.Br.18-24, but also conflicts

with this Court's precedents. First, this Court twice rejected similar efforts to read pre-*Smith* free-exercise limits into the statutory substantial-burden inquiry. Pet.25-26 (*Hobby Lobby*, *Holt*). Respondents suggest these holdings relate only to strict scrutiny. Res.18. Not so. See *Holt*, 574 U.S. at 361 (lower court "improperly imported" First Amendment cases in finding no "substantial[] burden"); *Hobby Lobby*, 573 U.S. at 735 n.43 (rejecting claim of "free hand" to "substantially burden" religion in commercial cases).

Second, even assuming "substantial burden" incorporates "the corpus of pre-RFRA precedent applying" *Sherbert* and *Yoder*, U.S.18-19, *Lyng* isn't part of that corpus, Pet.26-28. Rather, *Smith* holds that *Lyng* "abstained from applying the *Sherbert* test." 494 U.S. at 883-884. And *Trinity Lutheran* identifies *Lyng* as declining to apply strict scrutiny because "the law[] in question [was] neutral and generally applicable." 582 U.S. at 460. In other words, *Lyng* embodies the *Smith* framework that RFRA rejects. Respondents have no good answer for this; indeed, the government concedes the Ninth Circuit "questioned" (read: rejected) *Trinity Lutheran*'s understanding of *Lyng*. U.S.26 n.5.

Third, even construing *Lyng* as a substantial-burden case, it doesn't mean that the government's use of "its own property" *ipso facto* imposes no substantial burden. Cf. U.S.12-13. Rather, *Lyng*'s crucial facts included that "[n]o sites where specific rituals take place were to be disturbed," and plaintiffs retained "use of the area." 485 U.S. at 453-454. Thus, the *Lyng* plaintiffs—unlike here—weren't denied the ability to access or use the site for religious exercises. Pet.28-29.

Respondents find no "principled basis" for this distinction. U.S.21. But it's the same distinction drawn in

the government's own Executive Order 13,007, which mandates accommodation of "access to" and "use of" sacred sites on federal land. U.S.11 (quoting order). And the basis for this distinction is obvious: Courts can't second-guess whether "spiritual practices would become ineffectual," *Lyng*, 485 U.S. at 450, or whether government action would "rob [a person's] spirit," *Bowen* v. *Roy*, 476 U.S. 693, 696 (1986). But they can assess whether government action hinders specific acts of religious exercise, like accessing and using a sacred site. RFI.Br.6-8.

3. The Ninth Circuit's RFRA ruling also conflicts with six circuits. Pet.29-32. Respondents don't dispute that the Ninth Circuit *formerly* split with these circuits, since *Navajo Nation* "limited 'substantial burdens' under RFRA to two categories" not including prevention of religious exercise. Res.24-25. But Respondents claim the decision below mended the split by overruling *Navajo Nation* and holding that prevention counts except in one context: cases involving "government real property." U.S.23-24.

But no decision on the other side of the split contemplates categorical exceptions from the ordinary meaning of substantial burden. And several (*Haight*, *West*, *Yellowbear*) involve government property: prisons. Thus, the decision below only renders the Ninth Circuit's rule more obviously gerrymandered to exclude Native American sacred-site claims.

Respondents acknowledge that *Comanche Nation* supports Petitioner, but say no circuit has "endors[ed]" a "comparable" RFRA sacred-site claim. U.S.24. But Respondents identify no other circuit *rejecting* such a claim either. That's because there have been only five circuit decisions in thirty-one years addressing RFRA

sacred-site claims on federal land—all from the Ninth Circuit.[1] This confirms both that Respondents' floodgates concerns are exaggerated, cf. U.S.17, Res.22, and that this Court's review is urgently needed, given the Ninth Circuit's disproportionate power over Native American lives and liberty and its *de facto* control over this entire genre of cases. Pet.35-36.

Respondents note that several of Petitioner's cases "addressed RLUIPA." U.S.24-25. But they concede, as they must, that "substantial burden" in both statutes "should be 'interpreted uniformly.'" U.S.25. They also note that RLUIPA land-use claims require claimants to have an "ownership interest" in real property. *Ibid.*; 42 U.S.C. 2000cc-5(5). But this only supports Petitioner—since both RFRA and RLUIPA apply to the "use * * * of real property," but RFRA noticeably *omits* the "ownership" requirement.

Next, Respondents claim Petitioner "never explains how" the decision below conflicts with *In re Young*, 82 F.3d 1407 (8th Cir. 1996), *reinstated*, 141 F.3d 854. Res.24. But *Young* holds that government action that "would effectively prevent" religious exercise is a substantial burden. 82 F.3d at 1418. The decision below holds that government action that would "literally prevent" religious exercise is not. Pet.App.34a. That's a conflict.

Lastly, unable to refute the common thread running through prison, military, and sacred-site cases, Pet.31-32, Resolution resorts to pejoratives. Res.25

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[1] This case, *Navajo Nation*, *Snoqualmie Indian Tribe* v. *FERC*, 545 F.3d 1207 (9th Cir. 2008); *Slockish* v. *Dep't of Transp.*, 2021 WL 5507413 (9th Cir. 2021); and *Fallon Paiute-Shoshone Tribe* v. *Dep't of Interior*, 2022 WL 3031583 (9th Cir. 2022).

("extraordinary," "reparations"). But the point is simple: When the government brings religious resources "under federal control"—whether in prison, the military, or federal land—religious observers "can't voluntarily practice their faith unless the government" accommodates them. Chaplains.Br.14-15; RFI.Br.12-13. Given this change in "baseline," denial of "access" can burden religious exercise. *Lozano* v. *Collier*, 98 F.4th 614, 628-629 (5th Cir. 2024) (Oldham, J., concurring) (citing Barclay & Steele).

II. The free-exercise question warrants review.

On free exercise, Respondents don't deny that circuits are split over whether plaintiffs must show a "substantial burden" when a law is not "neutral and generally applicable." Pet.32. Instead, they say the split isn't presented here because the Ninth Circuit found no "*cognizable*" burden. U.S.26, Res.26. But the three circuits on the right side of this split draw no such distinction. Pet.33.[2]

To the extent *Lyng* really does create a federal-land-use exception to the Free Exercise Clause, it "lacks in originalist or textualist support" and should be "revisit[ed]." Pet.App.156a-157a (Nelson, J.). The government says Petitioner offered no "special justification" for doing so. U.S.27. But the justification is

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[2] Resolution cites three free-exercise cases from other circuits—none holding the government escapes heightened scrutiny when destroying and terminating religious practices at a sacred site. Res.26-27 (*Prater*, *Taylor*, and *Lockhart*). The one circuit to address such a case, by contrast, *rejected* the argument that there is no "cognizable free exercise claim" absent a "property interest in [federal land]." *Badoni* v. *Higginson*, 638 F.2d 172, 176-177, 177 n.4 (10th Cir. 1980).

"straightforward": "the ordinary meaning of 'prohibiting the free exercise of religion'" is "forbidding or hindering unrestrained religious practices or worship." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 567 (2021) (Alito, J., concurring). Here, it's undisputed that religious worship at Oak Flat would be not just hindered but obliterated.

III. The issues are vitally important.

Respondents don't dispute the exceptional importance of the issues or that destroying Oak Flat would forever end essential Apache rituals. Pet.35-36; 52.Tribes.Br.2. Nor do they dispute that the decision below threatens religious exercise of *all faiths* who worship on federal land—churches in national parks, Masses in national cemeteries, prayer gatherings on the National Mall, and more. Pet.26-28; Knights.Br.8-13; Sikh.Br.18-19.

Instead, Respondents press a policy argument, claiming that applying RFRA as written would "upend federal land management." Res.21-22; U.S.17. But this is the same "courting anarchy" concern that animated *Smith*. 494 U.S. at 888. Congress repudiated it in RFRA.

Rightly so, as that concern is greatly exaggerated. Any RFRA claim that thwarts a compelling governmental interest will fail. States.Br.12. That's what strict scrutiny means. And even before getting to strict scrutiny, RFRA plaintiffs must satisfy the threshold requirements of showing a "substantial" "burden" on "sincere" "religious" "exercise." RFI.Br.5. These are meaningful limits that have long enabled courts to

"sift the wheat of religious liberty from the chaff of unwarranted exemption claims." RFI.Br.6. Respondents ignore them.

Indeed, Respondents don't even attempt to explain why RFRA works across all federal law *except* "federal lands." U.S.18. Why can the government comply with RFRA in managing sensitive properties like prisons and military bases, Pet.39-40, but not parks and forests? And why can the government manage parks and forests subject to a host of restrictive laws—like NEPA, FLPMA, NHPA, NAGPRA, CERCLA, ESA, CWA, and CAA—but not RFRA? Particularly telling is the government's boast that it has "long" complied with Executive Order 13,007 (U.S.11), which requires the government to protect the use of sacred sites on "Federal lands" unless "clearly inconsistent with essential agency functions." 61 Fed. Reg. 26,771 (May 24, 1996). What makes the clearly-inconsistent-with-essential-agency-functions test workable, but RFRA's compelling-governmental-interest test not?

Even Respondents' unprincipled carve-out for federal lands is riddled with additional unprincipled carve-outs for "penaliz[ing]" and "discriminat[ion]." U.S.24. Why does it substantially burden religious exercise to penalize the use of Oak Flat as trespassing, Pet.39, or to discriminate in favor of secular uses there, but not to terminate religious uses entirely? Respondents don't even try to make this make sense—much less ground these carve-outs in RFRA's text.

Instead, Resolution touts the "potential" of its mine to create jobs and support "the clean-energy transition," citing the self-serving, extra-record affidavit of

its president. Res.35. But these are classic strict-scrutiny arguments having nothing to do with the substantial-burden inquiry. They can be tested on remand.

IV. This case is an ideal vehicle.

Unable to contest importance, Respondents invent supposed vehicle issues. None exist.

1. The government says Petitioner's RFRA claim is "atypical," because it would purportedly "nullify" a "statute," rather than grant an "exemption." U.S.12, 27-28. But what Respondents call the "Land Exchange Act" is just one of 649 sections in the National Defense Authorization Act for Fiscal Year 2015, P.L.113-291. Whatever happens with the land transfer, 648 sections of that statute will remain in effect.

Nor would a successful RFRA claim necessarily stop the transfer. If the RFRA ruling rested on the availability of less-restrictive alternatives—like the government's admission that alternative mining techniques "could physically and technically be applied" while reducing "impacts on [Oak Flat's] surface" (Pet.App.928a-936a)—the transfer might proceed conditioned on those alternatives. PCUSA.Br.15-18.

Even if the transfer were stopped, that is hardly atypical. When a law targets religion or lacks general applicability, courts often hold it "void" and enjoin its implementation. *Church of Lukumi* v. *City of Hialeah*, 508 U.S. 520, 547 (1993); see *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978); 42 U.S.C. 2000bb-1(c) ("appropriate relief").

2. Next, Respondents claim the land exchange was a carefully considered congressional "directive" that RFRA cannot "thwart." U.S.4, 30. In fact, it was a last-

minute rider to a 698-page, must-pass defense bill, added without vote or debate because Congress rejected all eleven standalone bills proposing it.[3]

More importantly, Congress carefully considered RFRA, and RFRA specifically provides that it applies to later-enacted laws "unless such law explicitly excludes such application by reference to this chapter," 42 U.S.C. 2000bb-3(b)—which all agree the transfer provision doesn't do. Respondents offer a "last-minute argument" (Pet.App.262a) that RFRA's express-reference provision is unconstitutional, because "one Congress cannot bind a later Congress." U.S.29. But this Court has twice applied the provision to later-enacted statutes without suggesting any such infirmity. *Hobby Lobby*, 573 U.S. at 719 n.30; *Little Sisters of the Poor* v. *Pennsylvania*, 591 U.S. 657, 681 (2020). Rightly so, as RFRA's express-reference provision leaves Congress free to exempt later-enacted laws from RFRA by a simple majority. Senator.Lee.Br.18; Pet.App.258a. In fact, members of Congress have introduced sixty-five bills in the last six years proposing to do just that.

Regardless, the transfer provision can't impliedly repeal RFRA either, because the statutes are readily "harmonized." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 510-511 (2018). RFRA doesn't "render [the land transfer] meaningless," *Traynor* v. *Turnage*, 485 U.S. 535, 548 (1988)—it permits it to occur *if* strict scrutiny is satisfied. This is precisely how RFRA is designed to

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[3] Resolution also touts the land exchange as a benevolent "opportunity" for the government to "acquire and protect Apache Leap." Res.34, I, 22. But the government already owns over 80% of Apache Leap. Pet.App.803a; 1-EIS-ES-8. And calling this "protection" is like destroying the Western Wall and telling Jews they should be thankful they can still visit King David's Tomb.

work: as a "super statute" that guarantees strict scrutiny before "other federal laws" substantially burden religious exercise. *Bostock* v. *Clayton County*, 590 U.S. 644, 682 (2020).

3. Resolution (but not the government) feigns "confusion about what land is even at issue," complaining about three overlapping areas labeled "Oak Flat." Res.28-31. But there is no confusion. The first two are created and defined by the government: (1) the 4,309-acre (6.7-square-mile) "Chí'chil Biłdagoteel Historic District Traditional Cultural Property" in the National Register of Historic Places, NPS Form at 10-12 (cited in Pet.13 n.3); and (2) within that, the 2,422 acres designated by statute for conveyance to Resolution, P.L.113-291, §3003(b)(2).

Because traditional religious practices don't necessarily track government boundaries, and to aid the Court, Petitioner delineated the specific "area of Oak Flat used for religious ceremonies." Pet.15 (Central Sacred Area). This includes the "sites used for Sunrise, Holy Grounds, and sweat lodge ceremonies," "old-growth oak groves," "sacred springs," and "centuries-old petroglyphs." Pet.15; see also SCAT.Br.5-10. The government has never disputed that this area is used for "rituals that can only take place there," SCAT.Br.19, 6, 10-12, and will be destroyed.[4]

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[4] Resolution complains (Res.30) about a photograph of Devil's Canyon, which Apaches call Ga'an Canyon, and which forms Oak Flat's eastern boundary. It is included for context and labeled in the record as Ga'an Canyon. 2.E.R.251. Resolution also questions the doctrine of associational standing (Res.27) but doesn't dispute that it is controlling law and Petitioner satisfies it.

Alternatively, Resolution suggests the project's impacts won't be "immediate." Res.32. But Judge Bumatay correctly dismissed this argument as "absurd[]," Pet.App.616a, not least because the EIS itself repeatedly describes the impacts as "immediate, permanent, and large in scale." Pet.App.912a. The transfer would immediately "strip" Apaches of "legal protections," "effectively exclud[ing]" them from Oak Flat. Pet.App.606a, 615a. Resolution "would undoubtedly" begin "preparatory activities that are likely to degrade" the site and "cause irreparable damage." Pet.App.615a-616a. And Ninth Circuit precedent makes seeking "reversal of the transfer futile." Pet.App.616a-617a. Thus, "further percolation," Res.28, means destruction.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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