No. 24-291

IN THE

Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PRESIDING BISHOP OF THE EPISCOPAL CHURCH, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, EVANGELICAL LUTHERAN CHURCH IN AMERICA, AND SOCIETY OF THE UNITED METHODIST CHURCH IN SUPPORT OF PETITIONER APACHE STRONGHOLD'S PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are major Protestant denominations representing millions of worshipers in the United States. *Amici* support strong protections for the free exercise of religion, and they were part of the campaign to secure passage of the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-4 *et seq. Amici* believe it is the responsibility of the United States to ensure the free exercise of religion. The proposed destruction of sacred Apache land will make it impossible for the Petitioners to practice their religion and will exacerbate the historical cruelties committed by this country against Native Americans. *Amici* recognize their own contributions to these cruelties, namely with the use of religious doctrine to rationalize the debasement and domination of Indigenous Peoples. *Amici* have a strong interest in working to right the wrongs of the past and are committed to standing with Native Americans in defense of their liberties.

The Most Reverend Michael Bruce Curry is the 27th Presiding Bishop of The Episcopal Church, a hierarchical religious denomination in the United States and seventeen other countries, which includes more than 6,500 Congregations. Under the Church's polity, he is charged with "[s]peak[ing] God's words to the Church and to the world, as the representative of [the] Church." In 2009, the Episcopal Church adopted a resolution to repudiate and

1. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice pursuant to Rule 37.2 of the *Amici*'s intention to file this brief.

renounce the Doctrine of Discovery that originated in the 15th century, which "held that Christian sovereigns and their representative explorers could assert dominion and title over non-Christian lands with the full blessing and sanction of the church." As indicated in the resolution, the Doctrine of Discovery led "to the colonizing dispossession of the lands of indigenous people and the disruption of their way of life." In 2012, the Episcopal Church adopted a resolution that called "upon congregations, institutions, dioceses and the corporate offices of The Episcopal Church . . . to help protect the sacred sites of Indigenous Peoples."

The General Synod of the United Church of Christ is the representative body of the denomination of the United Church of Christ ("UCC"), a Protestant denomination with more than 800,000 members and nearly 5,000 churches. The UCC has long advocated for the religious freedom of Native Americans and other Indigenous Peoples. In 1993, the General Synod of the UCC adopted a resolution "in support of amendments to the American Indian Religious Freedom Act" and noted the "great importance on access to sacred sites" in "Native American Religions." In 2013, the General Synod adopted a resolution "calling for the [UCC] to repudiate the Doctrine of Discovery which authorized the genocide of native peoples and the theft of native lands." The UCC declared that the Doctrine of Discovery "has been and continues to be a shameful part of United States and [the UCC's] history" and that the "[UCC has] join[ed] with its ecumenical partners to explore ways to compensate American Indians . . . for lands and resources that were stolen and which are now the United States of America."

The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and fifth largest Protestant body in the United States. The ELCA has over 8,000 member congregations which, in turn, have approximately three million individual members. In 2016, the Churchwide Assembly, the highest legislative authority in the ELCA, voted to repudiate the Doctrine of Discovery. In so doing, the ELCA "affirm[ed] that this church will eliminate the [D]octrine of [D]iscovery from its contemporary rhetoric and programs, electing to practice accompaniment with native peoples instead of a missionary endeavor to them, allowing these partnerships to mutually enrich [I]ndigenous communities and the ministries of the ELCA." In its subsequent Declaration to American Indian and Alaska Native People, the ELCA confessed that it has "devalued Indigenous religions and lifeways and ha[s] not challenged the invisibility of Indigenous people in American society."

The General Board of Church and Society of The United Methodist Church ("UMC") is responsible for seeking to implement the Social Principles and other policy statements of the UMC, a denomination consisting of over 39,000 congregations and over 9 million members in the United States, Africa, Asia, and Europe. The General Conference is the UMC's highest legislative body and is authorized to speak on behalf of the entire denomination. In 2016, the UMC through its General Conference adopted the following Social Principles: "we urge policies and practices that ensure the right of every religious group to exercise its faith free from legal, political, or economic restrictions." In 2024, the General Conference adopted "We join with indigenous peoples and tribes to demand that their rights to exercise national sovereignty be upheld by governments and courts. We support the

efforts of indigenous people to revitalize their languages and cultures in the face of concerted efforts to assimilate them into mainstream societies. We acknowledge that indigenous, native, and aboriginal peoples are entitled to control their land, water and other resources, and we decry any attempts to forcibly seize these resources or to forcibly remove indigenous people from their territories." Additionally, as adopted in 2024, "We urge governments, businesses, churches, and other institutions in civil society to take concerted action to preserve and protect the rights of all religious people. . . We endorse the rights of all religious people to practice their faith, free from unjustified and unnecessary legal, political, and financial restraints."

SUMMARY OF ARGUMENT

The Ninth Circuit has reached the startling conclusion that the Government's decision to destroy land sacred to the Western Apache, without which their religious practices cannot continue, is not a "substantial burden" on religion. The Ninth Circuit reads RFRA to exclude most federal land decisions. *Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024). This narrow reading contravenes the language of the statute, expressed intentions of Congress, and decisions by this Court and other Circuits. This Court should grant certiorari to clarify RFRA's substantial burden test, an issue that has divided the Circuits and is vitally important to all people of faith.

"Substantial burden" should be interpreted according to its ordinary and common-sense meaning. Congress did not limit the test by reference to prior case law, or allow the exclusion of whole areas of federal action. Congress

made all federal law subject to RFRA, consistent with Congress's intention to broadly protect religions liberty.

The "Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred." *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). The Ninth Circuit's reading of RFRA does just that. Many of the sacred sites essential to Native American religion are on federal land, a consequence of this country's history of divestment and persecution of Indigenous people. By exempting federal land decisions from RFRA, the Ninth Circuit test uniquely discriminates against Native American religions that depend on access to federal lands.

The substantial burden test should take into account Government control of Native American sacred sites. This Court has already held that when Government controls the resources required for religious practice, barring access to those resources is a substantial burden on free exercise. The same must be true for federal lands. This Court should make clear that the Government substantially burdens the free exercise of religion when it bars or substantially limits access to sacred land on which Native American religions depend.

ARGUMENT

Under any ordinary understanding of the words, Petitioners face a "substantial burden" on the exercise of their religion at the hands of the Government. The Government proposes to transfer Oak Flat, the sacred site necessary to Western Apache religious practice, to private owners who intend to mine it, and over time prohibit visitors and entirely collapse the site, permanently and

irrevocably preventing the Apache religious groups from continuing their ancient religious practices. The Government's plan would prevent Apache religious groups from accessing land that is fundamental to their worship, thereby destroying their religious practices entirely. There can be no question that the complete prevention of Petitioners' religious practices is a "substantial burden" on religion, as those words are commonly understood.

Splitting from this Court, other Circuits, and even itself, the Ninth Circuit rejected this common-sense understanding.[2] It held that the "substantial burden"

2. This Court, the Ninth Circuit, and six other Circuits have held that prohibiting access to or preventing religious exercise is a "substantial burden" on the free exercise of religion. *See Ramirez v. Collier*, 595 U.S. 411, 416 (2022) (holding that the state's refusal to allow petitioner religious touch or audible prayer "substantially burdens his exercise of religion" because "he will be unable to engage in protected religious exercise"); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) ("We have little difficulty concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise"); *see also, e.g., Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.); *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *Lovelace v. Lee*, 472 F.3d 174, 187-88 (4th Cir. 2006); *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004); *c.f. C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003); *see also Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830-31 (11th Cir. 2020). While these cases arise under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the "substantial burden" language in RLUIPA imposes the "same standard" as RFRA. *Holt v. Hobbs*, 574 U.S. 352, 356-58 (2015); *see also Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n. 103 (3d Cir. 2016) ("[T]he two statutes are analogous for purposes of the substantial burden test."). The same standard is particularly applicable here, where the government controls the resources required for the Petitioners' religious practice. *See infra.* Point D.

test in RFRA generally excludes the government's disposition of its own land, no matter how serious the impact on religion. The majority relied on this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*, a pre-RFRA Free Exercise case, as standing for the proposition that a disposition of government real property does not generally constitute a substantial burden to those using the land. *Apache Stronghold*, 101 F.4th at 1055 (*citing Lyng*, 485 U.S. at 449-53). It held that Congress, in adopting the "substantial burden" test in RFRA, was employing a term of art defined by this Court through the debate between Justices Scalia and O'Connor in *Employment Division v. Smith*. *Id.* at 1059-61 (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)). On the curious theory that the Justices in *Smith* had not indicated that *Lyng* "was inconsistent with the substantial burden test," the Ninth Circuit concluded that *Lyng* constrains the RFRA definition of "substantial burden." *Id.* at 1060-61.

The Ninth Circuit thus effectively removed from RFRA federal land decisions impacting Native American religious practices. The absurd result of this removal is that even though the Government's proposed action will destroy the Petitioners' religion, it does not, according to the Ninth Circuit, constitute a substantial burden on religion. Under RFRA, the Government could not, without a compelling interest, impose fines on Petitioners for conducting religious rites. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972) (fines against Amish for keeping students home from high school violate First Amendment in light of impact on Amish religion). Yet, according to the Ninth Circuit, RFRA offers no protection if the Government *destroys* the land necessary to those rites, eliminating the Petitioners' ability to practice their religion.

A. The Ninth Circuit's Narrow Test is Not Consistent with RFRA's Text or This Court's Decisions

There is no indication that Congress intended to define "substantial burden" so narrowly or to depart from a common-sense understanding of the term. Congress did not define "substantial burden" in RFRA. It did not, contrary to the Ninth Circuit's interpretation, link the term to any particular case or cases, or otherwise indicate that it considered the term to be a term of art. Congress referenced prior case law in stating that one purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b). But Congress did not include any such reference with respect to the substantial burden test. *Id.*; *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014) ("When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so.").[3]

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3. As noted by the dissenting judges below, Congress stated that RFRA has two purposes: (1) "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened," and (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b); *Apache*, 101 F.4th at 1134. The references to *Sherbert* and *Yoder* are sources for the compelling interest test only; Congress did not link the substantial burden test to those cases. *See Apache*, 101 F.4th at 1136-37 (Murguia, J., dissenting).

The caselaw does not treat "substantial burden" as a term of art. The phrase does not even appear in *Sherbert* or *Yoder*. None of this Court's Free Exercise cases define a "substantial burden" test. The consistent usage and clear definition that are the hallmarks of a term of art are simply missing from this Court's Free Exercise jurisprudence. *See Yellen v. Confederated Tribes of Chehalis Reservation,* 594 U.S. 338, 354 (2021) ("Ordinarily . . . this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.").

This Court's decision in *Lyng*, on which the Ninth Circuit relied so heavily, is one step even further removed. *Lyng*, like the cases before and after it, does not use the term "substantial burden." 485 U.S. 439. Congress made no mention of *Lyng* in RFRA. Nor did Congress indicate any intention to exempt land-management decisions from RFRA.

To the contrary, Congress made *all* implementations of federal law subject to RFRA, foreclosing a blanket exemption for federal land management. Congress's intention in passing RFRA was to provide "very broad protection for religious liberty," going "far beyond what this Court has held is constitutionally required" in its pre-*Smith* decisions. *Hobby Lobby,* 573 U.S. at 693, 706. The Ninth Circuit's restrictive approach does the opposite, using pre-*Smith* decisions to narrow the scope of RFRA's language beyond recognition.

B. *Lyng* Supports a Finding of Substantial Burden Here, Where the Government's Action Will Effectively Prohibit Petitioners From Accessing Their Sacred Site and Compel Them to Abandon Their Religious Practices

The Ninth Circuit also dramatically over-reads *Lyng*. Even if *Lyng's* constitutional analysis does inform the RFRA "substantial burden" test, its holding *supports* rather than refutes the Apache Petitioners' position.

This Court in *Lyng* held that government land decisions that may incidentally make it more difficult to practice religion are not subject to scrutiny under the First Amendment when they have no "tendency to *coerce* individuals into acting contrary to their religious beliefs." *Lyng*, 485 U.S. at 450-51 (emphasis added). The Court approved the building of a road on land sacred to Native Americans where the Government had taken pains to place the road "as far as possible from the sites" used for spiritual activities, so that "[n]o sites where specific rituals take place were to be disturbed." *Id.* at 443, 454. Justice O'Connor, writing for the majority, recognized that the road might "diminish the sacredness of the area" and "create distractions" that could interfere with religious experiences, but it would not prevent access entirely. *Id.* at 448. The Court therefore held that the building of a road on publicly owned land, like the use of a Social Security number in *Bowen v. Roy,* 476 U.S. 693 (1986), would not pose a Free Exercise problem because the Government would not be *coercing* the plaintiffs into violating their religious beliefs. *Id.* at 449.

At the same time, Justice O'Connor was clear that the "Constitution does not permit government to discriminate

against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area" altogether "would raise a different set of constitutional questions." *Id.* at 453.

That is precisely what the transfer of Oak Flat will do. By Government action, the Western Apache will be coerced into abandoning religious practices that depend on access to Oak Flat. By Government action, the Western Apache will be coerced into acting contrary to their religious obligation to care for and interact with their most sacred sites. The Government's proposed transfer of Oak Flat to Resolution Mining – which plans to eventually prohibit all visitors to Oak Flat and collapse and destroy the area – prohibits Petitioners from their sacred land altogether. Unlike the road in *Lyng*, the Government's proposal will not incidentally diminish religious activity, it will bar it entirely and permanently. Even under the *Lyng* decision, the proposed transfer will substantially burden Petitioners' free exercise of their religion.

C. The Ninth Circuit's Standard Discriminates Against Native American Religious Groups

The Ninth Circuit's novel interpretation of RFRA harshly discriminates against Native American religious groups.

Petitioners recount in their Petition the tragic history by which the federal government gained control over Apache sacred land. That history includes broken treaties, the organized massacre of Apache people, the removal of Apaches from their land, and the delivery of that land to metal miners. It also includes the systematic attempt to demolish Native American religious and cultural

practices, including by forcibly removing hundreds of Apache children from their families. (Petition for Cert. at 12-13). *Amici* are conscious of their own role in this history and the use of Christian doctrine to dispossess Indigenous people.

The result is that the Western Apache no longer live on the lands encompassing their sacred spaces. *Apache*, 101 F.4th at 1130 (Murguia, J., dissenting). Those sacred spaces are held and controlled by the federal government. The Apache are not alone in this. Many remaining Native American religious sites are on federal land. *See* Russel Lawrence Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 Or. L. Rev. 363, 396 (1986).

Western Apache religious practices, and the religious practices of many Native Americans, are entirely and inextricably bound to these federally controlled sacred sites. A common understanding in many Native American religions is "that land is itself a sacred, living being." *Lyng*, 485 U.S. 461 (Brennan, J., dissenting) (citing Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 Am. Ind. L. Rev. 1, 10 (1982)). "[L]and, like other living things, is unique, and specific sites possess different spiritual properties and significance." *Id.* Many Indigenous religious adherents "regard creation as an on-going process in which they are morally and religiously obligated to participate" through ceremonies and rituals tied to sacred sites. *Id.* at 460. These ceremonies cannot be conducted in a different location; barring or destroying the sacred site is effectively a termination of the religion. *See* Stephanie Hall Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites,* 134 Harv. L. Rev. 1294, 1304-06 (2021).

Native American religious groups thus face the unique problem that the Government has divested them of the sacred sites at the center of their religion, leaving them beholden to the Government for their continued ability to practice their religion. *Id.* at 1297. The Ninth Circuit framing ignores the nature of land-based religions, and thus privileges traditional Abrahamic religions and discriminates against Indigenous religions. If allowed to stand, the decision will disproportionately harm the Native American religions that depend on the Government to grant access to the sacred spaces where they have, since before the founding of this nation, performed their religious rituals.

D. An Appropriate Test Must Take Into Account the Government's Control Over Native American Access to Sacred Sites

This Court's precedents make clear that when the Government has control over the resources required for the practice of religion, denial of access to those resources will constitute a substantial burden on the free exercise of religion.

In *Cruz v. Beto*, for example, this Court held that a Buddhist inmate properly stated a cause of action when he alleged that the prison denied him access to the prison chapel and prohibited him from corresponding with his religious advisor. 405 U.S. 319, 322 (1972) (per curium).

Similarly, in *O'Lone v. Estate of Shabazz,* prison officials required Muslim prisoners to work on Fridays, preventing them from attending Friday congregational services required by their religion. 482 U.S. 342, 347

(1987). The Court held that the Muslim prisoners properly stated a Free Exercise claim based on denial of access to religious practices. *Id.* at 350-52.

In *Katcoff v. Marsh*, the Second Circuit held that providing a military chaplaincy where the Government dictates the physical location of service members was required by the Free Exercise Clause. 755 F.2d 223 (2d Cir. 1985). It found that in "situation[s] such as military service, where the Government regulates the temporal and geographic environment of individuals," such individuals "would be unable to engage in the practice of their faiths" unless the Government allows the "religious services to be conducted with the use of government facilities." *Id.* at 235.

In a series of modern cases, this Court and others have recognized that when the Government controls access to space required for religious practices, as in prisons or the military, the denial of such access is a substantial burden. *See Ramirez v. Collier,* 595 U.S. 411 (2022) (barring religious advisor from death chamber substantially burdened religious exercise); *Yellowbear v. Lampert,* 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.) (refusing to escort prisoner to a sweat lodge is a substantial burden); *Greene v. Solano County Jail,* 513 F.3d 982 (9th Cir. 2008) (refusing to escort prisoner to group worship services is a substantial burden); *see also Thai Meditation Ass'n of Alabama v. City of Mobile,* 980 F.3d 821, 830-31 (11th Cir. 2020) (regulation that "completely prevents the individual from engaging in religiously mandated activity" would plainly be a substantial burden).[4]

4. These cases were decided under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000bb

In the same way, because the Government has control of the resources Native Americans require for the practice of their religion, it substantially burdens their free exercise of religion when it bars access to or destroys those resources. *See Comanche Nation v. United States,* No. 5:08-cv-849, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008) (Government's plans to build a warehouse on federal land near a Native American sacred site imposed a substantial burden by denying reasonable opportunity to engage in religious activity). Accordingly, under RFRA the Government should be required to demonstrate a compelling interest and effort to minimize the impact of such burden.

Finally, this standard would not impose a religious veto over federal land decisions, as the Government has argued. The compelling interest test has long been recognized as an appropriate means for resolving the tension between Government action and First Amendment rights. Furthermore, federal land decisions are already subject to various requirements to minimize impacts to the environment, watersheds, and endangered species. *See* Barclay & Steele, *Rethinking Protections,* 134 Harv. L. Rev. at 1350-51. The Government also has committed itself to accommodating Native American sacred sites. Executive Order 13,007 on Indian Sacred Sites (61 F.R. 26671, 1996). Subjecting federal land management to RFRA and requiring the Government to minimize or justify the destruction of Native sacred sites would not

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et seq., the "sister statute" of RFRA. *Ramirez,* 595 U.S. at 424; *see Holt*, 574 U.S. at 356-58 (RLUIPA and RFRA involve the "same standard"); *see also Mack*, 839 F.3d at 304 n.13 ("[T]he two statutes are analogous for purposes of the substantial burden test.").

materially change the Government's ability to use federal lands to serve important purposes.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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