No. 24-291

In the Supreme Court of the United States

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

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR 85 RELIGIOUS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici have diverse religious beliefs but are united in their view that all sincere religious believers should be protected under the Religious Freedom Restoration Act (RFRA). The decision below discriminates against Native American religious beliefs, and *amici* have a significant interest in ensuring that this Court gives RFRA its full textual protections. *Amici* include:[*]

The **Christian Church (Disciples of Christ) in Arizona** is honored to call those in Apache Stronghold sisters and brothers.

Pax Christi New York State is a chapter of Pax Christi USA, a member of Pax Christi International, the Catholic Peace Movement.

Founded in 1880, **First Congregational United Church of Christ of Albuquerque** is the oldest Protestant church in New Mexico.

New Mexico Interfaith Power and Light is a grassroots non-profit working in New Mexico and El Paso to mobilize faith communities and people of conscience on environmental justice.

Arizona Interfaith Power and Light is a non-profit working with AZ congregations to address the unjust environmental impacts of the climate crisis.

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[*] Under Rule 37.2, *amici* provided timely notice of their intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Colorado Coalition for Indigenous Allies works to support equal opportunity for its Indigenous neighbors.

Ratzon Center for Healing and Resistance supports the spiritual, social, and philosophical needs of the queer Jewish community in Pittsburgh.

Portland Mennonite Church strives to be a distinctively Christ-shaped Anabaptist community that engages in the compassion, justice, and shalom of the Bible.

Saint Ambrose Episcopal Church (Boulder, CO) is a community of Christians that takes seriously its baptismal covenant to fight for justice for *all* people.

St. Stephen and the Incarnation Episcopal Church is a multicultural parish in DC, part of the Episcopal Diocese of Washington.

Ocean View Presbyterian Church (DE)

Xanapuk Land Water & Culture Conservancy Inc.

Arizona Poor People's Campaign

Shalom Mennonite Fellowship (Tucson, AZ) is a Christian church that seeks to follow Jesus, promote peace and justice, and repair historical harms.

Southwest Conference United Church of Christ

Plymouth Monthly Meeting of the Religious Society of Friends (est. 1708) is a Quaker Meeting (Church) in Pennsylvania.

Germantown Mennonite Church (PA)

Montana Jewish Project works to foster and strengthen Jewish life across Montana.

The **Max and Anna Levinson Foundation** is a Jewish family foundation committed to developing a more just, caring, and sustainable world.

Nefesh LA is a Jewish spiritual community in Los Angeles, welcoming all identities while cultivating empathy, love, and justice.

Shepherd of the Hills United Church of Christ (Phoenix, AZ) is an open and affirming church that serves the disadvantaged.

University Mennonite Church (State College, PA) is a group of Christians in the Anabaptist tradition who are praying and advocating for justice in Oak Flat.

Dorothy Day Catholic Worker, Washington DC is a house of hospitality for the poor and vulnerable.

Rochester (MN) Friends Meeting is a part of the Friends General Conference (Quakers) and advocates for the right of all people to worship in accordance with their beliefs, including Apache Stronghold.

Mennonite Church of Normal (IL)

Scottsdale Congregational United Church of Christ is an open and affirming community, welcoming all who seek present-tense spirituality.

Bethel College Mennonite Church (North Newton, KS) is a church that believes that faith in God

should lead us, by the Spirit's power, to follow Jesus in doing justice, loving mercy, and walking humbly with God.

The National Council of Jewish Women (NCJW) is a grassroots organization of volunteers who, inspired by Jewish values, strive for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. *Amicus*, the **NCJW (Arizona Section) Inc.**, is one of NCJW's more than 50 affiliates.

Presbytery of San Gabriel, PC(USA) is comprised of 39 congregations; it is the regional ministry of the Presbyterian Church (U.S.A.) in the San Gabriel Valley in Southern California.

Ignatian Solidarity Network is a 501(c)(3) organization with a mission to form advocates for social justice animated by the spirituality of St. Ignatius of Loyola and the witness of the Jesuit martyrs of El Salvador.

Raleigh Mennonite Church is part of Mennonite Church USA and is active in the Repair Network of Coalition to Dismantle the Doctrine of Discovery, which accompanies Apache Stronghold.

Hyattsville Mennonite Church (MD) is an inclusive Anabaptist community that seeks to live into an audacious faith and promote sustainability, so future generations can enjoy God's creation.

Wellington United Church of Christ is an inclusive faith community that worships God, cares for each other, and seeks justice in the world.

Minnetonka Community Church, (DBA) the Mills Church is a multi-denominational faith community seeking healing relationships with God, self, others, and all creation.

Eighth Street Mennonite Church (Goshen, IN) is an Anabaptist congregation.

First Congregational United Church of Christ, Phoenix is a justice-seeking, inclusive, spiritual community that engages with others to promote social justice.

Loretto Link is a community of people working for justice, particularly for economic equity and the rights of immigrants.

Pax Christi USA

First Mennonite Church of San Francisco is a Christian church committed to following the way of Jesus Christ.

Faith Mennonite Church (Minneapolis, MN) is a Christian community with a spiritual heritage of European ancestors persecuted and martyred for their religious beliefs and practices.

Hyde Park Mennonite Fellowship is a biblically-based Christian church that values the sacredness of all creation.

Community Christian Church is a fellowship of believers, seeking to live the way Jesus taught, by loving God and neighbor.

Belmont Mennonite Church (Elkhart, IN) is an Anabaptist Congregation seeking to follow Jesus'

example of peace, justice, and harmony with our neighbors.

Boulder Mennonite Church is an inclusive, caring and peace-minded Anabaptist Christian community.

Bartimaeus Cooperative Ministries is an ecumenical experiment that incubates collaborative work around liberation, nonviolence and mutual aid.

Seattle Mennonite Church, located on unceded Coast Salish lands, is a founding member of the Coalition to Dismantle the Doctrine of Discovery.

Columbus Mennonite Church (Columbus, OH) is an inclusive congregation seeking to follow Jesus' teachings of love, justice, and fellowship with all.

Saguaro Christian Church is a congregation that lives into the calling of the Christian Church (Disciples of Christ) to be a movement for wholeness in a fragmented world.

University Presbyterian Church (Tempe, AZ)

Franciscan Action Network is a collective Franciscan voice seeking to transform U.S. policy related to peace-making, care for creation, poverty, and human rights.

Since 1946, **Arizona Faith Network** has been uniting people of diverse faith backgrounds, fostering peace, understanding, and social action.

Mennonite Mission Network builds partnerships to participate in God's global ministry.

The **Unitarian Universalist Church of Tucson** has been committed to creating love, justice, and peace in the Sonoran Desert since 1948.

First Mennonite Church of Champaign-Urbana is a local Christian congregation committed to undoing the legacy of the Doctrine of Discovery and supports Apache Stronghold protecting their sacred land of Oak Flat.

Dayspring United Methodist Church

Tempe Monthly Meeting of the Religious Society of Friends (Quakers)

Rincon Congregational United Church of Christ (Tucson, AZ) strives to be a Just Peace church, making amends for harm and seeking justice and peace for all created by the Divine.

Sojourn Mennonite Church (Fort Collins, CO) is an inclusive, Anabaptist community that fosters peace and justice and seeks an authentic relationship with God.

Goshen College (Goshen, IN) is a private, liberal arts college shaped by the Anabaptist-Mennonite tradition.

Manchester Church of the Brethren (IN) is an Anabaptist Christian community and believes hospitality, inclusion, and service are at the heart of the Gospel.

The University of Arizona College of Law's **Indigenous Peoples Law and Policy Program** (IPLP) aims to protect and promote Indigenous peoples' human rights and increase Indigenous representation in the legal profession.

The **Coalition to Dismantle the Doctrine of Discovery** calls on the Christian Church to address the extinction, enslavement, and extraction done in the name of Christ on Indigenous lands.

Northern Yearly Meeting of the Religious Society of Friends is the regional organization of progressive Quakers in the upper Midwest.

La Crosse Friends Worship Group (WI) is a religious community that conducts spiritual practice in the manner of Friends (Quakers).

Nipponzan Myohoji of Bainbridge Island, a Buddhist organization, prays for the end of war and violence around the world and the realization of universal peace.

Assembly Mennonite Church works to repair relationships, restore justice, and counter the untold harm done to Indigenous and Black People.

Albuquerque Mennonite Church (NM) is a Christian community of the historic peace church and Anabaptist traditions.

Community Peacemaker Teams is an international non-profit organization that builds partnerships to transform violence and oppression.

Central District Conference of Mennonite Church USA represents 48 congregations who seek to know Christ's abundant love and answer God's call to bring peace, healing and hope.

Foothills Christian Church (Phoenix, AZ) is a congregation seeking to follow Jesus, love God, serve others, and welcome everybody.

Grace St. Paul's Episcopal Church serves Tucson, AZ and live-streams services across the country.

West Philadelphia Mennonite Fellowship is part of the Allegheny Mennonite Conference.

Indigenous Justice Group of Peace Mennonite Church

Eliza B. Conley Mennonite Catholic Worker House cares for earth and water in the Kaw Nation's homeland and provides low and no-cost housing to Indigenous, Black, and other women of color.

Eel River Community Church of the Brethren, chartered in 1838, is a church of folks trying to follow Jesus in doing justice and goodness.

Mennonite Church of the Servant (Wichita, KS) is a Christian church committed to radical and biblical spirituality, living in relational and accountable community, and seeking Christ's peace within and in the world.

Episcopal Diocese of Colorado

Mennonite Men is a nonprofit organization with a mission of engaging men to grow, give and serve as followers of Jesus for God's shalom.

The **Office of Peacebuilding and Policy** (DC), a ministry of the **Church of the Brethren**, advocates for Brethren values like peace and nonviolence, welcoming the stranger, and environmental justice.

The **Unitarian Universalist Association** is comprised of more than 1,000 Unitarian Universalist congregations nationwide.

The Presbytery of the Twin Cities Area is a cooperative institution of over 50 PC(USA) congregations in Minnesota and Western Wisconsin.

Mayflower Community Congregational United Church of Christ (Minneapolis, MN) is a church seeking to realize God's dream of justice on earth.

Community House Church of Washington DC is an ecumenical Christian lay-led congregation.

Minnesota Interfaith Power & Light organizes communities of faith and conscience toward climate and racial justice.

Repairers of the Breach is committed to building and supporting movements for social change and to mobilizing around a moral policy agenda that prioritizes love, truth, and justice.

SUMMARY OF THE ARGUMENT

The Religious Freedom Restoration Act forbids the government from "substantially burden[ing] a person's exercise of religion" unless it satisfies strict scrutiny. 42 U.S.C. § 2000bb-1(a). RFRA does not define "substantial burden," and in *Navajo Nation* v. *United States Forest Service*, a Ninth Circuit en banc panel held that a "substantial burden" exists only when the government "coerce[s] [individuals] to act contrary to their religious beliefs by the threat of civil or criminal sanctions" or "force[s] [them] to choose between following the tenets of their religion and receiving a governmental benefit." 535 F.3d 1058, 1070 (CA9 2008).

Below, another en banc Ninth Circuit panel overruled *Navajo Nation* and broadened RFRA's application. That majority held that strict scrutiny under RFRA applies if the government "(1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief." App. 118a (Nelson, J., concurring) (cleaned up); see App. 14a–15a (per curiam). Because the federal government's action here will prevent the Western Apaches from engaging in religious practices at *Chí'chil Biłdagoteel*, a sacred site for multiple tribes—practices that cannot take place anywhere else—the outcome of this case should have been straightforward.

But another majority refused to give RFRA its plain meaning, adding atextual limitations on

"substantial burden" specifically for this case. This majority reasoned that the meaning of "substantial burden" is limited by *Lyng* v. *Northwest Indian Cemetery Protective Association*. App. 58a (Collins, J.). There, this Court held that the Free Exercise Clause does not prohibit the government from "incidentally" burdening religious practice while managing its internal affairs. 485 U.S. 439 (1988). On this view, the government would be largely exempt from scrutiny in only one context—when preventing religious exercise on government property.

This atextual limitation of RFRA threatens significant consequences for religious exercise, especially by adherents to minority faiths. Native Americans place special emphasis on physical land in their traditional religious practices. Because of questionable land transfers by the federal government, most Native American sacred sites are under federal control. Exempting government land (or other "internal") decisions from RFRA's scope would uniquely harm Native American religious exercise. And adding atextual limitations to RFRA undermines its religious protections of all believers, a consequence of great concern to *amici*.

The Ninth Circuit's holding is also legally unsound. RFRA has no textual exclusion when the government is limiting religious exercise in some managerial capacity. Instead, RFRA applies whenever the government imposes a "substantial burden." And as Judge Nelson agreed, "the ordinary meaning of 'substantial burden'" easily covers situations like this, where, by "selling the land, the government is preventing the Apache's [religious] participation."

App. 119a. Nothing in *Lyng* affects how the public would have understood RFRA's "substantial burden," for *Lyng* does not mention the term. Plus, as this Court has repeatedly explained—including in *Employment Division* v. *Smith*, just a few years before RFRA's enactment—*Lyng* was about a law considered to be neutral and generally applicable, so the decision had no need to focus on the question of burden. Penumbras of *Lyng* hinted at in later separate writings are not a sound contextual basis to limit RFRA's expansive text.

The Ninth Circuit's error on a major legal question with massive importance to Native Americans, *amici*, and all religious people confirms that review by this Court is needed.

REASONS FOR GRANTING THE WRIT

I. The decision below departs from RFRA's meaning.

This Court's review is necessary to correct the Ninth Circuit's legal error in artificially limiting RFRA. Throughout this litigation, the United States and the lower courts have tried to avoid the ordinary meaning of "substantial burden" under RFRA. Invoking scattershot interpretive concepts with no apparent application to RFRA's "substantial burden" language, they have tried to layer atextual limitations on the statute.

Below, the United States relied on Ninth Circuit precedent "defin[ing] 'substantial burden' as a narrow term of art" covering limited scenarios. App. 197a (Murguia, C.J., dissenting); CA9 Appellees' Answering Br. 19, 2021 WL 2143060; see *Navajo Nation*, 535 F.3d at 1063. But a majority below disagreed, overruling

that definition of "substantial burden." App. 14a (per curiam); see App. 119a (Nelson, J.) ("[T]he strained interpretation of 'substantial burden' announced in *Navajo Nation* is not sustainable.").

Yet, another (bare) majority still refused to give "substantial burden" its ordinary meaning—even though its members could not agree on *why* to deviate from ordinary meaning. Several members of the majority relied on the concept that "[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." App. 84a (Bea, J., dissenting in part and concurring in part, joined by Bennett and Forrest, JJ.) (quoting A. Scalia & B. Garner, *Reading Law* 69 (2012)).

Another member of the majority disagreed, saying that "because 'substantial burden' is not a term of art with a specific definition, the soil theory is inapplicable." App. 153a (Nelson, J.).

Judge Collins's majority opinion, meanwhile, did not "rel[y]" on "the soil theory," *ibid.*, and instead unearthed a habeas decision from 2000 that does not appear to have been cited by any party below—and has never been used to interpret RFRA. The majority tortuously extracted a rule from scattered quotes across two pages of that decision, *Williams* v. *Taylor* (*Terry Williams*), 529 U.S. 362, 411–12 (2000):

> In the unusual situation in which the "broader debate and the specific statements" of the Justices in a particular decision "concern[] precisely the issue" that Congress later addresses in a statute that borrows the

> Justices' terminology, Congress should be understood to have "adopt[ed]" the relevant "meaning given a certain term in that decision."

App. 48a. The majority then declared that this rule was "exactly" on point, App. 49a, even though one of its members expressed "reservations" about "overappl[ying]" this supposed interpretive principle from *Terry Williams*—particularly since "[t]he Supreme Court has not relied on it" ever. App. 155a (Nelson, J.). Several other members stuck to the "old soil" rationale. App. 84a (Bea, J.).

All these efforts to avoid RFRA's ordinary meaning are unavailing. *Terry Williams* did not subordinate ordinary meaning to language from prior opinions, but used general understandings from those opinions to *confirm* the textual meaning. No matter how one characterizes the contextual principle here, no prior decision or understanding limits the meaning of "substantial burden" in the way the Ninth Circuit did below.

A. The decision below misunderstands *Terry Williams*.

First, *Terry Williams* is a shaky foundation for the majority's RFRA interpretation. There, the question was how to interpret an AEDPA amendment prohibiting federal courts from granting a writ of habeas corpus for a claim adjudicated in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Before the amendment, this Court had disagreed about "the standard of review to be employed by federal habeas courts." *Terry Williams*, 529 U.S. at 412 (discussing *Wright* v. *West*, 505 U.S. 277 (1992)). Returning to that issue post-AEDPA, the Court focused on the amendment's "textual meaning," holding first that the "unreasonable application" prong was separate from the "contrary to" prong. *Id.* at 404–07. Then, considering the meaning of "unreasonable application," the Court again looked to how the term is "common[ly]" "define[d]," holding that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly"—"[r]ather, that application must also be unreasonable." *Id.* at 410–11.

Only after reaching this conclusion did the Court mention its prior debate involving the difference between reasonableness and correctness—and only to rebut a footnote by the dissent. See *id.* at 411–12. And though the Ninth Circuit below implied that the Court then adopted some rule of interpretation based on prior statements in an opinion, the Court actually said that "whether Congress intended to codify the standard of review suggested by Justice Thomas in *Wright* is beside the point." *Id.* at 411. Reiterating that this discussion was dicta, the Court said that "[t]he *Wright* opinions" merely "confirm what § 2254(d)(1)'s language already makes clear—that an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." *Id.* at 412.

In sum, the Court in *Terry Williams* did not adopt the rule of interpretation suggested below. It did not graft onto a statute a term lifted from an earlier decision. Instead, it interpreted a statute by its plain meaning, then bolstered its interpretation by showing that multiple prior opinions had agreed on the import of an unreasonableness standard—while disagreeing about that standard pre-AEDPA.

As one member of the majority below admitted, "[t]here is good reason to be cautious of an overapplication of" a purported *Terry Williams* interpretive principle. App. 155a (Nelson, J.). "The Supreme Court has not relied on it in the 2[4] years since" the case was decided, and it "has not been established in the First Amendment context"—unlike habeas, where *Terry Williams* itself recognized that "'[i]t is not unusual for Congress to codify earlier precedent.'" *Ibid.* (quoting 529 U.S. at 380 n.11).

Indeed, this Court has specifically distinguished RFRA and AEDPA on this ground: AEDPA shows that "[w]hen 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." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 714 (2014). "[T]he text of RFRA" does not show a similar connection. *Ibid.* RFRA's "substantial burden" was part of the original statute, not an amendment. As discussed more below, that term had practically no discussion in prior opinions. And it would be backwards to use *Terry Williams* to overcome RFRA's text, given that *Terry Williams* used prior opinions' discussions only to "confirm what" the statutory "language already makes clear." 529 U.S. at 412.

B. The decision below misapplies "context."

Of course, context matters in statutory interpretation. And sometimes, context might draw on prior decisions or statutory history. But "legal context matters only to the extent it clarifies text." *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). No matter how one articulates the scattershot contextual concepts deployed below—*Terry Williams*, "old soil," the "canon of prior construction" (App. 153a (Nelson, J.), or plain old "context"—the Ninth Circuit went astray in limiting RFRA's text on that basis.

The key portion of the reasoning below was that "[a]s a decision about the scope of the term 'prohibiting,' *Lyng* defines the outer bounds of what counts as a cognizable substantial burden imposed by the government." App. 53a (Collins, J.). That, according to the Ninth Circuit, "is plainly how Justice O'Connor['s separate opinion in *Smith*] viewed *Lyng*," "and the *Smith* majority did not disagree." *Ibid.* Thus, reasoned the majority, "[w]hen Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise." *Ibid.*

This analysis is wrong. On the Ninth Circuit's telling, Congress in RFRA meant to import an unordinary meaning of "substantial burden" because *Smith* (an opinion that RFRA expressly *repudiates*) did not disagree with a minority opinion's characterization of *Lyng* (an opinion that does not even mention "substantial burden") as limiting the Free Exercise Clause's definition of "prohibiting" (a

term that RFRA does not apply). See App. 49a–53a. This contorted rationale is inconsistent with RFRA's text, context, and history.

Start with text. RFRA says that the "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1. "[U]ntil and unless someone points to evidence suggesting otherwise, affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 163 (2021). As one Ninth Circuit majority correctly held, "preventing access to religious exercise is an example of substantial burden." App. 14a. So, as Judge Nelson agreed, "the ordinary meaning of 'substantial burden' suggests that in selling the land, the government is preventing the Apache's participation by restricting their access to the land." App. 119a. Since this "restriction" is the complete destruction of the Apache's sacred lands, the burden on religious exercise is hard to dispute.

Next consider context. "Context always matters," but it "is a tool for understanding the terms of the law, not an excuse for rewriting them." *King* v. *Burwell*, 576 U.S. 473, 500–01 (2015) (Scalia, J., dissenting). Under several interpretive canons, "if a [phrase] is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling* v. *United States*, 586 U.S. 73, 80 (2019) (cleaned up); see App. 84a (Bea, J.,); but see App. 153a (Nelson, J.) (preferring to rely on the canon that "[i]f a statute uses words or phrases that have already received authoritative construction . . . they are to be understood according

to that construction"); App. 48a (Collins, J.) (relying on *Terry Williams*).

Applying any of these canons makes sense only "[w]hen Congress used the materially same language" that had been construed before. *Lamar, Archer & Cofrin, LLP* v. *Appling*, 584 U.S. 709, 721–22 (2018). In that circumstance, "repetition of the same language in a new statue indicates, as a general matter, the intent to incorporate its" prior construction. *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998); accord App. 48a (Collins, J.) (stating that *Terry Williams* applies when a statute "borrows the Justices' terminology" from an earlier decision).

Here, neither the Free Exercise Clause nor *Lyng* uses the term "substantial burden." In fact, the term appeared only in passing in *any* pre-RFRA decisions by this Court, a grand total of three times in two cases. See *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989); *Jimmy Swaggart Ministries* v. *Bd. of Equalization of California*, 493 U.S. 378, 384 (1990) (quoting *Hernandez*). The Ninth Circuit did not mention these cases, seemingly recognizing that these passing references provided no authoritative construction of "substantial burden." Indeed, this Court "has long stressed that the language of an opinion is not always to be parsed as though" it were the "language of a statute." *Brown* v. *Davenport*, 596 U.S. 118, 141 (2022) (cleaned up).

This minimal usage does not suggest that Congress "obviously transplanted" (*Stokeling*, 586 U.S. at 80) RFRA's definition of "substantial burden" from *Lyng*—which again, did not use that phrase. See M. Helfand, *Substantial Burdens As Civil Penalties*, 108 Iowa L.

Rev. 2189, 2192 (2023). This Court's "opinions dispose of discrete cases and controversies and they must be read with a careful eye to context." *Nat'l Pork Producers Council* v. *Ross*, 598 U.S. 356, 373–74 (2023). The Ninth Circuit's effort to "override a lawful congressional command" "on the basis of a handful of sentences extracted from decisions that had no reason to pass on th[is]" interpretive question is fundamentally flawed. *Davenport*, 596 U.S. at 141; compare App. 150a (Nelson, J.) ("*Lyng* does not even use 'substantial burden' or any analogous framing of the phrase."), with App. 156a (Nelson, J.) (nonetheless suggesting that *Lyng* "directly controls" the interpretation of a statute enacted after it was decided for a phrase that appears nowhere in *Lyng* (*or* the *Smith* majority or hardly anywhere else)).

Moreover, other RFRA provisions show that Congress knew how to incorporate decisional law when it wanted to—and did not do so for *Lyng*. Several opinions below said that RFRA "instructs courts to look to 'prior Federal court rulings.' 42 U.S.C. § 2000bb(a)(5)," and that "*Lyng* is such a prior federal court ruling." App. 156a n.8 (Nelson, J.); see also App. 327a n.5 (Bea, J.). But that provision endorses only "the compelling interest test as set forth in prior Federal court rulings," 42 U.S.C. § 2000bb(a)(5), which is separate from the question of burden. *E.g.*, *Hobby Lobby*, 573 U.S. at 726. RFRA sought "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)(1).

That Congress knew how to define RFRA's provisions by reference to prior law and chose not to do so with respect to "substantial burden" and *Lyng* provides more evidence that the Ninth Circuit was mistaken. Cf. *Jama* v. *Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."); *Ysleta Del Sur Pueblo* v. *Texas*, 596 U.S. 685, 704 (2022) ("Congress knows exactly how to adopt into federal law the terms of another writing or resolution when it wishes.").

Last, the Ninth Circuit misunderstood *Lyng* itself. Even if that decision were somehow relevant to RFRA's interpretation—and setting aside that it did not involve the complete destruction of a sacred site—it is not a decision about substantial burdens. Instead, it considered the law there to be neutral and of general applicability, and is thus merely a precursor to *Smith*. *Lyng* emphasized that "[t]he Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred." 485 U.S. at 453. But it found no such discrimination, holding that any repercussions for Native American religious exercises were "incidental." *Id.* at 450. That is the same language used a few years later by *Smith*, which prominently relied on *Lyng* to justify its preservation of "[t]he government's ability to enforce generally applicable prohibitions." 494 U.S. at 885; see *id.* at 878

("merely the incidental effect of a generally applicable and otherwise valid provision").

The Ninth Circuit first insisted that "the [Supreme] Court has not said, and could not have said, that *Lyng* was *itself* a case involving a neutral and generally applicable law," App. 38a (Collins, J.), then amended its claim to say that the Court has not said that "the *holding* of *Lyng*" rested on that "view." App. 11a. But this Court has repeatedly described *Lyng* this way. In 2017, this Court said: "In recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 460 (2017). This Court's very first example? *Lyng*. Its next example? *Smith*. *Ibid.* And in 2021, this Court again explained that *Smith* "drew support for the neutral and generally applicable standard from cases involving internal government affairs"—citing *Lyng*. *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 536 (2021).

The Ninth Circuit suggested that the facts of *Lyng* "manifestly would *not* fit th[is] Court's current understanding of a case involving a neutral and generally applicable law." App. 39a (Collins, J.). Disregarding this Court's own explanation of its "understanding" is improper, particularly from opinions that find their only grounding in the penumbras of separate opinions in repudiated decisions by this Court that allegedly snuck their way into RFRA. *E.g.*, App. 156a (Nelson, J.) ("The Supreme Court has been clear.").

In any event, what matters for RFRA's interpretation is "the ordinary public meaning of its terms at the time of its enactment." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 654 (2020). So how courts might assess the facts of *Lyng* today is irrelevant. In *Smith*, this Court treated *Lyng* as a precedent about neutral laws of general applicability. The majority in *Smith* refused to "distinguish" *Lyng* based on treating the government's "management of public lands" differently from other "harm[s] [to] the individual's religious interests." 494 U.S. at 885 n.2. The Ninth Circuit pointed to no reason to think that, when RFRA was enacted a few years later, the public instead understood *Lyng* to set out a definition of a phrase it never used ("substantial burden") and had no reason to address because the policy was considered neutral and generally applicable. Accord App. 249a–253a (Murguia, C.J.).

In short, *Lyng* does not limit the contemporaneous understanding of RFRA's "substantial burden." The Ninth Circuit's legal error on this question of massive importance to our religious communities calls out for this Court's review.

II. The decision below discriminates against Native American religious beliefs.

Under the Ninth Circuit's new definition of "substantial burden," many worshippers will see their religious exercise limited—especially Native Americans. In many traditional Native American religious beliefs, "natural sites [are] viewed as living supernatural beings." J. Edwards, *Yellow Snow on Sacred Sites: A Failed Application of the Religious Freedom Restoration Act*, 34 Am. Indian L. Rev. 151,

165 (2009). As Christians go to churches and Muslims go to mosques, Native American worshippers visit natural sites to partake in traditional religious rituals. See R. Griffin, *Sacred Site Protection Against a Backdrop of Religious Intolerance*, 31 Tulsa L.J. 395, 397 (1995) (noting that Native American sacred sites are the "equivalent of churches, temples or synagogues" (quoting S. Rep. No. 411, 103d Cong., 2d Sess. 2 (1994)).

But because of the federal government's long history of "divestiture of land" from Native Americans, "their most sacred sites are completely within the government's control." S. Barclay & M. Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1313 (2021). These sites are unique, leaving traditional Native American worshippers without adequate alternative areas to engage in religious exercise. So while a Buddhist or a Jew may attend another temple or synagogue, many Native Americans have no other options. "Without access to particular sites, essential practice of native religion may not be merely burdened, but effectively prohibited altogether." *Id.* at 1305.

Yet the Ninth Circuit held that "it is not enough . . . to show that the Government's management of its own land and internal affairs will have the practical consequence of 'preventing' a religious exercise." App. 35a (Collins, J.). Members of the majority seemed to acknowledge that this particularly infringes Native Americans' religious practices, but characterized this *positively*, seeking to avoid "benefit[ing]" "only *some* religions." App. 178a (VanDyke, J., concurring); cf. App. 123a (Nelson, J.).

This misses the point. What matters to RFRA is the burden imposed by the government, not the distribution of the burden among all religions. RFRA addresses substantial burdens, whether they be for many religions or few.

By analogy, this Court's ruling in *Trinity Lutheran* vindicated the religious exercise rights of a Lutheran church that operated a preschool. It did not thereby discriminate against religions that happened not to operate preschools, for those religions faced no similar harm. If other government actions infringe on those religions' exercise rights, then they too should have valid claims. And if not, then all the better—we should celebrate the free exercise of religion rather than allow more government restrictions in pursuit of equal burdensomeness.

Of course, while traditional Native American worshippers are particularly burdened by the Ninth Circuit's decision, adherents of other religions are threatened too. "American Indians are not the only people who hold certain places sacred and seek to use them for religions purposes. Our federal public lands contain thousands of Catholic missions, historic Mormon sites, bible camps, and other places used for religion." K. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 Denv. U. L. Rev. 981, 984 (2006).

According to Judge Nelson, the Ninth Circuit "has issued opinions more hostile to religion than any other court in the country." App. 126a n.1. Unfortunately, the decision below echoes that long hostility by excluding certain substantial burdens from RFRA's scope. In contrast to the Ninth Circuit's holding, most

other circuits have correctly held that whenever the government bars a religious practice, it "necessarily" imposes a "substantial burden" on practitioners. See Pet. 29–32; *Haight* v. *Thompson*, 763 F.3d 554, 564–565 (CA6 2014) ("barring access" to religious practice is "necessarily" a substantial burden); *Yellowbear* v. *Lampert*, 741 F.3d 48, 56 (CA10 2014) (preventing access to a prison sweat lodge for religious purposes "easily" qualifies as a substantial burden); *Thai Medication Ass'n of Ala., Inc.* v. *City of Mobile*, 980 F.3d 821, 830–31 (CA11 2020) (land-use regulation that "completely prevents" religious exercise "clearly satisfies the substantial burden standard"); see also *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 555–56 (CA4 2013); *West* v. *Radtke*, 48 F.4th 836, 845 n.3 (CA7 2022); *In re Young*, 82 F.3d 1407, 1418 (CA8 1996).

"[I]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands." *Smith*, 494 U.S. at 885 n.2. As shown above, the Ninth Circuit's exclusion of certain substantial burdens has no basis in RFRA. And because this exclusion works harm on all religious adherents—especially Native Americans with deep connections to sacred sites on public lands—this Court should hear the case and reverse.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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