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* THE CHAPLAIN ALLIANCE FOR RELIGIOUS LIBERTY, THE ARMED FORCES AND CHAPLAINCY FOR THE ANGLICAN CHURCH IN NORTH AMERICA, THE LUTHERAN CHURCH MISSOURI SYNOD MINISTRY TO THE ARMED FORCES, THE CHAPLAINCY ENDORSEMENT COMMISSION OF THE CHRISTIAN CHURCHES AND CHURCHES OF CHRIST, AND STEWARDS MINISTRIES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Statutes & Other Authorities

Table of Contents

Cited Authorities

Page

Cited Authorities

Page

INTEREST OF *AMICI CURIAE*[1]

The Chaplain Alliance for Religious Liberty is a private, non-profit association that advocates for and protects the religious liberty of military chaplains and those they serve. As a prerequisite to accepting a chaplain for service in the United States Armed Forces, the United States requires that a chaplain be "endorsed" by a religious organization to then serve as an official representative of his or her faith group. Most of the Chaplain Alliance's members and leadership are official representatives of their various faith groups who certify chaplains for service in the United States Armed Forces. Through this certification relationship, the Chaplain Alliance speaks on behalf of almost fifty percent of chaplains currently serving in the military.

The Right Reverend Derek Jones is the Executive Director of the Chaplain Alliance and Bishop of the Armed Forces and Chaplaincy for the Anglican Church in North America ("ACNA"). ACNA is part of the Anglican Communion, the world's third largest Christian communion with over 85 million members. The Right Reverend is a retired U.S. Air Force officer and decorated fighter pilot who served for 27 years and helped lead the development of the joint military religious affairs doctrine. He currently endorses over 250 military chaplains.

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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 a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of the *amici*'s intention to file this brief.

Reverend Craig G. Muehler is the President of the Chaplain Alliance and the Director of the Lutheran Church Missouri Synod Ministry to the Armed Forces. The Lutheran Church Missouri Synod is a national church body with more than two million baptized members, thousands of whom are serving in the armed forces. Pastors of the Church have served as military chaplains since the Civil War. Reverend Muehler served 27 years as a naval chaplain and currently endorses roughly 125 military chaplains.

Dr. Kal McAlexander is the Secretary of the Chaplain Alliance and the Executive Director for the Chaplaincy Endorsement Commission of the Christian Churches and Churches of Christ. Dr. McAlexander served 28 years as a naval chaplain and currently endorses 287 military chaplains.

Dr. Kenneth V. Botton is on the Board of Directors of the Chaplain Alliance and is the Chaplain Endorser for Stewards Ministries. Stewards Ministries is a non-profit organization that exists to support the Plymouth Brethren, an evangelical Christian movement. Dr. Botton served as a commissioned officer in the Navy for 23 years, 13 of which were as a naval chaplain. He has been an endorser for over 30 years and currently supervises 12 military chaplains.

Amici share a fundamental interest in ensuring religious liberty and free exercise of religion are given the full extent of protection offered by the Constitution, the First Amendment, and the nation's laws—particularly within the confines of government-controlled environments, where the boundaries of these liberties are perpetually tested.

SUMMARY OF ARGUMENT

In *Apache Stronghold v. United States*, a fractured majority of the *en banc* panel of the Ninth Circuit erroneously concluded that the government does not substantially burden religious exercise under the Religious Freedom Restoration Act when it forecloses religious worship entirely. 101 F.4th 1036 (9th Cir. 2024). The *en banc* panel's narrow interpretation of "substantial burden" deviates from this country's tradition of facilitating the free exercise of religion. *Amici* believe that the history of the military chaplaincy illustrates this principle.

As this Court has recognized, military service creates a situation "where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 226 n.10 (1963). Congress has enabled the practice of religion in the military since the nation's founding. The government has not merely avoided *interfering* with religious worship in the military; it has *affirmatively furnished* the means of worship by establishing a Chaplains Corps to serve all branches of the military. The United States military, in furnishing the chaplaincy, "has proceeded on the premise that having uprooted the soldiers from their natural habitats it owes them a duty to satisfy their Free Exercise rights." *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985).

The military's facilitation of religious practice helps contextualize the central issue in this case. Apache

Stronghold argues that the transfer and subsequent complete destruction of Chi'chil Biłdagoteel ("Oak Flat"), a sacred religious site, would pose a substantial burden on the Western Apache tribes by forever preventing them from conducting ancient religious ceremonies. As in the military, the federal government controls the Western Apaches' "temporal and geographic environment" through the federal ownership of native land. In the same way that the government must create the conditions in the military that allow and enable the free practice of religion, the government—in light of its control over the contested land in this case—must ensure the free exercise rights of the Western Apache tribes. A decision for petitioners would confirm what the Founding Fathers, federal courts, and Congress have long recognized in the context of the military—that the government burdens free exercise when it precludes citizens from religious worship entirely. The Court should grant certiorari to clarify the meaning of "substantial burden" and bring it into conformity with hundreds of years of tradition.

ARGUMENT

I. Military Chaplaincy and Its Roots

Congress, in the exercise of its War Powers under Article I, Section 8 of the Constitution, "specifically authorized that . . . there be 'Chaplains in the Army,' who shall include the Chief of Chaplains, and commissioned and other officers of the Army appointed as chaplains." *Katcoff*, 755 F.2d at 225 (quoting 10 U.S.C. § 7073 (formerly cited as 10 U.S.C. § 3073)). "[E]ach chaplain is required, when practicable, to hold religious services for the command to which he is assigned and to perform burial services for

soldiers who die while in that command." *Id.* (citing 10 U.S.C. § 7217 (formerly cited as 10 U.S.C. § 3547)). "The statute also obligates the commanding officer to furnish facilities, including transportation, to assist a chaplain in performing his duties." *Id.* (citing 10 U.S.C. § 7217).

Chaplaincy programs exist in all branches of the armed forces. *See* Department of Defense Instruction ("DoDI") 1304.28, *The Appointment And Service Of Chaplains* (2021). The Armed Forces Chaplains Board exists within the United States Department of Defense and is made up of three Chiefs of Chaplains and three active-duty Deputy Chiefs of Chaplains of the Army, Navy, and Air Force.[2] *See* DoDI 5120.08, *Armed Forces Chaplains Board* § 3.1(a) (2024). Together, the Chaplains Corps of the Army, the Chaplains Corp of the Navy, and the Air Force Chaplains Service are often referred to as the "military chaplaincy." Hannah F. Deardorff, *The U.S. Military Chaplaincy: An Invaluable Resource Providing Spiritual Fitness and Expertise Amidst Rising Religious Liberty Controversies*, 6 Savannah L. Rev. 1, 4 (2019). While chaplaincy programs exist under the Department of Defense, they also exist within

2. The Marine Corps, along with the Coast Guard, are part of the Navy Department and are served by the Navy chaplaincy. *See* Hannah F. Deardorff, *The U.S. Military Chaplaincy: An Invaluable Resource Providing Spiritual Fitness and Expertise Amidst Rising Religious Liberty Controversies*, 6 Savannah L. Rev. 1, 4 n. 24 (2019). The Chaplain of the Marine Corps serves on the Armed Forces Chaplains Board, assuming a dual position as the Deputy Chief of Chaplain of the Navy. *See Rear Admiral Carey H. Cash*, America's Navy, https://www.navy.mil/Leadership/Flag-Officer-Biographies/Search/Article/3048744/rear-admiral-carey-h-cash/ (last updated July 14, 2022).

the Veterans Administration and the Department of Justice. *See* Stephanie Hall Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1336 (2021).

As outlined below, the chaplaincy was born as an expression of, and grew alongside, the country's commitment to the free exercise of religion. The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This portion of the Amendment consists of the Religion Clauses—the former the Establishment Clause and the latter the Free Exercise Clause. While the Establishment Clause prohibits "official support" for "the tenets of one or of all orthodoxies," *Schempp*, 374 U.S. at 222, claims of government compulsion affecting religious exercise ("free exercise" claims) are traditionally raised under the Free Exercise Clause, *see id.*

A. The Military Chaplaincy Predates the Country's Founding.

The military chaplain has been a figure in American history since its earliest days. Even before the country's Founding, George Washington, during his service as a colonel in the Seven Years' War, reflected on the need for a chaplain in his regiment. *See* 2 *The Writings of George Washington from the Original Manuscript Sources* 33, 56 (J. Fitzgerald ed. 1932) ("It is a hardship upon the Regiment, I think, to be denied a Chaplain."). Washington repeatedly implored the Governor of Virginia for official action, offering to procure one himself if the government would only create the paid appointment. *See* Parker C.

Thompson, *The United States Army Chaplaincy: From Its European Antecedents to 1791* 58–59 (1978).

The military chaplaincy already had robust roots in Europe. In the late Roman Empire, pagan and Christian clerics alike accompanied soldiers into the field to attend to their religious needs. *See* David S. Bachrach, *The Medieval Military Chaplain and His Duties*, *in* The Sword of the Lord 69, 74–75 (D. Bergen ed., 2004). History of the developing role of military chaplains in early medieval Europe tells the story of an "alliance between [] Christian religion and warfare" that eventually culminated in the Crusades. Michael McCormick, *The Liturgy of War from Antiquity to the Crusades*, *in* The Sword of the Lord, *supra*, at 45–47. And accounts of Normandy's invasion of England describe clerics hearing confessions and granting absolution before troops moved into battle. *See* Bachrach, *supra*, at 80. In England, chaplains served throughout the Tudor and Stuart monarchies and into the Cromwellian and Hanoverian eras. *See* Thompson, *supra*, at xiii. In an era of massive upheaval, chaplains played a fraught role in the religiously-motivated wars that split England from 1642 to 1649—the English Civil War and the wars against Ireland and Scotland. *See* Anne Laurence, *Did the Nature of the Enemy Make a Difference?*, *in* The Sword of the Lord, *supra*, at 89. Following Restoration of the Stuart Monarchy, the chaplain's role was formalized in England with the advent of a permanent military force. *See* Thompson, *supra*, at xiii.

Early American military chaplaincies were sporadic and organic occurrences rather than a formal institution. Following the Battles of Lexington and Concord, the onset of the Revolutionary War mobilized not just militiamen—

but also their pastors, who joined them in battle. *See id.* at 90 ("Attending to the spiritual needs of their now fighting congregations were a number of pastors."). In addition to fostering the religious lives of those in the militia, chaplains in this era "universally" bore arms and occasionally used them in battle. *Id.* at 95. Recognizing the invaluable service that clergy provided for their militias, the colonies of New England began official efforts to authorize chaplains. *Id.* at 104. On May 25, 1775, a committee of the Provincial Congress of Massachusetts resolved that thirteen volunteer chaplains at a time attend to the army. *Id.*

On June 14, 1775, the Continental Congress passed a resolution establishing the Continental Army. *Id.* at 105–06. The act did not immediately provide for an official chaplain position, and initially, those chaplains serving in the Continental Army were appointed by the individual colonies. *Id.* at 107. But Congress formally recognized (for the first time) the existence of a chaplaincy in an act dated July 29, 1775, in which it established the pay for various enlisted personnel in the Continental Army—including chaplains. *Id.* Washington, now leading the Continental Army, continued to stress the importance of the Army chaplain's role. At the end of 1775, he successfully lobbied Congress to increase the allotment of chaplains to provide one chaplain per two regiments, and to increase their pay. *Id.* at 108. One hundred and eleven chaplains are recorded to have served in the Continental Army throughout its eight-year existence. *Id.* at 127.

Although the Revolutionary War chaplaincy was dominated by Protestant clergy, its conception as a vehicle for the free exercise of religion was already

clear. In September 1775, George Washington wrote to Colonel Benedict Arnold, ordering him to uphold religious activities within his ranks but also providing that he must "protect and support the free exercise of the Religion of the Country and the undisturbed Enjoyment of the rights of Conscience in religious Matters." 3 *Writings of George Washington*, *supra*, at 496. And an early example of the pluralist spirit of worship within the military occurred in Virginia when, in August 1775, at the behest of Virginia Baptists, the state's revolutionary government resolved that "dissenting" clergymen be permitted to preach to soldiers who did not choose to attend the service held by the official chaplain. *See* Thompson, *supra*, at 131.

B. The Tradition of a Chaplaincy Persisted Throughout the Development of the Nation.

Following the nation's founding, the chaplaincy role continued to develop both in times of war and peace. After the Continental Army was disbanded, the Regular Army was established, and a chaplain was appointed as early as 1791. *See* Herman A. Norton, *The United States Army Chaplaincy: Struggling for Recognition, 1791–1865* 3 (1977). As for the states, Congress did not immediately authorize a chaplain for the militia. *Id.* In the early days of the republic, Congress passed several acts relating to the military, including the Militia Acts of 1792, in which Congress allowed for some measure of federal control of the state militias, and the militia act of 1795, which made permanent some of the provisions of the earlier legislation. *See* Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149, 158–63 (2004). Nearly two decades after the first federal militia law was enacted, Congress passed a law formally providing for chaplains in the militia in March 1803. Norton, *supra*, at 7.

In 1802, Congress passed an Act authorizing the establishment of a "corps of engineers" to be "stationed at West Point," thereby creating the military academy. *See* Military Peace Establishment Act, ch. 9, § 11, 2 Stat. 132, 135 (1802). As part of ongoing efforts to reform conditions and morale at West Point, the first chaplain was formally appointed at the academy in August 1813. Norton, *supra*, at 24.

During the upheaval of the Civil War, changes in the chaplaincy seem to mirror the transformative changes to the nation as a whole. In 1861, Lincoln's War Department authorized the appointment of Army chaplains in both the Regular Army and the volunteer regiments from the states. *Id.* at 83. The official authorization initially specified that the chaplain had to be ordained by a Christian denomination, but in July 1862, a further Congressional Act removed the provision that required chaplains to be ministers of the Christian faith, paving the way for rabbis to serve as chaplains. *Id.* at 91. Despite the fact that one-sixth of the Army's ranks were Catholic, the Civil War marked the first time Catholic priests received official chaplaincy commissions. *Id.* at 93. This era also saw the first African American chaplains enter the Army, at the time serving only black troops. *Id.* at 93–94.

As the chaplaincy grew, waned, and transformed throughout the nineteenth century, the position was not without controversy. In early 1850, citizens submitted a series of memorials to Congress requesting that the office of "chaplain in the Army, Navy, at West Point, at Indian stations" and in both houses of Congress be abolished. Thompson, 2 *supra* at 76. The Judiciary Committee was tasked with responding to the criticism and addressing

concerns about the constitutionality of the chaplaincy. *See* H.R. Rep. No. 171, 31st Cong., 1st Sess. (1850). The Judiciary Committee disagreed with the petitioners' concerns that the chaplain position tends to establish a religion within the government, noting that within the military, "[t]here is no standard of faith to be measured by, or form of worship that must be followed." *Id.* at 2. The report went further than simply dispelling concerns of establishment and observed that the promise of free exercise may in fact compel the provision of a military chaplain:

> Were the office abolished, the soldier or sailor might with more than a show of plausibility complain that the "free exercise" of religion was denied him; that his constitutional rights were infringed. The nature of his employment and the necessity of discipline are such that he is not at liberty to go and enjoy the "free exercise thereof," as the constitution provides. He must remain at his post. Thus might he be deprived of the opportunity that all others not similarly engaged enjoy.

Id. at 3.

The twentieth century saw further formalization of the chaplaincy with the creation of the Office of the Chief of Chaplains in June 1920. *See* Robert K. Gushwa, *The United States Army Chaplaincy: The Best and Worst of Times, 1920–1945* 8 (1977). The legislation provided for four-year terms of service and specified that the Chief of Chaplains receive the rank, pay, and allowances of a colonel. *See id.* And further entrenching the program,

chaplains were appointed to the National Guard starting in 1925. *Id.* at 13–14.

Since its inception, the chaplaincy has served certain consistent roles, such as preaching, holding daily prayer services, and hearing confession. *See* Thompson, *supra*, at xvii. Chaplains also historically practiced "pastoral duties," which included caring for the sick and dying. *Id.* at 115. At many stages, the chaplaincy also served ancillary duties to meet soldiers' needs, such as education for illiterate soldiers in the Civil War, *see* Norton, *supra*, at 155, or general personal counseling, as priests are sworn to confidentiality due to the sanctity of confession, *see* Gushwa, *supra*, at 132. During the Vietnam War, chaplains developed programs to combat drug and alcohol abuse, ease race relations, and improve the leadership skills of junior officers. *See* Anne C. Loveland, *From Morale Builders to Moral Advocates*, *in* The Sword of the Lord, *supra*, at 239.

Today, the chaplaincy continues to provide religious guidance, rites, and other services to soldiers stationed at home and deployed throughout the world, who might otherwise be bereft of the ability to practice their faiths. And the Department of Defense provides extensive guidance on the appointment and service of chaplains. *See* DoDI 1304.28, *The Appointment And Service Of Chaplains* (2021).

II. The Military Chaplaincy Has Been Declared Permissible—and Even Necessary—Under the Religion Clauses.

Over 60 years ago, this Court observed that military service presents a situation "where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths." *Schempp*, 374 U.S. at 226 n.10 (1963). Since then, the Court of Appeals for the Second Circuit decided *Katcoff v. Marsh*, a seminal case on the constitutionality of the military chaplaincy, and set forth the unequivocal principle, rooted in hundreds of years of history, that provision of a chaplain in the military is an appropriate accommodation between the two Religion Clauses. *See* 755 F.2d at 234. In other words, the military chaplaincy is *permissible* under the Establishment Clause in part because it is *necessary* under the Free Exercise Clause. *See id.*

In *Katcoff*, the Second Circuit heard an Establishment Clause challenge to the Army chaplaincy program brought by taxpayers. Building on Justice Clark's statement in *Schempp*, the Second Circuit recognized that by raising an Army, the Government "regulates the temporal and geographic environment of individuals," thereby compelling it to permit the use of government facilities to freely practice their religion. *See id.* at 235 (quoting *Schempp*, 374 U.S. at 226 n.10). Pointing to the military chaplaincy's "unambiguous and unbroken history of more than 200 years," the Second Circuit rejected challenges to the program's constitutionality. *Id.* at 232. The court was

persuaded, in part, that because "Congress authoriz[ed] a military chaplaincy before and contemporaneous with the adoption of the Establishment Clause," the Framers likely did not intend the Clause to apply to the chaplaincy. *Id.*

The court further concluded that the Establishment and Free Exercise Clauses both "obligate[] Congress, upon creating an Army, to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them." *Id.* at 234. The court continued: "Unless the Army provided a chaplaincy it would deprive the soldier of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion." *Id.*; *see also Everson v. Board of Education*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions than it is to favor them.").

Katcoff remains good law today and solidifies the national commitment to accommodating religious practice in circumstances where "the Government regulates the temporal and geographic environment of individuals." *Katcoff*, 755 F.2d at 235 (quoting *Schempp*, 374 U.S. at 226 n.10). This Court should grant Apache Stronghold's petition for certiorari and find the same accommodation necessary where the Government controls the very land on which a religious practice is rooted. Having brought sacred land under federal control, the government has created another situation in which it "regulates the temporal and geographic environment" of the Western Apache tribes who worship on that site. In doing so, the government has placed the Western Apaches at a disadvantage compared to their fellow citizens, who are at liberty to practice their

religion as they choose and without government control. Therefore, as in the military, the government has a duty to facilitate the Western Apaches' free exercise of their religion. Indeed, the principles underlying the creation of the military chaplaincy apply with even more strength to the government's control of Native land, an arrangement that emerged over 150 years ago—by force—and continues to shape the lives of today's Western Apaches.

III. Congress Continues to Provide Significant Accommodation for Religious Worship in the Military.

Beyond the chaplaincy, Congress has repeatedly and firmly reiterated its commitment to religious accommodation in the military. Indeed, Congress has stood firm in this commitment despite countervailing interests in discipline and uniformity of attire, *see Goldman v. Weinberger*, 475 U.S. 503, 510 (1986), and a belief that the military represents "the subordination of the desires and interests of the individual to the needs of the service," *Orloff v. Willoughby,* 345 U.S. 83, 92 (1953).

For example, in 1987, Congress enacted 10 U.S.C. § 774, titled "Religious apparel: wearing while in uniform." The act mandates that, subject to certain exceptions, "a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force" and directing the Department of Defense to prescribe consistent regulations. 10 U.S.C. § 774.

In 1993, the Religious Freedom Restoration Act ("RFRA") reinstituted a strict scrutiny standard for free exercise claims, and the act was clearly meant to apply

to the armed forces. *See* 42 U.S.C. § 2000bb(b)(1); *id.* § 2000bb-3(a) (applying provisions "to all Federal law"). This heightened standard has meant, in practice, that any infringement of religious practice in the military has to meet the most exacting form of constitutional scrutiny to pass muster, or else the infringement on religious practice cannot stand. Federal courts have applied RFRA's heightened standards in cases involving religious attire and articles of faith in the military. *See Singh v. McHusgh*, 185 F.Supp.3d 201 (D.D.C. 2016) (Army had not shown compelling interest to deny accommodation to Sikh student seeking to enroll in ROTC while wearing a turban, unshorn hair, and beard to survive strict scrutiny inquiry); *Singh v. Berger*, 56 F.4th 88 (D.C. Cir. 2022) (Marine Corps' refusal to permit certain articles of faith failed narrow tailoring aspect of strict scrutiny inquiry).

In the National Defense Authorization Act for Fiscal Year 2013, Congress specifically directed the Department of Defense to accommodate the "conscience, moral principles, or religious beliefs" of service members and forbade any disciplinary action based on such beliefs to the extent "practicable." *See* Pub. L. No. 112–239 § 533(a)(1). In response, the Department of Defense incorporated RFRA's standards into its official regulatory guidance in 2014. *See* DoDI 1300.17, *Accommodation of Religious Practices Within the Military Services* (2009) (Incorporating Change 1, Effective January 22, 2014) (now superseded).

A final example, and perhaps the strongest testament to the chaplaincy's enduring significance, is embedded in 4 U.S.C. § 7, which governs the position and display of the American flag. Subsection (c) provides that "no other flag

should be placed above or, if on the same level, to the right of the flag of the United States of America," with only one exception—"during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy." 4 U.S.C. § 7(c).

CONCLUSION

This country's long tradition of expansive religious accommodation in the military is due, in large part, to the government's recognition that it has a duty to enable soldiers to practice their religions where the government controls where and how soldiers will be stationed and/or deployed.

Similarly, the federal government controls the Western Apaches' access to a holy and sacred site, Oak Flat. And the government should likewise enable the Western Apaches to continue to practice their religion rather than consign sacred land to a scrap heap. The same principles that gave rise to military chaplaincy (and continue to allow for the accommodation of the free exercise of religion in the military) should guide this Court's consideration of the federal government's decision to allow the destruction of Oak Flat, a cataclysm that will substantially burden the free exercise of religion.

Respectfully submitted,

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