

No. 24-291

IN THE
Supreme Court of the United States

APACHE STRONGHOLD,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF *AMICUS CURIAE* KNIGHTS OF
COLUMBUS IN SUPPORT OF PETITIONER**

Kristin Cope
Counsel of Record
Frances Mackay
O'MELVENY & MYERS LLP
2801 North Harwood Street
Suite 1600
Dallas, TX 75201
(972) 360-1900
kcope@omm.com

Danielle Feuer
O'MELVENY & MYERS LLP
1301 Ave. of the Americas
Suite 1700
New York, NY 10019
(212) 326-2000

Coke Morgan Stewart
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	4
I. RFRA Places Guardrails on the Federal Government’s Burdening of Religious Exercise.....	4
II. Thousands of Citizens and Groups, From Diverse Religious Faiths, Exercise Their Beliefs Through Activities on Federal Land.	5
III. RFRA Applies Equally to All Federal Law, Including the Management of Federal Lands.	14
IV. Courts Across the Country Have Long Understood RFRA to Safeguard Religious Exercise on Federal Land.....	17
V. The Decision Below Threatens RFRA’s Time-Honored Safeguards for All People Whose Religious Exercise Takes Place on Federal Lands.	22
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Animal Legal Def. Fund. v. U.S. Dep’t of Agric.</i> , 789 F.3d 1206 (11th Cir. 2015)	15
<i>Apache Stronghold v. United States</i> , 101 F.4th 1036 (9th Cir. 2024).....	4, 15, 16, 22
<i>Battle Mountain Band v. U.S. Bureau of Land Mgmt.</i> , No. 3:16-CV-0268-LRH-WGC, 2016 WL 4497756 (D. Nev. Aug. 26, 2016).....	20, 21
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014)	4
<i>Capitol Hill Baptist Church v. Bowser</i> , 496 F. Supp. 3d 284 (D.D.C. 2020)	19
<i>Comanche Nation v. United States</i> , No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008)	19
<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006)	4
<i>Knights of Columbus v. Nat’l Park Serv.</i> , No. 3:24-cv-363, ECF No. 21 (E.D. Va. May 22, 2024).....	23
<i>La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm.</i> , No. EDCV 11-1478-GW(SSx), 2012 WL 12904993 (C.D. Cal. May 3, 2012)	18

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
<i>Lyng v. Northwest Indian Cemetery Protective Ass'n</i> , 485 U.S. 439 (1988)	15, 18
<i>Mahoney v. U.S. Marshals Serv.</i> , 454 F. Supp. 2d 21 (D.D.C. 2006)	21
<i>Nenninger v. U.S. Forest Serv.</i> , No. CIV-07-3028, 2008 WL 2693186 (W.D. Ark. July 3, 2008), <i>aff'd</i> , 353 F. App'x 80 (8th Cir. 2009).....	21
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	16
<i>Slockish v. U.S. Fed. Highway Admin.</i> , No. 3:08-CV-1169-ST, 2012 WL 398989 (D. Or. Feb. 7, 2012)	18
<i>Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.</i> , 450 U.S. 707 (1981)	16
Statutes	
42 U.S.C. § 2000bb-1(a)	4
42 U.S.C. § 2000bb-1(b)	4
42 U.S.C. § 2000bb-2(4)	2, 4, 15
42 U.S.C. § 2000bb-3(a)	3, 15
42 U.S.C. § 2000bb-3(b)	15
42 U.S.C. § 2000cc-5(7)(B)	3, 4, 15

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
Other Authorities	
@AMPalestine, X (Oct. 20, 2023, 1:01 PM), https://x.com/AMPalestine/status/1715413011828007144	11
<i>10 Public Lands with Powerful Native American Connections</i> , U.S. Dep’t of the Interior (Jan. 20, 2021), https://www.doi.gov/pressreleases/10-public-lands-powerful-native-american-connections ...	5, 6
<i>10 Rosh Hashanah Celebrations Happening in the DC Area This Year</i> , NBC Washington (Sept. 23, 2022), https://www.nbcwashington.com/news/local/10-rosh-hashanah-celebrations-happening-in-the-dc-area-this-year/3164630/	12, 13
<i>A Million Women Home Page</i> , A Million Women (last visited October 14, 2024), https://amillionwomen.org/	11
<i>About David’s Tent DC</i> , David’s Tent (last visited Oct. 7, 2024), https://davidstentdc.org/about_davids_tent/	8
<i>About</i> , A Christian Ministry in the Nat’l Parks (last visited Oct. 7, 2024), https://acmnp.com/about/	8
<i>About</i> , Nat’l Menorah (last visited Oct. 7, 2024), https://nationalmenorah.org/about/	9

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
<p>Alice Herman, <i>Thousands Rally at Christian Nationalist Event in DC to ‘Turn Hearts Back to God,’</i> Guardian (Oct. 12, 2024, 3:29 PM), https://www.theguardian.com/us-news/2024/oct/12/jenny-donnely-anti-trans-christian-nationalist-rally</p>	11
<p><i>Bears Ears National Monument Management</i>, U.S. Dep’t of the Interior: Bureau of Land Mgmt. (last visited Oct. 7, 2024), https://www.blm.gov/programs/national-conservation-lands/utah/bears-ears-national-monument#:~:text=Bears%20Ears%20National%20Monument%20holds,for%20traditional%20and%20ceremonial%20uses</p>	7
<p><i>David’s Tent DC Home Page</i>, David’s Tent (last visited Oct. 7, 2024), https://davidstentdc.org/.....</p>	8
<p><i>Devil’s Tower: A Place of Reverence for Native Americans</i>, Nat’l Park Serv. (May 31, 2023), https://www.nps.gov/deto/learn/historyculture/reverence.htm.....</p>	6
<p><i>Easter Sunrise Service</i>, Grand Canyon Cmty. Church (last visited Oct. 7, 2024), https://grandcanyoncommunitychurch.org/easter-sunrise-service-2</p>	11
<p><i>Effigy Mounds: Effigy Moundbuilders</i>, Nat’l Park Serv. (Sept. 4, 2024),</p>	

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
https://www.nps.gov/efmo/learn/historyculture/effigy-moundbuilders.htm	6
<i>Hale o Keawe</i> , Nat'l Park Serv. (Feb. 14, 2021), https://www.nps.gov/places/walking-tour-stop-8-hale-o-keawe.htm	6
Homeland Security Bureau: Intelligence Division, <i>Demonstration Report</i> , FOIA Request No. 2021-01634 (June 2021), https://www.brennancenter.org/sites/default/files/2024-04/21.06.pdf	11, 12
<i>Jehovah's Witnesses Resume Public Ministry</i> , The Recorder (July 22, 2022), https://www.recorderonline.com/news/jehovahs-witnesses-resume-public-ministry/article_b04832aa-0a04-11ed-ae63-537991d2e8e7.html	10
Joel Millman, <i>To Assist Devout Vacationers, Rabbis Head to Great Outdoors</i> , Wall St. J. (Oct. 1, 2012), https://www.wsj.com/articles/SB10000872396390444433504577650332093228396	11
<i>Join a Worship Service</i> , A Christian Ministry in the Nat'l Parks (last visited Oct. 7, 2024), https://acmnp.com/join-a-worship-service/	8
Julie Zauzmer, <i>In the Shadow of the Washington Monument, a Christian Group Attempts 14 Months of Nonstop Prayer</i> , Wash. Post (Apr. 13, 2016),	

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
https://www.washingtonpost.com/news/acts-of-faith/wp/2016/04/13/in-the-shadow-of-the-washington-monument-a-christian-group-attempts-14-months-of-nonstop-prayer/	8
Laurie Goodstein, <i>Hundreds of Thousands Gather on the Mall in a Day of Prayer</i> , N.Y. Times (Oct. 5, 1997), https://www.nytimes.com/1997/10/05/us/hundreds-of-thousands-gather-on-the-mall-in-a-day-of-prayers.html	9
Matt Blitz, <i>David’s Tent Still Remains Up on the National Mall</i> (Mar. 23, 2020), https://dcist.com/story/20/03/23/davids-tent-still-remains-up-on-the-national-mall/	8
Michelle Boorstein & Sarah Pulliam Bailey, <i>Prayer March Draws Thousands to the Mall Seeking Healing for the Nation</i> , Wash. Post (Sept. 26, 2020), https://www.washingtonpost.com/local/social-issues/prayer-march-national-mall/2020/09/26/e401f184-002f-11eb-b555-4d71a9254f4b_story.html	10
<i>NAMA 1st Amendment Permit List</i> , Nat’l Park Serv. (last visited Oct. 7, 2014), https://www.nps.gov/aboutus/foia/upload/NA_MA_1stAmmendment_Permit_List.pdf	12
<i>NAMA Permits November 1, 2020 to January 6, 2021</i> , Nat’l Park Serv. (last visited Oct. 7, 2024),	

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
https://www.nps.gov/aboutus/foia/upload/NA MA_Nov-1-Jan-6-permit-applications.pdf	12, 13
Paul Strand, <i>Franklin Graham's Prayer March & Jonathan Cahn's 'The Return' Aim to Keep USA From 'Point of No Return'</i> , Christian Broad. Network (Sept. 17, 2020), https://cbn.com/news/us/franklin-grahams- prayer-march-jonathan-cahns-return-aim- keep-usa-point-no-return	10
Proclamation No. 10285, 86 FR 57321 (Oct. 8, 2021), https://www.federalregister.gov/documents/ 2021/10/15/2021-22672/bears-ears-national- monument	7
<i>Protecting Bears Ears National Monument</i> , Native Am. Rights Fund (last visited Oct. 7, 2024), https://narf.org/cases/bears-ears/	7
Tamarra Kemsley, <i>After 2-Year Hiatus, Jehovah's Witnesses Soon May Be Knocking on Your Door</i> (July 26, 2022), https://www.sltrib.com/religion/2022/07/26/a- fter-2-year-hiatus-jehovahs/	10
<i>The Return USA 2020</i> , The Return (last visited Oct. 7, 2024), https://thereturn.org/thereturn- washingtondc/	10
<i>The Return Home Page</i> , The Return (last visited Oct. 7, 2024), https://thereturn.org/home-old-2/	10

**TABLE OF AUTHORITIES
(continued)**

	Page(s)
<p><i>The White House and President’s Park: National Christmas Tree</i>, Nat’l Park Serv. (July 1, 2024), https://www.nps.gov/whho/planyourvisit/national-christmas-tree.htm.....</p>	9
<p>Thomas James, <i>Debunking the Myth, Fear of Yellowstone</i>, Nat’l Park Serv. (Apr. 10, 2019), https://www.nps.gov/articles/archeology-debunkingthemyth-fear-of-yellowstone.htm</p>	6
<p>Tiffany Jothen, <i>Tens of Thousands Cry Out to God at Prayer March 2020</i>, Billy Graham Evangelistic Association (Sept. 26, 2020), https://billygraham.org/story/tens-of-thousands-cry-out-to-god-at-prayer-march-2020/.....</p>	10
<p><i>Visit the Tree</i>, Nat’l Christmas Tree Lighting (last visited Oct. 7, 2024), https://www.thenationaltree.org/visit-the-tree/</p>	9
<p><i>White House Hosts Downsized Ramadan Gathering</i>, CBS News (Apr. 3, 2024), https://www.cbsnews.com/news/muslim-leaders-biden-smaller-ramadan-meeting/</p>	13
<p><i>Yellowstone: Historic Tribes</i>, Nat’l Park Serv. (Oct. 11, 2023), https://www.nps.gov/yell/learn/historyculture/historic-tribes.htm</p>	6

INTEREST OF *AMICUS CURIAE*¹

The Knights of Columbus is a Catholic fraternal benefit society with more than two million members worldwide. Established in 1882, it is founded on the principles of charity, unity, fraternity, and patriotism. As a faith-based organization, it has a strong interest in the continued ability of its members and all people of faith to freely engage in religious exercise throughout the nation.

The Knights of Columbus, through local councils or assemblies, has long held religious events on federal lands from Colorado to Mississippi to Delaware. That time-honored practice is threatened by the decision below, which upends the application of the Religious Freedom Restoration Act (“RFRA”) to religious exercise that takes place on federal property. The Knights of Columbus has already felt the impact of the decision below: Within days of its publication, the National Park Service invoked the decision below to deny the Knights of Columbus a permit to use the Poplar Grove National Cemetery in Virginia for its annual Memorial Day Mass, which had been held without incident for more than 60 years.

¹ Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For the past two decades, RFRA has protected the religious liberty of people of all faiths, all around the country, to engage in religious exercise without the undue interference of the government. RFRA has long been understood to safeguard religious exercise on federal land and private property alike, requiring the government to justify any substantial burden it imposes on such exercise with a countervailing compelling government interest and to demonstrate narrow tailoring to that interest. Commonsensically—and as the Ninth Circuit itself acknowledged—preventing access to religious exercise ordinarily would constitute one such substantial burden. But the decision below turns RFRA on its head when it comes to the federal government’s land management decisions, finding that RFRA actually means something else entirely in that context. The decision below is wrong as a matter of law and, if allowed to stand, threatens to upset the time-honored religious practices of countless faith-based groups nationwide and remove protection for their free exercise anytime they happen to use federal lands as part of their worship. The Knights of Columbus has already gotten a troubling preview of what that future looks like—with the decision below cited to deny it a permit for a Memorial Day Mass that had been conducted without issue for 60 years.

The decision below reads into RFRA an atextual constraint with no grounding in the statute itself. By its express terms, RFRA applies to “all Federal law” and protects the “use . . . of real property for the purpose of religious exercise.” 42 U.S.C. §§ 2000bb-2(4),

2000bb-3(a), 2000cc-5(7)(B). Thus, RFRA applies on equal footing to the federal government's land management decisions as to any other area of federal law. And courts have long interpreted RFRA exactly that way, recognizing that preventing religious exercise—whether in the federal land management context or elsewhere—constitutes a substantial burden and therefore triggers strict scrutiny.

Of course, that does not end the inquiry under RFRA; it is only the beginning. Many RFRA challenges fail at the strict scrutiny phase. But short-circuiting challenges like Apache Stronghold's on the threshold "substantial burden" showing flouts the statute's purpose and guts its protections for religious exercises that lie at the very heart of RFRA.

The decision below is devastating to the Western Apache who have long held Oak Flat sacred and stand to lose it forever—along with their central religious practices—in favor of a copper mine. It is devastating to the many Native American tribes around the country who use their ancestral lands—often now federal property—for their rituals and worship. And it is devastating to the myriad religious adherents of all faiths and backgrounds who use federal lands every day for their religious exercise, which is subject to arbitrary government interference if RFRA's longstanding protections are suddenly declared to be inapplicable.

Apache Stronghold's petition for a writ of certiorari should be granted and common sense returned to RFRA.

ARGUMENT

I. RFRA Places Guardrails on the Federal Government’s Burdening of Religious Exercise.

Congress enacted RFRA “to provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). RFRA prohibits the federal government from “substantially burden[ing] a person’s exercise of religion”—defined to include the “use . . . of real property for the purpose of religious exercise”—unless it “demonstrates that application of the burden to the person” is the “least restrictive means” of advancing a “compelling governmental interest.” 42 U.S.C. § 2000bb-1(a)-(b), 2000bb-2(4), 2000cc-5(7)(B). RFRA has long been interpreted to mean what it says—that the federal government cannot impose a substantial burden on religious exercise without first showing a compelling governmental interest and narrow tailoring to that interest. *E.g.*, *Hobby Lobby*, 573 U.S. at 726; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 430-31 (2006).

As even a majority of the Ninth Circuit’s en banc court recognized, a “substantial burden” plainly includes “preventing access to religious exercise.” *Apache Stronghold v. United States*, 101 F.4th 1036, 1043 (9th Cir. 2024) (per curiam). So it is equally remarkable and troubling that the Ninth Circuit proceeded to carve out that precise burden from RFRA’s scope whenever it arises in the context of the federal government’s management of federal land. There is no basis in RFRA to set apart the federal government’s land management decisions from its other

activities, giving it free reign to prevent any religious exercise that involves federal land, irrespective of whether there is a compelling countervailing governmental interest.

Of course, the bare showing of a substantial burden does not foreclose the challenged governmental action. All it does is trigger the government's obligation to justify its conduct as the least restrictive means of advancing a compelling governmental interest. But the atextual interpretation of RFRA set forth in the decision below derails viable claims like Apache Stronghold's before that inquiry even can begin.

II. Thousands of Citizens and Groups, From Diverse Religious Faiths, Exercise Their Beliefs Through Activities on Federal Land.

The federal government's treatment of Oak Flat is an egregious example of why RFRA's protections are so important—but it is no outlier. Instead, RFRA's protections are necessary because sites of religious significance and important religious activities are often located on federal land.

Due to this country's historical interactions with Native American tribes, many Native American sacred sites are situated on federal lands, with tribes continuing to use those lands for their religious exercise. Oak Flat is no aberration—it is the norm. For example, Devil's Tower in Wyoming, now a national monument, is sacred to several Native American tribes including the Arapaho, Cheyenne, Crow, Kiowa, Lakota, and Shoshone.² It remains an active

² *10 Public Lands with Powerful Native American Connections*, U.S. Dep't of the Interior (Jan. 20, 2021) [hereinafter *10*

site for prayer offerings, sun dances, and other religious ceremonies.³ Similarly, Hale o Keawe, located in Pu‘uhonua o Hōnaunau National Historical Park, is sacred to certain groups of Native Hawaiians and remains an active site for worship and prayer offerings.⁴ So too, Effigy Mounds in Iowa, now a national monument, is sacred to nearly two dozen Native American tribes and still serves as a burial ground and prayer site.⁵ Likewise, Dragon’s Mouth Spring, located in Yellowstone National Park, is sacred to the Kiowa tribe and believed by the Kiowa to be the site where the creator deity endowed them with a homeland.⁶ And Bears Ears in Utah, now a national monument, is sacred to several Native American tribes including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation,

Public Lands], <https://www.doi.gov/pressreleases/10-public-lands-powerful-native-american-connections>; *Devil’s Tower: A Place of Reverence for Native Americans*, Nat’l Park Serv. (May 31, 2023), <https://www.nps.gov/deto/learn/historyculture/reverence.htm>.

³ *Id.*

⁴ *Hale o Keawe*, Nat’l Park Serv. (Feb. 14, 2021), <https://www.nps.gov/places/walking-tour-stop-8-hale-o-keawe.htm>.

⁵ *10 Public Lands*, *supra* note 2; *Effigy Mounds: Effigy Moundbuilders*, Nat’l Park Serv. (Sept. 4, 2024), <https://www.nps.gov/efmo/learn/historyculture/effigy-moundbuilders.htm>.

⁶ *Yellowstone: Historic Tribes*, Nat’l Park Serv. (Oct. 11, 2023), <https://www.nps.gov/yell/learn/historyculture/historic-tribes.htm>; Thomas James, *Debunking the Myth, Fear of Yellowstone*, Nat’l Park Serv. (Apr. 10, 2019), <https://www.nps.gov/articles/archeology-debunkingthemyth-fear-of-yellowstone.htm>.

and Zuni Tribe.⁷ It remains an active site for prayer offerings and sacred ceremonies, and it is the source of religious ceremonial items that can be harvested only from those buttes.⁸ For tribes nationwide that already had much of their ancestral lands taken away from them, the decision below deals another crushing blow—allowing the federal government to sell or destroy any of these sites for any reason without any review under RFRA.

The impact of the decision below extends not only to the Western Apache, and not only to the country’s many Native American tribes, but also to the myriad religious groups from coast to coast who use federal lands for their religious exercise. If the decision below is allowed to stand, it would be devastating to them all.

Religious exercise on federal lands transcends faith lines. It spans Evangelical Christians and Jehovah’s Witnesses, Jews and Muslims, Catholics and non-denominational movements alike. It encompasses prayer marches and vigils, one-on-one

⁷ *Bears Ears National Monument Management*, U.S. Dep’t of the Interior: Bureau of Land Mgmt. (last visited Oct. 7, 2024), <https://www.blm.gov/programs/national-conservation-lands/utah/bears-ears-national-monument#:~:text=Bears%20Ears%20National%20Monument%20holds,for%20traditional%20and%20ceremonial%20uses>; Proclamation No. 10285, 86 FR 57321 (Oct. 8, 2021), <https://www.federalregister.gov/documents/2021/10/15/2021-22672/bears-ears-national-monument>; *Protecting Bears Ears National Monument*, Native Am. Rights Fund (last visited Oct. 7, 2024), <https://narf.org/cases/bears-ears/>.

⁸ *Id.*

evangelizing and massive conventions, annual holiday celebrations and ordinary religious services. And it occurs every day, all around the country.

Examples of religious exercise on federal lands include, to name a few:

- A Christian Ministry in the National Parks holds weekly religious services in national parks across the country, from Acadia to Big Bend, Bryce Canyon to Crater Lake, Denali to Grand Teton.⁹ It has used the national parks for religious worship since 1951, beginning with Yellowstone.¹⁰
- David's Tent, a nondenominational Christian ministry, holds a 24/7 prayer vigil on the National Mall in Washington, D.C., as it has done for the past decade.¹¹

⁹ *Join a Worship Service*, A Christian Ministry in the Nat'l Parks (last visited Oct. 7, 2024), <https://acmnp.com/join-a-worship-service/>.

¹⁰ *About*, A Christian Ministry in the Nat'l Parks (last visited Oct. 7, 2024), <https://acmnp.com/about/>.

¹¹ Julie Zauzmer, *In the Shadow of the Washington Monument, a Christian Group Attempts 14 Months of Nonstop Prayer*, Wash. Post (Apr. 13, 2016), <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/04/13/in-the-shadow-of-the-washington-monument-a-christian-group-attempts-14-months-of-nonstop-prayer/>; Matt Blitz, *David's Tent Still Remains Up on the National Mall* (Mar. 23, 2020), <https://dcist.com/story/20/03/23/davids-tent-still-remains-up-on-the-national-mall/>; *David's Tent DC Home Page*, David's Tent (last visited Oct. 7, 2024), <https://davidstentdc.org/>; *About David's Tent DC*, David's Tent (last visited Oct. 7, 2024), https://davidstentdc.org/about_davids_tent/.

- Since 1979, there has been an annual lighting ceremony of the National Menorah in celebration of Chanukah.¹² It is sponsored by American Friends of Lubavitch (Chabad) and held each year on the Ellipse across from the White House.¹³
- The annual National Christmas Tree Lighting is also hosted on the Ellipse.¹⁴ The tradition is entering its 102nd year.¹⁵
- The Promise Keepers, an Evangelical Christian movement, held a religious revival rally on the National Mall, convening hundreds of thousands of Christian men for a day of prayer.¹⁶
- Jehovah's Witnesses proselytize at national parks throughout the country, from Arches National Park in Utah to Sequoia National Park in California.¹⁷

¹² *About*, Nat'l Menorah (last visited Oct. 7, 2024), <https://nationalmenorah.org/about/>.

¹³ *Id.*

¹⁴ *Visit the Tree*, Nat'l Christmas Tree Lighting (last visited Oct. 7, 2024), <https://www.thenationaltree.org/visit-the-tree/>; *The White House and President's Park: National Christmas Tree*, Nat'l Park Serv. (July 1, 2024), <https://www.nps.gov/whho/planyourvisit/national-christmas-tree.htm>.

¹⁵ *Id.*

¹⁶ Laurie Goodstein, *Hundreds of Thousands Gather on the Mall in a Day of Prayer*, N.Y. Times (Oct. 5, 1997), <https://www.nytimes.com/1997/10/05/us/hundreds-of-thousands-gather-on-the-mall-in-a-day-of-prayers.html>.

¹⁷ Tamarra Kemsley, *After 2-Year Hiatus, Jehovah's Witnesses Soon May Be Knocking on Your Door* (July 26, 2022),

- The Billy Graham Evangelistic Association gathered tens of thousands of Christians for the Washington Prayer March on the National Mall from the Lincoln Memorial to the U.S. Capitol Building.¹⁸
- The Return, a cross-denominational “end-time movement,” assembled over 250,000 adherents for a “day of prayer and repentance” on the National Mall.¹⁹
- The Grand Canyon Community Church holds a Resurrection Sunday celebration at the Shrine of the Ages and an Easter Sunrise Service at

<https://www.sltrib.com/religion/2022/07/26/after-2-year-hiatus-jehovahs/>; *Jehovah's Witnesses Resume Public Ministry*, The Recorder (July 22, 2022), https://www.recorderonline.com/news/jehovahs-witnesses-resume-public-ministry/article_b04832aa-0a04-11ed-ae63-537991d2e8e7.html.

¹⁸ Michelle Boorstein & Sarah Pulliam Bailey, *Prayer March Draws Thousands to the Mall Seeking Healing for the Nation*, Wash. Post (Sept. 26, 2020), https://www.washingtonpost.com/local/social-issues/prayer-march-national-mall/2020/09/26/e401f184-002f-11eb-b555-4d71a9254f4b_story.html; Paul Strand, *Franklin Graham's Prayer March & Jonathan Cahn's 'The Return' Aim to Keep USA From 'Point of No Return'*, Christian Broad. Network (Sept. 17, 2020), <https://cbn.com/news/us/franklin-grahams-prayer-march-jonathan-cahns-return-aim-keep-usa-point-no-return>; Tiffany Jothen, *Tens of Thousands Cry Out to God at Prayer March 2020*, Billy Graham Evangelistic Association (Sept. 26, 2020), <https://billygraham.org/story/tens-of-thousands-cry-out-to-god-at-prayer-march-2020/>.

¹⁹ Boorstein & Pulliam Bailey, *supra* note 18; Strand, *supra* note 18; *The Return USA 2020*, The Return (last visited Oct. 7, 2024), <https://thereturn.org/thereturn-washingtondc/>; *The Return Home Page*, The Return (last visited Oct. 7, 2024), <https://thereturn.org/home-old-2/>.

Mather Point Amphitheater, both located in Grand Canyon National Park.²⁰

- A Million Women convened thousands of religious women for a day of atonement, fasting, and prayer on the National Mall.²¹
- Thousands of Muslims gathered for the Jum’ah prayer on the National Mall.²²
- Chabad rabbis blew the shofar in Grand Teton National Park and others around the country.²³
- The Macon Missionary Baptist Church used the Ellipse to “[p]reach Jesus to the Lost.”²⁴

²⁰ *Easter Sunrise Service*, Grand Canyon Cmty. Church (last visited Oct. 7, 2024), <https://grandcanyoncommunitychurch.org/easter-sunrise-service-2>.

²¹ *A Million Women Home Page*, A Million Women (last visited October 14, 2024), <https://amillionwomen.org/>; Alice Herman, *Thousands Rally at Christian Nationalist Event in DC to ‘Turn Hearts Back to God,’* Guardian (Oct. 12, 2024, 3:29 PM), <https://www.theguardian.com/us-news/2024/oct/12/jenny-donnelly-anti-trans-christian-nationalist-rally>.

²² @AMPalestine, X (Oct. 20, 2023, 1:01 PM), <https://x.com/AMPalestine/status/1715413011828007144>.

²³ Joel Millman, *To Assist Devout Vacationers, Rabbis Head to Great Outdoors*, Wall St. J. (Oct. 1, 2012), <https://www.wsj.com/articles/SB10000872396390444433504577650332093228396>.

²⁴ Homeland Security Bureau: Intelligence Division, *Demonstration Report*, FOIA Request No. 2021-01634 (June 2021), <https://www.brennancenter.org/sites/default/files/2024-04/21.06.pdf>.

- An Eid ul Adha celebration was held in Anacostia Park in Washington, D.C.²⁵
- The Ohev Yisrael Messianic Jewish Congregation held a Chanukah celebration at the National Sylvan Theater.²⁶
- The Traveling Church held religious services in Anacostia Park in Washington, D.C.²⁷
- The Truth in the Spirit used Lincoln Park in Washington, D.C. for a prayer and mourning service.²⁸
- Muslim worshipers convened for Iftar in the Park in Meridian Hill Park in Washington, D.C.²⁹
- Chabad hosted a Rosh Hashanah celebration in Lincoln Park in Washington, D.C.³⁰

²⁵ *Id.*

²⁶ *NAMA Permits November 1, 2020 to January 6, 2021*, Nat'l Park Serv. (last visited Oct. 7, 2024) [hereinafter *NAMA Permits*], https://www.nps.gov/aboutus/foia/upload/NAMA_Nov-1-Jan-6-permit-applications.pdf.

²⁷ Homeland Security Bureau, *supra* note 24.

²⁸ *Id.*

²⁹ *NAMA 1st Amendment Permit List*, Nat'l Park Serv. (last visited Oct. 7, 2014), https://www.nps.gov/aboutus/foia/upload/NAMA_1stAmendment_Permit_List.pdf.

³⁰ *10 Rosh Hashanah Celebrations Happening in the DC Area This Year*, NBC Washington (Sept. 23, 2022), <https://www.nbcwashington.com/news/local/10-rosh-hashanah-celebrations-happening-in-the-dc-area-this-year/3164630/>.

- The Christ Church Georgetown held a family Christmas gathering for its church members in Montrose Park in Washington, D.C.³¹
- Revolution Church and Christ Our Shephard Church held church services in Anacostia Park in Washington, D.C.³²
- Bethel Capitol Church held a church service at the Lincoln Memorial.³³
- Muslims broke the Ramadan fast with Iftar in Lafayette Park in Washington, D.C.³⁴

These instances of religious exercise on federal lands, large and small, illustrate just how sweeping the impact of the decision below could be. Importantly, for many religious observers, the locations themselves are necessary to the religious exercise, whether because the site is significant within their faith, they feel called to perform such events at a specific location, or the public nature of the event is itself religiously significant.

The Knights of Columbus, in particular, often uses federal lands for religious exercise. It regularly holds religious events, including Catholic Masses, wreath-laying ceremonies, and honor guards, at cemeteries, Veterans Administration facilities, and historic sites on federal lands. In recent years, local

³¹ *NAMA Permits*, *supra* note 26.

³² *Id.*

³³ *Id.*

³⁴ *White House Hosts Downsized Ramadan Gathering*, CBS News (Apr. 3, 2024), <https://www.cbsnews.com/news/muslim-leaders-biden-smaller-ramadan-meeting/>.

councils of the Knights of Columbus have held such religious events on federal lands including Montville National Cemetery in Alabama; Fort Logan National Cemetery, Fort Lyon National Cemetery, and Pikes Peak National Cemetery in Colorado; Dover Air Force Base in Delaware; Sarasota National Cemetery in Florida; Andersonville National Cemetery and Marietta National Cemetery in Georgia; Togus VA Medical Center in Maine; Fort Custer National Cemetery in Michigan; Biloxi National Cemetery in Mississippi; Dayton National Cemetery in Ohio; Nashville National Cemetery and Stones River National Battlefield in Tennessee; Arlington National Cemetery and Poplar Grove National Cemetery in Virginia; and the African American Civil War Memorial and the Columbus Monument at Union Station in Washington, D.C.

As this extensive (but not nearly exhaustive) list demonstrates, religious exercise events on federal land are frequent, often longstanding. They involve free exercise rights for a significant number of people, from a host of different religious faiths. All are worthy of protection from arbitrary government intrusion.

III. RFRA Applies Equally to All Federal Law, Including the Management of Federal Lands.

By its express terms, RFRA should apply to all the above examples of religious exercise on federal land. But the Ninth Circuit's decision, which improperly guts RFRA's protections, now places them all at risk.

RFRA applies to “all Federal law, and the implementation of that law, whether statutory or otherwise.” 42 U.S.C. § 2000bb-3(a). It empowers Congress to exempt statutes from RFRA’s scope, but Congress must do so “explicitly.” *Id.* § 2000bb-3(b). RFRA provides for no other exclusions. If Congress had wished to exclude government land management decisions from RFRA’s protections, it knew exactly how to do so; but it chose not to. *See, e.g., Animal Legal Def. Fund. v. U.S. Dep’t of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015) (“Where Congress knows how to say something but chooses not to, its silence is controlling.”).

Not only does RFRA contain no exclusion for cases involving the use of real property, but it expressly *includes* such use: RFRA protects the “use . . . of real property for the purpose of religious exercise.” 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(B). So it should be uncontroversial that RFRA applies to the use of federal lands for religious exercise.

The decision below flouts that commonsense understanding of RFRA’s scope. By limiting “substantial burden” only to “government action [that] has a ‘tendency to coerce individuals into acting contrary to their religious beliefs,’ ‘discriminate[s]’ against religious adherents, ‘penalize[s]’ them, or denies them ‘an equal share of the rights, benefits, and privileges enjoyed by other citizens,’” the decision below renders RFRA all but toothless in the government land management context. *Apache Stronghold*, 101 F.4th at 1062 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449-50 (1988)). According to the Ninth Circuit, because the destruction of religious sites arguably does not coerce, penalize, or

deny an equal share of rights to those whose religious practices depend on such sites, as long as the destruction is done for non-religiously motivated reasons (at least pretextually), the government is free to extinguish religious practice on federal land, without even triggering strict scrutiny under RFRA. This cannot be what Congress intended.

Indeed, the Ninth Circuit itself acknowledged that “preventing access to religious exercise” ordinarily would constitute a “substantial burden.” *Id.* at 1043. Yet it proceeded to apply a test for substantial burden that ignores the burden placed on religious exercise when government directly restrains individuals from acting in conformity with their religious beliefs. This was error.

Government places a substantial burden on religious exercise both when it compels individuals to engage in “conduct proscribed by [their] religious faith,” and when it restrains individuals from engaging in “conduct mandated by religious belief.” *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981). While direct compulsion and restraint—i.e., government action that *forces* individuals to engage in conduct proscribed by their religion, or makes it *impossible* to engage in conduct mandated by their religion—plainly constitute substantial burdens, this Court has recognized that government action that indirectly places “pressure on an adherent to modify his behavior and to violate his beliefs”—either by coercing the individual to act contrary to his beliefs, or pressuring the individual to refrain from acting in conformity with his beliefs—may also rise to the level of a substantial burden. *Id.* at 718; *see also Sherbert v. Verner*, 374 U.S. 398, 404 n.6 (1963) (a government

regulation creates a substantial burden when it has a “tendency to inhibit constitutionally protected activity”). The test applied by the Ninth Circuit below recognizes the substantial burden that such indirect pressures place on religious exercise. But it ignores the even greater burden placed on religious exercise by government action that does more than merely pressure individuals to act (or refrain from acting) contrary to their religious beliefs, and rather makes it *impossible* to comply with those beliefs. By doing so, the decision below arrives at an absurd result, where government activity that completely destroys a religious site and renders religious exercise impossible somehow does not even present a prima facie RFRA claim.

It makes good sense that RFRA must apply with full force to religious exercise on federal property. A core function of RFRA is to protect from government interference religious adherents who practice their faith on federal lands. After all, religious adherents rarely need statutory protections to enable their religious practice on their own private property.

IV. Courts Across the Country Have Long Understood RFRA to Safeguard Religious Exercise on Federal Land.

That RFRA applies equally to federal land management decisions has long been understood by other courts throughout the nation, including courts applying the very same substantial burden language interpreted by the decision below.

For example, in *Slockish v. United States Federal Highway Administration*, an Oregon district court considered a RFRA challenge brought by a group of

Native American plaintiffs to a federal highway widening project near Mount Hood, Oregon. No. 3:08-CV-1169-ST, 2012 WL 398989 (D. Or. Feb. 7, 2012). According to the plaintiffs, the project “severely damaged Plaintiff’s sacred burial grounds, traditional campsite, and other historic, cultural, and natural resources,” including by blocking “their access route from the highway to the campsite.” *Id.* at *1. In denying the government’s motion for judgment on the pleadings, the district court distinguished *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439 (1998)—the case on which the Ninth Circuit rested its decision below—explaining that, because the project “prevents Plaintiffs from having any access to their religious site, and, in addition, religious artifacts at the site were destroyed,” the plaintiffs may well “be forced to act contrary to their religious beliefs . . . [w]ithout the artifacts and free access to the site.” *Slockish*, 2012 WL 398989, at *4.

Similarly, in *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee*, a California district court denied a motion to dismiss a RFRA claim brought by a group of Native Americans challenging the government’s approval and construction of “a solar power generation project . . . on approximately 1,950 acres of federal public land in the California Desert Conservation Area,” including land used by the plaintiffs for religious practices. No. EDCV 11-1478-GW(SSx), 2012 WL 12904993, at *1-*2 (C.D. Cal. May 3, 2012). In doing so, the court recognized that “complete denial of access” to the site, as the plaintiffs had alleged would occur if construction were to proceed, could indeed impose a substantial burden on the plaintiffs’ religious exercise. *Id.* at *7.

As another example, in *Comanche Nation v. United States*, the Western District of Oklahoma granted a preliminary injunction against the “construction of a 43,000 square foot building” on a site of “religious and cultural significance to Native Americans,” finding that the Comanche Nation was likely to succeed in its RFRA challenge to the construction. No. CIV-08-849-D, 2008 WL 4426621, at *1 (W.D. Okla. Sept. 23, 2008). As the court recognized, “[t]he traditional religious practices of the Comanche people are inextricably intertwined with the natural environment,” such that the disruption of the site caused by the proposed construction would plainly “impose a substantial burden on the traditional religious practices of the Comanche people.” *Id.* at *17.

And in *Capitol Hill Baptist Church v. Bowser*, a D.C. district court granted Capitol Hill Baptist Church’s request under RFRA for a preliminary injunction banning enforcement of COVID-19 related restrictions barring the church from holding outdoor religious services in excess of 100 congregants on federal land. 496 F. Supp. 3d 284, 303 (D.D.C. 2020). As the court found, the restrictions imposed a substantial burden on the church congregation, because they “substantially pressured the Church to modify its behavior and to violate its beliefs.” *Id.* at 295 (internal quotations omitted). In particular, the court recognized that “[the church’s] convictions mandate meeting together in person as a full congregation,” and that, with the District’s restrictions in place, “that belief cannot be legally exercised.” *Id.*

None of these cases even suggested, much less held, that RFRA was inapplicable to the government’s land management decisions at issue, or allowed a

different “substantial burden” analysis. Instead, the courts have uniformly analyzed governmental action through RFRA’s typical burden-shifting framework and the ordinary meaning of “substantial burden.”

Even courts that have ultimately denied RFRA challenges to governmental land management decisions have recognized not only that RFRA applies, but that under its framework, a substantial burden would be imposed by a government action foreclosing religious exercise—like the government’s decision here to obliterate Oak Flat in favor of a copper mine.

For instance, in *Battle Mountain Band v. United States Bureau of Land Management*, a Nevada district court considered a motion for preliminary injunction to prevent the “construction of a power transmission line on land located in Elko County, Nevada,” that had been identified by the Battle Mountain Band as containing “sacred sites, burial grounds, ceremonial locations, [and] spiritual trails” of vital importance to the Band. No. 3:16-CV-0268-LRH-WGC, 2016 WL 4497756, at *1-*2 (D. Nev. Aug. 26, 2016). According to the Band, the Bureau of Land Management “violated the RFRA by failing to assess the impact that the construction of the power line would have on the Band’s religious activities” in the area. *Id.* at *5. The court disagreed, denying the preliminary injunction based on a finding that “the construction and operation of the power line will not substantially burden or restrict the Band’s exercise of religion.” *Id.* at *9. But in so finding, the court stressed that “[t]he Band will still be able to utilize the areas during and after the construction of the power line.” *Id.* Thus, critical to the court’s decision was the fact

that “the Band [was] not being foreclosed from engaging in or exercising its religious activities.” *Id.*

And in *Mahoney v. United States Marshals Service*, a D.C. district court emphasized the availability of alternative avenues by which the plaintiffs could have engaged in the religious exercise at issue, in holding that they “ha[d] not properly alleged that their religious exercise ha[d] been substantially burdened” under RFRA. 454 F. Supp. 2d 21, 38 (D.D.C. 2006). In *Mahoney*, the challenged government action involved the temporary imposition of a “controlled access area” in front of St. Matthew’s Cathedral during the Red Mass, into which only members of the public that were attending the Mass, or credentialed members of the media, were permitted to enter. *Id.* at 27-28. The plaintiffs had sought to engage in a religious protest within the controlled access area and were prevented from doing so. *Id.* According to the D.C. district court, this did not violate RFRA, because the plaintiffs did not offer any evidence “that their religion require[d] them to demonstrate at th[at] particular time and place as compared to all others.” *Id.* at 38; see also *Nenninger v. U.S. Forest Serv.*, No. CIV-07-3028, 2008 WL 2693186, at *5-*6 (W.D. Ark. July 3, 2008) (finding that Forest Service permit regulations did not impose a burden on the plaintiffs’ religious exercise, where they did not actually “prevent the [religious] gatherings” at issue, as demonstrated by the fact that “these large gatherings have continued to occur after the implementation of the opposed regulations”), *aff’d*, 353 F. App’x 80 (8th Cir. 2009).

This case is different—and indeed, epitomizes what it means to impose a substantial burden on religious exercise. Here, the destruction of Oak Flat will

completely foreclose the Western Apache from engaging in their longstanding religious practices that are inextricably tied to the site. Yet unlike each of the above precedents, the court below declared that the standard for “substantial burden” found in RFRA is effectively inapplicable anytime federal land management decisions are at issue. It makes a farce out of RFRA to hold that Oak Flat’s destruction does not even trigger strict scrutiny, much less violate RFRA’s deliberately broad protections for religious exercise.

V. The Decision Below Threatens RFRA’s Time-Honored Safeguards for All People Whose Religious Exercise Takes Place on Federal Lands.

The decision below reads into RFRA limitations that find no support in the statutory text or intent. And allowing it to stand would jeopardize crucial protections for religious adherents of all faiths and backgrounds who conduct religious exercise beyond the walls of their private property.

Indeed, the Ninth Circuit reasoned that in cases involving federal land, free exercise could only be “substantially burdened” by government action which *discriminates* amongst different groups, *penalizes* them, *denies* them an equal share of rights, or which has a “tendency to coerce individuals into acting contrary to their religious beliefs,” 101 F.4th at 1044, 1051-52, 1061-63—*coercion* to act *against* one’s beliefs. But these mean little if one is not protected against government action which entirely restrains or prevents religious exercise—*restraint* on acting *consistent* with their religious beliefs. For all of the above religious groups, free exercise of their beliefs includes

their simple ability *to* exercise them in the public square. A governmental actor’s decision not to allow *anyone* to publicly exercise their faith on a federal governmental property would not be discriminatory, or coerce action against one’s beliefs (the only relevant questions in the court’s analysis below)—but it would uniformly (and completely) restrain them from exercising their beliefs in public. Such government action is precisely what RFRA was designed to prevent.

The potential reach of the decision below is no abstract parade of horrors. Its concrete impact is already being felt by religious groups even outside the Ninth Circuit, including the Knights of Columbus. Within days of its publication, the National Park Service invoked the decision below to deny the Knights of Columbus a permit to use Poplar Grove National Cemetery in Virginia for its annual Memorial Day Mass, which was slated to be a small and solemn religious gathering of no more than 45 people. In particular, the Park Service expressly relied on the decision below to argue that its permit denial, which entirely precluded the proposed religious exercise, did not “substantially burden” the Knights under RFRA. Gov’t Br. at 19-21, *Knights of Columbus v. Nat’l Park Serv.*, No. 3:24-cv-363, ECF No. 21 (E.D. Va. May 22, 2024).³⁵ The Knights of Columbus had held the Poplar Grove Memorial Day Mass for more than 60 years

³⁵ The National Park Service reversed course amid public pressure after the Knights of Columbus brought a widely-publicized lawsuit, but there is no reason to believe its reliance on the decision below will let up with respect to other religious exercise on federal lands—or even the Knights of Columbus’s future use of Poplar Grove for that purpose.

without incident, illustrating the seismic paradigm shift ushered in by the decision below.

The Supreme Court should reverse the decision below before it is too late not only for the Apache but also for countless religious groups throughout the nation.

CONCLUSION

For these reasons, as well as those presented in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Kristin Cope
Counsel of Record
Frances Mackay
O'MELVENY & MYERS LLP
2801 North Harwood Street
Suite 1600
Dallas, TX 75201
(972) 360-1900
kcope@omm.com

Danielle Feuer
O'MELVENY & MYERS LLP
1301 Ave. of the Americas
Suite 1700
New York, NY 10019
(212) 326-2000

Coke Morgan Stewart
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300

October 15, 2024