No. 24-291

In the Supreme Court of the United States

APACHE STRONGHOLD, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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QUESTION PRESENTED

In 2014, Congress "authorized and directed" the Secretary of Agriculture to convey specific federal lands in Pinal County, Arizona, to respondent Resolution Copper Mining, LLC, as part of a land exchange. 16 U.S.C. 539p(c)(1). The federal lands to be conveyed to Resolution Copper include an area known as Oak Flat, which some Native Americans consider sacred and use for religious purposes. The statute contemplates that Resolution Copper will engage in mining that will eventually cause the surface of Oak Flat to subside, "preclud[ing] public access for safety reasons." 16 U.S.C. 539p(i)(3). Petitioner brought this action seeking to enjoin the transfer, asserting that it violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, and the Free Exercise Clause of the First Amendment. The question presented is:

Whether the court of appeals correctly determined that the land exchange does not violate RFRA or the First Amendment because the federal government's conveyance of its own property to a third party does not impose any cognizable burden on petitioner's exercise of religion.

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OPINIONS BELOW

The amended opinion of the en banc court of appeals (Pet. App. 1a-262a) is reported at 101 F.4th 1036. The initial, superseded opinion of the en banc court (Pet. App. 263a-517a) is reported at 95 F.4th 608. A prior panel opinion (Pet. App. 518a-603a) is reported at 38 F.4th 742. An earlier order by a motions panel (Pet. App. 604a-621a) is not published in the Federal Reporter but is available at 2021 WL 12295173. The opinion of the district court (Pet. App. 622a-652a) is reported at 519 F. Supp. 3d 591.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2024. On August 1, 2024, Justice Kagan extended the time within which to file a petition for a writ

of certiorari to and including September 11, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

1. This case concerns the transfer of approximately 2422 acres of federal land in Pinal County, Arizona, to respondent Resolution Copper Mining, LLC, for the development of a copper mine. Pet. App. 16a, 21a. The land to be transferred is located in the Tonto National Forest, *id.* at 16a, which is managed by the Secretary of Agriculture acting through the U.S. Forest Service.

In 1955, 760 acres in the Tonto National Forest were reserved for public use—and made unavailable for mineral extraction—to form the Oak Flat Picnic and Camp Ground. 20 Fed. Reg. 7336, 7337 (Oct. 1, 1955). Forty years later, the "third-largest known copper deposit in the world" was discovered thousands of feet beneath the Forest. Pet. App. 18a; see *id.* at 687a. Resolution Copper holds unpatented mining claims on part of that deposit, which is estimated to contain nearly two billion tons of copper resource. *Id.* at 688a. Although much of the deposit is open to mining under federal law, it also "extends underneath [the] adjacent 760-acre" Oak Flat area. *Ibid.* As a result, Resolution Copper has been unable to "conduct[] mineral exploration or other mining-related activities" on the deposit. *Ibid.*

To address that problem, Resolution Copper "pursued a land exchange [with the federal government] for more than 10 years." Pet. App. 688a. Between 2005 and 2014, multiple bills were introduced in Congress to "compel the Government to transfer Oak Flat and its surroundings to Resolution Copper" in exchange for other lands elsewhere. *Id.* at 19a. During the legislative process, Congress heard from both supporters and

opponents of the proposed land exchange. As particularly relevant here, the then-Chairman of the San Carlos Apache Tribe testified that the federal lands that Resolution Copper sought to acquire contained sites that he considered "sacred and holy places" for the Apache, including "Oak Flat" and another site known as "Apache Leap." *H.R. 3301, Southeast Arizona Land Exchange and Conservation Act of 2007: Hearing before the Subcomm. on National Parks, Forests and Public Lands of the House Comm. on Natural Resources*, 110th Cong., 1st Sess. 18 (2007) (2007 Hearings); cf. Gov't C.A. Br. 6-7 (citing additional testimony).

In 2014, Congress enacted a statute authorizing and directing a version of the land exchange that Resolution Copper had sought. See Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3732-3741 (16 U.S.C. 539p) (Land Exchange Act). The Land Exchange Act requires the Secretary to transfer 2422 acres of federal land in the Tonto National Forest to Resolution Copper if the mining company offers to convey to the United States other lands satisfying the criteria set forth in the Act. 16 U.S.C. 539p(c)(1) and (5)(A). The federal lands to be conveyed to Resolution Copper include the Oak Flat area that had previously been withdrawn from mineral entry. See 16 U.S.C. 539p(b)(6) and (c)(6)(C); Pet. App. 21a.

As a condition of the land exchange, Congress required Resolution Copper to "agree to provide access to the surface of the Oak Flat Campground to members of the public, including Indian tribes, to the maximum extent practicable." 16 U.S.C. 539p(i)(3). Congress also required the Secretary to engage in government-to-government consultations with affected Indian tribes

and to consult with Resolution Copper to "seek to find mutually acceptable measures" to address tribal concerns and to "minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper." 16 U.S.C. 539p(c)(3)(A) and (B). But the Land Exchange Act contemplates that Resolution Copper's mining activities will ultimately result in surface subsidence that will "preclude[] continued public access [to Oak Flat] for safety reasons." 16 U.S.C. 539p(i)(3); see Pet. App. 23a (explaining that Resolution Copper plans to engage in underground mining activities that, over several decades, will "caus[e] the surface geography to become increasingly distorted," eventually resulting in "a large surface crater").

Although Congress chose to direct a conveyance of Oak Flat that will result in the area being rendered unsafe and inaccessible to tribes and the public, Congress also acted to protect the separate site known as Apache Leap. Congress did not include Apache Leap in the federal lands to be exchanged with Resolution Copper; instead, Congress required Resolution Copper to surrender all rights it held to mine under Apache Leap. 16 U.S.C. 539p(g)(3). Congress also directed the Secretary to establish a special management area for Apache Leap for the purpose of, among other things, "allow[ing] for traditional uses of the area by Native American people." 16 U.S.C. 539p(g)(2)(B).

2. On January 4, 2021, the Forest Service announced that it was planning to publish a final environmental impact statement for the land exchange with Resolution Copper (and for the associated copper mining project) on January 15. Pet. App. 24a. An environmental impact statement is a document prepared under the National

Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, to study the environmental effects of proposed federal actions. See 42 U.S.C. 4332(2)(C). The Land Exchange Act requires the publication of such a statement as a precondition to the conveyance of federal lands to Resolution Copper. 16 U.S.C. 539p(c)(9).

On January 12, 2021, petitioner brought this action in the United States District Court for the District of Arizona, seeking to halt the transfer of Oak Flat in order to protect the "religious freedom rights * * * of the Western Apache Peoples." Compl. ¶ 1; see Pet. App. 24a. Petitioner is not itself an Indian tribe, nor was it established by a tribe or under tribal law. Petitioner instead describes itself as a "nonprofit community organization of individuals" that seeks to protect "Holy sites." Compl. ¶ 24. The gravamen of the complaint is that Oak Flat is a "sacred and actively utilized religious place" and that transferring title to the area to Resolution Copper will violate the free-exercise rights of petitioner and its members because Oak Flat will ultimately be "annihilate[d]" through subsidence. Compl. ¶ 9. The complaint includes claims under both the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* See Compl. ¶¶ 58-86.

The district court denied petitioner's motion for a preliminary injunction. Pet. App. 622a-652a. As relevant here, the court found that petitioner was unlikely to succeed on its free-exercise or RFRA claims. *Id.* at 636a-645a. The court stated that the evidence in the preliminary-injunction record "shows that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries." *Id.* at 636a. But with respect to the First Amendment, the court found the

Land Exchange Act to be a "'valid and neutral law of general applicability,'" which "merely authorizes the exchange of land" between the federal government and Resolution Copper. *Id.* at 639a (quoting *Employment Div.* v. *Smith*, 494 U.S. 872, 879 (1990)). The court also found that the land exchange would not "substantially burden" petitioner's exercise of religion within the meaning of RFRA. 42 U.S.C. 2000bb-1(a); see Pet. App. 639a-645a.

3. Petitioner appealed and sought an emergency injunction from the court of appeals. While that litigation was ongoing, the government withdrew the final environmental impact statement in order to engage in further consultations with affected Indian tribes. See Gov't C.A. Opp. to Emergency Mot. for Inj. Pending Appeal 1, 4-5. The government informed the court of appeals that the conveyance that petitioner sought to enjoin would not occur until a new final environmental impact statement was published. Pet. App. 604a. The government also committed to providing at least 30 days' notice to petitioner before publication. *Ibid.*[1]

After those developments, the court of appeals denied petitioner's motion for emergency relief without prejudice. Pet. App. 604a-605a. Judge Bumatay dissented; he would have granted an injunction pending appeal. *Id.* at 605a-621a.

4. In June 2022, a panel of the court of appeals affirmed the district court's denial of a preliminary injunction, over the dissent of Judge Berzon. Pet. App. 518a-603a. The court then granted rehearing en banc

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[1] The district court later ordered the government to provide at least 60 days' notice to petitioner and the public. D. Ct. Order 2 (May 12, 2021).

and again affirmed, issuing a per curiam order and several separate opinions. *Id.* at 1a-262a.[2]

a. RFRA forbids the government from "substantially burden[ing] a person's exercise of religion" unless "application of the burden to the person" furthers a "compelling governmental interest" and is "the least restrictive means of furthering that" interest. 42 U.S.C. 2000bb-1(a) and (b). At the panel stage, the majority viewed petitioner's likelihood of success under RFRA as turning on "what constitutes a substantial burden." Pet. App. 535a. The majority understood a prior en banc decision to establish that "the government imposes a substantial burden on religion" for RFRA purposes in only two circumstances: (1) " 'when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit' " or (2) "when individuals are 'coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.' " *Id.* at 537a-538a (quoting *Navajo Nation* v. *United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), cert. denied, 556 U.S. 1281 (2009)). And the majority concluded that the government's transfer of Oak Flat to Resolution Copper did not violate RFRA because it would not result in either circumstance. *Id.* at 543a-544a. The majority also agreed with the district court that petitioner's constitutional claim failed because the Land Exchange Act is a "valid and neutral law of general applicability." *Id.* at 571a (citation omitted); see *id.* at 571a-574a.

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[2] The en banc court issued an initial opinion on March 1, 2024. Pet. App. 263a-517a. Petitioner requested that the full en banc court rehear the matter. *Id.* at 13a. The court denied that request on May 14, 2024, and simultaneously released an amended en banc opinion, see *id.* at 11a-13a (noting changes).

b. At the en banc stage, the court of appeals issued a per curiam order affirming the denial of a preliminary injunction and explaining that the 11-judge en banc court had produced two majority holdings explained in different opinions. Pet. App. 14a-15a.

In the lead opinion—authored by Judge Collins, and joined by Judges Bea, Bennett, Nelson, Forrest, and VanDyke, see Pet. App. 16a—a majority of the en banc court held that petitioner's free-exercise claim is foreclosed by this Court's decision in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and that *Lyng*'s constitutional holding is incorporated into the concept of a "substantial[] burden" codified in RFRA, 42 U.S.C. 2000bb-1(a), therefore foreclosing petitioner's RFRA claim as well. See Pet. App. 27a, 41a.

In *Lyng*, a group of Indian and environmental plaintiffs challenged the Forest Service's decision to construct a road and allow logging on federal lands in an area within a national forest that had "historically been used for religious purposes." *Lyng*, 485 U.S. at 442. This Court acknowledged that the proposed project would have "severe adverse effects on the practice of [the plaintiffs'] religion." *Id.* at 447. But the Court nonetheless rejected the plaintiffs' free-exercise claim, explaining that the First Amendment does not confer any right to a "religious servitude" on public lands, *id.* at 452, and that the government's management of its own property did not impose a cognizable burden on the plaintiffs' exercise of their religion, see *id.* at 451-453.

In this case, the lead opinion explained that the land transfer required by the Land Exchange Act is "indistinguishable" from the government action in *Lyng*. Pet. App. 32a. As in *Lyng*, the transfer would have "no tendency to coerce" any persons "into acting contrary to

their religious beliefs." *Ibid.* (quoting *Lyng*, 485 U.S. at 450). Nor would the transfer "'discriminate' against [petitioner's] members, 'penalize' them, or deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Ibid.* (quoting *Lyng*, 485 U.S. at 449, 453). In light of *Lyng*, the lead opinion concluded that petitioner's constitutional claim amounts to an unfounded request for "a 'religious servitude' that would uniquely confer on tribal members '*de facto* beneficial ownership'" of the federal lands at issue. *Ibid.* (quoting *Lyng*, 485 U.S. at 452-453).

With respect to RFRA, the lead opinion further held that *Lyng* continues to inform "what counts as a *cognizable* substantial burden" on religious exercise for purposes of that statute. Pet. App. 53a. In particular, the lead opinion viewed RFRA's reference to a "substantial burden" as a term of art that incorporated this Court's pre-*Smith* case law. *Id.* at 58a. And the lead opinion thus concluded that "RFRA's understanding of what counts as 'substantially burdening a person's exercise of religion' must be understood as subsuming, rather than abrogating, the holding of *Lyng*." *Ibid.* (brackets omitted).

Chief Judge Murguia authored the lead dissent, which four other judges joined in full or part. Pet. App. 197a; see *id.* at 197a-261a. In her view, the prior en banc decision in *Navajo Nation* did not reflect a proper interpretation of RFRA. *Id.* at 197a-198a. In particular, she concluded that government action may constitute a "substantial burden" on the free exercise of religion for purposes of RFRA not only in the two circumstances described in *Navajo Nation*, 535 F.3d at 1070, but also in other instances—including "cases where places of worship will be obliterated" as a result of the government's action. Pet. App. 221a. Applying those principles here,

Chief Judge Murguia would have held that petitioner is likely to succeed in showing that the land transfer imposes a substantial burden under RFRA because it will ultimately result in the destruction, through subsidence, of Oak Flat. See *id.* at 261a.

Judge Ryan Nelson joined the lead opinion and also issued a separate concurrence. Pet. App. 16a, 118a-158a. In his concurrence, Judge Nelson stated that he agreed with the dissenting judges that *Navajo Nation* had adopted an unduly narrow interpretation of RFRA, albeit for "some overlapping and differing reasons" than those expressed by Chief Judge Murguia. *Id.* at 139a. But Judge Nelson also explained that he agreed with the lead opinion that affirmance was warranted because *Lyng* continues to inform the best reading of RFRA. See *id.* at 154a-156a. As reflected in the en banc court's per curiam order, the effect of Judge Nelson agreeing in part with the dissenters was to "overrule[] *Navajo Nation* * * * to the extent that it defined a 'substantial burden' under RFRA" as imposed only in the two circumstances described in *Navajo Nation*. *Id.* at 14a.

Judge Bea concurred in part and dissented in part. Pet. App. 62a-117a. He agreed in full with the lead opinion and dissented only from that portion of the per curiam order overruling *Navajo Nation*. *Id.* at 62a-63a. In a portion of his opinion also joined by Judges Forrest and Bennett, see *id.* at 62a, Judge Bea further emphasized that the land transfer at issue here is specifically "mandated by an Act of Congress" that post-dates RFRA. *Id.* at 108a. Accordingly, he explained, to the extent that RFRA could be construed to prohibit a transfer specifically mandated by Congress, the later-in-time

Land Exchange Act would be controlling. See *id.* at 110a-115a.

Judge VanDyke concurred. Pet. App. 159a-197a. He agreed with the lead opinion and separately observed that "reinterpreting RFRA to impose affirmative obligations on the government to guarantee its own property for religious use would inevitably result in religious discrimination." *Id.* at 159a; see *id.* at 177a-181a.

Judge Lee dissented to state his view that the government had forfeited the argument that RFRA cannot prohibit a land transfer specifically mandated by the later-in-time Land Exchange Act. Pet. App. 262a.[3]

ARGUMENT

Petitioner renews its contention (Pet. 21-32) that transferring Oak Flat to Resolution Copper would violate RFRA and the Free Exercise Clause because the exchange will allow Resolution Copper to engage in mining that will eventually cause Oak Flat to subside, preventing the use of the land for religious practices. The United States respects and does not in any way seek to diminish the importance of those practices. Indeed, the federal government has long had a policy of "accommodat[ing] access to and ceremonial use of Indian sacred sites" on federal land and "avoid[ing] adversely affecting the physical integrity of such sacred sites," to the extent practicable and as permitted by law. Exec. Order No. 13,007, § 1(a), 61 Fed. Reg. 26,771, 26,771 (May 29, 1996).

[3] After the en banc court heard oral argument, Resolution Copper moved to intervene as a defendant-appellee in the proceedings, and the court granted that motion before issuing its judgment. See C.A. Order 1 (June 30, 2023); see also Mot. of Resolution Copper Mining, LLC to Intervene 1-4 (June 16, 2023).

Here, however, Congress has specifically mandated that Oak Flat be transferred so that the area can be used for mining. The en banc court of appeals correctly rejected petitioner's contention that the required transfer violates RFRA or the Free Exercise Clause, and the court's decision does not conflict with any decision of this Court or another court of appeals. To the contrary, this Court rejected a materially identical constitutional claim in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), which formed part of the legal backdrop that Congress incorporated into RFRA. And petitioner does not cite any decision by any court of appeals holding that the federal government's use or disposition of its own land violates RFRA or the Free Exercise Clause.

Even if the Court were otherwise inclined to consider the law governing claims that the use of federal land interferes with religious exercise, this highly unusual case would be a poor vehicle in which to do it. Unlike a typical RFRA claimant, petitioner does not seek a religious exemption from a generally applicable federal law or policy. Instead, petitioner seeks to use RFRA to nullify a subsequent statute in which Congress mandated that this specific parcel of land be transferred to a third party. Even if petitioner were correct that the transfer would otherwise violate RFRA, the later-enacted and more specific Land Exchange Act would control in the event of such a conflict. The resolution of the RFRA question presented would thus have no effect on the ultimate outcome of this case.

A. The Decision Below Is Correct

As the court of appeals explained, *Lyng* and this Court's other relevant precedents establish that the government does not impose a cognizable burden on

religious exercise when it uses or disposes of its own property—even when members of the public seek to use that property for religious purposes. In restoring this Court's pre-*Smith* approach to religious-liberty claims, RFRA did not upset that settled understanding. To the contrary, RFRA is best read to "subsume[], rather than override[]," *Lyng's* holding. Pet. App. 53a.

1. For several decades, in a line of cases including *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court permitted religious adherents to invoke the Free Exercise Clause to seek religious exemptions from neutral, generally applicable laws. "[T]hose decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

This Court's decisions applying the *Sherbert-Yoder* test rejected claims that the government's management of its own programs or property could impose a substantial burden on the exercise of religion. In *Bowen* v. *Roy*, 476 U.S. 693 (1986), two applicants for welfare benefits challenged a federal statute requiring welfare agencies to use Social Security numbers to identify claimants, contending that using a number to identify their two-year-old daughter would "'rob [her] spirit'" and "prevent her from attaining greater spiritual power." *Id.* at 696. This Court did not question the sincerity or the weight of the parents' religious beliefs, but it held that the claimed injury was not a cognizable burden because the Free Exercise Clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700.

The Court later reaffirmed that principle in the specific context presented here—the government's management of federal lands. In *Lyng*, the Court considered a challenge brought by an Indian organization and other plaintiffs to government plans to permit timber harvesting in, and construction of a road through, the Chimney Rock area, a portion of a national forest traditionally used for religious practice by members of three Indian tribes. 485 U.S. at 442-443. The plaintiffs asserted that the Chimney Rock area was an "indispensible part of Indian religious conceptualization and practice," and that the project "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the[ir] belief systems and lifeway." *Id.* at 442 (citations omitted).

The Court acknowledged that the challenged project would have "devastating effects on traditional Indian religious practices." *Lyng*, 485 U.S. at 451. But it held that those harms did not constitute a cognizable burden under the Free Exercise Clause because, as in *Roy*, the affected persons would not "be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity." *Id.* at 449. Noting that a "broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs," the Court explained that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires" in matters such as the administration of public lands. *Id.* at 452. The religious beliefs asserted in *Lyng*, the Court emphasized, could allow adherents to "seek to exclude all human

activity but their own from sacred areas of the public lands." *Id.* at 452-453. The Court declined to adopt an understanding of the right to the free exercise of religion that would grant religious adherents such "*de facto* beneficial ownership" of federal lands. *Id.* at 453.

2. This Court ultimately rejected the *Sherbert-Yoder* approach as a matter of constitutional law in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause does not require religious exemptions to neutral laws of general applicability, even if those laws substantially burden religiously motivated conduct. *Id.* at 876-890. Congress responded to the Court's decision by enacting RFRA, which "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Under RFRA, the government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "application of the burden to the person" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b).

RFRA expressly provides that it is intended to "restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*]." 42 U.S.C. 2000bb(b)(1). And its legislative history confirms that Members of Congress intended for courts to "look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 111, 103d Cong., 1st Sess. 8 (1993) (Senate Report); see H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same). In particular, legislators recognized that, in light of *Roy* and *Lyng*, "pre-*Smith* case law makes it clear that strict scrutiny does not apply to

government actions involving only management of internal Government affairs or the use of the Government's own property or resources." Senate Report 9; see, *e.g.*, 139 Cong. Rec. 26,193 (1993) (Sen. Hatch) (observing that *Lyng* held that "the way in which Government manages its affairs and uses its own property does not constitute a burden on religious exercise" and reaffirming that "RFRA does not affect *Lyng*"); *id.* at 26,415-26,416 (Sen. Grassley) (same). Even those who strongly supported greater protection for "native American worship at sacred sites on federal land" recognized that, in light of "the Supreme Court's ruling in *Lyng*," RFRA "did not address" that issue. *Id.* at 26,416 (Sen. Inouye).[4]

RFRA originally "applied to both the Federal Government and the States." *Hobby Lobby*, 573 U.S. at 695. After this Court held that Congress had exceeded its authority in seeking to subject States to RFRA liability, see *City of Boerne* v. *Flores*, 521 U.S. 507, 533-534 (1997), Congress responded by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions," including certain restrictions on land use. *Hobby Lobby*, 573 U.S. at 695; see *Holt* v. *Hobbs*, 574 U.S. 352, 357-358 (2015). In particular, RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person," unless the government can satisfy the

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[4] Senator Inouye instead sought to protect sacred sites on federal land through separate legislation, which failed to pass. See 139 Cong. Reg. at 26,416 (Sen. Inouye) (discussing the Native American Free Exercise of Religion Act of 1993, S. 1021, 103d Cong. (1993)).

same compelling-interest test applicable under RFRA. 42 U.S.C. 2000cc(a)(1). But RLUIPA is not directed at state and local governments' management of their own land; to the contrary, the statute specifically requires that the claimant have an "ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. 2000cc-5(5) (defining "land use regulation").

3. The court of appeals correctly held that the principle adopted by this Court in *Lyng* and carried forward by Congress in RFRA forecloses petitioner's claim. See Pet. App. 41a-58a. Like the plaintiffs in *Lyng*, petitioner challenges a government action that will effectively preclude the use of certain federal land for religious exercise, but that government action does not "coerce[]," "penalize," or otherwise prohibit petitioner's religious practices. *Lyng*, 485 U.S. at 449. As in *Lyng*, petitioner effectively seeks a "religious servitude," *id.* at 452, that would preclude the transfer of Oak Flat or any other use of the land that would interfere with tribal religious exercise. If that theory were valid, similar RFRA claims could burden "some rather spacious tracts" of federal lands. *Id.* at 453. And that is not merely a theoretical concern: "One religious adherent has testified that the 'entire state of Washington and Oregon' is 'very sacred' to him," and another "has claimed as sacred" an area spanning "some 40,000 square miles" around the Colorado River. Pet. App. 100a n.18. As this Court held in *Lyng*, the right to the free exercise of religion "simply does not provide a principle that could justify upholding" such a claim to control the use of public land. 485 U.S. at 452.

Petitioner asserts (Pet. 21-22) that the court of appeals failed to give effect to the plain meaning of the term "substantial[] burden" in RFRA, 42 U.S.C. 2000bb-1(a). In petitioner's view (Pet. 22), that term may encompass "preventing [religious exercise] from taking place," just as it may encompass penalizing religious exercise or making religious exercise more costly or difficult. But a majority of the en banc court agreed with petitioner on that point as a general matter, and the court formally overruled the circuit precedent that the panel had read to require a more narrow understanding of RFRA. See Pet. App. 14a (per curiam order); see also *id.* at 119a (R. Nelson, J., concurring) (stating that "[p]reventing access to religious exercise generally constitutes a substantial burden"); *id.* at 225a (Murguia, C.J., dissenting) (stating that "prevent[ing] a person from engaging in sincere religious exercise" may constitute a substantial burden). The decision below thus clears the way for a future RFRA plaintiff to argue in an appropriate case in the Ninth Circuit that the government has substantially burdened the plaintiff's religious exercise by preventing access to a place of worship.

The particular place at issue in this case, however, is located on federal lands. And in that specific context, the court of appeals properly looked to this Court's decision in *Lyng* to inform the distinct question of "what counts as a *cognizable* substantial burden" under RFRA. Pet. App. 53a. Congress did not define the term "substantial burden" in RFRA or its sister statute, RLUIPA. But Congress was seeking to "restore" the approach reflected in this Court's pre-*Smith* decisions in *Sherbert* and *Yoder*, 42 U.S.C. 2000bb(b)(1), and looking to the corpus of pre-RFRA precedent applying those decisions is therefore appropriate to understand the concepts

that Congress incorporated into RFRA. Those pre-*Smith* decisions formed the "legal 'backdrop against which Congress enacted' RFRA," *Tanzin* v. *Tanvir*, 592 U.S. 43, 48 (2020) (citation omitted), as expressly reflected in the statutory text, see 42 U.S.C. 2000bb(a)(5) (referring to the "compelling interest test as set forth in prior Federal court rulings").

In referring to actions that "substantially burden" the exercise of religion, 42 U.S.C. 2000bb-1(a), moreover, Congress borrowed a phrase that this Court had used to summarize the *Sherbert-Yoder* test in *Smith* itself, as well as in pre-*Smith* decisions. See *Smith*, 494 U.S. at 883 ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."); see also, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989). This Court's subsequent decisions have likewise described the pre-*Smith* test as asking "whether the challenged action imposed a *substantial burden* on the practice of religion." *Hobby Lobby*, 573 U.S. at 693 (emphasis added); accord *Holt*, 574 U.S. at 357. Where, as here, a statutory term "is obviously transplanted from another legal source," it "brings the old soil with it." *Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019) (citation omitted). Thus, as the court of appeals recognized, "[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." Pet. App. 53a.

To be sure, this Court in *Lyng* did not use the phrase "substantial burden." Cf. Pet. 25. But the Court described the plaintiffs' claim in that case as a contention "that the burden on their religious practices is heavy

enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need." *Lyng*, 485 U.S. at 447. The Court "disagree[d]," *ibid.*, holding that burdens on religious exercise that result from the federal government's management of its own land are not cognizable under the Free Exercise Clause. See *id.* at 452-453; see also *id.* at 458-459 (Brennan, J., dissenting) (acknowledging "the Court's determination that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause").

More broadly, the concept of a "burden" on religious exercise was well-developed in this Court's pre-RFRA precedent. In *Sherbert*, for example, the Court began with the question whether the challenged disqualification from unemployment benefits "imposes any burden on the free exercise of [the challenger's] religion." 374 U.S. at 403; see also, *e.g.*, *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717 (1981) (same). Accordingly, even if the phrase "substantially burden" in Section 2000bb-1(a) was not itself a term of art, cf. Pet. 25, the concept of a cognizable "burden" certainly was. And in adding the qualifier "substantially," Congress plainly did not *expand* the burdens this Court's pre-*Smith* decisions had recognized as cognizable. Just the opposite: Senators Hatch and Kennedy sponsored the amendment inserting "substantially" and emphasized that the amendment was "intended to make it clear that the pre-*Smith* law is applied under RFRA in determining whether" a cognizable burden exists. 139 Cong. Reg. at 26,180 (Sen. Kennedy); see *ibid.* (Sen. Hatch).

Petitioner suggests (Pet. 23) that reading RFRA to preserve the reasoning of *Lyng* would conflict with

those portions of the statute making clear that the "use * * * of real property" can be a form of religious exercise. 42 U.S.C. 2000cc-5(7)(B) (RLUIPA); see 42 U.S.C. 2000bb-2(4) (incorporating that definition into RFRA). But that statutory language is fully consistent with both *Lyng* and the decision below. In *Lyng*, this Court accepted that using specific property for religious purposes can be a form of religious exercise. See, *e.g.*, 485 U.S. at 451 (explaining the plaintiffs' sincere belief that "rituals would not be efficacious if conducted at other sites"). The court of appeals likewise did not gainsay that accessing a particular site for ceremonial purposes may qualify as religious exercise. The court merely recognized that RFRA does not itself "grant freestanding rights to obtain otherwise unavailable access" to federal property, such as federal buildings generally closed to the public or federal lands that the government seeks to transfer to a third party. Pet. App. 57a n.8.

4. Petitioner briefly asserts (Pet. 28-29) that *Lyng* is distinguishable because the challenged project at issue there did not physically prevent the plaintiffs from visiting the relevant sacred sites. But as the court of appeals explained, "[t]hese efforts to distinguish *Lyng* are refuted by *Lyng* itself." Pet. App. 33a. "In *Lyng*, the State of California argued that *Roy* was distinguishable on the ground that it involved only interference with the plaintiffs' 'religious tenets from a *subjective* point of view,'" whereas the challenged action in *Lyng* would "'*physically destroy* the environmental conditions and the privacy without which the religious practices cannot be conducted.'" *Ibid.* (quoting *Lyng*, 485 U.S. at 449). This Court squarely rejected any such "subjective/physical distinction," *ibid.*, explaining that courts have no principled basis to "say that one form of incidental interference

with an individual's spiritual activities should be subjected to a different constitutional analysis than the other," *Lyng*, 485 U.S. at 450. That principle likewise forecloses petitioner's proposed "distinction between interference with subjective experiences and physical destruction of the means of conducting spiritual exercises." Pet. App. 34a.

B. Petitioner's RFRA Claim Does Not Warrant Review

The court of appeals' rejection of petitioner's RFRA claim does not conflict with any decision of this Court or another court of appeals, nor does it otherwise warrant this Court's review.

1. Petitioner principally asserts (Pet. 24-29) that the decision below "defies this Court's precedent." Pet. 24 (emphasis omitted); see Pet. 24-29. In fact, the court of appeals explained that its conclusion followed directly from faithful adherence to this Court's decisions, most obviously *Lyng*. See, *e.g.*, Pet. App. 27a-32a, 42a-46a. And petitioner does not cite any decision of this Court holding—or even suggesting—that the government's disposition of its own land can impose a substantial burden cognizable under RFRA. Instead, petitioner overreads statements in this Court's post-RFRA decisions addressing very different issues.

For example, petitioner asserts (Pet. 25) that the decision below is inconsistent with this Court's observation in *Hobby Lobby* that Congress did not seek to "tie RFRA coverage tightly to the specific holdings of [the Court's] pre-*Smith* free-exercise cases," 573 U.S. at 714. But the Court there was addressing whether for-profit corporations are "person[s]" who can exercise religion within the meaning of RFRA. *Id.* at 705 (citation omitted). The Court's conclusion that for-profit corporations can assert RFRA claims, even in the absence of

any pre-*Smith* case law squarely on point, "does not stand for the quite different—and erroneous—proposition that RFRA is somehow exempt from the settled rule that 'Congress legislates against the backdrop of existing law.'" Pet. App. 57a (citation omitted).

Petitioner likewise errs in relying (Pet. 26) on *Holt*, where this Court observed that a lower court considering a prisoner's RLUIPA claim had "improperly imported a strand of reasoning" from two pre-RLUIPA precedents, 574 U.S. at 361. The lower court's error in that case consisted of improperly taking into account whether a prisoner had "alternative means of practicing [his] religion"—a question that was relevant before RFRA and RLUIPA, but that Congress had foreclosed by adopting the substantial-burden test. *Ibid.* Here, in contrast, the court of appeals relied on a pre-*Smith* requirement—the existence of a cognizable "burden" on the exercise of religion—that Congress explicitly incorporated into RFRA's text.

Hobby Lobby and *Holt* underscore that RFRA and RLUIPA can obligate the government to provide religious accommodations in some circumstances where the Free Exercise Clause itself would not. But neither supports petitioner's view that Congress repudiated *Lyng*—an assertion that would have come as a shock to RFRA's key supporters, who gave express assurances that the statute would do no such thing. See pp. 15-16, *supra*.

2. Petitioner contends that the decision below conflicts with the decisions of six other courts of appeals, which petitioner describes as having recognized that a "substantial burden plainly exists 'where the government completely prevents a person from engaging in religious exercise.'" Pet. 29 (citation omitted); see Pet. 29-32. Petitioner invoked a similar purported circuit conflict

in seeking en banc review below. See Pet. C.A. Br. in Support of Reh'g En Banc 8-9. But a majority of the en banc court *agreed* with petitioner that Ninth Circuit precedent should be overruled to the extent that it had suggested that preventing religious exercise could not constitute a substantial burden. Pet. App. 14a. The en banc court instead rejected petitioner's claim based on the narrower ground that, consistent with *Lyng*, "a disposition of government real property does not impose a substantial burden on religious exercise when it has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious beliefs, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id.* at 14a-15a (quoting *Lyng*, 485 U.S. at 449-450, 453).

Petitioner does not identify any decision by any court of appeals that conflicts with that holding, which concerns only RFRA's application to the federal government's use or disposition of its own land. To the contrary, petitioner cites only a single district-court decision endorsing a RFRA claim comparable to the one it asserts here. See Pet. 30 (citing *Comanche Nation* v. *United States*, No. 08-cv-849, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008)). The court in that case did not address *Lyng*, and its preliminary, unpublished, and non-precedential decision does not create any conflict warranting this Court's review. See Sup. Ct. R. 10.

By contrast, the appellate decisions that petitioner invokes (Pet. 29-30) largely addressed RLUIPA claims arising in circumstances far afield from the government's use of its own land. See *Thai Meditation Ass'n of Ala., Inc.* v. *City of Mobile*, 980 F.3d 821, 825 (11th Cir. 2020) (RLUIPA challenge to zoning); *Bethel World*

Outreach Ministries v. *Montgomery Cnty. Council*, 706 F.3d 548, 552 (4th Cir. 2013) (same); *West* v. *Radtke*, 48 F.4th 836, 840 (7th Cir. 2022) (RLUIPA challenge to prison policies); *Haight* v. *Thompson*, 763 F.3d 554, 558-559 (6th Cir. 2014) (same); *Yellowbear* v. *Lampert*, 741 F.3d 48, 51-52 (10th Cir. 2014) (Gorsuch, J.) (same).

RFRA and RLUIPA are sister statutes and should be "interpreted uniformly" to the extent they overlap. Pet. App. 14a. But the two statutes apply in different contexts. RLUIPA creates two causes of action: one to challenge "land use regulation[s]" as substantial burdens on religious exercise, 42 U.S.C. 2000cc(a)(1), and the other to challenge substantial burdens on the religious exercise of "person[s] residing in or confined to an institution," 42 U.S.C. 2000cc-1(a)(1). The land-use cases are no help to petitioner because RLUIPA is limited to circumstances in which the claimant has an ownership interest in the lands at issue. See p. 17, *supra*. RLUIPA does not support any claim to control how *someone else's* property is used, let alone property of the federal government. And the court of appeals specifically distinguished cases involving both private land use and prisons because those contexts "inherently involve coercive restrictions" and thus "do *not* raise a similar *Lyng*-type issue about the bounds of what counts as 'prohibiting' religious exercise." Pet. App. 54a.

Only one of the appellate decisions that petitioner cites (Pet. 30) in asserting a circuit conflict actually addressed RFRA. In that case, the Eighth Circuit stated that it would "assume" that a bankruptcy trustee's recovery in bankruptcy of the debtors' tithe would impose a substantial burden on the debtors' religious exercise because it "would effectively prevent" them from tithing. *Christians* v. *Crystal Evangelical Free Church*

(*In re Young*), 82 F.3d 1407, 1418 (1996), vacated, 521 U.S. 1114 (1997). Petitioner does not attempt to explain how that decision conflicts with the decision below, and it plainly does not.

C. Petitioner's Constitutional Claim Does Not Warrant Review

Petitioner briefly contends (Pet. 32-34) that the decision below "deepens" an existing disagreement in the courts of appeals about whether a plaintiff asserting a violation of the Free Exercise Clause must show a "substantial burden" or merely a "burden" on the plaintiff's religious exercise when the plaintiff challenges a law that is *not* neutral and generally applicable. This case does not implicate any such division, even on the counterfactual assumption that the Land Exchange Act is not neutral or generally applicable.[5] The court of appeals rejected petitioner's free-exercise claim because that claim is squarely foreclosed by *Lyng*. See Pet. App. 31a-32a. The court thus had no occasion to pass on the free-exercise question that petitioner asks this Court to resolve, and this Court should not grant certiorari to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (observing that this Court generally sits as "a court of review, not of first view").

Petitioner also suggests in passing (Pet. 34) that the Court should grant certiorari to overrule *Lyng*. But

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[5] In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449 (2017), this Court identified its prior decision in *Lyng* as one of a number of decisions rejecting free-exercise challenges to "neutral and generally applicable" laws, *id.* at 460. The court of appeals questioned that characterization of *Lyng* but concluded that, in any event, the Land Exchange Act and the law at issue in *Lyng* are materially indistinguishable and thus both pass muster under the Free Exercise Clause. Pet. App. 36a-37a & n.4, 41a.

petitioner has not offered anything like the sort of "special justification" that this Court demands before overruling a precedent. *Gamble* v. *United States*, 587 U.S. 678, 691 (2019) (citation omitted). Instead, petitioner argues only (Pet. 34) that a *different* precedent—*Smith*—"has been criticized" as inconsistent with the Constitution's text, original understanding, and pre-*Smith* precedent. And although petitioner asserts without explanation (*ibid.*) that "*Lyng* is subject to criticism on the same grounds," that is not so. Justice O'Connor, for example, strongly disagreed with the Court's holding in *Smith* but explained that *Lyng* presented a very different issue because "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment) (citation omitted); see Pet. App. 50a-52a. And petitioner does not offer any basis in text, history, or precedent to conclude that the government must satisfy strict scrutiny whenever it seeks to use its own land in a manner that would prevent or interfere with a citizen's religious exercise.

D. This Case Would Be A Poor Vehicle For Considering The Questions Petitioner Seeks To Raise Even If Those Questions Otherwise Warranted Review

Even if this Court were inclined to consider how RFRA and the Free Exercise Clause apply to the use of federal land, this unusual case would be a poor vehicle in which to do so for at least two reasons.

First, petitioner's RFRA claim is atypical in important respects. In the paradigmatic RFRA case, the claimant seeks a religious exemption "from a rule of general applicability." 42 U.S.C. 2000bb-1(a); see, *e.g.*,

Hobby Lobby, 573 U.S. at 726-727 (religious exemption from mandate to provide contraceptive coverage); *O Centro*, 546 U.S. at 434-437 (religious exemption from federal drug laws for religious use of controlled substance). Here, by contrast, petitioner does not seek a religious exemption for itself or its members from the Land Exchange Act's requirement to transfer Oak Flat to Resolution Copper. Petitioner instead "seek[s] to prevent the land exchange" entirely. Pet. App. 623a; see *id.* at 24a. Moreover, it is not the transfer itself that would prevent petitioner from accessing Oak Flat for religious exercise, but rather subsequent mining activities by a private party. Those complexities would make this case an unsuitable vehicle for addressing broad questions about RFRA's application to more typical decisions about the use of federal lands.

Second, the RFRA question that petitioner seeks to present is academic to the proper resolution of this case. As Judge Bea explained below, "the plain text of the Land Exchange Act requires that the land exchange, including the exchange of Oak Flat, *must* occur if the preconditions are met." Pet. App. 114a (Bea, J., concurring in part and dissenting in part); see 16 U.S.C. 539p(c)(1) ("the Secretary is authorized *and directed* to convey" the specific lands to Resolution Copper) (emphasis added). If petitioner were correct that RFRA forbids the government from transferring Oak Flat to Resolution Copper, then the result would be an "irreconcilable" conflict between RFRA and the Land Exchange Act—one statute prohibiting what the other specifically commands. Pet. App. 114a (Bea, J., concurring in part and dissenting in part). And in the event of such a conflict, the later and more specific statute must be given effect. See, *e.g.*, *National Ass'n of Home Builders* v.

Defenders of Wildlife, 551 U.S. 644, 662-663 (2007); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936).

The later-enacted Land Exchange Act would be controlling over RFRA in those circumstances notwithstanding the rule of construction in 42 U.S.C. 2000bb-3. See Pet. App. 110a-113a (Bea, J., concurring in part and dissenting in part). That provision states that RFRA applies to any federal law enacted after the date on which RFRA was enacted "unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. 2000bb-3(b). But such express-statement requirements are "ineffective." *Lockhart* v. *United States*, 546 U.S. 142, 147-150 (2005) (Scalia, J., concurring) (citing Section 2000bb-3(b) as an example). "That is because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey* v. *United States*, 567 U.S. 260, 274 (2012). And, critically, a future Congress "remains free to express" its intention to amend or partially repeal prior law "either expressly or by implication as it chooses." *Ibid.*

The rule of construction in Section 2000bb-3(b) does underscore that RFRA applies broadly. This Court has thus described RFRA as "a kind of super statute, displacing the normal operation of other federal laws." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 682 (2020). And in the mine run of RFRA cases, no irreconcilable conflict will arise between RFRA and any later-enacted statute because the government will generally be able to carry both into effect by granting the particular claimant a religious exemption or accommodation while continuing to apply the later-enacted statute to others.

Providing exceptions or accommodations to a particular person is generally "how [RFRA] works," as explained above. *O Centro*, 546 U.S. at 434; see *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 681 (2020). But again, this case presents the anomalous situation in which a RFRA plaintiff does not seek an exemption from a law that would continue to operate as to others, but instead seeks to invoke RFRA to block a land transfer that Congress specifically required.

Here, moreover, Congress mandated the transfer of Oak Flat with full awareness that some Native Americans consider the area to be sacred. Indeed, the Land Exchange Act reflects a legislative compromise between economic development and concerns about protecting sacred sites: Congress did *not* transfer to Resolution Copper another area, Apache Leap, that had been identified as sacred in committee hearings, and instead mandated that the area be withdrawn from mining and managed "to allow for traditional uses of the area by Native American people." 16 U.S.C. 539p(g)(2)(B); see pp. 3-4, *supra*. The clear implication of those legislative choices is that Congress itself already determined that the transfer of Oak Flat "shall" occur despite sincerely held religious objections. 16 U.S.C. 539p(c)(10). RFRA's general prohibition cannot be invoked to thwart that specific and unambiguous directive from a later Congress.[6]

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[6] In his dissenting opinion, Judge Lee stated that the government had "waived" this argument below by raising it for the first time in opposing rehearing en banc. Pet. App. 262a. In fact, the government made the same argument in its brief at the panel stage. See Gov't C.A. Br. 16 n.3. And even if the government had forfeited the argument for purposes of this preliminary-injunction appeal, the government would still be entitled to raise it when the district court

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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addresses the merits—meaning that the resolution of the RFRA question presented in the petition would still have no effect on the ultimate outcome of this case.