No. _______

In the Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For centuries, Western Apaches have centered their worship on a small sacred site in Arizona called *Chí'chil Biłdagoteel*, or Oak Flat. Oak Flat is the Apaches' direct corridor to the Creator and the locus of sacred ceremonies that cannot take place elsewhere. The government has long protected Apache rituals there. But because copper was discovered beneath Oak Flat, the government decided to transfer the site to Respondent Resolution Copper for a mine that will undisputedly destroy Oak Flat—swallowing it in a massive crater and ending sacred Apache rituals forever.

Petitioner challenged this decision under the Religious Freedom Restoration Act and the Free Exercise Clause. In a fractured en banc ruling cobbled together from two separate 6-5 majorities, the Ninth Circuit rejected both claims. Although the court acknowledged that destroying Oak Flat would "literally prevent" the Apaches from engaging in religious exercise, it nevertheless concluded that doing so would not "substantially burden" their religious exercise under RFRA, relying on this Court's pre-RFRA decision in *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). And while the majority acknowledged that singling out Oak Flat for destruction is "plainly not 'generally applicable,'" it rejected the free-exercise claim "for the same reasons"—no substantial burden.

The question presented is:

Whether the government "substantially burdens" religious exercise under RFRA, or must satisfy heightened scrutiny under the Free Exercise Clause, when it singles out a sacred site for complete physical destruction, ending specific religious rituals forever.

PARTIES TO THE PROCEEDINGS

Petitioner Apache Stronghold, an Arizona nonprofit corporation, was plaintiff in the U.S. District Court for the District of Arizona and appellant in the U.S. Court of Appeals for the Ninth Circuit.

Respondents the United States of America, Sonny Perdue, Thomas J. Vilsack, Vicki Christensen, Randy Moore, Neil Bosworth, and Tim Torres were defendants in the U.S. District Court for the District of Arizona and appellees in the U.S. Court of Appeals for the Ninth Circuit. Defendants-appellees Sonny Perdue and Vicki Christensen were terminated as parties on June 24, 2022.

Respondent Resolution Copper Mining, LLC, intervened as a defendant in the District Court on May 29, 2023, and as an appellee in the Court of Appeals on June 30, 2023.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Apache Stronghold represents that it does not have any parent entities and does not issue stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Apache Stronghold* v. *United States of America*, No. 21-15295, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 1, 2024.
- *Apache Stronghold* v. *United States of America*, No. 2:21-cv-00050-SPL, U.S. District Court for the District of Arizona. Preliminary injunction denied February 12, 2021.

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PETITION FOR CERTIORARI

For centuries, Western Apaches have worshipped at a sacred site in Arizona called *Chí'chil Biłdagoteel*, or Oak Flat, which is the site of religious ceremonies that cannot take place elsewhere. The government has long protected religious exercise at Oak Flat. But it recently agreed to transfer Oak Flat to Respondent Resolution Copper for a mine that will admittedly obliterate the site. As a result, many sacred Apache rituals will be ended, not just temporarily but forever.

Six judges below—one at the emergency stage and five en banc—concluded that the government's action is an "obvious substantial burden" warranting strict scrutiny under the Religious Freedom Restoration Act. But a splintered 6-5 en banc majority nevertheless found no substantial burden. The majority didn't dispute that the government's actions "will categorically prevent the Apaches from participating in any worship at Oak Flat because their religious site will be obliterated." Nor did it dispute that categorically preventing religious exercise is a substantial burden under RFRA's ordinary meaning.

Instead, it held that the ordinary meaning of "substantial burden" does not apply in cases involving "the Government's management of its own land and internal affairs." In such cases, the court said, the phrase "substantial burden" in RFRA "subsumes" *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)—a pre-RFRA decision that never used the phrase "substantial burden." According to the court, *Lyng* holds that a disposition of government real property does not burden religious exercise if it does not (1) "coerce," (2) "discriminate," (3) "penalize," or (4) deny "equal" rights. So in the Ninth Circuit's view,

the government is free to destroy Oak Flat and permanently extinguish age-old Apache religious exercises without even triggering strict scrutiny under RFRA.

This remarkable result openly conflicts with RFRA's text, which expressly applies to "all Federal law" and "the use * * * of real property for the purpose of religious exercise"—with no carveout for government property. It also defies this Court's precedent, which has repeatedly rejected the proposition that RFRA's meaning is "tied" to "pre-*Smith* free-exercise cases" like *Lyng*. Indeed, this Court has consistently treated *Lyng* as part of the legal framework RFRA was designed to displace, not the secret key to RFRA's hidden, unwritten meaning. And in any event, the decision below wildly overreads *Lyng*, which said "a different set of constitutional questions" would arise if the government prohibited religious adherents from "visiting" a sacred site—much less destroyed it.

Not surprisingly, the decision below conflicts with decisions of the Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits. These circuits have long recognized that the government substantially burdens religious exercise not only by penalizing it but also by preventing it from occurring. Particularly when the government controls "the temporal and geographic environment" required for religious exercise—as in the military, in prison, or on federal land—individuals may be "unable to engage in the practice of their faiths" without "the use of government facilities." *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 226 n.10 (1963). In such cases, government action that "prevents" religious exercise "easily" qualifies as a substantial burden. *Yellowbear* v. *Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.).

The decision below also widens a circuit split over the correct legal standard for applying the Free Exercise Clause. The majority conceded that singling out Oak Flat for destruction is "plainly not 'generally applicable'" under *Employment Division* v. *Smith*—which would ordinarily trigger strict scrutiny. But the court declined to apply strict scrutiny based on its finding of no "substantial burden." This conflicts with decisions from the Second, Third, and Sixth Circuits, which hold that "there is no justification for requiring a plaintiff to make a threshold showing of substantial burden" when government actions "are not neutral and generally applicable."

These questions are vitally important for people of all faiths. The decision below poses an obvious and existential threat to Native Americans, gutting RFRA's protections in the circuit that governs by far the most Native Americans and the most federal land. More broadly, the decision provides a roadmap for eviscerating RFRA in any context that can be deemed part of the government's "internal affairs"—a concept that could cover almost anything the government does.

This Court has repeatedly held that RFRA provides "very broad protection for religious liberty." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). The decision below rejects that command in defiance of RFRA's plain text, this Court's precedent, and decisions of other circuits. And it threatens the permanent eradication of Western Apache religious identity. Certiorari is warranted.

OPINIONS BELOW

The Ninth Circuit's en banc opinion (App.1a) is published at 101 F.4th 1036. The Ninth Circuit's panel opinion (App.518a) is published at 38 F.4th 742. The Ninth Circuit's unpublished order denying an injunction pending appeal (App.604a) is accessible at 2021 WL 12295173. The district court's order (App.622a) is published at 519 F. Supp. 3d 591.

JURISDICTION

The Ninth Circuit entered judgment on March 1, 2024. App.263a. It denied full-court rehearing and issued an amended en banc opinion on May 14, 2024. App.1a. Justice Kagan extended the deadline for filing a petition for a writ of certiorari to September 11, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the First Amendment to the United States Constitution, U.S. Const. amend. I, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 *et seq.*, and the National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003, 128 Stat. 3732-3741, is reproduced at App.658a-679a.

STATEMENT OF THE CASE

I. Statutory Background

RFRA arose out of a back-and-forth between this Court and Congress over the scope of protection for religious exercise.

In cases like *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), this Court interpreted the Free Exercise Clause to require strict scrutiny of government actions burdening religious exercise. This was known as "the *Sherbert* test." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694 (2014).

In the 1980s, the Court decided a series of cases declining to apply the *Sherbert* test in various contexts—including challenges to military dress regulations, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), the government's use of Social Security numbers in its programs, *Bowen* v. *Roy*, 476 U.S. 693 (1986), restrictions on worship in prison, *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), and road construction on federal land, *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

These cases culminated in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which declined to apply the *Sherbert* test to free-exercise claims brought by two Native Americans who were fired and denied unemployment compensation for consuming peyote in violation of Oregon law. *Id.* at 874-875. Relying on *Goldman*, *Bowen*, *O'Lone*, and *Lyng*, the Court held that "the First Amendment has not been offended" if a burden on religious exercise is merely the "incidental effect" of a "neutral, generally applicable law." *Id.* at 878-879, 881.

Congress responded by enacting RFRA to provide "very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693. RFRA goes "far beyond what this Court has held is constitutionally required"—not only going beyond *Smith*, but also going "beyond what was required by our pre-*Smith* decisions." *Id.* at 706 & n.18.

RFRA thus provides that the federal government "shall not substantially burden a person's exercise of religion" unless it "demonstrates that 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)-(b). RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a). It also defines the "exercise of religion" to include "[t]he use * * * of real property" for religious exercise. 42 U.S.C. 2000bb-2(4), 2000cc-5(7)(B).

II. Factual Background

1. Since long before European contact, Western Apaches and other tribes have performed religious ceremonies at Oak Flat—a 6.7-square-mile sacred site east of Superior, Arizona. The site includes old-growth oak groves, sacred springs, burial locations, and a singular concentration of archaeological sites testifying to its persistent use for the past 1,500 years.

2 E.R. 235

2 E.R. 251

For Apaches, Oak Flat is a unique dwelling place of spiritual beings called Ga'an, who are "guardians" and "messengers" between the Creator and people in the physical world. App.981a-984a, 1000a-1001a. The Ga'an are "our creators, our saints, our saviors, our holy spirits"—"the very foundation of [Apache] religion." App.871a.

As the dwelling place of the Ga'an, Oak Flat is a direct corridor to the Creator and is "uniquely endowed with holiness and medicine." App.1170a. Neither "the powers resident there, nor [Apache] religious activities that pray to and through these powers can be 'relocated.'" *Ibid.*

Accordingly, Oak Flat is the site of religious ceremonies that cannot take place elsewhere. App.977a-978a. These include specific sweat lodge ceremonies for boys entering manhood, Holy Grounds Ceremonies for blessing and healing, place-specific prayers and songs, and the gathering of sacred medicine plants, animals, and minerals essential to those ceremonies. App.1170a-1171a; see App.997a-998a, 1026a.

One example is the Sunrise Ceremony, a multi-day celebration marking an Apache girl's entry into womanhood. App.979a-982a. To prepare, the girl gathers plants from Oak Flat that contain "the spirit of Chi'chil Biłdagoteel." App.976a. As she gathers, she speaks to the spirit of Oak Flat, expressing gratitude for its resources. *Ibid.* Her godmother dresses her in "the essential tools of * * * becoming a woman," and tribal members surround her with singing, dancing, and prayer. App.980a-983a.

During the night, the Ga'an enter Apache men called crown dancers. App.982a-984a. The Ga'an bless the girl, who joins their dance. *Ibid.*

App.1045a.

On the final day, one of the Ga'an dancers paints the girl with white clay taken from the ground at Oak Flat, "mold[ing] her into the woman she is going to be." App.981a. When her godmother wipes the clay from her eyes, "she's a new woman" forever "imprint[ed]" with the spirit of Oak Flat. App.982a, 977a.

App.1036a.

2. The United States first gained an interest in Oak Flat in 1848, when Mexico ceded its claim to the area in the Treaty of Guadalupe Hidalgo. In 1852, the United States signed the Treaty of Santa Fe with six Apache chiefs. In it, the United States promised to settle the Apaches' territorial boundaries—which included Oak Flat, according to the earliest map of the area, App.1015a—and "pass and execute" laws "conducive to the[ir] prosperity and happiness." App.1055a.

Shortly after the 1852 Treaty, settlers and miners entered the area over Apache opposition, and U.S. soldiers and civilians repeatedly massacred Apaches.[1] App.858a. In 1862, U.S. Army General James Carleton "ordered Apache men to be killed wherever found." Welch at 7.

When miners discovered gold and silver nearby, General Carleton ordered the "utter extermination" of Apaches or "removal to a Reservation" to protect "all those who go to the country in search of precious metals." Welch at 8. In 1872, the General Mining Act authorized mining on "public" land. Ch. 152, 17 Stat. 91. By 1874, the government had forced 4,000 Apaches onto the San Carlos Reservation—nicknamed "Hell's 40 Acres" because it was a barren wasteland. App.1032a. The government prohibited traditional Native American religious practices on pain of imprisonment and forcibly removed hundreds of Apache children from their families, sending them to boarding

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[1] John R. Welch, *Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874*, SAGE Open (2017) (hereinafter "Welch").

schools aimed at rooting out their "savagism" and converting them to Christianity.[2]

3. As federal policy toward Native Americans evolved, the government acknowledged the spiritual and cultural significance of Oak Flat. In 1955, President Eisenhower reserved part of Oak Flat for "public purposes" to protect it from "mining." 20 Fed. Reg. 7,319, 7,336-7,337 (Oct. 1, 1955). President Nixon renewed the protection. 36 Fed. Reg. 18,997, 19,029 (Sept. 25, 1971). And the National Park Service placed Oak Flat in the National Register of Historic Places, recognizing "that *Chí'chil Biłdagoteel* is an important feature of the Western Apache landscape as a sacred site, as a source of supernatural power, and as a staple in their traditional lifeway."[3]

4. In 1995, a large copper deposit was discovered 4,500 to 7,000 feet beneath Oak Flat. App.687a. Hoping to obtain the deposit, two large multinational mining companies, Rio Tinto and BHP, formed a joint venture called Resolution Copper. *Ibid.* From 2005 to 2013, congressional supporters of Resolution Copper introduced at least twelve standalone bills to transfer Oak Flat to the company. App.19a n.1. Each failed.

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[2] Hiram Price, *Rules Governing the Court of Indian Offenses*, Department of the Interior, Office of Indian Affairs (Mar. 30, 1883); Welch at 14; David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*, at 6 (1995).

[3] *Chí'chil Biłdagoteel Historic District, Traditional Cultural Property, National Register of Historic Places Registration Form, NPS Form 10-900*, at 8, National Park Service (Jan. 2016), https://perma.cc/4Y38-XQQE.

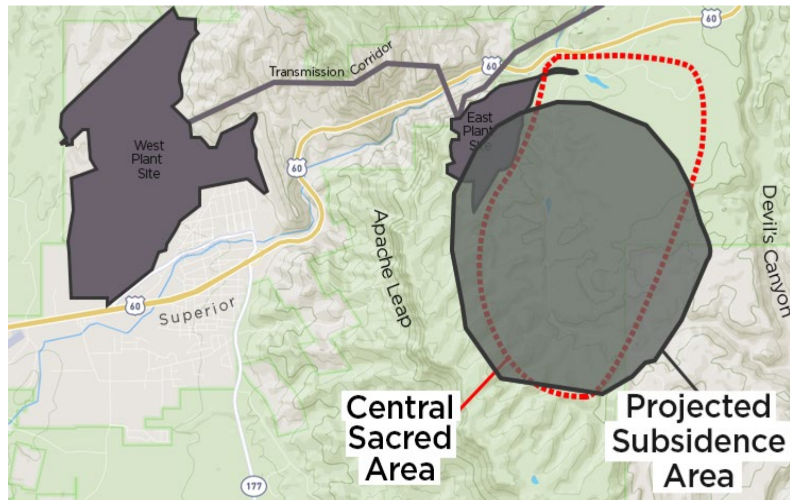
Lacking the votes for a standalone bill, Senators McCain and Flake in 2014 attached the land-transfer bill to the must-pass National Defense Authorization Act, authorizing transfer of a 2,422-acre parcel including Oak Flat to Resolution Copper in exchange for about 5,344 acres scattered elsewhere. Pub. L. No. 113-291, § 3003(b)(2), § 3003(b)(4), § 3003(c)(1) and § 3003(d)(1), 128 Stat. 3732-3736. The bill revokes the presidential orders protecting Oak Flat from mining and directs the Secretary of Agriculture to prepare an environmental impact statement (EIS) for the proposed mine. Pub. L. No. 113-291, § 3003(i)(1)(A), § 3003(a) and § 3003(c)(9)(B), 128 Stat. 3732. Within 60 days of publishing the EIS, it requires the Secretary to "convey all right, title, and interest" in Oak Flat to Resolution Copper. Pub. L. No. 113-291, § 3003(c)(10), 128 Stat. 3736-3737.

5. The Secretary published the EIS on January 15, 2021. As the EIS confirms, the mine would destroy Oak Flat. To mine the ore, Resolution Copper will use a technique called panel caving, which involves tunneling beneath the ore, fracturing it with explosives, and removing it from below. App.710a. This method has lower operating costs than other feasible techniques, but is far more destructive of Oak Flat's surface. App.928a-936a.

Once the ore is removed, approximately 1.37 billion tons of waste ("tailings") will need to be stored "in perpetuity." App.461a, 726a. That will "permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials." App.461a. And Oak Flat itself will collapse (or "subside") into a crater nearly 2 miles across and 1,100 feet deep, destroying it forever. App.611a.

The EIS acknowledges that the entire "*Chí'chil Biłdagoteel* Historic District" will be "directly and permanently damaged." App.698-699a. Nothing can "replace or replicate the tribal resources and traditional cultural properties that would be destroyed." App.912a. Among other things, the mine would completely destroy the sites used for Sunrise, Holy Grounds, and sweat lodge ceremonies (App.977a, 997a-999a, 1025a, 1034a); old-growth oak groves and other sacred medicinal plants (App.754a-755a, 877a); sacred springs (App.746a, 841a, 1043a-1044a, 1177a); and burial grounds and ancient religious and cultural artifacts, including centuries-old petroglyphs (App.746a, 1043a-1044a, 886a, 893a-894a).

The following map shows the planned crater in relation to the area of Oak Flat used for religious ceremonies:



3/18/21 Pet. C.A. Br. 21; *cf.* App.727a.

These effects would be "immediate, permanent, and large in scale." App.912a. "It is undisputed that this subsidence will destroy the Apaches' historical

place of worship, preventing them from ever again engaging in religious exercise at their sacred site." App.199a (Murguia, C.J., en banc dissent); see also App.974a-976a, 1026a, 1046a-1047a.

III. Proceedings Below

1. Petitioner Apache Stronghold is an Arizona nonprofit founded by Dr. Wendsler Nosie, former Chairman of the San Carlos Apache Tribe and direct descendant of Western Apache prisoners of war. Dr. Nosie founded Apache Stronghold to unite Western Apaches with other Native and non-Native allies to preserve indigenous sacred sites. App.979a-981a, 1033a, 1135a. After the Forest Service announced imminent publication of the EIS, Apache Stronghold filed this lawsuit seeking to enjoin the transfer and destruction of Oak Flat under RFRA, the Free Exercise Clause, and the 1852 Treaty of Santa Fe. Compl., D. Ct. Doc. 1 (Jan. 12, 2021). The Forest Service published the EIS three days later, triggering the 60-day clock to complete the land transfer. App.624a.

After the district court denied a preliminary injunction and stay pending appeal, Apache Stronghold sought an emergency injunction from the Ninth Circuit. Six hours before its response was due, the government rescinded the EIS and paused the transfer, stating that it needed "additional time" to "fully understand concerns raised by Tribes."[4] The government then argued the injunction should be denied because the harm was no longer "imminent." See App.608a.

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[4] *Resolution Copper Project & Land Exchange Environmental Impact Statement: Project Update*, U.S. Department of Agriculture (Mar. 1, 2021), https://perma.cc/RD6A-EQZZ.

By a 2-1 vote, a motions panel denied emergency relief, agreeing that immediate relief was no longer necessary. App.604a-605a. Judge Bumatay dissented, concluding that "Apache Stronghold has established a strong likelihood of success on the merits." App.609a. He noted that "a substantial burden exists" under RFRA when "the government 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.'" App.610a (quoting *Yellowbear* v. *Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.)). Since Apache Stronghold had shown that "certain religious ceremonies * * * *must* take place" at Oak Flat, and that the transfer and destruction of Oak Flat would "render[ ] their core religious practices impossible," there was an "obvious substantial burden." App.606a, 611a, 613a.

2. On plenary review, a divided panel rejected Apache Stronghold's claims. The majority didn't dispute that destroying Oak Flat would impose a "substantial burden" under the "plain meaning" of those words. See App.548a. But it deemed itself bound to reject RFRA's plain meaning under *Navajo Nation* v. *U.S. Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc), which held that "substantial burden" is a "term of art" that applies "in two—and only two—circumstances": when the government "denies a benefit" or "imposes a penalty" based on religious exercise. App.541a, 543a, 553a n.10.

Judge Berzon dissented, calling the majority's analysis "illogical," "incoheren[t]," "disingenuous," and "absurd." App.580a, 585a, 598a. She reasoned that the government can substantially burden religious exercise not only by denying benefits or imposing penalties, but also by preventing religious exercise entirely.

App.584a-585a. The latter imposes an even "*greater* burden on religious exercise." App.586a, 594a-595a. She thus had "no doubt that the complete destruction of Oak Flat would be a 'substantial burden' on the Apaches' religious exercise." App.600a.

3. The court granted rehearing en banc.[5] On rehearing, the Ninth Circuit splintered into two different 6-5 majorities, issuing seven opinions spanning 246 pages.

One majority, in opinions authored by Chief Judge Murguia and Judge Nelson, overruled *Navajo Nation* and its two-category definition of "substantial burden," concluding that government actions "[p]reventing access to religious exercise" constitute a "substantial burden" under RFRA's "plain meaning." App.209a-210a (Murguia, C.J.); App.118a-119a (Nelson, J.) ("ordinary meaning"); App.3a (per curiam).

A different majority, however, in opinions authored by Judges Collins and Nelson, held that the plain meaning of "substantial burden" does not control in cases involving "the Government's management of its own land and internal affairs." App.35a. In such cases, government action does not trigger RFRA scrutiny unless it (1) "'coerce[s] individuals into acting contrary to their religious beliefs,'" (2) "'discriminate[s]' against" religious adherents, (3) "'penalize[s]' them," or (4) "den[ies] them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" App.40a. The court therefore concluded that RFRA

[5] After en banc argument, Resolution Copper intervened "for the limited purpose of participating in potential future litigation before the Supreme Court." App.209a n.6.

provides no protection against government land-management decisions that physically destroy a sacred site and "literally prevent" religious exercise. App.34a, 50a-52a.

The majority reached that startling conclusion by positing that RFRA "subsumes" this Court's pre-RFRA decision in *Lyng*, which involved a Free Exercise Clause challenge to the government's decision to pave part of a road through a national forest sacred to tribes. App.27a-28a, 52a-53a. Although the tribes in *Lyng* retained access to the area, and "[n]o sites where specific rituals t[ook] place were to be disturbed," they maintained that the road would "diminish the sacredness of the area" and render their rituals spiritually "ineffectual." 485 U.S. at 454, 448, 450. This Court declined to apply strict scrutiny, reasoning that the road had only "incidental effects" on religious exercise, did not "discriminate" based on religion, and did not "prohibit[ ] the Indian respondents from visiting" the area. *Id.* at 450, 453.

Although *Lyng* never used the phrase "substantial burden," the Ninth Circuit reasoned that "[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." App.53a. Applying that logic, it held that destroying Oak Flat doesn't substantially burden the Apaches' religious exercise. App.58a. And it rejected the free-exercise claim "for the same reasons." *Ibid.*

In an opinion authored by Chief Judge Murguia, five dissenters explained that this majority "tragically

err[ed]" by deviating from "RFRA's plain text," the decisions of "[s]everal other circuits," and "the Supreme Court's" precedent. App.261a, 232a n.13, 242a.

As they explained, the "plain meaning" of "substantial burden" easily encompasses government actions that "prevent" religious exercise—as this Court and other circuits have long recognized. App.233a-235a. And far from carving out government actions involving "real property," RFRA applies to "all *Federal law*" and expressly defines religious exercise to include the "use" of "real property." App.252a-253a.

The dissenters explained that the majority's expansion of *Lyng* was mistaken for three reasons. First, *Lyng* was a free-exercise case, not a RFRA case, and this Court has expressly rejected tying RFRA's "coverage" "to the specific holdings of our pre-*Smith* free-exercise cases." App.219a (quoting *Hobby Lobby*, 573 U.S. at 714). Second, even assuming RFRA's coverage could be tied to pre-*Smith* cases, "*Lyng* did not analyze whether there was a substantial burden" on religious exercise, or even use that phrase. App.237a. Instead, *Lyng* rested on the principle that strict scrutiny is "inapplicable to neutral and generally applicable laws"—the very principle "rejected in RFRA." App.246a. Third, *Lyng* was factually inapposite because the plaintiffs there "continued to have full access to their sacred sites to engage in religious exercise," whereas here, "[i]t is undisputed" that the mine "will prevent the Western Apaches from visiting Oak Flat for eternity," resulting in "the utter erasure of a religious practice." App.237a, 240a-241a.

REASONS FOR GRANTING THE PETITION

I. The decision below defies RFRA's plain text and decisions of this Court and six circuits.

The decision below holds that the government can completely destroy a sacred site and end age-old religious rituals forever—without imposing a "substantial burden" on religious exercise under RFRA. That decision contravenes "any ordinary understanding of the English language," App.197a, conflicts with this Court's cases, and creates a 6-1 circuit split.

A. Destroying a sacred site and permanently terminating religious practices is a "substantial burden" under RFRA's ordinary meaning.

1. RFRA doesn't define what it means to "substantially burden" a person's exercise of religion. When a statutory term is undefined, the "usual" course is to apply "that term's 'ordinary, contemporary, common meaning.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 433-434 (2019). RFRA is no exception. For example, when interpreting "appropriate relief" in RFRA, this Court held that, "[w]ithout a statutory definition, we turn to the phrase's plain meaning." *Tanzin* v. *Tanvir*, 592 U.S. 43, 48 (2020) (citing dictionary definitions).

Here, the plain meaning yields an obvious result: destroying a unique sacred site necessary for specific religious ceremonies "substantially burdens" religious exercise. A "burden" is "'[s]omething oppressive'" or something that "'imposes either a restrictive or onerous load' on an activity." App.214a (Murguia, C.J.) (quoting *Burden*, Black's Law Dictionary (6th ed.

1990); citing Webster's Third New International Dictionary 298 (1986)). And "substantial" means "[o]f ample or considerable amount, quantity, or dimensions." *Ibid.* (quoting *Substantial*, Oxford English Dictionary 66-67 (2d ed. 1989)). So the government "substantially burdens" an exercise of religion when it "oppresses" or "restricts" it to a "considerable amount." *Ibid.*

One way the government substantially burdens religious exercise is by making religious exercise more costly: for example, by imposing penalties for engaging in it. See *Hobby Lobby*, 573 U.S. at 720. But another way the government substantially burdens religious exercise is by wholly preventing it from taking place: for example, by barring clergy from the execution chamber, see *Ramirez* v. *Collier*, 595 U.S. 411, 419 (2022), or "destr[oying] * * * religious property," *Tanzin*, 592 U.S. at 51.

Not only this Court but six circuits have so held. *Infra* Part I.C. For example, in *Haight* v. *Thompson*, the Sixth Circuit concluded that when the government "*barred* access" to resources needed for the plaintiff's religious exercise, it "necessarily place[d] a substantial burden on it." 763 F.3d 554, 564-565 (6th Cir. 2014) (Sutton, J.). Likewise, in *Yellowbear* v. *Lampert*, then-Judge Gorsuch observed that "it doesn't take much work to see" that when "access to a sweat lodge" is the relevant religious exercise, "refus[ing] *any* access" "easily" constitutes a substantial burden. 741 F.3d at 56.

2. RFRA's "overall statutory scheme," *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 275 (2023), confirms that RFRA applies with full force to government actions preventing religious exercise on "government real property." App.40a (Collins, J.).

First, RFRA applies to "all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. 2000bb-3(a). That sweeping language plainly encompasses the government's management of real property. Indeed, one of the key examples presented to Congress to support the need for RFRA involved the government's management of real property: "veterans' cemeteries had refused to allow burial on weekends even when that was required by the deceased's religion." *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 562 n.26 (2021) (Alito, J., concurring in judgment).

Second, if any doubt remained, Congress removed it by amending the definition of "exercise of religion" in RFRA to expressly include "[t]he use * * * of real property for the purpose of religious exercise." 42 U.S.C. 2000bb-2(4), 2000cc-5(7)(B). It would be hard for Congress to make any clearer that RFRA applies to government property.

Third, while the Ninth Circuit interpreted *Lyng* to require a showing that the government's management of property would "discriminate" or "deny" "equal" treatment (App.32a), RFRA applies regardless of whether government action is "'neutral' toward religion" or stems from a "rule of general applicability." 42 U.S.C. 2000bb(a)(2), 2000bb-1(a). Indeed, the core purpose of RFRA was to "counter" *Smith* on this score. *Tanzin*, 592 U.S. at 45. Thus, RFRA does not require "discrimination"; it "concentrate[s] on a law's effects." *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997).

So RFRA's plain terms dictate that it applies to government property; that religious exercise includes the use of such property; and that whether the govern-

ment "discriminates" in managing its property is irrelevant. That makes the substantial-burden analysis here straightforward. Swallowing Oak Flat in a crater will "literally prevent" Apaches from ever again engaging in religious exercise at that sacred site. App.34a (Collins, J.). That is an "obvious substantial burden." App.606a (Bumatay, J., motions panel dissent).

B. The Ninth Circuit's contrary reading defies this Court's precedent.

The Ninth Circuit reached a contrary conclusion only by ignoring RFRA's plain text and distorting this Court's precedent. According to the controlling majority, RFRA "subsumes" *Lyng* in cases involving "the Government's management of its own land and internal affairs," which means the government imposes a "substantial burden" only if it "coerce[s]," "'discriminate[s]' against," or "'penalize[s]'" religious exercise, or "den[ies]" religious adherents "'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" App.32a, 35a-36a, 52a-55a. That reasoning is wrong at every turn.

1. The majority's reasoning hinged largely on *Williams* v. *Taylor*, 529 U.S. 362 (2000) ("*Terry Williams*")—a fractured habeas decision that has never been cited by any court in any other RFRA case ever. According to the majority, *Terry Williams* compels the conclusion that RFRA should be assumed to have "adopted" the "meaning given" to "substantial burden" in "the body of law discussed in" *Smith*. App.47a-49a.

Even one of the judges who joined that majority opinion expressed "reservations" about that claim. App.155a (Nelson, J.). With good reason. *Terry Williams* addressed a statute that adopted a "certain

term" with a settled meaning derived from "specific statements" in prior cases. 529 U.S. at 411-412. But *Lyng*, by contrast, "does not even use 'substantial burden' or any analogous framing of the phrase." App.150a (Nelson, J.). Nor was "substantial burden" defined (or even contested) in *Smith*. In fact, the phrase appears in only two pre-*Smith* cases—and never with any meaningful elaboration. Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 Iowa L. Rev. 2189, 2192 & n.14 (2023) (citing *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989); *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378, 384-385 (1990) (quoting *Hernandez*)). Thus, "substantial burden" had no settled meaning for Congress to adopt.

Moreover, this Court has repeatedly *rejected* the proposition that RFRA's terms should be interpreted to "subsume" the perceived constraints of pre-*Smith* caselaw. For example, in *Hobby Lobby*, the government made two arguments mirroring the Ninth Circuit's analysis here. First, the government argued that a for-profit business couldn't bring a RFRA claim because RFRA "codif[ied]"—*i.e.*, subsumed—"this Court's pre-*Smith* Free Exercise Clause precedents," none of which "held that a for-profit corporation has free-exercise rights." 573 U.S. at 713. This Court rejected that argument as "absurd." *Id.* at 715. As it explained, far from "t[ying] RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases," "[b]y enacting RFRA, Congress went *far beyond* what this Court has held is constitutionally required." *Id.* at 706, 714-716 (emphasis added).

Second, the government invoked another pre-*Smith* free-exercise case, *United States* v. *Lee*, 455 U.S.

252 (1982), to argue that certain burdens—those imposed on "commercial activity"—are not cognizable under RFRA. *Hobby Lobby*, 573 U.S. at 735 n.43. The Court rejected this argument, too. As it explained, "*Lee* was a free exercise, not a RFRA, case." *Ibid.* And if *Lee* held something "squarely inconsistent with the plain meaning of RFRA," that plain meaning, not the pre-*Smith* caselaw, controls. *Ibid.*

This Court likewise rejected efforts to use pre-*Smith* caselaw to limit "substantial burden" in *Holt*. *Holt* involved RLUIPA, RFRA's "sister statute," which applies RFRA's "same standard" to prisons. *Holt* v. *Hobbs,* 574 U.S. 352, 356, 358 (2015). There, the lower court held that a prison's prohibition on beards didn't substantially burden a Muslim prisoner's religious exercise since the prison allowed numerous *other* religious items and observances. In support, the lower court relied on the pre-*Smith* free-exercise decisions in *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), and *Turner* v. *Safley*, 482 U.S. 78 (1987), which made "the availability of alternative means of practicing religion" a "relevant consideration." *Holt*, 574 U.S. at 361.

Again, far from agreeing that "substantial burden" in RLUIPA subsumed these cases, this Court unanimously reversed, explaining that the lower court had "improperly imported a strand of reasoning from cases involving prisoners' First Amendment rights." *Holt*, 574 U.S. at 361.

2. Even assuming *Lyng* could limit the plain meaning of "substantial burden," the Ninth Circuit erred by treating *Lyng* as a substantial-burden case, when this Court has consistently treated it as a neutral-and-generally-applicable-law case. Besides never using the

phrase "substantial burden," *Lyng* identified the "crucial word" for its analysis as the constitutional term "'prohibit,'" 485 U.S. at 450-451—which is not the term in RFRA. Moreover, *Lyng* described the effect on religious exercise there as "incidental," and contrasted the government's action with laws that "discriminate against religions." *Id.* at 445-450, 453. This is the classic language of general applicability later adopted in *Smith*—then rejected in RFRA.

Next, *Smith* "drew support for the neutral and generally applicable standard from * * * *Lyng*." *Fulton*, 593 U.S. at 536. Specifically, in rejecting "the *Sherbert* test," *Smith* cited *Lyng* as an example of a case that "abstained from applying the *Sherbert* test" "at all"—not one that applied the test but found no cognizable burden on religious exercise. 494 U.S. at 883-884. Indeed, *Smith* expressly *rejected* the attempt (echoed by the court below) to portray *Lyng* as a unique application of *Sherbert* to "internal affairs," finding no "reason in principle or practicality why" a different rule should apply to "management of public lands." 494 U.S. at 885 n.2; compare App.35a (Collins, J.) (applying a different rule to "the Government's management of its own land and internal affairs").

Since then, this Court has explicitly said *Lyng* was a case about neutrality and general applicability—not about what constitutes a cognizable burden on religious exercise. In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, this Court explained that "[i]n recent years," the Court has "rejected free exercise challenges" where "the laws in question have been neutral and generally applicable." 582 U.S. 449, 460 (2017). The Court then gave two "example[s]" of cases involving neutral and generally applicable laws: *Lyng* and

Smith. *Ibid.* And it expressly described *Smith* as having been decided "[a]long the same lines as our decision in *Lyng*." *Ibid.*

The en banc majority had no good answer for this. In fact, it initially ignored *Trinity Lutheran* entirely, insisting that "the [Supreme] Court has not said, and could not have said, that *Lyng* was *itself* a case involving a neutral and generally applicable law." App.296a (original opinion). When Petitioner pointed out that *Trinity Lutheran* says exactly that, the majority just amended its opinion to dismiss *Trinity Lutheran*'s understanding of *Lyng* as "dicta." App.11a-12a (amendment); App.38a-39a (amended opinion).

3. In all events, even assuming *Lyng* had some bearing on the phrase "substantial burden," it does not remotely support the proposition that the government imposes no cognizable burden when it completely destroys a sacred site, terminates access, and ends religious practices forever. Rather, *Lyng* emphasized that the road was "removed as far as possible from [religious] sites," and "[n]o sites where specific rituals take place were to be disturbed." 485 U.S. at 443, 454. Thus, the plaintiffs weren't restricted from "visiting" the area or continuing their religious practices; they claimed that the road would "create distractions" rendering their practices spiritually "ineffectual." *Id.* at 448, 450, 452-453.

That is a far cry from this case—which explains why the en banc majority's "retelling of *Lyng*" "omits [these] crucial facts." App.237a (Murguia, C.J.). Here it is undisputed that the site of specific rituals will be completely obliterated. Apache practices will be rendered not just spiritually "ineffectual" but physically impossible. Thus, unlike in *Lyng*, courts need not

"measur[e] the effects of a governmental action on a religious objector's spiritual development" to evaluate the claim here. 485 U.S. at 451; see also *id.* at 448 (analogizing to *Bowen*, where plaintiffs claimed the government's use of their daughter's Social Security number would "rob [her] spirit"). They need only recognize what the government has itself conceded: that "access to Oak Flat and the subsidence zone will" first be "curtailed once it is no longer safe," and "irreversibly los[t]" once Oak Flat is destroyed. App.205a (Murguia, C.J.).

C. The decision below conflicts with the decisions of six other circuits.

The Ninth Circuit's ruling not only defies this Court's precedent but conflicts with six other circuits' decisions interpreting "substantial burden."

Contrary to the decision below, the Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits recognize that a substantial burden plainly exists "where the government completely prevents a person from engaging in religious exercise." App.232a n.13, 236a (Murguia, C.J.); see *supra* at 22; *Haight*, 763 F.3d at 564-565 (Sutton, J.) ("barring access" to a practice is "necessarily" a substantial burden); *Yellowbear*, 741 F.3d at 56 (Gorsuch, J.) (preventing access to a prison sweat lodge "easily" qualifies as a substantial burden); *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 555-556 (4th Cir. 2013) ("preventing a religious organization from building a church" can be a substantial burden even if it does not "force the organization to violate its religious beliefs"); *West* v. *Radtke*, 48 F.4th 836, 845 n.3 (7th Cir. 2022) ("a substantial burden may arise" not only "when a

prison threatens an inmate with some negative consequence" but also "when a prison declines to provide an inmate access to something that will allow him to exercise his religion"); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (recovering tithing monies from debtors' church was a substantial burden because it "would effectively prevent the debtors from tithing"); *Thai Meditation Ass'n of Ala., Inc.* v. *City of Mobile*, 980 F.3d 821, 830-831 (11th Cir. 2020) (land-use regulation that "completely prevents" religious exercise "clearly satisfies the substantial-burden standard"). As Chief Judge Sutton aptly put it: "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight*, 763 F.3d at 564-565.

The Tenth Circuit's standard has already produced a conflicting result in an indistinguishable case involving government property. In *Comanche Nation* v. *United States*, Native Americans challenged the Army's plan to build a warehouse on federal land in Oklahoma near Medicine Bluffs, a sacred site. No. 5:08-cv-849, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008). They argued that the warehouse would substantially burden their religious exercise because it would occupy "the precise location" where they stood for worship. *Id.* at *7, *17. The government "urge[d] the Court to adopt a definition [of 'substantial burden'] applied by the Ninth Circuit" in *Navajo Nation*. *Id.* at *3 n.5. But the court refused, stating "[t]he Tenth Circuit has not adopted that definition." *Ibid.* Instead, applying Tenth Circuit precedent, the court issued a preliminary injunction under RFRA, holding that permitting construction that would prevent Native American religious exercise on federal land "amply demon-

strates" a "substantial burden." *Id.* at *17; see also *Perez* v. *City of San Antonio*, No. 5:23-cv-977, 2023 WL 6629823, at *1, 11 (W.D. Tex. Oct. 11, 2023) ("fencing off" Native American sacred site "substantially burdened Plaintiffs' religious exercise" under state RFRA).

The Ninth Circuit attempted to distinguish some of the contrary circuit rulings (like *Haight* and *Yellowbear*) on the ground that they involved RLUIPA, which applies only to prisons and land-use regulations—"contexts" where the "crucial element" of "coerci[on]" is "already baked in." App.54a-55a. Thus, according to the majority, the "dictionary definitions of 'substantial' and 'burden' will adequately flesh out the concept of 'substantial burden'" under RLUIPA, but not RFRA. *Ibid.* But "RFRA and RLUIPA are 'sister statute[s]'" that "apply the same test"—which is why "the Supreme Court and virtually all the lower courts have recognized that 'substantial burden' holds the same definitional meaning in RFRA and RLUIPA." App.119a, 135a-136a (Nelson, J.) (quoting *Holt*). Indeed, RFRA *itself* applies to federal prisons—yet gives not the slightest textual suggestion that "substantial burden" has a different meaning in prison.

In any event, comparison to the prison and land-use contexts only *supports* a finding of substantial burden here. Unlike in most of "private life," there are some contexts in which the "government controls access to religious locations and resources"—with examples including prison and land use, but also the military and sacred sites on federal land. App.583a-584a (Berzon, J., panel dissent); see Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301, 1333-

1343 (2021). In these contexts, "[b]y simply preventing access to religious locations and resources, the government may directly prevent religious exercise." App.585a; see also *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 226 n.10 (1963) ("military personnel would be unable to engage in the practice of their faiths" without religious services conducted "with the use of government facilities"); *Katcoff* v. *Marsh*, 755 F.2d 223, 234-235 (2d Cir. 1985) (military chaplaincy required by Free Exercise Clause). That is what is occurring here. And that is a substantial burden in six other circuits.

II. The decision below deepens a 5-3 circuit split over the meaning of the Free Exercise Clause.

1. The decision below also deepens a circuit split over the Free Exercise Clause. The majority acknowledged that the decision to authorize the transfer and destruction of Oak Flat is "plainly not 'generally applicable.'" App.36a-37a, 37a n.4. Nevertheless, the court refused to apply strict scrutiny, holding that the Apaches' RFRA and free-exercise claims "fail[] for the same reasons," App.58a—*i.e.*, the supposed lack of a "substantial burden."

That reasoning deepens an acknowledged split. The First, Fourth, Eighth, Tenth, and D.C. Circuits, like the court below, hold that regardless of whether the government's action is not "neutral and generally applicable," free-exercise claimants must still make a "threshold showing" of "substantial burden." *Firewalker-Fields* v. *Lee*, 58 F.4th 104, 114 n.2 (4th Cir. 2023); see also *Roman Catholic Bishop of Springfield* v. *City of Springfield*, 724 F.3d 78, 98, 101 (1st Cir. 2013) (rejecting free-exercise claim for lack of "sub-

stantial burden" even though "we do not view the Ordinance as a 'neutral law of general applicability'"); *Mbonyunkiza* v. *Beasley*, 956 F.3d 1048, 1053-1054 (8th Cir. 2020) ("like other courts, we have made the [free-exercise] standard more restrictive" by requiring a "substantial burden"); *Williams* v. *Hansen*, 5 F.4th 1129, 1133 (10th Cir. 2021) ("To state a valid constitutional claim, a prisoner must allege facts showing that officials substantially burdened a sincerely held religious belief."); *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("threshold showing" of substantial burden required "before the First Amendment is implicated").

But the Second, Third, and Sixth Circuits hold the opposite—that "there is no justification for requiring a plaintiff to make a threshold showing of substantial burden" when government action is "not neutral and generally applicable." *Kravitz* v. *Purcell*, 87 F.4th 111, 124-126, 126 n.11 (2d Cir. 2023) ("We disagree with those circuits that continue to apply the substantial burden test."); see *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) ("there is no substantial burden requirement when government discriminates against religious conduct"); *Hartmann* v. *Stone*, 68 F.3d 973, 978, 979 n.4 (6th Cir. 1995) ("[Plaintiffs] need not demonstrate a substantial burden" when "regulations are not neutral and generally applicable").

These latter circuits are correct. This Court's decisions show that where a challenged law is not neutral and generally applicable, no "substantial burden" is needed. Rather, a claimant can "prov[e] a free exercise violation" "by showing that a government entity has *burdened*"—not substantially burdened—"his sincere

religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (emphasis added); see *Kravitz*, 87 F.4th at 124 (collecting this Court's post-*Smith* decisions).

Moreover, while the Ninth Circuit purported to locate its imposition of a substantial-burden-understood-as-coercion requirement in the First Amendment's term "prohibiting," App.34a-35a, that effort flouts the original meaning of the term. As Justice Alito has explained, the "'normal and ordinary' meaning" of "prohibit," in 1791 as today, is "*either* '[t]o forbid' *or* 'to hinder.'" *Fulton*, 593 U.S. at 564-566, 565 n.30 (Alito, J., concurring in judgment) (emphases added). And regardless of whether the government is "forbidding" Apache religious practices, it is certainly "hindering" them, by destroying the irreplaceable location at which they must take place.

2. If the Ninth Circuit is right about *Lyng*—and *Lyng* means the Free Exercise Clause isn't implicated when the government knowingly singles out a sacred site for complete physical destruction and ends longstanding religious practices forever—this Court should revisit *Lyng*. As an example of *Smith avant la lettre*, *Lyng* is subject to criticism on the same grounds *Smith* is. And *Smith* has been criticized as contrary to the Constitution's text, structure, original public meaning, and longstanding precedent. *Fulton*, 593 U.S. at 543 (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 555-594 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment).

Making matters worse, the Ninth Circuit's reading of *Lyng* interprets the Free Exercise Clause even more narrowly than *Smith* did—holding that strict scrutiny

applies only when governmental action is *both* not neutral or generally applicable (*Smith*'s rule) *and* meets some additional requirement of "coercion" (the allegedly *Lyng*-derived addition). Thus, to the extent *Lyng* adds yet another atextual and ahistorical requirement to the Free Exercise Clause, *Lyng* likewise "lacks in originalist or textualist support," and "it is time for the Supreme Court to revisit *Lyng*." App.156a-157a (Nelson, J.).

III. This case is vitally important for people of all faiths.

The question presented is exceptionally important—not only for Apaches and other Native Americans, but for all people of faith.

1. The transfer and destruction of Oak Flat would end Western Apache religious existence as we know it. Oak Flat is "'crucial' to Western Apache religious life"—a "direct corridor" to the Creator and the site of religious practices that "must occur at Oak Flat and cannot take place anywhere else." App.17a-18a (Collins, J.). The mining crater, nearly two miles wide and over 1,000 feet deep, would completely engulf the irreplaceable locus of age-old sacred rituals. Once Oak Flat is gone, "religious practices at Oak Flat [that] date back at least a millennium" are gone forever, App.17a—and with them, the bedrock of Western Apache religious identity.

Yet the destruction of Oak Flat is far from the only issue at stake. The decision below guts RFRA for *all* Native Americans throughout the Ninth Circuit,

which encompasses 74% of all federal land[6] and almost a third of the nation's Native American population[7]—far more than any other circuit. Thus, the circuit with the most power over Native American lives and liberty has given the federal government carte blanche to destroy any sacred site on federal land for any reason—without even undergoing RFRA review.

What's more, the court's aggressive expansion of *Lyng* doesn't just harm Native Americans; it undermines religious liberty for all faiths. One need look no farther than the government's actions in the wake of the decision below. Two days after the decision, the National Park Service denied permission for the Knights of Columbus to hold an annual Memorial Day Mass within Virginia's Poplar Grove National Cemetery—a tradition they had maintained without objection for over 60 years. When the Knights sued, the Park Service invoked the decision below, arguing 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*"—and thus, the Knights suffered "no burden" under RFRA. Gov't Br. at 20-21, *Knights of Columbus* v. *National Park Serv.* 3:24-cv-363, ECF No. 21 (E.D. Va. May 22, 2024).

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[6] See Carol Hardy Vincent et al., *Federal Land Ownership: Overview and Data*, Cong. Rsch. Serv., R42346, 7-8 (Feb. 21, 2020), https://perma.cc/67BD-PP7C; *Our Mission* Infographic, Bureau of Land Management (May 2016), https://perma.cc/SFG9-WJXY.

[7] Eight of the sixteen states with the highest concentration of Native Americans are in the Ninth Circuit. *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. Census Bureau (Aug. 12, 2021), https://perma.cc/JX6W-EENT.

That same reasoning would let the government shut down almost any religious exercise on federal land. Many churches are situated on federal land—some 70 within national parks alone, not to mention Ebenezer Baptist Church (where Martin Luther King, Jr., preached) and historic missions dotted throughout the west. Barclay & Steele, 134 Harv. L. Rev. at 1341. Many host active religious communities and ongoing religious worship. Yet under the decision below, the federal government could shut down and destroy them all—for any reason or no reason at all.

And it's not just federal land; other circuits have used the same expansive reading of *Lyng* to undermine religious exercise in many contexts. Four circuits have stretched *Lyng* to find no burden when the government required religious groups to facilitate distribution of contraception and abortion-causing drugs. *Geneva Coll.* v. *HHS*, 778 F.3d 422, 435-436 (3d Cir. 2015); *Little Sisters of the Poor* v. *Burwell*, 794 F.3d 1151, 1193 (10th Cir. 2015); *Priests For Life* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014); *East Tex. Baptist Univ.* v. *Burwell*, 793 F.3d 449, 458 (5th Cir. 2015); all vacated *sub nom Zubik* v. *Burwell*, 578 U.S. 403 (2016). Two circuits have extended *Lyng* to find no burden when public schools require young children to attend religiously objectionable, sexually themed lessons with no parental notice or consent. *Mahmoud* v. *McKnight*, 102 F.4th 191, 204-205, 210 (4th Cir. 2024); *Parker* v. *Hurley*, 514 F.3d 87, 103-106 (1st Cir. 2008). Other courts have expanded *Lyng* to find no burden when public schools give young students condoms without parental notice or consent, *Curtis* v. *School Committee of Falmouth*, 652 N.E.2d 580, 589 (Mass. 1995), or when public health clinics give a minor the morning-after pill without informing her parents or

letting her know it could cause an abortion, *Anspach ex rel. Anspach* v. *Philadelphia*, 503 F.3d 256, 272-273 (3d Cir. 2007). All these actions were deemed the government's "internal affairs." *Ibid.*

2. The Ninth Circuit didn't deny the sweeping implications of its ruling. Instead, it professed concerns that recognizing a substantial burden here would grant Apaches a "religious servitude" that would "divest the Government of its right to use what is, after all, *its* land," App.32a, 40a (Collins, J.), or "entitle a wide variety of religions to government handouts," App.193a (VanDyke, J.). But these are the same sort of policy arguments "made forcefully by the Court in *Smith*"—and rejected by Congress in RFRA. *Hobby Lobby*, 573 U.S. at 735. Moreover, they have nothing to do with the question of whether permanently ending Apache religious exercises "substantially burdens" those exercises. Rather, they "slip[ ] * * * into the substantial burden analysis" the very different question of how to balance "competing claims on federal land"—the question to be resolved on strict scrutiny. App.598a-599a (Berzon, J., panel dissent).

Strict scrutiny, as "Congress determined," "'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.'" *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (quoting 42 U.S.C. 2000bb(a)(5)). It has proven workable in RFRA and RLUIPA cases for over 30 years, in every context from prisons to drug laws to military bases. See App.599a-600a (Berzon, J., panel dissent). And it's the statutorily prescribed mechanism for addressing the real question at the heart of this case: whether the government has a compelling interest in exploiting this

particular copper deposit, and whether destroying Oak Flat is the only way to do so.

Meanwhile, it's the Ninth Circuit's opinion that produces untenable results. Under that opinion, if the government posts "No Trespassing" signs at Oak Flat and imposes modest "penalties" for trespassing (App.31a), Apaches suffer a substantial burden—even though they can pay fines and still worship there. But if the government blasts Oak Flat into oblivion, Apaches suffer no burden at all. Likewise, if the government prevents a prisoner from using a sweat lodge in prison, he suffers a substantial burden—even though "those convicted of crime in our society lawfully forfeit a great many civil liberties." *Yellowbear*, 741 F.3d at 52. But if the government prevents law-abiding Apaches from using a sweat lodge at Oak Flat, they suffer no burden at all. Indeed, if a mine at Oak Flat would kill endangered fish, the project could not proceed, because "the balance has been struck in favor of affording endangered species the highest of priorities." *TVA* v. *Hill*, 437 U.S. 153, 156, 194 (1978). But if a mine would terminate Apache rituals forever, the government need offer no justification at all. All of this is backwards.

More broadly, if policy concerns about protecting the government's "internal affairs" can override RFRA's ordinary meaning, that is a recipe for judicial repeal of RFRA. Government officials routinely plead the same policy concerns in other contexts—that RFRA will make it impossible to manage prisons (*Holt*, *Ramirez*), enforce drug laws (*O Centro*), maintain military discipline (*Singh* v. *Berger*, 56 F.4th 88, 97-99 (D.C. Cir. 2022)), or deliver contraception (*Hobby Lobby*). Those concerns have never justified ignoring

RFRA's text before, and land use is no different. But by making an unprincipled exception for federal land, the court below has created a roadmap for evading RFRA in anything that can be deemed part of the government's "internal affairs"—which would encompass "most government action and indeed swallow RFRA whole." App.246a n.18 (Murguia, C.J.).

* * *

RFRA promises "very broad protection for religious liberty" for all faiths across all federal law. *Hobby Lobby*, 573 U.S. at 693. The decision below breaks that promise, in derogation of RFRA's text, this Court's precedent, and decisions from other circuits. Left standing, it will end Apache religious existence as we know it—without the government ever even having to justify that extraordinary result under RFRA. Only this Court can prevent that tragedy and ensure RFRA is applied evenhandedly to all faiths according to its text.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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ADDENDUM

Table of Relevant Excerpts of
U.S. Department of Agriculture, U.S. Forest Service,
Resolution Copper Project and Land Exchange Environmental Impact Statement (January 15, 2021)

App. Cite	**EIS Cite**	**Excerpt**
App.698a-699a	1-EIS-ES-28	"The NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP would be directly and permanently damaged by the subsidence area at the Oak Flat Federal Parcel."
App.701a-702a	1-EIS-ES-29	"Oak Flat is a sacred place to the Western Apache, Yavapai, O'odham, Hopi, and Zuni. It is a place where rituals are performed, and resources are gathered; its loss would be an indescribable hardship to those peoples .... Development of the Resolution Copper Mine would directly and permanently damage the NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP. One or more Emory oak groves at Oak Flat, used by tribal members for acorn collecting, likely would be lost. Other unspecified mineral or plant collecting locations and culturally important landscapes are also likely to be affected .... Dewatering likely would impact between 18 and 20 GDEs, mostly sacred springs .... Burials are likely to be

		impacted. The numbers and locations of burials would not be known until such sites are detected as a result of project-related activities.”
App.707a	1-EIS-9	“The land surface overlying the copper deposit is located in an area that has a long history of use by Native Americans, including the Apache, O’odham, Puebloan, and Yavapai people.”
App.710a	1-EIS-10	“As the ore moves downward and is removed, the land surface above the ore body also moves downward or ‘subsides.’ Analysts expect a ‘subsidence’ zone to develop near the East Plant Site; there is potential for downward movement to a depth between 800 and 1,115 feet. Resolution Copper projects the subsidence area to be up to 1.8 miles wide at the surface.”
App.712a	1-EIS-31	“[T]ailings storage facilities are permanent and remain part of the landscape in perpetuity.”
App.718a	1-EIS-40	“Construction and operation of the mine would pro-

		foundly and permanently alter the NRHP-listed *Chí'chil Biłdagoteel* .... In addition, development of the proposed tailings storage facility at any of the four proposed or alternative locations would permanently bury or otherwise destroy many prehistoric and historic cultural artifacts, potentially including human burials."
App.722a	1-EIS-42	"Construction and operation of the Resolution Copper Mine would, as a result of anticipated geological subsidence at the East Plant Site, permanently alter the topography and scenic character of the Oak Flat area."
App.726a	1-EIS-58	"Approximately 1.37 billion tons of tailings would be created during the mining process and would be permanently stored at the tailings storage facility."
App.734a	1-EIS-84	"Reclamation activities would not occur within the subsidence area. There would be a berm and/or fence constructed around the perimeter of the continuous subsidence area."

App.745a	1-EIS-149	"All public access … would be eliminated on 7,490 acres."
App.745a	1-EIS-154	"The NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP would be directly and permanently damaged."
App.746a	1-EIS-156	"Development of the Resolution Copper Mine would directly and permanently damage the NRHP-listed *Chí'chil Biłdagoteel* Historic District TCP .... Dewatering or direct disturbance would impact between 18 and 20 groundwater dependent ecosystems, mostly sacred springs .... Burials are likely to be impacted; the numbers and locations of burials would not be known until such sites are detected as a result of mine-related activities. Under this or any action alternative, one or more Emory oak groves at Oak Flat, used by tribal members for acorn collecting, would likely be lost. Other unspecified mineral- and/or plant-collecting locations would also likely be affected; historically, medicinal and other plants are frequently

		gathered near springs and seeps, so drawdown of water at these locations may also adversely affect plant availability."
App.750a-751a	1-EIS-185-86	"The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources from the proposed mine and block caving .... If the land exchange does not occur, not only would mineral exploration not take place within the 760-acre Oak Flat Withdrawal Area, but subsidence caused by block caving would not be allowed to impact the Withdrawal Area."
App.761a	1-EIS-314	"The land exchange would have significant effects on transportation and access .... [P]ublic access would be lost to the parcel itself, as well as passage through the parcel to other destinations, including Apache Leap and Devil's Canyon."

App.783a	2-EIS-423	"Mine dewatering at the East Plant Site under all action alternatives would result in the same irretrievable commitment of 160,000 acre-feet of water from the combined deep groundwater system and Apache Leap Tuff aquifer over the life of the mine .... [E]ven if the water sources are replaced, the impact on the sense of nature and place for these natural riparian systems would be irreversible. In addition, the GDEs directly disturbed by the subsidence area or tailings alternatives represent irreversible impacts."
App.798a	2-EIS-558	"With respect to surface water flows from the project area, all action alternatives would result in both irreversible and irretrievable commitment of surface water resources."
App.800a	2-EIS-575	"The entire subsidence area would be fenced for public safety."
App.802a	2-EIS-600	"The direct loss of productivity of thousands of acres of various habitat from the project components would result

		in both irreversible and irretrievable commitment of the resources."
App.806a-807a	2-EIS-620	"The land exchange would have significant effects on recreation .... Additional recreational activities that would be lost include camping at the Oak Flat Campground, picnicking, and nature viewing. The campground currently provides approximately 20 campsites and a large stand of native oak trees."
App.814a	2-EIS-716	"[O]nce the land exchange occurs, Resolution Copper could use hazardous materials on this land without approval."

App.816a-817a	2-EIS-766-67	"For all action alternatives, there would be an irretrievable loss of scenic quality from increased activity and traffic during the construction and operation phases of the mine .... There would be an irretrievable, regional, long-term loss of night-sky viewing during project construction and operations because night-sky brightening, light pollution, and sky glow caused by mine lighting would diminish nighttime viewing conditions in the direction of the mine."
App.823a-824a	2-EIS-774	"In consultation with SHPO, ACHP, tribes, and other consulting parties, the Forest Service determined that the project will have an adverse effect on historic properties. However, because of the complexity of the project, all of the effects would not be known prior to implementation of the project."
App.825a-826a	2-EIS-776	"The project area is within the traditional territories of the Western Apache, the Yavapai, and the Akimel O'odham or Upper Pima. The histories of the Western

		Apache—a group that includes ancestors of the White Mountain, San Carlos, Cibecue, and Tonto Apache—tell of migrations into Arizona where they encountered the last inhabitants of villages along the Gila and San Pedro Rivers .... In the 1870s, the Apache were forced onto reservations .... However, not all Apache stayed on the reservations, and some continued to use the vicinity of the project area into the twentieth century."
App.830a-831a	2-EIS-780	"The removal of the Oak Flat Federal Parcel from Forest Service jurisdiction negates the ability of the Tonto National Forest to regulate effects on these resources. If the land exchange occurs, 31 NRHP-eligible archaeological sites and one TCP within the selected lands would be adversely affected .... [H]istoric properties leaving Federal management is considered an adverse effect, regardless of the plans for the land, meaning that, under NEPA, the land

		exchange would have an adverse effect on cultural resources."
App.837a-838a	2-EIS-787	"[E]ven if recorded and documented, loss of these cultural sites contributes to the overall impact to the cultural heritage of the areas .... While the footprint of these projects is used as a proxy for impacts to cultural resources, effects on cultural resources extend beyond destruction by physical disturbance."
App.840a-841a	2-EIS-789-90	"Cultural resources and historic properties would be directly and permanently impacted. These impacts cannot be avoided within the areas of surface disturbance, nor can they be fully mitigated .... Physical and visual impacts on archaeological sites, tribal sacred sites, cultural landscapes, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale. Mitigation measures cannot replace or replicate the historic properties that

		would be destroyed by project construction. The landscape, which is imbued with specific cultural attributions by each of the consulting tribes, would also be permanently affected .... The direct impacts on cultural resources and historic properties from construction of the mine and associated facilities constitute an irreversible commitment of resources. Archaeological sites cannot be reconstructed once disturbed, nor can they be fully mitigated. Sacred springs would be eradicated by subsidence or tailings storage facility construction and affected by groundwater drawdown. Changes that permanently affect the ability of tribal members to use known TCPs for cultural and religious purposes are also an irreversible commitment of resources.”
App.846a, 848a	3-EIS-820	“No tribe supports the desecration/destruction of ancestral sites. Places where ancestors have lived are considered alive and sacred. It

		is a tribal cultural imperative that these places should not be disturbed or destroyed for resource extraction or for financial gain. Continued access to the land and all its resources is necessary and should be accommodated for present and future generations .... The Resolution Copper Project and Land Exchange has a very high potential to directly, adversely, and permanently affect numerous cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource-gathering localities, burial locations, and other places of spiritual value to tribal members."
App.848a-849a	3-EIS-821	"We received numerous comments from tribal members about the sacredness and importance of Oak Flat to them, their lives, their culture, and their children. Many expressed their sadness and anger that their sacred place would be destroyed and that they would lose access to their oak

		groves and ceremonial grounds."
App.851a-852a	3-EIS-824	"Direct impacts on resources of traditional cultural significance (archaeological sites; burial locations; spiritual areas, landforms, viewsheds, and named locations in the cultural landscape; water sources; food, materials, mineral, and medicinal plant gathering localities; or other significant traditionally important places) would consist of damage, loss, or disturbance .... [T]he land exchange will have an adverse impact on resources significant to the tribes."
App.855a-856a	3-EIS-826	"In 2015, the Tonto National Forest, in partnership with the San Carlos Apache Tribe, composed a nomination for Oak Flat, the area originally known as *Chí'chil Biłdagoteel*, to be listed in the NRHP as a TCP .... Places like springs, ancestral (archaeological) sites, plants, animals, and mineral resource locations are sacred and should not be disturbed or disrupted. The Oak Flat

		Federal Parcel slated to be transferred to Resolution Copper was once part of the traditional territories of the Western Apache, the Yavapai, the O'odham, and the Puebloan tribes of Hopi and Zuni. They lived on and used the resources of these lands until the lands were taken by force 150 years ago."
App.858a-860a	3-EIS 827-28	"After the signing of the Treaty of Guadalupe in 1848 … Euro-American settlers began arriving in Western Apache lands in search of mineral wealth and ranching lands …. Several massacres of Apache by soldiers and civilians occurred from the 1850s through the 1870s, including the reported events at Apache Leap. In the 1870s, the Apache were forced off their lands and onto reservations …. All these communities lost large portions of their homelands, including Oak Flat, and today live on lands that do not encompass places sacred to their cultures …. Knowing these places is vital to understanding Apache history

		and, therefore, identity. For the Western Apache, 'the people's sense of place, their sense of the tribal past, and their vibrant sense of them-selves are inseparably inter-twined' (Basso 1996:35). The Apache landscape is imbued with diyah, or power. Diyah resides in natural phenome-non like lightning, in things like water or plants, and in places like mountains. Gáán, or holy beings, live in im-portant natural places and protect and guide the Apache people. They come to ceremonies to impart well-being to Apache, to heal, and to help the people stay on the correct path."
App.864a	3-EIS-833	"[T]he tribal monitors rec-orded 594 special interest areas in the direct analysis area. Of the 594, 523 are de-scribed as cultural re-sources, 66 as natural re-sources, and 5 as both cul-tural and natural resources. The cultural resources gen-erally correspond to prehis-toric archaeological sites and were categorized by the tribal monitors as cultural

		areas, settlement areas, resource gathering areas, resource processing areas, agricultural areas, and other.”
App.869a	3-EIS-837	“Oak Flat is a sacred place to the Western Apache, Yavapai, O’odham, Hopi, and Zuni. It is a place where rituals are performed, and resources are gathered; its loss would be an indescribable hardship to those peoples. The following is the testimony of tribal members describing the spiritual significance of Oak Flat and what its loss would mean to their culture, especially Apache culture, in their own words.”
App.870a	3-EIS-838	“For as long as may be recalled, our People have come together here. We gather the acorns and plants that these lands provide, which we use for ceremonies, medicinal purposes, and for other cultural reasons .... These are holy, sacred, and consecrated lands which remain central to our identity as Apache People.” [Congressional testimony of Dr. Wendsler Nosie]

App.873a-875a	3-EIS-839-840	"*Chí'chil Biłdagoteel* (also known as Oak Flat) is a Holy and Sacred site .... where we pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here .... Emory oak groves at Oak Flat used by tribal members for acorn collecting are among the many living resources that will be lost along with more than a dozen other traditional plant medicine and food sources …. The impacts that will occur to Oak Flat will undeniably prohibit the Apache people from practicing our ceremonies at our Holy site …. Our connections to the Oak Flat area are central to who we are as Apache people. Numerous people speak of buried family members …. The destruction to our lands and our sacred sites has occurred consistently over the past century in direct violation of treaty promises and the trust obligation owed to Indian tribes .... [T]he

		United States incurred obligations to protect our lands from harm, and to respect our religion and way of life. Despite these obligations, the U.S. Government has consistently failed to uphold these promises or too often fails to act to protect our rights associated with such places like *Chí'chil Biłdagoteel*." [Congressional testimony of Dr. Wendsler Nosie]
App.875a-877a	3-EIS-840	"Throughout our history, Oak Flat continues as a vital part of the Apache religion, traditions, and culture. In Apache, our word for the area of Oak Flat is *Chí'chil Biłdagoteel* (a "Flat with Acorn Trees"). Oak Flat is a holy and sacred site, and a traditional cultural property with deep religious, cultural, archaeological, historical and environmental significance to Apaches, Yavapais, and other tribes. At least eight Apache Clans and two Western Apache Bands have documented history in the area .... A number of Apache religious ceremonies will be held at Oak Flat this Spring,

		just as similar ceremonies and other religions and traditional practices have been held for a long as long as Apaches can recall. We do so because Oak Flat is a place filled with power, a place Apaches go: for prayer and ceremony, for healing and ceremonial items, or for peace and personal cleansing …. In the Oak Flat area, there are hundreds of traditional Apache species of plants, birds, insects, and many other living things in the Oak Flat area that are crucial to Apache religion and culture …. Only the species within the Oak Flat area are imbued with the unique power of this area." [Congressional testimony of Terry Rambler]
App.878a	3-EIS-841	"In the late 1800s, the U.S. Army forcibly removed Apaches from our lands, including the Oak Flat area, to the San Carlos Apache Reservation. We were made prisoners of war there until the early 1900s. Our people lived, prayed, and died in the Oak Flat area …. Since

		time immemorial, Apache religious ceremonies and traditional practices have been held at Oak Flat. Article 11 of the Apache Treaty of 1852, requires the United States to "so legislate and act to secure the permanent prosperity and happiness" of the Apache people. Clearly, H.R. 687 fails to live up to this promise." [Congressional testimony of Terry Rambler]
App.883a-885a	3-EIS-843	"How can we practice our ceremonies at Oak Flat when it is destroyed? How will the future Apache girls and boys know what it is to be Apache, to know our home when it is gone? .... *Chí'chil Biłdagoteel* … is a place where we pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here. We have never lost our relationship to *Chí'chil Biłdagoteel*." [Congressional testimony of Naelyn Pike]
App.887a-888a	3-EIS-844	"My nine year old daughter dreams about having her

		Apache Sunrise dance ceremony at Oak Flat. The Apaches see Oak Flat differently—it is a church, a place for worship and the practice of our traditional religion. It is the center of our most sincerely held, religious beliefs, where diyf'(sacred power) can be called upon via prayers …. At least eight Apache clans have direct ties to this location. Tribal members continue to visit Oak Flat for prayer and a wide range of traditional needs and practices .... I pray my son will have the opportunity to sweat at Oak Flat for the first time, when he becomes a young man. We have gone to many Apache spiritual ceremonies (Sunrise dances and Holy ground ceremonies) at Oak Flat." [DEIS comment of Terry Rambler]
App.890a-891a	3-EIS-845	"My family, my ancestors come from Oak Flat. I grew up there, praying, picking the medicine, picking the acorn, going to the springs, gaining the teachings of my role as an Apache woman so I can pass it down to my

		daughters …. My daughter, Nizhoni, held her Ceremony at Oak Flat in October 2014 …. All the elements of the wind, fire, water, and land go into the Ceremony for my daughter. Everything Usen (Creator, God) has created has a significant role in the Ceremony [during] the 4 days that she prays, dances, connects with all the elements, connected to our ancestors, connected to the Holy Spirit. On the 3rd day of the Ceremony she is painted white with the white clay that is provided from Mother Earth, and that paint blesses all living beings, followed by the next day, the last day of the ceremony, she has to wash the paint off and give it back to the earth …. The exact springs she went to wash her paint off is being affected by Resolution Copper Mine already by dewatering the springs. You are already tampering with her life." [DEIS comment of Vanessa Nosie]

App.893a-894a	3-EIS-846	"For at least a half millennium through to the present day, members of our Tribe have utilized the Oak Flat area for traditional religious ceremonies, such as the Sunrise Dance .... It is a place where Apache Holy Ground rituals occur, where we commune with and sing to our Creator God, and celebrate our holy spirits, including our mountain spirits, the Ga'an. It is a place filled with rock paintings and petroglyphs, what some may describe as the footprints and the very spirit of our ancestors, hallmarks akin to the art found in gothic cathedrals and temples, like the Western Wall in Jerusalem, St. Peter's Basilica in Vatican City, or Angor Wat in Cambodia. This is why I call Oak Flat the Sistine Chapel of Apache religion." [DEIS comment of Terry Rambler]
App.895a-896a	3-EIS-847	"I just recently had my coming of age ceremony at Oak Flat and being there meant a lot to me to have my ceremony in a place where all

		my ancestors used to be. If the Resolution Copper mine continues with destroying Oak Flat, then I will never have a sacred place to come back to or to show my kids where our ancestors gathered." [DEIS comment of Gouyen Brown-Lopez] "Oak Flat is so important to me because I have a very strong connection with the land. Oak Flat gives me connection with my family and my past ancestors." [DEIS comment of Waya Brown] "Oak Flat is also a place where our members still conduct traditional harvesting of plants important to our diet, such as acorns from Emory oaks, and healing plant-based medicines for a wide range of ailments .... The numerous natural elements, that come from these Holy Sites, are used as tools to conduct Religious Ceremonies, spiritual sweats, and Sunrise Ceremonies." [DEIS comment of Terry Rambler and Wendsler Nosie on behalf of Apache Stronghold]

App.899a	3-EIS-848	"Distinctive features of the TCP include an Emory oak stand that Apache and Yavapai use to harvest acorn, and a nearby campground, constructed by the Civilian Conservation Corps, that provides a convenient place for family gatherings. All of these resources would be adversely affected by leaving Federal management. In particular, as described above, the loss of the ceremonial area and acorn-collecting area in Oak Flat would be a substantial threat to the perpetuation of cultural traditions of the Apache and Yavapai tribes, because healthy groves are few and access is usually restricted unless the grove is on Federal land."
App.909a, 912a	3-EIS-854-55	"Maintaining access to Oak Flat Campground …. represents only a small portion of Oak Flat, and would not reduce the impact on tribal cultural heritage caused by the destruction of the broader landscape due to the subsidence area …. Significant tribal properties and

		uses would be directly and permanently impacted. These impacts cannot be avoided within the areas of direct impact, nor can they be fully mitigated.”
App.912a-913a	3-EIS-856	“Physical and visual impacts on TCPs, special interest areas, and plant and mineral resources caused by construction of the mine would be immediate, permanent, and large in scale. Mitigation measures cannot replace or replicate the tribal resources and traditional cultural properties that would be destroyed by project construction and operation .... Traditional cultural properties cannot be reconstructed once disturbed, nor can they be fully mitigated. Sacred springs would be eradicated by subsidence or construction of the tailings storage facility, and affected by groundwater drawdown .... For uses such as gathering traditional materials from areas that would be within the subsidence area or the tailings storage facil-

		ity, the project would constitute an irreversible loss of resources.”
App.916a	3-EIS-871	“Native American communities would be disproportionately affected by the land exchange …. Loss of the culturally important area of Oak Flat would be a substantial threat to the perpetuation of cultural traditions of the Apache and Yavapai tribes.”
App.919a	3-EIS-875	“[D]isturbance of the sites would result in a disproportionate impact on the tribes, given their historical connection to the land. Additionally, the potential impacts on archaeological and cultural sites … are directly related to the tribes’ concerns and the potential impacts on cultural identity and religious practices. Given the known presence of ancestral villages, human remains, sacred sites, and traditional resource-collecting areas that have the potential to be permanently affected, it is unlikely that compliance

		and/or mitigation would substantially relieve the disproportionality of the impacts on the consulting tribes."
App.931a	4-EIS-F-3	"While there are other underground stoping techniques that could physically be applied to the Resolution copper deposit, each of the alternative underground mining methods assessed was found to have higher operational costs than panel caving."
App.933a	4-EIS-F-4	"The Forest Service recognizes and acknowledges scoping comments that suggest the use of mining techniques other than panel caving could substantially reduce impacts on surface resources, both by reducing or eliminating subsidence and by allowing the potential of backfilling tailings underground."