No. 24-291

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

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF REHEARING

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INTRODUCTION

Petitioner's rehearing petition explained that if this Court reversed the Fourth Circuit in *Mahmoud* v. *Taylor*, No. 24-297, a GVR was likely to be appropriate in this case. Reh'g Pet.5-11. The Court has now reversed in *Mahmoud*, and a GVR is indeed appropriate.

ARGUMENT

Mahmoud held that parents suffered a "burden" on their religious exercise when a school board imposed "'LGBTQ+-inclusive' storybooks" on their children without notice and opt outs. *Mahmoud* v. *Taylor*, No. 24-297 (June 27, 2025), slip op.17. That was so, the Court explained, because the government's actions posed an "objective danger," or a "very real threat," "of undermining" the parents' exercise—*i.e.*, instilling contrary beliefs about marriage and sexuality in their children. *Id.* at 17, 25.

Under *Mahmoud*, there is at least a "reasonable probability" the lower courts would find a substantial burden in this case. *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). The government's action here—transferring an Apache sacred site to be obliterated—plainly qualifies as a substantial burden on Apache religious exercise under *Mahmoud*'s test. And in articulating that test, *Mahmoud* rejected the same alternative "burden" theories the Ninth Circuit adopted in ruling against Petitioner here.

The Court should therefore follow its repeated practice where an intervening decision bears strongly on the question presented in a recently denied petition: It should grant rehearing, vacate the denial of certiorari, and GVR instead. Reh'g Pet.3-4 (collecting examples); see *Oklahoma* v. *United States*, No. 23-402,

2025 WL 1787679 (June 30, 2025) (additional example this week).

A GVR is warranted here for at least five reasons.

First, *Mahmoud* adopts an "objective" burden test that the Ninth Circuit rejected below. Under that test, destroying Oak Flat unambiguously poses an "objective danger," or a "very real threat," "of undermining" Apache religious exercise. *Mahmoud*, slip op.17, 25. Indeed, the site itself will be literally undermined—collapsed "into a massive hole in the ground." *Apache Stronghold* v. *United States*, No. 24-291 (May 27, 2025), slip op.1 (Gorsuch, J., joined by Thomas, J., dissenting) ("Gorsuch & Thomas Op."). And "[i]t 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." *Apache Stronghold* v. *United States*, 101 F.4th 1036, 1129 (9th Cir. 2024) (en banc) (Murguia, C.J., dissenting). Sacred ceremonies that are tied to that site and "can occur nowhere else," Gorsuch & Thomas Op.9, will be "objectively prevent[ed]." *Apache Stronghold* v. *United States*, 38 F.4th 742, 784 (9th Cir. 2022) (Berzon, J., dissenting).

Contrary to *Mahmoud*, the Ninth Circuit rejected any inquiry into the objective degree of the danger as beside the point. The Apaches and dissenters below argued that "the religious burden in controversy is not mere interference with 'subjective' experience, but the undisputed, complete destruction of the entire religious site," *Apache Stronghold* v. *United States*, No. 21-15295, 2021 WL 12295173, at *4 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting), which "render[s] their practices * * * objectively, physically impossible," Pet.

C.A. Reply Br.10-14. But the Ninth Circuit rejected this distinction, claiming there is "no permissible basis" for drawing a line "between interference with subjective experiences and physical destruction of the means of conducting spiritual exercises." *Apache Stronghold*, 101 F.4th at 1052; see also *Apache Stronghold*, 38 F.4th at 767 (panel majority) ("Who are we to say whether government action has an 'objective' impact on religious observance or merely 'diminishes [a worshipper's] subjective spiritual fulfillment'?").

Mahmoud renders the Ninth Circuit's reasoning untenable. Under *Mahmoud*, the question is precisely whether, looking to "the specific religious beliefs and practices asserted," the government's actions pose an "objective danger," or "very real threat," to the claimant's religious exercise. Slip op.17, 21, 25; see *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972) (distinguishing between "objective danger" and "interference * * * from a subjective point of view"). That is, the line the Ninth Circuit said is "no[t] permissible" is the one this Court adopted. This Court should GVR for that reason alone.

Second, in *Mahmoud*, this Court rejected the notion that the *sine qua non* of a free-exercise claim is "coercion" to act contrary to one's religious beliefs. The Fourth Circuit, the respondents, and the dissent all maintained that a burden exists only when the challenged action constitutes "compulsion or coercion to renounce or abandon one's religion." *Mahmoud*, slip op.30; see *Mahmoud* v. *McKnight*, 102 F.4th 191, 216 (4th Cir. 2024). But this Court rejected this rule as "alarmingly narrow": Religious liberty requires "more robust protection." *Mahmoud*, slip op.30. This Court

held that it isn't essential for claimants to be "compelled to commit some specific practice forbidden by their religion." *Id.* at 20-21. What is determinative is whether the government action will "substantially interfer[e]" with their religious exercise. *Ibid.*

Here, the Ninth Circuit conceded that the government's actions "would 'interfere significantly'" with Apache religious exercise at Oak Flat. *Apache Stronghold*, 101 F.4th at 1051. But it found no substantial burden because destroying Oak Flat "would have 'no tendency to coerce' [the Apaches] 'into acting contrary to their religious beliefs.'" *Ibid.* That is precisely the rule *Mahmoud* rejects—not only as foreclosed by precedent but as "chilling" and contrary to "the fundamental values of the American people." Slip op.31.

Mahmoud also rejected the notion that the parents faced no burden on their religious exercise because they had "alternatives" for exercising their religion—such as "send[ing] their children to private school" or "teach[ing] their religious beliefs and practices to their children at home." Slip op.34. Here, the Apaches have no alternatives. Once Oak Flat is destroyed, religious ceremonies at the core of the Apache religion are gone forever. So the government is not merely placing a "condition" on religious practice, *id*. at 32-33; it is making "religious practice impossible," *Apache Stronghold*, 38 F.4th at 774 (Berzon, J., dissenting). That is an even "*greater* burden" on religious exercise. *Id.* at 780; accord *Apache Stronghold*, 2021 WL 12295173, at *4 (Bumatay, J., dissenting) ("Western Apaches' exercise of religion at Oak Flat will not be burdened—it will be obliterated."); see also Gorsuch & Thomas Op.16 ("As Chief Judge Sutton has succinctly put it,

'[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).'").

Third, both the Fourth Circuit in *Mahmoud* and the Ninth Circuit here drew a line not between substantial and insubstantial burdens, but between burdens that are "cognizable" and those that are not. *Mahmoud*, 102 F.4th at 208-214; see *Apache Stronghold*, 101 F.4th at 1061 (what matters is "what counts as a *cognizable* substantial burden"). The Fourth Circuit held that a burden is not "cognizable" when it results from "exposure to objectionable material" in public schools; the Ninth Circuit held that a burden is not "cognizable" when it results from "disposition" of public lands. *Mahmoud*, 102 F.4th at 212; *Apache Stronghold*, 101 F.4th at 1055, 1061.

But in *Mahmoud*, this Court declined to draw a line between "cognizable" and "non-cognizable" burdens. Indeed, the term "cognizable" appears nowhere in the Court's opinion. To the contrary, this Court explained that not only "educating one's children in one's religious beliefs" but "*all* religious acts and practices" "receive[] a generous measure of protection from our Constitution." Slip op.18 (emphasis added). And it rejected the notion that "the touchstone for determining whether" free-exercise protections apply is how the government's actions are characterized—*e.g.*, as mere "'exposure to objectionable ideas'" via "operation of the public schools." *Id.* at 27-28. Rather, the question was whether the government's actions (however characterized) "would 'substantially interfer[e] with'" or "pose 'a very real threat of undermining'" the parents' "religious beliefs and practices." *Id.* at 15, 21.

The Ninth Circuit's effort to dismiss the burden here fails for the same reasons. The touchstone is not whether the government's actions can be characterized as "a disposition of government real property," *Apache Stronghold*, 101 F.4th at 1044, but whether the government's actions (however characterized) substantially interfere with or threaten to undermine the Apaches' religious practices. See Gorsuch & Thomas Op.12 ("Exactly nothing in the phrase 'substantial burden'—or anything else in RFRA's text—hints that a different and more demanding standard applies when (and only when) the 'disposition' of the government's property is at issue."). Such interference is undisputedly present here.

Fourth, both the Fourth Circuit in *Mahmoud* and the Ninth Circuit here relied on *Bowen* v. *Roy*, 476 U.S. 693 (1986), and *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), to conclude that no burden can result from the government's management of its "own internal affairs." *Mahmoud*, 102 F.4th at 212; *Apache Stronghold*, 101 F.4th at 1055, 1060. But this Court in *Mahmoud* rejected reliance on *Bowen* and *Lyng*, reasoning that "[t]he government's operation of the public schools is not * * * akin to the administration of Social Security or the selection of 'filing cabinets.'" Slip op.28-29 (quoting *Bowen*, 476 U.S. at 700 (majority opinion)). So too here. The government's decision to transfer and destroy Oak Flat is not a matter of the color of the government's filing cabinets but of the government's "direct, coercive" taking of what was once Apache land, its complete prevention of religious exercise, and its "power to discipline" the Apaches for trespassing once the land

is controlled by a foreign-owned mining company. *Id.* at 29; see also *Apache Stronghold*, 38 F.4th at 784 n.6 (Berzon, J., dissenting) (Apaches "will face penalties for trespassing if they attempt to hold religious ceremonies there.").

Moreover, this case involves claims under both the Free Exercise Clause *and RFRA*, which by its terms incorporates no "internal affairs" principle. To the contrary, RFRA applies to "'all' of 'Federal law,'" including "a law disposing of federal real property." Gorsuch & Thomas Op.12 (quoting 42 U.S.C. 2000bb-3(a)). And this Court has already recognized that RFRA goes "far beyond what this Court has held is constitutionally required." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014).

Finally, while the *Mahmoud* majority and dissent disagreed on much, everyone agreed that a burden would exist if the government's actions "would 'result in the destruction of [a religious] community as it exist[s] in the United States.'" Slip op.20 (Sotomayor, J., dissenting). That is this case: The "transfer and destruction of Oak Flat would end Western Apache religious existence as we know it." Pet.35. If reading the "subtle" message of Uncle Bobby's Wedding to a young girl in public school burdens religious exercise, *Mahmoud*, slip op.23, then surely blasting the cradle of Western Apache religion to oblivion—and stopping every young Apache from ever worshipping there again—does too.

* * *

This nation has a tragic history of driving Native Americans from their lands and eradicating Native

American religious practices. Absent this Court's intervention, that history will repeat itself—with consequences that will reverberate for generations. To list just one: No Apache girl will ever come of age at Oak Flat again, burdening the Apaches' own right "to direct the religious upbringing of their children." *Mahmoud*, slip op.19. Before the Court allows that to occur, the lower courts should be given the opportunity to consider that burden on religious exercise in light of *Mahmoud*.

CONCLUSION

The Court should grant rehearing and GVR in light of *Mahmoud*.

Respectfully submitted.

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