Nos. 06-15371, 06-15455, 06-15436

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION, *et al.*, HOPI TRIBE, and
HUALAPAI TRIBE, *et al.*,
Plaintiffs-Appellants

v.

UNITED STATES FOREST SERVICE,
NORA RASURE, Forest Supervisor, Coconino National Forest, and
HARV FORSGREN, Regional Forester, in their official capacities,
Defendants-Appellees

and

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,
Intervenor-Defendant-Appellee

FEDERAL APPELLEES' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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STATEMENT

The Federal Appellees respectfully petition for panel rehearing and rehearing en banc, pursuant to Fed. R. App. P. 35 & 40, and 9th Cir. R. 35-1. The panel's opinion in this case directly conflicts with the Supreme Court's opinions in *Bowen v. Roy*, 476 U.S. 693 (1986), *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and others, establishing that a government action can impose a "substantial burden" on religious exercise only when an individual is coerced to act contrary to his religious beliefs, or a government benefit is withheld or penalties imposed for acting in accordance with his religion. Indeed, the Supreme Court in *Lyng* specifically *rejected* the contention that the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) – which the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, was intended to restore and codify – applied to the very context at issue in this case: the government's use of or authorization of activities on its own land.

The panel's opinion in this case nonetheless permits plaintiffs to proceed under RFRA solely on the grounds that the proposed governmental action on its own land offends the plaintiffs' religious beliefs or may impact their religious practices. The panel invalidates a proposed government project because Plaintiffs believe that it will render their sacred mountain spiritually impure and weaken their

spiritual connection to the mountain as they conduct their prayers to it, often from miles away.

This decision also conflicts with this Court's prior application of RFRA's "substantial burden" test, *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), and creates a conflict with the D.C. Circuit, which previously reviewed similar free exercise claims brought by many of the same plaintiffs against an expansion of the the same ski area on a National Forest as is challenged in this case, *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983). This case should be reheard en banc to resolve these clear conflicts.

Moreover, the practical effect of the panel decision is of exceptional importance. The panel would impose rigorous compelling interest review on any government action when that action undermines a religious practitioner's belief in the purity of the lands affected, or his spiritual connection to those lands, even if he never even visits the affected property. This would unduly burden federal agencies charged with managing public lands. Much of the land in the American West is held sacred by religious practitioners, and the government cannot manage lands for the public interest generally based on potential offense to others' personal religious beliefs.

BACKGROUND

RFRA was enacted "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). The statute provides that:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(b). The "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." *Id.* at §§ 2000bb-2(4), 2000cc-5.

The Arizona Snowbowl ("Snowbowl") ski resort area lies just north of Flagstaff, Arizona, on the western flanks of the San Francisco Peaks. Snowbowl has been used as a ski area since 1938, and is located within the Coconino National Forest, managed by the United States Department of Agriculture, Forest Service ("Service"). Snowbowl is currently operated by the Intervenor-Appellee Arizona Snowbowl Resort Limited Partnership ("ASR") pursuant to a Special Use Permit ("SUP") issued by the Forest Service. (SER 0016.)

The Coconino Forest Plan designates the Snowbowl SUP area as an area where the Service should "emphasize developed recreation." (SER 0013.)[1/] Congress established a permitting system to encourage development of ski areas and facilities on National Forest System lands, 16 U.S.C. § 497b; 36 C.F.R. § 251.53(n), and the Forest Service now plays a "major role" in the provision of snow skiing opportunities nationwide. (SER 0013.)

In recent years, snowfall at Snowbowl has been sporadic, causing broad fluctuations in annual visitation and endangering Snowbowl's continued operation. (SER 1049.) The area has become increasingly popular, causing concerns about safety and overcrowding when it is open. As a result, ASR submitted a formal proposal in September 2002 to improve its facilities. (SER 0077.) The Forest Service consulted extensively with potentially affected tribes on the proposal, making more than 500 contacts with tribal members and holding between 40 and 50 meetings with the tribes. After reviewing the proposal pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, the Forest Supervisor issued a final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") in February 2005 authorizing the selected alternative, including

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[1/] "SER" refers to the Supplemental Excerpts of Record filed jointly by the Federal Appellees and ASR.

all of ASR's proposal except for night lighting. (SER 0559-1083.)

The authorized project included the use of reclaimed waste water for artificial snowmaking. The making of artificial snow would permit Snowbowl to substantially increase the number of days per season that it could stay open. The Service approved the use of Class A-plus water, the highest quality of reclaimed waste water categorized by the Arizona Department of Environmental Quality. This reclaimed water is heavily treated, *see* SER 0764–65, and is approved by the State for snowmaking as well as for "schoolground landscape irrigation," "irrigation of food crops," and other beneficial uses. Ariz. Admin. Code R18-11-309 Tbl. A.

Plaintiff tribes and environmental groups filed suit in the United States District Court for the District of Arizona. After an 11-day bench trial on RFRA issues, the district court found that Plaintiffs "failed to present any objective evidence that their exercise of religion will be impacted by the Snowbowl upgrades," and that the decision "does not bar Plaintiffs' access, use, or ritual practice on any part of the Peaks." *Navajo Nation v. Forest Serv.*, 408 F. Supp. 2d 866, 905 (D. Ariz. 2006). Plaintiffs provided no evidence that the decision would impact any religious ceremony, gathering, pilgrimage, shrine, or any other religious use of the Peaks. *Id.* at 889-92, 895-96. The district court concluded that

the Snowbowl Project did not "substantially burden" Plaintiffs' exercise of religion. *Id.* at 906. The district court also granted summary judgment to the Service and ASR on Plaintiffs' numerous NEPA claims.

The panel reversed in relevant part, holding that the Service's approval of the use of reclaimed water violated both RFRA and NEPA.[2/] The panel did not overturn any of the district court's factual findings, but nevertheless found a "substantial burden" on the Plaintiffs' religious exercise because Plaintiffs believed that their prayers to the Peaks would no longer be answered if the Snowbowl project went forward. *See, e.g.,* Slip op. at 2862. The panel discusses at length the testimony of several Plaintiffs to support its holding, but not one of those Plaintiffs testified that he went to or gathered materials from the Snowbowl area for religious purposes. *Id.* at 2846-62. The panel did not find that the project would actually contaminate any religious resources or sacred areas, *id.* at 2858, but relied instead on testimony that, to certain practitioners, the Snowbowl project would be "something you can't get out of your mind when you're sitting there praying" to

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[2/] The Federal Appellees disagree with the panel's application of NEPA and invalidation of the FEIS with respect to the evaluation of the use of reclaimed water, but do not seek panel rehearing or rehearing en banc on this issue. Because the panel's reversal of the judgment after trial on the RFRA issue prevents the Snowbowl project as proposed from going forward regardless of additional NEPA review on remand, rehearing or rehearing en banc is appropriate.

the mountain. *Id.* at 2860.

ARGUMENT

I. The Panel's Expansion of RFRA Conflicts with Supreme Court Precedent

A. Supreme Court Precedent Holds that a "Substantial Burden" Must Coerce an Individual into Violating His Religion or Penalize a Religious Exercise

To establish a *prima facie* case under RFRA, a plaintiff must show that the challenged government action imposes a "substantial burden" on religious exercise. Only if the plaintiff first makes such a showing does the statute require a compelling interest and a demonstration of least restrictive means. 42 U.S.C. § 2000bb(b).

A long line of Supreme Court precedent establishes that governmental actions can impose a "substantial burden" on religious exercise only in a circumscribed set of circumstances. The Supreme Court has found a substantial burden only when individuals were pressured to act contrary to their religious beliefs, or choose between following the tenets of their religion and receiving a government benefit or facing criminal sanctions. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (burden exists when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and

abandoning one of the precepts of her religion * * * on the other"); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (burden exists when government action forces individuals to choose between criminal sanctions and "acts undeniably at odds with fundamental tenets of their religious beliefs"); *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) (burden is "substantial" when government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (same).

The Supreme Court has explicitly rejected the idea that spiritual injury from the Government's own actions may constitute a "substantial burden" for purposes of free exercise challenges (and therefore, for purposes of RFRA). In *Bowen v. Roy*, 476 U.S. 693 (1986), two applicants for welfare benefits challenged a federal statute requiring the States to use Social Security numbers in administering certain welfare programs. The plaintiffs contended that using a Social Security number to identify their 2-year-old daughter would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." *Id.* at 696. Recognizing that its Free Exercise Clause cases had always been about the government acting *upon an individual* to constrain, limit, or prohibit that individual's religious exercise, the Court held that it had never "interpreted the First Amendment to require the

Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 699. The Court held that, despite the serious harm that Roy believed would occur, Roy could "no more prevail on his religious objection to the Government's use of a Social Security Number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Id.* at 700.

The Supreme Court reaffirmed that principle in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). In that case, a number of Indians challenged the Service's approval of construction of a road through a section of National Forest System land in California. *Id.* at 442. The affected area was "significant as an integral and indispensable part of Indian religious conceptualization and practice." *Id.* Its spiritual value to the plaintiffs depended on "privacy, silence, and an undisturbed natural setting," and a Forest Service study concluded that construction of a road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.* It was undisputed that construction of the road would have "severe adverse effects on the practice of their religion." *Id.* at 447.

Nevertheless, the Supreme Court held that the government's project on its

own land did not burden the Indian plaintiffs' exercise of religion in the sense necessary to require the government to advance a compelling interest to justify its action. *Id.* In so holding, the Court relied on *Roy*, finding the two cases analogous. *Id.* at 449. Even though the Government's proposed actions on National Forest System lands "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," *id.* at 449, the government project did not substantially burden the plaintiffs' free exercise of religion. "Incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not require the application of the compelling interest test. *Id.* at 450-51.

Most importantly for the present case, in *Lyng* the Supreme Court categorically rejected the application of the compelling interest test to the government's management of its own land. "Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453 (emphasis in original). The Court rejected the "religious servitude" the plaintiffs sought over the National Forest because "such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." *Id.*

Roy and *Lyng* remain controlling, following the enactment of RFRA. Congress expected "that the courts will look to free exercise cases decided prior to [*Employment Div., Dept. of Human Res. of Oregon v.*] *Smith*[, 494 U.S. 872 (1990)] for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. 103-111 at 8-9 (1993). The text of RFRA itself establishes that its purpose is to "restore the compelling interest test" set out in *Sherbert* and *Yoder*, 42 U.S.C. § 2000bb(b), and *Lyng* makes clear that *Sherbert* and *Yoder* did *not* require a compelling interest in a case involving the government's management of its own property. 485 U.S. at 452 (describing the plaintiffs' position as a "proposed extension of *Sherbert* and its progeny" and holding that "the analysis in *Roy* . . . offers a sound reading of the Constitution.").

Congress enacted RFRA on the understanding that *Sherbert* and *Yoder* do not trigger the compelling interest test in the precise context of this case and that *Roy* and *Lyng* would continue to control. Thus, the Senate Report states that "pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." S. Rep. 103-111, at 9 & n. 19 (citing *Roy* and *Lyng*). Thus, the panel's holding that "*Lyng* does not control the result in this case," slip op. at 2869, is plainly incorrect, and contrary to the express text and

legislative history of RFRA.

The panel attempts to distinguish *Lyng* on the ground that "it is easier for a plaintiff to prevail in a RFRA case than in a pure free exercise case." (Slip op. at 2870.) The panel cites what it regards as RFRA's broader definition of "exercise of religion," as well as the inclusion of a least restrictive means component in the compelling interest test. *Id.* Those distinctions are irrelevant to the threshold inquiry of whether the government action imposes a "substantial burden." The panel also claims that *Lyng* is dependent on the First Amendment's use of the term "prohibited," and that a "burden" is something less than a prohibition. *Id.* However, *Lyng* clearly evaluates the impact of the challenged agency action in terms of its "burden" on the plaintiff's exercise of religion, 485 U.S. at 447, consistent with the Supreme Court's longstanding practice of construing "prohibit" to mean the imposition of a "burden" on religious exercise. *See Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert*, 374 U.S. at 403, 404, 408. Congress's addition in RFRA of the modifier "substantial" hardly counsels in favor of the panel's significantly broader definition of religious "burden." *Lyng* thus controls this case.

The panel also sought to distinguish *Lyng* on the ground that "Appellants in this case do not seek to prevent use of the Peaks by others." (Slip op. at 2870.) But that was also true in *Lyng*. And as in *Lyng*, while Plaintiffs did not advocate elimination of all human activity except theirs in the area in question on this particular appeal, "[n]othing in the principle for which they contend . . . would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands." 485 U.S. at 452-53. It would require only that a religious practitioner believe that any human activity anywhere on the Peaks is a desecration. Indeed, some of the Plaintiffs testified in this case that they opposed any development at all at Snowbowl and that it should be shut down completely. *Navajo Nation*, 408 F. Supp. 2d at 900.

Although the Supreme Court in *Lyng* noted that the project there had been tailored to minimize its impact on the plaintiffs' religious beliefs or practice, that discussion was not part of the Court's Free Exercise Clause ruling, which held categorically that a compelling governmental interest is not required to justify the government's use (or authorization of use by others) of its own land, even though the government's action may have a severe impact on religious beliefs and practices of private individuals. *See* 485 U.S. at 448-53. Rather, the passages in

Lyng the panel cited were part of a separate portion of the Court's opinion in which it stressed that its constitutional holding should not be understood to discourage voluntary accommodations by the government, which had occurred in that case. *See id.* at 453-55.

B. The Panel's Opinion Conflicts Directly with Supreme Court and Ninth Circuit Precedent

The panel's opinion is contrary to the Supreme Court's holding in *Lyng* that a government action involving the use of its own land does not "substantially burden" individuals' exercise of religion because the individuals are not "coerced by the Government's action into violating their religious beliefs," unless the "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. at 449. Moreover, in this case, aside from the absence of any coercion or penalizing of religious activity, the Plaintiffs are free to continue the various practices described by the panel's opinion, all of which occur outside the Snowbowl area using resources gathered from outside the Snowbowl area. *Navajo Nation*, 408 F. Supp. 2d at 899-92, 895-96. The panel did not find error with any of the district court's factual findings to this effect. In fact, the approved project included provisions to ensure that religious practitioners would have continuous access to

the 777-acre SUP area (as well as the approximately 74,000 remaining acres of the Peaks) for religious purposes. (SER 0963.) Just as in *Roy* and *Lyng*, the proposed action of the government on its own land may be offensive to the religious believers who challenge it or affect their religious experience in using or deriving spiritual value from the government's land, but that does not establish a "substantial burden" on their religious exercise under the Free Exercise jurisprudence codified in RFRA.

Prior to the present case, this Court's own case law has followed that of the Supreme Court, holding that

> a statute burdens the free exercise of religion if it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas*[, 450 U.S. at 718], including when, if enforced, it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld v. Brown*, 366 U.S. 599, 605 [. . .] (1961). A substantial burden must be more than an "inconvenience." *Worldwide Church* [*of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000)].

Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002). Although the panel's opinion cites this statement of the law, the panel's recitation omits the critical aspect of the rule that a "substantial burden" must force the religious adherent to violate his beliefs or be penalized for his religious practice. (Slip op. at 2845.)

C. The Panel's Opinion Specifically Conflicts with the D.C. Circuit on the Precise Issue of "Burden" Raised Here

The panel's opinion cannot be reconciled with *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), in which a number of Indian plaintiffs challenged a 1979 EIS and ROD approving an upgrade and expansion of Snowbowl. The plaintiffs argued in that case that "development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes." *Id.* at 740. Additionally, "development would seriously impair their ability to pray and conduct ceremonies upon the Peaks." *Id.* The D.C. Circuit applied the compelling interest test of *Sherbert*, the same test that Congress expressly incorporated into RFRA, and concluded that the Snowbowl project did not burden the tribes' exercise of religion. "The construction approved by the Secretary is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exercise claim under *Sherbert*, *Thomas*, or any other authority." *Id.* at 741-42.

II. The Panel's Expansion of RFRA Presents an Issue of Exceptional Importance for Federal Land Management Agencies

The panel's abrupt departure from precedent is of exceptional importance. It

will require federal land management agencies to justify a great number of proposed actions with a compelling governmental interest and demonstrate that the action is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). This test "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). And, requiring federal land management agencies to determine whether a proposed action complies with RFRA using the panel's standard will be unworkable. "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng*, 485 U.S. at 451.

Approximately 122 million acres of National Forest System land, or 64% of the total system, lie within the boundaries of the Ninth Circuit. The Circuit also contains large percentages of land managed within the National Park System, as well as land managed by the Bureau of Land Management. The Southwestern Region of the Forest Service consults with tribes on 900 to 1,000 projects each year, and in Arizona and New Mexico alone there are at least 40 to 50 mountains held sacred by tribes. *Navajo Nation*, 408 F. Supp. 2d at 897. The Navajo consider the entire Colorado River basin to be sacred, and the Service has

inventoried at least 40,000 shrines, gathering areas, pilgrimage routes and prehistoric sites in the Southwestern Region, all of which are held sacred. *Id.* at 897-98. The panel's holding that use of reclaimed water on only one-quarter of one percent of the Peaks injures the whole of the Peaks and imposes a substantial burden on religious exercise has extraordinary implications for the management of other large tracts of public lands. Moreover, although this case involves claims by Indian tribes, the provisions of RFRA on which the panel relied are of general application. The panel's decision therefore exposes federal land management agencies to a requirement to show a compelling interest for actions affecting a location on public lands that any individual holds sacred or utilizes in his or her religious practice.

It is precisely for these reasons that the Supreme Court rejected the imposition of a "religious servitude" over public lands in *Lyng*. *Id.* at 452. Previously, the government's administration of its own affairs (including construction projects on National Forests) did not constitute a substantial burden triggering application of the compelling interest test, even if the project had severe effects on a person's religious beliefs or practice. *See, e.g.*, *Lyng*, 485 U.S. at 453. In a situation where the public lands in question are considered sacred by an individual, the panel's opinion could permit RFRA challenges to routine land

management decisions and actions such as permitting grazing, timber harvest, road construction, reforestation, fire management, or recreation, and require a compelling interest and a least restrictive means analysis for such activities. Congress explicitly preserved this aspect of *Lyng* in enacting RFRA to prevent just such a situation. S. Rep. 103-111 at n. 19 (1993).

CONCLUSION

Federal Appellees request that this petition for panel rehearing and request for rehearing en banc be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing and petition for rehearing en banc is:

☒ Proportionally spaced, has a typeface of 14 points or more and contains 4,137 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2007, I served one copy of the foregoing Federal Appellees' Petition For Rehearing or upon each of the following counsel of record by electronic mail and by First-Class U.S. Mail, postage prepaid, addressed to:

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ADDENDUM