No. 21-15295

In the United States Court of Appeals for The Ninth Circuit

APACHE STRONGHOLD,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. 2:21-cv-00050-PHX-SPL
Hon. Stephen P. Logan

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Apache Stronghold represents that it has no parent entities and issues no stock.

Dated: September 6, 2022

/s/ Luke W. Goodrich

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STATEMENT

This case involves the planned destruction of Oak Flat, a sacred site that has been the center of Apache religious worship for centuries. Plaintiff challenged Oak Flat's destruction under the Religious Freedom Restoration Act (RFRA), which requires strict scrutiny of any federal action that "substantially burdens" religious exercise.

Acknowledging "conflicting out-of-circuit cases," a divided panel held that destroying Oak Flat doesn't substantially burden Plaintiff's religious exercise, because "substantial burden" is a "term of art" that encompasses "only two" types of burdens—imposing penalties or denying benefits. Because destroying Oak Flat doesn't impose penalties or deny benefits, the panel said, it isn't a substantial burden—even though it makes it "'impossible' for [Plaintiff] to worship on Oak Flat."

Judges Berzon (at the panel stage) and Bumatay (at the emergency-injunction stage) issued separate dissents, explaining this reasoning not only is "absurd," "disingenuous," "flawed," "illogical," and "incoheren[t]," but also conflicts with circuit and Supreme Court precedent.

First, multiple circuits, including this one, have held the government substantially burdens religious exercise not only when it imposes penalties or denies benefits, but also when it "prevents" religious exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.). And multiple circuits have rejected the panel's conclusion that RFRA imposes a different substantial-burden standard than its sister statute, RLUIPA.

Second, the Supreme Court has repeatedly recognized the government can substantially burden religious exercise without imposing penalties or denying benefits—such as when it destroys religious property, performs unwanted autopsies, or prevents a chaplain from praying with a prisoner. *Ramirez v. Collier*, 142 S.Ct. 1264, 1272 (2022); *Tanzin v. Tanvir*, 141 S.Ct. 486, 491 (2020). And contrary to the panel, the Court has held that undefined terms in RFRA must be given their "plain meaning," *id.*, and that RFRA doesn't "merely restor[e] … pre-*Smith* decisions in ossified form," but instead goes "far beyond what this Court has held" previously. *Burwell v. Hobby Lobby*, 573 U.S. 682, 706, 715 (2014).

Nor is the panel's decision required by *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), which allowed a ski resort to make artificial snow on a sacred mountain. As Judges Berzon and Bumatay explained, the only burden there was on plaintiffs' "subjective spiritual experience," so that opinion "did not reach the issue" of physical destruction.

Finally, the panel's ruling is exceptionally important. It is undisputed that Apaches have worshipped at Oak Flat for centuries, and the mine will destroy it—ending their religious practices forever. Beyond that, the panel's decision guts RFRA for *all* Native Americans in this Circuit—blowing a gaping hole in this Nation's promise of religious liberty for all. That amply merits rehearing.

BACKGROUND

A. The Apaches and Oak Flat

Since before recorded history, Western Apaches and other tribes have worshipped at Oak Flat—a 6.7-square-mile sacred site in present-day Arizona. Oak Flat is the unique dwelling place of spiritual beings called Ga'an, who are "the very foundation of [Apache] religion." 3-ER-358; 2-ER-67. Thus, Oak Flat is the site of key religious "ceremonies that must take place there" and cannot be "relocated." 2-ER-67, 227; Br.9-13 (describing ceremonies).

The Government has long recognized Oak Flat's significance. Oak Flat has been reserved for "public purposes" and protected from mining for almost 70 years. 20 Fed. Reg. 7319, 7336-37 (Oct. 1, 1955). And it is listed in the National Register of Historic Places "as a sacred site, … source of supernatural power, and … staple in [Western Apaches'] traditional lifeway." Br.16.

B. Oak Flat's Planned Destruction

In 2014, congressional supporters of Resolution Copper, a mining company, attached a rider to a must-pass defense bill, authorizing transfer of Oak Flat to Resolution Copper for a copper mine. P.L.113-291 §3003(b)(2), (4), (c)(1), (8), (d). The rider directs the Secretary of Agriculture to "prepare a single [final] environmental impact statement" (FEIS) for the "proposed mine," and then "convey all right, title, and interest" in

Oak Flat to Resolution Copper within "60 days" of publishing the FEIS. *Id.* §3003(c)(9), (10).

The FEIS was published on January 15, 2021. It acknowledges the mine will cause "immediate, permanent, and large[-]scale" destruction of "archaeological sites, tribal sacred sites, [and] cultural landscapes," 3-ER-343, which is "an indescribable hardship to [Native] peoples." 3-ER-274. Waste from the mine will "permanently bury or otherwise destroy many prehistoric and historic cultural artifacts" and "human burials." 3-ER-281. And Oak Flat itself will collapse into a massive crater nearly 2 miles across and 1,100 feet deep. 3-ER-282.

According to the FEIS, "[m]itigation measures cannot replace or replicate the tribal resources and traditional cultural properties that would be destroyed." 3-ER-374. Oak Flat will be destroyed, and core Apache religious practices will end forever. 2-ER-67, 70, 124, 133, 147; Br.20-22.

C. Proceedings Below

Plaintiff sued on January 12, 2021, alleging that the transfer and destruction of Oak Flat violates (*inter alia*) RFRA.

The district court denied a request for a preliminary injunction. It acknowledged that "[t]he spiritual importance of Oak Flat to the Western Apaches cannot be overstated," and "the burden imposed by the mining activity in this case is much more substantive and tangible than that imposed in *Navajo Nation*." 1-ER-12, 17. Nevertheless, it found no "substantial burden." 1-ER-17.

D. Proceedings on Appeal

With the land transfer occurring in sixteen days, Plaintiff asked this Court for an emergency injunction pending appeal. Six hours before responding, the Government rescinded the FEIS and paused the transfer, stating it needed "additional time" to "understand concerns raised by [the] Tribes." Op.14. The Government then argued the harm was no longer "imminent." Dkt.18-1.

A divided motions panel denied emergency relief. The majority reasoned that because the Government wouldn't transfer Oak Flat until "after publication of a new FEIS, which will take 'months,'" Plaintiff "has not shown that it 'needs relief within 21 days.'" Dkt.26 at 1-2.

Judge Bumatay dissented, concluding that "Apache Stronghold has established a strong likelihood of success on the merits." *Id.* ("Bumatay Op.") at 7. He noted that under RFRA, "a substantial burden exists when the government 'prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.'" *Id.* at 8 (quoting *Yellowbear*, 741 F.3d at 55 (Gorsuch, J.)). Here, the transfer and destruction of Oak Flat would render Apaches' "core religious practices impossible"—making this an "obvious substantial burden." *Id.* at 4, 9, 11.

After briefing and argument, a divided panel rejected the RFRA claim, finding "no substantial burden." Op.26.

The majority didn't dispute that destroying Oak Flat would be a substantial burden under RFRA's "plain meaning." Op.30. Instead, invoking

Navajo Nation, it held that "substantial burden" is a "term of art" that "restored" the "substantial burden 'inquiry'" from "two cases": *Sherbert v. Verner*, 374 U.S. 398 (1963), which involved "denying government benefits on account of religion," and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which involved "imposing a government penalty on account of religion." Op.27, 19. According to the majority, these "two specific qualitative burdens—denying a benefit or imposing a penalty— … together form the complete universe of 'substantial burdens' under RFRA." Op.31. "Hence," the destruction of Oak Flat "imposes no substantial burden," "even if [it] makes worship on Oak Flat 'impossible.'" Op.26.

Judge Berzon dissented, calling this analysis "absurd," "disingenuous," "flawed," "illogical," and "incoheren[t]." Op.58, 60, 63, 75. She agreed the Government can substantially burden religious exercise by imposing penalties or denying benefits. Op.61-62. But it can also "directly prevent religious exercise" by "preventing access to religious locations and resources"—which is an even "*greater* burden." Op.63, 71.

Here, "there is no doubt that the complete destruction of Oak Flat would be a 'substantial burden.'" Op.77. Apaches "have been using Oak Flat as a sacred religious ceremonial ground for centuries." Op.78. The site "is not fungible." *Id.* And the FEIS admits it will be "destroyed." *Id.* Thus, "'[t]he Western Apaches' exercise of religion at Oak Flat will not be burdened—it will be obliterated.'" Op.79 (quoting Bumatay Op.9). And

because the Government has not even "attempted to satisfy the compelling interest test," "Apache Stronghold is likely to succeed on the merits of its RFRA claim." Op.79-80.

ARGUMENT

I. The panel's decision conflicts with decisions of this Court and other circuits on the meaning of substantial burden.

1. The panel said "'substantial burden' is 'a term of art'" applying "in two—and only two—circumstances:" when the government "imposes a penalty" or "denies a benefit." Op.20, 25, 33. But this squarely conflicts with decisions of this and other circuits, which have repeatedly found a substantial burden absent any penalty or denial of benefits. Op.69 (Berzon, J., dissenting); *see also* Bumatay Op.8.

In *Johnson v. Baker*, for example, this Court held a prison substantially burdened religious exercise when it prevented the plaintiff from obtaining prayer oil. 23 F.4th 1209 (9th Cir. 2022). *Contra Apache*, this Court said "[o]ur precedent shows that we do not take a narrow view of what constitutes a 'substantial burden.'" *Id.* at 1215. "Lesser restrictions," such as "threaten[ing] punishment,'" can qualify. *Id.* But "[o]f course, when a regulation outright bans religious exercise, it amounts to a substantial burden." *Id.* (cleaned up); *see also Jones v. Slade*, 23 F.4th 1124 (9th Cir. 2022) (excluding religious texts from prison was substantial burden absent penalty or denial of benefits); Op.70-71 (Berzon, J., dissenting) (collecting in-Circuit land-use cases to same effect).

Other circuits agree. In *Haight v. Thompson*, the Sixth Circuit held a prison substantially burdened Native Americans' religious exercise when it declined to provide ceremonial foods at their annual powwow. 763 F.3d 554, 564-65 (6th Cir. 2014). The prison neither imposed a penalty nor denied a benefit; it simply "*barred* access to the foods altogether." *Id.* at 565. But as Judge Sutton explained: "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Id.*

Likewise, in *In re Young*, the Eighth Circuit held church members suffered a substantial burden when, after they filed for bankruptcy, the trustee sought to recover money they had donated to their church. 82 F.3d 1407, 1418 (8th Cir. 1996). The bankruptcy court didn't subject the debtors to penalties or deny benefits; it simply allowed the trustee to recover donations *from their church*. Nevertheless, the Eighth Circuit found a substantial burden under RFRA, because recovering donations would "effectively prevent the debtors from tithing" for that year. *Id.* at 1418.

And in *Yellowbear*, the Tenth Circuit held a prison substantially burdened a Native American's religious exercise by denying him access to the prison's sweat lodge. 741 F.3d at 55. Then-Judge Gorsuch explained that the government can, of course, substantially burden religious exercise by putting a plaintiff to the "choice" of forgoing religious exercise or else losing a "benefit" or suffering a "penalty." *Id.* at 56. But there, the prison gave the plaintiff no "degree of choice in the matter"; it simply

"prevent[ed] the plaintiff from participating in [a religious] activity"—which "easily" qualifies as a substantial burden. *Id.* at 55-56.

These cases can't be reconciled with the panel's result here. It is undisputed that the destruction of Oak Flat will "prevent" Plaintiffs from engaging in their core religious practices—which "easily" and "of course" sufficed in *Johnson*, *Jones*, *Yellowbear*, *Young*, and *Haight*.

Nor do we have to wonder if this case would come out differently elsewhere, because a court in the Tenth Circuit already addressed an indistinguishable case and reached the opposite result. In *Comanche Nation v. United States*, Native Americans challenged the Army's plan to build a warehouse on "the precise location" where they worshipped. No. 08-cv-849, 2008 WL 4426621, at *7, *17 (W.D. Okla. Sept. 23, 2008). Although the Army "urge[d] the Court to adopt a definition [of 'substantial burden'] applied by the Ninth Circuit," the court refused, stating "[t]he Tenth Circuit has not adopted that definition." *Id.* at *3 n.5. Instead, the court held that authorizing the construction "amply demonstrates" a "substantial burden." *Id.* at *17. Nor are these cases alone. *See* Br.38-39 (collecting cases).

2. In response, the panel called *Johnson*, *Jones*, and other in-Circuit decisions "unpersuasive." Op.37 & n.15. And it admitted there are "conflicting out-of-circuit cases." Op.37 n.13. It tried to distinguish them by saying they "interpret not RFRA but RLUIPA instead." Op.37. But this

is mistaken; several conflicting cases (like *Young* and *Comanche Nation*) *do* interpret RFRA.

In any event, the RLUIPA distinction only exacerbates the circuit split. RFRA and RLUIPA have materially identical "substantial burden" language. *Compare* 42 U.S.C. §2000bb-1(a) *with*, *e.g.*, §2000cc-1(a). And the Supreme Court has described the two as "sister statute[s]" imposing "the same standard." *Holt v. Hobbs*, 574 U.S. 352, 358 (2015). Accordingly, six other circuits have rejected the majority's conclusion that RFRA and RLUIPA impose different substantial-burden standards, and the panel cited *none* going the other way. *See* Reply Br.9 n.2 (collecting cases).

Thus, there is no escaping that the panel opinion directly conflicts with other circuits. Only here do prisoners (governed by RLUIPA) enjoy greater religious freedom than law-abiding Native Americans. And in this Circuit, RFRA permits tribal sacred sites to be destroyed with impunity, while elsewhere strict scrutiny would apply. Indeed, since some of the largest Indian reservations span the Ninth and Tenth Circuits, Native Americans living *on the same reservation* are subject to different RFRA standards.

II. The panel's decision conflicts with Supreme Court precedent and is gravely mistaken.

The panel decision also conflicts with Supreme Court precedent. Op.64-67, 74-75 (Berzon, J., dissenting).

1. First, the Supreme Court has repeatedly held that when Congress doesn't define a statutory term, courts generally give that term "its ordinary or natural meaning." *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S.Ct. 2172, 2176-77 (2021). In *Tanzin v. Tanvir*, the Supreme Court applied this rule to RFRA, holding that when RFRA leaves a phrase undefined (like substantial burden), courts must apply "the phrase's plain meaning." 141 S.Ct. at 491. That's precisely what this Court has done with "substantial burden" in RLUIPA—defining the "plain meaning" of substantial burden as "a 'significantly great' restriction or onus on 'any exercise of religion.'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). And under that definition, the substantial burden here is "obvious." Bumatay Op.4, 7-8. Yet the panel here expressly rejected the "plain meaning" adopted in *San Jose* and simply ignored the holding of *Tanzin*.

2. Instead, citing *Navajo Nation*, the panel said "substantial burden" in RFRA is a "term of art" limited to the "same two burdens" in the pre-*Smith* cases of *Shebert* and *Yoder*. Op.27. But as Judge Berzon explained, "[r]ecent Supreme Court cases" are "clearly irreconcilable" with this holding. Op.74.

For one thing, in *Burwell v. Hobby Lobby*, the Supreme Court considered the same argument—that RFRA was "limited to situations that fall squarely within the holdings of pre-*Smith* cases." 573 U.S. at 706 n.18. Yet the Court rejected it as "absurd," explaining RFRA did not "merely

restore[] … pre-*Smith* decisions in ossified form" but rather "provide[s] very broad protection for religious liberty" "far beyond what th[e] Court has held" previously. *Id.* at 682, 693, 706, 715.

And the Supreme Court has repeatedly recognized substantial burdens outside the panel's two-category framework. Just last Term, in *Ramirez*, a Texas prisoner asked that his pastor be allowed "to pray with him and lay hands on him" during his execution. 142 S.Ct. at 1272. Texas didn't impose penalties or deny benefits based on this practice; it simply forbade it. Yet the Court held the prisoner was "likely to succeed in showing that Texas's policy substantially burdens his exercise of religion." *Id.* at 1278. As Judge Berzon said, the panel's ruling "cannot be squared with" *Ramirez*. Op.74-75; *see also* Op.64-67 (collecting conflicting pre-*Smith* cases).

Similarly, in *Tanzin*, the Court cited as examples of "RFRA violations" the "destruction of religious property" or performance of unwanted autopsies—neither of which involve imposing penalties or denying benefits. 141 S.Ct. at 492. The majority here offered no distinction of these examples; it simply dismissed them as a "choice of cases in a string citation." Op.42-43. "But when the Court speaks, we should take notice"—not "blandly shrug [it] off" as "dicta." *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1067 (9th Cir. 2020).

3. Unable to square its position with text or precedent, the panel disclosed the "practical basis" driving its reasoning: following RFRA would

make it too hard "to manage federal lands," giving Native Americans a "veto" over land-use decisions. Op.24, 45. But "Congress has determined that courts should" apply RFRA as written, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 439 (2006), not second-guess the "wisdom of [its] judgment," *Hobby Lobby*, 573 U.S. at 735-36.

In any event, this policy concern is misplaced. To hold destruction of a religious site a substantial burden wouldn't give Native Americans a "veto" over federal land-use decisions; it would simply trigger "the second step of the analysis, the compelling interest test." Op.76 (Berzon, J., dissenting). That's the step "for airing and resolving conflicts between the interests of religious adherents and those of others in society"—and it's hardly "an automatic loss for the government." Op.77; *see, e.g.*, *United States v. Christie*, 825 F.3d 1048, 1056-64 (9th Cir. 2016) (government satisfied RFRA's "demanding test").

If anything, the *majority's* approach creates "practical" problems. If the Government simply places "No Trespassing" signs at Oak Flat, backed by fines, it imposes a substantial burden—but not if it obliterates the site. *See* Op.79 n.6 (Berzon, J., dissenting). Indeed, the Government can inflict any number of extreme burdens without imposing penalties or denying benefits—from confiscating religious relics, to withholding the remains of deceased relatives, to forcibly removing religious clothing. Barclay & Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1332 (2021). Even endangered animals fare better

than Native Americans: If a mine would render an endangered fish extinct, it couldn't proceed no matter the Government's interest. *Cf. Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (stopping Tellico Dam). But if a mine would render the Apache way of life extinct, the government need offer no justification at all. This interpretation of RFRA is perverse.

III. The panel's decision drastically overreads *Navajo Nation*.

1. The panel said (and the Government no doubt will say) its interpretation of RFRA is just a straightforward application of *Navajo Nation*. *See* Op.18. Not so. As Judges Bumatay and Berzon explained, *Navajo Nation* "is … of little help here," Bumatay Op.11, because it "did not involve a situation" where "the government objectively and severely interfered with a plaintiff's access to religious locations or resources," Op.72.

The challenged action in *Navajo Nation* was the use of recycled wastewater in making artificial snow on a sacred mountain. This didn't prevent practitioners from "continu[ing] to pray, conduct their religious ceremonies, [or] collect plants for religious use." 535 F.3d at 1063. And "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies" were "physically affected." *Id.* Rather, "the sole effect of the artificial snow [was] on the Plaintiffs' subjective spiritual experience": they said the mountain would be "spiritually contaminated," diminishing their "spiritual fulfillment"—which the Court held insufficient. *Id.* at 1063-64; *see also id.* at 1070 n.12 ("[T]he burden … can only be expressed … as damaged spiritual feelings.").

Here, Plaintiffs aren't claiming spiritual contamination, "desecration" or a "decrease [in] spiritual fulfillment" from religious exercises they're otherwise free to carry out. *Cf. id.* at 1064, 1070. They *can't* carry out their religious exercises, because—as everyone agrees—the site will be destroyed. It's as if, rather than spraying water on a mountain near the *Navajo Nation* plaintiffs' ritual site, the Government obliterated the entire site.

Yet *Navajo Nation* made clear such a case would present a different question. The Court said "the sole question" there was "whether a government action that affects only subjective spiritual fulfillment 'substantially burdens' the exercise of religion." *Id.* at 1070 n.12. And it said burdens "'short of'" threatened penalties or withheld benefits don't count—suggesting a "greater burden" (like objective impossibility) *would* be "actionable," Op.59, 71 (Berzon, J., dissenting). Indeed, if *Navajo Nation* meant to equate spiritual contamination with physical destruction, then vast swaths of the opinion—including at least *twenty* references to the purely "subjective, emotional" nature of the claimed burden, *e.g.*, 535 F.3d at 1070—would be entirely unnecessary. *Cf. United States v. Antoine*, 318 F.3d 919, 923-24 (9th Cir. 2003) (assuming "raz[ing]" a "house of worship" would be a substantial burden).

The only way this case *could* be controlled by *Navajo Nation* is if that case's real holding is that federal land-use decisions are simply exempt from RFRA. But that's a conclusion *Navajo Nation* explicitly declined to

adopt. *See* 535 F.3d at 1067 n.9. It's irreconcilable with RFRA's plain language, which applies to "*all* Federal law" and its "implementation." 42 U.S.C. §2000bb-3(a) (emphasis added). And it would devastate the religious exercise of Native Americans, whose sacred sites are disproportionately located on federal land because the federal government systematically took them. *See* Dkt.37, Amicus Br. of National Congress of American Indians *et al.* at 7-11.

This Court has thus never considered the issue in this case *en banc*. But if *Navajo Nation were* read to predetermine this case, then *Navajo Nation* itself should be reconsidered, for the reasons discussed above. Op.75 n.5 (Berzon, J., dissenting); *cf.* Bumatay Op.11 n.3.

2. Alternatively, the panel invoked the Supreme Court's decisions in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Op.22-23. But neither supports the panel's stilted reading of RFRA.

In *Bowen*, the plaintiffs objected to the government's use of Social Security numbers in its "internal affairs." 476 U.S. at 699. The government didn't prevent plaintiffs from engaging in any religious exercise. Op.73 (Berzon, J., dissenting).

In *Lyng*, the government authorized road construction near where Native Americans engaged in religious exercise. But the Court emphasized the Government "could [not] have been more solicitous" toward those practices. 485 U.S. at 454. The Government ensured "[n]o sites where

specific rituals take place [would] be disturbed." *Id.* And the Court noted that "a law prohibiting the Indian [plaintiffs] from visiting [their sacred sites] would raise a different set of constitutional questions." *Id.* at 453.

Here, far from being maximally "solicitous" of the Apaches' religious practices, *id.* at 454, the Government is being maximally destructive. Apache ritual sites won't just be "disturbed," *id.*, but destroyed. And Apaches won't just be prevented from "visiting" Oak Flat, *id.* at 453, it will be gone, forever. *See* Op.73 (Berzon, J., dissenting) (distinguishing *Lyng*).

IV. The panel's decision is exceptionally important.

The panel's decision isn't just wrong and contrary to Supreme Court and circuit precedent. It's also exceptionally important, confirming the need for *en banc* review.

1. It is undisputed that "the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries." 1-ER-12. And Oak Flat's destruction would "completely devastat[e] the Western Apaches' spiritual lifeblood," ending their religious way of life forever. 1-ER-13.

Nor is there any dispute over the destruction's scope. The Government's own FEIS says the destruction of Oak Flat will be "immediate, permanent, and large in scale." 3-ER-343. "Burials," "many prehistoric … artifacts," and "prehistoric petroglyphs" will be demolished. 3-ER-274; 3-ER-281; 3-FEIS B-16. The harms are described in the FEIS 66

times as "irreversible," 54 times as "irretrievable," and 61 times as "permanent." Br.82-94. The 1,329-acre crater left by the mine, nearly two-miles wide and over 1,000 feet deep, is large enough to swallow the entire Old City of Jerusalem—including the Temple Mount, wailing wall, Dome of the Rock, and the site of Jesus' crucifixion, burial, and resurrection—five times over. It would completely destroy the area used for essential Apache religious ceremonies.

2. Nor is the importance limited to Western Apaches' use of this particular sacred site—though that should suffice. The panel's opinion guts RFRA for *every* Native American sacred site in the Ninth Circuit—which contains by far the most Native Americans and the most federal land of any circuit.

In fact, "[t]his is a case of enormous importance … for all people and communities of faith." Dkt.38, Br. *Amici Curiae* of Jewish Coalition for Religious Liberty *et al.* at 1. Many traditions have "spaces that are of special religious significance"—and "[m]aking it impossible to observe one's faith by permanently destroying a holy site is the most substantial burden of all." *Id.* at 1, 3.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

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September 6, 2022

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1 this brief is prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains 4,082 words.

/s/ Luke W. Goodrich
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 6, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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