No. 21-35220

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEREDITARY CHIEF WILBUR SLOCKISH; CAROL LOGAN; CASCADE GEOGRAPHIC SOCIETY; MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE,

Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court
for the District of Oregon
No. 3:08-cv-1169
Hon. Marco Hernández

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 26.1(a) of the Federal Rules of Appellate Procedure, *amicus curiae* National Congress of American Indians states that it is an independent non-profit organization, with no parent corporation and no publicly held companies that own 10 percent or more stock in the organization.

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INTEREST OF *AMICUS CURIAE*[1]

The National Congress of American Indians (NCAI) submits this brief as *amicus curiae* in support of Plaintiffs' petition for rehearing. NCAI is the oldest, largest, and most representative organization of American Indian and Alaska Native tribal governments and their citizens. Its mission is to promote better education about tribal rights and improve the welfare of American Indians and Alaska Natives.

Among NCAI's top priorities is Native religious freedom, including preserving and protecting indigenous sacred sites and Native Americans' rights to access them. NCAI therefore has a strong interest in ensuring that Native religious exercise at sacred sites on federal land is protected under the Religious Freedom Restoration Act (RFRA).

SUMMARY OF ARGUMENT

This case asks whether Native Americans can sue the government under RFRA for destroying a centuries-old indigenous sacred site and artifacts on federal land. The panel dodged that question by dismissing the claims here as moot in an unpublished decision. But not only was

[1] All parties consent to the filing of this brief. No party or its counsel authored this brief in whole or in part, and no one other than *amicus* or its counsel made a monetary contribution to its preparation and submission.

that ruling wrong for the reasons Plaintiffs outline in their petition, it also failed to repudiate the lower court's grievous misreading of Circuit precedent in refusing to apply RFRA to the destruction of sacred sites.

Relying on this Court's decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), the district court denied Plaintiffs' RFRA claims because, in its view, demolishing their sacred site and artifacts did not "substantially burden" Plaintiffs' religious exercise. But the "sole question" in *Navajo Nation*—at least as the Court there understood it—concerned "government action that affects only subjective spiritual fulfillment"; in that case, a challenge to artificial snow on a sacred mountain. *Id.* at 1070 n.12. *Navajo Nation* cannot be extended to cases where, as here, the government prevents religious exercise altogether by destroying a place of worship.

In its briefing, the government also seizes on language in *Navajo Nation* that describes a "substantial burden" as forcing someone to violate their religious beliefs under threat of sanctions or the denial of government benefits. But in seeking to restrict substantial burden to those scenarios, the government's position misreads *Navajo Nation* and would produce senseless results.

If anything, sanction-benefit scenarios create a floor—not a ceiling—for defining a "substantial burden" under RFRA. After all, it is hard to imagine a more substantial effect on religious exercise than destroying a place of worship. Indeed, even the government hesitates to defend its position by conceding that use of force against worshippers or religious property, despite falling outside a sanction-benefit framing, "easily qualifies as a substantial burden." Answer Br. 36.

Finally, and more broadly, just as religious accommodations are required in analogous cases of passive government interference with religion, they should be required here. The federal government exerts coercive control over indigenous sacred sites across the country, including the site in this case. This is not a coincidence, but the result of deliberate policies spanning centuries to seize Native lands and subordinate Native culture.

Left to stand, the district court's approach would gut Native American religious freedom, undermine RFRA, and create perverse incentives for the federal government in its management of indigenous sacred sites. This Court should grant rehearing and reverse.

ARGUMENT

I. If RFRA scrutiny of government action means anything, it must encompass destruction of sacred sites and artifacts.

A. RFRA grants broad protection for religious exercise.

Congress enacted RFRA "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014); *see also Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (describing the protections of RFRA and its parallel statute, the Religious Land Use and Institutionalized Persons Act, as "expansive" and "capacious[]").

Notably, RFRA was adopted to repudiate *Employment Division v. Smith*, 494 U.S. 872 (1990), where, in a case involving Native American faith practice, the Supreme Court "virtually eliminated the requirement that the government justify burdens on religious exercise" from neutral government action. 42 U.S.C. § 2000bb(a)(4). In fact, RFRA's response to *Smith* is so expansive that it can require the government to "incur expenses in its own operations." *Hobby Lobby*, 573 U.S. at 730 (quoting RLUIPA's internal-operation expense duty, 42 U.S.C. § 2000cc-3(c), and applying it to a RFRA claim).

Finally, Congress stated that it passed RFRA in part 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)(1).

At no point, however, did Congress suggest that the "compelling interest test" described in *Sherbert* and *Yoder* applies only to the sort of burdens at issue in those cases—i.e., conditioning government benefits in *Sherbert*, 374 U.S. at 403, or imposing criminal sanctions in *Yoder*, 406 U.S. at 218. *Cf. Hobby Lobby*, 573 U.S. at 715-16 (noting "absurd" results "if RFRA merely restored this Court's pre-*Smith* decisions in ossified form"). Rather, RFRA's text makes clear that government action is subject to the "compelling interest" test wherever it "substantially burden[s] a person's exercise of religion." 42 U.S.C. § 2000bb-1(a).

B. Destroying indigenous sacred sites forces Native American faith practitioners to violate their beliefs.

RFRA's broad protections for religious liberty should extend to the type of government action here. Indeed, if "having a place of worship . . . is at the very core of the free exercise of religion," *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011), then destroying indigenous sacred sites and artifacts warrants

scrutiny under RFRA. To hold otherwise would create an illogical double standard that protects some religions but not others.

Known as *Ana Kwna Nchi Nchi Patat* ("Place of Big Big Trees"), the site here encompassed a "historic campground and burial ground," "old-growth Douglas firs and rare medicine plants," and "a sacred stone altar." Pet. 4. Like Native practitioners at sites across the country, Plaintiffs carried on the traditions of ancestors who knew and used this site for sacred purposes long before it became federal land. This was imperative to Plaintiffs' religious beliefs, which require them "to protect the site and engage in religious practices there, or else risk being 'banished to' the 'land of darkness' 'forever.'" Appellants' Br. 12.

In destroying the site, therefore, the government forced Plaintiffs to violate their beliefs by rendering their religious practices impossible. Plaintiffs' exercise of religion at their sacred site "[was not] burdened—it [was] obliterated." Order at 9, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting).

The sincerity of Plaintiffs' religious beliefs is undisputed, and to characterize their site as nothing more than rocks, trees, and earth is like calling a church nothing more than brick, wood, and plaster. *Ana*

Kwna Nchi Nchi Patat was "just as sacred as a white person's church." 5-ER-916. But had the government destroyed a church instead of an indigenous sacred site on federal land, it is hard to imagine Congress not considering that to be a substantial burden under RFRA.

According to this Court, the plain meaning of "substantial burden" is "a significantly great restriction or onus" on the exercise of religion. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). Similarly, this Court has found a substantial burden where the government "exerted substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006).

If RFRA's "text, logic, and precedent" mean anything, then physically forcing someone to violate their beliefs by destroying their place of worship and thus preventing their religious exercise warrants scrutiny under the statute. Pet. 17.[2]

[2] The claims in *Foursquare Gospel*, 673 F.3d 1059; *San Jose Christian College*, 360 F.3d 1024; and *Guru Nanak*, 456 U.S. 978 arose under RLUIPA. But that statute has the same "substantial burden" language and uses the "same standard" as RFRA. *See* Order at 8, *Apache Stronghold*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting) (quoting *Holt*, 574 U.S. at 358).

II. This Court must act to prevent further erosion of Native American religious practice in this Circuit.

A. *Navajo Nation* does not absolve the government from RFRA scrutiny when destroying indigenous sacred sites.

In *Navajo Nation*, federally recognized tribes sued the government under RFRA for permitting the use of fake snow on a sacred mountain. 535 F.3d at 1062-63. According to the Court, because the snow's "only effect" was on the plaintiffs' "subjective, emotional religious experience," it was not a substantial burden on religious exercise. *Id.* at 1070 & n.12.

But the burden here does not merely concern "the diminishment of spiritual fulfillment," as the Court in *Navajo Nation* put it. *Id.* at 1070.[3] Rather, it involves "the total devastation of a religious site." Order at 11, *Apache Stronghold*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting). Even if *Navajo Nation* holds that subjective harm is not a substantial burden under RFRA, the government's complete physical prevention of religious exercise—such as "pav[ing] over the entirety of"

[3] NCAI uses *Navajo Nation*'s framing in distinguishing the present case but disagrees in no uncertain terms with the characterization of the effects on religious exercise there as merely "subjective" or "emotional." *See* 535 F.3d at 1096-97 (Fletcher, J., dissenting) ("The majority's misunderstanding of the nature of religious belief and exercise as merely 'subjective' is an excuse for refusing to accept the Indians' religion as worthy of protection under RFRA.").

a sacred site—is an altogether different matter demanding scrutiny. *Id.* (quoting *Navajo Nation*, 535 F.3d at 1090 (Fletcher, J., dissenting)).

Indeed, the effects on religious practice that this Court in *Navajo Nation* stressed were not at issue there are the very effects here. Unlike the Court's view of the situation in *Navajo Nation*, in the present case "natural resources, shrines of religious significance, [and] religious ceremonies [were] physically affected;" "plants [were] destroyed;" "places of worship [were] made inaccessible;" and Plaintiffs can no longer "pray, conduct their religious ceremonies, [or] collect plants for religious use." 535 F.3d at 1063. By applying *Navajo Nation* to forbid RFRA scrutiny, therefore, the district court defied even that decision's self-understanding.

And the implications of the district court's reading of *Navajo Nation* are severe. Failing to recognize destruction as a substantial burden under RFRA would grant the government license to eviscerate without compunction sacred sites across the country, like draining the Medicine Lake Highlands in California, blockading the Kootenai Falls in Montana, or bulldozing the Blythe Geoglyphs in the Sonora Desert. The next time an indigenous sacred site on federal land gets in the

government's way, the district court's logic encourages nothing less than obliteration.

B. The government abuses this Court's reference in *Navajo Nation* to burdens involving only sanctions or benefits.

Seizing on descriptive language in *Navajo Nation*, the government argues that a substantial burden occurs "only when" someone is forced to violate their religious beliefs under threat of sanctions or the denial of government benefits. Answer Br. 30 (quoting *Navajo Nation*, 535 F.3d at 1069-70). But sanction-benefit scenarios at most set the floor—not the ceiling—for government action that triggers RFRA scrutiny, and for at least three reasons. Moreover, an interpretation of substantial burden limited to those scenarios produces absurd results.

First, the sanction-benefit framework referenced in *Navajo Nation* comes from the pre-RFRA First Amendment cases of *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963). As this Court has made clear, however, RFRA "provides a level of protection to religious exercise beyond that which the First Amendment requires." *Guam v. Guerrero*, 290 F.3d 1210, 1218 (9th Cir. 2002).

Second, although the Court in *Navajo Nation* stressed sanction-benefit situations in rejecting a supposed subjective-harm scenario, it

did so because it determined that the latter type of harm fell "*short of* that described by *Sherbert* and *Yoder*." 535 F.3d at 1069-70 (emphasis added). The government's reliance on a sanction-benefit framework in this case, therefore, has no bearing where, as here, the violation of religious liberty is *greater than* that in *Sherbert* and *Yoder*.

Third, and in any event, shoehorning *Navajo Nation*'s holding into its reference to sanction-benefit scenarios ignores the Court's insistence there that "the sole question" at issue was "whether a government action that affects only subjective spiritual fulfillment 'substantially burdens' the exercise of religion." *Id.* at 1070 n.12.

Finally, as for the implications of limiting substantial burden to sanctions or benefits, the government here physically forced Plaintiffs to violate their religious beliefs by preventing their religious expression. Whether RFRA applies should not turn on the distinction between installing a fence around a sacred site and demolishing it altogether.

As Plaintiffs point out, the Supreme Court held in *Yoder* "that imposing a $5 criminal fine on Amish families for violating compulsory schooling laws was a substantial burden" on religious exercise. Appellants' Br. 40. But under the government's reading of *Navajo*

Nation, Plaintiffs add, "forcibly rounding up Amish children and sending them to a public boarding school—as the Government did to Native American children in the 1800s—would not be." *Id.*

In response to this example and those involving destruction of religious property, even the government concedes that "[s]uch an exercise of coercive governmental power easily qualifies as a substantial burden." Answer Br. 36. But applying the government's rigid definition of substantial burden under RFRA, it's not clear how this is so, as Plaintiffs' examples involve neither threat of sanctions nor the denial of government benefits. The government cannot have it both ways.

C. *Lyng* and *Snoqualmie* are distinguishable.

In support of its argument, the government also invokes *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). There, the Supreme Court rejected a First Amendment challenge by Tribal Nations to a road and timber project on federal land that the Nations held as sacred. Additionally, the government cites *Snoqualmie Indian Tribe v. FERC*, where this Court refused to find a "substantial burden" under RFRA based on the impact of a hydroelectric project on the flow of a sacred waterfall. 545 F.3d 1207, 1213 (9th Cir. 2008).

Whatever their merits, however, *Lyng* and *Snoqualmie* are distinguishable.

Not only did *Lyng* arise before the passage of RFRA, the Supreme Court's rejection of the First Amendment claim there was rooted in a finding that the Tribal Nations still had the "ability to practice" their faith and access the site—however difficult, efficacious, or diminished that might be. 485 U.S. at 450, 452. In so finding, the Court stressed that the situation facing the Tribal Nations did not "tend to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450.

But the sort of physical destruction of sacred sites, artifacts, or burial grounds that took place at *Ana Kwna Nchi Nchi Patat* not only objectively precludes the "ability to practice" indigenous religion there, it also coerces affected practitioners—not to mention their progeny—to abandon that aspect of their faith precisely because that which was sacred no longer exists. Unlike in *Lyng*, the site here is unrecognizable and its physical remains are scattered, buried, and desecrated. There is nothing to access. There is nothing sacred remaining to venerate.

As for *Snoqualmie*, the plaintiffs there argued that the power-plant operation deprived them of "access to the Falls for vision quests

and other religious experiences, eliminate[d] the mist necessary for the Tribe's religious experiences, and alter[ed] the ancient sacred cycle of water flowing over the Falls." 545 F.3d at 1213. But the panel declined to apply RFRA because the project, in its view, "merely diminishe[d] the quality of an individual's religious experience." *Id.* at 1215 n.3.

But again, the obliteration of indigenous sacred sites is no mere diminishment of religious experience. It is a total loss. The sort of destruction at issue more than disrupts the natural world, it eviscerates human and material connections to it.

III. The government's coercive control over indigenous sites on federal land alone warrants scrutiny.

Although there is ample reasoning based on facts and precedent to warrant scrutiny of the government's actions in this case, NCAI urges the Court to consider an additional burden on Plaintiffs' exercise of religion that is unique to religious practice at indigenous sacred sites: federal control of what used to be Native land.

Native American religious practitioners depend on access to sacred sites on federal land in the exercise of their religion. Therefore, federal land management decisions have direct effects on indigenous religious practice. *See* Stephanie Hall Barclay & Michalyn Steele,

Rethinking Protections for Indigenous Sacred Sites, 134 Harv. L. Rev. 1294, 1309 (2021). As Plaintiffs highlight in their petition, that is nowhere truer than in this Circuit, which has more federally recognized tribes and more federal land than any other. Pet. 16.

Moreover, the coercive constraint on Native religious practice is not coincidental, but the consequence of federal policies spanning centuries. Indeed, efforts to dispossess Indian tribes of their land and subordinate Native traditions define multiple eras of federal Indian policy, including removal, allotment, and termination. Barclay & Steele, *supra*, at 1307-14. Many of these policies sought to eradicate indigenous faith practices through coercion, from forcibly sending Native children to faraway boarding schools, to outlawing indigenous religious ceremonies, and in the most extreme cases, wholesale violence. *Id.*

As for this case, it "tells an old and familiar story." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring). *Ana Kwna Nchi Nchi Patat* is on land ceded under the Willamette Valley Treaty of 1855, which culminated in the government's forced removal of the area's Native inhabitants—including Plaintiffs' ancestors—to distant reservations. *See* Fourth Am.

Compl. at 5-7, 10, *Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-cv-01169-YY (D. Or. Feb. 21, 2021); *see also* Ronald Spores, *Too Small a Place: The Removal of the Willamette Valley Indians, 1850-1856*, 17 Am. Indian Q. 171, 182, 184-85 (1993) (describing Cascade Falls, a since-flooded segment of the Columbia River northeast of Plaintiffs' sacred site, as the northeast limit of ceded territory, and discussing removal).

Because of this history, Plaintiffs were not empowered to determine the fate of their sacred site. Instead, and like other Native practitioners in this Circuit, Plaintiffs exercised their religion at the mercy of the federal government. *See* Order at 7-9, *Apache Stronghold*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting).

In its brief, the government states that RFRA "requires a showing of coercion." Answer Br. 26. Accordingly, the government's coercive control of indigenous sacred sites and its underlying historical context should inform the analysis. And such an analysis is consistent with precedent. After all, the law requires accommodations for "substantial burdens" in other contexts of passive limits on religious exercise. *See* Barclay & Steele, *supra*, at 1333-39 (discussing required

accommodations for religious practice in prisons, the military, and zoning under statutes analogous to RFRA).

The same should be true here. If the federal government does not accommodate Native religious exercise at indigenous sacred sites on its land, those practices die. If that is not a substantial burden on religious exercise, then RFRA is yet another dashed promise for Native religious freedom. *See, e.g.*, Joel West Williams & Emily deLisle, *An "Unfulfilled, Hollow Promise":* Lyng*,* Navajo Nation*, and the Substantial Burden on Native American Religious Practice*, Ecology L.Q., Aug. 18, 2021, at *7-8 (discussing the American Indian Religious Freedom Act's unfulfilled commitment to protecting indigenous sacred sites).

IV. This Court must affirm RFRA's commitment to Native American religious freedom.

Absent en banc correction, the district court's approach in rejecting outright destruction as a substantial burden only further confuses what observers already call the "strained" jurisprudence of RFRA in this Circuit. Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment*, 30 J.L. & Religion 36, 38 (2015). Such confusion will, in turn, exacerbate threats to the religious exercise of "communities that Congress intended to protect under

RFRA;" and, for Native American communities in particular, it will entrench a "patterned, often ritualized, desecration by one group of another's sacred sites." *Id.*

If the trial court's approach takes hold, it will only confirm the irony lamented by many experts following *Navajo Nation* that, rather than expanding protections for Native Americans, RFRA limits them—and in a Circuit that has far more federally recognized tribes than any other. *See* Pet. 16; Williams & deLisle, *supra*, at *19 (arguing *Navajo Nation* encourages an "absurd result" contrary to RFRA's purpose, where government action that "preserves a site but prevents access" is subject to scrutiny, while "government activity that completely destroys a site and renders religious exercise impossible" is not).[4]

[4] *Accord* Michael D. McNally, *Native American Religious Freedom as a Collective Right*, 2019 B.Y.U. L. Rev. 205, 288 (2019) ("[This Circuit's] judicial record has had the effect of discouraging Native communities from boldly bringing religious freedom claims to safeguard sacred places, practices, objects, and ancestral remains."); *see also* Allison M. Dussias, *Friend, Foe, Frenemy: The United States and American Indian Religious Freedom*, 90 Denv. U. L. Rev. 347, 413 (2012) (calling "puzzling" the use of *Lyng* "as an excuse for actions that are so injurious as to desecrate a sacred site or to threaten to destroy a religion, even after the enactment of RFRA"); Barclay & Steele, *supra*, at 1325 ("[D]efining what constitutes government coercion is not as straightforward and universally obvious as the *Lyng* majority and subsequent courts somewhat casually and uncritically suggest.").

In short, it must not stand under RFRA that the government can destroy at will a church-in-all-but-name. Indeed, this would bless government programs that lack threat or coercion on their face but do not hesitate to destroy indigenous sacred sites, artifacts, and burial grounds. It would also incentivize government agencies to avoid any research, analysis, or determination of minimizing harm, because they are confident that outright destruction gives them a free pass under RFRA to do as they please.

Rather than allowing the government to effectively say "we never forced you to make a choice to change your religious expression but simply made that choice for you," this Court must call what is going on by its proper name: a substantial burden on religious exercise.

CONCLUSION

This Court should grant en banc review, reverse the district court, and make clear that the destruction of Native American sacred sites, artifacts, and burial grounds warrants scrutiny under RFRA.[5]

[5] Special thanks to Marco Torres and Kai Wiggins, bar-certified law students in the Stanford Law School Religious Liberty Clinic, for their assistance in preparing this brief.

Dated: February 22, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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I hereby certify that I electronically filed the foregoing **Brief of *Amicus Curiae* National Congress of American Indians in Support of Plaintiffs-Appellants' Petition for Panel Rehearing and Rehearing En Banc** 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 February 22, 2022.

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