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 A. Hernández

PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs state that no nongovernmental corporation is a party to this appeal.

Dated: February 9, 2022

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FRAP 35 STATEMENT

Plaintiffs are Native Americans who claim the Government violated the Religious Freedom Restoration Act (RFRA) and other federal laws by authorizing a highway-widening project that needlessly destroyed their sacred site. Their claim indisputably presents an exceptionally important legal question: whether complete physical destruction of a sacred site is a "substantial burden" under RFRA. Two district courts in this Circuit have held that it isn't, citing *Navajo Nation v. USFS*, 535 F.3d 1058 (9th Cir. 2008) (en banc). This interpretation of *Navajo Nation* guts RFRA for Native Americans in this Circuit, creates a circuit split contrary to RFRA's text, logic, and precedent, and cries out for correction. Order at 7-12, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting).

The panel, however, attempted to dodge this question by declaring this case moot—brushing aside thirteen years of litigation, and hundreds of pages of lower-court opinions, with a four-page, unpublished opinion. But the panel's mootness ruling itself flies in the face of this Court's settled mootness jurisprudence and splits with other Circuits.

Under settled mootness doctrine, a case is moot only if the defendant carries the "*heavy burden* of establishing" that "it is *impossible* for a court to grant *any effectual relief whatever*." Here, Plaintiffs seek modest relief that is easy to effectuate: replacing a small stone altar, replanting trees,

and uncovering a burial ground—all behind the highway guardrail and far from traffic. If possible, they also seek to modify a short stretch of highway to restore the highway's previous width.

The panel said the Government "cannot" provide any of this relief—and the case is therefore moot—because this relief "implicates" an "easement" the Government granted to the Oregon Department of Transportation (ODOT), which has been dismissed from the case. Op.3-5. But four different district and magistrate judges, in five separate opinions, rejected the panel's mootness holding, and with good reason. It conflicts with this Court's and other Circuits' precedent in two ways.

First, the panel's key premise was that the easement constrains the courts' remedial power. Yet this Court and others have held that when the Government enters an agreement that violates federal law, courts can order compliance with federal law—regardless of the prior agreement. Here, Plaintiffs claim the easement violates federal law; if they're right—which is assumed for mootness purposes—then the Court can *of course* order relief that conflicts with the easement or even void the easement entirely.

Second, even assuming an unlawful easement could constrain the courts' remedial power, the Government bears the "heavy burden" of demonstrating all of Plaintiffs' relief violates the easement. But the Government didn't even attempt to carry that burden here. Nor could it, as Plaintiffs seek several forms of relief that don't implicate the easement

at all—such as replacing a stone altar and replanting trees *outside* the easement's terms. The panel's misallocation of the burden of proof cannot be squared with this Court's cases.

As Judge Goodwin observed: "Some unpublished cases are covert efforts…to smuggle a 'just' result past the en banc watchers and the Supremes." Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. Cal. Interdisciplinary L.J. 67, 73 n.23 (2004). This is worse: It's an effort to smuggle a convenient but unjust result past this Court's binding mootness jurisprudence. The Court should grant rehearing to maintain uniformity of its cases and address the exceptionally important merits issues presented by this appeal. At minimum, it should withhold resolution of this petition pending its decision in *Apache* (argued Oct. 22, 2021), which presents the same merits question, and then remand for factfinding on mootness.

BACKGROUND

A. Plaintiffs and the Sacred Site

Plaintiff Slockish is a Hereditary Chief of the Confederated Tribes and Bands of the Yakama Nation; Logan is an Elder of the Confederated Tribes of Grand Ronde; Jackson was a Hereditary Chief of the Yakama, who passed away in 2020.

Plaintiffs exercised their religion at a small sacred site known as *Ana Kwna Nchi Nchi Patat* (the "Place of Big Big Trees"). The site was located north of U.S. Highway 26, between Wildwood and Wemme, Oregon, in

the Dwyer Scenic Area owned by Defendant BLM. It was held sacred because of its traditional use as a campsite and burial ground along an ancient trading route. Br.9.

The site measured 100 by 30 meters (less than an acre) and contained several features: the historic campground and burial ground, which was a traditional locus of prayer and meditation; old-growth Douglas firs and rare medicine plants used in Plaintiffs' worship; and a sacred stone altar, which served as a focal point for Plaintiffs' religious ceremonies. Br.10-11; 3-ER-469; 3-ER-533-534.

Plaintiffs (and other Native Americans) practiced their religion at the site for many decades. They visited it to pray to the Creator, gather sacred medicine plants, and venerate their ancestors by meditation, song, and tobacco offerings. Br.12-13. For Plaintiffs, the site was "like a church"—one that "never had walls, never had a roof, and never had a floor," but "is still just as sacred as a white person's church." 5-ER-916.

B. Destruction of the Site

In 2008, the Government bulldozed the site to add a center turning-lane to Highway 26.

FHWA and ODOT first proposed the turning-lane in 1985. Br.14. After community opposition, the project was modified to minimize its impact on Dwyer, the scenic area containing the sacred site. The Government omitted the turning-lane from Dwyer and used "guardrails and retaining walls" to "minimize the number of trees taken." 9-ER-1848-50, 1860-61.

In 2006, however, Defendant FHWA and ODOT again proposed adding a turning-lane through Dwyer. The Government recognized many alternatives that would minimize harm to Dwyer—such as widening to the south only, widening equally to the north and south, or widening to the north while using a steeper slope or retaining wall. 6-ER-1217-24. But it proposed widening to the north with a gradual slope—the most destructive option. 6-ER-1178, 1265-66. Meanwhile, the Government proposed using a steeper slope and guardrail to protect a nearby "wetland" on the same side of the highway. 6-ER-1175-76.

Plaintiffs objected, pleading that "an additional lane c[ould] be added…without destroying heritage resources." 6-ER-1147-56; *see also* 5-ER-981-1007; 6-ER-1067-69. But the Government forged ahead.

To authorize the project, BLM granted ODOT an easement, or right-of-way, to widen and maintain the highway over BLM's land. 5-ER-956-63. BLM, however, retained ownership in fee simple—including the right to use "any portion of the right-of-way for non-highway purposes" that would not "interfere with the free flow of traffic or impair the full use and safety of the highway." 5-ER-957.

Construction began soon after and destroyed all elements of the sacred site. Br.23-24. The trees were cut; native vegetation was replaced with grass; the campground and gravesite were buried under an embankment; and the altar was "disposed of." *See* Br.23-26 (map and images).

The destruction of Plaintiffs' sacred site has rendered their religious practices "impossible." 5-ER-948; *see also* Br.13, 27. However, Plaintiffs have testified that they would resume their religious exercise there if the site were remediated. 5-ER-924, 936, 948-49.

C. Proceedings Below

Plaintiffs sued in 2008, naming federal and ODOT defendants. 2-SER-205. They asserted claims under RFRA, the Free Exercise Clause, and environmental laws. For relief, they sought an injunction requiring "remedial measures" to restore the site, including restoring the stone altar, replanting vegetation, and uncovering the campground. 2-SER-373.

In protracted lower-court proceedings, the Government repeatedly claimed any relief for Plaintiffs was now impossible, rendering the case moot. But the argument was uniformly rejected—by four different judges in five opinions. ECF 48 at 15-24, 52 at 4-10, 312 at 3-4, 348 at 41-43, 355 at 3.[1]

These judges explained that courts have "broad equitable authority…to remedy violations of public law," even with respect to "completed" projects. ECF 52 at 5-6. And "[g]iven Plaintiffs' broad request for various forms of equitable relief, it is likely that the Court could craft some relief that would mitigate Plaintiff[s'] injury and improve their access to the

[1] The case was reassigned in 2016 from Magistrate Judge Stewart to Magistrate Judge You, and in 2017 from Judge Brown to Chief Judge Hernández, with the Government reasserting mootness each time.

site and ability to exercise their religion." ECF 312 at 4. The court reaffirmed this holding even after ODOT was dismissed on sovereign-immunity grounds, ECF 131 at 11-14, noting that "[e]ven if ODOT's dismissal" could limit some forms of relief, the "remaining defendants" hadn't carried their burden of showing all relief was impossible. ECF 348 at 42-43.

After years of litigation, the district court rejected Plaintiffs' claims on other grounds. On RFRA, it didn't dispute Plaintiffs' sacred site had been destroyed or that the destruction was unnecessary. Rather, invoking this Court's *en banc* decision in *Navajo Nation*, it held that completely destroying Plaintiffs' sacred site didn't substantially burden their religious exercise. ECF 300 at 5; *see* ECF 312 at 2.

D. Proceedings on Appeal

Plaintiffs appealed in March 2021. The Government's brief devoted only two of sixty-four pages to mootness. Answering Br.19-21. It asserted that "Plaintiffs' sacred site lies within ODOT's right-of-way" and "[o]nly ODOT…has authority to modify the highway." *Id.* at 19-20. It pointed to no evidence, however, that any of Plaintiffs' relief would "interfere with…traffic" or "safety" under the right-of-way's terms.

On November 24, 2021, eight days after oral argument, the panel issued a four-page unpublished opinion holding that "[t]he language of the easement, in combination with ODOT's dismissal, renders the case moot." Op.4. The panel said that because "[a]ll of the relief sought by

Plaintiffs implicates highway safety," "we cannot order any effective relief." Op.4-5.

ARGUMENT

The panel's mootness ruling conflicts with this Court's and other Circuits' precedents in two respects. First, the panel is wrong that ODOT's easement constrains the Court's equitable powers. If the easement is unlawful—as Plaintiffs allege—then the Court has broad authority to order relief that conflicts with the easement, even voiding the easement entirely. Second, even if the easement constrained the Court's power, Plaintiffs have requested a variety of relief that doesn't implicate the easement at all—and the panel was wrong to excuse the Government from its burden of showing otherwise.

The Court should grant rehearing, restore uniformity to its mootness caselaw, and address the critically important RFRA question at the heart of this case. Alternatively, the Court should remand for factfinding on mootness.

I. The panel's decision conflicts with this Court and other Circuits on mootness.

1. The panel's core premise—that ODOT's easement constrains the Court's remedial powers—conflicts with precedent. Plaintiffs claim the easement violates federal law. *See* Br.46-47, 50-51; ECF 292 at 54-55. And if a court is "ask[ed] to remedy the violation of a public law," the court is "not bound to stay within the terms of" the Government's "private

agreement[s]." *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 679-80 (9th Cir. 2007). Instead, it may "vindicate[]" "the public right to compliance with" the law—even if that means undermining contractual "commitments" with third parties. *Conner v. Burford*, 848 F.2d 1441, 1460-61 (9th Cir. 1988).

In *Bonneville*, for example, petitioners argued a federal agency violated the APA by contracting out its functions to nonparty entities. 477 F.3d at 677-78. The agency had already "executed its contract" with the nonparties, and it asserted any relief for petitioners was "beyond [the Court's] authority." *Id.* at 677, 679. But this Court disagreed: "When a public law has been violated, we are not bound to stay within the terms of a private agreement"; rather, "[we] may exercise our equitable powers to ensure compliance with the law." *Id.* at 680.

Other examples abound. In *Conner*, the Court concluded it could remedy a NEPA violation by "enjoining…federal defendants from permitting any surface-disturbing activity" on certain land—though the Government had already authorized it in leases sold to nonparties. 848 F.2d at 1448-49, 1460-62. In *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. DOE*, this Court held it could remedy an Endangered Species Act violation by rescinding a property sale—though the buyer had "executed…contracts" "in reliance on" it with nonparties. 232 F.3d 1300, 1303-05 (9th Cir. 2000). And in *Apache*, the Government itself told this Court that even if it transfers title of the sacred site to the nonparty

mining company that plans to destroy it, "the transfer can be reversed by this Court." Gov't's Br. at 56, 59-61, *Apache*, No. 21-15295 (9th Cir. May 17, 2021) (collecting cases).

The panel's opinion conflicts with these precedents. Plaintiffs claim the easement violates RFRA and other federal statutes, which are public law. *See Bonneville*, 477 F.3d at 679 n.9. If they are right—which is assumed in mootness analysis—then the Court can order "compliance" with federal law, even if it means voiding the easement. *Conner*, 848 F.2d at 1461.

The panel adopted a contrary rule here—that the district court was powerless to issue relief that would even "implicate[]" ODOT's easement. Op.4-5. And although Plaintiffs relied on *Bonneville* and *Conner* extensively in briefing and oral argument (Reply Br.5, OA Video 2:18-2:59), the panel ignored them.

The panel's opinion also splits with other Circuits. The Sixth Circuit held that a suit challenging the federal Government's grant of a permit remained live even after the permittee was dismissed and the underlying project completed, because the permit could be "invalidated" if plaintiffs prevailed. *City of Olmsted Falls v. EPA*, 435 F.3d 632, 634-36 (6th Cir. 2006). Likewise, the Fifth Circuit held that a suit challenging the Government's authorization of a project wasn't moot, even after the non-federal developers who completed it were dismissed, because "even if" it might "have an adverse effect on the…non-federal developers," the court

could remedy the Government's "alleged refusal to…comply with" federal law. *Vieux Carre Prop. Owners, Residents, & Assocs., Inc. v. Brown*, 948 F.2d 1436, 1440, 1446-47 (5th Cir. 1991).

The panel's reasoning can't be reconciled with these decisions. Indeed, the panel's obeisance to the easement is especially inexplicable here, since the fact that ODOT "was originally a defendant," yet voluntarily sought dismissal, "is the best evidence that [its] absence would not impair…[its] ability to protect [its] interests." *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994).

2. Even assuming the easement could constrain the Court's remedial power, the panel applied the wrong legal standard when assessing the supposed conflict with the easement.

Under settled mootness doctrine, "[a] case becomes moot…'only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party.'" *Campbell-Ewald Co. v. Gomez*, 577 U.S. 152, 161 (2016) (emphasis added; citation omitted). And the "heavy burden of establishing" impossibility falls on the "party asserting mootness." *Sackett v. EPA*, 8 F.4th 1075, 1082-83 (9th Cir. 2021). So even assuming an easement could limit the Court's remedial powers, the Government must prove that *every* form of relief Plaintiffs seek would *actually violate* the easement. Anything short of an "insurmountable barrier" is "not enough." *Clark v. City of Lakewood*, 259 F.3d 996, 1012 (9th Cir. 2001); *see Ctr. for Biological Diversity v. Export-Import Bank of U.S.*, 894 F.3d 1005, 1011

(9th Cir. 2018) (rejecting Government's claim that it could no longer co-operate with nonparty to "remediat[e]" site).

Here, Plaintiffs seek various kinds of relief that don't even implicate the easement, much less violate it—such as restoring the altar, replanting trees, or removing the embankment, well behind the guardrail and far from traffic. The easement simply grants ODOT a right-of-way to widen, operate, and maintain the highway. BLM retains ownership in fee simple—including the right to use "any portion of the right-of-way for non-highway purposes" that don't "interfere with the free flow of traffic or impair the full use and safety of the highway." 5-ER-957. So unless the Government demonstrates all of Plaintiffs' relief would impede traffic or impair safety, it cannot establish mootness.

The Government didn't even attempt to make that showing here. Nor could it, since the notion that *every form* of relief would impede traffic or impair safety is absurd.

One form of relief is replacing a 1.5-foot-high stone altar—which predated the highway, coexisted with it for decades, and was separated from it by a guardrail. *See* Br.11. That such a modest feature poses "safety" concerns is risible, and the Government has never argued otherwise.

So too for replanting trees. The project's Environmental Assessment considered alternatives that would have preserved trees, rejecting them for reasons of cost and convenience, not traffic or safety. 6-ER-1219-22. And trees *were* replanted after construction, but died from lack of care.

3-ER-349. Even at oral argument the Government conceded it "maybe" had authority to replant trees, OA Video 14:09-14—and "under the applicable standard," even "possible" or "conjectural" relief defeats mootness. *Ctr. for Biological Diversity*, 894 F.3d at 1011.

As for the embankment, the Government hasn't identified why it was placed at all, much less shown it can't be removed—and "safety" of course didn't require an embankment over the nearby wetland. Further, one form of relief the district court held it could still order—requiring commemorative "markers" or "signage," ECF 48 at 21-22—is *expressly permitted* by the easement's text, 5-ER-957 (BLM may locate "signs" within "the right-of-way").

Finally, even assuming unilateral remediation by the Government would violate the easement, a court could at least order the Government "back to the negotiating table" to seek "remediation" from ODOT. *Ctr. for Biological Diversity*, 894 F.3d at 1011. The mere "possib[ility]" this could be fruitful defeats mootness. *Id.*

All this explains why in settlement negotiations in this case—*after* ODOT's dismissal—the Government didn't claim all relief was precluded by the easement. Rather, it expressly *offered* several of these very measures—including planting "a tree [barrier]," "re-construct[ing] the

rock cluster," and "install[ing] [an] informational/interpretive sign." Exhibit 1 at 1-2.[2]

Far from requiring the Government to demonstrate all relief is impossible, the panel simply said "the Environmental Assessment" suggested "the removal of vegetation and the rock pile [and] the addition of the earthen embankment…were all conducted for the purpose of improving the safety of the highway." Op.4. But this is a blatant fudge—underscored by the absence of any citation to the EA. The EA says the project *as a whole* was undertaken to improve safety. 6-ER-1165-68. But it says *nothing* supporting the notion that rebuilding the altar, replanting trees, or removing the embankment—all behind the guardrail—would threaten safety. Nor has the Government offered any such evidence. Indeed, the Government affirmatively conceded it *could have* widened the highway while "avoid[ing] any impact on Plaintiffs' sacred site." Answering Br.1, 43. That admission is dispositive.

The bottom line is that the panel's opinion conflicts with precedent. The Court has repeatedly held defendants to a heavy burden of demonstrating any effectual relief is impossible. *Supra*. It has repeatedly held that it can order modification even of long-completed construction projects. *See West v. Sec'y, DOT*, 206 F.3d 920, 924-26 & nn.4-5 (9th Cir.

[2] Settlement offers are admissible to prove jurisdiction. *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1161-63 (9th Cir. 2007); Pls.' Mot. for Leave to Supplement Record 4-5, 9th Cir. ECF 74.

2000) (long-operative freeway interchange); *Tyler v. Cuomo*, 236 F.3d 1124, 1137 (9th Cir. 2000) (housing project that "has been built and is occupied"); *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001) (already-destroyed bird habitat); *Wild Wilderness v. Allen*, 871 F.3d 719, 724-25 (9th Cir. 2017) (collecting cases). Yet Plaintiffs seek far less than that here.

To rule for Plaintiffs, the Court needn't determine any of their relief in fact *is* consistent with the easement. It need only recognize the Government didn't carry its burden of proving otherwise. *NRDC v. County of L.A.*, 840 F.3d 1098, 1104 (9th Cir. 2016) (reversing for incorrect allocation of mootness burden); *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009) (agency "impermissibly attempts to shift the burden to [plaintiff] to defeat mootness.").

II. This proceeding involves multiple questions of exceptional importance.

The panel's error is also exceptionally important. The right to "free exercise of religion…lies at the heart of our pluralistic society." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). Yet the panel's decision would end Plaintiffs' religious exercise at their sacred site forever, on contrived procedural grounds.

The panel's reasoning also has sweeping consequences. "[B]ecause of the history of government divestiture of tribal lands,…many sacred sites"

are now on federal land. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1340 (2021). That's nowhere truer than in this Circuit—which includes more federally-recognized tribes[3] and more federal land[4] than any other Circuit.

Meanwhile, the facts generating the panel's mootness holding are hardly unique. An agreement like ODOT's easement is routine for federal-land development. 43 C.F.R. §§2888.10, 9262.1. And the easement language is standard. *See* 43 C.F.R., Part 2800, Subpart 2805 ("Terms and Conditions of Grants"). Thus, the panel offers a roadmap for agencies to evade judicial review for destroying Native American sacred sites—just contract with third parties for destruction. "Such a result is not acceptable." *West*, 206 F.3d at 925.

The substantive RFRA question here is also exceptionally important. The district court understood *Navajo Nation* to mean that even the complete, physical destruction of a sacred site, rendering plaintiffs' religious exercise impossible, doesn't constitute a "substantial burden." 1-ER-102. The *Apache* district court concluded likewise. *See* 519 F. Supp. 3d 591, 603-08 (D. Ariz. 2021); *cf.* Order at 3, *Apache*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting).

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[3] *Federally Recognized Tribes,* U.S. Dep't of Interior, Indian Affairs, https://perma.cc/7UKU-ET74.

[4] BLM Infographic (May 2016), https://perma.cc/SFG9-WJXY.

This reading of *Navajo Nation* guts RFRA for Native Americans. It has also generated withering academic criticism, *see* Barclay & Steele, *supra*, at 1324-25, 1328-31, and prompted *amicus* briefs from a wide array of scholars and religious organizations, *see* 9th Cir. ECF 28, 32. The question whether this reading is correct—and if so, whether *Navajo Nation* should be overruled—should be revisited *en banc*.

Indeed, this reading of *Navajo Nation* conflicts with RFRA's text, logic, and precedent, creating a circuit split. Textually, there is no "burden" on religious exercise more "substantial[]" than physical impossibility. 42 U.S.C. §2000bb-1(a). Logically, it makes no sense to hold that "sanction[ing]" Plaintiffs with trespassing fines for entering the site would be a substantial burden, *see* 1-ER-102, but destroying the site entirely wouldn't. And as for precedent, the Supreme Court and multiple Circuits have recognized that government actions making religious exercise impossible "easily" qualify as a substantial burden, *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.); *see also, e.g.*, *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014)—including, specifically, the "destruction of religious property." *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020); *see* Br.33-42; Reply Br.8-17. If not corrected by this Court, this reading of *Navajo Nation* is ripe for Supreme Court review.

III. At minimum, the Court should withhold resolution of this petition pending *Apache*, and then remand for further proceedings.

At minimum, the Court should withhold resolution of this petition until its decision in *Apache*. *See* G.O. 5.1.b.2 ("En Banc Coordinator…may, for good cause, extend [or] suspend…the time schedules provided in this Chapter"). If the Court there determines that destruction of a sacred site is a "substantial burden," the Court could then clarify the Government's burden on mootness here and remand for further proceedings.

A finding for the *Apache* plaintiffs on substantial burden would resolve Plaintiffs' RFRA claim here. The parties agree that *Apache* presents the same substantial-burden question as this case. *See* Answering Br.65 ("issue in common"). Meanwhile, the Government has abandoned any strict-scrutiny defense of its actions here, conceding that it could have "avoided any impact on Plaintiffs' sacred site." Answering Br.1; *see also id.* at 43.

So if the *Apache* plaintiffs prevail, the only obstacle to Plaintiffs' prevailing under RFRA would be the panel's novel mootness holding. In that event, it would be appropriate for this Court, at minimum, to remand for factfinding on mootness. Even if the Court remained convinced that ODOT's easement constrained its remedial powers (*but see supra* I.1), the Government offered *no evidence* that Plaintiffs' relief would *actually violate* the easement (*supra* I.2).

The district court is well-positioned to consider any such evidence and reevaluate the question based on this Court's guidance. *See, e.g.*, *Seneca*

v. Arizona, 345 F. App'x 226, 228 (9th Cir. 2009) ("We do not foreclose the possibility that the [agency] may be able to meet its [mootness] burden with additional evidence…. We therefore reverse the dismissal…and remand for further proceedings."). Such a disposition would ensure any mootness concerns are addressed, while being "careful not to preclude effective judicial review of" the Government's RFRA violation "unless it is abundantly clear that such a result is required." *Armster v. U.S. District Court*, 806 F.2d 1347, 1360 (9th Cir. 1986). That is the least the Court could do to ensure that the Nation's tragic history of destroying Native American sacred sites without consequence isn't needlessly repeated here.

CONCLUSION

Plaintiffs respectfully request that the Court grant rehearing.

Respectfully submitted,

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STATEMENT OF RELATED CASES

This appeal is related to *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. oral argument held October 22, 2021).

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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 February 9, 2022. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Luke W. Goodrich
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-35220

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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,197.

(Petitions and responses must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Luke W. Goodrich **Date** 2/9/2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Exhibit 1

U.S. Department of Justice
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Re: **Slockish, et al v. U.S. Federal Highway Administration, et al.**
U.S. District Court Civil No. 3:08-cv-1169-ST
Response to Settlement Proposal

Dear Mr. Nicita:

The purpose of this letter is to follow-up regarding our recent site visit and conversation regarding resolution of the above entitled matter. This letter is being sent pursuant to Federal Rules of Evidence 408 regarding the inadmissibility of offers of compromise. Please keep in mind that final settlement authority for the United States rests with the Attorney General or his designee, and that any provisional settlement discussions are ultimately subject to managerial approval within the United States Department of Justice and the defendant agencies.

Based upon our recent site visit and conversation, the United States wanted to provide a formal response to the latest settlement parameters proposed by the Plaintiffs. Based upon the most recent discussion with the federal agencies named as defendants, the United States would be willing to work towards a resolution that consists of the parameters identified below.

(1) The United States agrees to place a tree or plant barrier on the triangular shaped parcel of Wildwood National Recreation land north of U.S. 26, referred to the parties as the "Dwyer Triangle" and depicted in the attached **Exhibit 1**. The Dwyer Triangle is further identified as a parcel of land located in section 31, township 2 south, range 7 east, Willamette Meridian, Clackamas County, Oregon, containing 8 acres, more or less, and more particularly described as follows: "That portion of the south 1/2 of the northeast 1/4 lying north of the northerly right-of-way of U. S. Highway No. 26." The United States will work with the Oregon Department of Transportation ("ODOT") to identify any potential easement or right of way limitations related to the parcel of land and/or placement of material. The United States will provide the Plaintiffs with a map indicating the exact location of the tree/plant barrier and a list of trees/plants which will be placed at the location.

(2) The United States agrees to identify the ownership rights related to Wemme Road and determine if repair of the portion of Wemme Road accessing the "Dwyer Triangle" (identified in paragraph 1) is possible. The United States will work with the ownership entity to provide a one-time application of gravel and the filling of pot holes presently existing on the identified portion of Wemme Road.

(3) The United States agrees to contact ODOT to determine if ODOT employees or contractors possess alleged material associated with the rock cluster/ rock cairn or other artifacts previously located at the site. If the United States is able to recover material associated with the rock cluster/rock cairn, this material will be provided to the Plaintiffs for re-construction of the rock cluster/rock cairn. The Plaintiffs' re-construction must take place at a location agreed upon and approved by all parties. If material is recovered which was not previously identified and considered through the Section 106 process of the National Historic Preservation Act (NHPA) for the project, then United States will consult with Federally-recognized Tribes and consulting parties regarding the appropriate disposition of those materials. If no material is recovered and Plaintiffs still want to reconstruct the rock cluster/rock cairn, the United States agrees to work with Plaintiffs to identify and approve of a location for the Plaintiffs to re-construct the rock cluster/rock cairn.

(4) The United State agrees to issue a land use permit to Plaintiffs for 5 years allowing the Plaintiffs access to and the use of the Owl Mountain/ Miller Quarry area. The permit will contain the condition that Plaintiffs may not build or erect any structures on the public lands.

(5) The United States agrees to develop and install one informational/interpretative sign within the Wildwood recreation area reflecting the importance of the area to Native Americans. The United States will work with the Plaintiffs to develop language to be included on the sign. The final language provided for the sign must be approved by the United States. The Plaintiffs understand that the United States is required to consult with the federally recognized tribal governments connected to the area regarding the proposed sign language.

(6) The United States agrees to provide future notice of FHWA projects (and ODOT projects in which FHWA is a partner) within the following area: From Government Camp to Rhododendron on Highway U.S. 26. As part of this provision, the United States will designate points of contact for the Plaintiffs within each defendant agency, and will ensure that those contacts have reviewed National Register Bulletin 38.

(7) Due to funding limitations and lack of Congressional authority to acquire parcels of land, the United States is unable to agree to acquire specific parcels of land in the area impacted by the highway construction project which is the subject of the underlying

litigation. However, the United States supports the Plaintiffs' desire to acquire and protect additional parcels in the area.

(8) The United States agrees to take necessary action to avoid future development in the "Dwyer Triangle" (identified in paragraph 1). The United States agrees to take no future action to develop or open this specific parcel to additional public use. The Plaintiffs and other tribal leaders will continue to have access to this area to continue their traditional use of the area.

(9) This Agreement would not be intended nor would it be construed as an admission of liability or fault on the part of the United States, United States Federal Highway Administration, United States Bureau of Land Management, the Advisory Council of Historic Preservation, or the agents, servants, or employees of the named federal agencies.

(10) Upon the signing of a formal settlement agreement, the Plaintiffs will move to dismiss the pending litigation with prejudice indicating that each party will bear its own fees, costs, attorney's fees and expenses.

If the above parameters are agreeable, the parties would need to execute a formal Settlement Agreement which would settle and compromise all claims arising from the events, incidents, or circumstances giving rise to this litigation. If the Plaintiffs are unable to agree to a resolution consisting of the general parameters identified above, the United States would suggest that the parties discuss a briefing schedule to propose to the Court.

Sincerely,

TIM SIMMONS
Assistant United States Attorney

TY BAIR
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
Attorneys for Defendants

Exhibit prepared at the request of the Salem District office- Slokish Settlement

All that portion of the S 1/2 of the NE 1/4 of Section 31, T. 2 S., R. 7 E. lying north of the northerly right-of-way of U.S. Highway No. 26

N
W E
S

100 0 100 200 300 400 500
Feet

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual or aggregate use with other data. Original data were compiled from various sources. This information may not meet National Map Accuracy Standards. This product was developed through digital means and may be updated without notification. M14-05-07

Appendix

FILED

NOV 24 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILBUR SLOCKISH, Hereditary Chief of the Klickitat/Cascade Tribe; CAROL LOGAN, a resident of Oregon, and an enrolled member of the Confederated Tribes of the Grand Ronde; CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation; MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE, an unincorporated nonprofit association,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION, an Agency of the Federal Government; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT, an Agency of the Federal Government; ADVISORY COUNCIL ON HISTORIC PRESERVATION, an Agency of the Federal Government,

Defendants-Appellees.

No. 21-35220

D.C. No. 3:08-cv-01169-YY

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, Chief District Judge, Presiding

Argued and Submitted November 16, 2021
San Francisco, California

Before: SCHROEDER, W. FLETCHER, and MILLER, Circuit Judges.

Plaintiffs Hereditary Chief Wilbur Slockish, Carol Logan, Cascade Geographic Society, and Mount Hood Sacred Lands Preservation Alliance appeal from the district court's grants of summary judgment to Defendants United States Department of Transportation, Federal Highway Administration ("FHWA"), United States Department of the Interior, Bureau of Land Management ("BLM"), and Advisory Council on Historic Preservation.

Plaintiffs allege that Defendants' actions with respect to a 0.74-acre site located within a highway expansion project completed by the Oregon Department of Transportation ("ODOT") violated the Religious Freedom Restoration Act, the Free Exercise Clause of the First Amendment, the National Environmental Policy Act, the National Historic Preservation Act, the Federal Land Policy and Management Act, and Section 4(f) of the Department of Transportation Act. We conclude that this appeal is moot and that we therefore lack jurisdiction.

"The case or controversy requirement of Article III . . . deprives federal courts of jurisdiction to hear moot cases." *Native Vill. of Nuiqsut v. BLM*, 9 F.4th 1201, 1208 (9th Cir. 2021) (quoting *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1352 (9th Cir. 1984)). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (citation and quotations omitted). A case is not moot if "there can be *any* effective relief." *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017) (emphasis in original) (quoting *Or. Nat. Res. Council v. BLM*, 470 F.3d 818, 820 (9th Cir. 2006)).

ODOT, which owns the right-of-way for the highway that encompasses the site, was dismissed from this case in 2012 based on Eleventh Amendment immunity. The remaining Defendants are federal agencies that cannot order the outright removal of the challenged highway expansion. The district court concluded that the court could nonetheless "craft some relief that would mitigate Plaintiffs' injury." Plaintiffs specifically identify the relief that they seek. That relief falls short of removing the highway expansion, but it contemplates restoration of highway access to E. Wemme Trail Road, replacement of vegetation, reconstruction of the rock pile, removal of the sloped earthen embankment over the

site, and removal of the guard rail. This relief would partially restore the site to the status quo ante, but this relief would make changes to aspects of the highway project that ODOT designed and implemented based on its judgment that those aspects improved highway safety. Because ODOT has been dismissed from this suit, none of the Defendants has authority to make the changes sought by Plaintiffs.

Pursuant to an easement previously granted by FHWA, ODOT owns a right-of-way easement over BLM land. The easement encompasses the entire site of the highway widening project. The easement reserves limited rights for BLM to use or authorize the use of the highway for non-highway purposes, but it expressly precludes BLM from doing so when it would "impair the full use and safety of the highway" or would otherwise be "inconsistent with the provisions of Title 23 of the United States Code."

The language of the easement, in combination with ODOT's dismissal, renders the case moot. All of the relief sought by Plaintiffs implicates highway safety. As ODOT and FHWA explain in the Environmental Assessment, the removal of highway access to E. Wemme Trail Road, the removal of vegetation and the rock pile, the addition of the earthen embankment, and the addition of the guard rail were all conducted for the purpose of improving the safety of the highway. As a result, BLM's limited reservation of rights to use or authorize the

use of the highway for non-highway purposes would not permit it to undo those actions.

Plaintiffs' claims for declaratory relief are also moot. Declaratory relief must correspond with a separate remedy that will redress Plaintiffs' injuries. *California v. Texas*, 141 S. Ct. 2104, 2115-16 (2021) (explaining that the Declaratory Judgment Act "alone does not provide a court with jurisdiction," and that courts must "look elsewhere to find a remedy that will redress plaintiffs' injuries"). "[A] declaratory judgment may not be used to secure judicial determination of moot questions." *Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 816 (9th Cir. 1995) (quotations omitted) (quoting *Native Vill. of Noatak*, 38 F.3d 1505, 1514 (9th Cir. 1994)). Plaintiffs' claims for declaratory relief that correspond to their claims for injunctive relief are therefore moot.

Plaintiffs' claim for damages is barred by federal sovereign immunity. *See Price v. United States*, 174 U.S. 373, 375-76 (1899).

Because we cannot order any effective relief, this appeal is moot. Although Defendants' "burden of demonstrating mootness is a heavy one," that burden is carried here. *Nw. Env't Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

DISMISSED.