**No. 21-15295**

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**In the United States Court of Appeals for the Ninth Circuit**

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APACHE STRONGHOLD,
*Plaintiff-Appellant*,
v.
UNITED STATES OF AMERICA, ET AL.,
*Defendants-Appellees*.

Appeal from the United States District Court for the District of Arizona Honorable Steven P. Logan
(2:21-cv-00050-PHX-SPL)

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# BRIEF *AMICI CURIAE* OF RELIGIOUS LIBERTY LAW SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC BEFORE THE FULL COURT

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

*Amici* are legal scholars who have studied and written extensively about the exercise of religion under the law in the United States, with emphasis on religious liberty under the religion clauses of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*., and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc-1 *et seq*. *Amici* write to aid the Court in interpreting RFRA to achieve the statute's purpose of providing substantial protection for the religious exercise of all faiths.[2]

## INTRODUCTION AND SUMMARY OF ARGUMENT

The federal government owns the land at Oak Flat, where Apache people have worshiped and conducted ceremonies for centuries. As the district court's findings show, "Apaches view Oak Flat as a 'direct corridor' to their Creator's spirit"—a place "'uniquely endowed with holiness and medicine'"—"and neither 'the powers resident there, nor [the Apaches'] religious activities . . . can be relocated.'" Murguia Op. 184 (quoting *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021) (some quotations omitted). Oak Flat "serves as a

[1] The parties' counsel consented to this brief. No party or its counsel authored this brief in whole or in part. No one other than *amici* or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Amici*'s full titles and institutional affiliations (for identification purposes only) are listed in an Appendix.

sacred ceremonial ground, and these ceremonies cannot take place 'anywhere else.'" *Id.* If the government transfers the land to the Resolution Copper Company, the mine created there will blow a hole two miles long and more than 1,000 feet deep, destroying the sacred sites and completely preventing Apache worshipers from accessing them. As summarized in Chief Justice Murguia's en banc dissent:

> The impact of the mining activity on sacred sites will be immediate and irreversible. All that will be left is a massive hole and rubble, making the site unsuitable for religious exercise. Religious worship will be impossible, and the Apaches will be prevented from ever again worshipping at Oak Flat.

Murguia Op. at 215–16.

This action, simply put, will prevent and destroy religious exercise. It will impose a "substantial burden" on the Apaches' religious exercise, by any ordinary meaning of that term, and it therefore triggers the protections of RFRA. That statute, enacted in response to the Supreme Court's narrowing of Free Exercise Clause rights in *Employment Division v. Smith*, 494 U.S. 872 (1990), was designed to restore the requirement, applicable in pre-*Smith* caselaw, that government demonstrate a "compelling interest" when it imposes a substantial burden on religion. 42 U.S.C. §§ 2000bb(b)(2), 2000bb-1. RFRA's purpose is to "guarantee [the 'compelling interest' test's] application in *all* cases where the exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1) (emphasis added).

A majority of the partial en banc court—the Murguia majority[3]—held (6–5) held that "preventing access to religious exercise is an example of a substantial burden." Per Curiam Op. 10. That rule is correct as a matter of RFRA's text and purposes, and under it the destruction of Oak Flat is clearly a substantial burden. However, a different 6–5 majority—the Collins majority—held that this rule does not apply when the burden is imposed by "a disposition of government real property." *Id.* at 11. In those cases, the Collins majority said, government may entirely prevent religious exercise as long as it does not "'coerce individuals into acting contrary to their religious beliefs'" or "'discriminate' against" or "'penalize'" religious adherents. *Id.* (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 449–50, 453 (1988). The Collins majority drew that standard, it asserted, from a pre-*Smith* decision, *Lyng.* Collins Op. at 43–51; *id.* at 51 ("RFRA's understanding of what counts as [a 'substantial burden'] must be understood as subsuming . . . the holding of *Lyng*"). The crucial sixth judge in the Collins majority explicitly concluded that "[p]reventing access to religious exercise generally constitutes a substantial burden on religion"—but that the far narrower, coercion-based definition applies to government's use of its land. R. Nelson. Op. 107–08.

[3] We follow petitioner's designations in referring to the two en banc majorities.

Thus the Collins majority adopted a significantly narrower definition of burden for a single category of cases—government's use or disposition of real property—that overwhelmingly involves claims by Native Americans seeking to worship at their sacred sites. Under that narrower standard, the Collins majority held, the government may bring on the destruction of the Apaches' sacred site, preventing their worship, without having to provide any justification for that action.

The partial en banc court's ruling cries out for full court review. As petitioner explains, the opinions below are splintered and closely divided on a matter—the survival of Native American religious practices—where "this Court has a far greater say . . . than any other [court of appeals]." Full Court En Banc Pet. 18. In this brief, *amici* emphasize that RFRA should be read, according to its text and purposes, to provide meaningful protection for the religious exercise of all faiths. That includes faiths—like that of Native Americans—whose exercise is at the mercy of the government because government controls access to the resources necessary for religious practice.

**I.** RFRA's triggering phrase, a "substantial burden" on the exercise of religion, should be read to include government actions that prevent the exercise of religion—as the land transfer here would do by bringing on the destruction of petitioner's sacred site.

***A.*** Preventing religious exercise is a "substantial burden" under the term's plain, ordinary meaning—the criterion that, under Supreme Court precedent, should govern when the text provides no definition. The dictionary definition of "substantial burden" includes any significant restriction or hindrance on religious exercise, which easily includes the destruction of the sacred site here.

***B.*** Preventing religious exercise must be a substantial burden under RFRA because this Court treats it as a substantial burden under RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"). The Supreme Court has regularly instructed that courts should interpret materially identical phrases in RFRA and RLUIPA in the same way.

***C.*** Preventing religious exercise must be a "substantial burden" in order to provide protection for cases of prisoners' religious exercise that Congress clearly intended to protect. Prisons can burden inmates' religious exercise, even without imposing direct penalties on them, by simply denying access to resources—rooms, scriptures, worship implements—that are within the prisons' control and necessary to religious exercise. Government exercises similar control, and similarly can impose such burdens, by destroying or denying access to sacred sites on government property.

***D.*** Native Americans seeking to worship at sacred sites deserve no less protection than prisoners against government actions that deny access to religious

exercise. Prisons cannot be distinguished on the ground that government's general control of prisoners' lives restricts their access to religious exercise. The same is true with sacred sites like Oak Flat: government has control over, and can prevent access to, Native Americans' religious sites and resources. RFRA's purposes require protecting Native Americans as well.

**III. *A.*** Under the correct definition, the government's challenged action unquestionably imposes a "substantial burden" by hindering or oppressing Native American religious exercise to a considerable degree. The government's action will deny Apaches the opportunity to practice their religion by effectively barring religious exercise and destroying essential sacred sites of such exercise.

***B.*** Nor does the Supreme Court's ruling in *Lyng* require denying that a substantial burden on religious exercise exists here. This case is factually distinguishable from *Lyng*. That case did not involve the physical destruction of a sacred site, as is involved here, and it did not involve actions that would block the access of Native worshipers to the site.

## ARGUMENT

### I. THE TERM "SUBSTANTIAL BURDEN" UNDER RFRA SHOULD BE READ TO INCLUDE GOVERNMENT ACTIONS THAT PREVENT RELIGIOUS EXERCISE—AS THE LAND TRANSFER HERE WILL DO.

RFRA provides that government may not "substantially burden" religious exercise unless it "demonstrates that application of the burden" is "the least

restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). The triggering phrase "substantial burden" should be interpreted to include government actions that prevent religious exercise, in particular those that prevent access to necessary resources for religious exercise that are within government's control.

### A. Preventing Religious Exercise is a "Substantial Burden" Under the Term's Plain, Ordinary Meaning, Which Includes Any Significantly Great Restriction or Hindrance on Religious Exercise.

Preventing religious exercise is a "substantial burden" under RFRA first because that is the plain meaning of the term. The Supreme Court instructs that "[w]here Congress does not furnish a definition of its own, [courts should] generally . . . afford a statutory term 'its ordinary or natural meaning.'" *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Assn.*, 141 S. Ct. 2172, 2176 (2021) (quotation omitted). RFRA's text provides no definition of "substantial burden" (as everyone agrees), so the plain meaning governs.

Under the plain, dictionary meaning, a "burden" is "[s]omething that hinders or oppresses." *Black's Law Dictionary* (11th ed. 2019). And a thing is "substantial" when it is "[c]onsiderable in importance, value, degree, amount, or extent." *American Heritage Dictionary* (5th ed. 2020). Therefore, RFRA is triggered by any government action that "hinders or oppresses" a person's religious exercise to a considerable degree or extent. (This Court applies that definition under RFRA's

sister statute, RLUIPA. *Infra* pp. 10–12.) And under the plain, ordinary meaning of the term, there is no doubt that the destruction of Oak Flat—preventing the Apaches from worshipping at this sacred site—would considerably hinder ("substantially burden") their religious exercise. See *supra* pp. 1–2.

The plain-meaning approach is not simply the general rule; the Supreme Court has twice applied it recently *under RFRA itself*. In *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), in ruling that damages awards against individual officials constituted "appropriate relief" under RFRA, the Court emphasized that "[w]ithout a statutory definition, we turn to the [relevant] phrase's plain meaning at the time of enactment." *Id.* at 491.

Likewise, in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Court followed RFRA's plain meaning and rejected an argument that the statute was "limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Id.* at 706 n.18. There, the government asserted that it had a categorical compelling interest in overriding religious objections by commercial actors; it relied on a statement in pre-*Smith* caselaw that a commercial actor's objections "'are not to be superimposed on the statutory schemes which are binding on others in that activity.'" *Id.* at 735 n.43 (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)). But the Court refused to rely on that statement to reject all claims by commercial

actors'; it reasoned that the statement, "if taken at face value, is squarely inconsistent with the plain meaning of RFRA." *Id.* at 735 n.43.

*Hobby Lobby* refused to allow isolated language from pre-*Smith* caselaw to justify rejecting an entire category of RFRA claims in contradiction of the statute's plain text. Similarly, this court should refuse to exclude all claims by Native Americans to use their sacred sites on government land when—as here—preventing that use would impose a "substantial burden" under the ordinary meaning of that term.

No other provision of RFRA's text can justify replacing the ordinary meaning of "substantial burden" with a restrictive definition that limits the term to particular burdens involved in *Lyng* or in other decisions preceding *Employment Division v. Smith*. Judge Bea, concurring, attempted to base such a restrictive definition on RFRA's statement of purpose, which says that the statute is meant "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. 206 (1972)." 42 U.S.C. § 20000bb(b)(1); see Bea Op. at 78–79 & n.12. But the purpose clause does not stop there; it states further that RFRA's purpose is "to guarantee [the compelling interest test's] application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 20000bb(b)(1). As the en banc majority (the Murguia majority) properly held, the purpose clause by its terms "links *Sherbert* and *Yoder* to the

'compelling interest test'"—that is, to the test for justifying burdens on religious exercise—"*not* to the 'substantial burden' inquiry"—that is, the standard for triggering the compelling interest test in the first place. Murguia Op. at 198 (emphasis in original); accord R. Nelson Op. at 138 (stating that the purpose clause "does not start and end with [the sorts of burdens on religion involved in] *Sherbert* and *Yoder*—it extends further to all substantial burdens").[4]

### B. Preventing Religious Exercise Must Be a Substantial Burden Under RFRA in Order to Harmonize RFRA with Its "Sister Statute" RLUIPA.

The plain meaning of "substantial burden," encompassing acts preventing religious exercise, is also necessary in order to harmonize RFRA with RLUIPA. This court's RLUIPA cases follow the phrase's plain, ordinary meaning: any "'significantly great' restriction or onus on 'any exercise of religion'" triggers RLUIPA's application. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034–35 (9th Cir. 2004) (quotation omitted).

The Supreme Court has made clear that courts should apply "'the same standard'" when analyzing RFRA and RLUIPA. *Holt v. Hobbs*, 574 U.S. 352, 358

[4] For the same reason, a narrow definition of "substantial burden" incorporating language from *Lyng* finds no warrant in the provision of RFRA where Congress endorsed "the compelling interest test as set forth in prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5); see Bea Op. 76–77; R. Nelson Op. 142 n.8. If "the compelling interest test" in § 2000bb(b) means only the standard *justifying* substantial burdens on religion—not the definition of such burdens—then its meaning in § 2000bb(a) is the same.

(2015) (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)).[5] This is because RFRA and RLUIPA are "sister statute[s]" both enacted "'in order to provide very broad protection for religious liberty.'" *Holt*, 574 U.S. at 356–57 (quoting *Hobby Lobby*, 573 U.S. at 693); *see also Ramirez v. Collier*, 142 S. Ct. 1264, 1277 (2022). As explained in *Holt*, 574 U.S. at 356-58, both statutes were responses to the Supreme Court's narrowing of free exercise rights in *Smith*, 494 U.S. 872; and RLUIPA reimposed RFRA's standard in certain cases after the Supreme Court struck down RFRA's application to state and local laws in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Likewise, seven other circuits have concluded that the substantial burden standard is the same under both statutes. See Nelson Op. at 127 (collecting cases); see also Murguia Op. at 213 n.13.

Because RFRA and RLUIPA were both meant "to provide very broad protection for religious liberty," *Holt*, 574 U.S. at 356; *Hobby Lobby*, 573 U.S. at 693, this Court should apply the ordinary meaning of "substantial burden" under

[5] Thus *Holt*, which interpreted RLUIPA, quoted and followed *O Centro* and *Hobby Lobby*, which interpreted RFRA. In turn, *O Centro*, 546 U.S. at 436, quoted and followed a decision under RLUIPA, *Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005). Because the Supreme Court treats key concepts as interchangeable when they appear in RFRA and RLUIPA, this Court should do likewise.

both statutes, rather than a rigid approach limited to a few categories of burdens found in pre-*Smith* caselaw.

The Collins majority, in holding that the destruction of Oak Flat and Apache worship was not a "substantial burden" under RFRA, violated the bedrock rule that RFRA should be construed the same as RLUIPA. It applied a narrow coercion-based standard for RFRA claims, in contrast to RLUIPA's ordinary-meaning standard. See *supra* pp. 3, 9–10. And as we discuss *infra* part I.D, the arguments the Collins majority made for treating prison and sacred-site cases differently cannot withstand scrutiny.

### C. Preventing Religious Exercise Must Be a "Substantial Burden" in Order for RFRA to Protect Key Instances of Prisoners' Religious Exercise.

Moreover, if "substantial burden" did not encompass actions that prevent religious exercise, that would directly undermine RFRA's purposes. In particular, the statute would fail to protect important examples of prisoners' religious exercise.

In *Tanzin v. Tanvir*, 141 S. Ct. 486, the Supreme Court unanimously read RFRA to avoid interpretations that would prevent the statute from giving relief in certain important cases of religious exercise. *Tanzin* held that money damages against federal officials were "appropriate relief" under RFRA in part because they were "the *only* form of relief that can remedy some RFRA violations." *Id.* at 492

(emphasis in original) ("[I]t would be odd to construe RFRA in a manner that prevents courts from awarding such relief").

In enacting RFRA and RLUIPA, Congress emphasized protection for the religious freedom of prisoners. As enacted, RFRA protected prisoners in both federal and state prisons. RLUIPA reinstated protections for state prisoners after the Court struck down RFRA's application to state and local laws; but even today RFRA provides the sole source of protection for federal prisoners. *Ish Yerushalayim v. United States*, 374 F.3d 89, 92 (2d Cir. 2004).

Prison regulations can pervasively burden religious exercise because prisons control individuals' access to resources necessary to their religious practice. In prisons, the government exerts a degree of control "severely disabling to private religious exercise." *Cutter*, 544 U.S. at 720–21; see *id.* at 721 (noting that prisoners are "dependent on the government's permission and accommodation for exercise of their religion").

As a result, prison officials can often make a prisoner's religious exercise impossible, without imposing sanctions on him, simply by declining the necessary resources for religious practice. RFRA's background indicates that these cases fit within the statute's core purposes. And as we will discuss shortly (*infra* pp. 15–17), Native Americans seeking to worship at their sacred sites likewise fit within RFRA's key purposes because they share that same feature: they "are 'at the mercy

of government permission to access sacred sites.'" Murguia Op. 235 (quoting Stephanie Hall Barclay and Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301 (2021)).

For example, prisoners may need access to a particular space in order to worship or conduct rituals. This Court and others regularly hold that denial of such access is a substantial burden. *See*, *e.g.*, *Yellowbear v. Lampert*, 741 F.3d 48, 53, 56 (10th Cir. 2014) (holding that it is a substantial burden when a prison declines to escort a Native American inmate to a sweat lodge); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988–89 (9th Cir. 2008) (holding the same when a prison declines to escort inmate to group worship services); *Nance v. Miser*, 700 F. App'x 629, 632 (9th Cir. 2017) (same when prison declines to allow purchase of prayer oils). Well before RFRA, the Supreme Court held that a Buddhist prisoner who alleged that he was denied access to the prison chapel, among other things, stated a claim for a denial of free exercise under the First and Fourteenth Amendments. *Cruz v. Beto*, 405 U.S. 319, 320, 322 (1972) (per curiam). The Senate committee report on RFRA cited *Cruz* as the example of prisoners' "right to freely exercise their religions," which the statute aimed to protect. S. Rep. No. 103-111, *Religious Freedom Restoration Act of 1993*, at 9 n.22 (1993).

Similarly, the Supreme Court recently held that a death-row inmate is entitled under RLUIPA to have a spiritual advisor pray aloud with him and touch

him during the lethal injection. *Ramirez v. Collier*, 142 S. Ct. 1264. In that case, only the spiritual advisor, not Ramirez, would have faced prison penalties or sanctions barring him from the chamber or penalizing him for misbehavior. See *id.* at 1274. The only harm to Ramirez was that he was prevented from having his pastor praying and laying hands on him. Nevertheless, it was undeniable that "Texas's policy substantially burden[ed] [Ramirez's] exercise of religion" because "he will be unable to engage in protected religious exercise in the final moments of his life." *Id.* at 1278, 1282.

In none of the above cases are prisoners coerced into acting contrary to their religious beliefs or faced with penalties for acting on those beliefs. Rather, the government simply prevents the prisoner from practicing his faith because officials control the resources essential to his practice and deny access to those resources.

The same is true here with respect to government control over sacred sites located on government property. Government can prevent Native Americans from practicing their faith, whether or not it imposes a direct penalty, simply because it "'controls access to religious locations and resources'" and Native Americans "are 'at the mercy of government permission to access sacred sites.'" Murguia Op. 235 (quoting Barclay and Steele, *supra*, at 1301). The restrictive definition of "substantial burden" erroneously excludes both prisoner claims and Native American claims.

### D. Native Americans Seeking to Worship at Their Sacred Sites Should Receive No Less Protection than Other Claimants Against Government Actions that Prevent Their Religious Exercise.

For the above reasons, the Murguia majority correctly held that government imposes a substantial burden under RFRA by preventing religious exercise. Yet a different majority—the Collins majority—held that this protection did not apply to Native Americans seeking to worship at their sacred sites, because they challenged government's disposition of its real property. The anomalous result is that law-abiding Native Americans get less protection for their religious exercise than do prisoners convicted of crimes.

The Collins majority attempted to justify this differential treatment on the ground that that prisons "inherently involve coercive restrictions" on inmates, Collins Op. at 47; See also Van Dyke Op. 176 (asserting that prison restrictions "directly and immediately" coerce an inmates' religious exercise). But as we have just shown, some substantial burdens on prisoners' religious exercise do not involve direct or immediate coercion of the prisoner. They merely deny the prisoner access to religious exercise by denying meeting rooms, scriptures, worship items, or the assistance of clergy. See *supra* pp. 14–15.

Nor can the prison setting be distinguished on the ground that it involves a general form of coercion: i.e., that prisons' general control of prisoners' lives restricts their access to religious exercise. "[S]o does the government's control of

Oak Flat." Full Court En Banc Pet. 14. In the context of sacred sites as well as prisons, "the government has control over religious sites and resources, and religious adherents must 'practice their religion in contexts in which voluntary choice is not the baseline.'" Murguia Op. 235 (quoting Barclay and Steele, *supra*, at 1301).

RFRA's purpose is to apply the compelling interest test in "all cases where free exercise of religion is substantially burdened," 42 U.S.C. § 2000bb(b)(1)—in other words, "[t]o assure that all Americans are free to follow their faiths free from governmental interference." S. Rep. No. 103-111, *supra*, at 8. By protecting all faiths even from facially neutral laws, the statute preserves government "neutrality in the face of religious differences." *Sherbert*, 374 U.S. at 409. Native American worshipers face the same sort of government barriers to religious exercise as prisoners face; this Court's application of RFRA should take account of that fact.

## II. UNDER ANY PROPER STANDARD, THE DESTRUCTION OF PLAINTIFFS' SACRED SITES IMPOSES A SUBSTANTIAL BURDEN.

### A. The Destruction of Plaintiffs' Sites Imposes a Substantial Burden Under the Plain, Ordinary Meaning.

Under the proper definition, the government's challenged action unquestionably imposes a substantial burden by hindering or oppressing Native American religious exercise to a considerable degree. See *supra* pp. 6-7. The destruction of Oak Flat will not merely inhibit or limit the exercise of religion; it

will prevent that exercise by destroying the site where it occurs and preventing access to that site. *Id.*

### B. This Case Involves a Substantial Burden Even Under *Lyng*.

Nor does the Supreme Court's ruling in *Lyng* require denying that a substantial burden on religious exercise exists here. This case is factually distinguishable from *Lyng*. It involves the physical destruction of a sacred site. *Lyng*, by contrast, involved mere disturbance to the peace of the site from a nearby logging road. In fact, *Lyng* emphasized that if the challenged action *had* involved the physical destruction of sacred sites and objects, the cases would have been quite different. See *Lyng*, 485 U.S. at 454 ("No sites where specific rituals take place were to be disturbed").

Similarly, *Lyng* did not involve government actions that would block the access of Native worshipers to the sacred site—as the copper mine her will inevitably. Indeed, *Lyng* emphasized that if the challenged action "prohibit[ed] the Indian respondents from *visiting*" the sacred site, it "would raise a different set of constitutional questions." 485 U.S. at 453 (emphasis added).

## CONCLUSION

This Court should adopt the proper definition of "substantial burden" in light of the phrase's ordinary meaning and RFRA's purposes. Applying that definition,

this Court should reverse the judgment of the district court and remand for entry of the preliminary injunction requested by Plaintiffs.

Respectfully submitted.

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April 24, 2024

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the length limitation of Ninth Circuit R. 29-2(c)(2), concerning *amicus curiae* briefs filed while the petition for en banc rehearing is pending, because it contains 4,191 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/ Thomas C. Berg
Thomas C. Berg

**CERTIFICATE OF SERVICE**

I hereby certify that on April 24, 2024, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Thomas C. Berg
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# APPENDIX

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